

October 30, 1974

Time

November 14 - 7:00 p.m. - 10:00 p.m.
November 15 - 9:00 a.m. - 5:00 p.m.

Place

International Hotel
Los Angeles Airport
6211 W. Century Blvd.
Los Angeles 90045

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

November 14-15, 1974

November 14

1. Minutes of October 10-11, 1974, Meeting (sent 10/29/74)
2. Administrative Matters

Future Meetings

Memorandum 74-69 (sent 10/29/74)

3. Study 39.30 - Wage Garnishment

Memorandum 74-61 (enclosed)
Draft of Recommendation (attached to Memorandum)
First Supplement to Memorandum 74-61 (enclosed)

4. Study 72 - Liquidated Damages

Memorandum 74-63 (enclosed)
Printed Recommendation (attached to Memorandum)
First Supplement to Memorandum 74-63 (enclosed)
Letter and attached material from Denitz (attached to Supplement)

5. Study 39.70 - Prejudgment Attachment

Memorandum 74-62 (sent 10/18/74)
AB 2948 (as enacted)(attached to Memorandum)

6. Study 39.90 - Claim and Delivery Statute

Memorandum 74-65 (sent 10/18/74)
Professor Warren's Report (attached to Memorandum)

7. Study 39 - Recent Developments in Creditors' Remedies Field

Memorandum 74-66 (enclosed)

October 30, 1974

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8. Study 36.90 - Eminent Domain (Discovery)

Memorandum 74-51 (sent 10/29/74)
Professor Van Alstyne's Memorandum (attached to
Memorandum 74-51)

Printed Tentative Recommendation: The Eminent Domain Law (you have this)

9. Study 63.50 - Admissibility of Copies of Business Records

Memorandum 74-64 (to be sent)
Tentative Recommendation (attached to Memorandum)

10. Study 26 - Unclaimed Property

Memorandum 74-68 (sent 10/29/74)
Draft of Recommendation (attached to Memorandum)

11. Approval of Annual Report for Printing

Memorandum 74-67 (to be sent)
Draft of Annual Report (attached to Memorandum)

12. Study 23 - Partition Procedure

Memorandum 74-60 (sent 10/18/74)
Draft Statute (attached to Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 14 AND 15, 1974

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on November 14 and 15, 1974.

Present: Marc Sandstrom, Chairman
John J. Balluff
John D. Miller
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: John N. McLaurin, Vice Chairman
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. Professor William D. Warren, Commission consultant on creditors' remedies, was present on Thursday, November 14. Mr. Garrett H. Elmore, Commission consultant on partition procedure, was present on Friday, November 15.

The following persons were present as observers on days indicated:

Thursday, November 14

G. G. Barhugh, California Association of Collectors, Los Angeles
D. H. Battin, Judicial Council Advisory Committee on Legal Forms, Los Angeles
L. H. Cassidy, California Association of Collectors, Sacramento
Gus R. Cohen, International Consumer Credit Association, Los Angeles
Robert Hovard, Association of Municipal Court Clerks, Los Angeles
J. D. Lindley, California Association of Collectors, Huntington Beach
Hugh A. Lipton, Attorney at Law, Los Angeles
Mitch Mardesich, South Bay Municipal Court, Los Angeles
Emil A. Markovitz, Creditors Service, Los Angeles
Ken Wolf, Van Nuys

Friday, November 15

Gavin P. Craig, Department of Water Resources, Sacramento
William C. George, County of San Diego, San Diego
Anthony J. Ruffolo, Department of Transportation, Los Angeles

ADMINISTRATIVE MATTERS

Minutes of October 10-11, 1974, Meeting

The Minutes of the October 10-11, 1974, Meeting, were approved as submitted.

Schedule for Future Meetings

The following schedule was adopted for future meetings.

December 1974

No meeting

January 1975

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

February 1975

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

March 1975

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.	

Conflict of Interest

Chairman Sandstrom reported that he had requested that Commissioner Gregory provide a draft to serve as a basis for a request for an Attorney General's opinion on the application of the Governmental Conflict of Interests Act (Govt. Code § 3600 et seq.) to Commissioner Gregory's situation. The Commission briefly discussed this matter and directed the staff to prepare a request for an opinion of the Attorney General and present it for further consideration at the next meeting. Before the next meeting, the Executive Secretary was directed to make preliminary inquiries to ascertain the Attorney General's views on this subject.

Annual Report

The Commission considered Memorandum 74-67 and the attached draft of the Annual Report for the year 1974. Subject to editorial changes and revisions necessary to reflect Commission decisions with respect to its legislative program for the 1975-76 session and the reports that will be published by the Commission, the draft was approved for printing with the following revisions:

- (1) The last line on page 508 of the draft was revised to read:

have occasion to use it after it is in effect. They are entitled to substantial weight in construing the statutory provisions.⁸ However, while the

8. E.g., Van Arsdale v. Hollinger, 68 Cal.2d 245, 249-250, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968). The Comments are published by both the Bancroft-Whitney Company and the West Publishing Company in their editions of the annotated codes.

(2) On page 510, the words "Mr." and "Mrs." were deleted. The staff is to be listed on page 510.

(3) The 1975 Legislative Program (page 512) is to be revised to reflect the program as determined by the Commission at the November 1974 meeting.

(4) On page 544, the title to item 79 should be revised to conform to the title of the recommendation to be submitted to the 1975-76 session or some other appropriate revision should be made.

STUDY 23 - PARTITION PROCEDURE

The Commission considered Memorandum 74-60 and the attached draft of the partition statute. The Commission continued its review of the statute, making the following determinations.

§ 872.140. Compensatory adjustment

The word "ordinary" was deleted from the phrase "ordinary principles of equity."

§ 872.240. Joinder of property

A reference in the Comment should be made to Code of Civil Procedure Section 1048 relating to severance of issues and causes.

§ 872.250. Lis Pendens

The Comment to this section should indicate that the lis pendens is not jurisdictional, but the Comment should also indicate the consequences of failure to record.

§ 872.310. Summons

The next to last sentence of the Comment was revised to read:

Subdivision (b) makes clear that, where unknown parties or heirs are involved, service on such parties must be by publication.

§ 872.420. Requirements where defendant is lienholder

Subdivisions (a)(3) and (b) were deleted; the Comment should indicate that the waiver provision was unduly harsh.

§ 872.430. Pleading hardship and oppression

The beginning of this section was revised to read: "If the defendant opposes the partition or manner of partition sought on the ground it would be inequitable"

§ 872.510. Mandatory joinder of defendants

This section should be revised to provide for permissive joinder of lienholders. The Comment should make clear that "interest" includes "lien."

§ 872.710. Court determination of right

Subdivision (b) was revised to read:

(b) Partition as to concurrent interests in the property shall be as of right unless barred by a valid waiver.

The Comment should make clear that a purported waiver of the right to partition must be valid in order to constitute a sufficient defense to the action.

§ 873.070. Petition for instructions

This section was revised to read:

873.070. The referee or any party may on noticed motion petition the court for instructions concerning the referee's duties under this title.

§ 872.320. Requirements where service is by publication

Subdivision (c) should be revised to follow the pattern of other publication statutes, e.g., execution.

A note should be added to the Comment to the effect that, where personal property is involved, the court may order appropriate special service; the Comment should refer to the relevant provision of the Code of Civil Procedure.

§ 873.720. Motion to confirm report

The leadline of this section was revised to read:

§ 873.720. Motion to confirm or set aside sale

§ 873.730. Confirmation hearing

The leadline of this section was revised to read:

§ 873.730. Hearing on motion

The second sentence of subdivision (a) was revised to read:

The court may confirm the sale notwithstanding a variance from the prescribed terms of sale if to do so will be beneficial to the parties and will not result in substantial prejudice to persons interested in the sale.

The Comment should more clearly indicate what portions of the section continue existing law.

§ 873.740. Determination of amount of in-court offer without regard to agents' commissions

This section should be redrafted for clarity.

§ 873.760. Refusal of purchaser to deliver proceeds

This section should be recast to provide for motion of the parties or referee, with notice, for remedies to be applied upon court approval. The defaulting purchaser should be subject to the jurisdiction of the partition court. Subdivision (b) should make clear that attorneys' fees are awarded against the defaulting purchaser.

§ 873.780. Court authority at closing

This section should be revised to provide for changes in terms, and the like, upon agreement of the referee and the purchaser and a court determination that the changes will be beneficial to the parties and will not result

in substantial prejudice to other interested persons. Consideration should be given to incorporating this section into Section 873.780, and to affording the parties notice of a motion to change terms. Consideration should also be given to deleting or changing the language limiting the changes to objections to title or after-discovered defects.

§ 873.810. Court order of disbursement

This section was revised to refer to "interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government," and the Comment should make clear that the amounts invested may exceed the maximum amount covered by the insurance.

§ 873.830. Exhaustion of other security of lienholder

The staff should prepare a study analyzing the issues involved where there is a deed of trust on the property being partitioned, including considerations of impairment of security and due on sale provisions in the deed of trust.

§ 873.850. Treatment of successive estates

Subdivision (c) of this section should be expanded to apply to defeasible estates as well as to life estates. The staff should investigate the possibility of incorporating more precise standards for the application of this subdivision. In redrafting the statute, the possibility of successive life estates should be considered and the placement of the phrase "as determined by the court" should be altered. The Comment should make clear that investment of the proceeds includes investment by purchase of other property, and should explain the reason for deleting the "consent" provision of Section 778.

§ 873.910. Agreement of co-owners to partition by appraisal

The phrase "and all such interests are owned in absolute ownership" was deleted from this section; the Comment should indicate that a guardian ad litem may be appointed to represent contingent interests, and the guardian may agree to the partition by appraisal.

The staff should examine the problem of the lienholder under this chapter and under the remainder of the partition statute and make clear the rights of the lienholder in the various types of partition.

§ 873.920. Contents of agreement

Subdivision (b) was revised to read:

(b) The names of the parties and their interests.

Subdivision (c) was revised to read:

(c) The names of the parties who are willing to acquire the interests described in subdivision (b), and the undivided interests of the acquiring parties.

§ 873.930. Court approval of agreement

The phrase "and that there are no objections to the proposed procedure" was deleted from this section.

§ 873.940. Referee

The phrase "if provided in the agreement" was substituted for the phrase "upon request of the parties." The last sentence of this section should be made a separate section.

§ 873.950. Court confirmation of referee's report

The headline of this section was revised to read:

§ 873.950. Hearing on referee's report

The section should commence with the phrase, "At the hearing."

The last sentence of the Comment was deleted.

§ 874.010. Costs incurred for common benefit

The staff should redraft this section, incorporating the following features:

(1) The phrase "incurred or paid for the common benefit" should be moved out of the introductory portion of the section and into subdivision (a).

(2) Subdivision (e) should commence, "Other reasonable expenses, including attorney's fees"; the Comment should note that this changes the existing statutory language.

(3) Consideration should be given to making subdivision (e) a separate section.

§ 874.040. Apportionment involving future interests

The staff should check to make sure that the interest awarded under this section is at the legal rate of seven percent. The Comment should make clear that the share apportioned to a future interest is discounted based on the present value of the future interest.

§ 874.120. Nonpayment lien

The leadline of this section should read:

§ 874.120. Lien for costs

Subdivision (b) was revised to read:

(b) The lien provided by this section has priority over any other lien on the share.

§ 874.130. Enforcement of lien

This section should make clear that only liens imposed under this article stand on an equal footing.

§ 874.210. Persons bound by judgment

In subdivision (c) the phrase "joined as parties in the action" was replaced by the phrase "parties to the action."

The staff should consider the possible effects on this section where no lis pendens is filed.

§ 874.230. Holder of lien known to plaintiff

This section should be expanded to cover other interests known to plaintiff, as well as liens. The protection afforded such interests should be expanded in cases of persons in possession of the property, and consideration given to expanding the service requirements on such persons.

§ 874.250. Effect of conveyance before judgment

In view of the fact that this section appears to duplicate the lis pendens provisions, the section should be omitted unless a need for it is established.

Operative date

The operative date was changed to January 1, 1977.

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STUDY 26 - UNCLAIMED PROPERTY

The Commission considered Memorandum 74-68, the attached draft of a recommendation, the First Supplement to Memorandum 74-68, and letters from Western Union and American Express, all relating to the escheat of amounts held on account of travelers checks, money orders, and similar instruments.

The recommendation was approved for printing and for submission to the 1975 session of the Legislature after the revisions set out in the First Supplement to Memorandum 74-68 have been made and editorial and clarifying changes have been made in light of the letter from American Express. The Commission noted that there is some controversy concerning the application of the federal statute to travelers checks, money orders, and similar written instruments that were deemed abandoned prior to the effective date of the federal statute.

The staff was requested to determine the meaning of "other than a third party bank check" as used in the federal statute. Perhaps something should be added to the Comment indicating the meaning of this phrase.

EXHIBIT I

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western union
TELEGRAPH COMPANY

RICHARD C. HOSTETLER
VICE PRESIDENT AND GENERAL COUNSEL

ROBERT H. CUMMINS
HERBERT G. TELSEY
ASSISTANT GENERAL COUNSELS

November 7, 1974

Re: California
Unclaimed Property Law

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

Dear Mr. DeMouilly:

Your October 24 letter would have been answered earlier, but for a recent vacation and other matters.

There are some foreseeable problems in connection with the recommended legislation, but those I have in mind are not created by your staff draft. They are inherent in the proposed federal law and thus largely unavoidable at the State level.

The pure point-of-origin rule, under which the moneys involved would be escheatable solely by the State where the purchase occurred, would presumably be easy to administer. Various parties urged it upon the Court at the argument of Pennsylvania v. New York. But the Court provided for both primary and secondary rights to escheat, and apparently a similar dual scheme won favor in Congress.

EXHIBIT I

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Mr. John H. DeMouilly

November 7, 1974

2.

Consequently, there will not only be a need to ascertain whether or not a record of the place of purchase exists (presumably it will, if required by law), and sometimes also to ascertain where the principal place of business is (occasionally arguable), but sometimes to ascertain, further, what the abandoned property law of another State does not provide.

This last task can hardly be a welcome one: Some statutes make no specific reference to money orders or travelers checks; some still rely on vague concepts of situs ("held or owing in this state"); the meaning and effect of another State's law is supposed to be the domain of the judiciary of that other State, to whose interpretations, particularly at the appellate level, federal courts, California courts, and California administrative officials should defer in regard to what that State's abandoned property laws lay claim to. That State's administrators may have ideas of their own, also. There are only a few decisions of State courts of last resort dealing with abandoned money orders, etc.

In short, the continuation of any current need for one State to take a firm administrative position on the construction, operation, and effect of another's statutes, or on another's common law, seems unfortunate. Judges sometimes do this, of necessity, in litigated cases, and doubtless federal bureaus (GAO, IRS) also do so, but it is not always an enviable task. California could, of course, simply claim sums referable to money orders, etc., purchased in California (or elsewhere if there is no record of place of purchase and the corporate headquarters is in California) and not exercise the power to claim amounts where the key factor is non-applicability of a sister State's law. As this choice would waive some possible revenue it is obviously not likely to be made initially, if at all.

Another troublesome aspect of the statute concerns the time frame. The statute would apply (with an exception) to amounts deemed abandoned on or after the date when the

Mr. John H. DeMouilly

November 7, 1974

3.

Sun Oil case, Texas v. New Jersey, was decided, -- February 1, 1965. It purports to alter the legal status of amounts already processed under laws in effect when they were processed, unless actually paid over by December 31, 1973. States could become involved in accounting to one another for what they received during 1974, something which also seems unfortunate. As to the subject matter of Pennsylvania v. New York, it would probably be impossible, as the survey of old records was based on the Court's criteria.

With further special reference to Pennsylvania v. New York, constitutional questions suggest themselves: Assuming arguendo that Congress may retroactively alter the Court-made law vis-a-vis States which were not parties to that litigation, can it reverse the Court's adjudication of rights of the 9 States which came before it in regard to the very money orders involved in the case? [Money orders sold at any time through December 31, 1962 -- many were "deemed abandoned" on or after February 1, 1965.] Most of us would probably answer "No," and the Court itself is the final arbiter. Another possible question is whether there really is a sufficient connection between the federal statute and interstate commerce. Probably there is, but here too the Court is the final arbiter.

I realize that you are probably seeking comments directed specifically to the staff draft. The federal definition of "banking organization" and the California definition in CCP § 1501(b) seem not to be identical; I do not know whether you feel they should be. Otherwise, nothing specific occurs to me; hopefully the other thoughts may not be entirely without interest to you. It seems to me that the proposed repeal of § 1511 and the proposed changes in § 1581 are both sound steps.

Very truly yours,

Herbert G. Telsey

Herbert G. Telsey
Assistant General Counsel

HGT:fms

LAW OFFICES OF
ADAMS, DUQUE & HAZELTINE

320 WEST SIXTH STREET
LOS ANGELES, CALIFORNIA 90014
TELEPHONE (818) 620-1740

HENRY DUQUE (1904-1971)

October 31, 1974

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

Re: Legislation Relating to Escheat of
Travelers Cheques and Money Orders

Dear Mr. DeMouilly:

Thank you for your letter of October 24, 1974 and its enclosures.

We have reviewed your proposed recommendation concerning revisions to the California unclaimed property law to conform that law to the pending Federal legislation (HR 11221-Depository Institution's Amendments of 1974).

Based on our initial review of the revisions, we have the following suggestions for your consideration:

1. On page 5 of your proposal, concerning the new Section 1511, we suggest that the subparagraphs (1), (2) and (3) be set apart by the use of semicolons after the paragraphs (1) and (2) plus the word "or" at the end of paragraph (2) in order to make it absolutely clear that only one of those three conditions for escheat need be met before California is entitled to escheat any particular Travelers Cheque, Money Order or similar written instrument.
2. With respect to the revisions to Section 1542 appearing on page 7 of your enclosure, we question whether subparagraph (a)(1) is appropriate in Section 1542 inasmuch as Section 603(1) of the pending Federal legislation uses the phrase "shall be entitled exclusively to escheat . . ." which makes that Section both mandatory and

Mr. John H. DeMouilly
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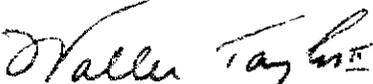
exclusive. The presently existing subparagraph (a)(1) implies that even where the provisions of Section 603(1) of the Federal legislation are met, if another state is able to prove a last known address of the apparent owner as being in that state, that state is therefore entitled to escheat.

3. With respect to Section 1581 appearing on page 8 of your enclosure, in subparagraph (a) thereof, you have added language that any business association that sells in this state its Travelers Cheques, etc. shall "maintain a record indicating those cheques, orders or instruments that are purchased in this state." We would suggest that the word "orders" be changed to "money orders" and we further suggest that the words "from it" be added after the word "purchased". The latter suggestion is to clarify that the purchases with which the subparagraph is concerned are the purchases from the business association and not the purchases of the business association from its suppliers of Travelers Cheques, etc., i.e., purchases from the printing office or other entity physically making the cheques.

Other than the above, our initial review has indicated no other desirable changes in your proposals.

We will be in touch if we have any further comments. If you have any questions or comments regarding the pending Federal legislation, the proposed California revisions, our comments with respect thereto, or any other aspects of this matter, please feel free to call.

Very truly yours,


WALLER TAYLOR, II

STUDY 36.90 - EMINENT DOMAIN (DISCOVERY)

The Commission considered Memorandum 74-51 comparing the California exchange of valuation data provisions with the Uniform Eminent Domain Code discovery provisions. The Commission entertained comments from representatives of public entities present at the meeting concerning the need for special discovery provisions for eminent domain. The Commission determined to make no change in the tentatively recommended exchange of valuation data chapter of the Eminent Domain Law; the Commission will review the chapter in connection with its overall study of discovery generally, to be undertaken in the future.

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STUDY 39 - RECENT DEVELOPMENTS IN CREDITORS' REMEDIES

The Commission considered Memorandum 74-66 concerning recent developments in the law relating to stop notices in private construction projects and the garageman's lien law. The Commission decided not to consider the subject of stop notices. The staff was directed to study the garageman's lien statute and to present this subject for consideration at a future meeting.

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STUDY 39.30 - WAGE GARNISHMENT

The Commission considered Memorandum 74-61 and the attached staff draft of the Recommendation Relating to Wage Garnishment Exemptions, the First Supplement to Memorandum 74-61, and a statement by Mr. Gus R. Cohen (attached hereto as Exhibit I) which was distributed at the meeting.

The Commission approved the draft Recommendation Relating to Wage Garnishment Exemptions for printing (subject to editorial changes) and submission to the 1975 session. The staff was directed to prepare a short prefatory summary of the recommendation and send it to the Commissioners for their editorial suggestions before the summary is sent to the printer.

The Commission directed the staff to revise the Recommendation Relating to Wage Garnishment and Related Matters (A.B. 101 in the 1973-74 legislative session) to take account of changes in the law since that recommendation was prepared and to incorporate the exemptions provided in the Recommendation Relating to Wage Garnishment Exemptions. This revised recommendation is to be considered at the January meeting with the intention of approving it for introduction into the 1975 session of the Legislature.

Gus R. Cohen

President United Merchants Association

3242 WEST EIGHTH STREET
LOS ANGELES, CALIFORNIA 90005

MAILING ADDRESS
P. O. BOX 76178
LOS ANGELES, CALIFORNIA 90005

TELEPHONE
(213) 388-2236
(213) 390-5440

To: California Law Revision Commission November 14, 1974

The following is presented in opposition to those proposals in your staff memorandum 74-61, 10/23/74; specifically the revisions in 690.6CCP.

Opposition is voiced in my dual capacity as legislative chairman for District 11, International Consumer Credit Association and as an individual citizen-businessman. District 11 of our 52,000 member organization has in excess of 5000 members. My own experience includes over 25 years in business dealing intimately with the present subject matter.

Our opposition has its genesis in both practical and moral concern. It is obvious the federal government has taken, and continues to take, an active interest in the area of exemptions as to earnings.

Already the crazy-quilted proliferation of legislation in individual states has emasculated the concept of uniformity where individual and inviolate rights to property, sanctity of contracts and redress of economic wrongs are concerned.

Almost invariably, the wage earner's sole collateral is his wage. It is his present paycheck and the capacity to earn others in the future, that allows him the enjoyment and convenience of credit. In rendering that paycheck incapable of a full legally-enforceable pledge, you legislatively create a special class of deprived citizens, the honorable and conscientious low wage earners. That is a gratuitous affront to the inherent dignity of labor, and a hardship on the innocent as well as the guilty.

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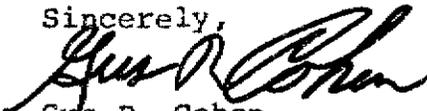
The ultimate practical effect of such questionable manipulation of a substantial segment of our credit oriented economy is apparent. The very same people you are earnestly endeavoring to help, plus the 95% who manage to meet their obligations, will be eliminated from the credit rolls, thus, further damaging our already seriously ill economy.

SB 1853 passed in the last legislative session. It empowers judges to dictate terms of payment for money judgments. Presumably, judges, with detailed information relevant to individual circumstances, with the capacity to inquire and assess, can achieve a balance between the rights of last years landlord vs today's; can arbitrate the equities incidental to the obstetrician of yesterday and the pediatrician of today. He may even be able to resolve and define the legitimate interests of yesterday's lender and next month's TV salesman.

If we are to determine through our legislature that thousands of wage earners are to be held unaccountable for their own maintenance and that of their families, then, at that point, we should determine that the burden be shared by the entire community. It is unreasonable, unrealistic and unjust to impose that entire burden to one segment of the community--the credit grantor.

Your thorough and objective consideration of our viewpoint is earnestly solicited.

Sincerely,



Gus R. Cohen

STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission considered Memorandum 74-62 and an oral presentation by Mr. D. H. Battin of the Judicial Council's Advisory Committee on Forms.

The Commission decided not to submit any bills to change amendments which were made in the attachment bill (A.B. 2948) in the last days of the 1974 legislative session. Particular attention was focussed on the changes made in the liability for wrongful attachment (Section 490.020(b)); the Commission decided not to submit a bill which would limit the liability for wrongful attachment only where the notice motion procedure was followed as provided in the original bill.

Mr. Battin stated that the Advisory Committee on Forms had encountered some difficulty in determining the precise meaning of "a defendant engaged in a trade, business, or profession" in Section 483.010. The difficulty involves the time when the defendant is so engaged--whether the defendant must be engaged in a trade, business, or profession when the claim arose, when the action is filed, or when the attachment is sought. This problem is also inherent in Section 487.010(c). Amendments suggested at the meeting included deleting the language in question or changing it to read "engaged . . . when the claim arose," "is engaged . . . or was engaged . . . when the claim arose," or "engaged . . . when the attachment is sought or where the claim arises out of a trade, business, or profession." The staff was directed to examine this problem and recommend corrective amendments at the January meeting. In addition, the staff should consider whether the property of guarantors is subject to attachment and whether Section 482.080 is superfluous or should be amended. The words "or arrest" in Section 482.080 should also be reviewed.

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STUDY 39.90 - CLAIM AND DELIVERY

The Commission considered Memorandum 74-65 and the attached memorandum on Mitchell v. W. T. Grant Co., prepared and presented orally by the Commission's consultant, Professor William D. Warren. The Commission decided not to recommend any amendments to the claim and delivery statute.

STUDY 63.90 - ADMISSIBILITY OF COPIES OF BUSINESS RECORDS

The Commission considered Memorandum 74-64, the attached tentative recommendation, the First Supplement to Memorandum 74-64, and a letter (attached to these Minutes) from Judge Homer H. Bell. The following actions were taken:

(1) The recommendation should note that Sections 1560 et seq. provide a means of satisfying the requirement of Section 1401 that authentication of a writing is required before secondary evidence of its content may be received in evidence.

(2) The numbering of the proposed legislation as Section 1562.5 was approved. The staff should suggest to the publishers of the California codes that a cross-reference to Section 1562.5 be inserted under Section 1271 if the proposed legislation is enacted. This suggestion can be made at the time the staff sends a copy of the official Comment to Section 1562.5 to the publishers after the proposed legislation is enacted.

(3) Some consideration should be given to whether the opposing party could be provided with a copy of the affidavit of the custodian. Also, perhaps something should be mentioned in the recommendation concerning the ability to obtain the records and affidavit of the custodian through discovery. See Code Civ. Proc. § 1987.5.

(4) The same sanction that applies when a request for an admission is denied should be made specifically applicable to a demand by the adverse party for compliance with the requirements of Section 1271.

(5) Subdivision (d) of Section 1562.5 (set out on pages 8-9 of Memorandum 74-64 was approved in principle after it was revised to read along the following lines:

(d) The adverse party has not, within 10 days after being served with the notice referred to in subdivision (c), served on the party who served the notice both of the following:

(1) A written demand for compliance with the requirements of Section 1271.

(2) A sworn statement of such adverse party stating precisely in what respect he believes the copy of the record served on him is inaccurate or setting forth in detail the reasons why he cannot truthfully state whether or not the record is accurate.

The adverse party would have to make a reasonable effort to determine whether the record is accurate.

(6) The additional provision suggested on page 2 of the First Supplement to Memorandum 74-64--that the party can offer evidence to disprove the act, condition, or event recorded in the record admitted in evidence--is to be added to the statute.

(7) Consideration should be given to how the new section will work in a noncontested case.

EXHIBIT I--STUDY 63.50

Minutes

November 14 and 15, 1974

The Superior Court

1000 NEWARK BUILDING
100 W. W. CALIFORNIA 90650

CHAMBERS OF
HOMER H. BELL, JUDGE

November 6, 1974

TELEPHONE
213 606 2115
213 6070

Mr. John H. De Moully
California Law Revision Commission
School of Law
Stanford, California 94305

Re: Business Records in Evidence

Dear Mr. De Moully:

Thank you very much for complying with my request for a copy of your letter of transmittal and tentative recommendation concerning the admissibility of copies of business records in evidence. I have read the entire recommendation and think that you will find it interesting to note that I have encountered this very problem in my courtroom. Some attorneys have insisted rather vehemently that sections 1560 and following justify an admission into evidence of business entries without any compliance with Section 1271.

The only comment that I would make is that my experience has shown that when hospital records are subpoenaed, the records sometimes come directly to the courthouse sealed in a brown manila envelope, and duplicate copies do not always seem to be available. Such a requirement seems superfluous in a malpractice suit where the hospital is one of the defendants and both the defendant's counsel and the hospital are apt to make it a little more difficult for the party subpoenaing the records to have copies of them in advance. Moreover, in such a situation, the hospital which has custody of the records, already has the originals, and possibly copies, and does not need to be supplied with a copy of them 20 days before trial, as your code section provides. Why should a malpractice plaintiff be required to serve copies upon a malpractice defendant who already has the records?

A doctor-defendant and a hospital-defendant usually work together in defending the case, so even though the doctor may not have complete copies of the records, he certainly has access to them, and can be supplied with copies by the hospital quite readily without a subpoena, or at least his attorney can. The very bulkiness of the documents to be subpoenaed might, in

Mr. JOHN H. DE MOULY
November 6, 1974
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some cases, impose quite a burden upon the party issuing the subpoena.

The only solution to the problem that I raise that I can think of is that exceptions be made in those cases where the documents are already in the possession of, or readily accessible to, the other party, and, in the case of extremely bulky records, that the party who would, under your change, be entitled to receive a copy of the records, be entitled, rather, (1) to inspect the records, or (2) to make specific demands to see some or all of the records or (3) to receive copies of some or all of the records to be subpoenaed, after receiving the notice you refer to.

I also see some problems where the documents to be subpoenaed are in the custody of a third person -- i.e., not one of the parties -- which might not take kindly to the idea of supplying copies of its records in advance of receiving a subpoena.

Perhaps these observations do not impress you as posing any serious problems. However, if you think they possess any merit, you might at least raise them at your November 14th-15th meeting.

Cordially yours,


Homer H. Bell

HHB:vc

STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 74-63, the First Supplement thereto, and the written and oral presentation of Mr. Ronald P. Denitz, Assistant General Counsel, Tishman Realty. The Commission made the following decisions:

Civil Code § 3319 (general liquidated damages provision). The staff was directed to redraft Section 3319 to shift the burden of proving reasonableness to the party seeking to enforce the liquidated damages provision in consumer cases and where the parties are of substantially unequal bargaining power.

Civil Code § 2954.6 (late payment charges in loans secured by real property). The late payment charges provision (Section 2954.6) should be deleted from the recommendation. The validity of late payment charges should be left to the general liquidated damages provision (Section 3319).

Civil Code § 3320 (earnest money deposits). Subdivisions (b), (c), and (d) of Section 3320 relating to earnest money deposits should be deleted from the recommendation; liquidated damages in real property sales contracts should be governed by the general section. Subdivision (a) of Section 3320 requiring deposit clauses to be initialed should be retained; subdivision (e) providing an exception in cases of installment land contracts should be examined by the staff. The Comment to the general section (Section 3319) should state that liquidated damages clauses in contracts for the sale of land may be enforced in cases of default by either the buyer or the seller.

APPROVED

Date

Chairman

Executive Secretary