

Revised May 7, 1968

Time

May 17 - 9:30 a.m. - 5:00 p.m.
May 18 - 9:00 a.m. - 4:00 p.m.

Place

State Bar Building
1230 West Third Street
Los Angeles

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

May 17 and 18, 1968

May 17

1. Approval of Minutes of April 7-9 Meeting (sent 5/2/68)

2. Administrative Matters

Future Meetings

June 21, 22 San Francisco

July 18 (evening), 19, 20 Los Angeles

August No meeting

September 19, 20, 21 (three full days) San Francisco

1968 Legislative Program

Oral Report at meeting

Future Activities of Law Revision Commission

Memorandum 68-47 (enclosed)

3. Study 65 - Inverse Condemnation

Denial Destruction

Memorandum 68-52 (enclosed)
Tentative Recommendation (attached to
Memorandum)

Special Order

of

Business

4. Study 36 - Condemnation

Entry for Survey or Examination

Memorandum 68-53 (enclosed)
Tentative Recommendation (attached to
Memorandum)

10:30 a.m.

May 17

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5. Study 52 - Sovereign Immunity
Prisoners and Mental Patients
Memorandum 68-51 (enclosed)
Tentative Recommendation (attached to
Memorandum)
6. Study 63 - Evidence
Evidence Code Section 1224
Memorandum 68-29 (sent 3/5/68)
Law Review article and other background
materials (attached to Memorandum)
Psychotherapist-Patient Privilege
Memorandum 68-44 (sent 4/1/68)
Comment on Exercise of Privilege Against
Self-Incrimination
Memorandum 68-39 (sent 4/1/68)
7. Study 50 - Abandonment or Termination of a
Lease
Memorandum 68-48 (sent 5/2/68)
8. Study 69 - Powers of Appointment
Memorandum 68-49 (sent 5/2/68)
Tentative Recommendation (attached to
Memorandum)
- May 18
- Special Order
of
Business
10:30 a.m.
May 17
- Special Order of
Business 1:30 p.m.
May 17
- Special Order of
Business 9:00 a.m.
May 18

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MAY 17 AND 18, 1968

Los Angeles

A meeting of the California Law Revision Commission was held at Los Angeles on May 17 and 18, 1968.

Present: Sho Sato, Chairman
F. James Bear, Member of the Assembly (May 17)
Roger Arnebergh
Thomas E. Stanton, Jr.
Lewis K. Uhler
Richard H. Wolford
William A. Yale

Absent: Joseph A. Ball, Vice Chairman
Alfred H. Song, Member of the Senate
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Executive Secretary, Clarence B. Taylor, Assistant Executive Secretary, and Gordon E. McClintock, Jr. Counsel of the Commission's staff also were present.

Professor Richard Powell, the Commission's consultant on Powers of Appointment, was present on May 18.

Also present were the following observers:

Robert F. Carlson, State Dept. of Public Works	(May 17)
Donald L. Clark, San Diego County Counsel's Office	(May 17)
Ronald P. Denitz, Ass't General Counsel, Tishman Realty & Construction Co., Inc.	(May 17)
Eugene Golden, Attorney, Buckeye Realty & Management Corporation	(May 17)
James F. Markle, Dept. of Water Resources	(May 17)
John M. Morrison, Attorney General's Office	(May 17)
Edward B. Smith III, Attorney at Law	(May 17)
Terry C. Smith, Los Angeles County Counsel's Office	(May 17)
Charles Spencer, State Dept. of Public Works	(May 17)

ADMINISTRATIVE MATTERS

Minutes of April Meeting. The Minutes of the meeting held on April 7-9, 1968, were approved as presented.

1968 Legislative Program. The Executive Secretary reported on the status of the 1968 legislative program.

Future Activities of the Commission. The Commission considered Memorandum 68-47 relating to future activities of the Law Revision Commission.

The Commission considered the priorities suggested by the staff to be given to various topics on the Commission's agenda. The Commission was in general agreement with the priorities as outlined in Memorandum 68-47.

The Chairman suggested that a status report as to condemnation and other studies be published in the State Bar Journal. The report should show what has been accomplished on the major studies and what is now in progress.

It was suggested that the topics under study by law revision commissions in other states be noted when the Commission next considers the topics it will request authority to study.

The Commission requested that letters suggesting topics be reproduced and distributed to each Commissioner if the topic is one that the staff concludes does not merit study by the Commission. Letters that suggest topics that appear to merit study by the Commission should be presented to the Commission with sufficient additional background information so that the Commission can make an informed determination as to whether the Legislature should be requested to authorize the Commission to study the topic.

STUDY 50 - ABANDONMENT OR TERMINATION OF A LEASE

The Commission considered Memorandum 68-48 and the attached staff recommended draft statute relating to leases. The following revisions were suggested in the draft statute.

New Section

The following new section was added to the statute:

As used in Sections 1951 to 1953.2, "rent" includes charges equivalent to rent.

Section 1951

This section was revised to read in substance:

1951. Except as otherwise provided in Sections 1951.2 to 1951.6, inclusive, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the amount that the lessor may recover from the lessee is limited to:

(a) The amount of the rent which had been earned but had not been paid at the time of the breach and abandonment or the termination of the lessee's right to possession, whichever is the earlier time;

(b) The amount by which the present worth of the rent, which had not been earned at the time of the breach and abandonment or the termination of the lessee's right to possession, whichever is the earlier time, exceeds the portion of such amount that the lessee proves could have been or could be reasonably avoided; and

(c) Any other damages necessary to compensate the lessor for all the detriment proximately caused by the lessee's breach or which in the ordinary course of things would be likely to result therefrom.

Subdivision (c), as revised, uses the language used in Civil Code Section 3300 which applies to contracts generally.

The section should indicate when the lease terminates. It might be provided that the lease terminates except as provided in Section 1952.4.

The Comment to subdivision (b) should indicate that rent that would have become payable prior to trial would draw interest to the time of trial in determining the present worth of such rent and rent that would have become payable after trial would be discounted to reflect its present worth at the time of trial.

In the Comment to Section 1951, the portion of the Comment beginning with "The obligation . . ." in the sixth line from the bottom of page 3 and ending on the 12th line of page 4 was deleted.

The portion of the case read at the meet defining the scope of the duty to mitigate damages should be considered for inclusion in an appropriate place in the Comments to the statute.

Section 1951.2.

This section was revised to read in substance:

1951.2. (a) Unless the lessor has retaken possession of the premises, the lessor of real property may elect to continue the lease in effect and recover from the lessee the rent as it becomes due under the lease if the lease so provides and:

(1) The lease permits the lessee to sublet the property, or assign his interest in the lease, to any person reasonably acceptable as a tenant to the lessor and does not set any unreasonable standards for the determination of whether a person is reasonably acceptable as a tenant or for such subletting or assignment; or

(2) The lease, if it requires consent of the lessor to a subletting or assignment, provides that such consent shall not be unreasonably withheld.

(b) For the purposes of this section, efforts by the lessor to maintain and preserve the property after vacation of the property by the lessee do not constitute a retaking of possession by the lessor.

Section 1951.4

This section is to be revised so that any amount paid to the lessor as a deposit or advance payment is to be considered as a security deposit

to be applied to the actual damages recoverable under Section 1951 or 1951.2. A possible wording for the section might be:

Any rent which has been prepaid, and any deposits which may have been made by the lessee, may be retained by the lessor and applied towards any damages which may be recovered by the lessor. If such prepaid rentals and deposits exceed the amount of such damages, the excess may be recovered by the lessee. "Prepaid rentals and deposits" includes (1) advance payment of rent; (2) bonus or consideration for the execution of the lease; (3) liquidated damages, and (4) deposits to secure faithful performance of the terms of the lease.

Care should be taken to avoid adverse income tax consequences.

Section 1951.5

This section, which provided for liquidated damages, was deleted. The deleted provision was based upon subdivision (1) of Section 2718 of the California Commercial Code.

The effect of deleting this provision is to leave liquidated damages in the case of leases under the general contract law (Civil Code Sections 1670 and 1671). A statement should be added to the Comment to Section 1951 to read in substance as follows: "Because a cause of action accrues immediately upon the breach and abandonment or termination of the lessee's right to possession, the cases which formerly held that liquidated damages provisions in leases were void may no longer be authoritative."

Section 1951.6

This section is to be amended so that, if the lease provides for attorney's fees for either party, the prevailing party is entitled to attorney's fees.

Sections 1951.8 and 1952

These sections should be deleted and a provision inserted in the

statute to provide that efforts of the lessor to mitigate the damages do not result in a waiver of the lessor's right to damages under Section 1951 and, in addition, the provision should include the substance of the last sentence of former Section 1952.

Termination of Lease

The statute must clearly indicate when a lease is terminated. A provision in Section 1951 or in another appropriate portion of the statute to so indicate is essential.

Section 1951.2

The phrase "and abandoned the property before the end of the term or after the lessee's right to possession has been terminated by the lessor because of a breach of the lease" was deleted.

Section 1952.4

If necessary, this section should be amended to preserve any right of indemnification despite the termination of the lease.

STUDY 65 - INVERSE CONDEMNATION (ENTRY TO SURVEY,
EXPLORE, AND EXAMINE PROPERTY)

The Commission considered Memorandum 68-53 and the draft of a proposed tentative recommendation relating to the privilege to enter, survey, and examine property. The Commission generally approved the draft of a new Section 815.8 to be added to the Government Code (the Tort Claims Act) to state the liability of public entities in this connection in terms of "actual damage" to property and "substantial interference" with use and possession. In subdivision (a) of the proposed section, however, the words "owner's" and "employees of" are to be omitted. The proposed Comment to the section is to be rewritten:

(1) To make it clear that the word "superficial" in subdivision (b)(1) applies to "testing, measurement, or marking," as well as to "examination"; and

(2) To clarify the language that refers to the relationship of the proposed new section and existing Section 821.8 (which confers an immunity for any "injury arising out of . . . entry upon property").

The Commission also generally approved, as codifications of existing law, the proposed revisions of Sections 1242 and 1242.5 of the Code of Civil Procedure. (Minor editorial changes were made in the draft of Section 1242.)

Representatives of local governments, however, expressed the view that it would be worthwhile to broaden the deposit-and-court-order system now provided by Section 1242.5 to cover cases other than takings for "reservoir purposes." It was also pointed out that in certain cases, such as proposed construction of bridges and certain other public works,

the examination or testing of the property might be as intensive as in the case of takings for reservoir purposes. The staff was directed to prepare an alternative draft of Section 1242.5 to accommodate these views and to effectuate the suggestions of the consultant on this subject. Under this alternative, Section 1242 (the general authorization to enter and survey) is to be retained and the new Section 1242.5 is to apply only to cases involving the substantial possibility of compensable "actual damages" or "substantial interference."

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STUDY 65 - INVERSE CONDEMNATION (DENIAL DESTRUCTION)

The Commission considered Memorandum 68-52 and the attached tentative recommendation. The Commission took the following actions:

Subdivision (a). Subdivision (a) was revised to read:

(a) As used in this section, "denial destruction" means physical damage to or destruction of the property of one or more persons to protect the lives or property of others in an emergency. "Denial destruction" includes, but is not limited to, the destruction of a house to prevent the extension of a conflagration to the property of others or the release of impounded waters onto property to prevent or reduce damage to other property from a threatened flood.

The Comment to subdivision (a) should be revised to explain that the type of destruction covered is that which a public official is authorized to commit under the common law in an emergency situation.

The operation of the statute should be restricted to physical damage, thus excluding contract rights and other losses involving an expectancy.

Subdivision (b). The words "except as provided in subdivisions (c), (d), and (e)" and the the words "the damage caused by" in subdivision (b) were deleted.

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

(c) No recovery may be had under this section for any loss that would have been incurred as a result of the conditions creating the emergency had there been no denial destruction.

Subdivision (d). Subdivision (d) is to be redrafted to codify the Supreme Court decision in City of Salinas v. Souza & McCue Construction Co., 66 Cal.2d 217 (1967), which held that the "collateral source" rule cannot be invoked against a public entity. In other words, the staff is to draft a subdivision that will provide that a public entity has the

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right to set off proceeds received from a "collateral source" to compensate the injury.

Subdivision (e). Subdivision (e) is to be revised so that, if a building is actually on fire at the time of its denial destruction, there will be no recovery. The subdivision is to use the term "conflagration" rather than "fire."

STUDY 69 - POWERS OF APPOINTMENT

The Commission considered Memorandum 68-49 and the attached Tentative Recommendation. The Commission approved the Tentative Recommendation for distribution subject to the following actions.

Section 1380.1. Section 1380.1 was revised to read:

Except to the extent that the common law rules governing powers of appointment are modified by statute, the common law as to powers of appointment is the law of this state.

Section 1380.2. The exception concerning revocability was deleted.

Section 1381.1. Subdivision (d) was revised to read:

(d) "Permissible appointee" means a person in whose favor a power of appointment can be exercised.

Section 1381.2. The wording of the Comment to this section was revised and the last paragraph beginning on page 13 was deleted.

Section 1381.3. Subdivision (b) was revised, in substance, to read:

(b) A power of appointment is "presently exercisable" if it is not testamentary and it was exercisable from the time of its creation, or if it was postponed, the period of postponement has expired.

Section 1381.4. The words "rather than any takers in default" were deleted. The wording of the Comment was revised.

Section 1382.1. The words "having the capacity to transfer" were substituted for the words "capable of transferring."

Section 1382.2. The words "interest in" were substituted for the words "title to." The Comment is to be revised by the staff for clarity.

Section 1383.1. Section 1383.1 was approved without change.

Section 1384.1. The words "having the capacity to transfer" were substituted for the words "capable of transferring."

Section 1385.1. The words "interest in" were substituted for the words "title to" in subdivision (a).

Subdivision (b) was revised to read:

(b) A power stated to be exercisable by an inter vivos instrument is also exercisable by a written will, unless such exercise is expressly prohibited by the creating instrument.

Section 1385.2. Section 1385.2 was approved without change.

Section 1385.3. Subdivision (a) was broken into two sentences. Subdivision (c) was deleted and its content is to be placed in the Comment.

Section 1385.4. Section 1385.4 was broken into two sentences.

Section 1385.5. Section 1385.5 was approved without change.

Section 1386.1. The introductory language was revised to read:

The exercise of a power of appointment requires a manifestation of the donee's intent to exercise the power. Such a manifestation exists in the following situations, although not limited to them:

The language "when the instrument of appointment purports to transfer an interest in the appointive property which the donee would have no power to transfer except by virtue of the power." is to be included as a subdivision.

In subdivision (c), the words "the disposition" were substituted for "its making."

Section 1386.2. The introductory language was revised to read:

A general power of appointment exercisable at the death of the donee is exercised by a residuary clause or other general language in the donee's will purporting to dispose of all of the donee's property of the kind covered by the power if:

Subdivision (b) was deleted because it is now part of the introductory language.

The Comment is to reflect the limited circumstances in which Section 1386.2 will operate.

Section 1386.3. The staff is to make necessary revisions in Section 1386.3 after amending Probate Code Sections 125 and 126.

Section 1386.4. Section 1386.4 was approved without change.

Section 1387.1. The Comment to Section 1387.1 was revised.

Section 1387.2. The words "to the extent that" were substituted for the words "if all of." The Comment is to be revised to indicate that Section 1387.2 is not meant to cover the disposition of the property where a power has been exercised in favor of a person who is not a permissible donee.

Section 1387.3. Subdivision (b) was revised to read:

(b) If the donor specifies either a minimum or maximum share or amount to be appointed to one or more of the permissible appointees, the exercise of the power must conform to such specifications.

Section 1387.4. Section 1387.4 was removed from the Tentative Recommendation. A reference to the problem previously covered by this section is to be included in the Comment to Section 1387.2.

Section 1388.1. Subdivision (a) was revised to read:

(a) The donee of a power to appoint that is presently exercisable, whether general or special, can contract to make an appointment to the same extent that he could make an effective appointment.

Subdivision (b) was revised to read:

(b) The donee of a power of appointment cannot contract to make an appointment while the power of appointment is not presently exercisable. If a promise to make an appointment under such a power is not performed, the promisee cannot obtain either specific performance or damages but he is not prevented from obtaining restitution of the value given by him for the promise.

Section 1388.2. Subdivision (a) was revised to read:

(a) Unless the creating instrument otherwise provides, any discretionary general or special power of appointment, whether testamentary or otherwise, may be released, either with or without consideration, by written instrument signed by the donee and delivered as provided in subdivision (c).

Subdivision (b) was revised to read:

(b) Any releasable power may be released with respect to the whole or any part of the appointive property and may also be released in such manner as to reduce or limit the permissible appointees. No partial release of a power shall be deemed to make imperative the remaining power that was not imperative before such release unless the instrument of release expressly so provides. No release of a power is permissible when the result of the release is the present exercise of a power that is not presently exercisable.

Section 1389.1. Section 1389.1 was revised to read:

An exercise of a power of appointment is not void solely because it is more extensive than authorized by the power, but is valid to the extent that it is permissible under the terms of the power.

The Comment is to discuss the relationship between this section and a fraud on the power.

Section 1389.2. In subdivision (a), the commas after "selection" and "power" were deleted, and a comma was substituted for the semi-colon after "equally."

Section 1389.3. In subdivision (b), the word "contrary" was substituted for the word "inconsistent."

Section 1389.4. Section 1389.4 was approved without change.

Section 1390.1. Section 1390.1 was approved without change.

Section 1390.2. Section 1390.2 was approved without change.

Section 1390.3. The last sentence in Section 1390.3 was revised to read: "This section applies even though (a) the power originally was exercisable only by will, and (b) the power has not been exercised."

May 16, 1968

1968 LEGISLATIVE PROGRAM
CALIFORNIA LAW REVISION COMMISSION

Passed Legislature and Sent to Governor

- AB 39 (service on unincorporated associations)
- AB 40 (good faith improvers)
- AB 41 (costs on abandonment)
- AB 73 (statute of limitations in actions against public entities)

Resolution Adopted by Legislature

- SCR 3 (study of previously authorized topics)

Passed Senate; on Third Reading in Assembly

- SB 61 (escheat of decedent's estate)
- SCR 2 (study of arbitration)

Note: The Assembly is not passing Senate bills because of a dispute over the recess problem

Passed Senate; Set for Hearing in Assembly

- SB 63 (unclaimed property) - approved by Assembly Judiciary Committee, to be heard by Assembly Ways and Means Committee on May 22
- SB 19 and 71 (personal injury damages as community property) - to be heard by Assembly Judiciary Committee on May 20

Dead

- SB 62 (unclaimed property compact) - Commission withdrew its recommendation that this bill be enacted, and it was never heard by Committee