OLSON
HAGEL
LEIDIGH
WATERS &
FISHBURN
LLP

June 24, 1998

VIA FACSIMILE & OVERNIGHT DELIVERY

Jennifer H Boyt
Federal Election Commission
999 E Street, N W
Washington, D C 20463

Re: MUR 4749

Dear Ms Boyt

This letter is in response to your letter dated May 22, 1998 concerning a complaint filed against Grace Napolitano by James M Casso This office represents Ms Napolitano, the Napolitano For Congress Committee and Yolanda Dyer, the Committee Treasurer Since the complaint essentially focuses on two issues (the value of the Committee's headquarters and the loans from Ms Napolitano to the Committee), we address these in turn, with each of the loan issues addressed separately

ROBERT E LEIDIGH

Value of Campaign Headquarters

The rental value for Ms Napolitano's campaign headquarters has been reported as an in-kind contribution from the owner of the property, Luigi Vernola, in the amount of $250 per month Mr Casso alleges that this contribution is undervalued

The property is located at 12123 E Firestone Blvd in Norwalk, California in a neighborhood with many run-down and abandoned buildings It is approximately 800 square feet and is not finished for commercial occupancy As you can see from the enclosed photographs (Attachment 1), there is a concrete slab floor with no carpeting installed, the outside walls are not painted, the inside windows are not finished, the ceiling is missing panels, and the walls have paint splattered on them The bathroom was not usable for the first ten days of the Committee's occupancy There is no parking available for the office except in front of the building

The owner has indicated that this space is not suitable for office or other commercial purposes and will require substantial remodelling before it can be so used It is his opinion that $250 per month is a fair estimate of the fair rental value If it is in error, it is on the side of being too high

Haz Tower
555 Capitol Mall Suite 1425
Sacramento CA 95814-4602

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Given the above information, we submit that Mr. Vernola's in-kind contribution of rental space has been appropriately valued.

Ms. Napolitano's Loans

The source of the loans. Mr. Casso states that if the loan came from Ms. Napolitano's retirement account, the retirement fund should be listed as the source of the loan on Committee statements, and that interest should be paid to the fund rather than Ms. Napolitano. He also notes that the loans were reported in three separate entries, and questions the source of each.

It is correct that a loan of $150,000 came from funds derived Ms. Napolitano's IRA, which was in turn funded by proceeds from her Employee Stock Option Plan. These funds were the result of stock benefits earned during her 22 years as an employee of Ford (1970 to 1992). This account contained approximately $218,000 on February 27, 1998 (Attachment 2). At that time, she withdrew the entire amount, made a loan of $150,000 to her campaign, and "rolled over" the balance into another IRA in her name. It is clearly not a loan from the IRA or the bank. While she will certainly pay a "penalty" for withdrawing these funds "early," she is not obligated to restore these funds to her IRA -- once withdrawn, they are just like any other cash available to her.

These funds are "personal funds" within the meaning of 11 CFR § 110.10(b)(1). That section defines personal funds to include any assets over which the candidate had a legal right of access or control, as well as legal or rightful title, before the time she became a candidate. Ms. Napolitano has always had legal access to, control over and rightful title to these funds. She held them at all times in her name alone, and she alone had the power to dispose of them.

The remaining $30,000 in loans which were the subject of the complaint were also made from personal funds. These loans were made in two increments of $15,000 each. One loan was from Ms. Napolitano's credit union account and the other from her personal savings account. Both of these accounts included only her personal funds, primarily her retirement income from Ford and her per diem payments from the State of California.

Whether the contribution limits were violated by use of community property funds. Mr. Casso claims that the pension funds used for this loan were community property and that Ms. Napolitano violated the contribution limitations insofar as she used more than her one-half to fund the loan.

It is true that a portion of ESOP/IRA funds were earned during Ms. Napolitano's marriage to Frank Napolitano. (Mr. and Mrs. Napolitano married in 1982, and she retired from Ford in 1992.). However, while her husband may have a community property interest under California law in a portion of the funds, this does not change the current character of

the funds. Ms. Napolitano still has legal ownership and the legal right to control and dispose of the funds. They are not "jointly owned" assets within the meaning of Section 110.10(b)(3). Accordingly, a portion of the funds are not required to be attributed as a contribution from Mr. Napolitano. (For your reference, we have enclosed as Attachment 3, relevant sections of the California community property laws.)

The separate nature of the account distinguishes this situation from AO 1991-10, in which the home and investment account were both held jointly and both spouses signatures' were required to encumber the assets with a bank loan. Here the funds which were the sources of the loans were never "jointly owned" by Mrs. Napolitano and her spouse. Her "share" in these funds was and is 100 per cent. Her husband was not required to consent to the withdrawal or use of the funds.

The two smaller loans also came from personal accounts which have never been held jointly and which have been funded with Ms. Napolitano's separate funds which came from her employment with Ford and with the State of California. Again her husband was not required to consent to the withdrawal or use of the funds. His name was not on the accounts, and he did not otherwise have any interest in the funds except his underlying community property interest in the portion of the funds earned during the marriage.

Accordingly, we submit that all three loans were made from "personal funds" within the meaning of the Commission regulation and applicable state law, and not contribution limits were violated.

Conversion of the interest rate on the loan. The loan document specifies that the loan bears 0.0% interest from March 16, 1998 through May 2, 1998, and a rate of 18% thereafter. Mr. Casso claims that this conversion is not permissible. We believe that his claim misconstrues the loan reporting requirements.

Ms. Napolitano has reported the loan and the interest rate on Schedule C, and will continue to report this obligation, as required by the regulations. This reporting satisfies the intent "that debts and obligations be initially disclosed in a timely manner and be continuously reported thereafter until extinguished." AO 1991-9. The prohibitions on "conversion" of interest rates apply when candidates retroactively attempt to charge (and collect) interest on a loan originally reported as a no-interest loan. See, e.g., AO 1991-9, supra,; AO 1986-45.

Ms. Napolitano has accurately reported the terms of her loan agreement. She deferred interest until May 2, 1998 because that was the deadline for her to re-deposit her IRA funds into another qualified account and avoid payment of taxes on the withdrawal. It was her hope that sufficient funds would be raised that use of her IRA funds would be

unnecessary and she would be able to re-deposit those funds. In the event that she was unable to do so, an interest rate was included for the period after May 2. The Commission's regulations do not preclude these financial arrangements.

Whether the interest rate was "commercially reasonable". The $150,000 loan carries an interest rate of 18%. The complaint alleges that this rate is not commercially reasonable. Although high, this rate is not out of line with the rates on other unsecured loan transactions. For example, the annual percentage rate (APR) charged for credit card advances or lines of credit is currently at or over 18% for many credit companies. The APR for unsecured personal loans through Wells Fargo Bank and Union Bank of California are currently as high as 16.77% and 16.57%, respectively -- and neither bank would loan an unsecured amount as large as $150,000. In addition, the candidate is entitled to take into account the high-risk nature of a campaign loan: in the event of an election loss, this money is virtually unrecoverable.

We have not found any Commission regulations or decisions which provide standards or criteria for determining what is "commercially reasonable" in this context.[1] In the absence of guidance from the Commission on this issue through regulations or advisory opinions, we submit that the interest rates here are certainly within the broad limits of that term.

We hope that the above information is responsive to the Commission's concerns in this matter. If you need anything additional, please contact me.

Very truly yours,

OLSON, HAGEL, LEIDIGH,
WATERS & FISHBURN, LLP

DIANE M. FISHBURN

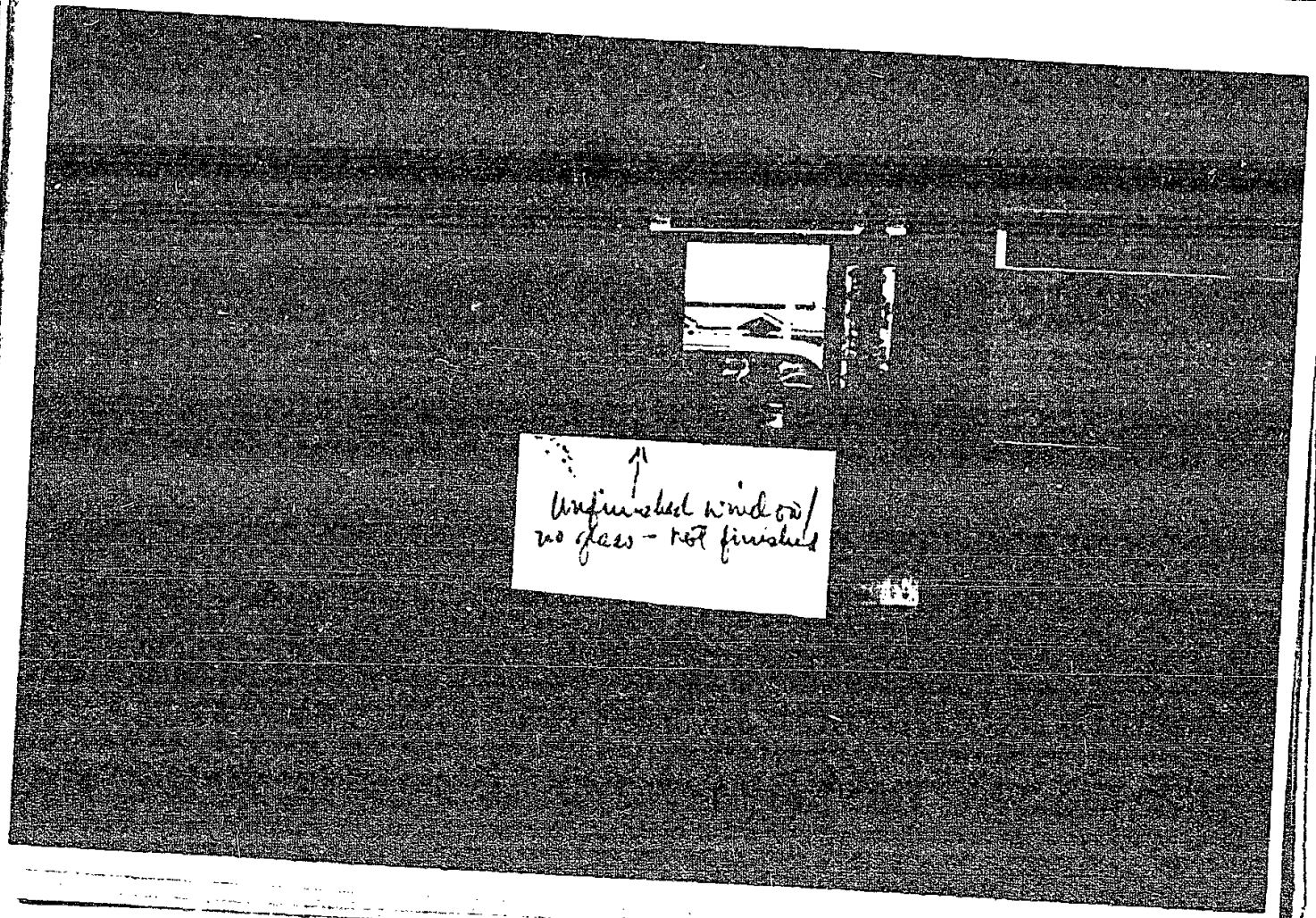
DMF:dar
Encls.
92076-6\RESPONSE.FEC

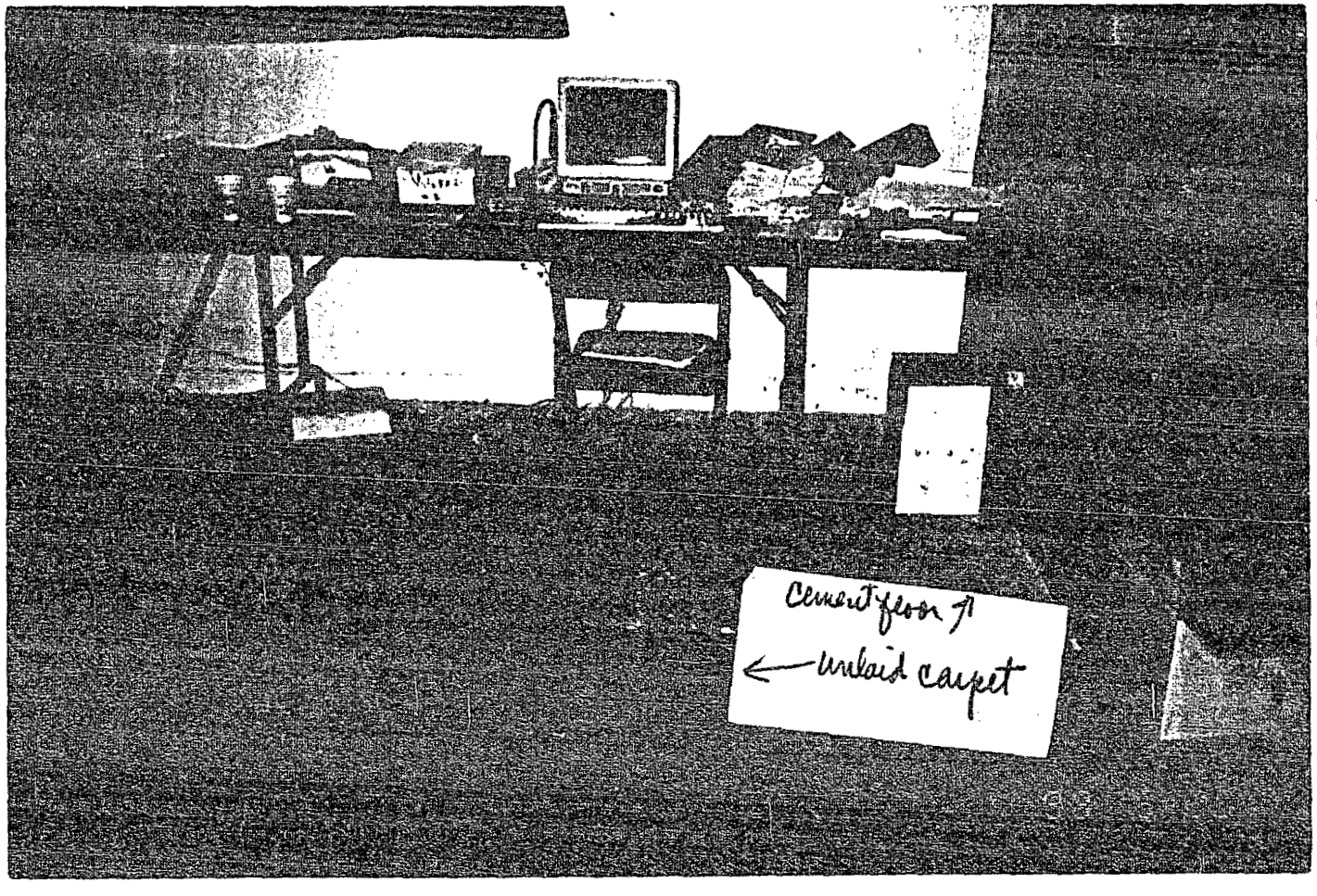
[1] Although AO 1986-45 indicates that 9% is commercially reasonable, and AO 1991-9 implicitly makes the same determination as to an 11% rate, neither opinion discusses the basis upon which these conclusions were reached.

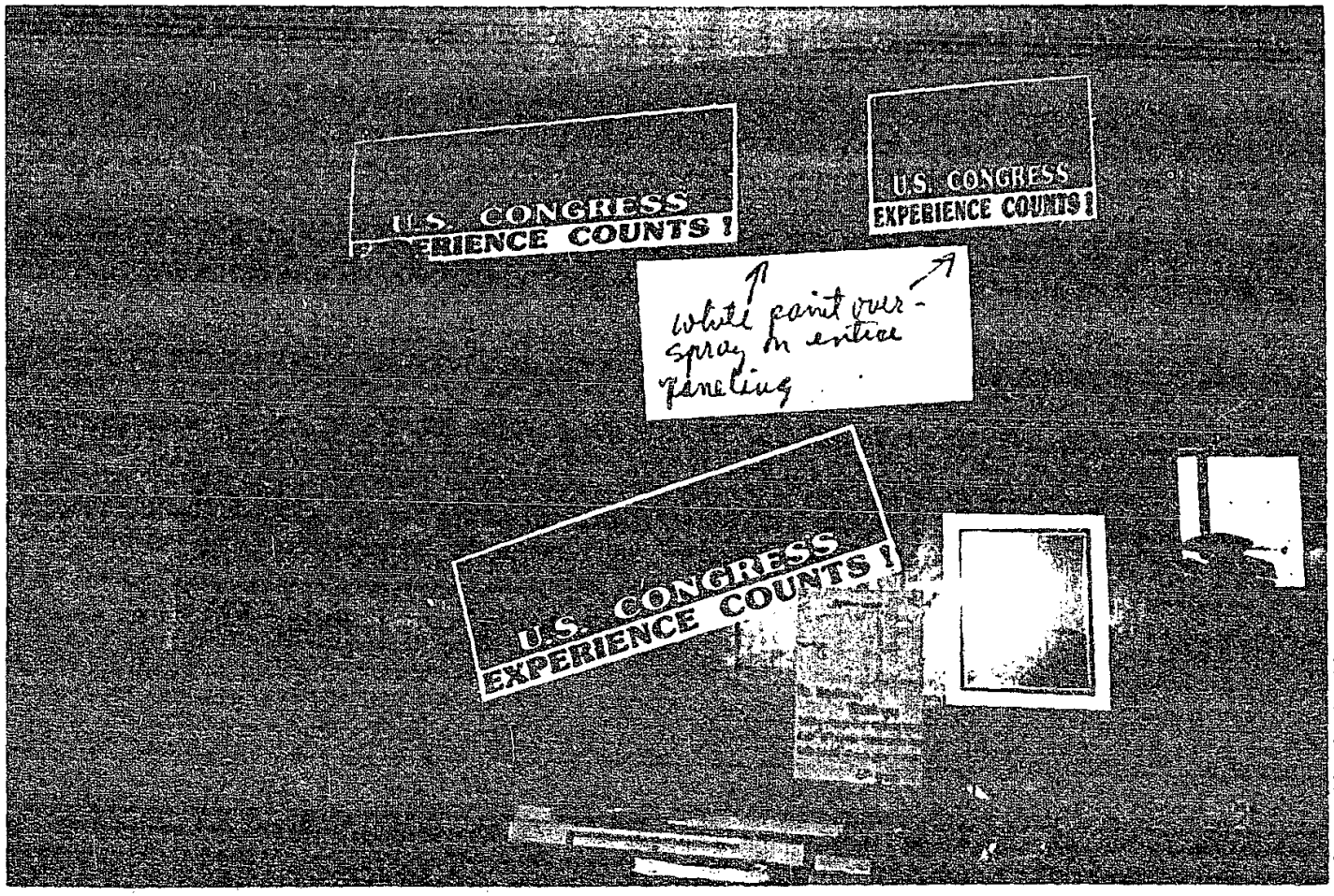
NAPOLITANO FOR CONGRESS
MUR 4749
Attachment 1

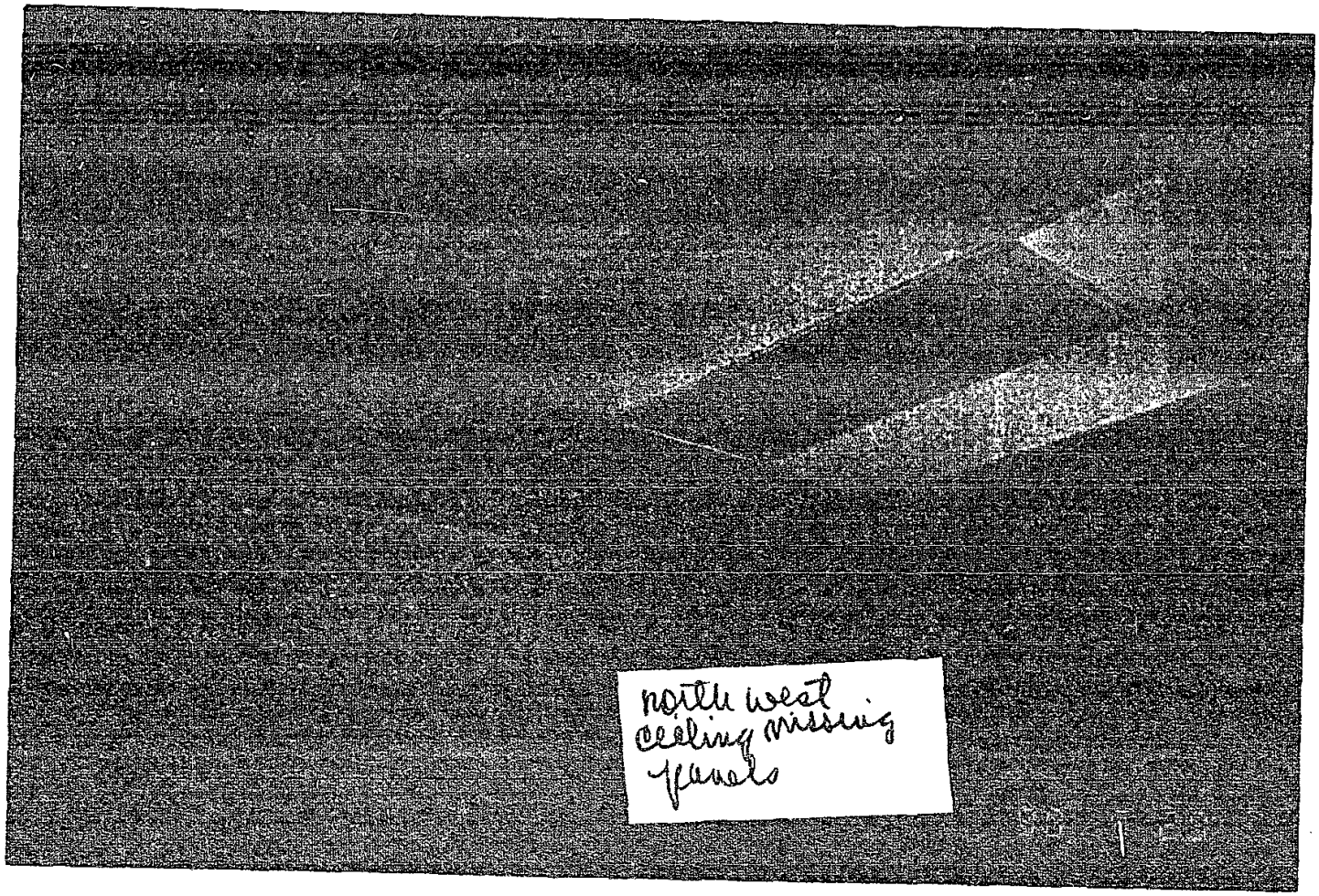
00 4001 1001 1001

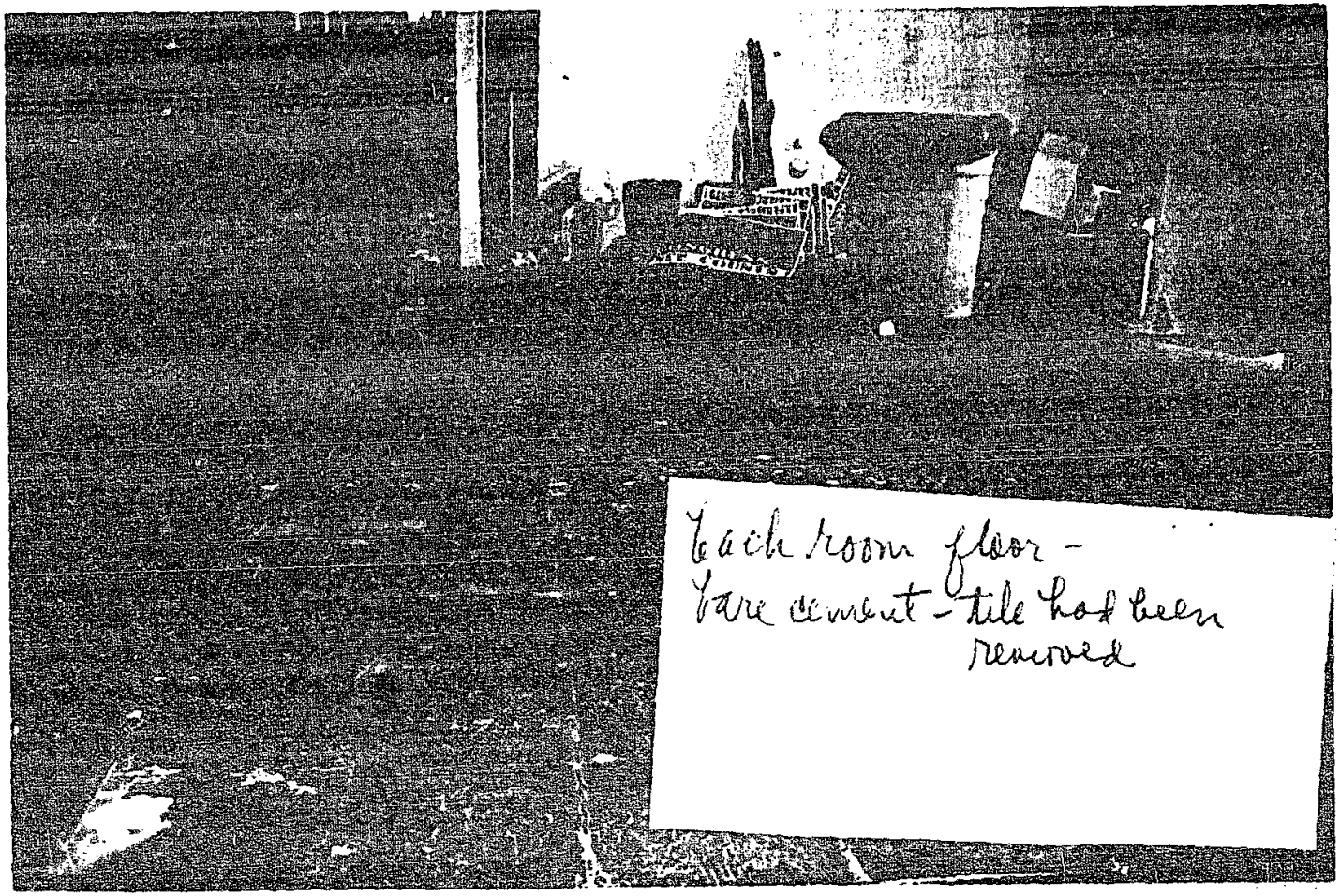
99.04.391.1535



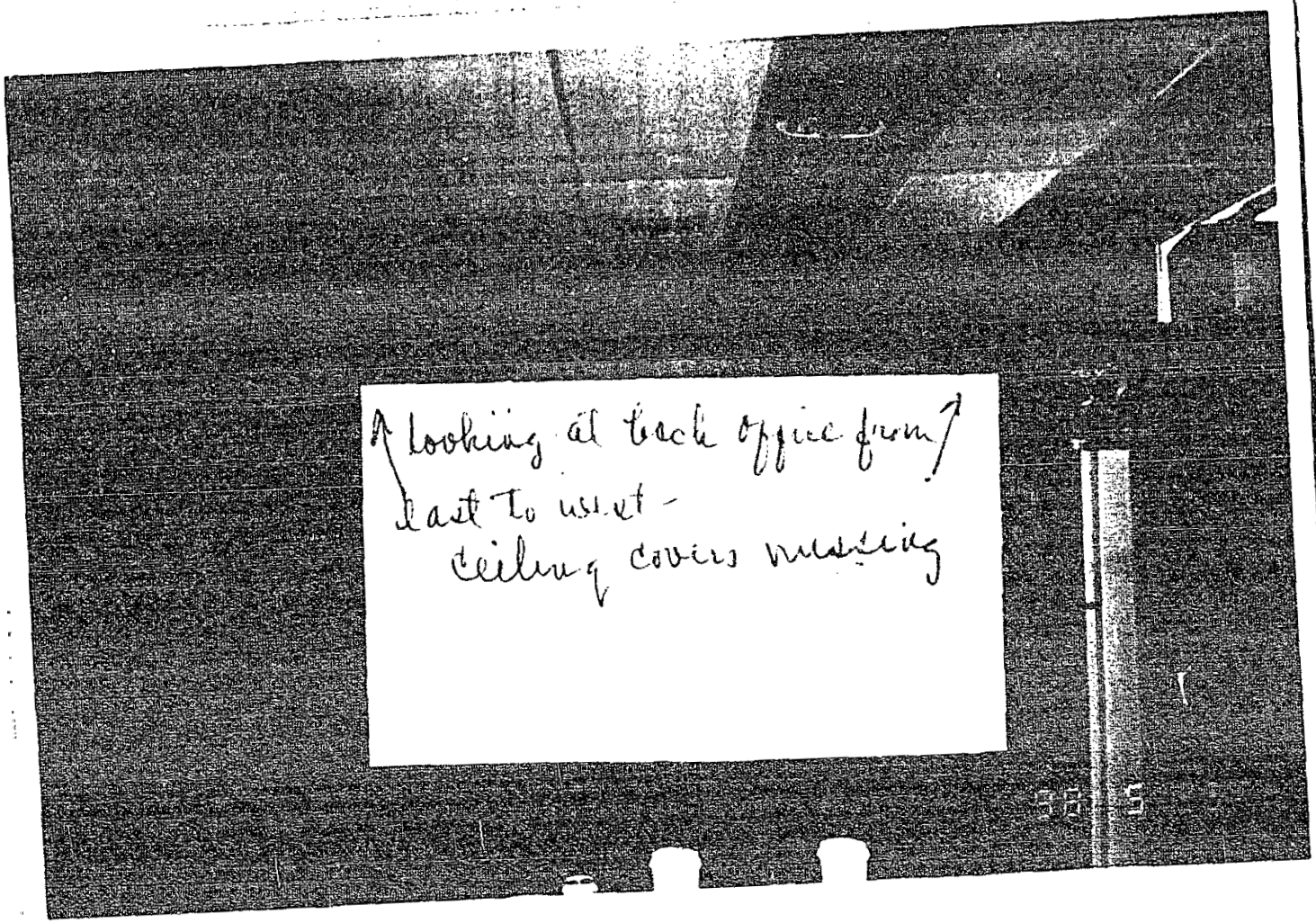

Cement floor ↑
← unlaid carpet

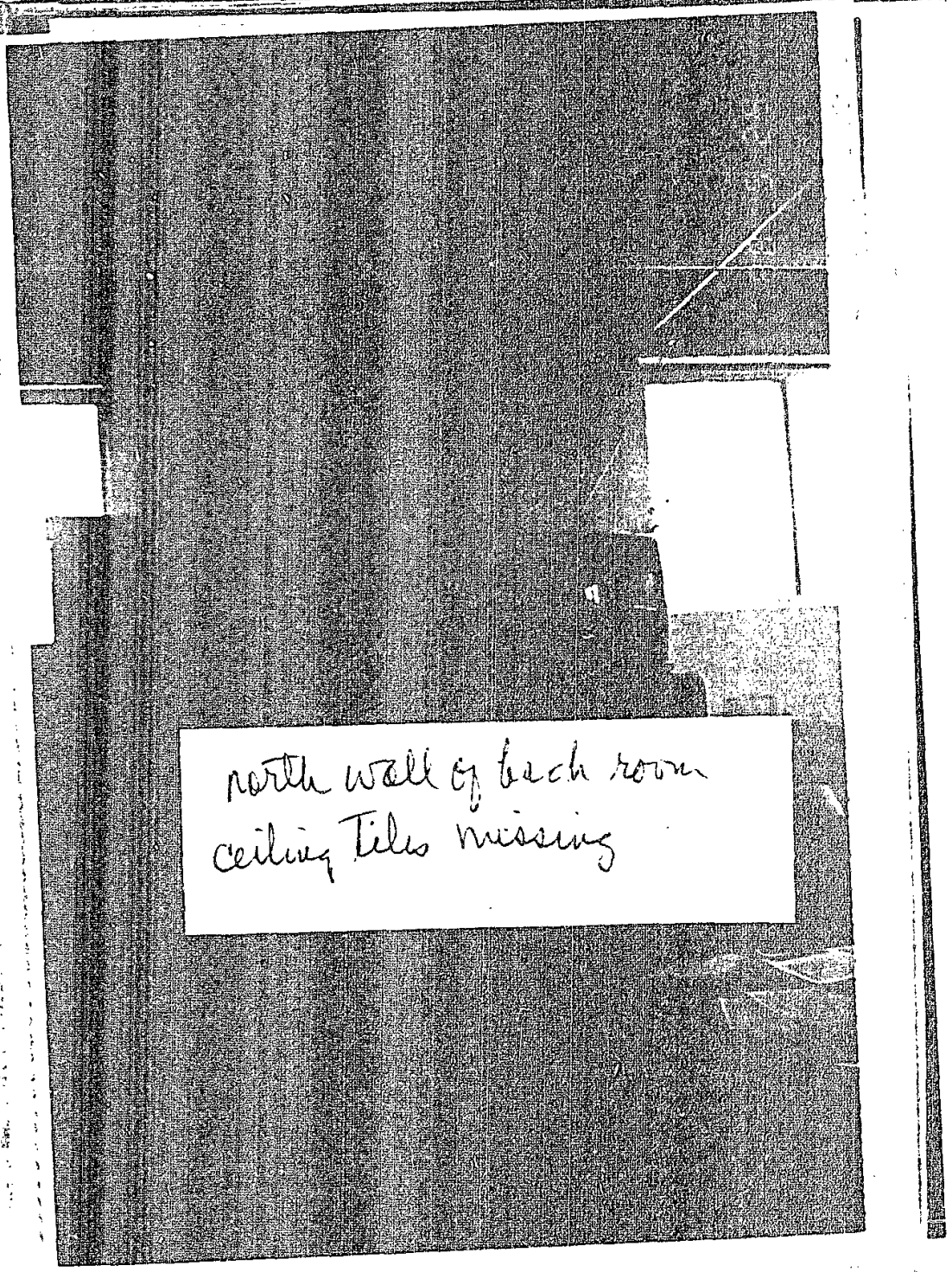

U.S. CONGRESS
EXPERIENCE COUNTS!
U.S. CONGRESS
EXPERIENCE COUNTS!
U.S. CONGRESS
EXPERIENCE COUNTS!
white paint over-
spray in entire
penetling

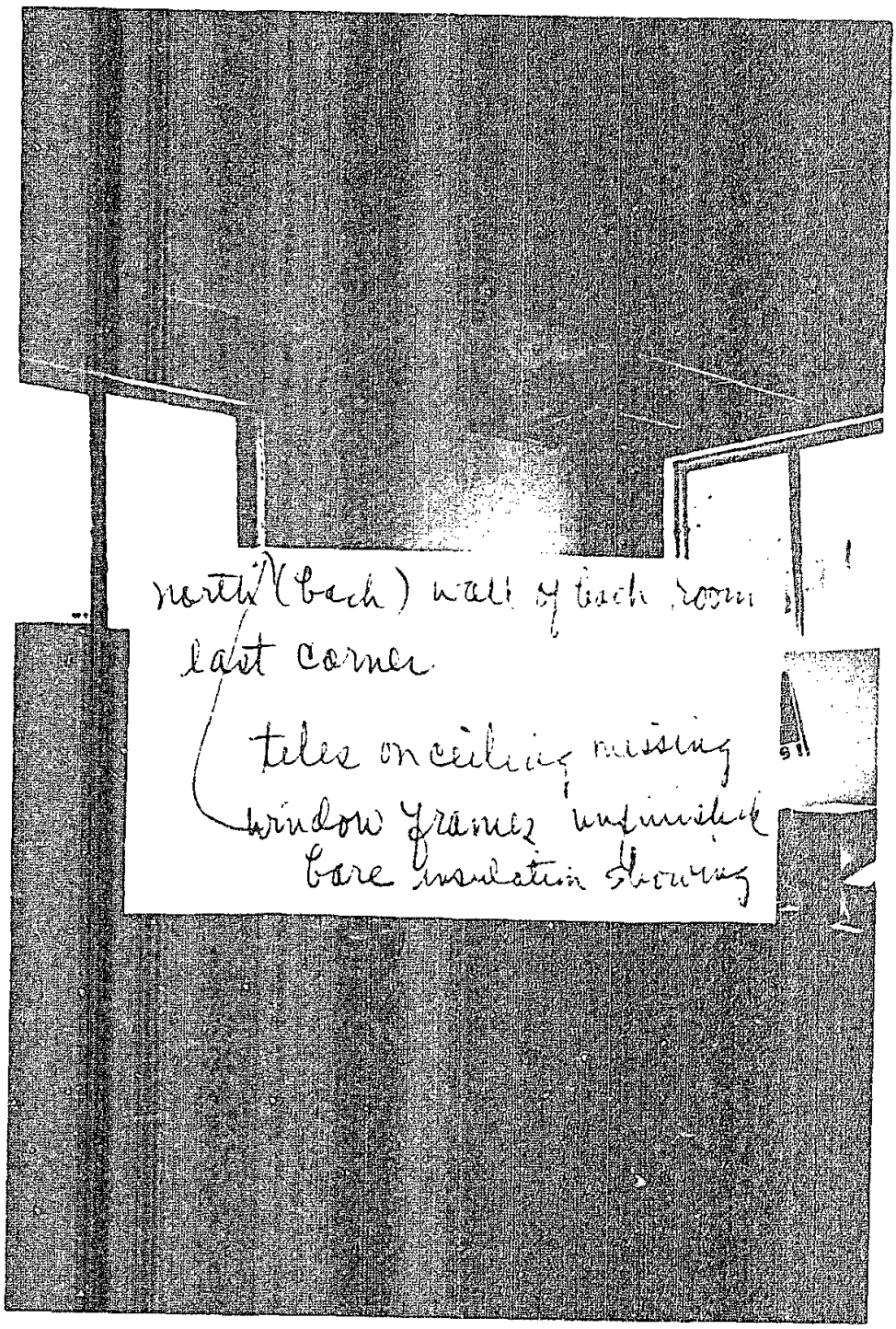

north west
ceiling missing
panels

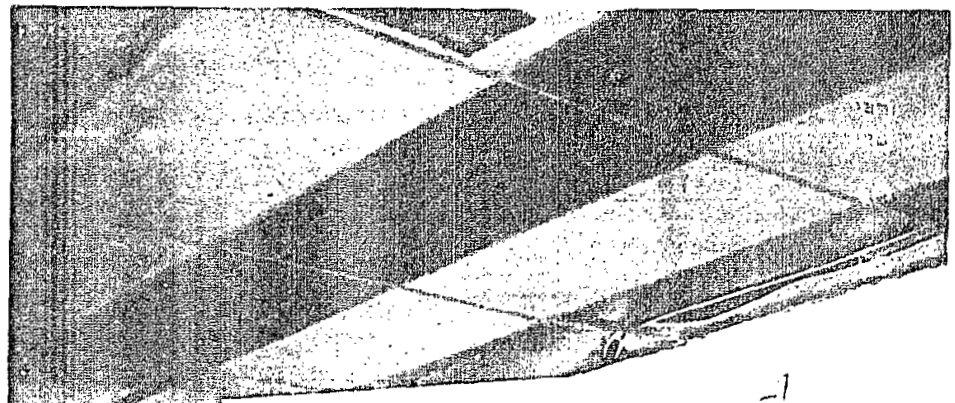

Back room floor -
bare cement - tile had been
removed

99.04.391.1540

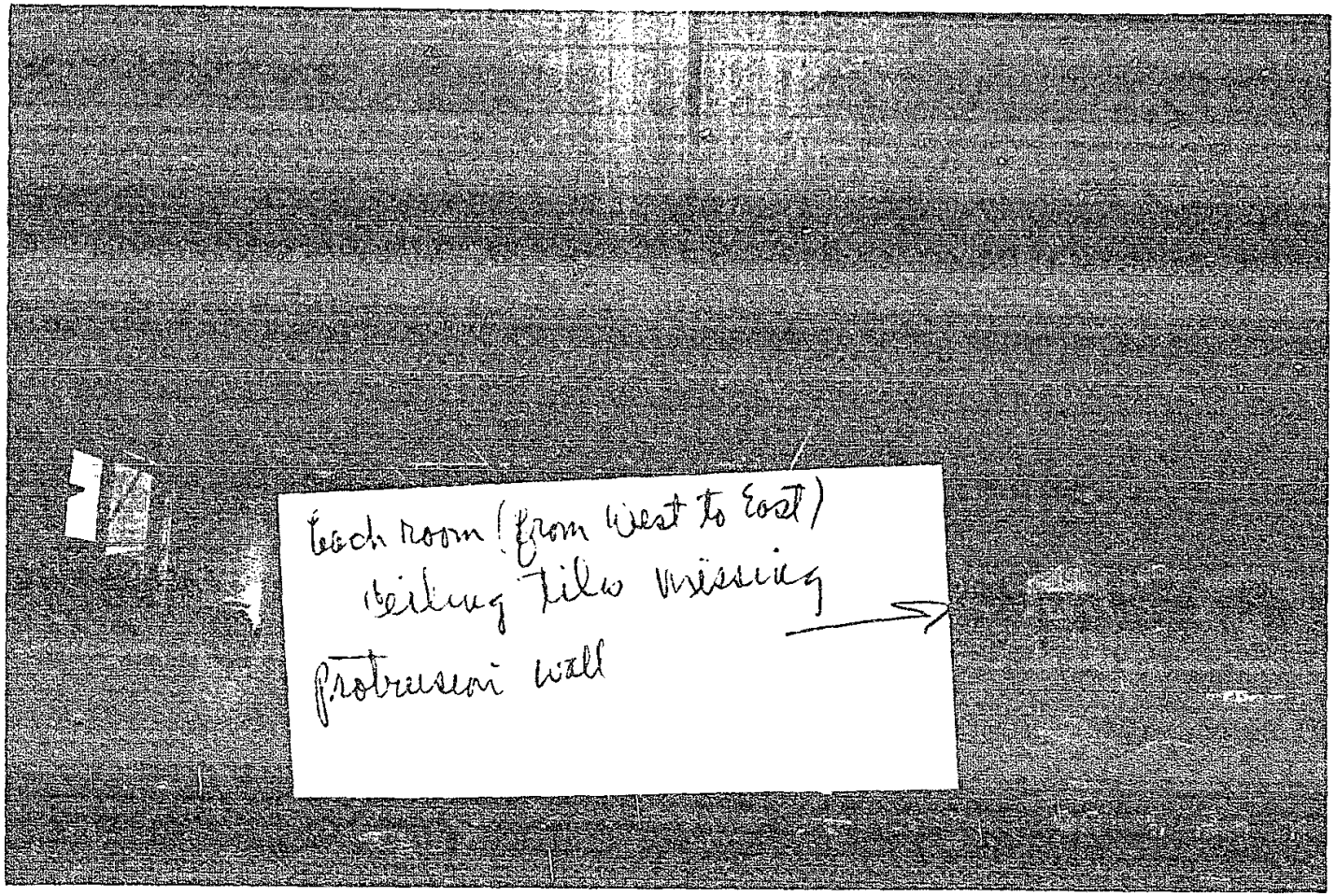



north wall of back room
ceiling Tiles missing


north (back) wall of back room
left corner
tiles on ceiling missing
window frames unfinished
bare insulation showing



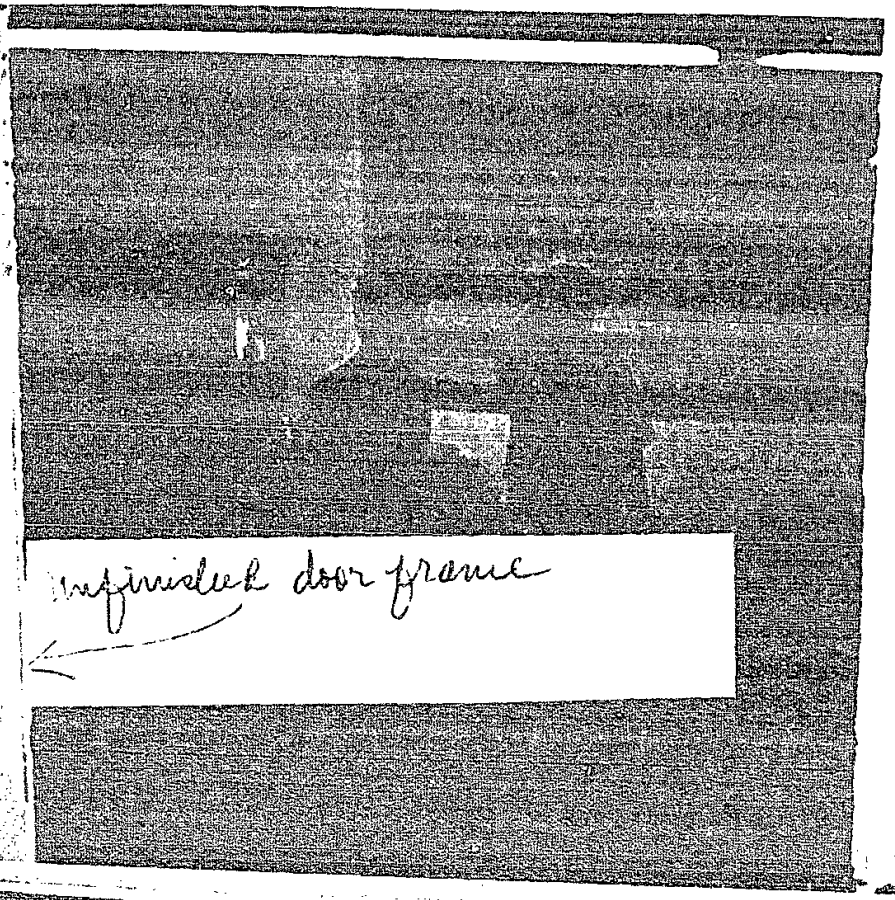
exposed wiring on
ceiling

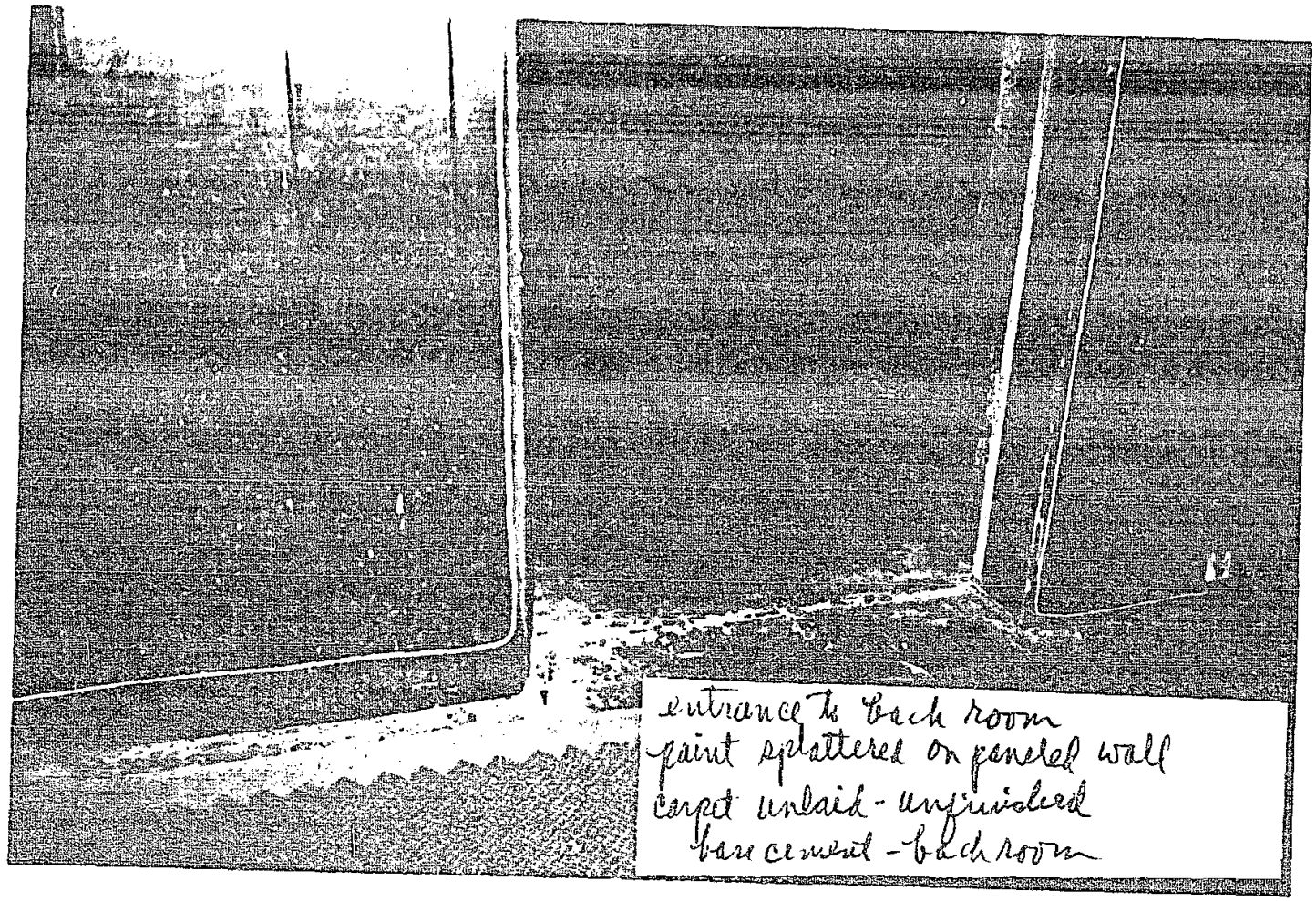

17
Teach room (from West to East)
Ceiling tiles missing
protrusion wall

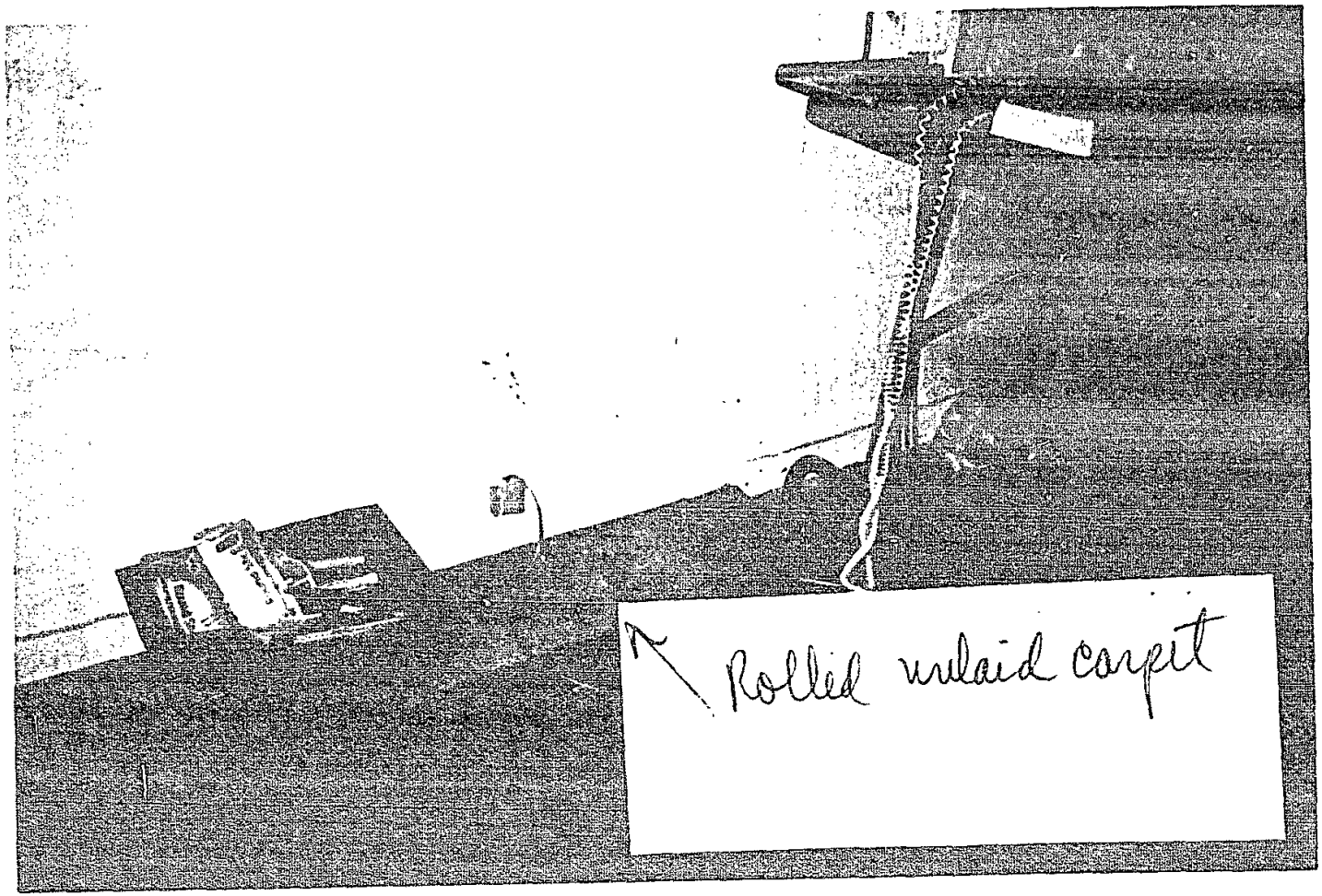
99.04.391.1545

EXPERIENCE COUNTS ! EXPERIENCE

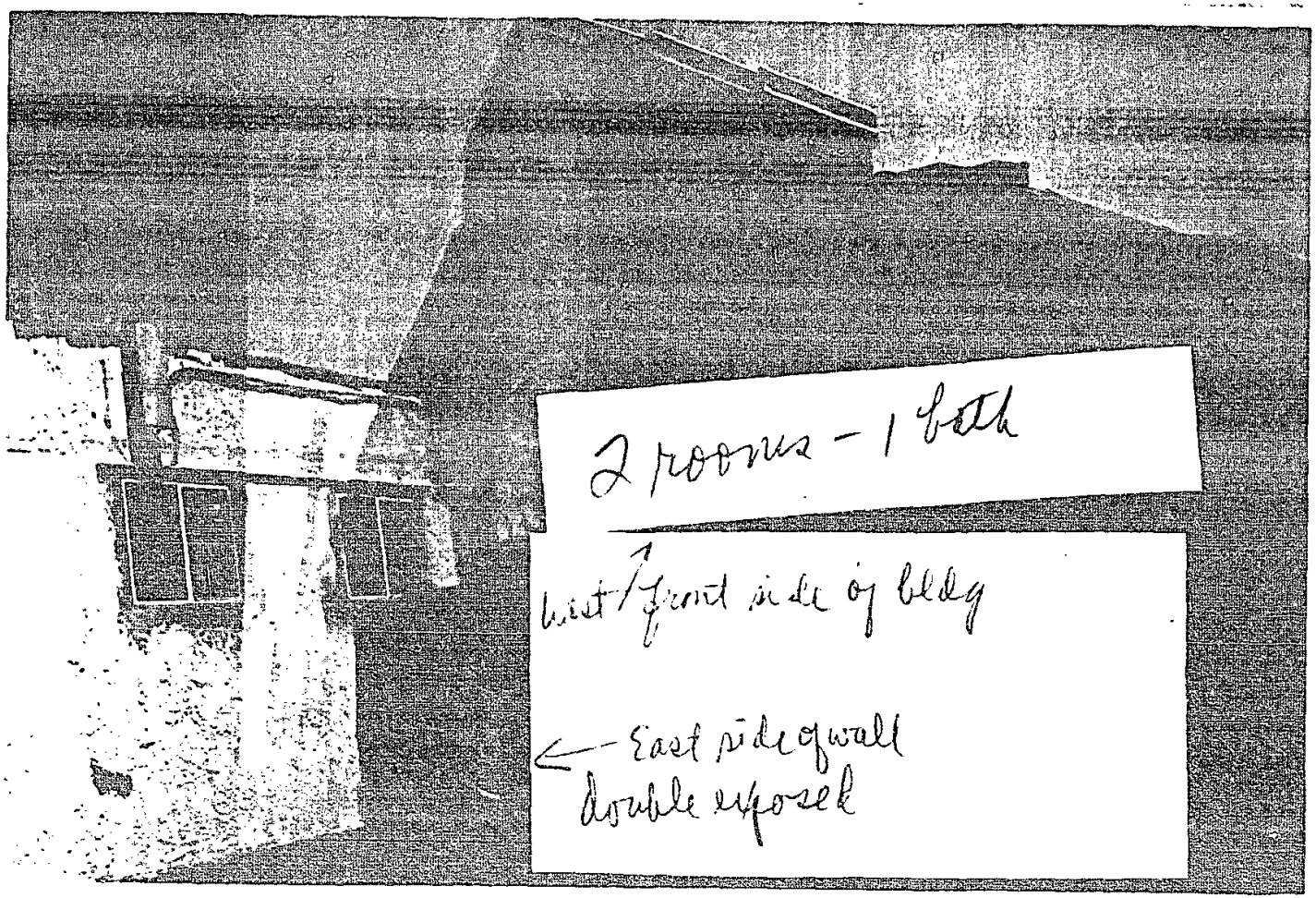
S!

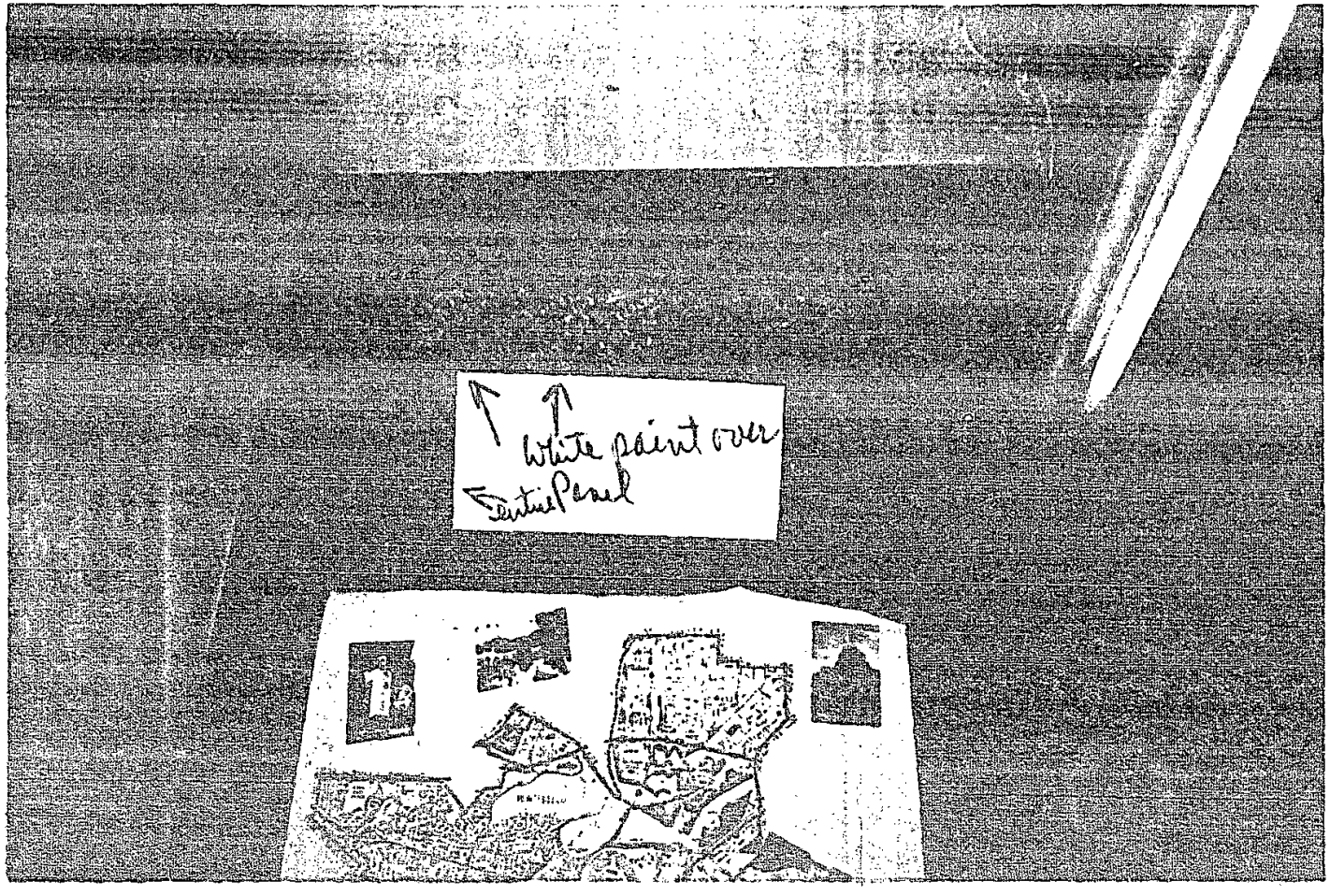


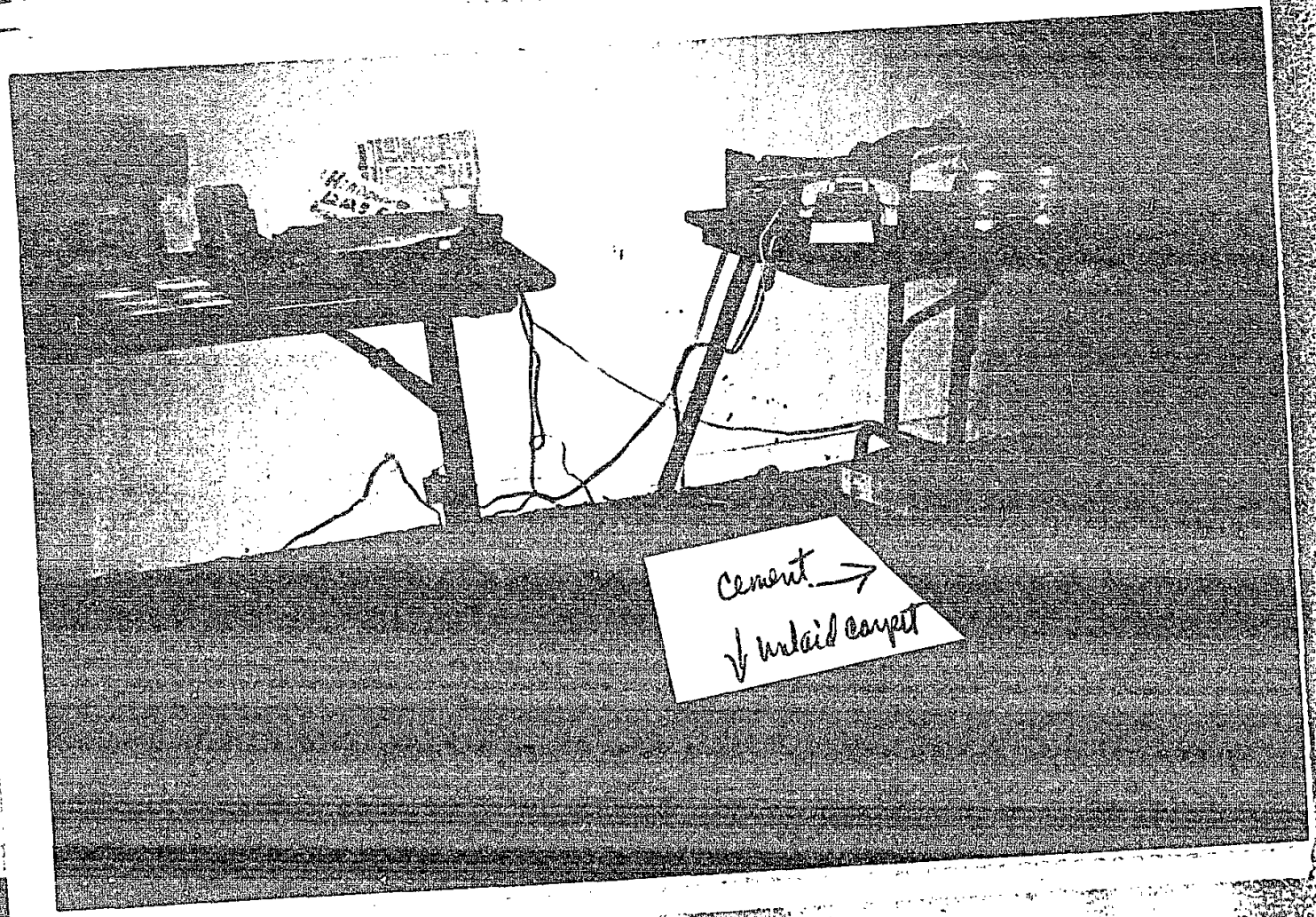

entrance to back room
paint splattered on paneled wall
carpet unlaid - unfinished
bare cement - back room


Rolled unlaid carpet

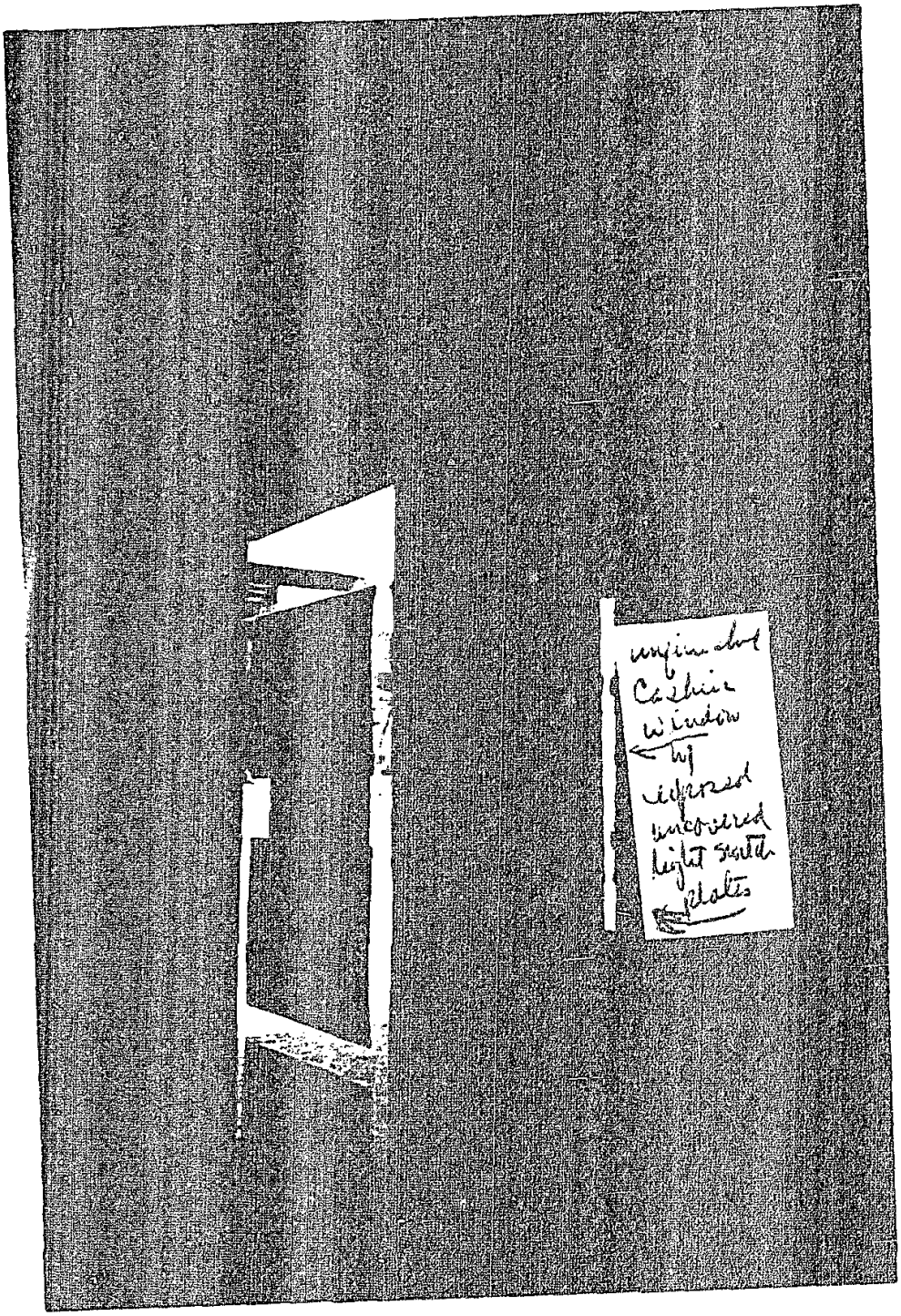
00.04.301.15119

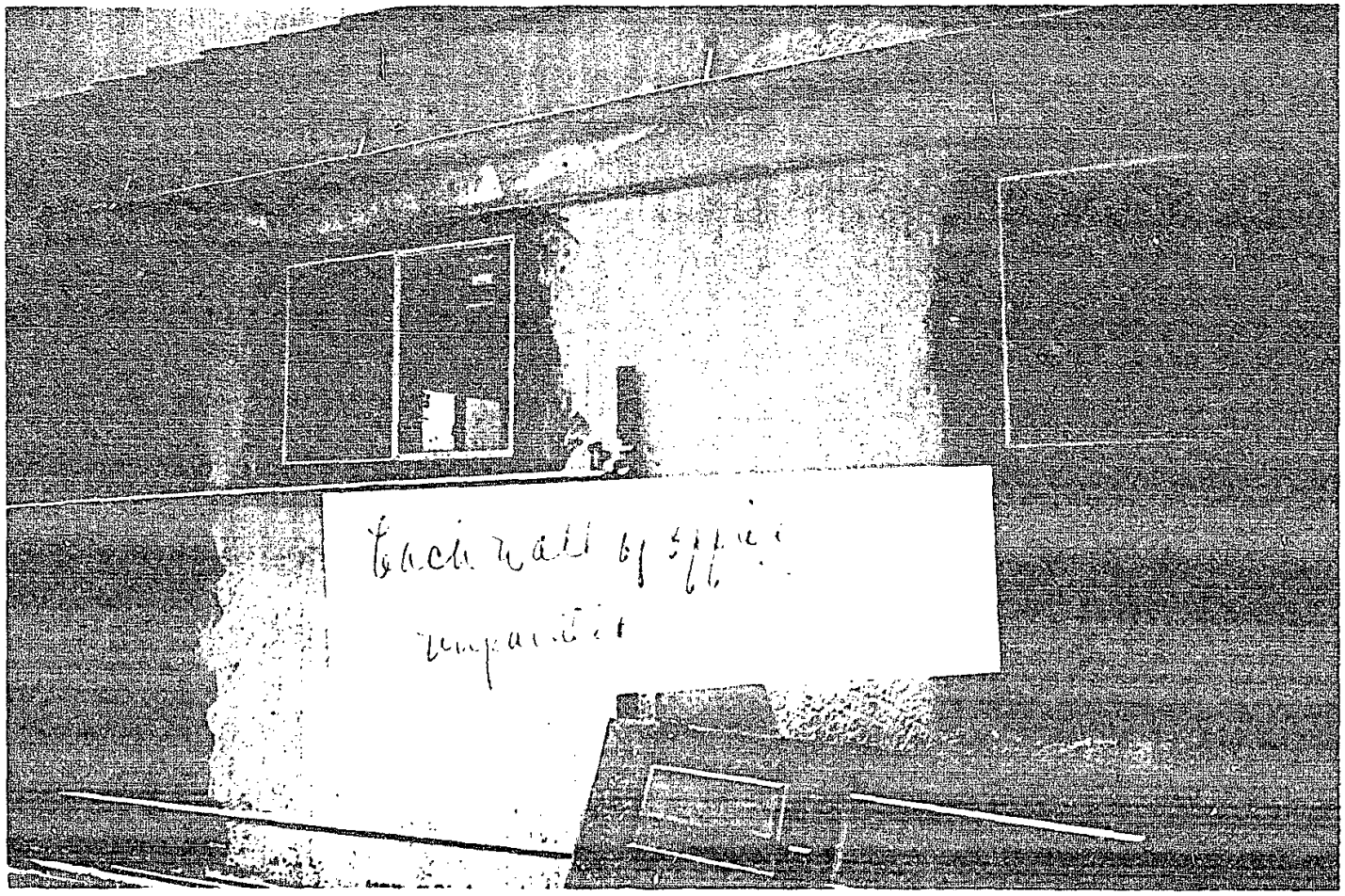



White paint over
Central Panel

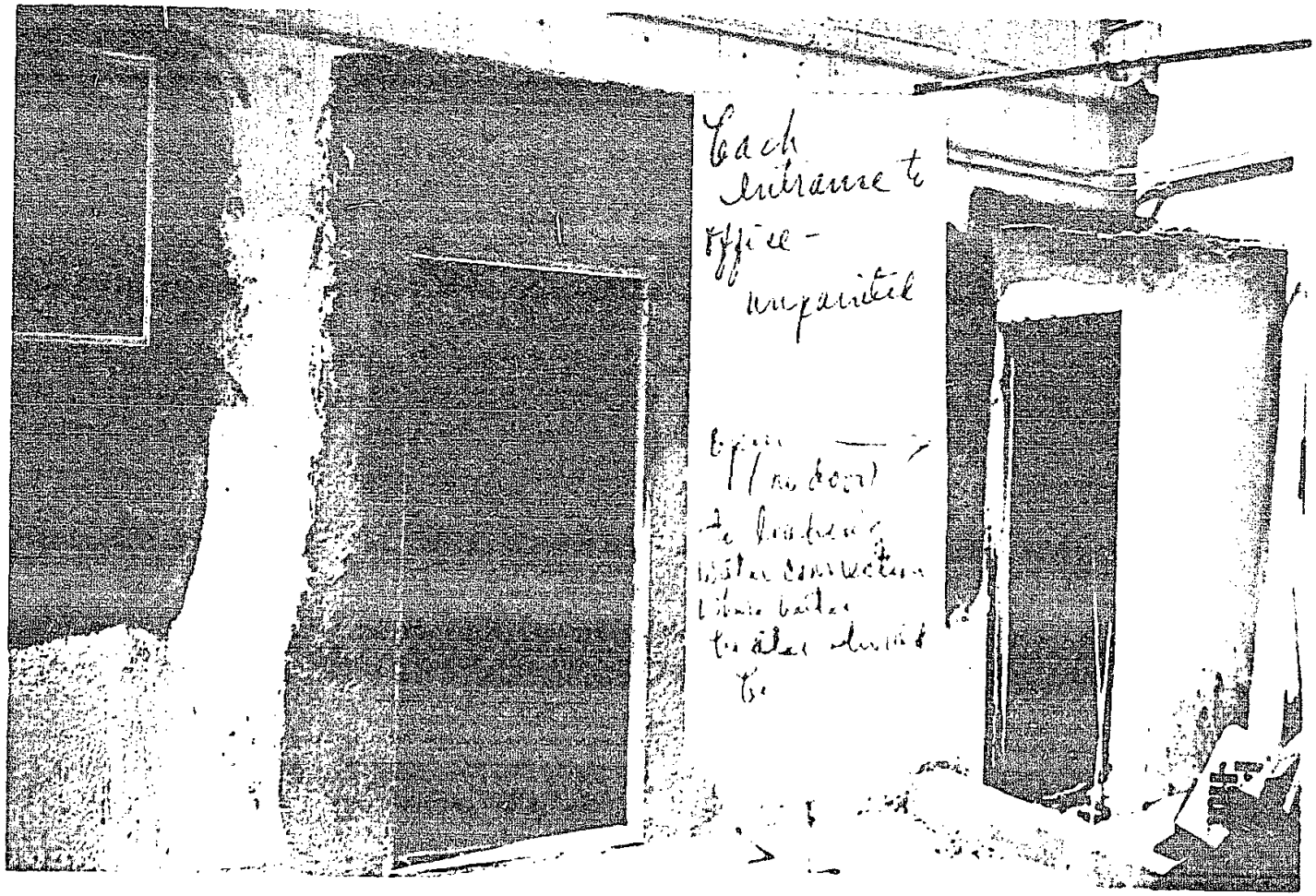


0551' 102' 10' 66

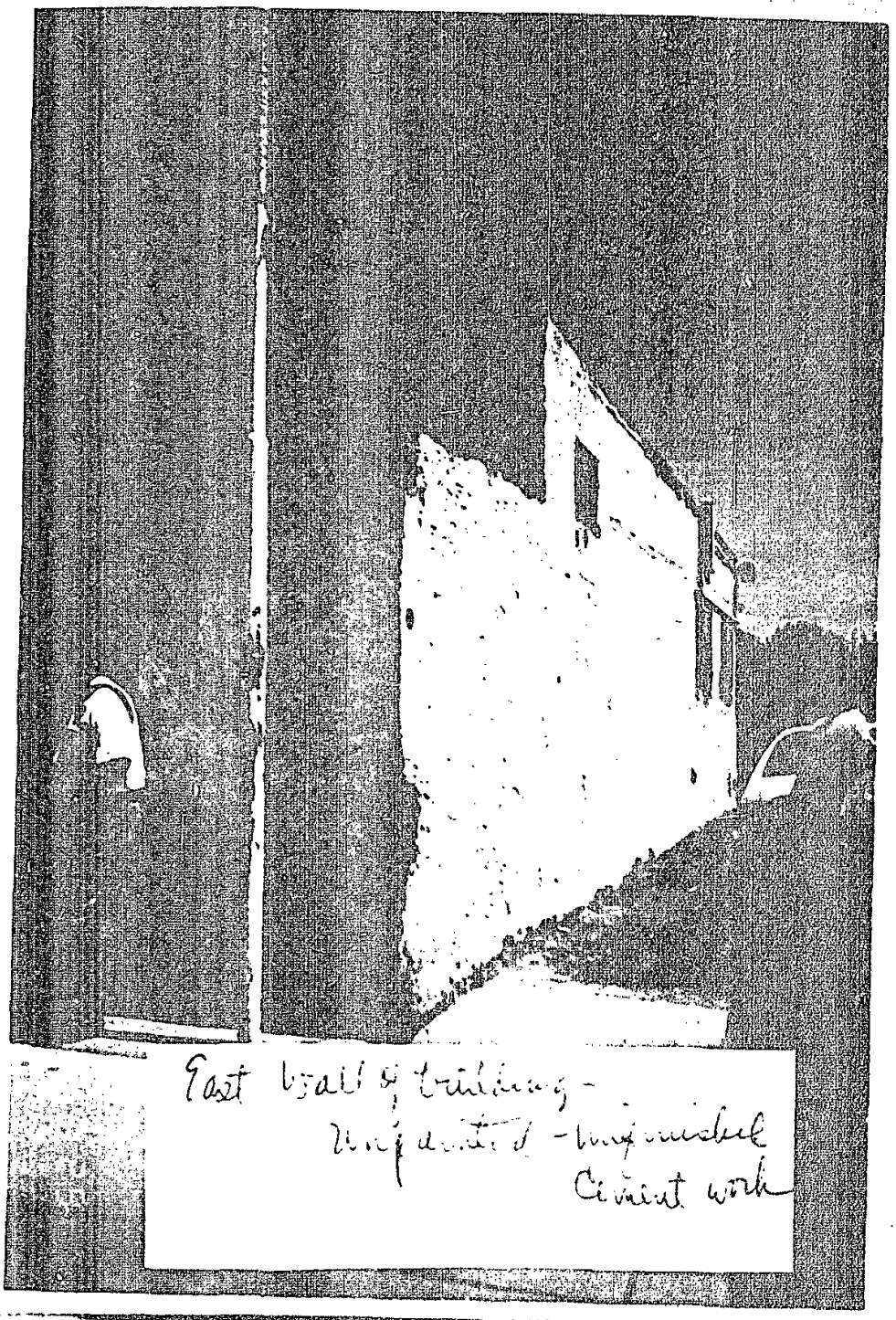

unfinished
Cashier
window
w/
exposed
uncovered
light switch
plates



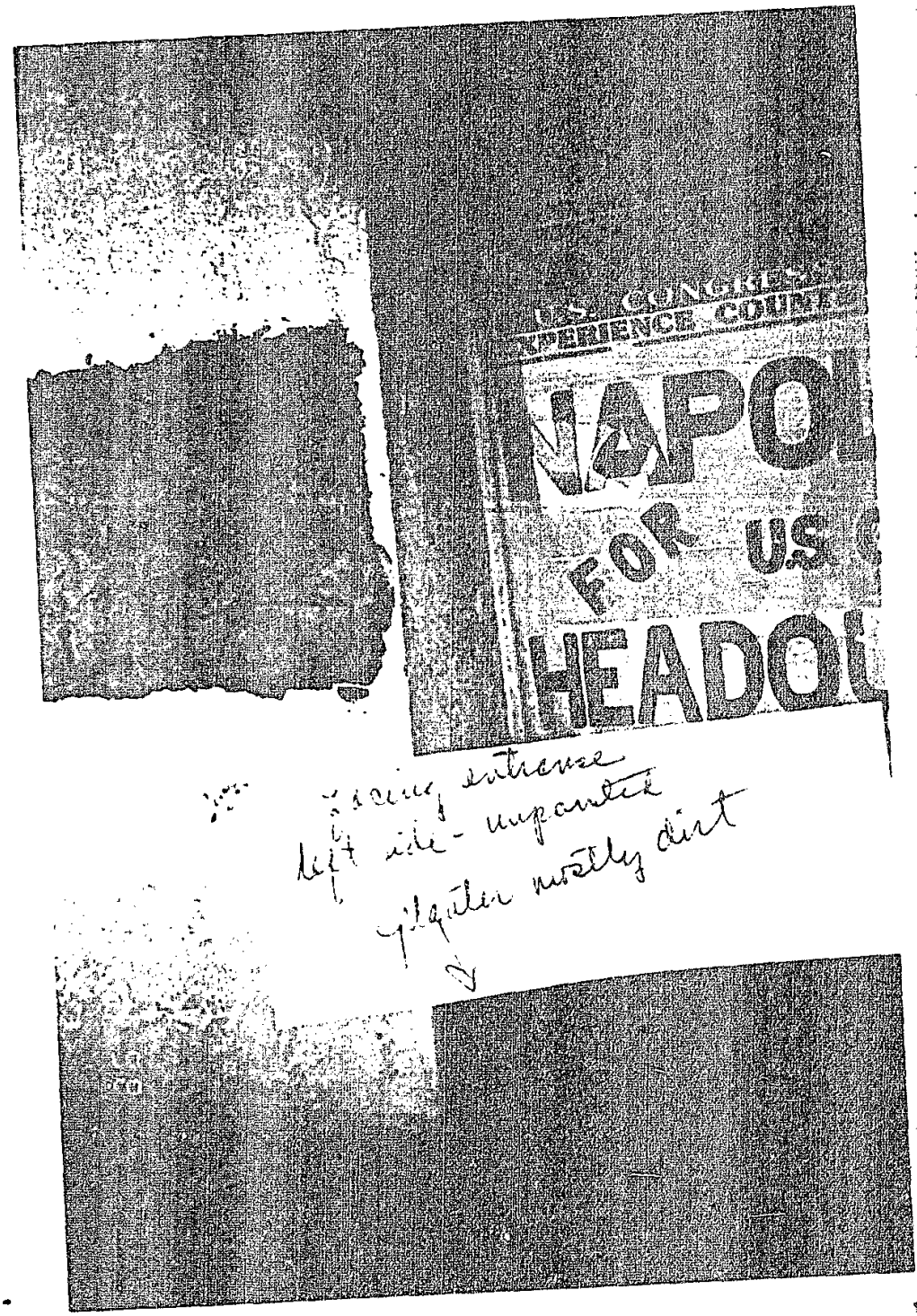
2591 102 10 66



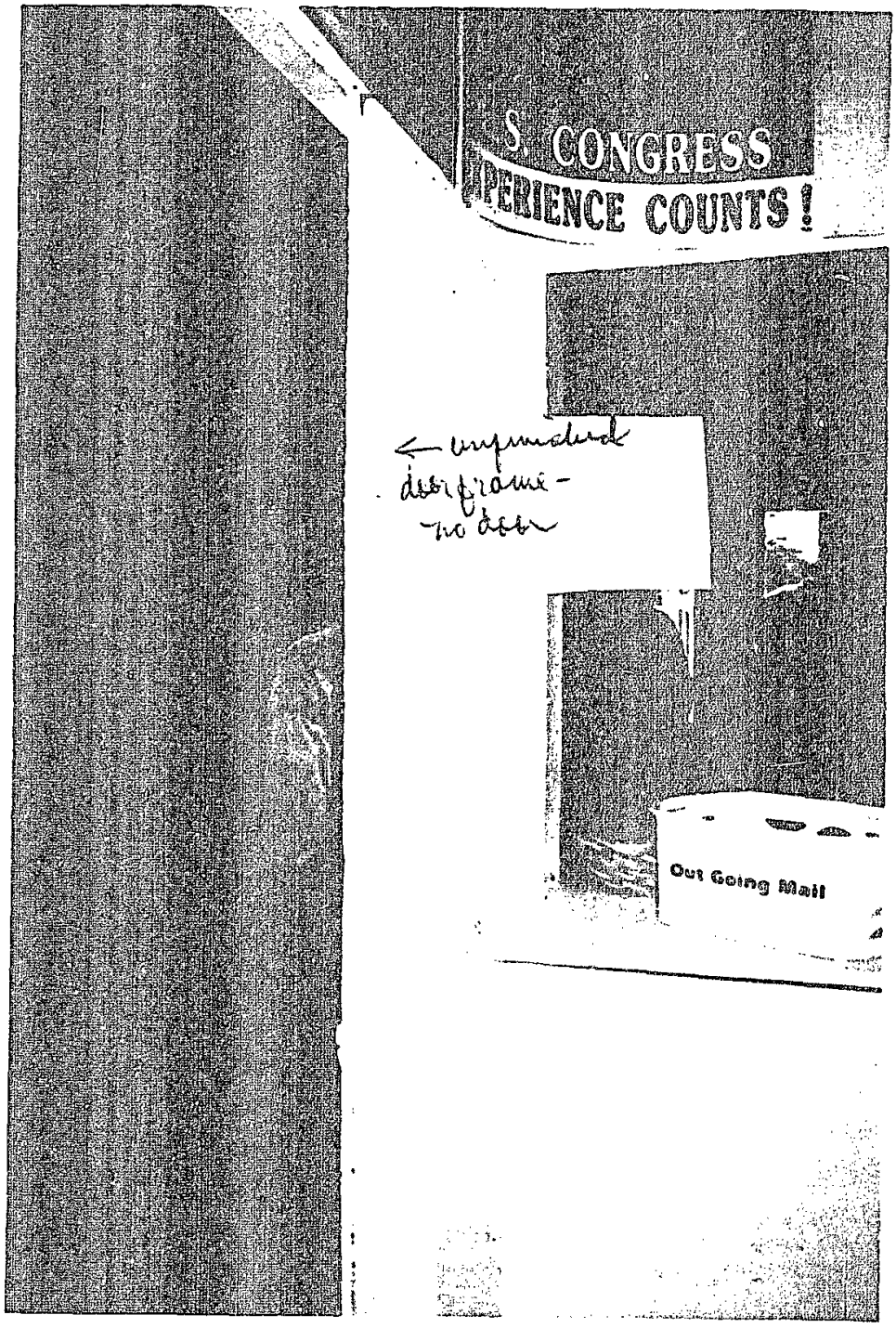
ESST 102 10 00



East wall of building -
Unpainted - unpainted
Cement work



facing entrance
left side - unpaved
gravel mostly dirt



← unmodified door frame - no door

ıclusive as to property's status, red in joint tenancy or in sole pouses may be shown to be / according to parties' intention, ıgreement. Thompson v Boyd 65, 32 Cal Rptr 513.

ween spouses that property be / is enough to convert character ion in sense of performance is lberg v Goldberg (1963) 217 tptr 93.

ɔerty to husband and wife as ys statutory presumption that ity even though consideration sists of community funds or ent creates tenancy in which and wife are separate property. ds of property held by husband nancy, absent contrary agree- er of property from which they uption of husband's and wife's form of conveyance to them merely by showing source of d property, though source is along with all other evi- presented against presumption property arising from form of erty to husband and wife may ntial credible and relevant evi- intention, understanding or (1966) 242 CA2d 396, 51

esteaded by husband and wife operty, the undivided one-half and wife were the separate ey v Scully (1967) 255 CA2d

conveyed to spouses as joint that the interests of husband property, but evidence of con- ent of the spouses is admissi- en becomes one of fact. Fry v 248, 85 Cal Rptr 742.

on

from conveyance of real prop- d wife is that of tenancy in sumed that interest of wife is ile that of husband is commu- v Phillips (1930) 9 C2d 239,

nveyed to husband and wife, vely vested in both as tenants different intention is expressed v Mullan (1931) 211 C 583, 015.

wife own property as tenants 's undivided interest therein is

4. Community Property

Neith[illegible]51 nor § 682 attempts to define the inter[illegible] either of the spouses in the community property. Stewart v Stewart (1928) 204 C 546, 269 P 439.

A community estate and a joint tenancy cannot exist at the same time in the same property. Siberell v Siberell (1932) 214 C 767, 7 P2d 1003; Young v Young (1932) 126 CA 306, 14 P2d 580; Gwin v Camp (1938) 25 CA2d 10, 76 P2d 160; Tomaier v Tomaier (1944) 23 C2d 754, 146 P2d 905; Sandrini v Ambrosetti (1952) 111 CA2d 439, 244 P2d 742; Trimble v Coffman (1952) 114 CA2d 618, 251 P2d 81; Schindler v Schindler (1954) 126 CA2d 597, 272 P2d 566.

Property can be community property because of its origin and intention of spouses, though recorded as held in joint tenancy. Silverstein v Silverstein (1946) 76 CA2d 872, 174 P2d 486.

Where separate and community property are so

Form of instrument under which husband and wife hold title [illegible] conclusive as to property's status, and prop[illegible] acquired in joint tenancy or in sole name of one of spouses may be shown to be community property according to parties' intention, understanding or agreement. Thompson v Boyd (1963) 217 CA2d 365, 32 Cal Rptr 513.

Common understanding of husband and wife as to whether their home is their community property despite designation of themselves as joint tenants in deed by which they were granted property is not required to be in any particular words or be attended with any particular formality. Hutchinson v Hutchinson (1963) 223 CA2d 494, 36 Cal Rptr 63.

It is a matter of common knowledge that in this state community property is commonly placed in joint tenancy to avoid the expense of probate or for other motives. Johansen v Pelton (1970) 8 CA3d 625, 87 Cal Rptr 784.

§ 751. Interests of spouses in community property

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

(a) Former CC § 161a, as added Stats 1927 ch 205 § 1 p 484.

(b) Former CC § 5105, as added Stats 1969 ch 1608 § 8 p 3338, amended Stats 1973 ch 987 § 4.

Law Revision Commission Comments:

1993— Section 751 continues the first sentence of former Civil Code Section 5105 without change. The last sentence of former Civil Code Section 5105 has been omitted as surplus. See also Section 65 ("community property" defined in Section 760 *et seq.*); Code Civ. Proc. §§ 370 (right of married person to sue without spouse being joined as a party), 371 (right of married person to defend suit for spouse's right).

Cross References:

Interests in property: CC §§ 678 et seq.
Nature of partner's right in specific partnership property: Corp C § 15025.
Right to make testamentary disposition of community property: Prob C §§ 21, 201.
Succession to community property: Prob C §§ 201 et seq.

Collateral References:

Witkin Summary (9th ed) Community Property §§ 104, 113.
Cal Jur 3d Decedents' Estates § 16, Family Law §§ 396, 418, 457, 474, Insurance Contracts and Coverage § 495.
Miller & Starr, Cal Real Estate 2d § 12:33.

Forms:

Am Jur Pl & Pr Forms (Rev ed) Community Property Forms 1 et seq.

Proof of Facts:

Proof of status of property as separate), Proof No. 2 (proof of change of status of property. 3 Am Jur Proof of Facts, Community Property, Proof No.

NAPOLITANO FOR CONGRESS
MUR 4749
Attachment 3

any benefit derived therefrom
rman, In re (1980) 109 CA3d
).

and Control under Former

it, existing and equal interest
operty, although management
is in the husband. Bank of
35) 4 C2d 322, 49 P2d 279.

ling, power of husband over
exists until entry of final de-
d (1954) 43 C2d 77, 271 P2d

time of parties, retains com-
nagement of community per-
ct only to restriction that he
to third party without wife's
ndenhall Estate (1960) 182
r 95.

in whom management and
nunity estate is vested by this
72a, is frequently analogized
agent or fiduciary; fiduciary
erning their performance by
or fewer or less rigorous than
iness partners. Vai v Bank of
2d 329, 15 Cal Rptr 71, 364

tions

on and Prob C § 201 the wife
causa mortis of one-half of
without the husband's con-
cchi (1949) 34 C2d 431, 211
209.

der one designated as benefi-
ervice life insurance policy to
roceeds of such insurance to
heory that under state law she
community property, since
Insurance Act (38 USC § 801)
vision contained in 38 USC
s such payments from claims
attachment, levy or seizure by
equitable process whatever ei-
receipt by beneficiary. Wissner
US 665, 94 L Ed 424, 70 S Ct
9, 201 P2d 837.

transfer of community prop-
raint but instead of exercising
signature, she, with advice of
l consent to "all of the terms
rust agreement involving such
parted voluntarily with her
ghts in community property as
nsfer, and she succeeded to a
rest in such property subject
d v Bank of America (1954)
532.

roperty by husband without

wife's consent may be set aside in its entirety by wife during husband's lifetime and as to one half after his death. Medeiros v Cotta (1955) 130 CA2d 740, 279 P2d 814.

Under national service life insurance policy, insured is fully protected and assured by federal law that proceeds of his policy will be paid to beneficiary of his choice, and beneficiary is likewise protected in receiving and retaining such proceeds from claims based either on community property laws or principles or on origin of source of funds used to pay policy premiums. *Allie Estate (1958) 50 C2d 794,* 329 P2d 903.

Whatever may have been former understanding of husband and wife as to character of their properties which stood in their names in a certain year some twenty-six years after their marriage, their oral agreement to make mutual wills and their mutual wills of that year evidenced understanding that they would treat the whole as property in which their interests were "*present, existing and equal interests* under the management and control of the husband," i.e., community property. Brewer v Simpson *(1960) 53 C2d 567,* 2 Cal Rptr 609, 349 P2d 289.

The use of the husband's entire income as the basis for computing his liability in an action by a county *to recoup welfare benefits paid to his indigent par*ent, as provided in Welf & Inst Code, § 12101, does not deprive his wife of a vested property right nor *deny her* equal protection of the laws, and hence the statute is not invalid on those grounds, though neither spouse is responsible for the support of the indigent parents of the other spouse, and though a wife, under the community property provisions of Civ Code, § 161a, is vested with one-half interest in her husband's earnings. Alameda v Aberle (1968) 268 CA2d 424, 73 Cal Rptr 926.

The reference in Gov Code, § 21210, to Civ Code, §§ 161a and 172, confirms the legislative intent that Gov Code, § 21210, would secure the Board of Administration, Public Employees' *Retirement Sys*tem from double liability for claims emanating from community property interests; moreover, the immunity conferred *is conditional, and where the board* pays a member of the system after receiving written notice of an adverse claim by the member's spouse, *the board remains subject to double liability.* Phillipson v Board of Administration (1970) 3 C3d 32, 89 Cal Rptr 61, 473 P2d 765.

5. Procedure

Where there was evidence that husband, during *pendency* of divorce action, went to collect rent at his building later awarded to his wife by interlocutory decree, it was not error for court to refuse, in action for assault and battery, instruction from which it might be inferred that when husband was collecting rent he was trespasser subject to removal from premises by force. Northrup v Baker (1962) 202 CA2d 347, 20 Cal Rptr 797.

In divorce action in foreign state on constructive service, court there, while having authority to adjudicate status of person residing in that state, does not have authority to adjudicate vested property rights of absent spouse, such as his or her interest in community property of marriage, where absent spouse does not reside in such state, does not appear in such action, and is not served within such state. Carmichael v Carmichael *(1963) 216 CA2d 674, 31* Cal Rptr 514.

§ 752. Interest of spouses in separate property

Except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

(a) Former CC § 157, as amended Stats 1957 ch 2145 § 1 p 3802.

(b) Former CC § 5102, as added Stats 1969 ch 1608 § 8 p 3337, amended Stats *1969 ch 1609* § 22 p 3357, Stats 1973 ch 987 § 3, Stats 1979 ch 795 § 4, Stats 1982 ch 497 § 21, Stats 1983 ch 192 § 1, ch 234 § 2.5.

(c) Field's Draft NY CC § 78.

Law Revision Commission Comments:

1993— Section 752 continues the first part of former Civil Code Section 5102(a) without substantive change. "Except as otherwise provided by statute" has been substituted for "[e]xcept as provided in this section." See also Sections 130 ("separate property" defined in Section 760 *et seq.*), 754 (limitation on disposition of separate property residence if notice of pendency of proceeding recorded); Code Civ. Proc. §§ 370 (right of married person to sue without spouse being joined as a party), 371 (right of married person to defend suit for spouse's right).

Cross References:

Exclusion of spouse from other's dwelling: Fam C § 753.

PART 2

Characterization of Marital Property

Chapter

1. Community Property. § 760
2. Separate Property. § 770
3. Damages for Injuries to Married Person. § 780
4. Presumptions Concerning Nature of Property. § 802
5. Transmutation of Property. § 850

CHAPTER 1

Community Property

Section

760. Community property
761. Property in certain revocable trusts as community property

§ 760. Community property

Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

(a) Former CC § 164, as amended Stats 1889 ch 219 § 1, Stats 1893 ch 62 § 1, Stats 1897 ch 72 § 1, Stats 1917 ch 531 § 1, Stats 1923 ch 360 § 1, Stats 1927 ch 487 § 1, Stats 1935 ch 707 § 1, Stats 1941 ch 455 § 1, Stats 1961 ch 636 § 1, Stats 1965 ch 1710 § 1.

(b) Former CC § 5110, as added Stats 1969 ch 1608 § 8, amended Stats 1970 ch 517 § 1, Stats 1973 ch 987 § 5, Stats 1977 ch 332 § 3, Stats 1979 ch 373 § 48, Stats 1983 ch 342 § 3, Stats 1987 ch 128 § 1.

(c) Former CC § 5120.020, as added Stats 1984 ch 1671 § 9.

(d) Stats 1850 ch 103 § 2.

Law Revision Commission Comments:

1993— Section 760 restates the first part of former Civil Code Section 5110, and extends the definition of community property to include real property situated outside California. The phrase "[e]xcept as otherwise provided by statute" has been substituted for the narrower reference to specific statutory provisions in the former section. The former reference to property held in trust has been eliminated as

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CHAPTER 2

Separate Property

Section

770. Separate property of married person

771. Earnings and accumulations while living separate and apart

772. Earnings and accumulations after judgment of legal separation

§ 770. Separate property of married person

(a) Separate property of a married person includes all of the following:

(1) All property owned by the person before marriage.

(2) All property acquired by the person after marriage by gift, bequest, devise, or descent.

(3) The rents, issues, and profits of the property described in this section.

(b) A married person may, without the consent of the person's spouse, convey the person's separate property.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

(a) Former CC §§ 162, 163.

(b) Former CC §§ 5107, 5108, as added Stats 1969 ch 1608 § 8.

(c) Stats 1850 ch 103 § 1.

(d) Const 1849 Art XI § 14.

Law Revision Commission Comments:

1993— Section 770 restates former Civil Code Sections 5107 and 5108 without substantive change. The two former sections (which separately stated the same rule, one in relation to a wife and the other to a husband) have been combined and made gender-neutral. For special definitions of separate property in other contexts, see Sections 2502 (division of property), 3515 (support). See also Cal. Const. Art. I, § 21 (separate property).

Cross References:

Community property: CC § 687.
Transfers generally: CC §§ 1039 et seq.
Separate property: Const Art I § 21.
Disposition of separate property by will: Prob C § 20.
Succession to community property: Prob C §§ 100 et seq.
Succession to separate property: Prob C §§ 220 et seq.

Section
850. Transmutation of property by agreement or transfer
851. Fraudulent transfers laws apply
852. Form of transmutation
853. Effect of will statement, waiver of specified benefits, or written joinder or consent to nonprobate transfer of property on transmutation of property

§ 850. Transmutation of property by agreement or transfer

Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration, do *any of* the following:

(a) Transmute community property to separate property of either spouse.

(b) Transmute separate property of either spouse to community property.

(c) Transmute separate property of one spouse to separate property of the other spouse.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

Former CC § 5110.710, as added Stats 1984 ch 1733 § 1.

Law Revision Commission Comments:

1993— Section 850 continues former Civil Code Section 5110.710 without substantive change. When enacted in 1984 (as former Civil Code Section 5110.710), this provision codified the basic rule that spouses may transmute the character of community or separate property. See, e.g., Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143 (1981).

In addition to the limitations on transmutation provided in Sections 851-853, the spouses are subject to the general rules governing the validity of agreements and transfers, as well as the special rules that control the actions of persons occupying confidential relations with each other. See Section 721. The characterization of community and separate property may be affected by a general marital property agreement, prenuptial or otherwise, as well as by a transmutation of specific property.

For background on former Civ. Code § 5110.710, see *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 Cal. L. Revision Comm'n Reports 205 (1984); 18 Cal. L. Revision Comm'n Reports 67 (1986).

Cross References:

Restrictions on sale, lease, or transfer of firearms: Pen C § 12070.

Exceptions to application of provisions respecting licenses to sell firearms: Pen C § 12078.

Collateral References:

Witkin Summary (9th ed) Community Property §§ 14, 127.

Cal Family Law Service § 15:21.

Miller & Starr, Cal Real Estate 2d § 12:33.

Law Review Articles:

Donative and interspousal transfers of community property in California: Where we are (or should be) after MacDonald. 23 Pacific LJ 361.

§ 851. Fraudulent transfers laws apply

A transmutation is subject to the laws governing fraudulent transfers.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

Former CC § 5110.720, as added Stats 1984 ch 1733 § 2.

Law Revision Commission Comments:

1993— Section 851 continues former Civil Code Section 5110.720 without change. When enacted in 1984 (as former Civil Code Section 5110.720), this provision codified case law. Cf. Bailey v. Leeper, 142 Cal. App. 2d 460, 298 P.2d 684 (1956) (transfer of property from husband to wife); Frankel v. Boyd, 106 Cal. 608, 614, 39 P. 939, 941 (1895) (dictum); Wikes v. Smith, 465 F.2d 1142 (1972) (bankruptcy). See also Civ. Code § 3439 et seq. (general law regarding fraudulent transfers).

For background on former Civ. Code § 5110.720, see *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 Cal. L. Revision Comm'n Reports 205 (1984); 18 Cal. L. Revision Comm'n Reports 68 (1986).

Cross References:

Fraudulent instruments and transfers: CC §§ 3439 et seq.

Collateral References:

Witkin Summary (9th ed) Community Property §§ 126-128.

Cal Family Law Service § 12:44.

Miller & Starr, Cal Real Estate 2d § 12:33.

Law Review Articles:

Donative and interspousal transfers of community property in California: Where we are (or should be) after MacDonald. 23 Pacific LJ 361.

§ 852. Form of transmutation

(a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.

(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature

that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.

(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.

(e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

Former CC § 5110.730, as added Stats 1984 ch 1733 § 3.

Law Revision Commission Comments:

1993— Section 852 continues former Civil Code Section 5110.730 without change. See also Section 700 (real property includes leasehold interests in real property).

Section 852 imposes formalities on interspousal transmutations for the purpose of increasing certainty in the determination whether a transmutation has in fact occurred. Section 852 makes clear that the ordinary rules and formalities applicable to real property transfers apply also to transmutations of real property between the spouses. See Civ. Code §§ 1091, 1624 (statute of frauds), 1213-1217 (effect of recording). When enacted in 1984 (as former Civil Code Section 5110.730), this provision overruled case law. See, e.g., Woods v. Security First Nat'l Bank, 46 Cal. 2d 697, 701, 299 P.2d 657, 659 (1956). It also overruled prior law that permitted oral transmutation of personal property; however, transmutation by gift of certain personal property was recognized.

For background on former Civ. Code § 5110.730, see *Recommendation Relating to Marital Property Presumptions and Transmutations*, 17 Cal. L. Revision Comm'n Reports 205 (1984); 18 Cal. L. Revision Comm'n Reports 68 (1986).

Cross References:

Effect of written joinder or written consent to nonprobate transfer of property on transmutation of property: Fam C § 853.

Inapplicability to spouse's written consent for nonprobate transfer of community property on death that satisfies this section: Prob C § 5022.

Collateral References:

Witkin Summary (9th ed) Community Property §§ 109, 126-128.

Cal Family Law Service §§ 12:34, 12:44, 15:30.

Miller & Starr, Cal Real Estate 2d §§ 12:33, 12:45.

Law Review Articles:

What's in a name: A critical look at California's system of characterizing marital property. 26 Cal Western LR 1.

Marriage: Until profits do us part. 15 Family L News No. 3 p 1.

Donative and interspousal transfers of community property in California: Where we are (or should be) after MacDonald. 23 Pacific LJ 361.

NOTES OF DECISIONS

Decisions under Former CC § 5110.730:

Parties to an action to determine whether the husband of a deceased wife is required to pay to her estate one-half the net proceeds of the sale of real property after the death of the wife are not bound by the writing requirement of Civ. Code, § 5110.730 (transmutation of property after 1985 must be in writing), for any agreement or understanding made before 1985. Retroactive application of § 5110.730 would contravene due process substantially affecting a vested property right. However, if the trial court finds that the parties did not agree on a transmutation before December 31, 1984, the require-

ner, in that he cannot obtain an unfair advantage from the trust placed in him as a result of the marital relationship, his duty not to obtain an unfair advantage over his wife does not require him to be as prudent as a trustee or to keep complete and accurate records of income received and disbursed. Williams v Williams (1971) 14 CA3d 560, 92 Cal Rptr 385.

The trial court erred in sustaining a wife's demurrer to her husband's complaint alleging she had taken and secreted a substantial sum in community funds, was in exclusive possession thereof, and had refused to repay it on the husband's demand. Under Civ. Code, § 5125, a husband generally has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate, and he has a cause of action against his wife for an invasion and violation of such right with attendant appropriate remedies. Wilcox v Wilcox (1971) 21 CA3d 457, 98 Cal Rptr 319.

The provision of Civ. Code, § 5125, that a husband may not make a gift of community personal property or dispose of it without valuable consideration, does not place the husband in the position of a fiduciary, thereby requiring that any transfer, sale or disposition of community property must be for an "adequate consideration" substantially equal in value, measured in terms of money, to the value of the property. In negotiating a property settlement with his wife with respect to community property, a husband has the duties of a fiduciary, but extension of the "fiduciary duty" concept to situations other than property settlements with the wife would hamper the exercise of the husband's business initiative, prejudice the rights of those who deal with him, and generally hinder commercial transactions. Bank of Cal. v Connolly (1973) 36 CA3d 350, 111 Cal Rptr 468.

4. 1975 Amendment; Equal Management and Control

1975 amendments to Civ. Code, §§ 5125, and 5127, deleting former provisions giving the husband management and control of community personal and real property, specifically made retroactive to indicate that the husband no longer has management and control of the community property, do not operate retroactively to support the assertion that a husband is not in a fiduciary relationship with his wife and, therefore, to validate a marital settlement agreement made prior to effective date of the amendments, as to which breach of the fiduciary relationship is asserted. The extent of retroactivity of the sections is limited to specific provisions dealing with their retroactivity, especially in light of other statutory and code provisions limiting retroactive application. Coffin, In re (1976) 63 CA3d 139, 133 Cal Rptr 583.

Support obligations based upon community earnings are community obligations, and it is not an abuse of the power of management and control to use community funds to discharge such obligations. Thus, in interlocutory judgment of dissolution, the trial court erred in ordering the husband to reimburse the community for one-half of the support payments made to his first wife from community funds, even though his second wife had not consented to the payments. No separate funds had been available to the husband during the marriage. Smaltz, In re (1978) 82 CA3d 568, 147 Cal Rptr 154.

By amendments to Civ. Code, §§ 5125 and 5127, effective January 1, 1975, spouses no longer have a fiduciary duty to each other; however, they do have a duty to deal in good faith with regard to the management and control of community property. This requires the disclosure of all community assets, but not their valuation, unless factors affecting the valuation are peculiarly within the knowledge of one spouse and reasonable inquiry and discovery by the other spouse would fail to disclose them. In re Marriage of Stevenot (1984, 1st Dist) 154 Cal App 3d 1051, 202 Cal Rptr 116.

§ 1101. Remedies for breach of fiduciary duty between spouses

(a) A spouse has a claim against the other spouse for a breach of the fiduciary duty imposed by Section 1100 or 1102 that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.

(b) A court may order an accounting of the property and obligations of the parties to a marriage and may determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties to a marriage.

(c) A court may order that the name of a spouse shall be added to community property held in the name of the other spouse alone or that the title of community property held in some other title form shall be

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reformed to reflect its community character, except with respect to any of the following:

(1) A partnership interest held by the other spouse as a general partner.

(2) An interest in a professional corporation or professional association.

(3) An asset of an unincorporated business if the other spouse is the only spouse involved in operating and managing the business.

(4) Any other property, if the revision would adversely affect the rights of a third person.

(d)(1) Except as provided in paragraph (2), any action under subdivision (a) shall be commenced within three years of the date a petitioning spouse had actual knowledge that the transaction or event for which the remedy is being sought occurred.

(2) An action may be commenced under this section upon the death of a spouse or in conjunction with an action for legal separation, dissolution of marriage, or nullity without regard to the time limitations set forth in paragraph (1).

(3) The defense of laches may be raised in any action brought under this section.

(4) Except as to actions authorized by paragraph (2), remedies under subdivision (a) apply only to transactions or events occurring on or after July 1, 1987.

(e) In any transaction affecting community property in which the consent of both spouses is required, the court may, upon the motion of a spouse, dispense with the requirement of the other spouse's consent if both of the following requirements are met:

(1) The proposed transaction is in the best interest of the community.

(2) Consent has been arbitrarily refused or cannot be obtained due to the physical incapacity, mental incapacity, or prolonged absence of the nonconsenting spouse.

(f) Any action may be brought under this section without filing an action for dissolution of marriage, legal separation, or nullity, or may be brought in conjunction with the action or upon the death of a spouse.

(g) Remedies for breach of the fiduciary duty by one spouse as set out in Section 721 shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. However, in no event shall interest be assessed on the managing spouse.

(h) Remedies for the breach of the fiduciary duty by one spouse when the breach falls within the ambit of Section 3294 of the Civil Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994.

Historical Derivation:

Former CC § 5125.1, as added Stats 1986 ch 1091 § 2, amended Stats 1991 ch 1026 § 4.

Law Revision Commission Comments:

1993— Section 1101 continues former Civil Code Section 5125.1 without change, except that (1) section references have been adjusted and (2) "community estate" has been substituted for "community interest" in subdivision (a) for internal consistency. These are technical, nonsubstantive changes. See Section 63 ("community estate" defined) & Comment. See also Prob. Code §§ 3057 (protection of rights of spouse who lacks legal capacity), 3101 (proceeding for court order to authorize particular transaction).

Cross References:

Action for spouse's refusal to sign election of disability and death benefit document under State Teachers' Retirement System: Ed C § 22253.5.

Collateral References:

Witkin Summary (9th ed) Community Property §§ 108, 109, 110.

Spouse's claim against other spouse for breach of duties with respect to community property and right to an accounting. *Cal Fam L Serv Newsalert Vol I, No. 5 (April, 1987).*

Meeting Statutory Deadlines: Specialized Litigation and Transaction Deadlines. CEB Action Guide, Summer 1991.

NOTES OF DECISIONS

Decision under Former CC § 5125.1:

Civ. Code, § 5125.1, subd. (e), allows the court, in certain instances, to dispense with the requirement of the consent of both spouses regarding transaction affecting community property. This provision is for the benefit of the parties to the marital community and not for the benefit of a party's attorneys. Droeger v Friedman, Sloan & Ross (1991) 54 Cal 3d 26, 283 Cal Rptr 584, 812 P2d 931.

§ 1102. Management and control of community real property

(a) Except as provided in Sections 761 and 1103, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses, either personally or by a duly authorized agent, must join in executing any instrument by which that community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered.

(b) Nothing in this section shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife.

(c) Notwithstanding subdivision (b):

(1) The sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975.

(2) The sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage rela-

tion, shall be presumed to be valid if executed on or after January 1, 1975.

(d) No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of that instrument in the recorder's office in the county in which the land is situated.

(e) Nothing in this section precludes either spouse from encumbering his or her interest in community real property, as provided in Section 2033, to pay reasonable attorney's fees in order to retain or maintain legal counsel in a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties.

Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994. Amended Stats 1993 ch 219 § 101 (AB 1500).

Amendments:

1993 Amendment: Added subd (e).

Historical Derivation:

(a) Former CC § 172a, as added Stats 1917 ch 583 § 2, amended Stats 1925 ch 37 § 1, Stats 1927 ch 488 § 1, Stats 1959 ch 125 § 22, Stats 1969 ch 647 § 3, ch 1609 § 4.

(b) Former CC § 5127, as added Stats 1969 ch 1608 § 8, amended Stats 1969 ch 1609 § 25, Stats 1973 ch 987 § 15, Stats 1974 ch 1206 § 5, Stats 1987 ch 128 § 3, Stats 1992 ch 356 § 6.

Law Revision Commission Comments:

1993— Section 1102 continues former Civil Code Section 5127 without substantive change. The section has been divided into subdivisions and some minor, nonsubstantive wording changes have been made, such as changing "situate" to "situated" in subdivision (d). In subdivision (e), the phrase "proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties" has been substituted for "action under this part," which referred to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code).

Cross References:

"Real property": CC § 14.
Community property: CC § 687.
Mode of transfer of real property: CC §§ 1091 et seq.
Effect of transfer of real property: CC §§ 1104 et seq.
Effect of recording or failure to record: CC §§ 1213 et seq.
Sale or mortgage of real property by married person as felony where spouse must assent to transaction: Pen C § 534.
Possession and control of community property where wife dies intestate: Prob C § 202.
Substitute for joinder or consent as to transaction where spouse lacks legal capacity: Prob C §§ 3070 et seq.
Application to manner of joinder or consent to transaction: Prob C § 3073.

Collateral References:

Witkin Procedure (3d ed) Actions § 341, Attack on Judgment in Trial Court § 210, Pleading § 149.
Witkin Summary (9th ed) Community Property §§ 105, 106, 108, 110–112, 123, 124, 129, 130, 133, Torts § 632.
Cal Jur 3d (Rev) Guardianship and Conservatorship § 459, 461.
Cal Jur 3d Contracts § 34, Decedents' Estates § 19, Family Law §§ 454, 455, 459, 468.
B-W Cal Civ Prac, Bus Lit § 30:10.
Cal Family Law Service §§ 1:4, 11:21.
Miller & Starr, Cal Real Estate 2d §§ 12:34, 12:42, 18:19, 30:12, 21:2.