

January 7, 1975

Time

Place

January 16 - 7:00 p.m. - 10:00 p.m.
January 17 - 9:00 a.m. - 5:00 p.m.
January 18 - 9:00 a.m. - 1:00 p.m.

Lang Room
Stanford Law School
Stanford 94305

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Stanford

January 16-18, 1975

January 16

1. Minutes of November 14-15, 1974, Meeting (sent 12/4/74)

Correction of Minutes: The Minutes should be corrected on page 1 to indicate that Commissioner McLaurin was present on November 15.

Schedule for Future Meetings

February (previously scheduled)

February 6 - 7:00 p.m. - 10:00 p.m. Los Angeles
February 7 - 9:00 a.m. - 4:45 p.m.

March (previously scheduled)

March 13 - 7:00 p.m. - 10:00 p.m. San Francisco
March 14 - 9:00 a.m. - 5:00 p.m.
March 15 - 9:00 a.m. - 1:00 p.m.

April (suggested)

April 10 - 7:00 p.m. - 10:00 p.m. Los Angeles
April 11 - 9:00 a.m. - 4:45 p.m.

May (suggested)

May 8 - 7:00 p.m. - 10:00 p.m. San Francisco
May 9 - 9:00 a.m. - 4:45 p.m.

June (suggested)

June 12 - 7:00 p.m. - 10:00 p.m. Los Angeles
June 13 - 9:00 a.m. - 4:45 p.m.

July (suggested)

July 17 - 7:00 p.m. - 10:00 p.m. San Francisco
July 18 - 9:00 a.m. - 5:00 p.m.
July 19 - 9:00 a.m. - 1:00 p.m.

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August

No meeting

September (suggested)

September 11 - 7:00 p.m. - 10:00 p.m. Los Angeles
September 12 - 9:00 a.m. - 5:00 p.m.
September 13 - 9:00 a.m. - 4:45 p.m.

1975 Legislative Program

Oral Report by Executive Secretary

Research Contracts

Memorandum 75-1 (to be sent)
Memorandum 75-10 (sent 12/4/74)

2. Study 63.50 - Admissibility of Copies of Business Records

Memorandum 75-2 (enclosed)
Draft of Recommendation (attached to Memorandum)

3. Study 63 - Admissibility of "Duplicates" in Evidence

Memorandum 75-11 (sent 12/4/74)

4. Study 23 - Partition Procedure

Memorandum 75-8 (sent 1/3/75)
Draft of Recommendation (attached to Memorandum)

January 17-18

5. Study 72 - Liquidated Damages

Memorandum 75-4 (sent 12/10/74)
Draft of Recommendation (attached to Memorandum)
First Supplement to Memorandum 75-4 (sent 1/6/75)

6. Study 39.30 - Wage Garnishment

Special Order of Memorandum 75-6 (sent 12/18/74)
Business at 10:00 a.m. Draft of Statute (2 alternatives)(attached to Memorandum)
on January 17 First Supplement to Memorandum 75-6 (sent 1/6/75)

7. Study 39.70 - Prejudgment Attachment

Memorandum 75-5 (sent 12/18/74)
Draft of Recommendation (attached to Memorandum)
First Supplement to Memorandum 75-5 (sent 1/3/75)
Second Supplement to Memorandum 75-5 (sent 1/3/75)

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8. Study 39.120 - Enforcement of Judgments

Memorandum 75-7 (sent 1/3/75)
Draft of Statute (attached to Memorandum)

9. Study 36 - Condemnation

Memorandum 75-12 (sent 12/10/74)
Statement to be sent to Board of Governors of State Bar
(attached to Memorandum)

10. Discussion of Conflict of Interest Statute

(Item 10 will be discussed on January 16
if time permits.)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 16, 17, AND 18, 1975

Stanford

A meeting of the California Law Revision Commission was held at Stanford on January 16, 17, and 18, 1975.

Present: Marc Sandstrom, Chairman
John N. McLaurin, Vice Chairman
John J. Balluff, Thursday and Friday
John D. Miller
Thomas E. Stanton, Jr., Thursday and Saturday
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
Noble K. Gregory
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Nathaniel Sterling, Stan G. Ulrich, and Mrs. Jo Anne Friedenthal, members of the Commission's staff, also were present. Mr. Garrett H. Elmore, Commission consultant on partition procedure, was present on Thursday, January 16, and Friday, January 17. Professors Stefan A. Riesenfeld and William D. Warren, Commission consultants on creditors' remedies, were present on Friday, January 17, and Saturday, January 18. Mr. Thomas M. Dankert, Commission consultant on condemnation, was present on Friday, January 17.

The following persons were present as observers on days indicated:

Friday, January 17

Michael Atherton, Michael Atherton, Inc., Mt. View
James M. Berg, Fitzgerald, Johnston & Berg, San Francisco
John Bessey, Attorney, Calif. Ass'n of Collectors, Sacramento
Roy Chiesa, Municipal Court Clerks Ass'n, Contra Costa
Ronald P. Denitz, Tishman Realty & Construction Co. Inc., Los Angeles
James E. Gillespie, Los Angeles County Marshal, Los Angeles
Robert N. Hovard, Municipal Court Clerks Ass'n, Long Beach

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Charles Iversen, Marshals' Ass'n of California, Contra Costa
Martin H. LeFevre, Calif. State Sheriff's Ass'n, San Jose
John MacIntyre, Marshal's Ass'n of California, Ventura
Leland Mearse, Calif. Ass'n of Collectors, Sacramento
Carl Olsen, Calif. State Sheriff's Ass'n, San Francisco
Brian Paddock, Western Center on Law and Poverty, Sacramento
Alex Saldamando, Calif. Rural Legal Assistance, Sacramento
Terrence Terauchi, Western Center on Law and Poverty, Sacramento

Saturday, January 18

Brian Paddock, Western Center on Law and Poverty, Sacramento
Terrence Terauchi, Western Center on Law and Poverty, Sacramento

ADMINISTRATIVE MATTERS

Correction of Minutes of November 14-15, 1974, Meeting. The Minutes of the November 14-15, 1974, Meeting were corrected on page 1 to show that Commissioner McLaurin was present on November 15. As so corrected, the Minutes were approved.

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

February

February 6 - 7:00 p.m. - 10:00 p.m. Los Angeles
February 7 - 9:00 a.m. - 4:45 p.m.

March

March 13 - 7:00 p.m. - 10:00 p.m. San Francisco
March 14 - 9:00 a.m. - 5:00 p.m.
March 15 - 9:00 a.m. - 1:00 p.m.

April

April 10 - 7:00 p.m. - 10:00 p.m. Los Angeles
April 11 - 9:00 a.m. - 4:45 p.m.

May

May 8 - 7:00 p.m. - 10:00 p.m. San Francisco
May 9 - 9:00 a.m. - 4:45 p.m.

June

June 12 - 7:00 p.m. - 10:00 p.m. Los Angeles
June 13 - 9:00 a.m. - 4:45 p.m.

July

July 17 - 7:00 p.m. - 10:00 p.m. San Francisco
July 18 - 9:00 a.m. - 5:00 p.m.
July 19 - 9:00 a.m. - 1:00 p.m.

August

No meeting

September

September 11 - 7:00 p.m. - 10:00 p.m. Los Angeles
September 12 - 9:00 a.m. - 5:00 p.m.
September 13 - 9:00 a.m. - 4:45 p.m.

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1975 legislative program. The Executive Secretary made the following report on the 1975 legislative program:

Measures Passed by First House

AB 74 - Modification of Contracts--Commercial Code Revision

ACR 17 - Continues authority to study previously authorized topics and to study five new topics.

Measures Heard by Policy Committee First House but Still Under Committee Consideration

AB 73 - Good Cause Exception to Physician-Patient Privilege

Note. This bill is discussed infra in these Minutes.

Measures Yet to Be Heard by Policy Committee in First House

AB 11, 124-131, 266, 278 - Eminent Domain Bills

AB 90 - Wage Garnishment (discussed infra in these Minutes)

AB 192 - Escheat--Travelers Checks and Money Orders

Measures Not Yet Introduced

Payment of Judgments Against Local Public Entities

Out-of-Court Views by Judge or Jury

Measures That are Dead

AB 75 - Oral Modification of Contracts--General Provisions

Additional Bills for 1975-76 Session

Prejudgment Attachment (See infra these Minutes)

Admissibility of Copies of Business Records in Evidence (See infra these Minutes)

Partition of Real and Personal Property (See infra these Minutes)

Liquidated Damages (See infra these Minutes)

Wage Garnishment Procedure (See infra these Minutes)

Admissibility of Duplicates in Evidence (See infra these Minutes)

Inverse Condemnation--Claims Presentation Requirement

Garageman's Lien

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Contract with Professor Friedenthal. The Commission authorized and directed the Executive Secretary to execute on behalf of the Commission a contract with Professor Jack Friedenthal of Stanford Law School in the amount of \$2,000 (plus not to exceed \$300 for travel expenses) to prepare a written report indicating the significant differences between the Federal Rules of Evidence and the California Evidence Code and, in addition, indicating any revisions the contractor recommends in the California Evidence Code privileges provisions in light of the recommendations of the Advisory Committee on the Federal Rules of Evidence. The report shall indicate matters treated differently in the Federal Rules and the California Code and matters covered by the Federal Rules that are not covered by the California Code and shall indicate any needed revisions in the California Code. In addition, the report shall indicate any improvements in language of the California Code in light of the language used in comparable provisions of the Federal Rules. The contract shall follow the form used for other research contracts of the California Law Revision Commission.

Contract with Professor Warren. The Commission considered Memorandum 75-10, which noted that the Commission had not formally approved the new contract to cover Professor Warren's travel expenses since June 30, 1974.

The Commission approved a contract with Professor Warren to pay his travel expenses during the period beginning November 1, 1974, and ending June 30, 1977, at the rate allowed for members of boards and commissions appointed by the Governor. The contract should be in the same form as other contracts for travel expenses. In addition, Professor Warren should receive \$20 for each day he attends a meeting or legislative hearing. The total amount for travel expenses and compensation for attending meetings and hearings should be limited by the contract to \$500. The Executive Secretary was authorized and directed to execute the contract on behalf of the Commission.

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Salary level for position of Executive Secretary. The Chairman reported that he was not successful in obtaining a review and reclassification of the salary level for the position of Executive Secretary. During the closing days of the former administration, it was felt that to review the position of Executive Secretary would cause a wholesale effort on the part of other agencies to obtain review of their exempt positions.

By a unanimous vote, the Commission directed the Chairman to again request that the salary level for the position of Executive Secretary be reviewed with a view to restoring the salary level for the position to its former level as compared to comparable positions in the offices of the Attorney General and Legislative Counsel.

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STUDY 23 - PARTITION PROCEDURE

The Commission considered Memorandum 75-8 and the attached draft of the partition recommendation, along with a letter from Mr. Cooper and a draft amendment to cure his problem, distributed at the meeting. The Commission approved the recommendation for printing subject to editorial revisions contained in copies of the recommendation submitted by the Commissioners to the staff, with the following changes:

Preliminary Part of Recommendation

On page 2 of the preliminary part of the recommendation, subparagraph (1) of the last paragraph was revised to read: "(1) the character of the property and any changes in its character since creation of the successive interests; (2) the circumstances under which the successive interests were created, and any changes in the circumstances since their creation;".

On page 9 of the preliminary part of the recommendation, the last paragraph should make clear that liens for costs of partition are on a parity and have no priority among themselves.

§ 872.020. Scope of title

This section should be revised to revise the phrase "to the extent applicable" to read "except to the extent not applicable." The Comment should cite an instance where the provisions of the partition statute would not be applicable to personal property.

§ 872.130. Temporary restraining orders and injunctions

The Commission voted to delete the phrase "with or without bond," but on reconsideration determined to leave the section unchanged in the form in which it appears in the draft statute.

§ 872.230. Contents of complaint

The staff should check use of the phrase "interests of record" in subdivision (c) to determine whether it includes security interests in personalty under the Commercial Code and, if so, the Comment should so indicate.

Subdivision (e) should be revised to read:

Where the plaintiff seeks a sale of the property, an allegation of the facts justifying such relief in ordinary and concise language.

The Comment to subdivision (e) should make clear that the plaintiff may, after an initial failure to seek sale, subsequently amend the complaint to seek sale under the general rules governing amendments.

The Comment explaining subdivision (b) should be revised to make clear that a lien itself is not a sufficient interest to maintain a partition action but that, if a person having a sufficient interest also has a lien, he must indicate his lien interest.

§ 872.250. Lis pendens

The words "but directory only" were deleted from the Comment to this section.

§ 872.410. Contents of answer

Subdivision (c) was added to this section to read:

(c) Where the defendant seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language.

§ 872.420. Requirements where defendant is lienholder

The Comment to this section should indicate that there may be related costs other than the amount remaining due on the lien.

§ 873.090. Designation of public and private ways

Subdivision (c) of this section was deleted and subdivision (d) was revised to add the words "subject to any necessary action by the appropriate public entities."

§ 873.230. Division involving purported conveyance

The Comment should make clear that this section applies only to transfers made prior to commencement of the partition action.

§ 873.250. Ovelty

The Comment to this section should make clear that the bar on the requirement that a minor pay ovelty extends to imposition of a lien on the share of a minor to enforce such payment.

§ 874.010. Costs incurred in partition action

The Comment should mention that the expenses of the referee include expenses of hiring an attorney.

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J. D. COOPER
ATTORNEY AT LAW
842 BANK OF AMERICA BUILDING
1212 BROADWAY
OAKLAND, CALIFORNIA 94612
TELEPHONE 893-0050

January 9, 1974

California Law Revision Commission
School of Law
Stanford University
Stanford, California, 94305

Recommendations Re Partition.

Gentlemen:

I have just received and examined your Recommendation Relating to Partition of Real and Personal Property. I believe you have done an excellent job.

There does, however, appear to me to be a single objectionable provision which I think should be considered at your next meeting.

Section 873.090 (c) forbids the court to approve the referee's report concerning closing or opening of public streets "unless all necessary action has been taken by the appropriate public entities." This necessary action could involve the enactment of ordinances, holding public hearing, advertising, etc.

Suppose the report is not approved for other reasons. The public entity may have closed a public street to no avail. This could be very embarrassing.

Section 873.090 applies to "selling or dividing" the property. Section 873.280 applies to "dividing the property" but does not make it necessary that public entities take any prior actions to open or close public roads in conformance with the "recommendations" of the referee set forth in the report.

Until a report recommending the opening or closing of public streets is accepted by the court no public entity should be called upon to take any action in connection therewith.

I think that subdivision (c) should be eliminated from section 873.090. The referee's report could be approved by the court subject to subsequent necessary action to be taken by the public entity to open or close a street. The same suggestion is made in connection with section 873.280.

Sincerely,


J.D. Cooper

§ 873.090. Designation of public and private ways

873.090. (a) In selling or dividing the property, the referee may, if it will be for the advantage of those interested, designate a portion of the property as a public or private way, road, or street. In connection therewith, the referee may also recommend the closure of any or all other roads on the property and allocation of the portion of the property occupied by such roads to the parties.

(b) Upon making such a designation and recommendation that is adequate to accomodate public and private needs, the referee shall report that fact to the court.

~~(c) -- The court shall not confirm the referee's report for the opening or closing of a public way, road, or street unless all necessary action has been taken by the appropriate public entities.~~

(a) (c) Upon confirmation of the referee's report, subject to any necessary action by the appropriate public entities :

(1) The portion of the property designated as a public way, road, or street shall not be allocated to any of the parties or sold but shall be an open and public way, road, or street.

(2) The property designated as a private way, road, or street shall be a private way for the use of the parties interested.

(3) The roads recommended to be closed shall be deemed abandoned upon the terms stated in the order of confirmation.

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STUDY 36 - CONDEMNATION LAW AND PROCEDURE

The Commission considered Memorandum 75-12 and the attached draft of a letter to the Board of Governors of the State Bar concerning the objections of the Bar Committee on Condemnation to the Commission's proposed Eminent Domain Law. The Commission approved sending the letter to the Board of Governors, with editorial revisions contained in drafts submitted by the Commissioners to the staff, and with the following changes:

(1) The cover letter should contain some information concerning the development of the Commission's recommendation--the time, talent, and consideration that went into it. The cover letter should also indicate the Commission's hope that any objections of the State Bar to the legislation be phrased in the context of the overall approval of the Eminent Domain Law.

(2) In the discussion on page 5, the words "few if any meritorious claims" should be replaced with the words "few if any cases in which fraud or collusion were actually established."

The following paragraph illustrating the ways the Commission has dealt with right to take problems should be expanded.

Commissioner Miller reiterated his disagreement with the approach of the Commission on this matter.

(3) In paragraph (2) at the top of page 6, the infinitive should be unsplit.

At the bottom of page 6, the discussion of existing law should add the phrase "except where the delay is caused by the defendant."

(4) On page 7, paragraph (2) should be revised to read: "The Commission was not convinced that any further change in the existing law would be desirable."

(5) At the top of page 9, a sentence should be added to the effect that the proposed statute changes the existing rule which places the burden of

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proof of value on the owner, to provide that neither party has the burden of proof.

At the bottom of page 9, the word "negate" should be replaced by the words "seriously jeopardize."

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STUDY 39.30 - ASSEMBLY BILL 90 (WAGE GARNISHMENT EXEMPTIONS)

The Executive Secretary made an oral report on suggested amendments to the Recommendation Relating to Wage Garnishment Exemptions (AB 90). The Commission approved the proposal that subdivision (b) of Section 690.6 should read as follows:

(b) The portion of his earnings which the debtor proves is necessary for the support of the debtor or the debtor's family is exempt from execution unless the debt is incurred for personal services rendered by any employee for former employee of the debtor. Neither the debtor's accustomed standard of living nor a standard of living appropriate to his station in life is a criterion for measuring the debtor's claim for exemption under this subdivision.

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STUDY 39.30 - WAGE GARNISHMENT PROCEDURE

The Commission considered Memorandum 75-6, the First Supplement thereto, and the attached draft statute on green paper entitled Revision of AB 101 to Retain Levying Officer for Service and Collection of Wage Garnishment. Representatives from the Western Center on Law and Poverty, the Los Angeles County Marshal's Office, the Marshal's Association of California, the Municipal Court Clerks Association, and the California State Sheriff's Association, and the Commission's consultants, Professors Stefan A. Riesenfeld and William D. Warren, participated in the discussion. The Commission made the following decisions:

Wage assignments for support. The wage garnishment procedure recommendation should not attempt to integrate the procedure for wage assignments for support enacted by Cal. Stats. 1974, Ch. 514.

General approach. The Commission decided to recommend the revision of AB 101 which uses the levying officer to serve the earnings withholding order and collect the earnings withheld so long as the levying officer's fee is not excessive. The total fee for serving the earnings withholding order should be \$6.50.

Manner of service of earnings withholding order. The levying officer should have the option of serving the earnings withholding order by mail or by personal service; however, where the levying officer does not receive a return receipt after service by mail, he should be required to personally serve the order.

Relationship of earnings withholding order to writ of execution. The staff is to study the relationship between the earnings withholding order and the writ of execution. Particular attention should be paid to the time

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within which the earnings withholding order must be sought after a writ of execution is issued and to return procedures. It was suggested that the creditor desiring to execute on the debtor's wages should first obtain a writ of execution in the normal manner; the form for the earnings withholding order would be available from the levying officer; the creditor would fill out the earnings withholding order application form as a part of his levy instructions to the levying officer; the forms would contain the information required by the wage garnishment exemption recommendation and the provisions of the wage garnishment procedure recommendation.

Code of Civil Procedure § 690.50. Exemption procedure. Section 690.50 should provide that its procedure for claiming exemptions does not apply to claiming exemptions from an earnings withholding order under Chapter 2.5.

§ 723.022. Withholding period. The first sentence of subdivision (a) of Section 723.022 should provide that the withholding period begins on the tenth rather than the fifth day after service. Paragraph (4) of subdivision (a) should require the levying officer to send a notice of termination of the order to the employer when he receives an amount in excess of the amount of the order. The Comment should say that the excess received is refunded. The staff was directed to study the problem of where the earnings withholding order should be served (see subdivision (e)). Subdivision (f) should be deleted.

§ 723.027. Notification of satisfaction of judgment. Subdivision (b) of Section 723.027 should be changed to provide that, promptly upon satisfaction of judgment, the judgment creditor shall notify the levying officer to terminate the earnings withholding order.

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§§ 723.050-723.051. Restrictions on earnings withholding. These sections will be conformed to changes made in Sections 690.6 and 690.6a concerning wage garnishment exemptions.

§ 723.077. Priority of orders. In the last sentence of subdivision (a) of Section 723.077, the words "judgment creditor who obtained the prior order" should be replaced by "levying officer."

§ 723.104. Employer's return. The provision in subdivision (b) of Section 723.104 allowing the employer's return to be made within a specified period longer than 15 days should be deleted.

§ 723.105. Judgment debtor's claim of exemption. Subdivision (f) should require the levying officer to file the claim of exemption with the court clerk so that the court clerk may set the matter for hearing. In subdivision (g), the copy of the order modifying or terminating the earnings withholding order transmitted by the clerk to the levying officer should be required to be certified. Subdivision (g) should also require the levying officer to "promptly" send notice and a copy of the order to the employer. At the end of subdivision (i) it should be provided that, if the court determines that any amount withheld pursuant to the earnings withholding order be paid to the judgment debtor, the court may make an order directing the person who holds such amount to pay it to the judgment debtor.

§ 723.122. Notice of application. In subdivision (d) of Section 723.122, the words "clerk of court" should be changed to "levying officer."

Notice of opposition. A provision should be added to Article 6 (commencing with Section 723.120) requiring the Judicial Council to provide the form of the judgment creditor's notice of opposition to the judgment debtor's claim of exemption. The levying officer should make the forms available to the creditors.

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§ 723.155. Failure of employer to give notice to employee. Section 723.155 should provide that an employer who fails to give notice of the garnishment to his employee may be subject to contempt of court. The Commission's intent is to allow punishment of employers who fail to give notice out of malice or willful neglect but not employers who are merely negligent.

§ 723.156. Fees of clerk. Section 723.156 providing a \$2 filing fee should be deleted.

Government Code § 26750. Fee for serving earnings withholding order. Paragraph (2) of subdivision (a) of this section, which provides for a fee equal to one percent of the money collected pursuant to the earnings withholding order, should be deleted.

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STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission considered Memorandum 75-5, the First, Second, and Third Supplements thereto (the Third Supplement, distributed at the meeting, is attached) concerning questions about the Attachment Law, and the comments of the Commission's consultants, Professors Stefan A. Riesenfeld and William D. Warren. The Commission made the following decisions:

Code of Civil Procedure § 482.060. Court commissioners. Section 482.060 (as printed in the Commission's report), designating the judicial duties in the Attachment Law as subordinate judicial duties, should be proposed once again to the Legislature.

§ 482.080. Turnover order. The words "or arrest" should be deleted from Section 482.080 providing for enforcement of a turnover order by contempt.

§ 483.010. Actions in which attachment authorized. The Commission discussed at length the problem of providing precisely for the sort of cases in which attachment may be issued and the relationship between the "engaged in a trade, business, or profession" standard of subdivision (a) and the "used primarily for personal, family, or household purposes" standard of subdivision (c). The staff was directed to give further consideration to this problem and to provide the Commission with materials tracing the development of the standard provided in Section 483.010 as enacted. Particular attention should be focused on the meaning of "individual engaged in a trade or business" in Section 537.2 of existing law and "defendant engaged in a trade, business, or profession" in Section 483.010 as enacted. Various suggestions were made, including the following:

(1) An attachment could be issued where the claim arises out of the conduct by the defendant of a trade, business, or profession (as was provided in the Commission's printed recommendation).

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(2) An attachment could be issued against any corporation, any partnership, a defendant engaged in a trade, business, or profession, a guarantor on an obligation arising out of a trade, business, or profession, or any individual defendant on a claim arising out of a trade, business, or profession provided that, in the case of an individual defendant, the subject of the contract was not used primarily for personal, family, or household purposes.

(3) The statute could provide explicitly for attachment against corporate and partnership defendants.

(4) The "used primarily for personal, family, or household purposes" standard in subdivision (c) could be moved to subdivision (a).

(5) The time when the claim would have to arise in order for an attachment to issue on it could be specifically stated in the statute.

Some sentiment was expressed for making sure that attachment is available against guarantors on business debts and retired persons on business claims arising while they were still engaged in a trade, business, or profession.

§ 486.050. Temporary protective order effect on transfers. This section, providing for the effect of the temporary protective order on transfers in the ordinary course of business, should be reviewed. The Commission deferred decision on the suggestion that the section be amended to provide that the "temporary protective order may prohibit any transfer by the defendant of any of his property specified in the order in this state subject to the levy of a writ of attachment" until the staff provides background information on the sort of description of property that would be required by the word "specified" or by "identified" (such as is used in the Commercial Code). The staff should also consider the possibility of restricting the temporary protective order to property described in the application for the order and writ.

§ 486.060. Effect of temporary protective order on deposit accounts.

The first clause of Section 486.060 should be amended to read as follows:

Notwithstanding Section 486.050, ~~the temporary protective order issued under this chapter shall permit~~ the defendant ~~to~~ may issue any number of checks:

The form and content of the temporary protective order would be left to the Judicial Council.

§ 487.020. Property exempt from attachment. This section should be redrafted to avoid the use of the "notwithstanding" phrase which causes confusion when read with subdivision (d) providing that property not subject to attachment is exempt. Subdivision (b) should be reworded to be consistent with the hardship exemption provided in the wage garnishment exemption recommendation which reads "necessary for the support of the debtor or the debtor's family."

§ 488.010. Levy on real property. The staff was directed to do further research into the meaning of "standing upon the records of the county in the name of the defendant" in Section 542 (providing for manner of levy) to see whether these words mean anything other than recorded in the name of the defendant. Section 488.010 should be consistent with the meaning of existing law.

§ 488.080. Inventory. This section should be amended to make clear that the person who retains property in his possession is a person other than the defendant. The staff should review the Attachment Law to see whether the terms "third person" or "third party" should be replaced with more specific language or whether these terms should be defined.

§ 489.130. Insufficient undertaking not wrongful attachment. Section 489.130, providing that, where the amount of the undertaking is ordered to be increased, the plaintiff's failure to increase the undertaking is not a wrongful attachment within the meaning of Section 490.010, should be added to the Attachment Law.

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§ 489.310. Undertaking for release of attachment. Subdivision (a) of this section should be amended as suggested on the top of page 4a of the First Supplement to Memorandum 75-5, with additional language making clear that the court in the county where the action is pending may order the release of property attached throughout the state but that the court in some other county where a writ has been issued may order the release of property only in that county.

§ 490.010. Acts constituting wrongful attachment. The Commission decided not to change the basic principle of subdivision (d) of this section which holds the plaintiff liable for levy of attachment on property of a person other than the person against whom the writ was issued (with the exception stated in paragraphs (1)-(3)). Chairman Sandstrom requested that the Minutes record that he voted to eliminate liability for wrongful attachment for the plaintiff's good faith, nonnegligent levy on property of a third person. Subject to further research into the types of registration which might be "required by law," the Commission was in tentative agreement that the plaintiff should not be liable where he relies on registered ownership which is "required or permitted by law."

1/14/75

Third Supplement to Memorandum 75-5

Subject: Study 39.90 - Prejudgment Attachments

The attached letter from Mr. Hal Coskey raises three questions concerning wrongful attachment liability for attachment of property of third persons, provided by Section 490.010(d):

490.010

a wrongful attachment consists of any of the following:

* * * * *

(d) The levy of a writ of attachment on property of a person other than the person against whom the writ was issued except that it is not a wrongful attachment if all of the following exist:

- (1) The property levied on is required by law to be registered or recorded in the name of the owner.
- (2) It appeared that, at the time of the levy, the person against whom the writ was issued was such registered or record owner.
- (3) The plaintiff made the levy in good faith and in reliance on the registered or recorded ownership.

Mr. Coskey seems to suggest that, if the plaintiff relies on a registered ownership where that ownership is not required to be registered, the plaintiff should not be liable for wrongful attachment assuming he satisfies the other requirements of subdivision (d). The language of the exception is derived from Section 689 providing an exception to the liability of the plaintiff and his sureties to third persons on the undertaking to continue the attachment after a third-party claim has been filed. This language was added at the March 1973 meeting at the suggestion of the Ad Hoc Committee on Attachment of the State Bar. (Memorandum 73-5.) The limitation of this exception in Section 689 as well as Section 490.010 to cases where the ownership is required to be registered probably reflects the judgment that such registered ownership is presumed to be reliable whereas registered ownership which is not required is less likely to be current or reliable information. Allowing the plaintiff to rely on any registered or recorded ownership would expand this exception to an unknown degree--

the staff would hesitate to guess the sorts of registration or recording which would then satisfy the exception. Accordingly, the staff recommends no change.

Mr. Coskey states that fictitious third-party claims resulting from fictitious transfers by the defendant can be determined under present law in an orderly fashion but that, under the new Attachment Law, the plaintiff will be subject to substantial liability for wrongful attachment. The staff notes that the same procedure for determining third-party claims is applicable (so far) to both existing law and the Attachment Law; we do not anticipate any less orderly a procedure. (See Section 488.090.) The staff thinks that it is doubtful that liability would be substantial, especially where it is shown in the third-party claim hearing (if there is one) or on the third-party motion for wrongful attachment damages that the transfer was fictitious or fraudulent or that the transferee is in fact the agent or alter ego of the defendant. The staff does not believe that it is advisable to handle the problem of fictitious transfers and fictitious third-party claims by eliminating wrongful attachment liability for any good faith levy.

Finally, Mr. Coskey suggests that the plaintiff should not be liable for wrongful attachment where he levies in good faith on property which is in the hands of the defendant but which is not registered or required to be registered. Mr. Coskey states that, in over 75 percent of business levies with which he is acquainted, there is a typewriter, cash register, or some other piece of equipment which is the subject of an unrecorded lease, and that the Attachment Law would make almost every attaching creditor subject to an action for wrongful attachment. The staff is in disagreement on this problem. The minority view is in agreement with Mr. Coskey that plaintiffs levying in "good faith"

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should be protected from liability. The majority view is that the plaintiff and not the third person should bear the burden of any damages caused by the plaintiff's levy of attachment. The third party is not in a good position to protect himself from levy. The plaintiff is the one who initiates the process and is in the best position to make sure that the property is not owned by a third person. The plaintiff gives a bond to cover damages caused by levy of attachment, and damages for statutory wrongful attachment are limited by the bond. Where the plaintiff acts in complete good faith and has undertaken heroic efforts to determine the ownership of property he seeks to attach, there is still no affirmative reason to make an innocent third party absorb the damages. It may also be asked whether a plaintiff can in good faith levy on equipment which is of a type often the subject of an unrecorded lease unless he has made some effort to determine ownership.

It may be argued that under existing law the fact that the levy was in good faith does not save the creditor from liability for abuse of process. In McPheeters v. Bateman, 11 Cal. App.2d 106, 53 P.2d 195 (1936), the court stated that, in a case where the creditor has made a bona fide attempt to collect a just debt and levies on property ostensibly owned by the debtor but which in fact is owned by a third person, "the owner of the property is entitled to recover from those responsible for the levy such damages as he may have suffered by reason of the levy."

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

Third Supplement to
Memorandum 75-5

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EXHIBIT I

COSKEY, COSKEY & BOXER

ATTORNEYS AT LAW
1100 GLENDON AVENUE
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TOBIAS COSKEY (1898-1974)
HAL L. COSKEY
SANDOR T. BOXER

January 7, 1975

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Re: Attachment - AB 2948, signed September 27, 1974

Dear Mr. DeMouilly:

Section 490.010 "d" and the comments thereto contained in your memorandum 75-5 raise some very serious problems to the good faith creditor.

It appears from the statute and the comments that a good faith levy upon a place of business which is registered by the Board of Equalization in the name of the debtor which, in fact, has tenants on a concession basis or has merchandise on consignment could render the attaching creditor liable for wrongful attachment to the consignors or the concession tenants. In both of those cases, the requirements of sub-paragraph 1 of Section 490.010 "d" would not be present in that the property levied upon need not be registered anywhere.

In order to defeat a levy, debtors often will create fictitious transfers and cause fictitious third party claims to be filed. Under the present law, the validity of those claims can be determined in an orderly fashion. Under the new law, any attempt to determine the validity of the claims will subject the levying creditor to substantial liability for wrongful attachment.

STUDY 39.70 - EXHIBIT I

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Mr. John H. DeMouilly

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Subdivision "d" of 490.010 should be amended to provide that there is not a wrongful attachment provided any of the elements set forth in Sub-paragraphs 1, 2, and 3 are present, as opposed to all of the elements. There should further be provision to protect the good faith levy against property in which there is no registered or recorded ownership.

A further example of the problems raised by 490.010 is the widespread practice in commercial enterprises of leasing equipment. Unless the lease is a security device, there need be no filing or other registration disclosing the existence of the lease. It would be my estimate that in over 75% of the business levies, there is at least an IBM typewriter, an NCR cash register, or some other item of equipment which is the subject of an unrecorded lease. The new law will make almost every attaching creditor subject to an action for wrongful attachment.

I would be pleased to discuss this matter further with you.

Very truly yours,



HAL J. COSKEY
of COSKEY, COSKEY & BOXER

HLC/bh

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STUDY 63.30 - VIEW BY TRIER OF FACT IN CIVIL CASE

The Commission considered the comments and proposed amendments suggested by the Committee on Administration of Justice of the State Bar, a copy of which is attached hereto. The Commission made the following decisions:

Section 632. The Commission approved the change in Section 632 suggested by CAJ. The first sentence of the paragraph the Commission proposes to be added to Section 632 should read:

Where findings are required and a finding is supported primarily in whole or in part by evidence obtained at a view as provided in Section 651, the court shall so state in its findings and shall also state its observations at the view supporting such findings.

Consistent with this change, the first and last sentences of the Comment to Section 632 should be changed by substituting the words "in whole or in part" for the word "primarily."

Section 651. The Commission approved CAJ's suggestions that subdivision (b) of Section 651 should not require the judge and court personnel to travel to the view in a body and that the language concerning explanations of the view or other testimony of witnesses should be deleted. The Commission reaffirmed its decision to specifically provide by statute that the judge must always attend the view. However, the Commission decided that the manner of proceeding to the view in both jury and court trials should be left to the discretion of the judge. To implement these decisions, subdivision (b) of Section 651 should read as follows:

(b) On such occasion, the entire court, including the judge, jury, if any, court reporter, if any, and any necessary officers, shall proceed ~~in a body~~ to the place, property, object, demonstration, or experiment to be viewed. The court shall be in session throughout the view and ~~while going to and returning from the view~~. At the view, the court may permit ~~explanations of the view or other testimony of witnesses and may permit examination testimony~~ of the witnesses by counsel. The proceedings at the view shall be recorded to the same extent as the proceedings in the courtroom.

The Comment to Section 651 should state that it is anticipated that the jury will ordinarily go to and return from the view in a body under the charge of an officer but that in the court's discretion the jury may be permitted to assemble at the view and leave separately. The Comment should also make clear that the word "testimony" in the third sentence of subdivision (b) includes explanations of the view by witnesses in the manner of showers under former law and examination of witnesses by counsel, subject to the control of the judge.

The following is the text of the revised Comments:

Code of Civil Procedure § 632

Comment. Section 632 is amended to require the court to state in its announcement of intended decision or in its findings, if findings are requested, which findings are based in whole or in part on evidence obtained at a view pursuant to Section 651. In addition, the court must state its observations at the view which support the indicated findings. This provision changes the rule as stated in Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941), that an appellate court will assume that the evidence acquired at a view by the trial judge is sufficient to sustain the findings. See also South Santa Clara Valley Water Cons. Dist. v. Johnson, 231 Cal. App.2d 388, 41 Cal. Rptr. 846 (1964); Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App.2d 220, 272 P.2d 106 (1954); Orchard v. Cecil F. White Ranches, Inc., 97 Cal. App.2d 35, 217 P.2d 143 (1950); Estate of Sullivan, 86 Cal. App.2d 890, 195 P.2d 894 (1948); Chatterton v. Boone, 81 Cal. App.2d 943, 185 P.2d 610 (1947). If the court does not state that a finding is supported in whole or in part by evidence obtained at a view and also state the observations supporting the finding, the finding will not be sustained by the appellate court in the absence of substantial evidence in the record to support it.

Code of Civil Procedure § 651

Comment. Section 651 provides a procedure whereby the trier of fact--whether judge or jury--may leave the courtroom to receive evidence. Former Section 610 provided only for a view by a jury. Views by a judge were governed by case law. See, e.g., Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941); Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal. App.2d 153, 164 P.2d 257 (1945). Where a view is ordered, or is conducted, in violation of this section, the view is not independent evidence sufficient to support a finding.

Subdivision (a) provides the standard for determining whether the trier of fact should view evidence outside the courtroom. The court has discretion whether to order a view. In making the determination, the court should weigh the need for the view against such considerations as whether the view would necessitate undue consumption of time or create a danger of misleading the trier of fact because of changed conditions. The nature of evidence which may be viewed outside the courtroom has been expanded to include objects, demonstrations, and experiments. Former Section 610 provided only for a "view of the property which is the subject of litigation, or of the place in which any material fact occurred." The courts have held, however, that they have inherent authority to order a view of other forms of evidence. See, e.g., Newman v. Los Angeles Transit Lines, 120 Cal. App.2d 685, 262 P.2d 95 (1953) (operation of streetcar door).

Under former law, in a court-tried case, all the parties had to consent to a view by the judge in order for the information there obtained to be considered independent evidence. See Noble v. Kertz & Sons Feed & Fuel Co., *supra*. The requirement of consent by all the parties has not been continued. It should be noted, further, that the court is not required to follow the procedure of Section 651 where it is proper to take judicial notice of facts obtainable at a view. See Evid. Code §§ 450-460 (procedure where judicial notice is to be taken).

Subdivision (b) makes clear that the view by the trier of fact is a session of court, essentially the same as a session inside the courtroom. Hence, subdivision (b) requires the presence of the judge, jury (if any), and any necessary court officials, including the court reporter (if proceedings inside the courtroom are being recorded). It is anticipated that ordinarily the jury will go to and return from the view in a body under the charge of an officer. However, this is a matter left to the court's discretion, and the court may direct that the jury be permitted to assemble at the view and leave separately. The third sentence of subdivision (b) makes clear that the judge has discretion to permit the testimony of witnesses and examination of witnesses by counsel while the court is in session outside the courtroom. See also Evid. Code § 765 (court control over interrogation). Thus, where appropriate, the court should provide the parties with the opportunity to examine witnesses (direct and cross-examination) at the view and to note crucial aspects of the view for the record. Yet there may be occasions where it will be inconvenient or unnecessary to permit testimony outside the courtroom. Former Section 610 allowed only the person appointed by the court to speak to the jurors and made no provision for the presence of witnesses or counsel for the parties. The decisions concerning a view by the judge admonish, however, that counsel for the parties should be present. See Noble v. Kertz & Sons Feed & Fuel Co., *supra*. The power of the judge to control the proceedings remains intact while the court is in session outside the courtroom. See Code Civ. Proc. § 128 (general authority of court to control proceedings). Hence, for example, the court may appoint a person to show the premises to the trier of fact and may allow or refuse to allow the jurors to question witnesses at the view (see Evid. Code § 765). As to when in a court-tried case the observation of the judge at the view must be made a part of the record, see Section 632 of the Code of Civil Procedure.

CAJ's proposed changes in the Recommendation Relating to View by Trier of Fact in Civil Case.

AGENDA 29.9 - JURY VIEWS

(Gen. Mtg. 12/13-14/74)

ACTION TAKEN: Recommend approval of LRC proposal to repeal CCP 610, amend CCP 632 if the words "in whole or in part" are substituted for

1 "primarily" in the first line of the added paragraph. (1 dissent) and recommend approval of new CCP 651 if subdivision (b) thereof is

2 amended in the following respects: 1) the first sentence to read "On such occasion, the jury, if any, shall be conducted in a body, under the charge of an officer, to the place, property, object, demon-

3 stration or experiment to be viewed." (1 dissent) and 2) the third sentence to read "At the view, the court may permit examination of witnesses." It is also recommended that the Commission include in

4 its comment a statement to the effect that the language of the third sentence is not intended to prohibit attorneys from speaking. (One dissent)

DISCUSSION: As to the LRC proposed amendment to CCP 632, it was the general feeling that the first sentence of the added paragraph created ambiguity (see North Minutes 11/7/74). However, a motion was adopted approving the proposed amendment if the first sentence of the paragraph to be added is changed to read as set forth above. As to proposed new section 651, general approval was expressed. However, certain language of subdivision (b) of 651 is believed to be unnecessary or redundant. Specifically, as to the first sentence of subdivision (b), it was the consensus that in court trials there is no need for the judge and court personnel to travel in a body, but that in jury trials, jurors should be required to proceed together to the view under the supervision of a court officer. A motion then carried to recommend approval of LRC proposed new section 651 if the first sentence of subdivision (b) is amended as set forth above (1 dissent). The member in dissent believes that allowing jurors to proceed to the scene other than in a supervised body will create no more opportunity for undue influence or improper discussion of the case than already exists. With regard to the third sentence of subdivision (b) of 651, it was agreed that approval of the LRC proposal should also be conditioned on amendment of said sentence, as set forth above, since in large part it appears to be redundant or unnecessary, e.g., testimony would encompass "explanations of the view", and presumably counsel would examine the witnesses. While there was no dissent as to this change, there was some concern that the sentence might be read to prohibit counsel from speaking other than as witnesses, and it was agreed to recommend that the Commission state in its official explanatory comment that no restriction on the right of counsel to speak as they ordinarily would during trial is intended.

Bill portion of Recommendation Relating to View by Trier of Fact in Civil Case
(showing changes proposed by Committee on Administration of Justice)

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 632 of, to add Article 1.5 (commencing with Section 651) to Chapter 7 of Title 8 of Part 2 of, and to repeal Section 610 of, the Code of Civil Procedure, relating to views by triers of fact.

The people of the State of California do enact as follows:

Section 1. Section 610 of the Code of Civil Procedure is repealed.

610. When, in the opinion of the Court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the Court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

Comment. See the Comment to Section 651.

Sec. 2. Section 632 of the Code of Civil Procedure is amended to read:

632. 1. In superior courts and municipal courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required, except as herein provided.

In superior courts, upon such trial, the court shall announce its intended decision. Within the time after such announcement permitted by rules of the Judicial Council, any party appearing at the trial may request findings. Unless findings are requested, the court shall not be required to make written findings and conclusions.

In municipal courts, findings and conclusions shall be deemed waived unless expressly requested by one or more of the parties at the time of the trial; provided, that the court shall not be required to make any written findings and conclusions in any case in which the amount of the demand, exclusive of interest and costs, or the value of the property in controversy, does not exceed one thousand dollars (\$1,000).

In any such trial in the superior or municipal court, findings and conclusions may be waived by consent in writing filed with the clerk or judge, or by oral consent in open court, entered in the minutes, and shall be deemed waived by a party by failure to appear at the trial.

Where findings are required, they shall fairly disclose the court's determination of all issues of fact in the case.

Where findings are required and a finding is supported in whole or in part ~~primarily~~ by evidence obtained at a view as provided in Section 651, the court shall so state in its findings and shall also state its observations at the view supporting such findings. The statements required by this paragraph are not required to be stated in the findings where the court includes such statements in its announcement of intended decision.

CAJ
#1

The procedure for requesting, preparing, and filing written findings and conclusions and the written judgment of the court shall be in accordance with rules adopted by the Judicial Council. Judgment shall be entered as provided in Section 664.

2. In justice courts, upon trial by the court, no written findings of fact and conclusions shall be required in any case, and judgment shall be entered as provided in Section 664.

Comment. Section 632 is amended to require the court to state in its announcement of intended decision or in its findings, if any are requested, which findings are based primarily on evidence obtained at a view pursuant to Section 651. In addition, the court must state its observations at the view which support the indicated findings. This provision changes the rule as stated in Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941), that an appellate court must assume that the evidence acquired at a view by the trial judge is sufficient to sustain the findings. See also South Santa Clara Valley Water Cons. Dist. v. Johnson, 231 Cal. App. 388, 41 Cal. Rptr. 846 (1964); Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App.2d 220, 272 P.2d 106 (1954); Orchard v. Cecil F. White Ranches, Inc., 97 Cal. App.2d 35, 217 P.2d 143 (1950); Estate of Sullivan, 86 Cal. App.2d 890, 195 P.2d 894 (1948); Chatterton v. Boone, 81 Cal. App.2d 943, 185 P.2d 610 (1947). If the court does not state that a finding is ~~primarily~~ ^{in whole or in part} supported by evidence obtained at a view and also state the observations supporting the finding, such a finding will not be sustained by the appellate court in the absence of sufficient evidence in the record.

Sec. 3. Article 1.5 (commencing with Section 651) is added to Chapter 7 of Title 8 of Part 2 of the Code of Civil Procedure, to read:

Article 1.5. View by Trier of Fact

651. (a) On its own motion or on the motion of a party, where the court finds that such a view would be proper and would aid the trier of fact in its determination of the case, the court may order a view of any of the following:

(1) The property which is the subject of litigation.

(2) The place where any relevant event occurred.

(3) Any object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case and which cannot with reasonable convenience be viewed in the courtroom.

CAJ #2

(b) On such occasion, ~~the entire court, including~~ the ~~judge,~~ jury, if any, ~~court reporter, if any, and any necessary officers, shall proceed~~ shall be conducted under the charge of an officer ~~in a body~~ to the place, property, object, demonstration, or experiment to be viewed. The court shall be in session throughout the view and while going to and returning from the view. At the view, the court may permit ~~explanations of the view or other testimony of witnesses and may permit~~ examination of ~~the~~ witnesses ~~by counsel~~. The proceedings at the view shall be recorded to the same extent as the proceedings in the courtroom.

CAJ #3

Comment. Section 651 provides a procedure whereby the trier of fact--whether judge or jury--may leave the courtroom to receive evidence. Former Section 610 provided only for a view by a jury. Views by a judge were governed by case law. See, e.g., Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576 (1941); Noble v. Kertz & Sons Feed & Fuel Co.,

72 Cal. App.2d 153, 164 P.2d 257 (1945). Where a view is ordered or conducted in violation of this section, the view is not independent evidence sufficient to support a finding.

Subdivision (a) provides the standard for determining whether the trier of fact should view evidence outside the courtroom. The court has discretion whether to order a view. In making the determination, the court should weigh the need for the view against such considerations as whether the view would necessitate undue consumption of time or create a danger of misleading the trier of fact because of changed conditions. The nature of evidence which may be viewed outside the courtroom has been expanded to include objects, demonstrations, and experiments. Former Section 610 provided only for a "view of the property which is the subject of litigation, or of the place in which any material fact occurred." ~~the court's inherent authority to~~ ^{the courts have held, however, that they have} inherent authority to order a view of other forms of evidence. See, e.g., Newman v. Los Angeles Transit Lines, 120 Cal. App.2d 685, 262 P.2d 95 (1953) (operation of streetcar door).

Under former law, in a court-tried case, all the parties had to consent to a view by the judge in order for the information there obtained to be considered independent evidence. See Noble v. Kertz & Sons Feed & Fuel Co., supra. The requirement of consent by all the parties has not been continued. Of course, the judge is not required to follow the procedure of Section 651 where it is proper to take judicial notice of facts obtainable at a view. See Evid. Code §§ 450-460 (procedure where judicial notice is to be taken).

Subdivision (b) makes clear that the view by the trier of fact is a session of court, essentially the same as a session inside the courtroom. Hence, subdivision (b) requires the presence of the judge, jury (if any), and any necessary court officials, including the court reporter (if proceedings inside the courtroom are being recorded). The third sentence of subdivision (b) makes clear that the judge has discretion to limit the testimony of witnesses and examination by counsel while the court is in session outside the courtroom. See also Evid. Code § 765 (court control over interrogation). Thus, where appropriate, the court should provide the parties with the opportunity to ~~view~~ examine witnesses (direct and cross-examination) at the view and to note crucial

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aspects of the view for the record. Yet there may be occasions where it will be inconvenient or unnecessary to do so outside the courtroom. Former Section 610 allowed only the person appointed by the court to speak to the jurors and made no provision for the presence of witnesses or counsel for the parties. The decisions concerning a view by the judge admonish, however, that counsel for the parties should be present. See Noble v. Kertz & Sons Feed & Fuel Co., supra. The power of the judge to control the proceedings remains intact while the court is in session outside the courtroom. See Code Civ. Proc. § 128 (general authority of court to control proceedings). Hence, for example, the court may appoint a person to show the premises to the trier of fact and may allow or refuse to allow the jurors to question witnesses at the view (see Evid. Code § 765). As to when in a court-tried case the observation of the judge at the view must be made a part of the record, see Section 632 of the Code of Civil Procedure.

STUDY 63.40 - ASSEMBLY BILL 73 (GOOD CAUSE EXCEPTION
TO THE PHYSICIAN-PATIENT PRIVILEGE)

The Commission considered a report from the Executive Secretary concerning Assembly Bill 73 which was introduced to effectuate the Commission's recommendation relating to the good cause exception to the physician-patient privilege. The Executive Secretary reported that the State Bar supported the bill in substance but had suggested some language changes. He also reported that the Assembly Judiciary Committee had heard the bill and some members of the Committee had expressed the view that the bill created too broad an exception to the physician-patient privilege. The Committee has suggested to Assemblyman McAlister that he consider amendments to the bill to narrow the proposed exception.

After discussion, the Commission revised Section 999 of the Evidence Code to read as follows:

There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient which constitutes a crime if good cause for disclosure of the communication is shown .

Changes in existing Section 999 are shown by strikeout and underscore. The Commission adopted the substance of the following Comment to revised Section 999:

Comment. Section 999 is amended to provide an exception to the physician-patient privilege where good cause is shown for the disclosure of a relevant communication concerning the condition of a patient in a proceeding to recover damages on account of the conduct of the patient. Section 999 permits the disclosure of communications between patient and physician (see Section 992 broadly defining communication) where a need for such evidence is shown while at the same time protecting from disclosure the communications of persons whose conduct is not involved in the action for damages.

Section 999 permits disclosure not only in a case where the patient is a party to the action but also in a case where a party's liability is based on the conduct of the patient. An example of the latter situation is a personal injury action brought against an employer based on the negligent conduct of his employee who was killed in the accident. On the other hand, the section does not affect the privilege of nonparty patients in malpractice actions. See, e.g., Marcus v. Superior Court, 18 Cal. App.3d 22, 95 Cal.

Rptr. 545 (1971). However, even in such malpractice actions, it sometimes may be possible to provide the necessary information without violating the privilege. See Rudnick v. Superior Court, 11 Cal.3d 924, 933 n.13, 523 P.2d 643, 650-651 n.13, 114 Cal. Rptr. 603, 610-611 n.13 (1974).

The requirement that good cause be shown for the disclosure permits the court to protect the defendant against a "fishing expedition" into his medical records. Compare Evid. Code § 996 (patient-litigant exception). It should be noted that the exception provided by Section 999, like the other exceptions in this article, does not apply to the psychotherapist-patient privilege. That privilege is a separate and distinct privilege, and the exceptions to that privilege are much more narrowly drawn. See Evid. Code §§ 1010-1028.

Formerly, Section 999 provided an exception only in a proceeding to recover damages arising out of the criminal conduct of the patient. This "criminal conduct" exception has been eliminated as unnecessary in view of the "good cause" exception now provided by Section 999. Moreover, the "criminal conduct" exception was burdensome, difficult to administer, and ill designed to achieve the purpose of making needed evidence available. See Recommendation Relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege, 11 Cal. L. Revision Comm'n Reports 1147 (1973).

STUDY 63.50 - ADMISSIBILITY OF COPIES OF BUSINESS RECORDS

The Commission considered Memorandum 75-2, the attached tentative recommendation, the comments of the Committee on Administration of Justice of the State Bar (attached to these Minutes as Exhibit I), and a letter and memorandum from Michael E. Barber, Supervising Deputy District Attorney, County of Sacramento, California, distributed at the meeting (attached to these Minutes as Exhibit II). The following actions were taken:

(1) The staff was directed to draft proposed amendments to Penal Code Section. 270 et seq. (criminal liability for support) and Civil Code Section 241 et seq. (civil liability for support) which would allow admission into evidence of copies of business records with regard to earnings of a party upon the affidavit of the custodian of records. This would provide a special hearsay exception in support matters similar to the provision for waiver of the privilege against disclosure of communications between husband and wife (Penal Code § 270e and Civil Code § 250).

(2) Pursuant to the recommendation of the State Bar, the staff was directed to:

(a) Add the words "or other hearing" after the word "trial" in several places in the proposed statute.

(b) Provide for service of copies of the records of all parties rather than merely "adverse parties" and allow all parties the opportunity to file an affidavit requiring the testimony of the custodian to satisfy the requirements of Evidence Code Section 1271.

(3) The staff was directed to draft a provision which would permit the court on ex parte motion in a case in which there are numerous parties or voluminous records to authorize the deposit of records with the clerk for

examination by the parties rather than sending copies to all parties. The statute was to be amended to provide for notice of such court action in lieu of service of the copies of the records under Section 1562.5(c). The Comment is to be amended to state that deposit would be made with the clerk only upon special order and where sending copies would be burdensome because multiple parties or voluminous records are involved.

(4) The staff was directed to study the time requirements for sending copies of records and to determine whether the statute should provide for an ex parte order shortening time where good cause is shown.

(5) The Commission considered the question of whether the affidavit of the custodian of records should either be filed with the court or served on the offering party. Decision of the question of the affidavit was deferred pending decision of other revisions of the statute.

AGENDA 29.11 - ADMISSIBILITY OF BUSINESS RECORDS

(General Meeting 12/13-14/74)

ACTION TAKEN: Recommend approval of LRC proposal to amend Evid. C. 1561 and 1562 and add new Evid. C. 712 to exempt copies of business records from the hearsay rule if proposed Evid. C. 712 is amended as follows: 1) insert the words "or other hearing" after the word "trial" at the two places it appears in subd. (c); 2) strike the word "adverse" from the second line of subd. (c); 3) substitute the phrase "No party has etc." for the phrase "The adverse party has not etc." in the first line of subd. (d) of 712. (No dissent.)

DISCUSSION: This LRC proposal to provide a hearsay rule exemption for copies of business records which meet the requirements for exemption from the best evidence rule, on condition of prior notice and transmittal of copies to "each adverse party", arises out of the erroneous belief of some practitioners that compliance with the present requirements of the best evidence rule (especially Evid. C. 1561(a)(3)) also operates to satisfy the hearsay rule requirements under Evid. C. 1271. South on 11/4/74 recommended approval of the LRC proposal on condition proposed 712 be amended by inserting "or other hearing" after the word "trial" at the two places the latter appears in subd. (c) of 712. In discussion, it was agreed that the South amendments were appropriate and that the LRC proposal should be approved as so amended, if further amended as set forth above to eliminate problems of determining which parties are "adverse".



COUNTY OF SACRAMENTO

DISTRICT ATTORNEY

1901 - 19TH STREET
SACRAMENTO, CALIFORNIA 95814

JOHN M. PRICE
DISTRICT ATTORNEY
GEOFFREY BURROUGHS
CHIEF DEPUTY

January 15, 1975

John H. DeMouilly, Executive Secretary
California Law Revision Commission
Stanford School of Law
Stanford, California 94305

Re: Evidence Code Section 1560

Dear Mr. DeMouilly

I have carefully reviewed your letter of January 8, 1975, in reference to amending Section 1560 of the Evidence Code. Enclosed is a memorandum from a member of my staff on this subject.

As things now stand, it will be impossible for us to have a staff member at your hearing on the 16th. However, I think we can live with your proposal in re Section 1562.5 of the Evidence Code provided we are permitted to have a pre-trial hearing along the lines of 1538.5 PC. Ms. Raffeto develops that point in detail in her memorandum.

There are two problems with the proposal as it now stands. The first concerns the time limitations any pre-trial hearing must take into consideration in reference to the Penal Code requirement that felony cases must be brought to trial within sixty days after the filing of information and a misdemeanor within thirty days if in custody and 45 days if not. Ms. Raffeto develops this point in her memorandum. Secondly, we believe that the financial penalties may well be meaningless in terms of harassing demands for the production of out-of-state witnesses. This is because in criminal cases at least, travel will be quite often publicly subsidized and, therefore, will incur no personal loss should a financial penalty be existent at the time of trial.

In view of the fact that there is no pre-trial hearing, defense counsel may very well complete production of the witnesses in each case simply to protect himself from a latter charge of malpractice by his client. Because of this, a pre-trial hearing that will be binding on the trial court is the solution to this problem.

EXHIBIT II - STUDY 63.50

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I might add one other observation; it is still our position that 1560 Evidence Code, as written, does create an exception to the hearsay rule. The first paragraph of Section 3 of Ms. Raffeto's memorandum develops this point fully. The fact that at least one other state, Texas, has taken this position without any substantial appellate change tends to reinforce this opinion. We would prefer to continue to leave the burden of production of the keepers of the records with the defense without exception.

One final point; in criminal cases we have found that the courts have required us to produce a completely new set of documents under 1560 Evidence Code at the time of trial notwithstanding the fact that copies of these same documents have been previously admitted at the pre-trial hearing. Incorporation of a provision in Section 1560 Evidence Code et seq, will be most helpful.

Very truly yours

Michael E. Barber
Supervising Deputy District Attorney

MEB:sc

Enclosure

MEMORANDUMOFFICE OF DISTRICT ATTORNEY
SACRAMENTO COUNTYD. January 14, 1975

To : Michael E. Barber

From : Carol Raffetto

Subject: Proposed Revision of Business Records Statute

**1. POSSIBILITY OF A COMMON-LAW PRE-TRIAL MOTION AND ORDER ON
ADMISSIBILITY OF BUSINESS RECORDS ON AFFIDAVIT**

Pre-trial motions on the admissibility of evidence can be made in both criminal and civil actions. Saidi-Tabatabai vs Superior Court (1967) 233 C.A.2d 257; Witkin, California Procedure, 2nd Ed, pp 2695-96. The only statutory authority I have for the motion at this point is the Judge's general discretionary power to admit or exclude evidence under Evidence Code Section 352; the few criminal cases I read all dealt with the suppression rather than the admission of evidence. Ron Tochterman said he made a successful pre-trial motion on admission of evidence in an Aranda situation three of four years ago; the defendants were Roy Thornton and a Cardwell or Caldwell. I'll try to track down Ron's Points and Authorities if you think it is worthwhile - we could use such a motion, for example, until the present law is changed or clarified.

The big problem with such a pre-trial motion is that it is not binding on the trial court in either criminal or civil actions. Saidi, supra; People v. Beasley (1967) 250 C.A.2d 71, 77; Witkin, supra; CCP Section 128(8).

2. SECTION 1538.5 AS A MODEL

P.C. Section 1538.5(d) provides that once a 1538.5 motion is granted, the evidence involved is not admissible at trial or any other hearing unless the people take further action under P.C. Sections 1238, 1466, or the other Sections of 1538.5. Sections 1238 and 1466 deal with appeal from decisions of superior and inferior courts. Sections 1538.5(i), (j), and (o) deal with situations in which defendant or the people can obtain an additional hearing after the preliminary hearing or after a special 1538.5 hearing, and the procedure for appeal is petition for writ of mandate or prohibition. In almost all instances, the

question of admissibility is settled and binding by the time of trial. One exception is provided in Section 1538.5(j): if the motion is granted at a special hearing and the People subsequently come up with additional evidence on the motion, they have the right to try to show the trial court that there was good cause for the failure to present the new evidence at the hearing, and that the prior ruling thus should not be binding on the trial court.

Assuming that the Commission won't accept our first two alternatives, our interpretation of Sections 1560 et seq, or a law modeled on the Texas statute - we could propose a reworded version of the Commission's proposed Section 1562.5 with an added paragraph providing that after the adverse party files his written demand, the court rule on the admissibility of the records based on the affidavits filed by both parties and that the ruling be binding at trial. The problem I see here is one of time - if we filed our notice 20 days before trial, the adverse party could be required to file his notice within five days, and the judge to rule within five days after that, which would still give us ten days to get a witness subpoenaed if the judge ruled against us. However, we might well want to have time to respond to the defendant's affidavit if we contest his contentions; a hearing could be a possibility at this point, and time becomes a real problem. One possible solution is a different time schedule for civil and criminal cases, perhaps a 30-10-10 schedule with a provision for a hearing in civil cases and a more abbreviated 20-5-5 schedule with no hearing in criminal cases. I don't have time to work out all the ramifications now and suggest that we point the time problem out to the Commission at this time and tell them we're working on a proposal for a solution.

A possible redrafting of the proposed Section 1562.5 is attached.

3. DRAFT OF POINTS WE WANT TO MAKE TO THE COMMISSION

As we have said before, we disagree with your conclusion that the present Sections 1560 et seq do not create an exception to the hearsay rule. Our interpretation of Section 1560 is supported both by case law and by the development of and rationale behind the business records exception. See People v. Blagg, 267 C.A. 2d 598, and Witkin, California Evidence, Section 588. In addition, the procedure set out in Sections 1560 et seq becomes meaningless if it does not create a hearsay exception. It is unnecessary if both parties stipulate to the admission of the evidence, and worthless if they do not.

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If you still feel that Sections 1560et seq must be modified to create a valid hearsay exception, we would prefer to see a revision (similar to the Texas statute) which would make it the responsibility ~~of the adverse party to subpoena the custodian of the record if~~ he objected to the affidavit procedure. The moving party's burden should be met by his production of a sworn affidavit from the custodian stating that the requirements for the business records exception are satisfied. Requiring the adverse party to assume the burden at this point will, we feel, be the best way to eliminate frivolous objections by the adverse party and assure that he will object to the affidavit procedure only if he has some sound basis for questioning the accuracy or trustworthiness of the records.

If this idea is rejected, we would like to see a provision added to your proposed Section 1562.5 to provide that the court make a ruling on the admissibility of the records prior to trial which would be binding on the trial court. The ruling could be based on the affidavits filed by both sides, allowing time for the moving party to file a response to the adverse party's objection, or on a hearing held after the adverse party files his written notice of objection. The ruling will tell the parties exactly what the status of the records will be at trial, and can be timed to allow the moving party ample time to subpoena the custodian for trial if necessary. A proposed draft of Section 1562.5 as applied to civil cases is attached.

Along this line, we also would like to see included a provision that if business records are admitted into evidence at a preliminary hearing in a criminal action, they will also be admissible at trial unless

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the defendant files a motion objecting to their admission prior to trial.

In considering your proposed Section 1562.5, we foresee several problem areas. One which particularly concerns us is that while the procedure outlined is suitable for civil cases, it may be difficult to carry out within the time limits set for bringing criminal defendants to trial. Penal Code Section 1382 states that all defendants in felony cases must be brought to trial within sixty (60) days after the filing of the indictment or information. Misdemeanor defendants must be brought to trial within thirty (30) days of arraignment if they are in custody, and forty-five (45) days if they are not. The time limits on misdemeanors particularly concern us as most of our complaints for violation of Penal Code Section 270, failure to provide child support, are misdemeanors, and they require the production of the defendant's earnings or payroll records to establish his ability to pay support. Given our heavy volume of Section 270 cases and the amount of time required to investigate and prepare each case, we will not always be able to meet the time framework set out in the proposed Section 1562.5. We feel a separate time schedule and procedure will be necessary in criminal actions, and are now working on the details of a separate proposal for a procedure in criminal actions.

We are also concerned with the possibility of frivolous objections and the apparent ease with which the adverse party may be able to negate the proposed Section 1560 procedure by simply filing an objection and affidavit.

Particularly in criminal cases in which the Public Defender or appointed counsel represent the defendant, financial penalties will be meaningless as funds will simply be shifted from one county agency to another. Such penalties may also be meaningless in cases involving private counsel, as the imposing of sanctions is entirely discretionary with the judge, and he is given no criteria for determining what "substantial justification" for objection is. In addition, private counsel may be motivated to file objection in all cases to protect themselves from possible malpractice actions. As we mentioned above, we feel a better solution is to shift to the adverse party the burden of subpoenaing the custodian if he feels there is a basis for objecting to the admissibility of the records.

CR:ta

Attachments

PROPOSED SECTION 1562.5 FOR CIVIL CASES

- A. A copy of the business records subpoenaed pursuant to subdivision (b) of Section 1560, and Section 1561 and Section 1562, is not made inadmissible by the hearsay rule when offered to prove an act, condition, or event recorded if the following conditions are met:
1. The party offering the copy of the business records as evidence establishes both:
 - (a) the affidavit accompanying the copy of the records containing the statements required by subdivision (a) of Section 1561, and
 - (b) the subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy of records, the subpoena not containing the clause set forth in Section 1564, requiring personal attendance of the custodian or other qualified witness and the production of the original records, and serves on each adverse party, not less than thirty (30) days prior to the date of the trial a copy of the business records to be offered in evidence and a notice that such copy is a copy of business records that have been subpoenaed for trial in accordance with the procedure authorized pursuant to subdivision (b) of Section 1560, and Section 1561 and Section 1562 of the Evidence Code, and will be introduced into evidence pursuant to Section 1562.5 of the Evidence Code.
 2. The adverse party does not, within ten (10) days after being served with the notice referred to in subdivision (1), serve on the party seeking to introduce the record, both of the following:
 - (a) a written demand that the requirements of subdivision (c) and (d) of Section 1271 be satisfied before the record is

PROPOSED SECTION 1562.5 FOR CIVIL CASES

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admitted in evidence, and

- (b) an affidavit of the adverse party stating that he has good reason to believe that the business record served on him does not satisfy the requirement of subdivision (d) of Section 1271 and setting forth the precise facts upon which this belief is based.

If the adverse party files the written demand and affidavit referred to in subdivision (2) above, the party seeking the admission of the record in evidence shall, within ten (10) days of receipt of such demand, file with the adverse party and the trial court his response to adverse party's contentions. The court shall then rule on the admissibility of the records under the procedure set forth in Section 1562.5, and such ruling shall be binding on both parties at trial or any other hearing. Prior to his ruling, the court may in its discretion request additional affidavits or evidence, or may require a hearing on the admissibility of the records under Section 1562.5.

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STUDY 63.60 - ADMISSIBILITY OF "DUPLICATES" IN EVIDENCE

The Commission considered Memorandum 75-11 and the attached Exhibits. The Commission directed the staff to prepare a study and tentative recommendation for presentation at a future meeting on the question whether a rule similar to Rule 1003 of the Proposed Federal Rules of Evidence (providing for admission into evidence of duplicate originals) should be adopted in California.

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STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 75-4 and the attached revised draft of the Recommendation Relating to Liquidated Damages, the First Supplement to Memorandum 75-4, the written comments of Mr. Ronald Denitz (attached hereto), and oral comments of Mr. Denitz, Mr. Brian Paddock of the Western Center on Law and Proerty, and Professor William Warren. The Commission approved the draft recommendation for printing subject to the changes indicated below and suggested editorial revisions. Before the recommendation is sent to the printer, a copy should be sent to the Commissioners for approval. The Commission made the following decisions:

Introduction to recommendation. On page 2, the first paragraph should be revised to state that a party may desire to specify damages in the contract in order to avoid the uncertainty, cost, and time consumption involved in proving damages in a court action. The last two sentences of the paragraph should be deleted. Other changes will have to be made to conform the introduction to the changes in the statute.

Consumer contracts (Section 3319). The phrase, "the contract is for the retail purchase by him of consumer goods or consumer services," should be added before the phrase "primarily for his personal, family, or household purposes" in subdivision (b) of Section 3319 which shifts the burden to the person seeking to enforce the liquidated damages provision upon a proper showing. The original language was too broad since it would apparently encompass all contracts for the sale of real property. The Comment to this section should be revised to reflect this change.

Contracts for the sale of real property. A liquidated damages provision in a contract for the sale of a single family residential unit not exceeding

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the amount actually deposited by the buyer (in the form of cash or check, including a postdated check) should be valid unless the buyer establishes that it was unreasonable under the circumstances existing at the time the contract was made. The Commission considered and rejected the following proposals: provide that a liquidated damages provision is valid on contracts for the sale of residential housing of a value of less than \$40,000 or \$50,000 only where damages do not exceed 2 percent of the purchase price; provide a similar 2 percent limit on lower cost housing, but allow enforcement of liquidated damages provisions for amounts over 2 percent where the seller shows such amount to be reasonable in light of the circumstances existing at the time the contract was made; provide that liquidated damages provisions in contracts for the sale of residential housing in the amount of a deposit actually made are automatically valid. The Commission agreed that the buyer of residential housing will expect that he will lose the deposit actually made if he does not go through with the deal, but that the buyer should have the opportunity to show that the amount actually deposited is unreasonable in light of the circumstances existing at the time the contract was made.

APPROVED

Date

Chairman

Executive Secretary

Fishman Realty & Construction Co., Inc.

WEST COAST HEADQUARTERS

10960 WILSHIRE BOULEVARD, LOS ANGELES, CALIFORNIA 90024

B-1 CONTRACTOR'S LICENSE NO. 170730

January 9, 1975

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Commission Recommendation concerning Liquidated Damages

Dear John:

With regard to Memorandum 75-4 and First Supplement to Memorandum 75-4, I have carefully weighed the suggested revised Section 3319 and 3320 against the hinderances that might prevent liquidated damages from being readily used as a means of minimizing the burden on the courts.

Although I recognize the practical difficulties which might hinder passage of a liquidated damages provision in the Legislature, the placing of burden of proof on the seller in a consumer contract matter (including purchases of residential real property) would seem to deter rather than encourage the use of liquidated damages clauses in contracts.

We all wish to protect a consumer who is in a substantially inferior bargaining position, but it is often possible that the consumer is in an equal or greater bargaining position than the seller in a consumer contract situation. Then, too, a lessee of real property (even commercial) might sometimes argue that the lease was primarily for his "personal" purposes and thereby attempt to shift the burden of proof to the type of lessor whom the Commission might not wish to be burdened with task of proving the reasonableness of the liquidated damages clause.

Consequently, when I once again accept your hospitality at the January 17, 1975 meeting of the Commission, I will urge that the Commission shift the burden of proof only when the party seeking to invalidate the provision establishes that he was in

Tishman Realty & Construction Co., Inc.

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John H. DeMouilly, Esq.

January 9, 1975

a substantially inferior bargaining position at the time the contract was made. To aid the Commissioners, enclosed as Exhibit "A" hereto is a marked-up page 7 from Memorandum 75-4 showing the suggested modification.

If the Commission desires to retain the concept that the burden of proof should be upon the seller in contracts for the purchase of consumer goods or consumer services, then it would seem best to say so specifically rather than using the phrase "personal, family or household purposes" out of the definitive context of the Unruh Act.

Apart from the foregoing suggestion, I commend the Staff on the clarity of the proposed Sections as well as the brevity of draftsmanship.

With best personal regards, I am

Cordially,

TISHMAN REALTY & CONSTRUCTION CO..

By


RONALD F. DENITZ
Assistant General Counsel

RPD/svh
encl.

Civil Code § 3319 (added)

Sec. 4. Section 3319 is added to the Civil Code, to read:

3319. (a) Except as otherwise provided by statute, a provision in a contract liquidating the damages for breach of the contract is valid unless the party seeking to invalidate the provision establishes that it was unreasonable under the circumstances existing at the time the contract was made.

(b) Where the party seeking to invalidate the provision establishes that he was in a substantially inferior bargaining position at the time the contract was made ~~or that the contract is primarily for his personal, family, or household purposes~~, the provision is invalid unless the party seeking to enforce the provision establishes that it was reasonable under the circumstances existing at the time the contract was made.

Comment. Section 3319 provides that a liquidated damages provision in a contract is valid if it is reasonable and places the burden of proof generally on the person seeking to invalidate the provision. It thus reflects a policy that favors the use of liquidated damages provisions, reversing the restrictive policy of former Sections 1670 and 1671. However, ~~in consumer cases and~~ in cases where the parties are in unequal bargaining positions, Section 3319 shifts the burden of proof to the party seeking to enforce the liquidated damages provision.

Section 3319 limits the circumstances that may be taken into account in the determination of reasonableness to those in existence "at the time of the making of the contract." Accordingly, the amount of damages actually

Civil Code § 3319 (added)

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(b) Where the party seeking to invalidate the provision establishes for the that he was in a substantially inferior bargaining position at the time retail purchase by him of consumer goods or consumer services, or both, the contract was made or that the contract is primarily for his personal, family, or household purposes, the provision is invalid unless the party seeking to enforce the provision establishes that it was reasonable under the circumstances existing at the time the contract was made.

Comment. Section 3319 provides that a liquidated damages provision in a contract is valid if it is reasonable and places the burden of proof generally on the person seeking to invalidate the provision. It thus reflects a policy that favors the use of liquidated damages provisions, reversing the restrictive policy of former Sections 1670 and 1671. However, in consumer cases and in cases where the parties are in unequal bargaining positions, Section 3319 shifts the burden of proof to the party seeking to enforce the liquidated damages provision.

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