

September 29, 1975

Time

Place

October 9 - 9:30 a.m. - 5:00 p.m.
October 10 - 9:00 a.m. - 5:00 p.m.
October 11 - 9:00 a.m. - 11:30 a.m.

Stanford Law School
Room 85 - FIR Building
(Basement of Classroom Bldg.)
Stanford

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Stanford

October 9-11, 1975

Suggested Schedule for Future Meetings

November

November 6 - 7:00 p.m. - 10:00 p.m.
November 7 - 9:00 a.m. - 5:00 p.m.

Los Angeles

December

December 11 - 7:00 p.m. - 10:00 p.m.
December 12 - 9:00 a.m. - 5:00 p.m.

San Francisco

January

January 15 - 7:00 p.m. - 10:00 p.m.
January 16 - 9:00 a.m. - 5:00 p.m.
January 17 - 9:00 a.m. - 1:00 p.m.

Los Angeles } NOTE CHANGE
 } IN PROPOSED
 } DATES

February

February 12 - 7:00 p.m. - 10:00 p.m.
February 13 - 9:00 a.m. - 4:30 p.m.

San Francisco

Note: USC and UCLA play at Stanford on February 27 (Thursday) and 28 (Friday)

March

March 18 - 7:00 p.m. - 10:00 p.m.
March 19 - 9:00 a.m. - 5:00 p.m.
March 20 - 9:00 a.m. - 1:00 p.m.

Los Angeles

October 9

1. Minutes of July 17-18, 1975, Meeting (sent 8/27/75)
2. Administrative Matters

1975 Legislative Program

Memorandum 75-57 (to be sent)

Amendment to Lease for Office Space

Memorandum 75-56 (enclosed)

September 29, 1975

Schedule for Consideration of Topics

Memorandum 75-58 (sent 8/27/75)

Annual Report

Memorandum 75-59 (sent 9/26/75)

Draft of Annual Report (attached to Memorandum)

Printed Annual Report (December 1974)(to be handed out at meeting)

Unconstitutional Statutes

First Supplement to Memorandum 75-59 (sent 9/19/75)

Draft of Report on Unconstitutional Statutes (attached to Supplement)

Research Contracts

Memorandum 75-68 (sent 9/19/75)

Plaques

Oral Suggestion of Executive Secretary

Election of Officers

Memorandum 75-76 (sent 9/3/75)

3. Study 23 - Partition

Memorandum 75-60 (sent 9/12/75)

Printed Recommendation (attached to Memorandum)

Assembly Bill 1671 (attached to Memorandum)

First Supplement to Memorandum 75-60 (sent 9/19/75)

Second Supplement to Memorandum 75-60 (sent 9/26/75)

4. Study 72 - Liquidated Damages

Memorandum 75-61 (sent 9/3/75)

Recommendation (attached to Memorandum)

Staff Draft of Recommendation (attached to Memorandum)

Printed Recommendation and Study (attached to Memorandum)

First Supplement to Memorandum 75-61 (sent 9/26/75)

5. Study 47 - Oral Modification of Contracts

Memorandum 75-62 (sent 8/27/75)

Printed Recommendation (attached to Memorandum)

6. Study 63.60 - Admissibility of Duplicates

Memorandum 75-63 (sent 9/3/75)

Tentative Recommendation (attached to Memorandum)

7. Study 63.50 - Admissibility of Business Records

Memorandum 75-64 (sent 9/3/75)

Printed Recommendation (attached to Memorandum)

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8. Study 81 - Transfer of Out-of-State Trusts to California

Memorandum 75-65 (sent 9/3/75)
Tentative Recommendation (attached to Memorandum)

Note: If agenda for October 9 is not completed on October 9, remaining items will be considered on afternoon of October 10

October 10

9. Study 39.30 - Wage Garnishment Procedure

Memorandum 75-66 (sent 9/5/75)
Printed Recommendation (to be distributed at meeting)
Preprint Senate Bill No. 3 (attached to Memorandum)

10. Study 39.100 - Revision of Attachment Law

Memorandum 75-67 (enclosed)
Tentative Recommendation (attached to Memorandum)

11. Study 39.120 - Redemption From Execution Sales

Memorandum 75-52 (sent 9/5/75)

12. Study 39.130 - Third-Party Claims

Memorandum 75-69 (sent 9/19/75)

13. Study 39.140 - Supplementary Proceedings

Memorandum 75-70 (sent 9/5/75) - *Not taken up at meeting*

14. Study 39.150 - Enforcement of Judgments Other Than Money Judgments

Memorandum 75-71 (sent 9/26/75) - *Not taken up at meeting*

October 11

15. Study 36.60 - Condemnation for Byroads and Utility Purposes

Memorandum 75-72 (sent 9/12/75)
Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 75-72 (sent 9/26/75)

16. Study 36.60 - Relocation Assistance by Private Condemnors

Memorandum 75-73 (sent 9/12/75)
Tentative Recommendation (attached to Memorandum)
First Supplement to Memorandum 75-73 (sent 9/26/75)

17. Study 52.80 - Undertaking for Costs

Memorandum 75-74 (enclosed)
Tentative Recommendation (attached to Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

OCTOBER 9, 10, AND 11, 1975

STANFORD

A meeting of the California Law Revision Commission was held at Stanford on October 9, 10, and 11, 1975.

Present: Marc Sandstrom, Chairman
John N. McLaurin, Vice Chairman
John D. Miller
Thomas E. Stanton, Jr., October 9 and 10
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
John J. Balluff
George H. Murphy, ex officio

Members of Staff Present:

John H. DeMouilly Nathaniel Sterling
Stan G. Ulrich Robert J. Murphy III
Jo Anne Friedenthal, October 9 and 10

Mr. Garrett H. Elmore, Commission consultant on partition procedure, was present on October 9. Professor Stephan A. Riesenfeld, Commission consultant on creditors' remedies, was present on October 10.

The following persons were present as observers on days indicated:

October 9

Ronald P. Denitz, Tishman Realty & Construction Co., Los Angeles
Brian Paddock, Western Center on Law and Poverty, Sacramento
Terrence Terauchi, Western Center on Law and Poverty, Sacramento

October 10

Lawrence H. Cassidy, California Ass'n of Collectors, Inc., Sacramento
E. P. Hill, Judicial Council, San Francisco
Brian Paddock, Western Center on Law and Poverty, Sacramento
Terrence Terauchi, Western Center on Law and Poverty, Sacramento
Carl M. Olsen, County Clerk, San Francisco

October 11

Norval Fairman, Department of Transportation, San Francisco
Brian Paddock, Western Center on Law and Poverty, Sacramento
Terrence Terauchi, Western Center on Law and Poverty, Sacramento

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ADMINISTRATIVE MATTERS

Minutes of July 17-18, 1975, Meeting

The Minutes of the July 17-18, 1975, Meeting were approved as submitted by the staff.

1975 Legislative Program

The Executive Secretary made the following report concerning the 1975 Legislative Program.

ENACTED

- AB 11 (Chapter 1275, Statutes of 1975) - Eminent Domain Law
- AB 73 (Chapter 318, Statutes of 1975) - Good Cause Exception to Physician-Patient Privilege
- AB 74 (Chapter 7, Statutes of 1975) - Modification of Contracts--Commercial Code Revision
- AB 124 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 125 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 126 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 127 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 128 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 129 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 130 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 131 (Chapter ____, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
- AB 192 (Chapter 25, Statutes of 1975) - Escheat--Travelers Checks and Money Orders
- AB 266 (Chapter ____, Statutes of 1975) - Conforming Changes--State Agency Condemnation

- AB 278 (Chapter ____, Statutes of 1975) - Conforming Changes--Codified Provisions Eminent Domain
- AB 919 (Chapter 200, Statutes of 1975) - Defers Attachment Law One Year
- SB 294 (Chapter 301, Statutes of 1975) - Out-of-Court Views by Judge or Jury
- SB 607 (Chapter 285, Statutes of 1975) - Payment of Judgments by Local Public Entities
- ACR 17 (Res. Ch. 15, Statutes of 1975) - Authority to Study Topics
- ACR 39 (Res. Ch. 82, Statutes of 1975) - Authorizes Study of Marketable Title Act

TO BE SET FOR HEARING JANUARY 1976

AB 1671 - Partition of Real and Personal Property

DEAD

- AB 75 - Oral Modification of Contracts--General Provisions
- AB 90 - Wage Garnishment Exemptions
- AB 924 - Admissibility of Copies of Business Records in Evidence

Election of Officers

On motions duly made, seconded, and unanimously adopted, the following new officers of the Law Revision Commission were elected:

Chairman - John N. McLaurin

Vice Chairman - Howard R. Williams

The new officers will take office effective December 31, 1975.

Schedule for Future Meetings

The Commission adopted the following schedule for future meetings.

November

November 6 - 7:00 p.m. - 10:00 p.m. San Francisco
November 7 - 9:00 a.m. - 5:00 p.m.

January

January 15 - 7:00 p.m. - 10:00 p.m. Los Angeles
January 16 - 9:00 a.m. - 5:00 p.m.
January 17 - 9:00 a.m. - 1:00 p.m.

February

February 27 - 9:30 a.m. - 4:30 p.m. San Francisco
February 28 - 9:00 a.m. - 12:00 noon

March

March 18 - 7:00 p.m. - 10:00 p.m. Los Angeles
March 19 - 9:00 a.m. - 5:00 p.m.
March 20 - 9:00 a.m. - 1:00 p.m.

Schedule for Consideration of Topics

The Commission considered Memorandum 75-58.

Nonprofit Corporation Law. The Commission decided to give top priority to the study on nonprofit corporation law.

Lessor-lessee relations. The Commission directed the staff to include on the agenda for a future meeting a background memorandum on the problem of defining what constitutes an "abandonment" by the lessee of real property and the problem of recovering future damages in an unlawful detainer proceeding. The memorandum should be a superficial overview rather than an in-depth analysis.

Class actions. The Commission also directed that the staff consult with such persons as would be appropriate and make a recommendation at a future meeting (probably January 1976) of a suitable person to serve as a consultant to write a background study on class actions and also suitable persons whose practice in this field would qualify them as consultants to advise the Commission at meetings concerning the implications of various alternative solutions on the plaintiffs and defendants in class actions. These consultants would not be expected to prepare background studies and their compensation probably would be nominal (\$20 per meeting day plus travel expenses).

Tentative schedule for consideration of topics. The Commission adopted the following tentative schedule for consideration of topics (subject to modification to reflect Commission action on matters scheduled for presentation to the 1976 Legislature):

1976 LEGISLATIVE PROGRAM

1. Partition (bill already introduced and will be set for hearing in January 1976; recommendation published; now working on amendments to bill).
2. Claim and Delivery Statute (technical amendment already approved for printing).

3. Admissibility of Duplicates (tentative recommendation distributed for comment; one aspect will be considered at November meeting).
4. Admissibility of Business Records (recommendation to 1975 session; proposed legislation held in Assembly Judiciary Committee; staff draft of legislation to be prepared; unlikely can be included in recommendation to 1976 session).
5. Revision of the Attachment Law (tentative recommendation distributed for comment; will be reviewed at November meeting).
6. Relocation Assistance by Private Condemnors (tentative recommendation distributed for comment; approved for printing at October meeting).
7. Transfer of Out-of-State Trusts to California (recommendation approved for printing at October meeting).
8. Undertaking in Actions Against Public Entities and Public Employees (tentative recommendation will be considered at November meeting).
9. Claim Presentation Requirement in Inverse Condemnation Actions (staff draft of recommendation will be considered at November meeting).
10. Liquidated Damages (recommendation will be considered at November meeting).
11. Oral Modification of Contracts (recommendation to 1975 session; proposed legislation held in Assembly Judiciary Committee; revised recommendation to be prepared).
12. Condemnation for Byroads and Utility Purposes (recommendation approved for printing at October meeting).

1977 LEGISLATIVE PROGRAM

1. Revisions of the Evidence Code (Study of Federal Rules of Evidence and Needed Conforming Changes in California Evidence Code).
2. Nonprofit Corporations Law (top priority).
3. Offers of Compromise.
4. Unlawful Detainer Proceedings and definition of "abandonment"(tentative).
5. Technical Conforming Changes--Eminent Domain (new acts adopted 1975 and 1976 that are inconsistent with or overlap or duplicate provisions of comprehensive eminent domain law).

1978 LEGISLATIVE PROGRAM

1. Discovery in Civil Actions.
2. Marketable Title Act (includes Possibilities of Reverter and Powers of Termination).

1979 LEGISLATIVE PROGRAM

1. Class Actions.
2. Enforcement of Judgments.
3. Inverse Condemnation Procedural Provisions.
4. Adoption, Child Custody, Guardianship, and Related Matters.

Research Contracts

The Commission considered Memorandum 75-68 and approved the following research contracts.

Contract with Mr. Dankert. The Commission authorized and directed the Executive Secretary to execute on behalf of the Commission a contract with Thomas M. Dankert to provide expert advice to the Law Revision Commission in connection with the study of condemnation and inverse condemnation law. The compensation is to be \$20 per day for attending meetings of the Law Revision Commission or legislative hearings plus travel expenses at the rate for members of the boards and commissions appointed by the Governor. The total amount payable under the contract is not to exceed \$500.

Contract with Professor Kanner. The Commission authorized and directed the Executive Secretary to execute on behalf of the Commission a contract with Professor Gideon Kanner to provide expert advice to the Law Revision Commission in connection with the study of condemnation and inverse condemnation law. The compensation is to be \$20 per day for attending meetings of the Law Revision Commission or legislative hearings plus travel expenses at the rate for members of boards and commissions appointed by the Governor. The total amount payable under the contract is not to exceed \$500.

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Approval of Amendment to Lease for Commission Office Space

The Executive Secretary reported that an increase in the rent for the office space occupied by the Commission, located at 553 Salvatierra Street on the Stanford University campus, Stanford, California, is necessary. The original rent was based on tentative estimates of the cost of alterations necessary to make the space suitable for the Commission's use and the estimated cost of utility and maintenance services. When firm estimates for the cost of alterations were received, it became apparent that the rent was far too low to cover the cost of alterations. (One item of increased costs was certain modifications required by the office of the State Fire Marshall after a representative of that office inspected the property for fire safety. Also, it was discovered that a large hive of bees was located in the house, and this will require additional expenditures.) Accordingly, it was recommended that the monthly rent be raised from Five Hundred Fifty Dollars (\$550.00) to Six Hundred Thirty Dollars (\$630.00). Even with this increase, it is not certain that Stanford will recover all of its out-of-pocket costs. Even with the increase in rent, the rent for the space will still be substantially less than a reasonable rent for comparable space. The Commission adopted the following resolution:

RESOLUTION

The Commission approves the increase in the monthly rent from Five Hundred Fifty Dollars (\$550.00) to Six Hundred Thirty Dollars (\$630.00) and also a technical provision to terminate the existing lease on the effective date of the new lease (October 1, 1975). John H. DeMouilly, the Commission's Executive Secretary, is authorized and directed to execute any necessary documents on behalf of the Commission to effectuate the amendment to the lease.

Annual Report

The Commission considered Memorandum 75-59 and the attached draft of the Annual Report for 1975. The general revision in format was approved, but the

Commission concluded that a more radical change in format was desirable. The following format was suggested:

(1) Summary of Report. This should give a summary of the report and would replace the portion of the draft entitled "Summary of Work of Commission." Point out major work of Commission was presentation of eminent domain recommendations to Legislature and consideration of amendments.

(2) 1976 Legislative Program.

(3) Calendar of Topics for Study.

(4) Legislative History of Recommendations Submitted to 1975 Legislative Session.

(5) Report on Statutes Repealed by Implication or Held Unconstitutional.

(6) Personnel of Commission.

(7) Function and Procedure of Commission.

(8) Recommendations.

(9) Appendix I. Current Topics--Prior Publications and Legislative Action.

(10) Legislative Action on Commission Recommendations (Cumulative).

Various technical revisions of the Annual Report were suggested. The following basic policy decisions were made. The Commission indicated that it was desirable to indicate the amendments made after the bills were introduced. In the case of eminent domain, the substance of this material will be included in the separate publication of the eminent domain law as enacted rather than in the Annual Report. In this publication, the Legislature should be given credit for the changes it made. Where a Commission recommended provision was deleted, reference to that provision in the preliminary portion should be deleted. A paragraph might be added at the end to state: "Certain recommendations of the Commission were not enacted: [list]. Do not drop escheat topic. Also request State Controller to advise on amount received under 1975 escheat recommendation.

Unconstitutional Statutes

The Commission approved the draft of the Report on Statutes Repealed by Implication or Held Unconstitutional (Exhibit I to First Supplement to Memorandum 75-59), subject to the following drafting changes:

1. Reorganize the discussion on pages 1 and 2 so the discussion of cases immediately follows the applicable summary statement in each category.
2. Eliminate the words "has [or have] been found" from summary statements (1) and (3), and change the passive voice to active voice.
3. Change "his parentage" on line 11 of page 3 to "that he was the parent of the child."
4. Rewrite footnotes 15 and 16 to make the long sentences shorter.
5. Provide a more complete statement of the holding in Dupuy v. Superior Court, 15 Cal.3d 23, ___ P.2d ___, ___ Cal. Rptr. ___ (1975).

Publication of Eminent Domain Law With Official Comments

The Commission approved the proposal to publish the Eminent Domain Law with Official Comments with the understanding that the cost of the publication would be paid by the Continuing Education of the Bar. The preliminary portion of the Commission's recommendation should be revised to reflect the changes made by the Legislature. In revising this portion, the staff should restate the first portion so that it reflects the new statute as enacted but should indicate those significant changes made by the Legislature after the bill was introduced so that the reader can determine those portions of the law as enacted that had their source in the Legislature as distinguished from the Commission. The preliminary portion, as thus revised, should be presented to the Commission for review and approval at the November meeting. Consideration should be given to using another color for the cover. See also the discussion under Annual Report.

STUDY 23 - PARTITION OF REAL AND PERSONAL PROPERTY

The Commission considered Memorandum 75-60 and the First and Second Supplements thereto, relating to partition of real and personal property. In addition to the changes contained in Exhibit I to Memorandum 75-60, the Commission determined to make the changes in the partition legislation recommended by the staff in the memorandum and supplements with the following exceptions:

§ 872.230. Contents of complaint

The Comment to this section should list the types of estates in real property, with a reference to the applicable Civil Code provisions. The language relating to "fewer than all interests" should be deleted. This, and other sections, should be reviewed for usage of the terms "interests" and "estates."

§ 872.320. Requirements where service is by publication

The posting requirement in subdivision (a) should be limited to real property.

§ 872.510. Joinder of defendants

The last sentence of the Comment should be revised to refer to "the holder or claimant" of a recorded interest.

§ 872.730. Partition of community property

This section should provide that the partition title may not be applied to an action between spouses for partition of their community, quasi-community, or quasi-marital interest in property. The Comment should indicate that partition of community property is a problem more appropriately handled under the Family Law Act, that there is a potential gap in the right to obtain partition during marriage since legal separation is necessary and must be consented to by both parties under the Family Law Act, and that this defect, if any, is one the Commission has not addressed. Necessary conforming changes should be made in the Comments to other sections.

STUDY 36.60 - CONDEMNATION (CONDEMNATION BY PRIVATE PERSONS)

The Commission considered two aspects of condemnation by private persons:

(1) condemnation for byroads and utility easements, and (2) relocation assistance by private condemnors.

(1) The Commission reviewed the comments received on its tentative recommendation relating to condemnation for byroads and utility easements, which were attached to Memorandum 75-72 and the First Supplement to Memorandum 75-72. The Commission approved the recommendation for printing and submission to the Legislature, with the following changes: (i) any changes necessitated by the enactment of the eminent domain bills should be made; (ii) the byroads background study should not be reproduced, but a reference to the existing law should be made in footnote 4 on page 1; (iii) the sentence "The public shall be entitled, as of right, to use and enjoy the easement which is taken" should be deleted from Section 1001(b) and a reference made in the Comment to Sherman v. Buick, 32 Cal. 241 (1867).

(2) The Commission reviewed Memorandum 75-73 and the First Supplement thereto containing comments received on the tentative recommendation relating to relocation assistance by private condemnors. The Commission approved the recommendation for printing and submission to the Legislature with directions to the staff that, if the Legislature should amend the legislation to require compliance with the fair acquisition policies or to require supervision of relocation assistance by local public entities, the staff should report back to the Commission with an analysis of the impact of such amendments.

STUDY 39.32 - WAGE GARNISHMENT PROCEDURE

The Commission considered Memorandum 75-66 and a copy of the printed Recommendation Relating to Wage Garnishment Procedure (handed out at meeting).

The Commission reviewed the background on the series of bills the Commission has recommended to reform wage garnishment procedure. The following revisions were made in the recommended legislation as set out in the printed report:

(1) The existing exemptions should be retained without change and merely the procedural revisions should be made. This would retain the federal formula (except for support and taxes) and the existing hardship exemption. The special procedure for support orders should be retained as proposed in the printed recommendation. The wording of the federal statute should be written in as the standard for the amount to be withheld on an ordinary wage garnishment.

(2) The hardship exemption should not apply at all to withholding for state taxes. There would be no court or administrative hearing on whether withholding the amount pursuant to the federal formula would cause hardship. This revision was made because it is planned not to change the existing common necessities exception to the hardship exemption.

(3) The other revisions proposed by the staff in Memorandum 75-66 were approved.

After the recommended legislation was thus revised, the Commission solicited comments from representatives of the California Association of Collectors and the legal services officers who were present at the meeting. The representative of the California Association of Collectors indicated that the association favored the including of public employees under the continuing levy and certain other features of the recommended legislation but that the association had a number of objections to the recommended legislation:

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- (1) Object to 10-day delay before order goes into effect.
- (2) Object to monthly (rather than weekly) remittance by employers.
- (3) Object to \$1 charge permitted to be made by employer for each withholding.
- (4) Object to mail service provisions.

The representatives of the legal services officers indicated they would oppose the legislation unless, at a minimum, the withholding table formula (set out in the printed recommendation) were included in the bill recommended to the Legislature.

After some discussion, the Commission decided not to request that legislation on this subject to be introduced at the 1976 session. The Commission feels that, since there is opposition to the proposal from both representatives of creditors and representatives of debtors, it would not be a desirable use of Commission resources to again propose legislation in 1976 on this subject. Moreover, the view was expressed that the reform of the procedural aspects of wage garnishment without the reform in the withholding formula might preclude real reform in the withholding formula in the future. The procedural reforms the recommendation would make can be included in the overall reform of execution procedure.

STUDY 39.160 - REVISION OF ATTACHMENT LAW

The Commission considered Memorandum 75-67 concerning comments received on the Tentative Recommendation Relating to Revision of the Attachment Law and some comments of Mr. Edward P. Hill, of the Judicial Council, presented orally. The Commission approved the recommendation for printing except for the matters referred to the staff for additional study and subject to editorial changes.

Excessive attachment. The Commission directed the staff to devote further research to the problem of excessive attachment and present its conclusions at the next meeting. The Commission discussed the possibility of making explicit the duty of the court at the noticed hearing on issuance of the right to attach order and writ of attachment to prevent an excessive levy. A provision could also be added which would permit the defendant to seek the release of property levied upon by noticed motion on the grounds of an excessive levy. It was also suggested that the staff attempt to clarify the right of the defendant to counter-claim for abuse of process for an excessive levy.

§§ 482.100, 484.530, 485.230 - Expeditious procedure for claiming necessities exemption. The Commission approved the amendments of Sections 484.530 and 485.230 proposed on pages 2 and 3 of the memorandum.

§ 482.110 - Attachment for amount of attorney's fees. Subdivision (a) of Section 482.110 should read:

(a) The plaintiff's application for a writ of attachment pursuant to this title may include an estimate of the costs and where reasonable allowable attorney's fees ~~;-that-will-be-recoverable-in-the-action .~~

The Comment should state that "this section does not provide any authority for the award of costs or attorney's fees not otherwise made recoverable by contract or statute."

§ 483.010 - Cases in which attachment is authorized. The Comment to Section 483.010 should include a reference to Advance Transformer Co. v. Superior Court, 44 Cal. App.3d 127, 118 Cal. Rptr. 350 (1974), where the court construed the interim attachment statute "as limiting the attachment to situations in which the claim arises out of the defendant's conduct of his business."

§ 484.090 et cetera - Issuance of order and writ. In this section and wherever it is appropriate, the Attachment Law should provide that the court orders the issuance of a writ of attachment rather than the court issues the writ.

§ 486.090 - Effect of general assignment or bankruptcy on lien of temporary protective order. The Commission approved the principle of making clear that the lien of the temporary protective order expires when the defendant makes a general assignment for the benefit of creditors or proceedings for the judicial distribution of assets are commenced before the lien is perfected by the levy of the writ of attachment.

§ 489.220 - Undertaking in justice court. The Commission approved the provision for a \$500 undertaking in justice court.

§ 487.010 - Property subject to attachment. A statement should be added to the Comment to Section 487.010 to make clear that the fact that property is subject to attachment does not mean that it can be attached in the particular action without incurring abuse of process liability for an excessive attachment.

§ 488.520 - Execution of commercial paper by levying officer. Section 488.520 should be amended as follows to continue authority provided by existing law:

(a) When a check, draft, money order, or other order for the withdrawal of money from a banking corporation or association, the United States, any state, or any public entity within any state, payable to the defendant on demand, comes into the possession of a levying officer under a writ of attachment or execution, the officer shall promptly endorse and present it for payment.

§ 490.010 - Wrongful attachment. The Comment to this section should state that excessive attachment is a form of abuse of process.

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STUDY 39.220 - ENFORCEMENT OF JUDGMENTS

(REDEMPTION FROM EXECUTION SALES)

The Commission considered Memorandum 75-52 concerning redemption from execution sales and reviewed the staff draft of Sections 703.710-703.780. The statute will be redrafted to incorporate the following Commission decisions:

§ 703.710. Property subject to redemption. The Commission approved the substance of this section.

§ 703.720. Elimination of liens. The provision of existing Section 703 that the debtor is restored to his estate if he redeems should be added to this section. The section should make clear that a judgment creditor cannot rerecord his judgment and get a new judgment lien where his lien has been extinguished under this section. The staff should consider what happens to a lien equal in rank to that on which the property is sold. The word "subsequent" should not be used to refer to a subordinate lien.

§ 703.730. Persons entitled to redeem. The staff should consider what redemption rights a joint tenant of the judgment debtor should have.

§ 703.740. Notice of right of redemption; liability of officer. Subdivision (a) should provide for written notice to the debtor of the right of redemption. The staff should consider whether this notice might best be included on some form given the judgment debtor at some time in the proceedings. The penalty provision for the levying officer's failure to give the notice in subdivision (b) should be deleted. However, the staff should investigate whether a penalty is needed in some cases to make the word "shall" truly mandatory.

§ 703.750. Deposit of redemption price. The 90-day redemption period was approved. The staff should further consider what sort of evidence of his interest a successor in interest should be required to produce before he is permitted to redeem. It was suggested that a certified copy of the record of his interest should be sufficient.

§ 703.760. Issuance of deed of sale or certificate of redemption; tender of deposit. The staff should further research the problem of what happens to redemption money when its tender is refused under existing law. Under this section, if the tender is refused, the money should go to the county if it remains unclaimed. It should be specifically provided that tender is payment. Subdivision (c) will have to be revised in accordance with the revision of Section 703.770.

§ 703.770. Liability for additional sums. The Commission decided that the amounts due under this section (taxes, interest, insurance, et cetera) should be paid before the debtor or his successor in interest is permitted to redeem.

§ 703.780. Possession during redemption period; rents and profits; waste. In subdivision (a), the meaning of "rents of the property sold or the value of the use and occupation thereof" should be clarified. The bracketed language in subdivision (c) concerning actions not to be considered waste should be deleted. The determination of what is waste should depend on the facts of each case.

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STUDY 39.240 - ENFORCEMENT OF JUDGMENTS (THIRD PARTY CLAIMS)

The Commission began its consideration of Memorandum 75-69 concerning post-judgment third-party claims. The Commission discussed the general approach to be taken to deal in a constitutional and fair manner with the rights of third persons to property levied upon or sought to be levied upon. The Commission deferred detailed consideration of the staff draft of Sections 706.010-706.440 until a later meeting.

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STUDY 47 - ORAL MODIFICATION OF CONTRACTS

The Commission considered Memorandum 75-62 and the printed recommendation attached thereto. The Commission, taking into account its experience on the legislation submitted to the 1975 session, directed the staff to prepare a draft of a recommendation for the November meeting. The draft should be based on the Commercial Code approach to the problem: A contract in writing may be modified by an oral agreement supported by new consideration but the requirements of the statute of frauds must be satisfied if the contract as modified is within its provisions. The parties may insert in the original contract a requirement that any modification be in writing. The above provisions would be substituted for subdivision (c) of the section set out on page 311 of the Commission's original recommendation.

STUDY 52.80 - UNDERTAKINGS FOR COSTS

The Commission considered Memorandum 75-74 and the attached staff draft of a tentative recommendation relating to undertakings for costs and expenses. The Commission made the following decisions:

1. The recommendation should reflect that the Commission does not necessarily endorse the policy underlying the undertaking requirement, and that the Commission expresses no view concerning the kinds of cases in which an undertaking should be required.

2. Where the purpose of the undertaking is to deter frivolous litigation, the undertaking should be limited to cases in which there is "no reasonable possibility" that the plaintiff will prevail, rather than the "no reasonable probability" standard recommended by the staff.

3. Initially, the burden of producing evidence to show that there is no reasonable possibility that the plaintiff will prevail in the action should be on the moving defendant, and not on the plaintiff.

4. The staff should review the question of whether the defendant's right to move for an undertaking should be cut off prior to trial in view of some Commission sentiment in favor of such a provision.

The Commission suggested several other minor drafting changes, and directed the staff to present a revised draft of a tentative recommendation to the Commission at its November meeting.

STUDY 63.50 - ADMISSIBILITY OF BUSINESS RECORDS

The Commission considered Memorandum 75-64 and the attached recommendation submitted to the 1975 Legislature.

The Commission considered the staff proposal set out in the memorandum. After considerable discussion, the Commission requested that the staff prepare a revised draft of the recommendation for the November meeting.

The draft section set out on pages 2 and 3 of the memorandum was revised to read substantially as follows:

1562. (a) The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of producing evidence.

(b) If the requirements of subdivision (c) are satisfied, the copy of the records is not made inadmissible by the hearsay rule when offered to prove an act, condition, or event recorded unless (1) a genuine question is raised as to whether the record accurately records the act, condition, or event or (2) in the circumstances it would be unfair to admit the copy without requiring the personal attendance of the custodian or other qualified witness.

(c) The party offering the copy of the records as evidence served on each party, not less than 30 days prior to the date of the trial or other hearing at which the copy of the records is offered, a notice that a copy of the records described in the subpoena duces tecum have been subpoenaed for the trial or other hearing pursuant to Article 4 (commencing with Section 1560) of Chapter 2 of Division 11 of the Evidence Code, together with a copy of the subpoena duces tecum served upon the custodian of records or other qualified witness for the production of the copy.

The Commission concluded that the recommendation also should deal with two procedural problems under existing law:

(1) Under existing law, a copy of a business record subpoenaed during discovery proceedings must again be subpoenaed for the trial. A procedure should be provided that would permit use at the trial of the copy of the business record obtained during discovery.

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(2) Under existing law, the copy of the business record comes to the clerk, judge, or other person pursuant to Section 1560 in a sealed envelope and, unless the parties otherwise agree, the copy is to be retained in the sealed envelope to be opened only at the time of the trial or other hearing. Some fairly simple procedure should be provided whereby the parties can obtain a copy of, or examine, the record in the sealed envelope prior to the trial or other hearing.

The proposed section set out on page 3 of the memorandum was discussed and the requirement of good cause was eliminated, and it was suggested that the section be drafted with a view to the fact that court rules might be adopted to provide the procedure for examination of the record in the sealed envelope. However, the section itself was not approved and the staff is to give further consideration to a procedure that will permit the parties to examine or obtain copies of the records provided to the court in the sealed envelope.

The Commission also suggested that consideration be given to the situation where a custodian is examined at the time of discovery concerning the mode of preparation and related matters and the copy of the records is to be offered at the trial without the presence of the custodian at the time of trial.

STUDY 63.60 - ADMISSIBILITY OF DUPLICATES

The Commission considered Memorandum 75-63 and the attached tentative recommendation which had been distributed for comment to interested persons and organizations.

The following actions were taken:

(1) The following sentence was added to the text of the Comment: A counter-part produced by an electrostatic method of reproducing the writing would qualify as a duplicate since it is produced by an "equivalent technique which accurately reproduces the writing itself."

(2) The following was added to the text of the Comment: The fact that the duplicate was prepared for litigation does not prevent its admission under Section 1500.5. Compare Dugar v. Happy Tiger Records, Inc., 41 Cal. App.3d 811, 816-817, 116 Cal. Rptr. 412, ___-___.

(3) The following was added to the text of the Comment: If the original is in color (such as a multi-colored document, colored photograph, or color movie), the duplicate must be in the same colors as the original when the coloring of the original is relevant in view of the purpose for which the duplicate is to be received in evidence.

(4) The paragraph beginning at the bottom of page 3 of the tentative recommendation was revised to read:

Under subdivision (b), duplicates will not be admitted into evidence if either a genuine question is raised as to the authenticity of the writing itself or in the circumstances admission of the duplicate would be unfair. The courts should be liberal in finding that a "genuine question is raised as to the authenticity of the writing itself." See the statement to this effect in the Comment to Federal Rule of Evidence 1003 in the House Report, Report No. 93-650, accompanying H.R. 5463, 93d Cong. 1st Sess., Nov. 15, 1973. For example, if a party opposing admission of a duplicate makes a good faith claim that the writing from which the duplicate has been made is not authentic and it would be impractical or more difficult to determine the authenticity of the writing itself from the duplicate, the court should require that the original be produced for examination (see Section 1510) before permitting the duplicate to be introduced in evidence.

(5) The Commission rejected the suggestion that there be a pretrial filing of the duplicate and that failure to object to the admission of the duplicate within a specified period prior to trial would be a waiver of the right to object at the trial. The Commission's experience with a similar requirement in its bill relating to the admissibility of business records in evidence indicates that the Legislature would not approve such a provision since it can result in an inadvertent waiver of the right to object.

(6) The following was added to the text of the Comment in the portion discussing the authentication requirement:

Thus, if the duplicate is a duplicate of a copy of the writing itself, the person offering the duplicate in evidence must make a sufficient preliminary showing of the authenticity of the duplicate, the copy of which it is a counterpart, and the original writing itself. See Section 1401 and Comment thereto.

(7) The staff is to make a report on whether a duplicate of a certified copy of a public record would be admissible. The general feeling of the Commission was that the duplicate of a certified copy should be admissible and that to permit this under the conditions specified in the rule concerning the exception to the best evidence rule for duplicates would permit savings in costs and not prejudice the opposing party.

(8) The following was added to the discussion of authentication in the Comment: Nothing in Section 1500.5 relieves the person offering the duplicate in evidence from the burden (see Section 1402) of explaining and justifying any post-occurrence entries, corrections, changes, alterations, or modifications in the writing itself or in the copy of the writing itself from which the duplicate was made.

As thus revised, the recommendation was approved for printing and submission to the 1976 session except that the staff is to prepare a memorandum for the

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November meeting containing the staff suggestions for revisions to permit admission of a duplicate of a certified copy of a public record. After the Commission has determined the nature of the revisions that should be made, the approved recommendation is to be revised accordingly.

STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 75-61, the attached Staff Draft of a recommendation, and the First Supplement to Memorandum 75-61.

The Commission approved the general approach of the staff draft. The following matters were noted for review and revision by the staff in preparing a revised draft of the recommendation for the November meeting:

(1) The Commission was unwilling to permit the more liberal liquidated damages statute to apply where the parties are in a substantially unequal bargaining position even though the party against whom the provision is to be applied was represented by a lawyer at the time the contract was made. The Commission rejected the suggestion that the unequal bargaining position exception not apply where the parties are represented by lawyers. This suggestion, made in the First Supplement to Memorandum 75-61, raises many problems as, for example, where the contracting party is himself a lawyer and places an unrealistic burden on the lawyers. The feeling was that the provision might create more litigation than it would save. Moreover, the strong opposition expressed at the meeting to eliminating the inequality of bargaining position exception where the parties have lawyers was believed to be a good indication that the Legislature would not approve a bill with such a provision. The Comment should indicate that whether a person is represented by a lawyer is a factor to consider in determining whether the parties are in a substantially equal bargaining position.

(2) The introductory portion of Section 1672 ("Notwithstanding Sections 1670 and 1671") should be reviewed with a view to eliminating this clause if possible. Perhaps Section 1671 should be amended to add an "except as otherwise provided by statute" clause.

(3) The suggestion for defining the standard of "reasonableness" made by Mr. Agay in the First Supplement was not adopted.

(4) Subdivision (a) of Section 1672 should be revised to make the section not applicable to the contracts therein described so that the court is not to apply the more liberal liquidated damage provision to a contract that is a consumer transaction even though the consumer does not raise this defense. This would be important in a default case.

(5) The Comment to Section 1672 should list whether the parties are represented by lawyers at the time the contract was made as one of the factors relevant to determining whether the liquidated damages provision is reasonable. The Comment also should include a reference to the difficulty of proving causation and foreseeability.

(6) The substance of subdivisions (b) and (c) of Section 1673 as set out on page 3 of the First Supplement to Memorandum 75-61 was approved. However, it should be made clear that the separate signing requirement applies to subdivision (b) as well as subdivision (a).

(7) It was suggested that the separate signing requirement be stated in one section and the rules concerning the amount of liquidated damages that is valid should be stated in a separate section or sections.

(8) Something should be included in the Comment to indicate that Sections 1673 and 1674 do not deal with the validity of a liquidated damages provision liquidating the damages if the seller fails to perform. The validity of such a provision is to be determined under the general standards for liquidated damages.

(9) In the case of a deposit actually made on the sale of a single family residential unit, the deposit is presumed to be valid as liquidated damages to the extent that it does not exceed five percent. To the extent that the deposit

actually made exceeds five percent, the amount in excess is valid only if the seller establishes that it is reasonable.

(10) There should be a minimum type size for the liquidated damages provision in a printed real estate sale contract. Examples of such provisions are AB 864, Commercial Code warranty limitation provisions, and other statutes.

(11) There should be a requirement that there be a separate signing each time an additional deposit is made. Subsequent payments would not be covered by a liquidated damages provision unless there is a separate signing of the liquidated damages clause for each subsequent payment.

(12) The word "payment" should be used instead of the word "deposit."

(13) The single family residential unit should include a unit with not more than four dwelling units, one of which is to be occupied by the buyer.

(14) The liquidated damages clause should not affect the right of either the buyer or seller to compel specific performance. The statute should include a provision that nothing in the statute affects the right of the buyer or seller to obtain specific performance of the contract, that the inclusion of a liquidated damages clause in the contract does not itself affect the right of specific performance, but the contract may contain a clause that expressly waives the right of specific performance and makes damages the sole remedy.

STUDY 81 - TRANSFER OF OUT-OF-STATE TRUSTS TO CALIFORNIA

The Commission considered Memorandum 75-65 and the attached draft of a recommendation. The recommendation was approved for printing and submission to the 1976 Legislature after the following changes were made:

- (1) Section 1139.11 was revised to read:

§ 1139.11. Transfer of place of administration or assets to California

1139.11. Subject to the limitations and requirements of this article, an order may be made by the superior court accepting the transfer of the place of administration of a trust from another jurisdiction to this state or the transfer of some or all of the assets of a trust to a trustee in this state.

- (2) Subdivision (b) of Section 1139.15 was deleted.

APPROVED

Date

Chairman

Executive Secretary