

December 3, 1971

Time

Place

December 9 - 7:00 p.m. - 10:00 p.m.  
December 10 - 9:00 a.m. - 5:00 p.m.  
December 11 - 9:00 a.m. - 1:00 p.m.

State Bar Building  
601 McAllister Street  
San Francisco 94102

REVISED

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

December 9-11, 1971

DECEMBER 9

1. Minutes of November 4-5, 1971, Meeting (sent 11/10/71)
2. Study 39 - Attachment, Garnishment, Execution

Report on 1971 Enactments

Oral Report at Meeting

39.70 - Prejudgment Attachment Procedure

Memorandum 71-86 (sent 12/1/71)

39.30 - Employees' Earnings Protection Law

Memorandum 71-87 (sent 11/18/71)

Revised Recommendation and Statute (attached to Memorandum)

First Supplement to Memorandum 71-87 (sent 11/30/71)

Second Supplement to Memorandum 71-87 (enclosed)

DECEMBER 10-11

Continuation of item 2 if necessary

3. Administrative Matters

Personnel matter (Oral report by Executive Secretary)

4. Study 36 - Condemnation

36 Generally - Condemnation Study Schedule

Memorandum 71-95 (sent 11/29/71)

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Report of Select Committee on Trial Delay--Litigation Costs

Memorandum 71-93 (sent 11/15/71)  
Memorandum 71-85 (enclosed)

36.35 - Immediate Possession--Condemnation Deposits Fund

Memorandum 71-94 (sent 11/18/71)

36.35 - Immediate Possession Procedure

Memorandum 71-89 (sent 11/24/71)

36.204 - Takings for State Purposes

Memorandum 71-88 (enclosed)

36.24 - Takings for More Necessary and Joint Uses

Memorandum 71-92 (sent 11/24/71)  
First Supplement to Memorandum 71-92 (sent 11/29/71)

36.65 - Disposition of Existing Statutes--Provisions Involving  
Public Utilities

Memorandum 71-90 (sent 11/18/71)

36 - Jurisdiction of Public Utilities Commission

Memorandum 71-91 (sent 11/18/71)

36.50 - Compensation in Case of Partial Take

Memorandum 71-64 (sent 11/9/71)  
Research Study (attached to Memorandum 71-64)  
First Supplement to Memorandum 71-64 (sent 11/24/71)

36.80 - Procedural Aspects

Memorandum 71-78 (sent 10/27/71)  
Draft of Statute (attached to Memorandum)

Note: We will consider the portion of Memorandum 71-78  
that was not considered at the November meeting.

5. Study 65 - Inverse Condemnation (Compulsory Dedications)  
Memorandum 71-96 (sent 11/29/71)  
First Supplement to Memorandum 71-96 (enclosed)
6. Study 77 - Nonprofit Corporation Law  
Memorandum 71-97 (enclosed)

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
DECEMBER 9, 10, AND 11, 1971  
San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on December 9, 10, and 11, 1971.

Present: Thomas E. Stanton, Jr., Chairman (December 11 and 12)  
John D. Miller, Vice Chairman  
John J. Balluff  
Noble K. Gregory  
John N. McLaurin  
Marc W. Sandstrom (December 11 and 12)  
Howard R. Williams

Absent: Alfred H. Song, Member of Senate  
Carlos J. Moorhead, Member of Assembly  
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, and Nathaniel Sterling, members of the Commission's staff also were present. On December 9 and 10, Professor Riesenfeld--Commission consultant on attachment, garnishment, and execution--was present. On December 10, Norman E. Matteoni--Commission consultant on condemnation law and procedure--was present. Gideon Kanner, Commission consultant on condemnation law and procedure was present on December 10 and 11.

Sitting with the Commission as a special guest on December 10 and 11 was Mr. Justice R. G. Reynolds, Chairman, Law Reform Commission of New South Wales, Australia.

The following observers were present for the portions of the meeting indicated:

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Thursday, December 9

Arthur C. Bailey, Fireman's Fund Insurance Co., San Francisco  
John E. Balluff, Judicial Council, Sacramento  
John D. Bessey, Attorney for CAC, Sacramento  
James M. Conners, Board of Trade of San Francisco  
Nicholas C. Dreher, Stanford Law School  
James A. Fletcher, Stanford Law School  
Alexander J. Krem, Boalt School of Law, Berkeley  
Emil A. Markovitz, Creditor's Service, Los Angeles  
Charlotte Schaber, National Business Factors, San Francisco  
Perry H. Taft, Association of California Insurance Cos., Sacramento  
Eric W. Wright, Santa Clara Law School

Friday, December 10

John E. Balluff, Judicial Council, Sacramento  
John D. Bessey, Attorney for CAC, Sacramento  
James M. Conners, Board of Trade of San Francisco  
Nicholas C. Dreher, School of Law, Stanford  
James A. Fletcher, School of Law, Stanford  
Lloyd Hinkelman, Attorney General's Office, Sacramento  
James Markle, State Department of Water Resources, Sacramento  
Emil A. Markovitz, Creditor's Service, Los Angeles  
John M. Morrison, Attorney General's Office, Sacramento  
Kenneth G. Nellis, State Department of Public Works, San Francisco  
Terry C. Smith, Los Angeles County Counsel  
Jon D. Smock, Judicial Council, San Francisco  
Charles E. Spencer, State Department of Public Works, Los Angeles  
Gerald J. Thompson, County Counsel of Santa Clara County, San Jose

Saturday, December 11

Lloyd Hinkelman, Attorney General's Office, Sacramento  
James Markle, State Department of Water Resources, Sacramento  
John M. Morrison, Attorney General's Office, Sacramento  
Kenneth G. Nellis, State Department of Public Works, San Francisco  
Terry C. Smith, Los Angeles County Counsel  
Charles E. Spencer, State Department of Public Works, Los Angeles

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ADMINISTRATIVE MATTERS

Minutes

After correcting the spelling of "questionnaire" in the first paragraph on page 11, the Commission approved the November 1971 minutes.

Personnel Matter

The Executive Secretary made an oral report to the Commission concerning the progress made and the problems involved in selecting a new staff attorney to fill the vacancy created by the resignation of E. Craig Smay. The Commission dispensed with personal interviews of the applicants and authorized the Executive Secretary to hire the best qualified applicant available, based on the staff's evaluation.

Recommendations for Changes in Laws Enacted Upon Commission Recommendation

The Commission established that, as a matter of policy, unless there is a good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted upon Commission recommendation

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STUDY 36 - SCHEDULE FOR CONDEMNATION STUDY

The Commission considered Memorandum 71-95 relating to the schedule of its eminent domain study, particularly that portion of the study that involves the right to take by eminent domain. The Executive Secretary reported that the staff hopes to be able to produce a revised version of the comprehensive statute in January 1972 and to send the Commission's tentative recommendation on the right to take to the printer by July 1972. In addition, the staff will attempt to prepare a rough schedule for the Commission's future deliberations on eminent domain and will provide the State Bar Committee on Governmental Liability and Condemnation a copy of the schedule.

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STUDY 36 - CONDEMNATION (JURISDICTION OF  
PUBLIC UTILITIES COMMISSION)

The Commission considered Memorandum 71-91 relating to the jurisdiction of the Public Utilities Commission to determine just compensation in certain eminent domain proceedings. The Commission noted that the Constitution Revision Commission has studied and made recommendations in this area and determined not to recommend any legislation on this matter at this time.

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STUDY 36.24 - CONDEMNATION (TAKING FOR MORE  
NECESSARY AND JOINT USE)

The Commission considered Memorandum 71-92 and the First Supplement to Memorandum 71-92, relating to taking property by eminent domain for more necessary and joint use. Commissioner Sandstrom stated that he is opposed in principle to the draft statutory scheme proposed by the Commission. The Commission rejected a proposal to exempt state highways from the operation of the joint use provisions. The Commission added to Section 452(c) the following sentence:

Unless otherwise provided by statute, all costs and damages that result from the relocation or removal shall be paid by the plaintiff.

With this addition, the Commission adopted the draft statute as set out in Memorandum 71-92, subject to any necessary technical changes. The Commission also directed the staff to prepare a draft provision that guarantees indemnity to the defendant by the plaintiff for injuries that arise from the plaintiff's use of the property.

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STUDY 36.35 - CONDEMNATION (IMMEDIATE POSSESSION)

The Commission considered Memorandum 71-89 presenting for review the previously approved scheme for possession of property prior to judgment in eminent domain proceedings. The Commission reviewed and approved the draft statute attached to Memorandum 71-89 with the following changes:

Section 1269.02

Section 1269.02 and the Comment thereto were revised to read substantially as follows:

§ 1269.02. Stay of order for hardship

1269.02. At any time after the plaintiff has been authorized to take possession of property under Section 1269.01, any defendant or occupant of the property may move for relief from the order if the hardship to him of having possession taken at the time specified in the order is substantial. If the court determines that the hardship to the defendant or occupant is substantial, the court may stay the order or limit by terms and conditions its operation unless, upon considering all relevant facts (including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan), the court further determines (a) that the plaintiff needs possession of the property within the time specified in the order for possession and (b) that the hardship the plaintiff would suffer as a result of a stay or limitation of the order would be substantial.

Comment. Section 1269.02 is new. It permits the court to stay an order for possession issued ex parte under Section 1269.01 or to limit the operation of the order by fixing terms and conditions of the plaintiff's possession. The court may do this only after making a dual finding of fact. The court must first find that having possession of the property specified in the order taken at the time specified in the order would be a substantial hardship to the defendant. If the court finds this fact, it next looks to the plaintiff's interest in early possession of the property. If it finds that the plaintiff needs possession of the property at the time specified and that the plaintiff would suffer substantial (as distinguished from trivial) injury from a stay or other limitation of the order, the court may not stay or limit the order.

Section 1269.02 gives the court broad authority to draft an order that is appropriate to the circumstances. The court may, for example, impose limitations on the order that will permit the plaintiff and defendant to have possession of portions of the property or to jointly use the property.

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Section 1269.025

A sentence was added to the Comment to Section 1269.025 to indicate that objections to the right to take are generally determined expeditiously and that a stay may be granted only where the determination would occur beyond the date set by the order of possession.

Section 1269.04

Subdivision (a) of Section 1269.04 was revised to read:

(a) As used in this section, "record owner" means the owner of the legal or equitable title to the fee or any lesser interest in property as shown by recorded deeds or other recorded instruments.

Subdivisions (d) and (e) were combined and revised to read substantially as follows:

(d) Service of the order shall be made by personal service, except that:

(1) If the person on whom service is to be made has previously appeared in the proceeding or been served with summons in the proceeding, service of the order may be made by mail upon such person and his attorney of record, if any.

(2) If the person on whom service is to be made resides out of the state, or has departed from the state or cannot with due diligence be found within the state, service of the order may be made by registered or certified mail addressed to such person at his last known address.

The Comment to subdivision (c) was expanded to indicate the general import of Section 1269.06, referred to therein.

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STUDY 36.35 - CONDEMNATION (IMMEDIATE POSSESSION--  
CONDEMNATION DEPOSITS FUND)

The Commission considered Memorandum 71-94 relating to the Condemnation Deposits Fund. The Commission determined not to merge the fund with the Litigation Deposits Fund created by the Statutes of 1971, Chapter 1148. The Commission determined to continue the Condemnation Deposits Fund as Article 10 (commencing with Section 16429.1) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

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STUDY 36.85 - CONDEMNATION (LITIGATION EXPENSES)

The Commission considered Memoranda 71-85 and 71-93 and the following attachments: the opinion of the California Supreme Court in County of Los Angeles v. Ortiz and the second report of the Select Committee on Trial Court Delay. The Commission discussed the problems involved in awarding litigation expenses to parties in eminent domain proceedings and determined not to devote further study to these problems at this time. The Commission took the position that eminent domain proceedings should be treated no differently in this respect than any other civil action. The Commission took no position on the specific proposals of the Select Committee.

In addition, the Commission determined to solicit the views and experience of practitioners and of the State Bar Committee on Governmental Liability and Condemnation with regard to the use of arbitration in eminent domain proceedings as a way to minimize litigation expenses.

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STUDY 36.204 - CONDEMNATION (TAKINGS FOR STATE PURPOSES--  
RESOLUTION OF NECESSITY)

The Commission considered Memorandum 71-88 and the attached report of the Legislative Analyst relating to land acquisition by the state. The Commission also considered comments of the State Bar Committee on Governmental Liability and Condemnation, which were distributed at the meeting, relating to the resolution of necessity.

The Commission directed the staff to send relevant background material on public necessity and public use, including key cases and statutory exceptions, to the new Commissioners.

The Commission directed the staff to prepare a memorandum dealing with the right of a defendant in an inverse condemnation case to acquire an interest in the damaged property.

The Commission directed the staff to send copies of the provisions on condemnation by the state to the state agencies affected by them, particularly the Department of Aeronautics.

The Commission approved the draft statutory provisions attached to the memorandum--with the following alterations--subject to further consideration when comments from the state agencies are received:

Eminent Domain Code § 351

The staff was directed to study the problems involved in declaratory relief actions by the condemnor, and in amending the resolution of necessity when the complaint is amended; appropriate notes on these matters should be inserted in the Comment to Section 351. The matter of amending the resolution when the complaint is amended will be considered in connection with the general problem of abandonment.

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Eminent Domain Code § 354

The last sentence of the Comment to subdivision (a) was revised to read:

As to the effect of the resolution of necessity where the taking is by a city or county for open space, see Government Code Section 6953.

The staff was directed to prepare for the February meeting a memorandum that reviews the authority of various persons to condemn for open space and the effect of their resolutions of necessity on this issue. The memorandum should include recently enacted statutes and any relevant background materials.

Military & Veterans Code § 437

The first sentence of the Comment was amended to read:

Military and Veterans Code Section 437 is amended to delete the reference to the Adjutant General's power of eminent domain.

The staff was directed to make comparable changes in the Comments to other sections.

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STUDY 39.30 - ATTACHMENT, GARNISHMENT, EXECUTION (EMPLOYEES'  
EARNINGS PROTECTION LAW)

The Commission considered Memorandum 71-87, the revised recommendation attached thereto, and the First and Second Supplements to Memorandum 71-87. Because bank accounts will be dealt with in the course of the Commission's work on prejudgment attachment, the Commission determined that Section 690.7 (exemption of bank accounts from prejudgment levy of attachment) should be deleted from the Employees' Earnings Protection Law recommendation. See also Minutes relating to Study 39.70 (Prejudgment Attachment Procedure). No change in the proposed exemption of bank accounts from postjudgment levy of execution was, however, made.

The Commission rejected the staff suggestion set forth in Memorandum 71-87 that the cost of personal service be recoverable whether or not mail service has first been refused.

The Commission determined that the minimum amount withheld pursuant to the Employees' Earnings Protection Law should be five dollars. The staff was directed to prepare additional tables and formulas which take into account the new state withholding tax provisions and which would provide for the withholding of greater amounts than presently provided.

It was suggested that recent welfare recipients be given a grace period before any of their wages may be withheld. The staff was directed to review the statutes of other states which have implemented such a provision and to secure the reaction of the appropriate California state agencies to such a provision in light of the proposed recommendation.

STUDY 39.70 - ATTACHMENT, GARNISHMENT, EXECUTION (PREJUDGMENT  
ATTACHMENT PROCEDURE)

The Commission considered Memorandum 71-86, the preliminary draft statute attached thereto, and the oral presentation of its consultant, Professor Stefan A. Riesenfeld. Professor Riesenfeld briefly reviewed the impact of recent decisions upon prejudgment attachment procedures. He noted that, although "necessities" must be exempt from such procedures under all circumstances, other assets may be subject to attachment either after prior notice and hearing or in certain exceptional situations even before notice and hearing.

The Commission determined that, at least preliminarily, it must concentrate its attention on attachment procedures and defer detailed consideration of other provisional remedies.

The Commission considered at some length the problems of defining and dealing with "necessities." The staff was directed to consider the following guidelines in working with these problems. The general definitional standard for necessities should be more liberal than "essential for support and, "necessities" should not be limited to those items which are commonly required by all or nearly all persons but should include all those items which are necessary for the particular defendant and his family. On the other hand, a defendant should not be able to continue to maintain an extravagant or lavish life style.

The statute should separately describe those items which must be absolutely exempted without limitation and without requiring the defendant to file a claim. These items should include a fixed amount in a bank account, [ordinary] household furnishings and wearing apparel at the principal place of residence, and earnings. (In connection with the bank account exemption, the staff was

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directed as soon as possible to eliminate Section 690.7 from the Employees' Earnings Protection Law recommendation and to revise the remainder of the recommendation accordingly.) Certain tools, equipment, and vehicles should, if possible, also be included here. However, the staff was directed to investigate whether nonpossessory remedies could be devised to deal with these kinds of assets.

The staff was directed to consider means of specifying additional items which could be exempted after a claim and showing of need. Property exempt from execution must, of course, be exempt from attachment; however, for some types of such property, a claim will be required to identify precisely what may be exempted.

In dealing with business property, e.g., accounts receivable, inventory, equipment and other capital assets, the staff should consider treating the sole proprietorship separately from a business operated in corporate or partnership form--and should focus on protection for the defendant-owner who "works with the tools."

After a hearing or an opportunity for a hearing on the issues of necessities has been afforded, a defendant should be entitled to relitigate the issue only after a significant change in circumstances.

For the January meeting, the staff was directed to assist Professor Rieseinfeld in preparing an outline of the remaining policy questions presented both by the draft statute attached to Memorandum 71-86 and by attachment procedures generally.