

November 19, 1969

Time

Place

November 21 - 1:30 p.m. - 4:30 p.m.

Stanford
Law Revision Commission Office
(Inquire at Law School Reception
Office for directions)

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Stanford

November 21, 1969

1. Minutes of October 3-4 Meeting (sent 10/27/69)

2. Election of Chairman and Vice Chairman

Memorandum 69-118 (sent 10/27/69)

3. Future Meetings - Suggested Dates

January 8, 9, 10 (three full days)	- Los Angeles
February 6-7	- San Francisco
March 6-7	- Los Angeles
April 10-11	- San Francisco
May 8-9	- Los Angeles
June 5-6	- San Francisco
July 10-11	- Los Angeles
September 3-5	- San Francisco
October 9-10	- Los Angeles
November 6-7	- San Francisco
December 4-5	- Los Angeles

4. Fiscal Report

(Oral Report at Meeting)

5. Publications Report

Memorandum 69-147 (sent 11/5/69)

6. Contract with Professor Jim Hogan - Davis Law School
(\$7,500 for entire study on procedural aspects of eminent domain)

7. New Topics

Practice and Procedure

Memorandum 69-143 (sent 11/5/69)(Exhibit I replaced by page 25
of Annual Report--Memorandum 69-128)
Letter from Senator Grunsky (HANDOUT)

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Inverse Condemnation (expanding scope of study)

Memorandum 69-135 (sent 11/5/69)

8. Annual Report

Memorandum 69-128 (sent 11/7/69)
Draft of Annual Report (attached to Memorandum)

9. Study 63 - Evidence (Res Ipsa Loquitur)

Memorandum 69-142 (sent 11/5/69)
First Supplement to Memorandum 69-142 (sent 11/12/69)
Letter from California Trial Lawyers Association (HANDOUT) *W.C.H.C.*

10. Study 50 - Leases

Memorandum 69-144 (sent 11/5/69)
Recommendation (attached to Memorandum)

11. Study 52 - Sovereign Immunity

Statute of Limitations

Memorandum 69-127 (sent 10/27/69)
Proposed Legislation (attached to Memorandum)
Letters from Public Works and League of Cities (sent 11/12/69)

Nuisance Liability

Memorandum 69-139 (sent 10/27/69)
First Supplement to Memorandum 69-139 (sent 10/27/69)

12. Study 60 - Representations as to Credit

Letters from State Bar and California Bankers Association (HANDOUT)

13. Study 63 - Evidence (Marital Testimonial Privilege)

Memorandum 69-122 (sent 11/5/69)

14. Filling Staff Vacancy

15. Procedures in Connection With Obtaining Approval of Legislative Proposals

Memorandum 69-125 (sent 10/27/69)

16. "Short Form" Cover Sheet; Meetings With Local Bar Associations and Judges

Memorandum 69-136 (sent 10/27/69)
Commissioner Uhler's letter (attached to Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 21, 1969

Stanford

A meeting of the California Law Revision Commission was held at Stanford University on November 21, 1969.

Present: Sho Sato, Chairman
John D. Miller
Lewis K. Uhler
Richard H. Wolford
William A. Yale

Absent: Thomas E. Stanton, Jr., Vice Chairman
Alfred H. Song, Member of the Senate
Carlos J. Moorhead, Member of the Assembly
Roger Arnebergh
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Clarence B. Taylor, and Jack I. Horton, members of the Commission's staff, also were present. Mr. Kenneth Nellis, Department of Public Works, attended as an observer.

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ADMINISTRATIVE MATTERS

Approval of Minutes of October 3-4 Meeting. The minutes of the October 3-4, 1969 meeting were approved as submitted.

Schedule for future meetings. The following schedule for meetings during 1970 was adopted:

January 9-10	Los Angeles
February 6-7	Sacramento
March 6-7	Los Angeles
April 10-11	San Francisco
May 8-9	Los Angeles
June 5-6	San Francisco
July 10-11	San Diego
September 3-5 (three full days)	San Francisco
October 9-10	Los Angeles
November 6-7	San Francisco
December 4-5	Los Angeles

It was suggested that some members of the Legislature might be invited to lunch at the time of the February meeting. It was also suggested that a meeting with the San Diego Bar Association members might be arranged in connection with the July meeting.

Publications. The publications listed in Memorandum 69-147 were approved for printing and inclusion in Volume 9.

Annual Report. The Commission approved the draft of the Annual Report (attached to Memorandum 69-128) for printing with the following revisions:

(1) On page 7, footnote 4 was deleted and the sentence to which that footnote related was revised to read: "However, because of the limited resources available to the Commission and the substantial topics already on its agenda, the Commission has determined not to request authorization to study any but two of these topics at this time."

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(2) On page 8, the topic is to be listed for each of the recommendations to be submitted to the Legislature and reference is then to be made to the recommendation.

(3) Technical errors were noted in the first sentence on page 11.

(4) On pages 26 and 27, the second and third paragraphs of the statement on the inverse condemnation study were revised to read:

The Commission's study of inverse condemnation liability discloses that, in the past, the California courts have relied frequently upon the rules of private law in dealing with inverse condemnation liability.¹¹ These rules appear unsatisfactory in certain situations as applied to public entities and changes in the rules may be required. However, such changes in the public sphere alone and the resultant differences between the rules governing public and private activities could create serious problems. For example, should different rules of liability or immunity apply where public and private improvements combine to cause damage? In other words, is only one improver--either the private or public improver--to be liable in some situations where public and private improvements combine to cause damage and, if so, how should the damages be computed? Should liability be imposed or immunity be granted merely because a private improvement is subsequently acquired by a public entity? The resolution of these and similar problems requires consideration of the law applicable to both private persons and public entities.

Filling staff vacancy. The Executive Secretary reported on the progress in filling the legal position that will become vacant when John Cook leaves the staff. The Commission determined that the Executive Secretary, in consultation with other members of the staff, should select the best qualified applicant for the position.

"Short form" cover sheet. The Commission considered Memorandum 69-136, which suggested that a "short form" cover sheet be used for each study. Commissioner Uhler explained his proposal for a "short form" cover sheet as follows:

The form would include a summary of past action. The form would state, for example, the problems that the Commission sought to solve at the February meeting, the problems that were solved, then the problems that were sought to be solved at the March meeting,

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the problems that were solved at that meeting, etc. For February meeting, there would also be an entry for comments from the outside (if any). Then, for the March meeting, there would be another entry for comments from the outside (if any). In other words, for each item listed on the suggested form, the results of the meeting each month would be summarized in the form indicated and the form would be reproduced after each meeting at which the topic was considered with the information for the previous meeting set out in addition to the portion previously reproduced. This would give the Commissioners a running record of the prior decisions, problems considered, comments received, etc. The idea is that the only thing that would be done for a particular meeting in addition to the summary that is already on hand would be the portion of the material relating to the actions at the last meeting and the portion relating to the next meeting. The previous material would remain unchanged. Another suggestion was that the Minutes be produced on separate sheets to permit filing with the topic.

After discussion, the Commission determined that the staff and Commissioner Uhler should communicate with respect to one agenda item only and that the staff should attempt to prepare the material on that item in the form desired by Commissioner Uhler. The item selected should be a representative one.

Meetings with members of local bar associations. It was suggested that communications might be improved if meetings were held with members of local bar associations. It was suggested that the Commission might be able to have such a meeting when it meets in San Diego in July.

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STUDY 36.80 - CONDEMNATION LAW AND PROCEDURE (PROCEDURAL ASPECTS)

The Commission approved a contract with Professor Jim Hogan of the Davis Law School in the amount of \$7,500 for the entire study on the procedural aspects of eminent domain law. A detailed outline of the scope of the study is to be prepared and circulated to interested persons and organizations with the request that they suggest (1) those areas of the study which they believe should be given priority and (2) any procedural aspects not listed in the outline that should be covered by the study. A special effort should be made to obtain the views of 4 or 5 outstanding attorneys representing condemnees and 4 or 5 outstanding attorneys representing condemnors as to the areas of procedural law that are most important. The Commission will then determine the particular aspects of the study that should be given priority so that the most needed portions will be available as soon as possible. The study is to be financed using \$6,000 of the salary savings that result from leaving the staff vacancy for Junior Counsel unfilled during a six-month period and funds budgeted for research. The Executive Secretary is authorized to execute the contract on behalf of the Commission. The contract should be in the standard form of Commission research contracts.

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STUDY 50 - LEASES

The Commission considered Memorandum 69-144 and the attached revised recommendation on leases. The recommendation was approved for printing as submitted.

The Commission determined that the lease recommendation should be included on the agenda for the January meeting. Commissioner Miller questioned whether the approach of the recommendation is sound. The approach is to treat a lease as any other contract, making the basic measure of damages for breach of the lease the same as for any other contract (loss of the benefit of the bargain). This approach makes the so-called specific performance remedy (collecting the rent as it becomes due whether or not the lessee has breached the lease and abandoned the property) unavailable unless this remedy is provided in the lease and also the lease gives the lessee the right to sublease or assign subject to reasonable limitations and conditions. Commissioner Miller noted that under existing law it is necessary to include a provision making available the remedy of the loss of the benefit of the bargain but that the right to collect the rent as it becomes due is available even though no provision for this remedy is included in the lease. Under the proposed statute, the situation is reversed: The right to collect the rent as it becomes due is available as a remedy only if the lease so provides, but the loss of the benefit of the bargain remedy is available even though the lease does not so provide.

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STUDY 52 - SOVEREIGN IMMUNITY (STATUTE OF LIMITATIONS)

The Commission considered Memorandum 69-127 and the letters from the Department of Public Works and the League of California Cities. The proposed legislation which was attached to the Memorandum was approved for printing for the 1970 Legislature.

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STUDY 52.70 - SOVEREIGN IMMUNITY (NUISANCE LIABILITY)

The Commission considered Memorandum 69-139 and the First Supplement to Memorandum 69-139, and the provisions relating to nuisance liability that are included in the Sovereign Immunity No. 10 recommendation.

The Commission approved the portion of the recommendation (attached as Exhibit II to Memorandum 69-139) relating to nuisance liability after the following revision was made. On page 5 of Exhibit II, the last two sentences were revised to read: "The possibility that liability could be imposed under an ill-defined theory of common law nuisance in circumstances where a public entity would otherwise be immune creates an uncertainty that is both undesirable and unnecessary."

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STUDY 60 - REPRESENTATIONS AS TO CREDIT

The Commission considered letters from Mr. Pownall of Landels, Ripley, Gregory & Diamond (November 14, 1969), representing the California Bankers Association, and from the State Bar of California (November 14, 1969).

The California Bankers Association states:

Neither the members of the California Bankers Association which represents every bank in California nor ourselves as attorneys are aware of any dissatisfaction on the part of business, the Bar or the public at large which would require this issue to be brought before the Legislature in the near future.

The Commission was advised that all members of the State Bar Committee on Debtor-Creditor Relations "reviewed the materials presented and were unanimous in their opinion that the recommendation of the Law Revision Commission be supported by the State Bar of California. The members of the committee concluded that little could be added to the Law Revision Commission report and that the conclusions reached by the Law Revision Commission are sound."

After discussion, the Commission made no change in its previous decision to submit this recommendation to the 1970 Legislature.

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STUDY 63.20-50 - EVIDENCE (MARITAL TESTIMONIAL PRIVILEGE)

The Commission considered Memorandum 69-122. The Commission noted the case of People v. Coleman, 71 Adv. Cal. 1201, 1209-1210 (Oct. 1969). No action on this case was recommended by the staff and none was taken by the Commission. The Commission also noted the technical revision that the staff had made in the Evidence Code recommendation to the 1970 Legislature. This revision was set out in Memorandum 69-122.

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STUDY 63.20-50 - EVIDENCE CODE (RES IPSA LOQUITUR)

The Commission considered Memorandum 69-142, the attached revised version of the res ipsa loquitur section, and a letter from the California Trial Lawyers Association commenting on the recommendation.

The draft of the res ipsa loquitur section and comment (attached to Memorandum 69-142) was approved for printing after the following revisions were made:

(1) On the first page of the draft, the material in the balloon at the bottom right-hand corner of the page was revised to read "and drawing such inferences therefrom as the jury believes are warranted)".

(2) On the second page of the draft, the following was deleted: "Under the California cases, such evidence must show either that a specific cause for the accident existed for which the defendant was not responsible or that the defendant exercised due care in all respects wherein his failure to do so could have caused the accident. See, e.g., *Dierman v. Providence Hosp.*, 31 Cal.2d 290, 295, 188 P.2d 12, 15 (1947)."

(3) On the third page of the draft, the following was deleted: "Where the defendant is a bailee, proof of the elements of res ipsa loquitur in regard to an accident damaging the bailed goods while they were in the defendant's possession places the burden of proof--not merely the burden of producing evidence--on the defendant."

(4) On the fourth page of the draft, the phrase "defendant's negligence was the proximate cause of the accident unless" was substituted for the phrase "defendant was negligent unless and until".

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(5) The following is to be added at the end of the Comment to
Section 646:

Other appropriate instructions

The jury instructions referred to in Section 646 do not preclude the judge from giving the jury any additional instructions on res ipsa loquitur that are appropriate to the particular case.