

October 30, 1975

Time

Place

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

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

November 6 and 7, 1975

1. Minutes of October 9-11, 1975, Meeting (sent 10/22/75)
2. Study 65 - Inverse Condemnation (Claims Presentation Requirement)
Memorandum 75-83 (to be sent)
Staff Draft of Recommendation (attached to Memorandum)
3. Study 52.80 - Undertakings for Costs
Memorandum 75-74 (sent 9/29/75; another copy enclosed)
(sent 10/22/75)
First Supplement to Memorandum 75-74 (to be sent)
Revised Staff Draft of Recommendation (attached to Supplement)
Second Supplement to Memorandum 75-74
4. Study 72 - Liquidated Damages
Memorandum 75-77 (to be sent)
Staff Draft of Recommendation (attached to Memorandum)
5. Study 47 - Oral Modification of Contracts
Memorandum 75-78 (sent 10/25/75)
Staff Draft of Recommendation (attached to Memorandum)
6. Study 63.60 - Admissibility of Duplicates
Memorandum 75-79 (sent 10/25/75)
7. Study 23 - Partition
Memorandum 75-81 (sent 10/28/75)
8. Study 39.160 - Revision of Attachment Law
Memorandum 75-82 (enclosed)
First Supplement to Memorandum 75-82

Special Order of
Business - 9:00 a.m.
November 7

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9. Study 77.30 - Nonprofit Corporations

Special Order
of Business
1:30 p.m.
November 7

Subcommittee of State Bar Committee

Memorandum 75-80 (enclosed

Organization--Business Activities

Memorandum 75-57 (sent 10/22/75)

10. Administrative Matters

Annual Report

Memorandum 75-75 (sent 10/28/75)

Draft of Annual Report (attached to Memorandum)

Eminent Domain Publication

Memorandum 75-84 (enclosed)

Draft of Preliminary Portion (attached to Memorandum)

November 3, 1975

1975 LEGISLATIVE PROGRAM

CALIFORNIA LAW REVISION COMMISSION

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 584, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
AB 125 (Chapter 581, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
AB 126 (Chapter 585, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
AB 127 (Chapter 1176, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
AB 128 (Chapter 582, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
AB 129 (Chapter 586, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
AB 130 (Chapter 587, Statutes of 1975) - Eminent Domain--Conforming Amendments--Special District Statutes
AB 131 (Chapter 1276, 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 1239, Statutes of 1975) - Conforming Changes--State Agency Condemnation
AB 278 (Chapter 1240, 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

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

NOVEMBER 6 AND 7, 1975

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on November 6 and 7, 1975.

Present: Marc Sandstrom, Chairman
John N. McLaurin, Vice Chairman
John D. Miller
Thomas E. Stanton, Jr.,
Howard R. Williams, November 7

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

Commission Consultants Present:

G. Gervaise Davis III (nonprofit corporations), November 7
Garrett H. Elmore (partition), November 7
Professor Stefan A. Riesenfeld (creditors' remedies), November 6

The following persons were present as observers on days indicated:

November 6

Ronald P. Denitz, Tishman Realty & Const. Co., Los Angeles
Norval Fairman, Dept. of Transportation, San Francisco
M. Reed Hunter, Goldstein, Barceloux & Goldstein, San Francisco

November 7

Virgil P. Anderson, California State Auto Ass'n, Sacramento
Norval Fairman, Dept. of Transportation, San Francisco
Wells A. Hutchins, California State Auto Ass'n, San Francisco
Carl Leonard, California State Auto Ass'n, San Francisco
Janis M. McDonald, Wells Fargo Bank, Legal Dept., San Francisco
James P. Molinelli, California State Auto Ass'n, San Francisco
Robert H. Nida, Auto Club Southern California, Los Angeles
Carl M. Olsen, County Clerk, San Francisco
R. U. Robison, Auto Club Southern California, Los Angeles

ADMINISTRATIVE MATTERS

Minutes of October 9-11, 1975 Meeting

The Minutes of the October 9-11, 1975, Meeting, were approved with subdivision (c) of Evidence Code Section 1562 (page 22) corrected to read as follows:

(c) The copy of the records is admissible under subdivision (b) only if the party offering the copy of the records as evidence establishes that he 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.

Annual Report

The Commission considered Memorandum 75-75 and the attached draft of the Annual Report. The Commission approved the report for printing, subject to editorial changes by Commission and staff, with the following revisions:

Letter of transmittal. The letter of transmittal should acknowledge the efforts of the legislative members of the Commission. The last sentence of the letter referring to membership of the Commission should be deleted. It should be replaced by a summary of the work of the Commission, which the Chairman undertook to write.

Introduction. The third paragraph of the introduction should be revised to read:

The Commission assists the Legislature in keeping the law up to date by:

- (1) Intensively studying complex and controversial subjects.
- (2) Identifying major policy questions for legislative attention.
- (3) Gathering the views of interested persons and organizations.

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(4) Drafting recommended legislation for legislative consideration.

The efforts of the Commission permit the Legislature to determine significant policy questions rather than to concern itself with the technical problems . . . (remainder unchanged).

Summary of work of Commission. The summary should be printed on grey and placed immediately after the title page.

STUDY 23 - PARTITION OF REAL AND PERSONAL PROPERTY

The Commission considered Memorandum 75-81 relating to findings and appeals in partition actions. The Commission determined not to propose general provisions on findings and appeals. The Commission decided to amend the partition statute to incorporate the following technical amendments:

872.310. (b) Service on persons named as parties pursuant to Sections 872.530(b) and 872.550, and on other persons named as unknown defendants, shall be by publication pursuant to Section 415.50.

873.290. (a) Any party, upon notice to the other parties who have appeared, may move the court to confirm, modify, or set aside the report.

(b) At the hearing, the court may either confirm or modify the report and enter judgment of partition accordingly, or it may set aside the report and order preparation of a new report and, if necessary, appoint a new referee for this purpose.

(c) The division is effective and title vests in accordance therewith upon entry of judgment of confirmation partition.

873.960. At the hearing, the court shall examine the report and witnesses. If the court ~~finds~~ determines that the proceedings have been regularly conducted, that transfer of title to the interests may regularly be made, and that no facts appear which would make such transfer inequitable, it shall confirm the report and order the interests transferred to the acquiring parties in proportion to their respective interests, or in such other proportion as is set out in the agreement. The ~~court order is-contingent~~ shall be conditioned upon payment of the amounts fixed as the purchase price and any other amounts required by the agreement, the giving of any required security, and payment by the parties of the expense of the proceeding authorized by this chapter and of the general costs of the-action partition or an appropriate share thereof. Thereafter the court, upon motion of a party to the agreement, or of the referee, upon not less than 10 days' notice of motion to the parties who have appeared, shall determine whether the conditions have been fulfilled and, if so, shall enter a judgment confirming the transfer; otherwise, upon such further proceedings as may be ordered, the action or proceeding shall be ordered terminated.

874.010. The costs of partition include:

* * * * *

(e) Other disbursements or expenses ~~found~~ determined by the court to have been incurred or paid for the common benefit.

~~874.240. As used in this chapter, "judgment" includes a court order of conveyance or transfer of the property pursuant to Section 873.750 or Section 873.960. A conveyance or transfer pursuant to Sections 873.650 and 873.790 or Section 873.960 shall be binding and conclusive, in the same manner as a judgment.~~

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STUDY 36 - EMINENT DOMAIN (PUBLICATION OF EMINENT DOMAIN BOOKLET)

The Commission considered Memorandum 75-84 and the attached draft of the preliminary portion of the eminent domain booklet that the Commission is to publish in cooperation with the Continuing Education of the Bar. The Commission determined that the publication should have an index. The preliminary portion should be revised to reflect more precisely whether the changes from the Commission's original recommendation were initiated by the Commission or were made by the Legislature; it should also give some indication of the effect of the change. Thus, on page 1634, the discussion of open space should indicate that, during the legislative process, the Commission recommended the change, and the result is that existing law is continued. On page 1643a, the reference to "two important changes" should be changed to "two significant changes."

STUDY 39.160 - REVISION OF ATTACHMENT LAW

The Commission considered Memorandum 75-82, and the First Supplement thereto, concerning several matters in the Attachment Law referred to the staff for additional study at the October meeting. The Commission had approved the Recommendation Relating to Revision of the Attachment Law for printing at the October meeting except for the matters discussed in Memorandum 75-82 and the First Supplement thereto.

At the November meeting, the Commission gave its final approval of the recommendation for printing and submission to the Legislature subject to the following decisions and editorial suggestions:

§ 482.120. Determination of order of levy; order restricting attachment. Section 482.120 as set forth in the First Supplement was adopted after it was revised to read as follows:

482.120. If the court determines at the hearing on issuance of a writ of attachment under this title that the value of the defendant's interest in the property described in the plaintiff's application clearly exceeds the amount ~~reasonably-sufficient~~ necessary to satisfy the amount to be secured by the attachment, the court may direct the order of levy on the property described in the writ or restrict the amount of the property to be levied upon.

§ 484.090. Issuance of writ and order. The introductory clause of subdivision (a) of Section 484.090 was revised to read as follows:

484.090. (a) At the hearing, the court shall consider the showing made by the parties appearing and shall issue a right to attach order, which shall state the amount to be secured by the attachment, if it finds

In addition, the Commission approved the deletion of the last sentence of subdivision (b) providing for the contents of the writ of attachment.

(The substance of this sentence will be continued in Section 488.010.)

Similar amendments would be made in Sections 484.370, 484.520, 485.220, 485.540, 492.030, and 492.090.

§ 486.090. Temporary protective order lien. The Commission decided not to add subdivision (c) to Section 486.090 which would have provided that the temporary protective order expires when the defendant makes a general assignment for the benefit of creditors or where proceedings for the liquidation or rehabilitation of an insolvent defendant's estate are commenced before the lien of the temporary protective order is perfected. The Commission noted that general assignments may prefer some creditors over others and that the Bankruptcy Act, the National Bank Act, and the state laws concerning liquidation, conservatorship, reorganization, and dissolution of banks void attachments. Furthermore, it was noted that Section 486.050 permitted the temporary protective order to prohibit any transfer by the defendant (with certain exceptions) which would preclude a general assignment.

§ 488.010. Contents of writ of attachment. The proposed amendment of subdivision (a) of Section 488.010 set forth on page 3 of the First Supplement (requiring that the amount to be secured by the attachment and a description of the property to be levied upon be stated in the writ) was approved.

§ 488.555. Release of excessive attachment on noticed motion. Subdivision (a) of Section 488.555, as set forth on page 3 of the First Supplement, was approved after it was revised to read as follows:

488.555. (a) The defendant may apply by noticed motion to the court in which the action is pending for an order releasing the attachment of property to the extent that the value of the defendant's interest in the property clearly exceeds the amount ~~reasonably-sufficient~~ necessary to satisfy the amount to be secured by the attachment.

The Comment should be revised accordingly. The word "duty" should be deleted from the cross-reference to Section 488.030 in the Comment to Section 488.555

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and in the Comment to Section 488.030. The Comment to Section 488.555 should state that the defendant may counterclaim in the plaintiff's action for damages for abuse of process arising from an excessive attachment. A question was raised concerning whether the release order would be appealable and whether the Attachment Law should make clear that the levying officer is not liable for releasing the property pursuant to a court order. If any amendment is needed to remedy this situation, it will be made after the bill is introduced.

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STUDY 47.400 - ORAL MODIFICATION OF CONTRACTS

The Commission considered Memorandum 75-78 and the attached staff draft of the Recommendation Relating to Oral Modification of Contracts. The Commission approved the recommendation for printing and submission to the Legislature subject to the following changes and editorial revisions:

The last sentence of the letter of transmittal should state that the earlier recommendation has been reviewed in light of suggestions rather than objections made concerning it.

The preliminary part should give an example of a situation where the contract as modified is within the Statute of Frauds. The preliminary part should also state that, under the recommended section, a wholly executory modification would be enforceable so long as it is not forbidden by a contract provision or the Statute of Frauds.

Subdivision (c) of Section 1698 should be revised as follows:

(c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration . ~~but the~~ The statute of frauds (Civil Code Section 1624) must be satisfied if the contract as modified is within its provisions.

STUDY 52.80 - UNDERTAKINGS FOR COSTS

The Commission considered the First Supplement to Memorandum 75-74 and the revised staff draft of a tentative recommendation relating to undertakings for costs and attorney's fees. The Commission made the following decisions and approved the recommendation for printing as thus revised:

1. The time limit for making the motion for an undertaking should not be generalized, and the time limit in each existing statute should be preserved.
2. The "no reasonable probability" standard should be preserved in the only statute where it now appears (see Code Civ. Proc. §§ 391.1, 391.3, re vexatious litigant); the "no reasonable possibility" standard should be used in all others.
3. Delete the requirement that the defendant make a "showing" in support of his motion; require the defendant merely to support his motion by an affidavit and with points and authorities.
4. Include a provision imposing sanctions on a party or his attorney who makes or resists a motion for an undertaking in bad faith.
5. Retain the language now contained in Code of Civil Procedure Sections 1029.5 and 1029.6, requiring the defendant to show that the undertaking if required would not impose an "undue economic hardship" on the plaintiff, but do not generalize such language. Include in the Comment to the appropriate section or sections (see proposed Code Civ. Proc. §§ 1040.20, 1040.25), in addition to the case of Conover v. Hall, 11 Cal.3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974)(common-law authority to dispense with undertaking for poor litigant), the case of Boddie v. Connecticut, 401 U.S. 371 (1971) (constitutionally required waiver of filing fee for poor litigant in certain favored actions, e.g., divorce action). Do not codify Conover v. Hall, supra.

6. Add a section to the proposed statute providing that "An order granting or denying a motion for an undertaking under this chapter is not appealable."

7. Revise proposed Code of Civil Procedure Section 1040.25 to make the amount of the undertaking equal to the defendant's probable allowable costs and attorney's fees, not one and one-half times that sum. Change paragraph (5) on page 6 of the preliminary part accordingly.

8. Rewrite proposed Code of Civil Procedure Section 1040.05(b) to read, as recommended by the staff, that: "No undertaking to secure an award of costs or attorney's fees may be required in any action or proceeding referred to in subdivision (a) which is commenced in a small claims court."

9. Amplify the disclaimer on pages 5-6 of the preliminary part (Commission "does not necessarily endorse the policy underlying the undertaking requirement. . . .") to indicate that the Commission has not reexamined the soundness of the policy underlying each cost bond statute, nor has the Commission considered whether there may be other and better ways to deter frivolous litigation.

10. Add to footnote 32 on page 6 of the preliminary part a statement that, since a statutory offer to compromise may not be given in evidence at trial under Section 998(b) of the Code of Civil Procedure and Section 1152 of the Evidence Code, it has no bearing on the question of whether an undertaking should be required.

11. Indicate in a Comment that the hearing on a motion for an undertaking shall be conducted in accordance with usual motion practice.

The Commission further authorized the recommendation as approved be submitted to the Legislature forthwith, and to be circulated for comment after it is in bill form.

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STUDY 63.60 - ADMISSIBILITY OF DUPLICATES

The Commission considered Memorandum 75-79 and the attached draft of a Recommendation Relating to Admissibility of Duplicates. The draft was approved for printing after the following revisions and any other necessary editorial revisions have been made:

Letter of Transmittal

A sentence should be added to the second paragraph to state in substance that the recommended legislation would improve trial procedures.

Page 1 of Recommendation

In the last line, "electrostatic" was substituted for "xeroxed."

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STUDY 65.70 - INVERSE CONDEMNATION (CLAIMS
PRESENTATION REQUIREMENT)

The Commission discussed the recommendation submitted by Professor Kanner relating to repeal of the claims statute in inverse condemnation cases. Because some of the Commissioners had not received the recommendation prior to the meeting, or had not had sufficient time to review it, the Commission determined not to consider the recommendation in detail at this time.

The Commission heard a presentation on this subject by Mr. Reed Hunter of Goldstein, Barceloux and Goldstein. His presentation is summarized in edited form below.

These are generally the views of that part of the bar who represent property owners. This is an area of great concern to us for a number of reasons:

(1) The claims statute is a substantive limitation on a constitutional right. The claims statute, in effect, sets up a de facto statute of limitations. If you do not present the claim within the claims period, you are barred in the same way you would be if the statute of limitations period itself went by. The claims statute thus substantively limits a right which is created both in the federal and state Constitutions. There are a couple of federal cases involving the California claims statute which deal with this. Willis v. Reddin (9th Cir. 1969) 418 F.2d 702, and a very recent case. Both of these cases hold that the claims statute cannot be required as a condition precedent to a property owner's constitutional right under the Fifth and Fourteenth Amendments of the federal Constitution, which, of course, is the counterpart to our Article I, Section 19. The rationale of the cases is essentially as follows-- I'll read you one sentence from the opinion-- "The State of California may not require compliance with the Government Code Section 905.2 as a precondition to an inverse condemnation suit whereby plaintiff seeks to vindicate a federally created right because of the fact that the impact is substantive and not procedural." Now carried over into the state constitutional provision, this has a dual impact. First of all, most of the time, at least where represented by the sophisticated offices, plaintiffs will assert their rights simultaneously under the federal and the state constitutional provisions. So, even if they are in state courts, they will be asserting a federal right and, under the federal cases, the claims statute cannot defeat that right. Second, the logic which underlies the decisions construing the federal right is equally applicable obviously to the state right itself, if the state right is a constitutional right. If the claims statute substantively limits the state constitutional right, then the same reasoning that the federal courts went through would suggest that the defense of the claims presentation requirement would not be recognized.

(2) The claims statute creates serious inequities. The Law Revision Commission found in its 1969 study, 9 Cal. L. Revision Comm'n Reports 55, that many entities deny claims out of hand as a matter of policy. That is true with virtually every entity. I do not know anyone who has ever had an inverse condemnation claim granted. Michael Berger, of Professor Kanner's old law firm, wrote an article a couple of years ago in a law review (I would be happy to get a cite for you if you would like); he said that his office had never heard of an inverse condemnation claim being granted. I have asked the major offices in this state who do a lot of this work what their experience has been and none have heard of an inverse condemnation claim being granted. Larger entities who self-insure occasionally do grant claims, but these are mostly property damage claims. The net effect is that the claims statute does not serve its purported purposes; it merely provides a procedural trap that may operate to defeat an otherwise meritorious cause of action.

(3) The claims statute is of dubious constitutionality.

(4) The claims statute is an anachronistic remnant of sovereign immunity.

Mr. Norval Fairman, representing the State Department of Transportation, stated that the public entities are subject to types of claims and bases of liability not normally encountered in private civil litigation and that the need for a claims statute is great, particularly in cases involving Klopping type damages.

The staff noted that inverse condemnation cases were of a different type than others in that attorney's fees may be awarded in some situations and that perhaps a notice of intent to sue in inverse condemnation might be made a precondition of the award of attorney's fees. The staff also suggested that a statute might make clear that damages accruing within the period not barred by the statute of limitations be included in the recovery.

The Commission determined that a broader study of these inverse condemnation problems is necessary. In particular, the study should include a discussion of the accrual of cause of action problem raised by Professor Kanner, in the context of the statute of limitations. The Commission suggested that a consultant might be retained for this project, possibly Professor Kanner.

STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 75-77 and the staff draft of the Recommendation Relating to Liquidated Damages attached thereto. The Commission also considered an alternate draft of the general provisions and a letter from Mr. Ronald P. Denitz, Assistant General Counsel, Tishman Realty & Construction Co., distributed at the meeting. (Exhibits I and II, respectively, attached hereto.) The Commission made the following decisions:

§§ 1670-1673. General provisions governing liquidated damages. In an effort to complete work on this recommendation so that it may be introduced during the 1976 legislative session, the staff should send its redraft of the general liquidated damages provisions to the members of the Commission for their approval before sending the material to the printer. If any member of the Commission wishes to have the matter deferred for discussion at the January meeting, the recommendation will be submitted in 1977 rather than 1976. If the recommendation is submitted in 1976, the Commission will give further consideration to the recommendation before the proposed legislation is set for hearing.

The general provisions governing the validity of liquidated damages provisions should be redrafted to keep the wording of existing Sections 1670 and 1671. No substantive change would be made with respect to the cases that would be governed by these sections. The statute should not attempt to codify the rule developed by the courts that the provision must reflect a reasonable endeavor by the parties to estimate actual damages.

It was suggested that the general provisions be drafted substantially as follows:

SEC. __. Section 1670 of the Civil Code is repealed.

SEC. __. Section 1670 is added to the Civil Code, to read:

1670. This chapter does not apply where the validity of a provision in a contract liquidating the damages for breach of the contract is determined by another statute expressly applicable to the contract.

SEC. __. Section 1671 of the Civil Code is amended to read:

1671. (a) A provision in a contract liquidating the damages for breach of the contract is valid except in any of the following cases:

(1) Where the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.

(2) Where the party from whom the liquidated damages are sought to be recovered establishes that he was in a substantially inferior bargaining position at the time the contract was made.

(3) Where liquidated damages are sought to be recovered from a party to a contract for the retail purchase by such party of goods, personal property, or services, primarily for his personal, family, or household purposes.

(b) In the cases described in paragraphs (2) and (3) of subdivision (a), every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except that ~~the~~ the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

Heading for Chapter 2. The word "Buyer's" should be deleted from the heading for Chapter 2 so that it reads "Default on real property purchase contract."

§ 1677. Liquidated damages provision in contract for sale of real property.

The staff should check to see if there is a commonly accepted definition of "bold type" as that term is used in subdivision (b).

§ 1680. Right to obtain specific performance. The last sentence of this section should be deleted. The Comment should cite People v. Ocean Shore R.R. Co., 90 Cal. App.2d 464, 203 P.2d 579 (1949).

Repeal Section 1670.

Enact Section 1671 as read:

1671. (a) Except where the validity of the liquidated damages provision is determined by another statute expressly applicable to the contract, a provision in a contract liquidating the damages for breach of the contract is valid only if it satisfies the requirements of either subdivision (b) or (c).

(b) A provision in a contract liquidating the damages for breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made. This subdivision does not apply in either of the following cases:

(1) Where the party from whom the liquidated damages are sought to be recovered establishes that he was in a substantially inferior bargaining position at the time the contract was made.

(2) Where the liquidated damages are sought to be recovered from a party to a contract for the retail purchase by such party of goods, property, or services primarily for his personal, family, or household purposes.

(c) A provision in a contract liquidating the damages for breach of the contract is valid when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage and the liquidated damages provided in the contract reflect a reasonable endeavor to estimate actual damages.



Fishman Realty & Construction Co. Inc.

WEST COAST HEADQUARTERS
10960 WILSHIRE BOULEVARD, LOS ANGELES, CALIFORNIA 90024
B-E CONTRACTOR'S LICENSE NO. 170730

November 7, 1975

HAND DELIVERED

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

Re: Study 72 - Liquidated Damages -
San Francisco Meeting -
November 7, 1975

Dear John:

With-reference to Memorandum 75-77 in the captioned matter, I have reviewed the proposed revised Staff Draft of Recommendation and, first, compliment the Staff on its excellent organization of the revised material. However, enclosed is a marked up copy showing my proposed changes which, as matters of substance, can be summarized as follows:

- (a) Section 1672: make clear that the "property" to which Section 1672 does not apply is personal property (because Sub-section "B" of Section 1676 seems to infer that real property could possibly be excluded from Section 1672 if it is "consumer" in nature).
- (b) Title of Chapter 2: because this new Chapter contains Sections 1679 (alluding to liquidated damages other than upon the Buyer's default) and 1680 (affirming the right of Buyer as well as Seller to obtain Specific Performance), the title of Chapter 2 should merely be "Default on Real Property Purchase Contract".
- (c) Section 1676: the first clause should, for technical reasons, read "Except for residential property covered by Section 1675 . . .".
- (d) Section 1679: this Section should directly, rather than indirectly, state outright that the validity of a provision liquidating the damages to the Buyer, if the Seller fails to sell the property, is determined under Section 1672 or, where not applicable, Section 1671.

Tishman Realty & Construction Co., Inc.

John H. DeMouilly, Esq.

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Although my attached proposed modifications do not so state, I would prefer that the stated distinction between Section 1671 (the old present strict requirement) and 1672 (the new proposed liberal rule where parties have relatively equal bargaining positions) be reversed in Sub-section "(b)" of Section 1676 and Section 1679 to affirmatively provide that the validity of a liquidated damages provision" . . . is determined under Section 1672 or, when the contract is not covered by such Section, under Section 1671".

With many thanks for the opportunity to present these views tonight in person, I am

Cordially,



RONALD P. DENITZ
Assistant General Counsel

RPD:dmg
Enclosure

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STUDY 77 - NONPROFIT CORPORATIONS (BASIC APPROACH)

The Commission considered the portion of Memorandum 75-57 relating to the basic approach to the nonprofit corporations study and Memorandum 75-80 relating to the State Bar Subcommittee on Nonprofit Corporations. The Commission approved the general accelerated approach to the study proposed by the staff, which will include involvement of the State Bar Subcommittee during the developmental stages of the recommendation. The Commission also welcomed the participation of other interested groups, including the automobile clubs represented at the meeting.

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STUDY 77.20 - NONPROFIT CORPORATIONS (ORGANIZATION--
BUSINESS ACTIVITIES)

The Commission considered the portion of Memorandum 75-57 relating to profit-making activities by nonprofit corporations. The Commission requested that the staff provide a rough general outline of the nonprofit corporation law so that it will be able to review the problems and sections in context. The Commission also requested that the staff give an illustrative listing of the types of nonprofit corporations that might incorporate under the general nonprofit corporation law. In this connection, the staff should collect the various statutes in the Corporations Code and other codes relating to special types of nonprofit corporations such as the Motor Club Act in the Insurance Code; the Commission will review these statutes during the course of its study.

The Commission reviewed the draft provisions attached to Memorandum 75-57, making the following tentative determinations:

§ 5210. Purposes

The portion of this section providing that a nonprofit corporation may be formed for any lawful purposes "which do not contemplate" the distribution of profits to members should be revised to refer to any lawful purpose "other than" the distribution of profits. The Comment should cross-refer to the requirement of a statement in the articles precluding such distributions. The Comment might also refer to any special statutes placing limits on particular types of nonprofit corporations.

§ 5235. Power to engage in business activity

This section was revised to read:

5235. (a) Subject to any limitations contained in the articles and applicable laws, a nonprofit corporation may engage in business activity.

(b) Any gain or profit that results from business activity of a nonprofit corporation shall be applied only to the purposes for which the nonprofit corporation is formed.

§ 5236. Shares prohibited

This section was deleted.

§ 5237. Distributions to members, directors, or officers prohibited

This section was revised to delete references to officers and directors. In subdivision (b)(1), the words "in a reasonable amount" were deleted. In subdivision (b)(2), the words "specific and primary" were deleted, and the phrase "subject to any limitations in the articles or bylaws" was added at the end.

§ 5240. Required contents of articles

This section should be revised to delete the requirement of a statement of specific and primary purposes. It should include a requirement that the articles state that the distribution of dividends to members is prohibited except as provided in the general nonprofit corporation law; in this connection, consideration should be given to adoption of a grandfather clause for existing corporations, and consideration should be given to some sort of requirement that charitable corporations state specific purposes. The Commission also directed the staff to give consideration to whether the membership certificate, if one is issued, should contain a statement that distributions to members are prohibited.

APPROVED

Date

Chairman

Executive Secretary