

October 31, 1972

Time

Place

November 9 - 7:00 p.m. - 10:00 p.m.

Santa Barbara Biltmore Hotel

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

November 11 - 9:00 a.m. - 12:00 noon

Santa Barbara

REVISED

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Santa Barbara

November 9-11, 1972

November 9

1. Minutes of October 6, 1972, Meeting (sent 10/17/72)
2. Administrative Matters

Suggested Schedule for Future Meetings

	December 1 (9:30 a.m. - 5:00 p.m.)	San Francisco
	December 2 (9:00 a.m. - 1:00 p.m.)	
<u>Note change</u> <u>in dates</u>)	January 19 (9:30 a.m. - 5:00 p.m.)	Los Angeles
	January 20 (9:00 a.m. - 1:00 p.m.)	
	February 8 (7:00 p.m. - 10:00 p.m.)	San Francisco
	February 9 (9:00 a.m. - 5:00 p.m.)	
	February 10 (9:00 a.m. - 1:00 p.m.)	
	March 15 (7:00 p.m. - 10:00 p.m.)	Los Angeles
	March 16 (9:00 a.m. - 5:00 p.m.)	
	March 17 (9:00 a.m. - 1:00 p.m.)	

Termination of Research Contract

Memorandum 72-72 (sent 10/26/72)

Special 3. Study 72 - Liquidated Damages

order of
business

7:00 p.m.-
8:00 p.m.

Memorandum 72-71 (sent 10/26/72)

First Supplement to Memorandum 72-71 (sent 10/27/72)

4. Study 36 - Condemnation Law and Procedure

Special order
of business

8:00 p.m.

36.70 - Date of Valuation

Memorandum 72-63 (sent 10/17/72)

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36.80 - Jurisdiction of P.U.C.

Memorandum 72-64 (sent 10/17/72)

36.65 - Disposition of Existing Statutes

Memorandum 72-65 (sent 10/17/72)

36.30 - Substitute Condemnation

Memorandum 72-66 (sent 10/17/72)

November 10-11

5. Annual Report

Fourth Supplement to Memorandum 72-54 (enclosed)

6. Study 39.30 - Wage Garnishment and Related Matters

Memorandum 72-67 (sent 10/17/72)

7. Study 39.90 - Claim and Delivery Statute

Approval of Recommendation for Printing

Memorandum 72-68 (sent 10/18/72)

Recommendation (attached to Memorandum)

First Supplement to Memorandum 72-68 (enclosed)

8. Study 39.70 - Prejudgment Attachment

Review of Responses to Questionnaire

Memorandum 72-69 (sent 10/27/72)

Approval of Tentative Recommendation for Sending to Printer

Memorandum 72-70 (sent 10/26/72)

Tentative Recommendation (attached to Memorandum)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
NOVEMBER 9, 10, AND 11, 1972
Santa Barbara

A meeting of the California Law Revision Commission was held in Santa Barbara on November 9, 10, and 11, 1972.

Present: John D. Miller, Chairman
John J. Balluff
Noble K. Gregory
John N. McLaurin (November 10 and 11)
Howard R. Williams

Absent: Marc W. Sandstrom, Vice Chairman
Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
Thomas E. Stanton
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, Nathaniel Sterling, and Stan G. Ulrich, members of the Commission's staff, also were present. Professor William D. Warren, Commission consultant on attachment, garnishment, and execution, was also present. Professor Stefan A. Riesenfeld, Commission consultant on attachment, garnishment, and execution, was present on November 10 and 11.

The following persons were present as observers on the days indicated:

Thursday, November 9

Norval Fairman, Department of Public Works, San Francisco
Dugald Gillies, California Real Estate Association, Sacramento
Terry C. Smith, Los Angeles County Counsel, Los Angeles
Charles Spencer, Department of Public Works, Los Angeles

Friday, November 10, and Saturday, November 11

A. Morgan Jones, attorney for San Francisco Board of Trade, Los Angeles
and San Diego credit associations, Los Angeles and
San Diego

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ADMINISTRATIVE MATTERS

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The Minutes of the October 6, 1972, meeting were approved as submitted.

Schedule for Future Meetings

The following schedule for future meetings was approved:

December 1 (9:30 a.m. - 5:00 p.m.)	San Francisco
December 2 (9:00 a.m. - 1:00 p.m.)	
January 19 (9:30 a.m. - 5:00 p.m.)	Los Angeles
January 20 (9:00 a.m. - 1:00 p.m.)	
February 8 (7:00 p.m. - 10:00 p.m.)	San Francisco
February 9 (9:00 a.m. - 5:00 p.m.)	
February 10 (9:00 a.m. - 1:00 p.m.)	
March 15 (7:00 p.m. - 10:00 p.m.)	Los Angeles
March 16 (9:00 a.m. - 5:00 p.m.)	
March 17 (9:00 a.m. - 1:00 p.m.)	

Termination of Research Contract

The Commission considered Memorandum 72-72. The Executive Secretary was authorized to execute on behalf of the Commission an agreement terminating the contract with Mr. Joseph B. Harvey to prepare a background study on problems arising out of divided interests in property acquired by eminent domain.

The staff plans to prepare the study unless a suitable consultant can be found to prepare it.

Annual Report

The Commission considered the Fourth Supplement to Memorandum 72-54, which contained a suggested addition to the portion of the Annual Report

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discussing statutes ruled unconstitutional. The substance of the following was approved for addition to the Annual Report for the year 1972:

Curtis v. Board of Supervisors¹⁴ held that part of Government Code Section 34311, which provided for the veto of a proposed municipal incorporation upon written protest of landowners representing 51 percent of the total assessed valuation of the land involved, violated the equal protection provisions of the California and United States Constitutions.

¹⁴. 7 Cal.3d 942, 501 P.2d 537, 104 Cal. Rptr. 297 (1972).

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STUDY 36.70 - CONDEMNATION (DATE OF VALUATION)

The Commission considered Memorandum 72-63 and the attached draft of the tentatively approved provision relating to date of valuation that was published by the Commission in September 1967. The staff had proposed in Memorandum 72-63 that the substance of the prior tentatively approved provision be included in the comprehensive statute.

After considerable discussion, the Commission took no action to change the substance of its prior tentatively approved provision.

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STUDY 39.30 - WAGE GARNISHMENT AND RELATED MATTERS

The Commission considered Memorandum 72-67. The draft of Section 723.051 as set out on page 1 of the memorandum was approved.

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STUDY 39.70 - PREJUDGMENT ATTACHMENT

Creditors' Remedies Questionnaire

The Commission reviewed the analysis of the responses to the creditors' remedies questionnaire set forth in Memorandum 72-69. These responses were for the most part inconclusive. It was, however, decided to reduce the dollar limit on actions in which attachment is authorized from \$1,000 to \$500 on the basis of the views expressed by the persons responding.

Prejudgment Attachment Recommendation

The Commission considered Memorandum 72-70 and the tentative recommendation attached thereto. The following action was taken with respect to specific portions of the recommendation.

Preliminary portion of the recommendation. The procedural flow chart attached as Exhibit I to Memorandum 72-70 should be included in an appropriate place in the preliminary portion of the recommendation together with a cross-reference to the discussion under the heading to Chapter 4.

Section 480.010. This section should be conformed to comparable sections in other codes.

Section 480.040. In connection with this section, the staff was directed to consider adding a definition of "security agreement" to the recommendation. The definition should be substantively the same as that provided in the Commercial Code.

Section 480.050. The staff was directed to reexamine this section and redraft, if necessary, to make clear that net profits interests are attachable.

Section 480.100. The brackets were removed from the word "personal" in the definition. The staff was directed to add to the Comment the substance

of the discussion concerning "fixtures" quoted in Memorandum 72-70 and an explanation that the treatment or nontreatment here is comparable to that under the Commercial Code and that, where doubt exists regarding the proper characterization of a given item of property, such property may be levied upon as both realty and personalty.

Section 480.110. The brackets were removed from the word "personal."

Section 480.120. The brackets were removed from the word "personal."

Section 481.020. The first clause of this section was deleted.

Section 481.030. The second sentence of this section was deleted.

Section 482.010. As noted above, the dollar limit in this section was reduced from \$1,000 to \$500. The second sentence should refer to costs, as well as interest and attorney's fees, and the section should not permit aggregation of claims, i.e., each claim on which an attachment may be issued must be at least \$500. The Comment should note that, for claims under \$500, generally an expeditious remedy will be available under the small claims procedure and that too high a limit might unduly prejudice the collection efforts of creditors with claims too large for small claims court but too small to permit attachment.

Section 483.010. The discussion of the issuance procedures set forth on pages 3-5 of Memorandum 72-70 and Exhibit I attached to Memorandum 72-70 should be included here as a Comment to the heading of Chapter 4.

Sections 484.020 and 484.030. These sections should be relocated following Section 484.220. The following sentence was added to subdivision (c) of Section 484.030.

(c) . . . If he finds that the plaintiff is entitled to the right to attach order, thereafter the plaintiff may apply for additional writs pursuant to Article 2 (commencing with Section 483.310) or Article 3 (commencing with Section 483.510) of Chapter 4.

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Section 485.090. The word "service" in subdivision (a) was changed to "issuance." In connection with this section, the staff was directed to re-consider (1) whether provisions are needed for extending the effective date of a TRO until levy can be accomplished, (2) whether provisions for injunctive relief ("equitable attachment") should be included here, and (3) what effect the relief provided by this title has on the availability of injunctive relief generally, i.e., does this title provide an adequate remedy at law? Should there be a provision authorizing injunctive relief notwithstanding whatever relief may be available pursuant to this title?

Section 486.010. The introductory clause of subdivision (c) was revised to read:

(c) Where the defendant is an individual engaged in a trade, business, or profession, all of the following property used or held for use in the defendant's trade, business, or profession:

The Comment should note the priority for claims based on personal services granted to certain persons by Section 1206 of the Code of Civil Procedure.

Section 486.020. In connection with this section, the staff was directed to include a repealer of the attachment exemption in Section 690.6 of this recommendation. The exemption from execution provided in that section should be limited to the earnings of employees.

Section 487.070. The Comment should be revised to indicate the reason for increasing the time limit on the sheriff's return from 30 to 60 days. The staff was also directed to take whatever action is required to make clear that, subject to the 60-day limitation, the levying officer may make his return whenever required by the instructions accompanying the writ.

Section 487.310. The material in brackets in subdivision (c) was deleted. The Comment to this section should refer to Section 490.010 and Section

490.010 should clearly provide liability whenever property of a third person is levied upon whether by mistake or not. The Comment here should also note that failure to serve pursuant to subdivision (c) may be evidence of malice sufficient to support punitive damages where the failure is due to action or inaction by the plaintiff. The staff was further directed to reconsider to whom notice of the attachment must be given under this section.

Section 487.340. Present Section 542.3 should be added as subdivision (e) of this section. (See Note to Section 487.340.) The reference in brackets to Section 487.310 should be deleted.

Section 487.350. The staff was directed to provide protection for a bona fide purchaser under this section. The Comment to this section should also note that a defendant who violates a restraining order or fails to honor a writ is subject to sanctions for contempt.

Section 487.360. The staff was directed to attempt to determine the manner in which the pink slips on motor vehicles which are inventory are treated presently under an attachment and, if desirable, to conform this section to such practice. A suitable test for solvency should be included here, and the staff was directed to examine the feasibility of incorporating the test for solvency set forth in the federal bankruptcy act.

Section 487.400. The brackets around subdivision (c) were deleted. A provision should be added that, until service upon the obligor of the writ of attachment, payments made in good faith by him to the previous holder of the instrument shall be applied to the discharge of his obligation. The same rule should be made to apply to execution if it does not already apply.

Section 487.410. The staff was directed to make sure that the provisions of this section meet the requirements for a valid levy under Section 8317 of the Commercial Code.

Section 487.420. This section was retained but sale (upon execution) of the judgment should be permitted, if at all, only upon application to the court.

Section 487.430. Section 487.430 was retained as submitted but the Comment should indicate that partnership interests are available only pursuant to the provisions of the Uniform Partnership Act.

Section 487.510. Where an extension must be filed or recorded, this should be done by the levying officer except for real property where the extension may also be filed by the plaintiff or his attorney.

Section 487.530. In connection with this section, the Commission determined that (1) a third person whose interest in the property has been established should perhaps be permitted to apply for immediate disposition of the property, but this decision should be deferred until Section 689 is discussed; (2) sales should be conducted in the same manner as under execution; and (3) the present ability to appoint a receiver under Section 547a should be generalized.

Sections 487.550 and 487.560. Both these sections should provide for release of property attached to the person from whom it was taken unless the court otherwise orders. Where the release of an attachment involves the filing or a recording of a release, this action should generally be taken by the same person who originally filed or recorded, i.e., the levying officer; however, with respect to real property, the plaintiff or his attorney should also be permitted to record.

Section 489.120. The time limit in this section should be consistent with Section 490.030(b).

Section 489.310. The brackets in subdivision (a) were deleted.

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STUDY 39.90 - CLAIM AND DELIVERY STATUTE

The Commission considered Memorandum 72-68, the First Supplement to Memorandum 72-68, and the tentative recommendation relating to the claim and delivery statute dated October 1972. The Commission approved the recommendation for printing subject to the following revisions:

Preliminary portion of recommendation. The disclaimer relating to self-help repossession and the circumstances under which a person may be entitled to statutory repossession was relocated from page 15 to page 1. The preliminary portion must also be conformed to the changes made in the proposed legislation.

Section 511.100. A Comment was added to this section to read as follows:

Comment. Section 511.100 requires that, at the hearing on the application for a writ, the plaintiff must at least establish a prima facie case and the judicial officer must then consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation.

Section 512.020. Subdivision (f) was deleted. The staff was directed to conform subdivision (d) to the standards required to be met by an affidavit in support of a criminal search warrant. All the present provisions were made subdivision (a), subdivisions (a) through (e) were renumbered as (1) through (5), and subdivision (b) was added to provide as follows:

(b) The requirements of subdivision (a) may be satisfied by separate affidavits filed together with the application.

The Comment to subdivision (b) should contain a cross-reference to Section 516.030.

Section 512.030. The introductory clause of this section was revised as follows:

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512.030. No writ shall be issued under this chapter except after a hearing by a judicial officer. Prior to the hearing, the defendant shall be served with all of the following:

Section 512.040. Subdivision (d) was deleted. The last two sentences of subdivision (c) were made a new subdivision.

Section 512.050. This section was revised to provide as follows:

512.050. Each party shall file with the court and serve upon the other within the time prescribed by rule any affidavits and points and authorities intended to be introduced at the hearing. The judicial officer shall make his determinations upon the basis of the pleadings and other papers in the record, provided that, upon good cause shown, he may receive and consider additional evidence and authority produced at the hearing or he may continue the hearing for the production of such evidence, oral or documentary, or the filing of other affidavits or points and authorities.

Section 512.080. Subdivision (e) was deleted.

Section 513.010. To permit the ex parte repossession of a credit card, the following section was added to the Civil Code:

1747.95. In lieu of a temporary restraining order issued pursuant to Section 513.010 of the Code of Civil Procedure, the judicial officer may issue ex parte a writ of possession in an action to recover possession of a credit card.

A sentence should be added to subdivision (a) to make clear that, except as otherwise specifically provided by this chapter, the provisions of Chapter 3 (commencing with Section 525) of this title are applicable. The Comment should contain cross-references to the specific provisions of this chapter which may alter the general rules.

Section 513.020. Subdivision (a) was revised as follows:

513.020. In the discretion of the judicial officer, the temporary restraining order may prohibit the defendant from any or all of the following:

(a) Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of the property. If

the property is farm products held for sale or lease or is inventory, the order may not prohibit the defendant from transferring the property in the ordinary course of business but the order may impose appropriate restrictions on the disposition of the proceeds from such transfer.

* * * * *

The Comment to this section should note that the prohibition of transfers should not cause interference with a manufacturer's processing of raw materials or work in process.

Section 514.010. A subdivision (d) was added to this section to provide as follows:

(d) Nothing in this section authorizes the levying officer to enter or search any private place not specified in the writ of possession or other order of the judicial officer.

Section 514.020. The first sentence of this section was made subdivision (a). A subdivision (b) was added to provide as follows:

(b) If no one is in possession of the property at the time of levy, the levying officer shall serve the writ and attached undertaking on the defendant. If the defendant has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of this part. If the defendant has not appeared in the action, service shall be accomplished in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part.

The staff was directed to determine what the existing law is concerning priorities and rights of third persons under the claim and delivery statute and to preserve such law under this statute.

Section 514.030. The following provision was added to replace the second sentence of subdivision (a):

Except as otherwise provided by Section 514.050:

(1) If an undertaking for redelivery is not filed within 10 days after levy and plaintiff's sureties are not excepted to, the sheriff shall deliver the property to plaintiff 10 days after levy of the writ of possession, upon receiving his fees for taking and necessary expenses for keeping the property.

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(2) If an undertaking for redelivery is filed and defendant's sureties are not excepted to, the sheriff shall redeliver the property to defendant upon expiration of the time to so except, upon receiving his fees for taking and necessary expenses for keeping the property not already paid or advanced by the plaintiff.

(3) If the sureties of plaintiff or defendant are excepted to, the sheriff shall not deliver or redeliver the property until the time provided in Section 515.030.

Section 515.010. Subdivision (a) was revised in part to read as follows:

515.010. (a) The judicial officer shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court a written undertaking that, if the plaintiff fails to recover judgment in the section, the plaintiff shall return the property to the defendant, if return thereof be ordered, and shall pay all costs that may be awarded to the defendant and all damages referred to in subdivision (b), not exceeding the amount of the undertaking. . . .

Section 515.020. The time limit for filing a redelivery bond by the defendant was eliminated. The staff was directed to make the necessary revisions in this section and conforming changes in other sections, including a procedure for transfer from the plaintiff to the defendant.

Section 516.010. This section was revised to read as follows:

516.010. The Judicial Council may provide by rule for the practice and procedure in proceedings under this chapter.

The Comment should be revised accordingly.

Section 516.020. The second sentence of this section was deleted. The Comment should be revised accordingly.

Section 516.030. The Comment to this section should make clear that, although in certain situations statements may be based on information and belief, affidavits must still meet the standards of this section. Hence, in such situations, the affiant must be able to testify competently as to the nature of the information received and to the reliability of the informant rather than to the ultimate facts.

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STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 72-71 (and the attached staff draft of a tentative recommendation), the First Supplement to Memorandum 72-71, letters handed out at the meeting from Acting Professor David A. Leipziger, UCLA Law School, W. Jerome Thomas, Chief Legal Officer, California Department of Real Estate, and W. Dean Cannon, Jr., Senior Vice President, California Savings and Loan League, and Assembly Bills 1516 and 2193 of the 1972 Regular Session. The Commission also considered the discussion of the C.R.E.A. Deposit Receipt in the CEB publication "Real Estate Sales Transactions" (pages 115-120) and the 1971 revision of California Real Estate Association Standard Form; Real Estate Purchase Contract and Receipt for Deposit.

After considerable discussion, the Commission decided that liquidated damages was a topic that merited study by the Commission. It appears that it may be possible to prepare a recommendation on the topic that has a reasonable chance of legislative approval. The Commission decided to consider the topic again at its January 1973 meeting. Before the January meeting, the Commission's staff is to solicit the information the Commission needs to make informed policy decisions and is to work with the California Real Estate Association and other interested persons and organizations to formulate a generally acceptable recommendation.

The Commission discussed the staff draft of the tentative recommendation. The discussion is summarized below.

§ 2954.6. Late charges for payments on loans secured by real estate

The representative of the California Real Estate Association suggested that there is no need for a separate provision in the Business and Professions

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Code (like Section 10242.5 set out in the First Supplement to Memorandum 72-71). He suggested that a provision should be included in the Civil Code like Section 2954.6 (set out on page 2 of the First Supplement to Memorandum 72-71) but indicated that there are significant problems with that provision. It is the position of the California Real Estate Association that legislation limiting late payment charges on real estate secured loans should be uniform, every lender being treated in the same way.

The following views were expressed concerning Section 2954.6 (set out on page 2 of the First Supplement to Memorandum 72-71):

(1) The computation of the amount of the late payment charge is made on the amount of principal and interest, and does not include any amount included in the payment for taxes, insurance, and the like.

(2) The association is greatly concerned with the restriction on the amount. It was suggested that a 10-percent restriction with a minimum amount of perhaps \$10 or \$15 would be reasonable. Members of the Commission expressed concern that the late payment charge might be equal to the amount of the payment (for example, a late payment charge of \$10 for failure to make a \$10 payment on time). This problem might be avoided by providing, for example, that nothing permits a late payment charge in excess of 20 or 25 percent of the amount of the payment.

(3) A provision should be included that the parties may agree to a late payment charge in excess of the restriction on the amount of the late payment if the amount of the periodic payments is in excess of \$250 (or \$350). This would permit flexibility in large transactions which are likely to involve informed parties having equal bargaining power. It may be a better approach

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than limiting the restrictions to the single family, owner-occupied dwelling, or some other comparable standard (such as the deficiency judgment standard).

(4) The costs to the lender include the cost of the notice to the debtor and the cost of the bookkeeping and the special additional clerical tasks required when a payment is not made on time. Also, in the real estate loan situation, consideration should also be given to the long term to which the lender is committed. The staff was directed to request that Senator Song write to various lenders and obtain information from the banks and others as to the actual costs that are incurred as a result of failure to make payments on time. In addition to the clerical costs, there must also be considered the cost of the money--the lender loses the interest he could obtain on the money had it been paid to him when due. Similar information should be obtained, if possible, from the California Real Estate Association.

(5) The representative of the California Real Estate Association reported the results of a survey of late payment charges on real estate loans made by savings and loan associations. Thirty-eight percent of savings and loan associations charged 10 percent of the monthly payment after 10 days' delinquency, and many charged a minimum of \$10. Ten percent charged one-tenth of one percent of the unpaid balance of the loan. Eight percent charged two percent of the loan balance if not paid within 30 days. This survey was published in the California Real Estate Association magazine. The Assembly Committee on Insurance and Financial Institutions (in 1969?) made a survey, working through the regulatory agencies, of late payment charges.

(6) If the provision--such as 10 percent with a minimum of a specified amount--were limited to cases where the monthly payment is less than \$250 or \$350, the 10-percent provision would not result in picking up more than \$25

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or \$35 per month. On larger monthly payments, it would be necessary to establish that the provision is reasonable.

(7) Nothing in the late payment charge provision should affect the lender's right to foreclose on the real property; and, in such case, the amount the lender is authorized to collect under Section 2924c of the Civil Code (basically not exceeding one-half of one percent of the entire unpaid principal sum for attorney fees and other expenses) should be in addition to the late charge. The statute should make this result clear. Perhaps the late payment charge should only be permitted if no notice of default is filed. The late payment charge is designed to discourage the lender from using foreclosure as his remedy. If the late charge is inadequate, the lender may decide that foreclosure is his only practical remedy. In such case, the lender can file a notice of default and the penalty (one-half of one percent--referred to above) is collectable if the debtor seeks to cure the default. The notice of default remedy is not very useful to the lender who holds a second mortgage. Such a lender may not have the money to buy out the first mortgage and must necessarily rely on the late payment charge as a remedy for delinquencies.

(8) It should be kept in mind that we are concerned about the borrower who has difficulty in obtaining a loan. If he has an equity in his home, he should be able to borrow the money at a lower rate than going to other unsecured loan sources. If you deny the loan secured by real estate to such a borrower by not providing adequate late payment charges, you drive the borrower to the loan shark or into a foreclosure.

(9) Section 2954.5, requiring notice of late payment assessments, should help to reduce the abuses that formerly occurred with respect to late payment assessments for delinquency in payments on loans secured by real property.

§ 3319. General rule concerning liquidated damages clauses

The question was raised whether "manifestly" should be included in this section.

§ 3320. General late payment provision

The representative of the California Real Estate Association indicated that Section 3320 (set out on pages 2-3 of the First Supplement to Memorandum 72-71) was generally satisfactory, and the application of this provision to rent payable under a lease was approved. However, subdivision (e), excepting contracts requiring periodic payments over \$250, perhaps should be changed to a different amount, perhaps \$350. Also, it should be made clear that no greater amount can be charged as a late payment on the contracts covered by the section (other than those over \$250 or other amount substituted for that amount). Also, subdivision (b) should be revised to delete "to be reasonable and."

§ 3321. Land sale deposits

The representative of the California Real Estate Association indicated approval in principle with the draft of Section 3321. However, there are various suggested changes in the staff draft of the section that should be considered:

(1) In the third line of the section, "all or a part of the deposit" should be substituted for "the deposit." The same suggestion was made by Professor David A. Leipziger.

(2) The provision should apply to a "deposit made or agreed to be made." Professor Leipziger made a similar suggestion. Concern was expressed that the

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"agreed to be made" provision would create the possibility of abuse. On the other hand, in actual practice, deposits are not always made at the time the agreement is executed. Also, if the amount is in excess of two percent, the person relying on the liquidated damages provision would have to establish its reasonableness. Perhaps the deposit could be required to be made within a specified time after the agreement is made. The staff is to work with the California Real Estate Association to see if this problem can be resolved in a reasonable way.

(3) The two-percent provision is considered acceptable as an amount that is deemed to satisfy the requirements of Section 3319 subject to the rights of the parties to agree on a higher amount if such higher amount can be shown by the person invoking the provision to satisfy the requirements of Section 3319.

(4) Concern was expressed about the requirement that the liquidated damages clause be separately signed or initialed. Members of the Commission expressed the view that the separate signing or initialing was desirable, and it was noted that the form now generally used requires that the clause be initialed by both parties.

(5) The clause, at the end of subdivision (a), reading "if the purchaser fails to proceed with the purchase" was considered unclear in that it fails to recognize that the purchaser may fail to complete the purchase through no fault of the purchaser. The clause should be rephrased to use more precise language. It was suggested that the clause might be rephrased substantially as follows: "if the purchaser fails to complete the purchase unless excused from performance by the conditions of the contract or prevented from performance by any act of the seller."

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(6) The question was raised whether "deposit" is broad enough to include anything of value--so that it covers, for example, a note as well as cash.

(7) In subdivision (b), the words "to be reasonable and" were considered unnecessary and confusing and are to be deleted.

(8) The question whether Section 3321 would or should have any effect on the buyer's remedies was discussed. It was first noted that the buyer always has the remedy of specific performance. Accordingly, it was suggested that the general standard provided in Section 3319 should be adequate to cover the buyer's liquidated damages remedy and that there was no need for a statutory statement of an amount of damages that would be deemed to satisfy the requirements of Section 3319. Consideration should be given to including an additional subdivision in Section 3321 to provide in substance: "The parties to a contract for the sale of real property may provide for liquidated damages to the buyer if the seller fails to complete the sale unless excused from performance by the conditions of the contract or prevented from performance by any act of the buyer if such liquidated damages satisfy the requirements of Section 3319." On the other hand, the view was expressed that it would be better to include, in lieu of such a provision, a statement in the Comment that liquidated damages could be used for the buyer's failure if the provision satisfies the requirements of Section 3319. A similar statement might be included in the Comment to Section 3319. It should also be noted in the Comment that the inclusion of a liquidated damages provision would not preclude the buyer from obtaining specific performance if he elects that remedy instead of liquidated damages. The staff is to give further consideration to this problem

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and the California Real Estate Association indicated a willingness to review a draft of a provision that gives the buyer the option of liquidated damages.

APPROVED

Date

Chairman

Executive Secretary