MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MARCH 27-28, 1981

SAN FRANCISCO

A meeting of the California Law Revision Commission was held in San Francisco on March 27-28, 1981.

Law Revision Commission

Present: Beatrice P. Lawson, Chairperson
Jean C. Love, Vice Chairperson
Bion M. Gregory, Ex Officio
Robert J. Berton
Thomas S. Loo

Absent: Omer L. Rains, Senate Member
Alister McAlister, Assembly Member

Staff Members Present

John H. DeMoully
Nathaniel Sterling
Robert J. Murphy III

Consultants Present

Paul E. Basye, Property Law (March 28 only)
Carol S. Bruch, Community Property (March 27 only)
Garrett H. Elmore, Real and Personal Property, Dismissal for Lack of Prosecution (March 28 only)
Jesse Dukeminier, Real and Personal Property, Probate

Other Persons Present

(March 27 only)
Nordin Blacker, private attorney, San Jose
Jan C. Gabrielson, State Bar Family Law Section, Los Angeles
Susan I. Keel, State Bar Family Law Section, San Francisco
Mark I. Starr, State Bar Family Law Section, Carmel
Barry D. Russ, State Bar Family Law Section, San Francisco
Tim Roake, University of California, Davis
F. Richard Losey, Law Offices F. Richard Losey, San Francisco

ADMINISTRATIVE MATTERS

MINUTES OF JANUARY MEETING

The Minutes of the January 9, 1981 meeting of the Law Revision Commission were approved without change.

MEETING SCHEDULE

The May 1981 meeting which is scheduled for Friday and Saturday, May 15 and 16 in Los Angeles, was expanded to include Thursday evening, May 14, 7:00 p.m.-10:00 p.m. A major portion of the meeting is to be devoted to community property.

An additional meeting was scheduled for Friday, June 5, 10:00 a.m. - 5:00 p.m., and Saturday June 6, 9:00 a.m. - 12:00 p.m., in San Francisco. The meeting is to be devoted primarily to enforcement of judgments; no community property matters are to be considered at the meeting.

CONSULTANT CONTRACTS

The Commission considered Memorandum 81-11 concerning consultant contracts. The Commission authorized the Executive Secretary to make a contract with Professor Susan French of the University of California Davis Law School to provide expert advice and information at Law Revision Commission meetings on the subjects of real property law and probate law. The contract should provide for travel expenses in attending Commission meetings and legislative hearings when these subjects are discussed and for $50 per day when attending a Commission meeting or legislative hearing. Authorized expenditures under the contract would not exceed $1,500.

The Commission deferred decision on a contract to index Volume 15 of the Commission Reports, pending the investigation of the possibility that the Legislative Counsel may have resources available to do the index.

LEGISLATIVE PROGRAM

The Executive Secretary made the following report concerning the Commission's 1981 legislative program:

Enacted

Assembly Concurrent Resolution No. 5 (authorizes Commission to continue its study of previously authorized topics).

To Governor

Assembly Bill No. 132 (guardianship-conservatorship revisions).

Passed First House

Senate Bill No. 202 (technical clean-up amendment to state tax lien revision enacted upon Commission recommendation last session).

Senate Bill No. 203 (increases interest rate to 10 percent).

Assembly Bill No. 327 (powers of appointment).

To Be Set for Hearing By Fiscal Committee in First House

Assembly Bill No. 78 (technical clean-up amendment to special assessment lien statute enacted upon Commission recommendation last session).

Set for Second Hearing in Policy Committee in First House

Assembly Bill No. 325 (nonprobate transfers) set for hearing by Assembly Judiciary Committee on April 1.

Assembly Bill No. 329 (durable power of attorney) set for hearing by Assembly Judiciary Committee on April 1.

Introduced

Assembly Bill No. 707 (comprehensive enforcement of judgments law).

Assembly Bill No. 798 (conforming additions, amendments, and repeals to enforcement of judgments law).

STUDY D-300 - PERIODIC PAYMENTS OF JUDGMENTS

The Commission considered Memorandum 81-12 containing comments received from interested persons on the Uniform Law Commissioners model act on periodic payment of judgments. The Commission decided not to study this matter at this time.

D-320 - STATUTORY BONDS AND UNDERTAKINGS

The Commission considered Memorandum 81-16 and the attached staff draft of a tentative recommendation relating to statutory bonds and undertakings. The Commission authorized the tentative recommendation to be distributed to interested persons for comment as proposed by the staff in the memorandum.

STUDY F-600 - COMMUNITY PROPERTY

The Commission considered Memorandum 80-90 and the attached background study relating to community property, along with Memorandum 81-7

relating to disclosure by one spouse to the other of community assets and obligations. The Commission made the following decisions with respect to these memoranda:

Right to Disclosure of Assets and Liabilities

The duty of a spouse to disclose should be a duty, upon written request of the other spouse, to make available sufficient information to enable the other spouse to determine the nature and extent of the community property and nonbusiness debts incurred by the spouse after marriage. The spouse requesting disclosure should be able to obtain mandatory counseling concerning the duty to disclose in a conciliation court upon payment of the conciliation court fees. The statute should prescribe no special form for disclosure or impose special penalties for failure to disclose or for false disclosure. The statute should make any disclosure pursuant to the written request inadmissible in evidence for any purpose. The Comment to the section should make clear that conciliation court proceedings are one option, but not the exclusive means, by which the disclosure duty may be enforced.

Duty of Good Faith

The Commission decided not to attempt to give content in the statute to the "duty of good faith" of a spouse in managing community property. The staff should examine the prior case law relating to the confidential relation between the spouses in connection with the duty of good faith to determine whether this law is continued in the existing statute and, if so, the Comment should so indicate, but the Comment should not imply the existence of a fiduciary standard in the management of the community assets. In this connection the staff should examine Civil Code Sections 2228 and 2261, which use the standard of "good faith" in stating the fiduciary standard applicable to a trustee.

Written Consent to Gifts

The limitation on a spouse making a gift of community personal property without the written consent of the other spouse should be amended so that it applies only to gifts to third parties and so that it does not apply to usual or moderate gifts. In determining whether a gift is usual or moderate, the circumstances of the marriage should be taken into account.

Written Consent to Sale of Household Goods and Personal Effects

The Commission discussed whether the limitation on a spouse making a sale of household goods or personal effects without the written consent of the other spouse should be amended to permit such a sale with the express oral consent or implied consent of the other spouse. The Commission made no decision on this issue.

Joinder Requirement for Purchase or Sale of Community Property Business

Professor Bruch noted that three jurisdictions, Louisiana, Nevada, and Washington, impose a joinder requirement for purchase or sale of a community property business, and suggested that such a requirement be adopted in California. If a spouse arbitrarily refuses to join in a transaction, a summary proceeding would be available to authorize the transaction without the joinder of the spouse.

Mr. Richard Losey, a business and tax attorney requested to address the Commission on this point by the State Bar Family Law Property Committee, indicated he could see problems for commerce in such a proposal. He felt that an inexperienced or intentionally obstructive spouse could hamper a legitimate business transaction. He also foresaw securities implications where a spouse has a veto power over disposition of business assets.

The Commission made no decisions on Professor Bruch's proposal, pending further information on the experience under the Washington and Louisiana statutes. However, the following points were brought up in the Commission discussion. (1) If such a proposal is adopted, it should be limited to acquisitions of a going business and to a business of which the community owns a controlling interest. It should not extend to a partnership. For a determination of what constitutes a controlling interest, Sections 482 (control in fact) and 267 and 318 (attribution rules) of the Internal Revenue Code should be examined. (2) As an alternative to requiring joinder, a procedure should be considered to enable a spouse to have his or her name put on the title to the community property business. (3) Consideration should be given to requiring consent of a spouse rather than joinder of a spouse.

Consent to Acquisition of Real Property

The Commission rejected the concept that both spouses must consent or join in an acquisition of community real property. Concern was expressed

about the cloud such a requirement would create on real property titles, as well as about the position of bona fide seller of real property unaware that the purchaser is married.

Written Consent to Sale of Mobilehome

The Commission determined to add to the law a requirement that a spouse give written consent to a sale by the other spouse of a mobilehome or a vessel that is the family dwelling. The staff pointed out that the Commission already has recommended this requirement in the enforcement of judgments recommendation (in connection with repeal of the declared homestead) in Assembly Bill No. 798 of the 1981-82 session.

Former Community Property That Has Become Marital Property by Operation of Law

The Commission discussed but did not resolve the issue whether the same fiduciary standards that apply to community property should also apply to former community property that is not divided at the time of dissolution of marriage. Community property that is not divided at the time of dissolution of marriage becomes tenancy in common property by operation of law. In order to assist it in the determination whether special rules should apply to former community property, the Commission requested staff research on the duties that apply to tenants in common generally.

STUDY H-400 - MARKETABLE TITLE ACT

The Commission considered Memorandum 81-13 and the First Supplement thereto, along with a letter from Ronald P. Denitz distributed at the meeting (a copy of which is attached), concerning the possibility of adopting a marketable title act in California. The Commission was concerned that a marketable title act is overbroad, that it might affect interests in property that should not be affected, such as the fee or long-term valid interests. The Commission felt that a better approach to problems created by obsolete interests of record is to draw narrower provisions than a marketable title act designed to cure specific types of problems with specific types of interests, such as ancient mortgages, dormant mineral rights, abandoned easements, obsolete restrictive covenants, etc. The Commission directed the staff to commence work on narrower statutes aimed at such interests.

The Commission also discussed the possibility of investigating adoption of a tract indexing system for public land records. The general feeling of the Commission was that title companies now are able to handle the grantor-grantee indexing system, so that change to a tract indexing system is not necessary. The Commission decided not to begin such an investigation.

STUDY J-600 - DISMISSAL FOR LACK OF PROSECUTION

The Commission considered Memorandum 81-14 and the attached background study presenting policy issues concerning dismissal of a civil action for lack of diligent prosecution. The Commission made the following decisions concerning the issues raised in the background study:

General approach. The Commission generally favored moderate liberalization of the dismissal statute. The statute should provide for a one-year extension of the five-year dismissal period upon affidavit of the plaintiff filed before expiration of the period. Consideration should also be given to allowing such an extension upon court order where trial was impossible due to the court calendar.

Policy statement. A policy statement should be included in the statute indicating that, in the case of a conflict, trial on the merits is to be preferred over diligence in prosecution.

Conditions upon granting or denial of motion to dismiss. A provision should be added to the statute expressly stating the authority of the court to condition its order. The Comment should state that the types of conditions contemplated are payment of expenses and attorney's fees that result from unreasonable delay.

Imposition of civil penalty upon party or counsel. The court should be able to fine the attorney or the plaintiff for unreasonable delay as an alternative to dismissal of the action.

Matters to be considered in determination of motion. Court Rule 203.5, which includes matters to be considered in determination of a motion to dismiss, should not be codified. However, the rule should be referred to in the Comment to the discretionary dismissal section.

Vacation of order of dismissal. A special motion for reconsideration procedure should not be adopted.

Court dismissal under local rule. The staff should inquire of the local court administrators whether dormant civil cases are a problem, how the court handles the problem, and whether additional tools are necessary to weed out the dormant cases.

Time for filing return of summons. The three-year time for filing return of summons should be absolute and should not be subject to extension upon court order.

Stipulation of parties extending time. The provision allowing an extension of time upon filed stipulation should be amended to allow an extension upon presentation of a stipulation to court without filing. This would codify case law.

Broadening general appearance exception. The general appearance exception to the three-year service statute should be amended to reflect case law of an exception where the defendant has "filed an answer or other document or entered into a stipulation in writing or otherwise made a general appearance."

Exclusion of certain time periods. The exclusion of the time during which the defendant is not amenable to service from calculation of the three-year dismissal statute should be supplemented by the time during which service is stayed, the time during which the validity of service is being litigated, and the time service was impossible, impracticable, or futile for any other reason.

Discretionary dismissal for failure to serve summons. The Comment to the discretionary dismissal section should note that discretionary dismissal for failure to bring to trial includes dismissal for failure to serve summons.

Time for discretionary dismissal. The time for a motion for discretionary dismissal should be changed from two to three years. The two-year period is confusing in conjunction with, and appears to conflict with, the mandatory three-year dismissal, and a motion made after only two years will ordinarily be unsuccessful anyway.

Requirement for notice of motion for dismissal. No special rules for notice of motion for dismissal should be adopted.

Dismissal for failure to have default entered. Subdivision (c) of Section 581a, relating to dismissal for failure to have default entered,

should be repealed. The provision is not generally understood, and appears to serve no useful purpose.

Technical drafting changes. The technical drafting changes in Section 581a suggested by the consultant at page 21 of the study should be incorporated in the statute.

Extension of time for new trial by stipulation. A provision should be added to permit an extension of time for new trial by stipulation of the parties.

Exclusion of certain time periods from mandatory time for trial. The Commission deferred consideration of possible factors to be excluded from calculating the time within which trial must be held, pending work on an affidavit procedure or court order for extending the time period.

Waiver or estoppel. The statute should state simply that the provisions of the statute do not modify or otherwise affect the rules pertaining to waiver or estoppel of a defendant.

Application to pending cases. As a general rule, the new statute should not apply to any dismissals made before the effective date and should apply to all motions to dismiss made after the effective date. The staff should review the statute to see whether there should be any exceptions to this rule.

APPROVED AS SUBMITTED _____

APPROVED AS CORRECTED _____(for corrections, see Minutes of next meeting)

_____
Date

_____
Chairperson

_____
Executive Secretary

Tishman West Management Corp. 10960 Wilshire Boulevard Los Angeles, California 90024 213 477-1919

March 26, 1981

Nathaniel Sterling, Esq.
Assistant Executive Secretary
California Law Revision Commission
c/o State Bar Building
555 Franklin Street
San Francisco, CA 94102

Re: Study H-400 Marketable Title

Dear Mr. Sterling:

I regret that because of a high virus fever, I will not be able to attend the "Commission Hearing" this Saturday March 28, 1981 at the State Bar Building in San Francisco, and ask that you convey my regrets to the commission. I also ask that you distribute the enclosed copies of this letter to each commissioner and ask that they accept it in lieu of my personal appearance.

First, I heartily concur with our distinguished colleague, Garrett Elmore, esq's opinion as stated in his letter of March 24, 1981 which you distributed as First Supp. Memo 81-13. In particular, the increased governmental cost of a literal flood of recorded Notices of Interest (not only in the initial grace period but also everytime any tenant signs any lease, no matter how short) would cause an incalculable number of recordings but also would place heavy administrative budget burdens on all county recorders; moreover, the "trap for the unwary" suggested by Mr. Elmore would most certainly bring out the land seizure "wolves" which he, perhaps more diplomatically, suggests.

Second, the proposed Draft fails to exempt long term leases in the absence of actual possession by lessee or one claiming under him; my earlier correspondence to you has suggested the serious threat which a Marketable Title Act would impose upon commercial transactions in California of the '80's, the significance of ground leasing being again the subject of a lengthy newspaper article on the first page of the real estate section of last Sunday's Los Angeles Times.

Third, our present system of title insurance has proven entirely adequate in the vast majority of title transfer and title verification situations. To revolutionize the present system of title in California (as opposed to the salutary task of curing specific minor inequities and establishing a better indexing system) is roughly equivalent to throwing out the baby with the dirty wash water.

Fourth, the fact that the proposed Draft fails to exempt restrictions, easements and agreements not obviously apparent to the eye will play havoc with shopping center developments, planned unit developments and condominium projects, the value of which depends on the uninterrupted peace of mind and assurance that such restrictions will continue in effect in the absence of changes of conditions or expiration according to their terms.

Fifth, & finally, as one who tries to keep aware of developments in the real property field, based only upon twenty-seven years of practice in Los Angeles, I do not recall having heard any hue and cry (either in the newspapers or professional media or from professional sources) that injustices are being perpetrated by our present title system. There appears to be not only the problems which Mr. Elmore suggests, and which I have humbly above suggested, but also no need for the Draft legislation.

Although I remain willing to work in any way I can to aid the commission in implementation of its study matters in the real property field, I must respectfully concur with Mr. Elmore that the present interest of the commission and real property owners in this state would best be served by reforms other than the proposed Draft Marketable Title Act.

Sincerely,

Ronald P. Denitz, Jr.

Ronald P. Denitz,
Corporate Counsel
(Dictated but not read)

RPD:pv