

| <u>Time</u> | <u>Place</u> |
|---|---------------|
| June 29 - 7:00 p.m. - 10:00 p.m. | Senate Lounge |
| June 30 - 9:00 a.m. - 5:00 p.m. | State Capitol |
| July 1 - 9:00 a.m. - 3:00 p.m. (if necessary) | Sacramento |

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

June 29-July 1, 1967

June 29

1. Approval of Minutes of June 2-3 meeting (sent 6/9/67)
2. Administrative matters, if any
3. Report on Commission bills recommended to 1967 legislative session
Memorandum 67-41 (to be distributed at meeting) *Not distributed*
4. Commission Program for 1967-68
Memorandum 67-38 (enclosed)
5. Study 42 - Good Faith Improvers (Senate Bill No. 254)
Memorandum 67-43 (enclosed)
6. Study 55 - Additur (Senate Bill No. 250)
Memorandum 67-45 (enclosed)
7. Study 63 - Evidence Code

Note: The memoranda listed below refer to various law review articles and notes that relate to the new Evidence Code. It is essential that you have read these articles prior to the meeting since an understanding of each article is necessary to a determination of whether any change is needed in the Evidence Code.

Memorandum 67-29 (previously sent; another copy sent 6/9/67)
Law Review articles and notes considered in Memorandum 67-29:
Judicial Notice and the California Evidence Code, HASTINGS L.J., Nov. 1966, p. 117
Note, HASTINGS L.J., Nov. 1966, p. 198
Note, HASTINGS L.J., Nov. 1966, p. 210
Note, HASTINGS L.J., Nov. 1966, p. 222
(We sent you a copy of the November 1966 Hastings Law Journal several months ago when we first sent you Memorandum 67-29.)

First Supplement to Memorandum 67-29 (previously sent; another copy sent 6/9/67)
Memorandum 67-30 (previously sent; another copy sent 6/9/67)
First Supplement to Memorandum 67-30 (to be sent)
Memorandum 67-31 (previously sent; another copy sent 6/9/67)
Memorandum 67-39 (sent 6/9/67)
Note, Hastings Law Journal attached to Memorandum 67-39

June 30

8. Study 36 - Condemnation (Possession Prior to Judgment)
- | | |
|--|-----------------|
| Revised Memorandum 67-34 (to be sent) | [Special order] |
| Revised Statute (attached to revised memorandum) | [of business] |
| | [9:00 a.m.] |
9. Study 65 - Inverse Condemnation
- Memorandum 67-42 (enclosed)
First Portion of Research Study (enclosed)
10. Interviews of candidates for position as Assistant Executive Secretary
- | | |
|--|-----------------|
| Memorandum 67-44 (enclosed) | [Special order] |
| First Supplement to Memorandum 67-44 (enclosed) | [of business] |
| Second Supplement to Memorandum 67-44 (to be sent) | [3:30 p.m.] |
| Third Supplement to Memorandum 67-44 (to be sent) | |

If time permits, completion of agenda if not completed on June 29

July 1

Completion of agenda if not completed on June 29-30

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JUNE 29 AND 30, 1967

Sacramento

A meeting of the California Law Revision Commission was held in the Senate Lounge, State Capitol, Sacramento, on June 29 and 30, 1967.

Present: Richard H. Keatinge, Chairman
Sho Sato, Vice Chairman
Hon. Alfred H. Song (June 30)
John R. McDonough
Thomas E. Stanton, Jr.

Absent: Joseph A. Ball
James R. Edwards
Herman F. Selvin
George H. Murphy, ex officio

Note: The Assembly member of the Commission had not been designated at the time of this meeting.

Messrs. John H. DeMouilly and Clarence B. Taylor of the Commission's staff were present.

Also present were the following observers:

| | |
|---------------------------|-------------------------------------|
| Hon. James Bear (June 30) | The Assembly |
| Richard N. Light | Department of Water Resources |
| Willard Shank | Office of Attorney General |
| Jon Smock | Administrative Office of the Courts |

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ADMINISTRATIVE MATTERS

Minutes of first June meeting. The minutes of the meeting of June 2 and 3, 1967, were approved as presented by the staff.

Future meetings. Future meetings are scheduled as follows:

July 27 (evening), 28, and 29 San Francisco

Note: The time of this meeting was changed
to include the evening of July 27.

August No meeting

September 21 (evening), 22, 23 Los Angeles

October 20 (evening), 21 San Francisco

Assistant Executive Secretary Position. The Commission interviewed and considered personal resumes and examples of writing submitted by the following candidates:

| | |
|--------------------|------------|
| Clarence B. Taylor | Palo Alto |
| Charles L. Swezey | Palo Alto |
| Harry K. Grafe | Sacramento |

After discussion, the Commission adopted a motion that Mr. Taylor be appointed as Assistant Executive Secretary.

Report on 1967 Legislative Program. The Executive Secretary reported the status of all bills recommended by the Commission for the 1967 session. The Commission noted in particular that Senate Bill No. 245 which would have made personal injury damages community property, with certain exceptions, was defeated on the floor of the Assembly, and that Senate Bill No. 246, a companion bill, was moved to the inactive file. The Executive Secretary advised the Commission that the opposition to Senate Bill 245 arose from dissatisfaction with

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the division of personal injury damages in case of divorce, especially upon divorce shortly following the recovery. Various possibilities for overcoming the objections were discussed and the matter is to be placed on the Agenda for the next meeting.

The Commission noted that a significant amendment was made to Senate Bill No. 251 (unincorporated associations) in the Assembly Judiciary Committee. The amendment would liberalize the requirements for obtaining service upon an association in certain situations and may create opposition to the bill on the part of certain associations, especially labor unions.

The Commission noted that Senate Bill No. 253 (exchange of information in eminent domain proceedings) has been reported "do pass as amended" by the Assembly Judiciary Committee and is on third reading in the Assembly. The Executive Secretary reported various possible sources of opposition to the bill and outlined the steps taken by the staff to fully inform the members of the Assembly about the bill.

The Executive Secretary reported that Senate Bill No. 247 (Evidence Code revisions) had been adopted by the Assembly and sent to the governor without the section codifying the doctrine of res ipsa loquitur.

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COMMISSION ACTIVITIES DURING 1967-68

The Commission discussed its activities for the remainder of 1967 and noted that there may be a turnover in membership after October. In the latter connection, the staff is to prepare an explanation of the progress of the various projects, especially condemnation law, for the benefit of the new members.

In general, the Commission determined to devote its efforts prior to October, insofar as possible, to follow-up work on previous recommendations.

Escheat. The Commission noted that the tentative recommendation on this subject has been twice distributed and that the comments received do not indicate the need for substantial revision. This subject is to be placed on the Agenda for the July meeting with a view to approving the recommendation and including it in the 1968 program.

Immediate possession. As reported in these minutes, the Commission determined to place this matter on the Agenda for the July meeting with a view to approval of a tentative recommendation for publication.

Moving expenses. The Commission considered the possibility of bringing our work on moving expenses up to date and of preparing a separate recommendation on that subject. The Commission determined not to do so at this time because of the substantial possibility that progress cannot be made on the subject apart from a general "package" on condemnation law.

Costs and fees on abandonment. After discussion, the staff was directed to consider the possibility of preparing a separate bill, possibly for proposal in the 1968 session, dealing with costs and fees

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on abandonment. The Commission noted that progress might be made with such a bill apart from the total subject of possession prior to judgment and related problems.

Personal injury damages. As noted earlier, the reason for the defeat of this recommendation was the law governing the disposition of property on divorce or separate maintenance. The Commission therefore considered the possibility of undertaking a study of the division of property on divorce or separate maintenance. In this connection, the Commission considered the report of the Governor's Commission on the Family and, after discussion, directed the staff to consult with members of the Governor's Commission and others as to the feasibility of undertaking a study of this subject.

Fictitious business names. The Commission discussed the status of this study and the nature of the objections that were raised to the tentative recommendation that was prepared and distributed. The Commission determined to place the subject on the Agenda for the purpose of considering a statute and comments as revised by the staff. After consideration of the efforts of the staff to eliminate the practical problems that arose, the Commission will determine whether it is necessary to prepare a research study on the subject.

Condemnation law and procedure. The Commission determined to consider no new aspects of this topic until after the Governor has made his appointments to the Commission.

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STUDY 36 - CONDEMNATION LAW AND PROCEDURE (POSSESSION
PRIOR TO FINAL JUDGMENT AND RELATED PROBLEMS)

The Commission considered Memorandum 67-34 and the draft of legislation and constitutional amendment attached to that memorandum. The Commission determined to publish a tentative recommendation on this subject after the July meeting.

Constitutional Amendment

The Commission determined to recommend an amendment to Section 14 of Article I of the California Constitution that would (1) delete the detailed and "self-executing" provision that now governs "immediate possession" and (2) permit the Legislature to provide for such possession subject to an assurance of simultaneous payment of approximate compensation. The tentative recommendation, when printed, is to be submitted to the Constitutional Revision Commission for consideration by that group in the course of its study. In essence, the content of the section is to be as follows:

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by a jury. The Legislature may provide for the taking of possession of property and the devoting of such property to public use following commencement of an eminent domain proceeding and prior to judgment therein, and may prescribe the manner in and the time at which such possession may be taken. Legislation authorizing such possession to be

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taken shall require that (1) before possession is taken, the probable amount of compensation to be made for the property and any damage incident to the taking be paid into court for the owner, (2) the amount paid or to be paid into court be subject to determination or redetermination by the court on motion of any interested person, and (3) the total amount paid into court be available immediately to the persons that the court determines to be entitled thereto and be withdrawable by such persons in accordance with such procedure as the legislation may provide.

The comment accompanying the amendment is to be revised accordingly and, in particular, is to state more fully the effect of deleting the existing provision that declares, in effect, that property may be taken by eminent domain for certain logging or lumbering railroads and that such taking constitutes the taker a common carrier.

Statutory Revision

The Commission considered the revised draft legislation and determined to include proposed Section 1269.02 which would permit "immediate possession" to be obtained by noticed motion by all public entities and public utilities in cases of a demonstrated need for such possession. That section, of course, would be in addition to proposed Section 1269.01 which retains existing practice in right of way and reservoir cases. Section 1269.02 is to be included to implement the view taken by the Commission that there is at least some need for possession prior to judgment in cases not now covered and that, under a proper procedure, possession accompanied by approximate

payment prior to judgment can be advantageous to the property owner as well as to the condemnor. In the draft legislation, changes are to be made as follows:

Section 1249 (amended)

In this section, which defines "market value," subdivision (a) is to read:

(a) As used in this section, "market value" means market value unaffected by . . . (4) any preliminary actions on the part of the condemnor related to the taking or damaging of the property.

Subdivision (b) is to be revised to avoid stating that market value, as defined, is "the basis of damages to property not taken but injuriously affected." In the context, the existing language seems to say that the project itself is not to be considered in connection with the "after condition" of the remainder of a larger parcel. The staff is to devise other language clearly stating that the impermissible factors are not to be considered in determining the market value of the remainder of the larger parcel in the "before condition," but are to be considered in determining value in the "after condition."

Section 1249a

In this section, which states alternative dates of valuation, subdivisions (c) and (d) are to be combined to read as follows:

If the issue of compensation is not brought to trial within one year after the filing of the complaint, the date of valuation is the date of the commencement of the trial unless the delay is caused by the defendant, in which case

the date of valuation is the date of the filing of the complaint.

The comment to the section is to be rewritten and, in particular, the comment to subdivision (g) is to omit the reference to "Chapter 3 (commencing with Section 1270.01)."

Section 1253 (amended)

In this section, which prescribes the contents of the final order of condemnation, the first two sentences are to be revised, in the interest of clarity, to read:

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation which shall describe the property condemned and state the estate or interest acquired by the plaintiff and the purposes of the condemnation. If the court has made an order authorizing the plaintiff to take possession of the property pursuant to Chapter 2 (commencing with Section 1269.01) or Chapter 3 (commencing with Section 1270.01) of Title 7.1, the final order of condemnation shall also state the date upon or after which the plaintiff was authorized to take possession.

Section 1255b

In subdivision (d) of this section, paragraph (2) is to be restored to read:

(2) As to any amount deposited pursuant to Section 1269.05, the date of such deposit.

As restored, the paragraph causes interest to cease as to any amount deposited by the condemnor on demand of a residential property owner at the time the deposit is made.

Section 1257 (amended)

The comment to this section, which provides that the costs of a new trial are taxed to the defendant unless he obtains greater compensation, is to be revised to clearly indicate that the section is merely a continuation of existing law, that its provisions do not necessarily reflect any recommendation of the Commission, and that the section will be considered later in the course of the Commission's study.

Chapter 1 (commencing with Section 1268.01)

Sections 1268.01 and 1268.02 of this chapter (which deals with the depositing of estimated compensation) are to be revised to require the condemnor to have at least one appraisal made of the property and to deposit the amount of an appraisal. Such provision replaces language permitting the condemnor to deposit its estimate of probable compensation and to have its notice of the deposit explain any discrepancy between the amount of the deposit and the amount indicated by an appraisal report.

In Section 1268.03, which deals with changes in the amount of the deposit, subdivision (b) is changed, in the interest of clarity, to read:

(b) If the court redetermines the amount after entry of judgment and before that judgment has been reversed, vacated, or set aside, it shall redetermine the amount to be the amount of the judgment. If a motion for redetermination of the amount is made after entry of judgment and a motion for a new trial is pending, the court may stay its redetermination until disposition of the motion for a new trial.

Section 1268.06, which requires an undertaking when an amount in excess of the original deposit is withdrawn, is to be revised to clearly state that the amount of the undertaking is only that amount by which the withdrawal exceeds the amount of the original deposit (rather than "the amount to which the applicant is entitled as finally determined in the eminent domain proceeding").

With respect to subdivision (b) of Section 1268.09, which forbids reference in the trial to appraisal reports or statements made in connection with deposits or withdrawal, the staff is to obtain the views of the Department of Public Works and other condemnors. The Commission was disposed to revise the subdivision to permit at least the cross-examination of an appraiser on the basis of his appraisal even though his appraisal report had been used in connection with a deposit.

Chapter 2 (commencing with Section 1269.01)

Subdivision (d) of Section 1269.02, which deals with "immediate possession" in "other cases," is to be revised to read:

(d) The date after which the plaintiff is authorized to take possession of the property shall be determined by the court and shall not be less than 60 days after the making of the order.

Subdivision (f), which would have required the court to preserve evidence of the existing condition of the property, is to be deleted.

Section 1269.03, which would have authorized an appeal from an order granting or denying immediate possession in certain cases, is to be deleted and the comments to related sections are to be revised accordingly.

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STUDY 42 - THE RIGHTS OF A GOOD FAITH IMPROVER
(SENATE BILL NO. 254)

The Commission considered Memorandum 67-43 and the attached revision of Senate Bill No. 254. The Executive Secretary reported the nature of the opposition to Senate Bill No. 254 and outlined alternatives that might overcome that opposition. In the draft prepared by the staff, the Commission directed the following changes:

(1) Section 871.1 is to be restored to its original form, and is to contain two subdivisions as a matter of drafting style.

(2) Section 871.3 is to be expanded to contain an explicit statement that the good faith improver may bring an action for the relief provided for in Chapter 10.

(3) Section 871.4 is to be revised to read as follows:

The court shall not grant relief under this chapter if the court determines that the right of setoff under Section 741 of the Code of Civil Procedure or the right to remove the improvement under Section 1013.5 of the Civil Code provides the good faith improver with a remedy which will result in substantial justice to the parties under the circumstances of the case.

After discussion the Commission determined to retain proposed subdivision (b) of Section 871.5 which provides that the chapter does not affect the remedies available in encroachment cases.

The Commission considered and approved deletion of Section 871.6, which would have provided the elaborate formula for relief.

The staff is to further revise the bill with a view to including the proposal in next year's program.

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STUDY 55 - ADDITUR (SENATE BILL NO. 250)

The Commission considered Memorandum 67-45, the decision of the California Supreme Court in Jehl v. Southern Pac. Co., and a draft revision of Code of Civil Procedure Section 662.5 as that section was added by Senate Bill No. 250. After discussion, and after noting that the Jehl decision raises problems for ultimate resolution by the Supreme Court of the United States, the Commission determined to take no further action with respect to additur at this time, but indicated that the subject might be reconsidered by the Commission during 1968.

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STUDY 63 - EVIDENCE CODE

The Commission considered Memorandum 67-29, the first supplement to that memorandum, and the various articles from the evidence issue of the Hastings Law Journal. The Commission also considered Memorandum 67-30 and the first supplement to that memorandum.

After a careful consideration of the materials listed above, the Commission concluded that the materials failed to demonstrate that changes are needed in the Evidence Code.

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STUDY 65 - INVERSE CONDEMNATION

The Commission considered Memorandum 67-42 and the second portion of Professor Van Alstyne's study on inverse condemnation. After discussion, the Commission determined to defer detailed consideration of inverse condemnation until after October when the remainder of the study will be available and the Commission can deal with specific recurring forms of inverse condemnation claims.