

Time

Place

November 17 - 7:00 p.m. - 10:00 p.m.
November 18 - 9:00 a.m. - 5:00 p.m.
November 19 - 9:00 a.m. - 11:30 a.m.

Room 131, Law Building
University of California
Berkeley, California

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Berkeley

November 17-19, 1966

Thursday evening, November 17

1. Approval of Minutes of October Meeting (enclosed)
2. Administrative matters

Suggested schedule for future meetings

December 1966	No meeting
January 19 (evening), 20, 21	Los Angeles
February 24 (evening), 25	San Francisco
March 19 (evening), 20, 21 (morning)	Lake Tahoe
April 21-22	Los Angeles
May 19 (evening), 20, 21	San Francisco

3. Study 26 - Escheat

Memorandum 66-67 (to be sent)
Revised Recommendation (attached to memorandum)

Friday, November 18

Continuation of work on Item 3, if necessary

4. Study 36 - Condemnation Law and Procedure

Possession Prior to Final Judgment and Related Problems

Memorandum 66-68 (to be sent)
Revised Recommendation (attached to memorandum)

Saturday, November 19

Discovery

Memorandum 66-69 (enclosed)
Recommendation (attached to memorandum)

} Special Order of
Business 9:00 a.m.
November 19

Annual Report

Memorandum 66-66 (sent 10/27/66)

Research contracts

Memorandum 66-70 (to be sent)

Film on presumptions

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
NOVEMEER 17, 18, AND 19, 1966
Berkeley

A meeting of the California Law Revision Commission was held at Berkeley on November 17, 18, and 19, 1966.

Present: Richard H. Keatinge, Chairman (November 19 only)
Sho Sato, Vice Chairman
John R. McDonough
Herman F. Selvin
Thomas E. Stanton, Jr.

Absent: Honorable James A. Cobey
Honorable Alfred H. Song
Joseph A. Ball
James R. Edwards
George H. Murphy, ex officio

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

Also present on November 18 were the following observers:

Robert F. Carlson	State Dept. of Public Works
Norval Fairman	State Dept. of Public Works
James F. Markle	Dept. of Water Resources
J. M. Morrison	Attorney General's Office
David B. Walker	San Diego County Counsel's Office
Willard A. Shank	Attorney General's Office

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ADMINISTRATIVE MATTERS

Minutes of October 1966 meeting. The minutes of the October 1966 meeting were corrected as follows: On page 5, third line from bottom of page, delete "Section 1516" and in the last line substitute "1506" for "1508." As corrected, the minutes were approved.

Future meetings. Future meetings are scheduled as follows:

December 1966	No meeting
January 19 (evening), 20, 21	Los Angeles
February 24 (evening), 25	San Francisco
March 19 (evening), 20, 21 (morning)	Lake Tahoe
April 21-22	Los Angeles
May 19 (evening), 20, 21	San Francisco

Research contracts. The Commission considered Memorandum 66-70, approved the following research contracts and authorized the Executive Secretary to execute the contracts on behalf of the Commission:

1. A study to determine the changes needed to conform the Code of Civil Procedure to the Evidence Code. Compensation - \$750. Consultant - Jon D. Smock.

2. A study to determine the changes needed to conform the Business and Professions Code to the Evidence Code. Compensation - \$1,000. Consultant - Jon D. Smock.

3. A study of Procedural Aspects of eminent domain law as outlined in Memorandum 66-70. Compensation - Not to exceed \$5,000. Consultant - to be selected by Executive Secretary and approved by Chairman. A law professor should be selected as the consultant if possible. If a law

professor can not be retained, the Executive Secretary may discuss the study with other possible consultants and attempt to work out an arrangement to be submitted to the Commission for approval at the January meeting.

4. A study of quasi-community property and division of property on divorce. Compensation for the two studies - \$ 1,500. Consultant to be selected by Executive Secretary and approved by Chairman.

Annual Report. The Commission considered Memorandum 66-66 and the attached draft of the Annual Report and took the following actions:

1. On the inside cover, the names of the members of the Commission and the staff are to be included. (This same format is to be used on all reports and recommendations.)

2. On page 5, delete "in Progress" from heading "Other Studies in Progress."

3. The list of topics on page 12 is to be revised to conform to the topics upon which recommendations will be submitted to the 1967 legislative session.

4. On page 14, the words "in Progress" were deleted from the heading "Other Studies in Progress." It was also suggested in future reports that the footnotes indicate the chapter numbers of the legislation enacted to effectuate recommendations. Because the material considered by the Commission was already set in type, this change was not made in the Annual Report under consideration.

5. On page 18, the paragraph indicating the holding in Mulkey v. Reitman was deleted.

6. The second paragraph on page 19 was revised to read:

Pursuant to the mandate imposed by Section 10331 of the Government Code, the Commission recommends that the Legislature take appropriate action to effect the repeal of the Free Television Act (submitted by the initiative and approved by the electors, November 3, 1964).

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7. The inclusion of the Recommendation Relating to Discovery in Eminent Domain Proceedings in the Annual Report as an Appendix was approved.

8. As thus revised, the Annual Report was approved for printing.

9. The staff was requested to consider the possibility of devising some short form of citation to bound volumes. It was suggested that a short form of citation be indicated in the next bound volume.

STUDY 26 - ESCHEAT

The Commission considered Memorandum 66-67 and the attached Recommendation and the First Supplement to Memorandum 66-67.

The following actions were taken:

Recommendation

It was suggested that the reference to the "Uniform Act" in the preliminary portion of the Recommendation is confusing since the "Uniform Act" in some cases is the California Act. In some cases, the phrase, "the existing California law" could be used.

Section 1300

In subdivision (c) and (d), after "known owner" insert the substance of "or where the whereabouts of the owner is unknown."

Section 1501

Subdivision (d) was approved.

Former subdivision (h), redesignated as subdivision (i), was approved in the following form (showing amendments of existing law):

(h) (i) "Utility" means any person who owns or operates ~~within this state,~~ for public use ; any plant, equipment, property, franchise, or license for the transmission of communications , the transportation or passage of persons or property, or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas , whose rates are fixed by the Public Utilities Commission of this state, a similar public agency in any other state, or a similar public agency of the United States .

A conforming revision of Section 1581(d) was made so that subdivision (d) reads:

(d) Any property held by a utility which the Public Utilities Commission of this state or a similar public agency of another state or of the United States considers as a part of the revenues of the utility in determining the rates to be charged by the utility.

In response to a suggestion from the life insurance companies, subdivision (g) was revised to read in substance:

(g) "Owner" with respect to any property subject to this chapter means a person who is entitled the property.

Section 1510

The revision of this section was approved. The staff was requested to consider the form that regulations adopted under subdivisions (c) and (d) would take and consider whether the language of subdivisions (c) and (d) is adequate in light of the form such regulations would be likely to take.

A suggestion from American Express that travelers checks escheat to the state where the check was issued was rejected. The Commission took the view that the suggestion was inconsistent with Texas v. New Jersey.

Sections 1511 and 1512

These sections were approved as drafted.

Section 1513

Subdivision (a) should be revised to conform to the revised definition of "owner" in Section 1501.

The Commission discussed subdivision (b). It was pointed out that the publication in the county of the last known address of the insured or annuitant would be more likely to give notice to the person entitled to the funds. No decision was made on whether subdivision (b) should be retained, revised, or deleted.

Sections 1533 and 1573

Authorize controller to enter into agreements with other states for exchange of information. Further authorize the controller to adopt regulations to require the reporting to him of information needed so

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that he can comply with the requirements of such agreements. Possibly Section 1533 should be deleted and the authority to require the reports should be included in revised Section 1573.

Section 1581

Subdivision (d) of this section was revised. See the discussion supra under Section 1501.

STUDY 36 - CONDEMNATION LAW AND PROCEDURE (DISCOVERY)

The Commission considered Memorandum 66-69 and the attached draft of a tentative recommendation relating to discovery in eminent domain proceedings.

The Commission determined that a statute providing for the pre-trial exchange of valuation data should be recommended to the 1967 legislative session.

The Commission made the following revisions of the tentative recommendation:

1. The staff was directed to revise the discussion on page 4 of the tentative recommendation to read in substance as follows:

Although some trial courts now require a pretrial exchange of valuation information, the Commission has been advised that there is a need for legislation that would establish a uniform procedure for exchange of valuation data throughout the state.³ Such legislation would provide a relatively inexpensive means of discovery in eminent domain proceedings and would reduce the necessity for interrogatories and depositions.

³ The State Bar Committee on Condemnation Law and Procedure, attorneys who ordinarily represent condemnees, and representatives of various public agencies have expressed this view to the Commission.

2. The remainder of the preliminary portion of the recommendation should be conformed to the changes made in the proposed legislation. Specifically, the following is to be substituted for items 4 and 5 on page 7 of the recommendation:

4. The procedure recommended above for the pretrial exchange of valuation data should be supplemental to other discovery procedures.

3. The proposed legislation was approved after it was revised as follows:

Code of Civil Procedure Section 1247b

The proposed amendment of this section was deleted. Section 1247b will be considered later in the course of the comprehensive revision of the law of eminent domain.

Section 1272.01

The time for filing a demand under subdivision (a) should be not later than 10 days after the memorandum to set has been served and filed.

In subdivision (c)(2) and in subdivision (d), the 20 day period should be changed to 10 days.

Proposed new subdivision (e) was disapproved as unnecessary.

In original subdivision (e), which was restored, the 20 day period should be changed to 35 days.

These changes were made to provide for a pretrial exchange a short time before trial--10 days--so that the parties will not have to prepare their cases a long time before trial. However, the Judicial Council is granted authority to adopt rules governing the exchange of the data referred to in the proposed legislation at such times as those rules provide, subject to the limitation that the trial must be held within 35 days after the exchange. The 35-day period was provided because the Commission concluded that it would be difficult, if not impossible, to provide a rule that would provide for holding the trial within 20 days after the exchange.

Section 1272.02

In subdivision (c), "damage and benefit" was substituted for "damage or benefit."

Subdivision (c)(4) was revised to read:

(4) The cost of reproduction or replacement of the existing improvements on the property less whatever depreciation or obsolescence the improvements have suffered and the method of calculation used to determine depreciation.

Subdivision (c)(5) was revised to read:

(5) The gross income from the property, the deductions from gross income, the resulting net income, the reasonable net rental value attributable to the land and existing improvements thereon, the rate of capitalization used, and the value indicated by such capitalization.

The Commission considered a Los Angeles pretrial order and rejected adding "and a concise statement of the factual matter upon which such opinion is based" to subdivision (c)(2) relating to an opinion concerning a probable change of zoning.

The Commission also considered and rejected adding to subdivision (d) a new subdivision providing "the person with whom such sale was verified."

The Commission concluded that the latter two matters should be left to cross-examination. The material required to be included in the statement is sufficient to put the adverse party upon notice of the contentions of the other party and he can check such contentions by his own investigation prior to trial.

Sections 1272.03 and 1272.04

These sections were approved as drafted.

Section. 1272.05

Subdivision (c) was deleted and subdivision (b) was revised to read:

(b) In making a determination under this section, the court shall take into account the fact that the opposing party may have relied upon the statement of valuation data and will be prejudiced if the witness is called or the evidence introduced.

Section 1272.06

This section was revised to read:

1272.06. The procedure provided in this chapter does not prevent the use of other discovery proceedings or limit the matters that are otherwise discoverable in eminent domain proceedings.

Section 1272.07

This section was revised to read:

1272.07. Nothing in this chapter makes admissible any evidence that is not otherwise admissible nor permits a witness to base an opinion on any matter that is not proper basis for an opinion.

Approval for printing

The proposed legislation as revised and the preliminary portion of the recommendation after it has been revised to conform to the proposed legislation were approved for printing as an appendix to the Annual Report.

STUDY 50 - ABANDONMENT OR TERMINATION OF A LEASE

The Commission considered material handed out at the meeting which contained revisions of the previously approved recommendation.

The following actions were taken:

Section 1954.5

This section was approved as set out below.

SEC. 7. Section 1954.5 is added to the Civil Code,
to read:

1954.5. (a) Except as provided in subdivision (b), the legal consequences of the actions of the parties to a lease of real property as provided in Sections 1951, 1951.5, and 1952, and the legal remedies available upon breach of a lease of real property as provided in Sections 1953 and 1954, are not subject to modification by the prior agreement of the parties.

(b) The parties to a lease of real property may, by contract made at any time, waive any right of either or both parties to specific enforcement of the lease.

(c) This section does not affect any agreement for the arbitration of any dispute that has arisen or may arise under a lease of real property.

(d) This section applies only to leases that were executed or renewed on or after the effective date of this section.

Comment. Sections 1951, 1951.5, 1952, 1953, and 1954 are designed to make the ordinary rules of contract law applicable to leases of real property and thus relieve both lessors and lessees of the forfeitures to which they had been subjected by the application of feudal property concepts. Subdivision (a) of Section 1954.5 will secure to the parties the benefits of the preceding sections by prohibiting the restoration of the previous system of lease law by standard provisions in leases.

Subdivision (b) permits a waiver of the right to specific performance because such a waiver does not result in a forfeiture or an uncompensated loss. A lease containing such a waiver provides in substance for an alternative performance--actual performance or payment of damages in lieu thereof.

Subdivision (c) makes it clear that this section is not intended to limit the arbitrability of disputes arising under leases of real property, nor is it intended to limit the powers that may be exercised by the arbitrators of such disputes.

Under subdivision (d), a provision in a lease that specifies remedies at variance with those specified in Sections 1951-1954 may be enforced only if the lease containing the provision antedates the effective date of this section. Sections 1951-1954 prescribe the remedies that may be used to enforce a lease that does not contain any provisions governing the available remedies.

Section 1954.7

This section was approved as set out below.

§ 1954.7. Agreements for exploration for or removal of natural resources

SEC. 8. Section 1954.7 is added to the Civil Code, to read:

1954.7. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of this chapter.

Comment. An agreement for the exploration for or the removal of natural resources, such as the so-called oil and gas lease, has been characterized by the California Supreme Court as a profit a prendre in gross. See Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d.962(1935). These agreements are distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while a natural resources agreement contemplates the destruction of the valuable resources of the property with compensation for such destruction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

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The sections in this chapter dealing with leases of real property are intended to deal with the ordinary lease of real property, not with agreements for the exploration for or the removal of natural resources. Accordingly, Section 1954.7 limits these sections to their intended purpose. Of course, some of the principles expressed in this chapter may be applicable to natural resources agreements. Section 1954.7 does not prohibit application to such agreements of any of the principles expressed in this chapter, it merely provides that the statutes found here do not require such application.

Section 3324

This section was approved as set out below.

§ 3324. Attorney's fees

3324. (a) In addition to any other relief to which a lessor or lessee is entitled in enforcing or defending his rights under a lease of real property, he may recover reasonable attorney's fees incurred in obtaining such relief if the lease provides for the recovery of such fees.

(b) If a lease of real property provides that one party to the lease may recover attorney's fees incurred in obtaining relief for the breach of the lease, then the other party to the lease may also recover reasonable attorney's fees incurred in obtaining relief for the breach of the lease should he prevail. If a lease of real property provides that one party to the lease may recover attorney's fees incurred in successfully defending his rights under the lease, then the other party to the lease may also recover reasonable attorney's fees incurred in successfully defending his rights under the lease. The right to recover attorney's fees under this subdivision may not be waived prior to the accrual of such right.

Comment. Leases, like other contracts, sometimes provide that a party is entitled to recover a reasonable attorney's fee incurred in successfully enforcing or defending his rights in litigation arising out of the lease. Section 3324 makes it clear that the remaining sections in the article do not impair a party's rights under such a provision.

Subdivision (b) is included in the section to equalize the operation of leases that provide for the recovery of an attorney's fees. Most leases are drawn by one party to the transaction (usually the lessor), and the other seldom has sufficient bargaining power to require the inclusion of a provision

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for attorney's fees that works in his favor. Under Section 3324, if either party is entitled by a provision in the lease to recover attorney's fees, the other may recover such fees under similar circumstances. To prevent the provisions of subdivision (b) from being nullified by standard waiver provisions in leases, the second sentence of subdivision (b) prohibits the waiver of a party's right to recover attorney's fees under the subdivision until the right actually accrues.

Section 3327

This section was approved as set out below.

§ 3327. Agreements for exploration for or removal of natural resources

3327. An agreement for the exploration for or the removal of natural resources is not a lease of real property within the meaning of this chapter.

Comment. An agreement for the exploration for or the removal of natural resources, such as the so-called oil and gas lease, has been characterized by the California Supreme Court as a profit a prendre in gross. See Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962 (1935). These agreements are distinguishable from leases generally. The ordinary lease contemplates the use and preservation of the property with compensation for such use, while a natural resources agreement contemplates the destruction of the valuable resources of the property with compensation for such destruction. See 3 LINDLEY, MINES § 861 (3d ed. 1914).

The previous sections in this chapter are intended to deal with the ordinary lease of real property, not with agreements for the exploration for or the removal of natural resources. Accordingly, Section 3327 limits these sections to their intended purpose. Of course, some of the principles expressed in this chapter may be applicable to natural resources agreements. Section 3327 does not prohibit application to such agreements of any of the principles expressed in this chapter, it merely provides that the statutes found here do not require such application.