

11/25/69

Memorandum 69-130

Subject: New Topic--Use of Affidavits in Default Cases

Attached (pink) is a letter from Thomas L. Lord, Laguna Hills attorney, suggesting that a study be made of subdivision 4 of Section 585 of the Code of Civil Procedure to determine why this "most sensible procedure" is not generally used.

Subdivision 4 of Section 585 provides:

4. In the cases referred to in subdivisions 2 [personal service--default cases] and 3 [service by publication--default cases] of this section, excepting those cases which involve the dissolution or annulment of marriage or separate maintenance or the custody of children, or upon application to have an attorney's fee fixed by the court pursuant to subdivision 1 of this section [contract provides for recovery of reasonable attorney's fee], the court in its discretion may permit the use of affidavits, in lieu of personal testimony, as to all or any part of the evidence or proof required or permitted to be offered, received or heard in such cases. The facts stated in such affidavit or affidavits shall be within the personal knowledge of the affiant and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto.

Mr. Lord points out in his letter the problems he has had because the courts in his area have been unwilling to permit him to use affidavits in default cases. Jack Horton tells me that he was able to use the affidavit procedure in default cases when he was practicing law but only after he had spent some time in educating the judges as to the existence and purpose of subdivision 4 of Section 585 and to the efficiency and convenience of its use.

The staff believes that the topic is one that merits study. Consideration should be given to adding the topic to the resolution we introduce in the 1970 session to authorize study of additional topics. On the other hand, we believe that this is a topic that we could study under our limited new authorization to study practice and procedure if such authorization is given by the 1970 Legislature.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

MUDGE AND REILLY

ATTORNEYS AT LAW

RICHARD T. MUDGE
THOMAS A. REILLY
THOMAS L. LORD

23521 PASEO DE VALENCIA, SUITE 104
LAGUNA HILLS, CALIFORNIA 92653

(714) 837-8030

November 18, 1969

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

Gentlemen:

I am wondering why section CCP 585(4) exists.

As yet, no one seems to use it although it is a most sensible procedure for the court, attorneys and witnesses.

The several times I have tried to use it, I have been rebuffed. Nobody knew what I was talking about. Most recently I tried to use CCP 585(4) to prove up a default case in San Bernardino, and never even received the courtesy of a response from the judge regarding my request. Thus, I shall have to waste at least a half day of my time and that of my witnesses making a trip to San Bernardino.

In another matter, I had to have a very elderly woman appear in court regarding a promissory note. She didn't drive and she lived some twenty miles from the court. She thus had to find a driver to take her to the court, imposing on an elderly neighbor as all other persons who could drive her would have to take off from work to do so. The testimony could very adequately have been presented by affidavit and saved both of these persons, plus myself, from an asinine waste of time.

It seems to me that to make the code section work, judges must somehow be required to use it. Thus the section should be re-written to provide that it shall be used, and additional evidence, or the personal appearance of a witness, can be required by a judge in a particular case only if he deems the affidavits that were presented to be insufficient. The exception should be on a case to case basis only, and not by some

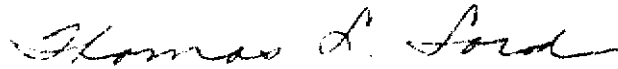
California Law Review Commission
November 18, 1969
Page two

broad rule that a local court might adopt.

I would expect that upon examination of my proposed rule, it would be found that certain type of cases should be excepted either entirely or partially from its operation, such as default divorce cases (which are presently excepted from the operation of CCP 585(4)).

Very truly yours,

MUDGE AND REILLY

A handwritten signature in cursive script, appearing to read "Thomas L. Lord".

Thomas L. Lord

TLL:sf