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## Commercial Transactions

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## *Commercial Transactions*

by *Neil M. Levy\**

The emphasis of this article reflects the degree to which commercial law today is statutory. Particularly in California, where the Uniform Commercial Code has only been in effect since January 1, 1965, few cases construing that statute reached the appellate courts during the year 1967. However, the state legislature in 1967 amended 25 sections of the California Commercial Code.<sup>1</sup> Although these amendments cover a wide range of substantive problems, they can be viewed in the light of the policy of the code as enunciated in section 1102(2)(c), “[t]o make uniform the law among the various jurisdictions.” In addition, one group of these

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1. Amended were §§ 1201(17), 1202, 1209, 1210, 2209(3)(4), 2403(4), 2719, 2725, 3107, 3112(1)(b) and (c), 3506, 5116(2), 6103, 7403(3), 7503, 7507, 7508, 8105, 8106, 8304, 8313(3), 8320 (5), 9104, 9301 and 9302. Senate Bill 580 also amended Cal. Civ. Code § 3440, dealing with fraudulent transfers, to reconcile it with Division 9 of the Uniform Commercial Code.

amendments can best be analyzed by the effect upon freedom of contract.

### **Uniformity and the Commercial Code**

Both the official text<sup>2</sup> and the California version of the Uniform Commercial Code state in section 1102(2):

Underlying purposes and policies of this code are

- (a) To simplify, clarify and modernize the law governing commercial transactions;
- (b) To permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) To make uniform the law among the various jurisdictions.

As a text proposed for adoption in the various jurisdictions, these policies have general agreement. It is obvious that the more simple, clear, and modern the code, the greater the likelihood of adoption of a uniform commercial law in all of the states. When the proposed code is submitted to a particular state legislature, however, the various policies listed under subsection 1102(2) may be in conflict; the legislature may feel that the language of the official text can be further clarified or that modern commercial practices call for different substantive rules of law. The state must then elect whether to give priority to the policy of conformity with the official text in order to achieve the desired uniformity.<sup>3</sup>

William A. Schnader, chairman of the Permanent Editorial Board<sup>4</sup> for the Uniform Commercial Code, predictably is currently the leading spokesman for uniformity.<sup>5</sup> He denies

2. The official text of the Uniform Commercial Code is the text promulgated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute.

3. For a discussion of the similar tensions in case development of the code, see Vold, *Construing the Uniform Commercial Code: Its Own Twin Keys, Uniformity and Growth*, 50 CORN L. Q. 49 (1964).

4. For a brief description of the workings of the Permanent Editorial Board, see Schnader, *The Permanent Editorial Board: Can It Accomplish Its Object?*, 3 AM. BUS. L. J. 137 (1965).

5. See Schnader, *Why the Commercial Code Should Be "Uniform"*, 20 WASH. & LEE L. REV. 237 (1963).

the need for state variations from the official text, even if those variations are intended merely to clarify language. As to minor variations, he states that the "amendments which were trivial may be said to have done no harm but it can be said with equal force that being trivial, they should not have been made."<sup>6</sup> But this objection seems unconvincing; certainly the advantage to having uniform language in all the states is to build up a body of national authority for handling difficult questions. But might not clarification of language be a superior method of removing these difficulties?

When considering major substantive variations, Schnader stresses, as additional support for his position, that large banks and sellers whose operations are national should not be forced to investigate the laws of 50 states in order to operate. Thus it seems clear, at least to Schnader, that uniformity is necessary in order to ease the legal and operative burdens of large national concerns. Even conceding the importance of those concerns to our present economy, one may answer that fulfilling their supposed needs is not the only legitimate function of a commercial code.

Moreover, even if the official text of the Uniform Commercial Code were to be adopted in all states, some local problems would remain for national concerns, since the code does not resolve all commercial problems. For example, the questions of the maximum interest rates allowed in each state and of the existence of special consumer legislation would still have to be carefully investigated. Yet, large national concerns, of course, have been able to survive despite these burdens.

Schnader's trump card is that if the needs of large businesses are not met by the various states, then those businesses will demand and obtain a federal commercial code. He assumes that this result will be abhorrent to some who might otherwise favor some local variation. Nonetheless, one may question whether any advantage would be obtained by instead having each state "voluntarily" adopt the same code. Even if Schnader's assumptions regarding the wishes of business

6. Schnader, 20 WASH. & LEE L. REV.  
at 248.

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firms<sup>7</sup> and their power to obtain federal legislation are accurate, one may still argue that it is closer to the rhetoric of American democracy for Congress to enact a federal commercial code than for the nonelective Permanent Editorial Board to determine, in fact, the commercial law in the 50 states.

One would, of course, be foolhardy to advocate *ad hoc* unstudied tinkering with the official text; certainly the caliber and energy of the contributors to the text should caution those who are attempting to improve it.<sup>8</sup> Moreover, because of the complexity and interlocking nature of the code, that which at first blush appears only to be a minor change may in fact have profound effects. Merit may also be found in a suggestion of the board, apparently followed at least by New York State, that any proposed variation from the code first be submitted to the board. If this procedure does not unduly lengthen the time necessary for amendment, it seems an ideal manner in which to take advantage of the expertise of that board.

When California first enacted the California Commercial Code, its version of the Uniform Commercial Code, it created 120 variations from the official text—more than any other jurisdiction;<sup>9</sup> apparently California lawmakers did not place great importance on the goal of conformity with the official text. However, the 1967 amendments to the California Commercial Code numerically lessen the variations from the official text. Of the amendments that bring sections of the California code into conformity with the official text, some effect no substantive changes from the code as originally enacted in California, and only remove variations, the purpose of which had been greater clarity of text.<sup>10</sup> However, several other amendments, which had been recommended by the Advisory

7. Schnader's prediction may not even be accurate. As later discussed in this article, national business interests seem quite willing to urge local variations when a particular variation seems to be to their immediate advantage.

8. Anyone who has ever found a section of the code to be less than precise,

however, will enjoy reading Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L. J. 185 (1967).

9. See Schnader, 3 AM. BUS. L. J. at 144.

10. Cal. Com. Code §§ 2403(4), 3112(b), 5116(2), 7403(3), 7507, 7508, 8304 and 8320(5).

Committee to the (California) Senate on the Editorial Aspects of the Uniform Commercial Code, and which purported only to conform language, may, in fact, have substantively amended the code. For example, a 1967 addition to section 2209 dealing with modification of contracts states, "The requirements of the statute of frauds section of this division . . . [sales] . . . must be satisfied if the contract as modified is within its provisions." This provision, included in the official text, had been omitted from the California code as originally enacted. The Permanent Editorial Board,<sup>11</sup> as well as other commentators,<sup>12</sup> had pointed out that this omission could only have resulted from a failure by the California legislature to realize that the section deals with oral modifications of oral contracts. Although the amendment was therefore desirable in order to prevent the use of oral modifications of oral contracts to avoid the requirements of the statute of frauds, it is not certain that the same result would necessarily have been reached under the former language.<sup>13</sup>

Similarly, section 8313, a provision dealing with investment securities held in street names, was amended to conform to the official text. Although the Advisory Committee stated that no substantive change was intended,<sup>14</sup> the Permanent Editorial Board had rejected the old California variation because it would "deprive a purchaser of needed protection from his broker."<sup>15</sup>

It may seem that once amendments to the California code are made, the question becomes moot whether the variation was a substantive change from the official text, unless a case has already arisen under the old language. However, with legislative history that states that no substantive change was intended, confusion may result from the argument that since

**11.** Permanent Editorial Board for the Uniform Commercial Code, REPORT ON VARIATIONS TO CODE IN ADOPTING STATES, no. 2, p. 35 (1965).

**12.** Coyne, *Some Comments on Contracts and the California Commercial Code*, 1 U.S.F. L. REV. 1, 7-8 (1966).

**13.** Cal. Com. Code § 2209 still maintains some local variation. For a full

discussion of problems raised by § 2209, see Laube, CONTRACTS, in this volume.

**14.** SENATE JOURNAL, April 20, 1967, p. 1237.

**15.** Permanent Editorial Board for the Uniform Commercial Code, REPORT ON VARIATIONS TO CODE IN ADOPTING STATES, no. 2, p. 157 (1965).

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a certain result would have been obtained under the old language, the legislative intent is that the same result now be reached.

Several other amendments, supposedly intended only to conform the California code, resulted even more clearly in substantive change. When the code was first enacted in California, the statute of limitations section of Division 2, entitled "Sales," was omitted, leaving in effect the old California law.<sup>16</sup> However, in this past year section 2725 was added. It is interesting to note that one reason for the addition of section 2725 was to meet the Permanent Editorial Board's "lack of uniformity" objection. However, even proponents of uniformity feel that uniformity of procedural provisions is not at the top of the scale in importance.<sup>17</sup>

Section 2725, unlike the old law that had provided for a two-year limitation for oral sales contracts, now provides a four-year statute of limitations for all sales contracts, whether oral or written. The new law also makes explicit that although the period of limitation may be lessened by contract to one year, it cannot be extended by contract beyond the statutory period. Moreover, the code makes clear that with some exceptions,<sup>18</sup> the cause of action accrues at the time of breach, regardless of the "aggrieved party's lack of knowledge of the breach."

An amendment to section 3506 produced another substantive change. In every other state, payment of an instrument

16. Cal. Code Civ. Proc. §§ 337 and 339.

17. See Schnader, 3 AM. BUS. L. J. at 139.

18. Cal. Com. Code § 2725. Breach of contract for sale; Limitation of Actions: Accrual of action: Time for bringing second action: Retrospective operation of section provides in part:

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends

to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subdivision (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

must be made in a reasonable time from presentment, but in order to avoid dishonor, payment must be made "before the close of business on the day of presentment." In California, presumably because of the wide extent of branch banking, an additional day was originally allowed. Upon observing that no problems had arisen in the other states, the California legislature decided to conform the section to the official text. Only the passage of time will show whether local needs will be met by this provision.

Another amendment substantially conforms section 7503, dealing with the entrusting of goods and documents of title, to the official text.<sup>19</sup> When the code was originally adopted, California omitted the provision allowing rights in goods to be lost to the good-faith purchaser of a document of title if the owner of the goods "acquiesced in the procurement by the bailor or his nominee of any document of title." The provision was originally omitted from the California code because of fear engendered by the official comments that mere knowledge of the likelihood of shipping or storage might be enough to cut off the title of the original owner.<sup>20</sup> The Permanent Editorial Board having stated that this was "an expansive reading,"<sup>21</sup> the Advisory Committee thereupon recommended that the provision be added. However, it is interesting to note that the committee has indicated that the goal of uniformity has become more important than the original substantive problem with which the legislature had been concerned. Legislative history is now added weight against the feared "expansive reading." But certainly there is more likelihood now, than under the old California language, of such an interpretation actually being made.

Section 8105, which affirms that securities governed by Division 8 are negotiable instruments, was also amended in order to eliminate a California variation. The effect of this amendment will be greater in states other than California,

19. The California Code, unlike the official text, does not mention delivery orders.

20. See California Comments to Commercial Code § 7503.

1. See Permanent Editorial Board for the Uniform Commercial Code, REPORT ON VARIATIONS TO CODE IN ADOPTING STATES, no. 2, pp. 138-139 (1965).

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since many states have so-called "legal investment" statutes, which require that securities that may be invested in by certain agents must be negotiable instruments. When California originally adopted the code, it was thought that since California had no such requirement, this section should be eliminated so that there would be no possible confusion that sections of Division 3 of the code were thereby made applicable. However, in 1967, the amendment was adopted to avert any possible problems regarding California securities that might arise in other states having such statutes.

An amendment to section 8106 lessens the difference between the California and official text provisions governing conflicts of laws for investment securities. The official text simply states:

The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer.

California's version, on the other hand, originally had extensive provisions to allow California law to apply in many situations, even if the organization of the issuer were in a different jurisdiction. After the 1967 amendment, however, California's provision more closely resembled the official text, stating:

The validity of a security and the duty of an issuer to register a transfer (Section 8401) are governed by the law of the jurisdiction of organization of the issuer or, in the case of any national bank or other corporation organized under the laws of the United States, by the law of the jurisdiction in which such bank or other corporation has its principal place of business.

Even after this amendment, however, a problem raised by the Permanent Editorial Board is still not solved since

the liability of an issuer for refusal to register a transfer might be governed by the law of the state of organiza-

tion while its liability for an improper registration would be governed by the law of California.<sup>2</sup>

Similarly, subsection 9301(3) was amended to provide that trustees in bankruptcy, assignees for the benefit of creditors, and receivers in equity shall be considered lien creditors. California originally did not enact this provision of the official text.

However, the 1967 amendments do not all implement the goal of achieving accord with the official text. Section 9104, for example, was amended to an even further inconsistency with the official version in order to make clear the fact that Division 9 is not meant to apply to securities issued by public bodies. Although the California comment states that no substantive change is intended, the status of these securities in other states is not as clear as it is in California. Thus, the same act that, in some sections, eliminates variations based on earlier attempts to clarify, in other sections continues this same attempt at clarification. It is also interesting to note that the amendment to section 9104 was actually suggested by attorneys representing underwriters of these securities, a group that, according to Schnader's analysis, would oppose any local variations.

The amendment of section 9302 eliminates one local variation, but imposes another. The section provides exceptions to the rule stating when a financing statement must be filed in order to perfect a security interest. The 1967 amendment eliminated the California variations, which had excepted assignments of claims against the United States, that had been made under federal assignment of claims statutes.<sup>3</sup> However, the amendment now excepts "assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder," an exception not made in the official version.

The principal group of amendments causing a variance between the California code and the official text reflects the

**2.** Permanent Editorial Board for the Uniform Commercial Code, REPORT ON VARIATIONS TO CODE IN ADOPTING STATES, no. 2, pp. 144-145 (1965).

**3.** 31 U.S.C. § 203; 41 U.S.C. § 15.

attempt to harmonize the California Commercial Code with the new California Evidence Code.<sup>4</sup>

Throughout the official text of the Uniform Commercial Code, presumptions are raised. Section 1-201(31) states:

“Presumption” or “presumed” means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

For example, section 3-114(3) states, “Where the instrument or any signature thereon is dated, the date is presumed to be correct.” Thus, if a payee of a note places that note in evidence, and no contrary evidence is presented, the date that the maker signed on the note must be accepted as the date when the note was made. However, neither the code nor the comments state what effect the presumption raised will have if the maker brings forth some evidence that the date written was not the actual date of the note, or who will have the ultimate burden of proof of the issue. Because of this ambiguity, and the knowledge that a new evidence code was being studied, the legislature originally refused to adopt section 1-201(31),<sup>5</sup> leaving undefined, until the 1967 amendment, the word “presumption,” used so often throughout the code.

The California Evidence Code very neatly deals with presumptions.<sup>6</sup> Section 601 simply states: “Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.” The code then goes on to draw guidelines by which judges may determine how to treat any given presumption. Section 603 states that presumptions affecting the burden of producing evidence are those that have been enacted solely “to facilitate the determination of the particular action in which the presumption is applied,” while section 605 defines

4. See generally, Note, *The Law of Evidence in the Uniform Commercial Code*, 1 GA. L. REV. 44 (1966).

5. See California Comments to Commercial Code § 1201(31).

6. The California Commercial Code uses only the concept of the rebuttable presumption, and does not use the concept of the conclusive presumption.

a burden of proof presumption as one “established to implement” some other public policy.

However, the California Law Revision Commission was unwilling to allow the various presumptions raised by the Commercial Code to be classified judicially according to these broad standards.<sup>7</sup> Instead, upon their recommendation, the legislature categorized the specific presumptions of the Commercial Code so that there would be predictability without the necessity of first having a judicial determination.<sup>8</sup>

The central provision dealing with this problem in the Commercial Code is section 1210,<sup>9</sup> which states, “Except as otherwise provided in Section 1202, the presumptions established by this code are presumptions affecting the burden of producing evidence.” Section 604 of the Evidence Code, then, makes clear that the trier of fact must assume “the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. . . .” The Evidence Code goes on, however, to clarify what section 1–201(31) leaves unclear: if evidence is introduced that would support a finding of the nonexistence of the presumed fact, “the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption,” although he may draw appropriate inferences.

Section 1202 represents the one provision in the code where the legislature this year created a burden of proof presumption.<sup>10</sup> Subsection (2) creates a presumption affecting *the*

7. California Law Revision Commission Recommendation: Related to the Evidence Code, No. 3—Commercial Code Revisions, October 1966, p. 309.

8. The report at one point (p. 307) states that one reason why a legislative determination is desirable is because “the general standards provided in the Evidence Code do not permit ready classification of all the presumptions in the Commercial Code.” The report then goes on to state (p. 308) that in most cases it is relatively easy to determine the intent of the drafters of the Uniform

Code, though admittedly in a few cases it would be difficult to determine how the drafters would have classified the presumptions based on the California Evidence Code. Note the optimism of the comment in saying that the amendment is not a substantive change from the official text.

9. This section was recommended by the California Law Revision Commission as § 1209.

10. Certain other provisions in the code affect burden of proof without the

*burden of producing evidence*, that such documents as bills of lading are presumed to be authentic<sup>11</sup> and genuine. However, if a document is found to be authentic and genuine, either through this presumption or otherwise, a presumption affecting the *burden of proof* is then raised that the facts stated in that document are true. Because of section 606 of the Evidence Code, a party claiming that the facts are incorrect must therefore bear the burden of proof on that issue; that is, he must by a preponderance of the evidence convince the trier of fact that the stated information is untrue.

There was one other amendment dealing with burdens. California originally enacted the official text of section 2719, dealing with contractual modification or limitation of remedy. Section 2719(3) stated:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

The 1967 amendment, by stating that “[l]imitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable,” eliminates the use of the prima facie concept while retaining the distinction between commercial and noncommercial loss. Limitation of consequential damages where the loss is commercial is, however, still valid unless it is proved that the limitation is unconscionable.<sup>12</sup>

concept of presumptions. See § 3307 (1)(a).

11. Section 1202 was also amended to make clear that the presumption only applies in actions concerning the contract that authorized the document.

12. Although this provision was enacted as recommended by the commission in order “to clarify the allocation of the burden of proof,” it is interesting that the legislature did not see

fit to accept another recommendation of the commission, that § 4103, relating to a bank’s responsibility for failure to exercise ordinary care, also be amended to remove the prima facie concept. Although the commission itself was unsure whether, under § 602 of the Evidence Code, a presumption was created, the comment to § 1210 merely stated that no rebuttable presumption was created. It is difficult to see why the language

**The Uniform Commercial Code and the Law of Contracts**

The spheres of the Commercial Code and the traditional law of contracts obviously overlap. Section 1102(3) specifically states:

The effect of provisions of this code may be varied by agreement, *except as otherwise provided in this code* and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement. [Emphasis added.]

However, in order to determine whether any specific contractual agreement will be given effect, a court has to interpret the phrase “except as otherwise provided.” An examination of one of the 1967 amendments will be a helpful illustration.

The code makes use of the concept of fungible goods and states in section 1201(17), “‘Fungible’ with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit.” It would seem then, merely because of the definition, that one could not simply contract to call nonfungible goods fungible, even though there is no specific language in the code against doing so. But the 1967 amendment, conforming the California text to the official text, now provides:

Goods which are not fungible shall be deemed fungible for the purposes of this code to the extent that under a particular agreement or document unlike units are treated as equivalents.

Thus it is now clear that parties may contract to deem goods fungible whenever this suits their purpose.

Similarly, an amendment to subsection 3107(2) makes it clear that a negotiable instrument may require payment in a foreign currency. Thus, parties once again are given more leeway in their financial arrangements.

However, the amendment to section 3112(c), due at least in part to legislative confusion about this section, restricts

of § 4103 should be treated differently from the language of § 2719, and it is difficult to know the effect of the lan- guage, assuming it is not to be treated as a rebuttable presumption.

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the right of parties to include certain clauses in an instrument and still have that instrument considered negotiable. Section 3104(1) states:

Any writing to be a negotiable instrument within this division must . . . [c]ontain an unconditional promise or order to pay a sum certain in money *and no other promise* . . . except as authorized by this division. . . . [Emphasis added.]

Section 3112 is the primary section that states those other promises that may be made.

Subsection 3112(c) of the official text states that “a promise or power to maintain or protect collateral or to give additional collateral” does not destroy negotiability. As originally enacted, the same subsection in the California code had allowed, in addition, and without affecting negotiability, a promise or power

to furnish financial information or to do or refrain from doing any other act for the protection of the obligation expressed in the instrument not involving the payment of money on account of the indebtedness evidenced by the instrument.

The Permanent Editorial Board rejected this variation fearing that on the one hand, it would open the door to “an indefinite number of possibly long and complex provisions . . . ,”<sup>13</sup> and on the other hand, the provision was so vague as to offer little guidance as to which provisions would be valid and which not.

Somehow, in the 1967 amendment the phrase “to give additional collateral,” rather than the objectionable portion, was eliminated. The California Code comment to section 3112 states that this was due to “an error resulting from the process of amendment.”<sup>14</sup> Therefore, because of the error, it is impos-

13. Permanent Editorial Board for the Uniform Commercial Code, REPORT ON VARIATIONS TO CODE IN ADOPTING STATES, no. 2, p. 56 (1965).

14. Although the California Comment states that the Advisory Commit-

tee had recommended that the section be amended to conform to the official text, such recommendation does not appear in the official report of that committee.

sible to state whether an instrument giving the payee the right to demand additional collateral is negotiable. It can be argued that since the code provision permitting such a clause was specifically excluded from the section, the right to put in the clause has been eliminated. It can also be argued, however, that the right to do so is still plainly included in the objectionable clause. It would seem that until the legislature corrects its error, the latter is the more desirable result, considering that this useful commercial procedure<sup>15</sup> is allowed in all other states.

Another section adopted in 1967 was section 1209, dealing with subordinate agreements. After studying this provision, which began as a New York variation, the Permanent Editorial Board recommended it for optional amendment.<sup>16</sup> By the language of the section itself, it is deemed to be merely declaratory of the existing law. It allows the highly useful commercial technique of allowing one party to subordinate his rights, in case of insolvency, to another, and states that the mere fact of such an agreement does not per se create a security agreement. Thus the parties are free to create this "halfway house," rather than be forced to choose between having no priority or creating a security interest.

Finally, section 6103 was amended to a greater degree of inconsistency with the official text, although the amendment may also be considered as giving more freedom to contract. It excludes from Division 6, dealing with bulk sales, *all* assignments for the benefit of creditors. Thus, partial assignments may be exempted from the requirements that the official text places on them. The official text only excludes "general assignments for the benefit of *all* the creditors. . . ."

### **Case Law—Negotiation of Checks<sup>17</sup>**

Three cases dealing with negotiation of checks were decided during the reported period. Of greater significance than the

**15.** Of course, different issues are presented when a note is given in return for consumer goods.

**16.** See Permanent Editorial Board for the Uniform Commercial Code,

REPORT ON VARIATIONS TO CODE IN ADOPTING STATES, no. 3, p. 11 (1966).

**17.** Other cases that involve some aspects of the Uniform Commercial Code are treated in this volume in

substantive holdings, however, was the manner in which the court treated the newly enacted code. To a great extent, the code was treated as a reenactment and rephrasing of pre-code law. In view of a natural desire by judges (and lawyers) to work with the familiar, this approach is understandable. When deciding one case in which the code governed, the court of appeal meticulously attempted to show that the code did not even deal with the problem presented.<sup>18</sup> Paradoxically, during this period of transition, a court of appeal of the same district, deciding a difficult case under pre-code law, relied on the code as persuasive authority, since it felt the result was clearer under the code. In so deciding, the court presupposed that no change from pre-code law could have been intended in the code.<sup>19</sup>

In *Harry H. White Lumber Co. v. Crocker-Citizens National Bank*,<sup>20</sup> the court of appeal, was reluctant to use the code as a means to decide afresh an old question of law. The question presented and answered affirmatively by the court was:

Does a joint payee of a check have a cause of action against a collecting bank which has paid a check made payable to joint payees bearing an indorsement effected by one joint payee signing his own name and forging that of his joint payee?<sup>1</sup>

There were four checks involved, and since two were drawn before the effective date of the Uniform Commercial Code, and two afterwards, the court had to apply both old and new law. It seems more important for purposes of discussion, however, to concentrate on the court's solution under the code.

The issue presented to the court had two facets. First, the court had to decide whether the joint payee had any cause of action. If it found that he did, then the court would have

Laube, CONTRACTS, and McIntosh, REAL PROPERTY.

18. *Harry H. White Lumber Co. v. Crocker-Citizens Nat'l. Bank*, 253 Cal. App.2d 423, 61 Cal. Rptr. 381 (1967).

19. *Pacific Indemnity Co. v. Security*

*First Nat'l. Bank*, 248 Cal. App.2d 75, 56 Cal. Rptr. 142 (1967).

20. 253 Cal. App.2d 423, 61 Cal. Rptr. 381 (1967).

1. 253 Cal. App.2d at 425, 61 Cal. Rptr. at 382.

to inquire whether that action could be maintained against the *collecting* bank.

The court's reasoning is clear on the first question. Section 3116 states: "An instrument payable to the order of two or more persons . . . [i]f not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them." The forgery by one joint payee does not alter the rights of the other, since section 3404(1) states, "Any unauthorized signature is wholly inoperative as that of the person whose name is signed. . . ." Since section 1201(43) states that "[u]nauthorized' signature or indorsement means one made without actual, implied or apparent authority and includes a forgery," the only possible conclusion is that the joint payee did have a cause of action under the code.

The court thereupon had to face the more difficult question of whether the joint payee could bring that action against the collecting bank. The court quoted from the code, as follows:

Section 3306: "Unless he has the rights of a holder in due course any person takes the instrument subject to . . . (d) The defense that he . . . holds the instrument . . . by theft. . . ." Section 3419: "(1) An instrument is converted when . . . (c) It is paid on a forged indorsement."<sup>2</sup>

The court then citing, but not quoting, the comments to sections 3404 and 3419, concluded that although section 3419 gives the payee of a forged check a cause of action against the *drawee* bank, "no change is indicated as to preexisting California case law permitting the payee to recover from a collecting bank which has paid out on a forged endorsement."<sup>3</sup> Although the comments do not indicate any change, neither

2. 253 Cal. App. 2d at 428, 61 Cal. Rptr. at 385.

3. 253 Cal. App.2d at 430, 61 Cal. Rptr. at 386. Curiously, the court relied on *Stone & Webster v. First Nat'l. Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962). *Stone*

was an action by a *drawer* against the collecting bank. In it, the court also felt that the code effected no change, but old law in Massachusetts had not allowed the action. Moreover, the court in *Stone* carefully considered the policy questions involved.

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do they address themselves to this issue. The court's result can only be reached by assuming that "paid" refers only to an action by a drawee bank, a conclusion certainly not made clear in the code. But the court concluded that the code did give the payee a cause of action against the collecting bank.

It is unfortunate that the court in *White* did not use the opportunity, in facing this issue for the first time under the code, to discuss whether granting an action against a collecting bank is *desirable*. Certainly section 3419(c) can be read broadly enough to reach a conclusion contrary to that reached by the court. The court then could have balanced the competing interests involved. In favor of allowing the action against the collecting bank would be the argument that the joint payee would thus be permitted to avoid a multiplicity of actions, since a forger who steals a series of checks drawn on a number of banks is likely to cash them at the same bank. Moreover, circuitry of action would be avoided, since the payee would otherwise have to sue the drawee, who would in turn sue the collecting bank for breach of warranty under section 4207. On the other hand, it can be argued that the thrust of Divisions 3 and 4 is against allowing the actions, since these divisions generally lessen the responsibility of collecting banks. Even more important than the disposition of this particular problem, however, is that courts should use the occasion of deciding a case for the first time under the code as an opportunity to re-reason old problems.

In *Pacific Indemnity Company v. Security First National Bank*,<sup>4</sup> a case where old law was clearly applicable, the majority reached a result that seemed even more clearly warranted under the code. The court then reasoned that since no change was intended, the code's solution could be used as persuasive authority.

The facts of the case are complicated and, as the court of appeal pointed out, the record does not adequately disclose them. Certain facts, however, are clear. Brown was an

4. 248 Cal. App.2d 75, 56 Cal. Rptr. 142 (1967).

employee of Credit Managers, a firm “engaged in the business of administering the affairs and assets of various businesses which had made assignments to it for the benefit of creditors.”<sup>5</sup> Brown, making use of the firm’s checkwriting machine, caused numerous checks payable to the defendant bank to be drawn. Even though notations on the front of these checks indicated that they were being given for payment in full of various debts supposedly owed to the defendant bank, the defendant allowed Brown to place these checks, which were drawn on another bank, into his personal checking account. Under the terms of a fidelity bond, Credit Managers’ indemnity company reimbursed Credit Managers for losses they could not recover from Brown, and then sued the defendant for the loss. At the trial, evidence was presented that showed that the bank had not followed its usual precautions with these checks. Evidence was also presented from which it could be inferred that Credit Managers was remiss in its auditing procedures. The superior court found for the defendant, but the court of appeal reversed.

In a rather lengthy opinion, Justice Herndon attempted to dispel what he felt was an error that the trial court had made, and that the dissent was trying to perpetuate. The trial court had applied the so-called fictitious payee rule. That rule is embodied in former Civil Code section 3090<sup>6</sup> and currently appears in § 3405<sup>7</sup> of the Commercial Code. It protects the *drawee* bank from suffering loss when an employee pads the payroll of his employer, who has an account at that bank. As Justice Herndon pointed out, and the concurrence made clear, this case presents a different circumstance. Here the bank was the payee of the check. The fraud of the employee

5. 248 Cal. App.2d at 79, 56 Cal. Rptr. at 145.

6. Stats. 1917 c. 751, p. 1534, § 1, as amended Stats. 1945 c. 658, p. 1315 § 1.

7. Cal. Comm. Code § 3405 provides:  
(1) An indorsement by any person in the name of a named payee is effective if:

(a) An imposter by use of the mails or otherwise has induced the maker or

drawer to issue the instrument to him or his confederate in the name of the payee; or

(b) A person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) An agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

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was completed because of the bank's carelessness in letting funds it received leave its hands. Therefore, Justice Herndon concluded that as against the employer, the bank should suffer the burden of being bound by the notations on the face of the checks.

The court then had to consider whether the paid surety had the same equities, vis-à-vis the bank, as the employer would have had. It implied that since the bank was not totally innocent,<sup>8</sup> it could not therefore maintain that the indemnitor should bear the burden. However, the court did not clearly state whether a bank would be liable any time it was negligent, or only liable when its negligence was greater than that of the insured party.

Once again, the court's approach was more significant than its holding. The court quoted:

"Article 3 of the Uniform Commercial Code is a revision and reorganization of the existing Uniform Negotiable Instruments Law now found in our Civil Code. While new language has been used, the changes from the existing NIL are not too great and to all intents and purposes it may be said that the law in this area remains the same." (Sixth Progress Report to the Legislature by Senate Fact Finding Committee on Judiciary (1959-1961) Part I, the Uniform Commercial Code, pp. 342-343.)<sup>9</sup>

Even the dissent felt compelled to offer his tentative belief that the code did not change prior law!<sup>10</sup>

Nonetheless, it might be helpful to look at the one other indorsement case that reached the court of appeal this year, and to see how counsel might have argued for an opposite result if the code, rather than pre-code law, had been applicable.

8. The court thus distinguished Meyers v. Bank of America, 11 Cal.2d 92, 77 P.2d 1084 (1938).

9. 248 Cal. App.2d at 92, 56 Cal. Rptr. at 153.

10. 248 Cal. App.2d at 105, 56 Cal. Rptr. at 161.

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In *Cameron v. Security First National Bank*,<sup>11</sup> the plaintiffs, Mr. and Mrs. Cameron, received a check as joint payees. At that time, the plaintiffs had a joint savings account with the bank. The husband was also authorized to sign at the same bank for the checking account of Amber Construction Company, of which he was a primary stockholder and officer.

Shortly before the Camerons received the check, an officer of the bank had notified Mr. Cameron's secretary that the account of Amber Construction Company was overdrawn. The secretary replied that Mr. Cameron was expecting a check and would cover the deficit when it arrived. When the check in question did arrive, the Camerons indorsed it and wrote "For Deposit Only" under their signatures. Afterwards, the secretary placed the number of the Amber account under the signature.

When the secretary arrived at the bank to deposit the check, a bank officer, noting that the check was jointly payable to the Camerons rather than to Amber, stated, "This appears like Mr. Cameron may have wanted this to go into his own account."<sup>12</sup> Although the secretary said that such was not the case, the officer attempted to call Mr. Cameron. Since Cameron could not be reached, the officer accepted the check for the Amber account.

Seven months later, after his association with Amber had ended, Cameron and his wife sued the bank for failure to honor the restrictive indorsement. The court of appeal affirmed the decision of the trial court, which had found that the bank had no notice of any defect, that the secretary had ostensible authority to deposit the check in the Amber account, that the bank was an innocent party, and that since plaintiffs had been negligent, they must bear the responsibility of the secretary's act.

There is no reason to suspect that applicable principles concerning the agency of the secretary should be considered changed by the code. Section 1103 specifically states: "Unless displaced by the particular provisions of this code, the

**11.** 251 Cal. App.2d 450, 59 Cal. Rptr. 563 (1967).

**12.** 251 Cal. App.2d at 454-455, 59 Cal. Rptr. at 566.

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principles of . . . principal and agent . . . shall supplement its provisions.”

Section 3206(3) on the effect of restrictive indorsements then provides:

Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words “for collection,” “for deposit,” “pay any bank,” or like terms (paragraphs (a) and (c) of Section 3205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement, and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of Section 3302 on what constitutes a holder in due course.

With the secretary considered the agent of the Camerons for purposes of signing the account number, the problem still remains, however, of whether the bank took with notice of defect in the instrument and thus should be responsible for the loss. In deciding the case, the court had interpreted section 3137<sup>13</sup> of the old Civil Code to narrowly restrict what would be considered notice. In keeping with the usual interpretation of that section, the court quoted from *Christian v. California Bank*:<sup>14</sup>

Under this section [Civ.Code, § 3137] it is the well-settled rule that “mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, or mere suspicion of an infirmity or defect of title, does not preclude the transferee from occupying the position of a holder in due course, unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. . . . [T]his rule is

13. Stats. 1917, c. 751, p. 1541 § 1. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the in-

firmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

14. 30 Cal.2d 421, 182 P.2d 554 (1947).

subject to the qualification that 'where the circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction, such indorsee is charged with knowledge.'<sup>15</sup>

However, Commercial Code section 1201(25) leaves open the possibility of more liberal findings of notice. That section provides:

A person has "notice" of a fact when (a) He has actual knowledge of it; or (b) He has received a notice or notification of it; or (c) From all the facts and circumstances known to him at the time in question he has reason to know that it exists.

From the language of this section it would appear that Cameron could argue that from all the facts and circumstances known to it, and as evidenced by its attempt to contact Cameron by telephone, the bank had reason to know of the defect.

This interpretation of section 1201(25) might lead to a desirable result. However, it is doubtful that the courts would accept it in view of their reluctance to use the code to change old results. Moreover, a counterargument could be made that the code was not meant to revive this objective test, but to retain the so-called subjective test of notice in fact.<sup>16</sup>

### **Consumer Credit**

Commercial law today is increasingly regulated by statutes that deal with the problems of consumer credit; intensive attention is being paid to the practice of consumer purchase of goods through instalment contracts.<sup>17</sup> California's basic statutory scheme deals with the purchase of motor vehicles

15. 251 Cal. App.2d at 458, 59 Cal. Rptr. at 568.

16. See Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 So. CAL. L. Rev. 48 at 56-60 (1966).

17. See *Symposium*, 8 BOST. COLL. IND. & COMM. L. REV. 387 (1967); Note, *Consumer Legislation and the Poor*, 76 YALE L. REV. 745, 746 (1967).

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under the Rees-Levering Act<sup>18</sup> and with the purchase of all other consumer goods under the Unruh Act.<sup>19</sup> The year 1967 brought amendments to both of these acts.

### *Rees-Levering Act*<sup>20</sup>

Several attempts were made by the legislature to fill loopholes that sellers had discovered in the statute and had capitalized upon. The first such amendment governs section 2983 of the Civil Code, which deals with the amount recoverable by the buyer when a conditional sales contract is held to be unenforceable because it violates either subsection 2982(a), dealing with formal requirements, or section 2982(c), dealing with finance charges.

The original 1945 Automobile Sales Act had simply stated that the amount recoverable would be "three times the total amount paid on the contract balance."<sup>1</sup> However, that phrase caused confusion when the purchaser had traded in one automobile as part of the purchase price of another. In *City Lincoln-Mercury Company v. Lindsey*,<sup>2</sup> the supreme court held that to determine "the total amount paid," the automobile traded in should be valued at its actual value rather than at the presumably fictitious trade-in value. Thus, after that decision, a seller could overvalue trade-ins, in order to increase market appeal, without fear of loss if the contract

18. Automobile Sales Finance Act, Cal. Civ. Code §§ 2981–2984.3.

19. Retail Installment Sales Act, Cal. Civ. Code §§ 1801–1812.10.

In addition, of course, the Civil Code also deals specifically with certain other business practices. For example, one 1967 act (see Cal. Civ. Code § 1716) forbids sending to a potential customer "any writing that could reasonably be interpreted as a statement or invoice, for goods not yet ordered or for services not yet performed and not yet ordered, unless there appears on the face of the statement or invoice or writing in 30-point boldface type the following warning:

This is a solicitation for the order of

goods or services and you are under no obligation to make payment unless you accept the offer contained herein."

20. For articles discussing the Rees-Levering Act, see *Recent Legislation—The Rees-Levering Motor Vehicle Sales & Finance Act*, 10 UCLA L. REV. 125 (1962); *Selected 1960–1961 California Legislation*, 36 CAL. S. BAR J. 688 (1961).

1. Stats. 1945 c. 1030, p. 1993, § 9 (c).

2. 52 Cal.2d 267, 339 P.2d 851, 73 A.L.R.2d 1420 (1959); see also *G.M.A.C. v. Kyle*, 54 Cal.2d 101, 4 Cal. Rptr. 496, 351 P.2d 768 (1960).

3. Stats. 1961 c. 1626, p. 3538, § 4,

proved unenforceable. In 1961, however, the legislature changed this result by providing:

The amount recoverable for property traded in as all or part of the down payment shall be equal to the agreed cash value of such property as the value appears in the conditional sale contract.<sup>3</sup>

The consumer was then relieved from having to prove actual value; rather, he could rely on the stated value.

However, some sellers were quick to adjust to the new statute and to realize that by inducing the buyer to accept an artificially low trade-in value and giving a corresponding reduction in the sales price, they could place themselves in an advantageous position if the contract proved to be unenforceable. The 1967 amendment to section 2983 now gives the buyer adequate protection, stating:

The amount recoverable for property traded in as all or part of the down payment shall be equal to the agreed cash value of such property as the value appears on the conditional sale contract *or the fair market value of such property as of the time the contract is made, whichever is greater.*

In addition to protecting the purchaser if the contract proves unenforceable, this provision will also encourage the seller to value the trade-ins as closely as possible to the actual value. The amendment will thus have some aspects of a truth-in-lending bill, in that the buyer will be able to get a better idea of the true economic cost of the new car since the seller will be encouraged to give an accurate estimate of the value of the automobile that the buyer is trading in.

Civil Code section 2984.2 was also amended as an attempt to fill another feared loophole. However, the success of this change was only partial. The 1961 amendment to the act had prevented a seller from taking either title to, or a lien on, real or personal property other than the subject matter of the sale, in connection with the conditional sale of an automobile. However, some sellers attempted to evade the plain import of the act by urging the buyer to negotiate a loan

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from a loan company that had an "understanding" with the seller, giving land or other property for collateral on that loan, and then, with the money borrowed, complete "an outright sale" of the automobile.<sup>4</sup>

Senate Bill 778 was passed to remedy this situation. As first proposed, the bill would have made unenforceable, to the same extent as an agreement for conditional sale, *any* agreement in connection with a sale of an automobile. Probably because of fear that a lender who was not aware of the use of a loan might find himself with an unenforceable contract, the bill as finally enacted merely makes unenforceable such agreements *between the buyer and the seller*.

However, assuming that one of the primary evils that Rees-Levering is trying to prevent is that of a buyer losing valuable assets through defaulting on payment for a car, one wonders how effective this amendment will be. Although a buyer may be able to have his contract with the seller rescinded, he will have given the security interest to another party. Although the amendment may deter sellers from trying to arrange such transactions, even if one feels that good-faith lenders' agreements should be held enforceable, might it not be preferable to allow buyer rescission of the contract with the lender, at least when lender knowledge is shown?<sup>5</sup>

Another change, though of a more limited nature, was effected by amending section 2983.2 of the Civil Code, which deals with the notice that must be given on the sale of a repossessed automobile. The time of notice was doubled, so that at least 10 days' notice must now be given to anyone liable on the conditional sales contract. This is extended to 20 days if the notice is given to someone outside of the state. Additionally, section 2983.2 now states that notice may be "personally served or shall be sent by certified mail, return receipt requested."

4. Of course, even under the act as it existed before the 1967 amendments, one could not rule out the possibility that a court would look to the substance of the transaction if it felt that the loan was, in fact, from the seller.

5. See Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 So. CAL. L. REV. 48 (1966), for the possible interrelation of the Uniform Commercial Code.

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In addition to these legislative changes, several cases helped to clarify the Rees-Levering Act. In *San Jose Autocar White Co. v. Williamson*,<sup>6</sup> the purchaser of two trailer trucks sought protection of the Rees-Levering provisions, even though the trucks had been bought for a commercial purpose. Despite defendant's argument that the act was designed to protect "an unsophisticated individual buyer purchasing from a sophisticated seller",<sup>7</sup> the court refused to depart from the plain meaning of the statute, which limits application to

any vehicle required to be registered under the Vehicle Code which is bought for use primarily for personal or family purposes, and does not mean any vehicle which is bought for use primarily for business or commercial purposes.<sup>8</sup>

The court went on to buttress its argument, finding that although the original Automobile Sales Act of 1945 did not exclude commercial sales, one purpose of the 1961 amendments was to limit the purview of the act by the purpose of the purchaser rather than by the magnitude of the sale. Conceding the appealing nature of defendant's argument, if addressed to the legislature, it is difficult to see how the court could have accepted it in the face of the statutory language.

In *Highway Trailer v. Frankel*,<sup>9</sup> the court of appeal affirmed a trial court's determination that a contract was unenforceable as to the unpaid balance because, on the contract, the sum listed for cash downpayment included a postdated check.<sup>10</sup> The court held that this violated section 2982(2) of the Civil Code, which requires that the contract set forth

[t]he amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with

6. 249 Cal. App.2d 619, 57 Cal. Rptr. 692 (1967).

7. 249 Cal. App.2d at 621, 57 Cal. Rptr. at 694.

8. Cal. Civ. Code § 2981(j).

9. 250 Cal. App.2d 733, 58 Cal. Rptr. 883 (1967).

10. Even though the court was dealing with law existing before the 1967 amendment, the issue confronting the court would be similarly decided if the facts arose today.

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a statement of the respective amounts credited for cash and for such property.

The court thus extended a decision previously reached by an appellate court in the case of *Bratta v. Caruso Car Co.*,<sup>11</sup> where it was held that a contract was unenforceable because the buyer had given a promissory note that was included in the stated "cash" downpayment. In *Highway Trailer*, the court perceived that when the cash downpayment sum includes a postdated check, the danger of the buyer being misled as to the balance due is equal to the danger created when a promissory note is included in the stated cash downpayment, since the buyer would also have to make good at some future date.

Because the court held the contract unenforceable on the above grounds, it did not have to consider the related issue of whether a currently dated check should be considered "cash" for purposes of section 2982. The court did state, however, that it would assume, without deciding, "that a currently dated check, drawn on an account having sufficient funds to pay it, is 'cash.'"<sup>12</sup> Considering the supreme court's refusal to hold contracts unenforceable that suffer only from slight technical deficiencies,<sup>13</sup> it would seem unlikely that any court would invalidate the common practice of supplying a currently dated check for payment. However, automobile sellers might place themselves in a more secure position by clearly indicating on the sales form that a check has been received in the transaction.

### *Unruh Act*<sup>14</sup>

Prior to its amendment in 1967, section 1804.2 of the Civil Code stated that if a buyer did not give notice "of the facts giving rise to . . . [a] claim or defense of the buyer"<sup>15</sup>

11. 166 Cal. App.2d 661, 333 P.2d 807 (1958).

12. 250 Cal. App.2d at 736, 58 Cal. Rptr. at 885.

13. See *Stasher v. Harger-Haldeman*, 58 Cal.2d 23, 22 Cal. Rptr. 657, 372 P.2d 649 (1962).

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14. See Note, *Installment Sales: Purpose of the Unruh Act*, 12 HASTINGS L. J. 312 (1961).

15. Stats 1961, c. 1214, p. 2951 § 5.

within 15 days of request by an assignee of the seller, his rights must be cut off. Whether such a provision in fact gives any protection to the average consumer has long been questioned. As Professor Dunham has pointed out:

Many people have commented on the incongruity of starting to solve a problem on the assumption that there is a group so ignorant that they cannot operate in the bargaining process, and then proceeding to protect these same people by creating more rights for them in court, or before administrative agencies, as to which they will be presumed equally, if not more, ignorant.<sup>16</sup>

One may similarly question whether the average consumer would reply to such a request by an assignee. Moreover, since most sellers will assign their contracts immediately, if they plan to assign at all, the buyer may not even be aware of defenses such as breach of warranty until after the 15-day period had elapsed.

The 1967 amendment removes all burdens from the buyer and provides:

An assignee of the seller's rights is subject to all claims and defenses of the buyer against the seller arising out of the sale notwithstanding an agreement to the contrary.<sup>17</sup>

However, the amendment makes clear that if the assignee had no knowledge of the seller's noncompliance with the statute, the buyer's claim can only be asserted as a matter of defense, and then only to the extent of the debt owed to the assignee.<sup>18</sup>

### *Collection Procedures*

The extension of consumer credit also raises problems concerning remedies thereby made available to the creditor or

<sup>16</sup> Dunham, *Research for Uniform Consumer Credit Legislation*, 20 BUS. LAW 997, at 1002-1003 (1965).

<sup>17</sup> Cal. Civ. Code § 1804.2.

<sup>18</sup> See C.E.B., 1967 REVIEW OF CODE LEGISLATION, pp. 34-35, for the possible meaning of a cross-reference to Cal. Civ. Code § 1812.7.

his assignee. Wage garnishment, an attempt to collect the debt from the employer of the debtor, is one common remedy employed by creditors. Although this method has been under growing attack,<sup>19</sup> the 1967 legislature was unable to effect any meaningful change. Numerous bills, however, were introduced that would have exempted wages from attachment and execution;<sup>20</sup> one of these bills would have virtually prevented an employer from firing an employee because wages were garnished.<sup>1</sup> At present, for all practical purposes, only 50 percent of wages are exempt in California; this is the smallest exemption allowed in any of the 10 most populated states.<sup>2</sup>

Minor amendments not specifically dealing with wage garnishment, but dealing generally with execution and attachment, were made to the Code of Civil Procedure. The exemption of an automobile was raised from a straight \$350, to \$350 "over and above all encumbrances" if the total value of the automobile is below \$1,000. Similarly, a debtor may now exempt a housetrailer of the value of \$2,500 above all encumbrances, if neither the debtor nor his spouse has another homestead.<sup>3</sup>

Another amendment aids creditors by clearly allowing partial attachment.<sup>4</sup> Thus, a creditor can now attach an asset that is worth less than the entire amount claimed and pay a bonding fee only for the amount attached, rather than for the entire amount of the claim.

19. See Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CAL. L. REV. 1214 (1965).

20. See *e.g.*, Assembly Bill 435 (1967).

1. Assembly Bill 613 (1967).

2. See 53 CAL. L. REV. 1214, at 1215-1223.

3. Cal. Code Civ. Proc. § 690.24.

4. Cal. Code Civ. Proc. §§ 538-540.