#D-300 10/25/78

Memorandum 78-48

Subject; Study D-300 - Enforcement of Judgments (Homestead Exemption)

This memorandum discusses the basic policy issues involved in revising the homestead exemption laws (including the declared exemption, the claimed exemption, and the mobilehome and vessel exemption). When these issues are resolved by the Commission, the staff will be able to draft implementing legislation for further consideration.

Accompanying this memorandum is a copy of the Commission consultant's study, Adams, Homestead Legislation in California, reprinted from 9 Pac. L.J. 723 (1978). This reprint is being sent only to Commissioners. Also attached hereto are the following exhibits:

Exhibit 1: Memorandum from Professor Stefan A. Riesenfeld on Revision of Homestead Laws.

Exhibit 2: Declared homestead exemption statutes--Civil Code §§ 1237-1304 (§ 1260 as amended, 1978 Cal. Stats., Ch. 993, § 1).

Exhibit 3: Claimed homestead exemption--Code of Civil Procedure § 690.31 (as amended, 1978 Cal. Stats., Ch. 684, § 1).

Exhibit 4: Mobilehome and vessel used as a dwelling exemption--Code of Civil Procedure § 690.3 (as amended, 1978 Cal. Stats. Ch. 993, § 2).

Exhibit 5: Probate homestead--Probate Code §§ 660-668.

Exhibit 6: Judgment lien statutes--Code of Civil Procedure §§ 674 (as amended, 1978 Cal. Stats., Ch. 203, § 1), 674.5, 674.7.

Exhibit 7: Letter from Mr. Rick Schwartz concerning Schoenfeld v. Norberg.

Two major questions run throughout the following discussion--whether the homestead exemption is best asserted by way of a filed declaration or in proceedings initiated by the creditor seeking to execute on a dwelling, and whether qualification for a homestead exemption should have other consequences such as on conveyancing and survivorship. Some of the following discussion will turn out to be irrelevant depending upon which procedural scheme is ultimately selected. However, the determination of the optimum procedural scheme depends in part on the relative benefits and defects, both procedural and substantive, of the various options.

The following material frequently refers to the Adams Study, (Adams, Homestead Legislation in California, 9 Pac. L.J. 723 (1978), copy sent

to Commissioners on Oct. 19, 1978) and to the Riesenfeld Memorandum which is attached hereto as Exhibit 1. We have not attempted in this memorandum to summarize these materials so it will frequently be necessary to read the portions referred to in conjunction with a particular discussion.

Purpose and Desirability of Homestead Exemption

The homestead exemption originated in the Republic of Texas in 1839. California enacted its first homestead exemption in 1851. Forty-four states currently provide some level of protection of the homestead from the claims of creditors. The California provision is among the two or three most generous, providing a $40,000 exemption for a head of household and for persons 65 or older. 1978 Cal. Stats., ch. 993.

The commonly stated purpose of homestead exemption laws is to provide for the security of the family home by protecting it from certain creditors (generally unsecured creditors) and by preventing its alienation without the consent of both spouses. It is also suggested that the homestead exemption serves to encourage home ownership, which is assumed to be a societal good, and historically speaking is thought to have been intended to attract settlers to the western and southwestern states. Additional impetus occurred where legislatures dominated by rural interests attempted to thwart the collection efforts of creditors representing urban interests or where debtors in the South attempted to resist Reconstruction carpetbaggers. See S. Riesenfeld, Creditors' Remedies and Debtors' Protection 302-03 (2d ed. 1975); Haskins, Homestead Exemptions, 63 Harv. L. Rev. 1289, 1289-90 (1950); Vukowich, Debtors' Exemption Rights, 62 Geo. L.J. 779, 805-06 (1974).

The staff does not question the continuing need for the homestead exemption. In a recent article, one commentator argued that the homestead exemption is "unnecessary and undesirable" because when such laws were enacted "home ownership was the norm and rental of apartments atypical" whereas now "families commonly and conveniently make their homes in rented houses or apartments." See Vukowich, supra at 805. Census statistics show, however, that 46.7% of all housing units in 1900 were owner-occupied and 53.3% were rental units, whereas 64.6% of all housing units in 1975 were owner-occupied and 35.4% were rental units--counter to the trend suggested by Vukowich. See 1977 Statistical Abstract of the United States 781.

Property Subject to Homestead Exemption

Civil Code Section 1237 provides that the "homestead consists of the dwelling house in which the claimant resides, together with outbuildings, and the land on which the same are situated." The claimant must actually occupy the property when the homestead is declared and intend to reside there. See Ellsworth v. Marshall, 196 Cal. App.2d 471, 16 Cal. Rptr. 588 (1961).

The term "dwelling house" has been liberally construed to permit exemption of an entire building only part of which is used for residence purposes. Under the older cases the building had to be primarily used as a residence, but more recent cases permit a homestead even though the primary purpose is business. See 3 H. Miller & M. Starr, Current Law of California Real Estate § 16.10 (rev. ed. 1977). We assume that this question is only important where there is a dispute over whether proceeds are exempt because they derive from sale of a homestead. The debtor's equity in an apartment house or motel would in almost all cases provide an excess over the homestead exemption permitting the creditor to have it sold on execution. The staff would not disturb this case law.

The claimant may declare a homestead property if the interest therein is

> any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive, and includes land held under long-term lease . . . and ownership rights in a condominium, planned development, stock cooperative, or community apartment project even though the title, interest, or estate of the condominium, planned development, stock cooperative, or community apartment project is in a leasehold or subleasehold. [Civil Code § 1238.]

It appears from this language that, a leasehold interest not in a condominium, planned development, stock cooperative, or community apartment project must be long-term (30 years or more) in order to qualify for a homestead exemption. See Civil Code § 1237.

The staff does not understand the necessity for the restriction to long-term leases, especially when there is no such restriction in the case of condominiums, etc. A homestead could be declared on a mere tenancy until 1929 when the word "property" was defined as "freehold title, interest, or estate." See, e.g., Brooks v. Hyde, 37 Cal. 366 (1869). From 1929 until 1970, homesteads could not be declared on

leasehold interests. The long-term lease language was added at the same time as the provisions concerning condominiums. Most residential leasehold interests, being of relatively short duration, do not need homestead protection because it is unlikely that a creditor would attempt to levy upon a residential lease and probably even more unlikely that anyone at an execution sale would be tempted to purchase such an interest. However, there may be leases with a sufficiently long term but not over 30 years that would be attractive; the staff believes that such leases should be protected. It appears that at least 18 states permit homestead rights in leases, even in oral month-to-month tenancies. See Annot., 89 A.L.R. 555 (1934); Annot., 74 A.L.R.2d 1378 (1960).

An unmarried person may select the homestead from any of his or her property, including cotenancy property. Civil Code § 1238. However, a cotenant has a right of partition. Squibb v. Squibb, 190 Cal. App.2d 766, 769, 12 Cal. Rptr. 346, (1961). A married person may select the homestead from community property, quasi-community property, property held by the spouses as tenants in common or in joint tenancy, or from the separate property of either spouse. Civil Code § 1238. After legal separation or an interlocutory judgment of dissolution, each spouse may select a homestead from that spouse's separate property or from property awarded in the judgment. Civil Code § 1300. We do not suggest any change in these rules.

Amount of Homestead Exemption

The amount of the homestead exemption (and also the dwelling and mobilehome-vessel exemptions) was increased again this legislative session from $30,000 to $40,000 for heads of families and persons over 65 and from $15,000 to $25,000 for other persons. 1978 Cal. Stats., ch. 993. In view of this legislation, we do not believe that it would be useful to attempt to change the amount of the exemption, although the extension of such amounts to mobilehomes and vessels seems extravagant. If a homestead exemption is set too low, it will be of no use because of the relatively high value of real property, particulary when property values are increasing rapidly. If the exemption level is set too high, it will be viewed as removing an unconscionable amount of the debtor's assets from the reach of creditors. One might argue that no matter what amount is selected, it will be viewed as too high by creditors, too low by debtors, or both. Vukowich cites these factors in support of his

argument that the exemption is undesirable as a matter of policy. Vukowich, supra at 806-07.

Cost of Living Escalator

The staff recommends that the homestead exemption amount be subject to automatic increases (or decreases) to reflect changes in the value of the dollar as is provided for other exemptions in draft Section 707.200 (see Memorandum 78-70). In the past 33 years the homestead exemption has been increased seven times, from $5,000 to $40,000 for heads of households and persons over 65 and from $1,000 to $25,000 for other persons. In the past 28 years, the mobilehome exemption has been increased six times, from $500 to $40,000/$25,000. The automatic escalator would avoid the need for such amendments. The changes under an automatic escalator would conform much more closely to the gradual changes in the cost of living than has the rather haphazard amendment process.

Retroactive Application of Homestead Exemption

For the reasons discussed in Memorandum 78-35, the staff believes that changes in the amount of the homestead exemption and in the procedure for claiming it should be made retroactive.

Schoenfeld v. Norberg--Joint Tenancy Homestead

In Schoenfeld v. Norberg, 11 Cal. App.3d 755, 90 Cal. Rptr. 47 (1970), creditors of the husband attempted to reach the debtor's interest in homestead property which was held in joint tenancy. It was held that the husband was entitled to claim the entire homestead exemption for his half interest in the property and also that the mortgage lien on the entire property would have to be satisfied before proceeds could be distributed to the creditors. In other words, in order to be sold on execution, the husband's interest (half of $35,000) would have to exceed the total of the joint encumbrance ($9,000) and the homestead exemption ($12,500) which it did not. However, if the property were community property, it could be sold on execution if the value of the property ($35,000) exceeded the total of the joint encumbrance ($9,000) and the homestead exemption ($12,500), which it did. The court of appeal sent the case back for a determination of the nature of the property. For discussions of Schoenfeld, see Adams Study at 728, 749; Riesenfeld Memorandum at 19-20.

This case is another illustration of the difficulties and inequities that arise where community property laws and creditor's remedies and exemption laws meet. The Commission has previously expressed its dissatisfaction with the different consequences that flow from the manner in which debtor spouses hold property and a consultant has been retained to study this problem in general. The Commission should be aware of this problem in the homestead area and may want to make some preliminary decisions pending the preparation of the consultant's study.

The following examples illustrate the varying results that proceed from the interplay of community property laws, the homestead exemption, and the Schoenfeld rule. Assume that a prospective buyer at an execution sale is willing to bid $80,000 for the entire property and that it is subject to a purchase money mortgage in the amount of $20,000:

1. A single head of household is entitled to a $40,000 exemption. The house would realize $20,000 at an execution sale. (80 minus the sum of 20 and 40.)

2. A married couple qualify for a $40,000 exemption. If they hold the house as community property, it would realize $20,000 at an execution sale. This is true whether one or both of the spouses are liable for the debt. (80 minus the sum of 20 and 40.)

3. If a married couple having a $40,000 exemption hold the house in joint tenancy, the Schoenfeld rule would apply where the house is sought to be sold on execution to satisfy a debt against one spouse. In this case the house would not be sold on execution. (Half of 80 minus 20 is less than the exempt amount.)

4. If a married couple having a $40,000 exemption hold the house in joint tenancy but are both liable on the debt, the result would presumably be the same as if they held the property as community property. The spouses would not each be able to claim a separate $40,000 exemption. Hence, as in example 2, the house would realize $20,000 at an execution sale.

5. Cohabiting unmarried persons who hold a house as joint tenants and file homestead declarations (two homesteads in the same residential property) would qualify for a total exemption of $50,000, $65,000, or $80,000, depending upon whether they qualified for two $25,000 exemptions, one for the $25,000 and one for the $40,000 exemption (such as where one has minor children and the other does not), or for two $40,000

exemptions (such as where both have minor children or where both are over 65 years of age).

Several solutions to the Schoenfeld problem have been suggested:

1. Bankruptcy solution. Mr. Adams suggests that the court be empowered to authorize the sale of the interest of the debtor spouse and the interest of the nondebtor spouse and give the nondebtor spouse the first right to purchase the property at its sale price. See Adams Study at 749. This is patterned after a portion of Section 363 of the proposed Bankruptcy Act:

> (h) [T]he trustee may sell . . . both the estate's interest and the interest of any co-owner in property in which the debtor had, immediately before the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; and;
>
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweights the detriment, if any, to such co-owners.
>
> . . . .
>
> (i) Before the consummation of a sale of property to which subsection . . . (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.
>
> (j) After the sale of property to which subsection . . . (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate. [S. 2266]

Professor Riesenfeld questions this proposal on the grounds that the trustee in bankruptcy succeeds to the bankrupt's title and so has partition rights, whereas a spouse has no partition right against the other spouse in regard to homestead property. See Riesenfeld Memorandum at 3, 19-20. This prohibition against partition is a consequence of the policy of the homestead exemption laws which permit a spouse to declare a homestead in any marital real property, including the separate property of the other spouse. See Civil Code § 1240; Walton v. Walton, 59

Cal. App.2d 26, 30-31, 138 P.2d 54 (1943). The policy of permitting a homestead to be declared on separate property would be defeated if the spouses had a right of partition.

2. Sale subject to senior liens. Professor Riesenfeld suggests that the Schoenfeld problem be dealt with by permitting execution sales of homestead property subject to liens senior to the judgment creditor's lien. See Riesenfeld Memorandum at 20. In example 3 above, the property still would not be sold, however, because the one-half interest of the debtor spouse ($40,000) does not exceed the amount of the homestead exemption ($40,000). This proposal would still yield different results depending upon whether the property is held in joint tenancy or as community property since, if the property were community property, the execution sale would yield $20,000 or, if the mortgage lien is not paid off, $40,000. This would seem to be only a partial solution. In cases where the value of the property is high and the mortgage is high, Professor Riesenfeld's proposal would be beneficial to creditors. However, where the value of the property is not high or where the mortgage lien is not high, creditors would not benefit much more than under the Schoenfeld rule. This is because the debtor spouse is still entitled to apply the entire exemption to half of the value of the property.

3. Apportionment. Another possible remedy for the Schoenfeld problem would be to apportion the exemption and the senior lien. Alternatively, the exemption could be apportioned and the property sold subject to the senior lien.

The effect of apportioning both the exemption and the senior lien in the example would yield results consistent with the disposition where the property is community property. Hence, the $40,000 interest of the debtor spouse could be sold with $10,000 applied to satisfaction of one-half of the mortgage, $20,000 going to the debtor as exempt proceeds (one-half of the $40,000 exemption), and leaving $10,000 to be applied to the judgment. The question then arises as to what the nondebtor spouse has left. In effect, the homestead exemption has been severed. Would the second spouse now have the benefit of only a $20,000 exemption should that spouse's creditors attempt to execute on the remaining half interest in the house? How would the second spouse's creditors know that only a $20,000 exemption could be claimed?

A similar problem arises in the Schoenfeld situation. This alternative would abrogate both of the rules that were responsible for the Schoenfeld result: (1) that a joint encumbrance burdens both cotenants' interests to the full amount and must be satisfied in an execution sale of either interest and (2) that each spouse may claim the entire exemption as to that spouse's interest. The second rule was stated in Strangman v. Duke, 140 Cal. App.2d 185, 189-190, 295 P.2d 12 (1956) as follows:

> The exemption "extends to the entire interest of both in the property. It has been specifically so held with respect to joint tenancies. . . ." The result of this is that if the husband's creditors first pursue the statutory method of enforcing an execution he gets the benefit of the exemption, or if the wife's creditors move first she gets it; once the property is sold the homestead is gone and the question of apportionment of the exemption has exhausted its practical importance. Until such a sale is had it is for the benefit of both spouses that the one who is the judgment debtor have the full exemption.

The spouses may have only one exemption and it may be used whenever it is most advantageous to do so. Of course, if one spouse takes the full exemption in the form of proceeds upon the execution sale of that spouse's interest, the other spouse still would have homestead rights in the proceeds. It would be an abrupt change in the law to apportion exemptions in such cases. It is reported, however, that in Kentucky and Illinois the exemption may be apportioned. See S. Riesenfeld, Creditors' Remedies and Debtors' Protection 322 (2d ed. 1975).

A variant of this alternative would be to apportion the exemption but sell the property subject to liens.

4. Community property presumption. Another possible solution is suggested by the comments of Mr. Rick Schwartz in the letter attached as Exhibit 7. If a homestead is declared, the law could provide that it is to be treated as community property regardless of the intent of the spouses to hold it in joint tenancy. It could also be provided that, if the property is treated as community property, the spouses may take advantage of the full $40,000 exemption, but if they elect to treat it as a joint tenancy, only a $20,000 (or $25,000) exemption will apply.

As Mr. Schwartz notes in his letter, property may be treated differently for different purposes under Civil Code Section 5110. However, Section 5110 provides only a presumption. The rebuttable presumption of community property would not go very far toward solving the Schoenfeld

dilemma because in appropriate cases the spouses would be able to rebut the presumption. Presumably we want to eliminate the Schoenfeld result in cases of intentional as well as unintentional joint tenancy.

Voluntary Encumbrances Junior to Judgment Creditor's Lien

The effect of Civil Code Section 1256 pertaining to the distribution of proceeds from the sale of homestead property is ambiguous, as discussed in the Riesenfield Memorandum at 4-7 and in the Adams Study at 729. The law clearly should not provide for encumbrances junior to the lien of the judgment creditor to be paid off first, as Section 1256 appears to do. Riesenfeld and Adams agree that the exempt amount which otherwise would be paid to the judgment debtor should be applied to the satisfaction of voluntary junior encumbrances. See Riesenfeld Memorandum at 7; Adams Study at 749.

One treatise explains the scheme of priorities as follows, notwithstanding the seemingly plain language of Section 1256:

> This order or priority presumes that all liens and encumbrances against the property are senior to the homestead and that a prospective lien which is junior to the homestead does not attach to the property. It also presumes that all of the other liens are senior to the lien of the executing creditor. In other words, either the lien is senior to the homestead (such as tax liens, the lien of trust deeds, prior judgment liens and mechanics' liens) or they do not attach to the property and, therefore, there cannot be a lien which is junior to the homestead but senior to the executing creditor. If several creditors are executing on their liens at the same time, the proceeds are distributed (1) to the costs of sale; (2) to the payment of all liens senior to the homestead; (3) to the homestead claimant to the extent of his exemption; (4) to pay any liens junior to the homestead but senior to the lien of the executing creditor; (5) to satisfy the debt of the executing creditor; (6) to liens junior to the exucuting creditor; and (7) any remaining surplus is paid to the homestead claimant. [3 H. Miller & M. Starr, Current Law of California Real Estate 61 n.19 (rev. ed. 1977)]

Miller and Starr cite White v. Horton, 154 Cal. 103, 97 P. 70 (1908) which was decided long before Section 1256 was amended in 1945 to require payment of "all liens and encumbrances" as discussed in the Riesenfeld Memorandum at 6.

As between junior encumbrances, they should be paid in order of priority, as opposed to taking a pro rata share of the available assets. If such junior encumbrances exceed the amount of the homestead exemption, the surplus after satisfaction of the execution should be applied

to them. This principle should be qualified by the rule that both voluntary and involuntary encumbrancers who are entitled to a share of the distribution should take the surplus in their order of priority.

In the following example, a debtor with a home which will sell for $120,000 has the following creditors listed in their normal order of priority:

Mortgage #1: $40,000
Judgment Creditor #1: $10,000
Mortgage #2: $20,000
Judgment Creditor #2: $20,000
Mechanic's Lien: $10,000
Judgment Creditor #3: $15,000

The debtor is entitled to a $25,000 homestead exemption. Judgment Creditor #1 causes the property to be sold on execution. Proceeds should be distributed as follows:

$120,000--sale price of house at execution sale.
- 40,000--to satisfy Mortgage #1.
80,000
-25,000--exempt amount which is subject to:
55,000 $25,000
-20,000--to satisfy Mortgage #2.
5,000
-5,000--to satisfy 1/2 of Mechanic's Lien.
0--homestead exemption used up.
-10,000--to satisfy Judgment Creditor #1.
45,000
-20,000--to satisfy Judgment Creditor #2.
25,000
- 5,000--to satisfy remainder of Mechanic's Lien.
20,000
-15,000--to satisfy Judgment Creditor #3.
5,000--remainder to Judgment Debtor.

If the funds had been exhausted upon the satisfaction of Judgment Creditor #1, the Mechanic's Lien would still have been satisfied in half even though Judgment Creditor #2 has a general priority over the Mechanic's Lien because the Mechanic's Lien may be satisfied out of the exempt amount, whereas Judgment Creditor #2 may not be. Similarly, if there were no Mechanic's Lien in this example, the Judgment Debtor would have received $5,000 of the $25,000 homestead exemption in addition to the $10,000 remaining after satisfaction of the other creditors. These examples assume that the various creditors have satisfied procedural requirements entitling them to share in the proceeds of sale.

Miller and Starr provide some support for this manner of distribution, apparently reflecting existing practice (which is out of line with a literal reading of applicable statutes):

> Suppose, for example, that the parties execute and record a deed of trust on their homesteaded property prior to the recordation of an execution lien, and after the execution lien is recorded, the debtor and his wife execute and record another deed of trust. On the execution sale, the sales proceeds would be paid to satisfy the debt secured by the first deed of trust and the next proceeds would be paid to the debtor for the amount of his homestead exemption. The remaining proceeds would be paid to the execution creditor to the extent of his debt. However, since the lien of the second deed of trust is senior to the homestead, the beneficiary is entitled to take that portion of the exemption proceeds paid to the debtor until the obligation secured by the second trust deed is satisfied. If these proceeds are insufficient, he receives whatever surplus remains after the execution creditor has been satisfied. The debtor would then receive whatever is left after all of the secured obligations have been paid. [2 H. Miller & M. Starr, Current Law of California Real Estate 114 n.11 (rev. ed. 1977).]

Sale Subject to Senior Lien

The foregoing discussion has assumed that senior liens must be paid off before a junior lien may be satisfied. Professor Riesenfeld questions the need for this rule in his memorandum at 7-8 and at 20. This is part of a larger question which also arises in the third party claims area and where nonhomestead real property is sold on execution. The staff agrees that there is no reason to force payment of senior liens of record if the senior lienholder does not desire to be paid. As Professor Riesenfeld notes, Code of Civil Procedure Section 873.820 permits sales subject to senior liens in partition sales. In its consideration of the third party claims chapter, the Commission decided that, if a third person makes a claim, the interest claimed must be paid off before the property may be sold on execution if it is determined to be valid and superior to the judgment creditor's lien. Similarly, it could be provided as to real property that, if a person holding a superior lien (assuming that it is indisputably superior) makes an appropriate demand, the superior interest shall be satisfied, but that if no demand is made, the execution sale shall be made subject to the superior lien. However, absent a mandate in the law requiring sales subject to senior liens, it is doubtful that many senior lienors would agree to sales subject to their liens, particularly if the interest rate on the mortgage is much lower than the current rate.

In this connection, it should be noted that the California Supreme Court recently held due on sale clauses invalid as unreasonable restraints on alienation. Wellenkamp v. Bank of America, 21 Cal.3d 943, ___ P.2d ___, 148 Cal. Rptr. 379 (1978). The court held that due on sale clauses in promissory notes or deeds of trust cannot be enforced when the property is sold outright unless the lender can show that enforcement is reasonably necessary to protect against impairment of its security or the risk of default. Id. at 953. The court did not specifically limit its holding to voluntary sales, but discussion of the detrimental effect of enforcement of due on sale clauses on sellers is cast in terms of voluntary sales. Assuming that the holding of Wellenkamp applies with equal force to judicial sales, mortgage lenders may be reluctant to give up the statutory due on sale clause embodied in Civil Code Section 1256 since they would no longer be able to rely on contractual due on sale clauses without undertaking the burden of showing that the security would be impaired by the execution sale.

There are several alternatives:

1. The existing provision requiring satisfaction of senior liens could be continued.

2. All sales could be made subject to senior liens. Mortgage lenders would then be left to their right under Wellenkamp to show that security would be impaired. The timing and nature of a hearing to determine the reasonable necessity of the enforcement of a due on sale clause is unclear.

3. Whether the sale is made subject to a senior lien or it is to be satisfied could be at the option of the senior lienor. Since such interest holders would receive notice of levy under the draft statute, they could be permitted to file a notice if they desire to be paid out of the proceeds of sale sometime before notice of sale is given.

4. Whether the sale is made subject to a senior lien could be in the discretion of the court. This would require another hearing at which the court could consider whether, for example, the security would be impaired and the likelihood that a better price would be obtained.

Anti-Deficiency in Execution Sales of Homestead Property

Professor Riesenfeld suggests that an execution creditor should not be able to have an execution sale in partial satisfaction of the creditor's lien. See Riesenfeld Memorandum at 7-8. Stated differently,

execution creditors who levy on and sell homestead property would not be entitled to further satisfaction on their judgments; the judgment would in effect be discharged.

The staff does not agree with this proposal. It would insulate substantial assets from creditors. A creditor with a $75,000 judgment could perhaps afford to execute on and sell a debtor's house for a $50,000 satisfaction, thereby suffering a $25,000 loss, but a creditor with a judgment in the amount of $200,000 would be forced to choose between a lost of $150,000 and an incalculable chance at realizing more than $50,000 through haphazard enforcement over years against other assets. Correspondingly, a debtor with a relatively small debt and a small surplus value in a homestead would be likely to lose the homestead whereas a debtor owing a much larger amount would be more likely to be able to retain the homestead. This proposal would also meet with stiff resistance from creditors' interests in the Legislature.

Relation of Homestead Exemption and Liens, Reaching Excess Value

Under existing law, the declaration of a homestead dissolves prior attachment liens but not prior judgment liens. If a homestead declaration has been filed, a judgment lien may not attach, but attachment and execution levies may take place. In fact, the mandated procedure for reaching the excess value of a homestead is to levy under a writ of execution and institute appraisal proceedings under Civil Code Sections 1245-1259. If the judgment lien has attached, the debtor is entitled to an exemption under Code of Civil Procedure Section 690.31 which requires the judgment creditor to apply on noticed motion for a writ of execution in the county where the real property is located. However, even if the debtor is found to be entitled to the exemption, the judgment lien remains on the property and may, upon the sale of the property, be enforced despite the exemption against the proceeds of the property or against the property in the hands of the new owner. See Adams Study at 737-38. The court in Krause v. Superior Court, 78 Cal. App.3d 499, 144 Cal. Rptr. 194 (1978), resolved some of the confusion arising from the relationship between the Civil Code declared exemption and the Code of Civil Procedure claimed exemption by holding that the restrictions on levy in the Code of Civil Procedure did not apply where the creditor was seeking to reach the excess value under the Civil Code levy and appraisal procedures. A major aim of this study is to provide one procedure for asserting a homestead exemption and reaching excess value.

The resolution of the problems outlined here depend upon the basic procedure selected.

Declared exemption. If the Commission ultimately decides to recommend retention of the declared exemption and elimination of the claimed exemption, the rule in Boggs v. Dunn, 160 Cal. 283, 116 P. 743 (1911), to the effect that a judgment lien does not attach to property subject to a prior homestead exemption should be abolished. This would enable the judgment creditor to preserve a priority without the necessity of levying execution and proceeding to appraisal and sale within the periods allowed by Civil Code Sections 1245 (petition for appraisal within 60 days after levy), 1248 (hearing within 90 days after petition), 1252 (appraisers' report within 15 days after appointment). The debtor should also be able to declare a homestead exemption after the judgment lien has attached. This right should be exercisable at any time before the notice of sale of the property is given. Under the draft statute, the debtor would be afforded 90 days after the notice of levy is mailed or served within which to file a homestead declaration. The current rule precluding the effectiveness of the homestead declaration after the judgment lien attaches is the most frequently criticised aspect of existing law. See, e.g., Adams Study at 726, 748; Riesenfeld Memorandum at 3, 9, 21; Exhibit 7 at 3; Rifkind, Archaic Exemption Laws, 39 Cal. St. B.J. 370, 371 (1964).

If the Commission decides to recommend a unified declared homestead scheme under which the creditor would be able to obtain a judgment lien after the homestead declaration has been filed, the effect of the lien and the manner of reaching excess value will need to be specified. Mr. Adams suggests that if the judgment lien has first attached, upon the filing of a homestead declaration the judgment lien would be dissolved to the extent of the exemption. Adams Study at 726, 748. Professor Riesenfeld expresses some doubts about the particular formulation of this proposal but not its intent. See Riesenfeld Memorandum at 9-14. If the statute is to be drafted to implement this proposal under a declared homestead exemption scheme, we anticipate that the desired result would be attained by providing that the judgment lien does not have priority over the exempt amount. The determination of whether the property could be sold would then depend upon whether the property will be bid at an amount in excess of liens senior to the judgment creditor's

lien (assuming that these liens are required to be paid off) plus the applicable homestead exemption. As discussed elsewhere, voluntary encumbrances junior to the judgment creditor's lien would be payable out of the exempt amount and would not affect the required sale price.

Both Mr. Adams and Professor Riesenfeld recommend that a procedure be adopted for removal of judgment liens to facilitate the sale of property. See Adams Study at 749-50; Riesenfeld Memorandum at 14-17. A major defect of the claimed exemption under Code of Civil Procedure Section 690.31 is that the benefit of the exemption is lost if the debtor sells the property since the judgment lien must either be discharged or may be enforced against the property in the hands of the buyer who will reduce the price paid for the property accordingly. This problem does not occur under the existing declared exemption because the exemption and the judgment lien never coexist--the judgment lien will not attach if a homestead exemption has been declared and the exemption is lost if the judgment lien first attaches. Both Adams and Riesenfeld recommend adoption of a procedure based on Oregon law which permits the judgment debtor to apply for a discharge of the judgment lien. If the judgment creditor does not request a hearing within a certain time after service of notice the lien is discharged. If a hearing is held, the court determines the amount of the excess value, if any. If there is no excess, the lien is discharged; if there is an excess, the lien remains unless the judgment debtor pays the creditor the excess value. See Adams Study at 750; Riesenfeld Memorandum at 17-18.

Claimed exemption. If the Commission decides to recommend a unified claimed (or automatic) exemption scheme, the principles just discussed would be achieved in a similar manner. The judgment lien would attach but would be subordinate to the exempt amount when the required showing is made upon the claim of the debtor or at a hearing on motion by the creditor for issuance of a writ of execution. The procedure for removal of liens where there is no excess amount reachable by the judgment creditor would solve the major deficiency of the existing claimed exemption scheme in Code of Civil Procedure Section 690.31.

Exemption of Proceeds Representing Exempt Amount

Under existing law, exempt proceeds from the execution sale of homestead property are paid to the judgment debtor and are protected for a period of six months. Civil Code § 1257. In view of the large

amount of money involved, it might be asked whether the exempt amount should be paid into court so that if the debtor does not in fact purchase another exempt dwelling, the funds may be used to pay creditors. Under existing law, the debtor could squander the exempt proceeds or flee the state.

Collateral Effects of Declared Homestead in Marital Property

Declaration of a homestead has three major consequences for married claimants: It shields the homestead from the claims of creditors, it prevents the convenance or encumbrance of the homestead property without the acknowledged written consent of both spouses (Civil Code § 1242), and it creates a right of survivorship in certain cases that vests title to the homestead in the surviving spouse despite the will of the deceased spouse (unless the survivor elects to take under the will) (Civil Code § 1265). The homestead exemption is probably viewed by most as a device for protecting the home of debtors from the claims of their creditors. It is our assumption that most persons filing a homestead declaration do so with this aspect in mind, perhaps in the face of an imminent judgment, and give no thought to the effect of the declaration on conveyancing and survivorship. These collateral effects are consistent with the overall policy of the homestead law to protect the security of the family home, but it should be considered whether all of these consequences should follow automatically from the act of declaring a homestead.

Restriction on convenances and encumbrances. Civil Code Section 5127 in the community property law provides that both spouses (or their authorized agents) must join in executing any instrument by which community real property or any interest therein is leased for more than a year or is sold, conveyed, or encumbered. Civil Code Section 1242 has a broader effect since it precludes the conveyance or encumbrance of a spouse's separate property if it is impressed with a homestead. Section 1242 also does not exclude leases of less than a year or authorize an agent to act for a spouse. This effect on separate property derives from a time when the wife had the right to declare a homestead on the husband's property without his consent (see former Civil Code § 1238) but the wife had to consent before the husband could declare a homestead declaration on the wife's separate property (see former Civil Code § 1239). This scheme was consistent with the notion that the husband had a greater duty to support the wife than vice versa and that the

wife's property needed protection from a designing husband. When the community property laws were reformed, the right to declare a homestead in the other spouses separate property was made nondiscriminatory. The discriminatory aspect could also have been eliminated by requiring that the owner of separate property, whether husband or wife, must join in its designation as a homestead. The opportunity to declare a homestead in the other spouse's separate property seems divisive and implies spousal disagreement. If the husband and wife are interested in the security of the family home, it is only natural that they would agree on the declaration of a homestead regardless of its character. Of course, it may be that a significant number of cases arise in which an irresponsible, neglectful, or uncaring spouse holds the home as separate property and the other spouse needs to be able to declare the homestead despite the objections or lack of cooperation of the owner spouse in order to protect the family home, particularly if children are involved. Should a spouse's right to declare a homestead in the other spouse's separate property be continued?

Survivorship. Upon the death of one spouse, the title to the homestead property vests in the surviving spouse if the homestead was selected from community property, quasi-community property, or the decedent's spouse's separate property provided that the decedent spouse joined in its selection. See Civil Code § 1265; Prob. Code § 663; Adams Study at 731-33, 751-52. If there is no survivor's homestead, the probate court is required to designate a probate homestead for the surviving spouse and minor children pursuant to Probate Code Section 661. See Adams Study at 733-36. The probate homestead is different from the survivor's homestead in amount, duration, beneficiaries, effect of surviving spouse's death or remarriage or a child's attainment of majority, and the treatment of liens on the property. These differences are summarized in the Adams Study at 751. In an early recommendation the Commission concluded (1) that every declared homestead should terminate upon the death of either spouse, leaving the protection of the surviving family to the probate homestead provisions, (2) that the probate homestead should be limited to the amount of the permissible declared homestead, and (3) that the interest of the surviving family in the homestead set off from the decedent's separate property should be absolute rather than for a limited period. See Recommendation Relating

to Summary Distribution of Small Estates Under Probate Code Sections 640 to 646, 1 Cal. L. Revision Comm'n Reports, Annual Report for 1954, at 52 (1957). Mr. Adams supports these recommendations and suggests in addition that the probate court be required to designate the spouses' declared homestead, if any, as the probate homestead, that the excess value of the probate homestead be made subject to execution by creditors, and that certain preferred creditors under Civil Code Section 1241 should be able to enforce their debts despite the exemption. See Adams Study at 751-52. Mr. Adams also suggests the abolition of the rule in Probate Code Section 735 requiring exoneration of liens on the probate homestead out of other assets of the estate on the grounds that the modern trend disfavors exoneration.

The staff supports these recommendations with the exception of the proposed requirement that the probate court should have no discretion in the selection of a probate homestead if the spouses have declared a homestead. This is based on our assumption that persons declaring homesteads do so to protect their property from claims of creditors without thought for the effect it may have after the death of one or the other spouse. In a case where there are other possible residences, the surviving spouse may not want to be restricted to the homestead declared while the other spouse was still alive. In short, the staff would prefer to restrict the effects of a declaration of homestead to exemption from creditors' remedies during the life of the debtor. It should be noted that a likely consequence of eliminating the declared homestead procedure in favor of the claimed or automatic homestead would be to eliminate the collateral effects of assertion of a homestead right. Under existing law, the claim of a homestead under Code of Civil Procedure Section 690.31 does not affect the right to convey property or the disposition of exempt property upon death.

Procedure for Asserting Homestead Exemption

In the preceding discussion, frequent reference has been made to the variations in the two procedures provided by existing law for asserting a homestead exemption. The following is a summary of what the staff sees as the advantages and disadvantages of the existing system:

Declared Homestead (Civil Code §§ 1237-1304)

Advantages:

1. Certainty due to requirement of filing declaration; makes title search easier.

2. Relatively easy to determine priorities from time of filing declaration as against attachment of various liens. (However, a declaration may be invalid if in fact the declarant did not live in the property or intend to make it a home when the declaration was made or declared a second homestead without abandoning the first.)

Disadvantages:

1. Declaration of homestead affects the right to convey and the rules of survivorship.

2. Appraisal procedure is cumbersome.

3. Exemption is easily lost since it is invalid if filed after judgment lien attaches.

4. Opportunity to declare homestead at any time before judgment lien attaches may result in many unnecessary homestead declarations and requires additional rules pertaining to abandonment of declared homestead.

Claimed Homestead (Code of Civil Procedure § 690.31)

Advantages:

1. Exemption may be asserted after judgment lien attaches.

2. Debtor receives notice of right to claim exemption when creditor seeks issuance of writ of execution.

3. Granting of exemption does not restrict right to convey or rules of survivorship.

Disadvantages:

1. Debtor loses exemption in effect if property is sold after judgment lien has attached due to provisions of Code of Civil Procedure Section 674(c).

Most if not all of the disadvantageous aspects of the two systems can be remedied by appropriate amendments as suggested in the foregoing discussion. Mr. Adams recommends retention and reform of the declared homestead exemption system on balance because it provides certainty of title records. See Adams Study at 747. This certainty is somewhat overstated, however, because the declaration is invalid if when it was made the debtor did not satisfy the requirements of residency and intent to make the property a home. We also question whether the claimed homestead exemption may not provide commensurate certainty. In this context the title searcher has an interest in certainty only when the property is sought to be sold. If it is subject to a judgment lien, the question will arise whether the lien is subordinate to a valid exemption claim. This problem can be resolved by the Oregon procedure for discharging judgment liens when there is no excess or for determining the amount of

the excess to be paid off. A judgment debtor seeking to sell a home would take advantage of this procedure and the problem of the title searcher would not seem to exist. Title companies prefer judicial determinations to presumptions concerning the validity of declarations.

Another reason to prefer the declared homestead scheme (assuming appropriate reforms are instituted), however, is that it would efficiently continue the protection of all those homeowners who have filed declarations which are currently effective. Some confusion might result if the claimed exemption scheme were to replace the declared homestead since debtors might assume they are protected when in fact they are not. It would be possible, however, to continue the protection of existing declared homesteads under a claimed homestead scheme until such time as all declared homesteads had been abandoned or conveyed.

The declared homestead scheme might also be preferable to the claimed homestead because there is quite a lot of case law which would still be relevant, whereas there are very few decisions as yet under the claimed homestead exemption and the relevance of decisions under the declared homestead exemption statutes is problematical.

The claimed homestead scheme makes more sense in that it comes into play only when it is needed, that is, when a judgment creditor seeks to reach the dwelling of the debtor. It does not require complex rules concerning filing and abandonment. All the issues of entitlement, existence and amount of any excess, minimum bid, and priorities of distribution may be determined at one hearing.

While the claimed exemption procedure would provide a more efficient resolution of the various issues involved and would be more analogous to the procedure for claiming other exemptions, the declared exemption would provide a greater peace of mind to debtors and potential debtors because they would be able to declare a homestead even before an action is commenced. The declared exemption procedure would also be preferable if the collateral effects on conveyancing and survivorship are desired.

The choice between the two procedural schemes is a close one. Mr. Adams recommends revision and retention of the declared homestead procedure and Professor Riesenfeld apparently concurs (see Riesenfeld Memorandum at 23). For reasons of efficiency, the staff tends to favor the claimed homestead procedure but recognizes that the declared homestead procedure is an acceptable alternative.

Mobilehome and Vessel Exemption

Code of Civil Procedure Section 690.3, as amended, 1978 Cal. Stats., Ch. 993, § 2, provides an exemption for housetrailers, mobilehomes, houseboats, boats, or other waterborne vessels in which the debtor or the family of the debtor actually resides in the same amounts as the homestead exemption. See Exhibit 4. The amount of this exemption is the same as for a house--$40,000 for heads of families and persons over 65 and $25,000 for all others. This exemption is a claimed exemption under Section 690.50.

Section 690.31 has also been amended to provide an exemption for a "mobilehome as defined in Section 18008 of the Health and Safety Code ['designed and equipped to contain one or more dwelling units to be used without a permanent foundation and which is in excess of 8 feet in width or in excess of 40 feet in length'] in which the debtor or the family of the debtor actually resides, together with the outbuildings and the land on which the same are situated" in the same amount as a house. 1978 Cal. Stats., Ch. 684, § 1. See Exhibit 3.

We can only assume that the explanation for these varying provisions is the result of a lack of legislative coordination--one bill coming from the Senate and one from the Assembly. These two provisions are both overlapping and incomplete in view of the omission of the exemption of land and outbuildings in Section 690.3 and the restriction to width and length in Section 690.31. What happens to land owned by a person living in an 8 X 36 foot mobilehome? Or to the land and outbuildings of a person in a 14 X 46 foot mobilehome with a permanent foundation?

The staff has no doubt that persons living in mobilehomes of whatever width, length, nature of foundation, type and variety of outbuildings, or nature of title or interest in the underlying real property should have the benefit of a dwelling exemption. The inconsistencies and omissions evident in the amended versions of Sections 690.3 and 690.31 should certainly be corrected. The staff is inclined to recommend a uniform claimed dwelling exemption covering mobilehomes, vessels, and houses affixed to real property. The only issue would be the fact of residence and the equity in the property involved.

This conclusion is subject to one reservation. Despite the dual amendments at this year's legislative session, the staff questions the

level of protection for mobilehomes. It is reported that as of 1974 the average price of a new mobilehome without land was $8,000 whereas the average price of a new house was $35,000. Center For Auto Safety, Mobile Homes 1 (1975). As of 1976, the median price of new, single family houses in the western states was $47,200 and, of existing single family houses, $46,100. 1977 Statistical Abstract of the United States 787-88. Even assuming that the average cost of new mobilehomes has doubled or tripled in the last four years, the new level of exemption in obviously unwarranted. This conclusion is even more obvious when it is considered that mobilehomes tend to depreciate whereas houses tend to appreciate. It is estimated that a new mobilehome may depreciate as much as 20% in the first year and that it will depreciate 50% in the first five years. Center For Auto Safety, Mobile Homes 21, 28 (1975). Most sales of mobilehomes are conditional sales; if the loan is arranged directly through a bank the down payment is typically 25% and, if through a dealer, 10%. Id. at 39. Considering the initial price of a mobilehome, its rate of depreciation, and the amount of the downpayment, it is obvious that very few, if any, mobilehomes in the state would be nonexempt. The staff sees no policy reason why mobilehomes should enjoy such a disproportionate protection over houses.

Despite these conclusions, practically speaking it may be impossible to lower the level of mobilehome protection to an appropriate amount, such as one-half of the dwelling house exemption since the legislation equating their protection to homesteads in general is of such recent vintage. (In 1976, the exemptions were first equated at a $30,000 maximum and raised this year to $40,000.) The only positive feature we perceive is that if the homestead and mobilehome exemptions are at the same level, there is no need to determine whether a particular dwelling is a mobilehome or not.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Conversion Table for Exhibit 1 to Memorandum 78-48

Note. When Professor Riesenfeld prepared the attached memorandum, he had a mimeographed copy of the study by Mr. Charles Adams because the reprint was not yet available. The following table shows the page location in the reprint of material referred to by Professor Riesenfeld:

Location in Riesenfeld memo	Reference to mimeo study	Location in reprint study
p. 1	pp. 30-38	pp. 746-52
p. 2	pp. 33-34	p. 749
p. 6	"Adams study . . . citing pre-1945 cases"	p. 729
p. 7	"Mr. Adam's proposed solution"	p. 749
pp. 9-12	p. 32	p. 748
p. 12	"Mr. Adams suggests"	p. 749
p. 13	"As Mr. Adams pointed out"	p. 728
pp. 19-20	Schoenfeld v. Norberg	pp. 728, 749

Memorandum 78-48 EXHIBIT 1 June 5, 1978 D-39.200

TO: California Law Revision Commission

FROM: Stefan A. Riesenfeld SAR.
Consultant

SUBJECT: Revision of Homestead Laws

I have the Minutes of May 12-14, 1977, containing the tentative policy decisions of the Commission on the execution sale of realty subject to homestead exemption rights and the study of Mr. Chuck Adams on California Homestead Legislation. I agree with most of the recommendations made on pp. 30-38, but I have some reservations as to the accuracy of certain statements and conclusions.

I.

The Declared Homestead

Under the currently applicable provisions it is clear that the recording of a homestead declaration creates exemption rights against creditors who have not recorded a judgment lien prior to the recording of the declaration of homestead, Calif. Civil Code § 1241.

1. It is important to note that § 1241(1) which permits enforcement of judgments that are obtained prior to the recordation of the declaration of homestead and constitute liens upon the premises includes also pre-existing

judgment liens against former owners that are still valid and subsistent. The homestead exemption operates only against creditors of the owner of the homesteaded premises.

2. The exemption granted to a head of a family amounts to $30,000 "over and above all liens and encumbrances on the property." The meaning of "over and above all liens and encumbrances" which is a phrase used in §§ 1246, 1254, or "all liens and encumbrances, if any, on the property" (a phrase used in § 1256), or "the aggregate amount of all liens on the property" (§ 1255) raises difficult constructional questions with respect to liens and encumbrances attaching after the declaration of homestead and before or after the execution lien under which a sale is sought and with respect to that execution lien itself. The Adams report deals with that problem only in the recommendations on p. 33 (bottom) and 34 (upper part) and does not really discuss the ramifications of the problem. See infra.

3. The declaration of a homestead affects the rights of the owner of the exempt property.

a. All dispositions thereafter require joint action by both spouses, C.C. § 1242.

b. One spouse is barred from levying a partition action with respect to separate property held with the other spouse as joint tenants or tenants in common, California Bank v. Schlesinger, 159 C.A.2d Supp. 854, 324 P.2d 119 (1958), Walton v. Walton, 59 C.A.2d 26, 138 P.2d 54 (1943).

c. Prior attachments are dissolved, Becker v. Lindsay, 16 C.3d 188, 545 P.2d 260 (1976) and authorities cited.

d. The succession, whether intestate or by will, follows special rules, C.C. § 1265.

4. The existing law has been criticized primarily as being a trap for the ignorant that have failed to file a declaration prior to the recording of a judgment lien and thereby lose the benefit of a potential exemption. This defect led to the enactment of the alternative homestead exemption law, Cal. CCP § 609.31 and 674c, as amended in 1977.

5. The existing law is replete with other ambiguities, especially with respect to the liens which must be covered by a bid over and above the exempt amount (CC § 1255) and the effect of the levy of an execution on the property.

a. It is clear that a creditor does not acquire any interest in the homesteaded property unless he levies an attachment or execution.

b. The declaration of a homestead does not prevent the creation of consensual securities by joint action of the spouses, and since property subject to a declaration of homestead is thereafter not subject to a judgment lien (Boggs v. Dunn, 160 C. 283, 116 Pac. 743 (1911); Clausseneus v. Anderson, 216 C.A.2d 171, 30 Cal. Rpt. 772 (1963)), deeds of trust or mortgages granted by both spouses after recording of a homestead declaration have priority over a subsequent attachment and execution creditor and do not reduce the exempt amount governing the minimum bid. See White v. Horton, 154 Cal. 103, 97 Pac. 70 (1908).

c. Until 1945, property subject to a declared homestead was sold subject to prior encumbrances, and it was clear from the Code provision that encumbrances prior to the execution lien would not be affected by the execution sale and that the minimum bid had to cover only the exempt amount since the execution purchaser bought subject to all existing prior encumbrances.

In 1945 the law was cast in its present form and required that the bid must also cover the aggregate amounts of all liens and encumbrances (§ 1255) and that the proceeds must discharge all liens and encumbrances and cover the exempt amount (§ 1256).

d. This raises the question whether the liens and encumbrances covered by the bid include (1) the whole amount of the execution lien under which the execution sale is sought as well as (2) liens and encumbrances created subsequent to the creation of the levy lien.

The Adams study minimizes the importance of that problem by citing pre-1945 cases, i.e. cases under a different statute. Actually, §§ 1254, 1255 and 1256 as amended in 1945, create the problem involved, § 1256 provides that the distribution is in the following order:

(1) dischage of all liens and encumbrances;

(2) exempt amount;

(3) satisfaction of the execution;

(4) surplus, if any, to the homestead claimant.

The position of the "if any" in Section 1256 seems to indicate that all liens, prior and subsequent, as well as the execution lien, must be paid off in full.

e. It would seem reasonable that the execution creditor who has levied in compliance with the applicable provisions of the Civil Code should have priority over all subsequent liens and that the debtor should not have the power to destroy the creditor's potential collection by subsequently exhausting any excess value by creating

encumbrances (mortages or deeds of trust) thereon. It is less clear, whether such subsequent encumbrances should be satisfied out of the exempt amount otherwise payable to the debtor or whether they should be closed out unless there is an excess over (1) all liens prior to the levying creditor, (2) the exempt amount, and (3) the lien of the levying creditor. Should a debtor be entitled to the full $30,000 although after a levy the spouses have further encumbered the property?

I agree with Mr. Adams' proposed solution:

It is recommended that subsequent voluntary encumbrances should be paid out of the exempt amount.

f. Still less clear is the answer to the question whether the execution lien should be covered in full by the minimum bid, i.e. whether the creditor cannot have an execution sale in partial satisfaction of his lien. On policy grounds, it could be argued that a levying creditor should not be able to sell the homestead and still have an unpaid

deficiency on his judgment. The proper solution seems to be that the creditor should be able to have an execution sale only in full satisfaction of his judgment, regardless of whether the bid actually covers only part of the judgment. The Adams study does not discuss these matters adequately.

6. There seems to be no good reasons why senior liens must be paid off and why a sale cannot be subject to senior encumbrances or at least encumbrances on record prior to the recording of the declaration of homestead. This was the rule until 1945 and the 1945 amendments seem to overshoot the mark.

In cases of execution sales not subject to the homestead exemption, the bidder has to know that he acquires the property subject to encumbrances on record. There is no reason to change that rule in execution sales of homesteads. This means that the minimum bid must be the exempt amount (and -- if that is the chosen option -- the amount of the lien under which the sale is made) and that the title remains subject to all prior liens. At least the court should be able to authorize execution sales subject to prior liens as in the case of partition sales.

7. The greatest difficulties stem from the need to cure the defect of the declared homestead law which deprives the debtor of his right to retain his residence or to obtain the exempt amount if a judgment lien attaches prior to the recording of the homestead declaration.

The Adams study recommends recordation at any time prior to the execution sale with effect on the prior judgment lien creditor's remedies.

Adams describes the effect as follows (p. 32): "The recordation of a declaration of homestead prior to the execution sale would operate to dissolve any judgment liens on the dwelling to the extent of the homestead exemption. Judgment liens would continue after the declaration of homestead on the excess over the amount of the homestead exemption, however, so that the judgment creditor would retain his priority with respect to subsequent lienholders."

Frankly speaking, I cannot figure out the full ramifications of Adams' proposal, and the recommendation conveys no complete picture to me. The suggested statutory amendments (C.C. Secs. 1240, 1241(1) and C.C.P. § 674(1)) do not help to clarify Adams' ideas.

On principle, I am of the opinion that the needed reform should consolidate the two statutory schemes and combine the principles of both of them to the extent that this is feasible.

Assume the following situation: O is the owner of residential premises, holding title thereto as separate and sole property. The realty is the dwelling of O and O's spouse. The title is subject to a purchase money deed of trust in the amount of $15,000. No declaration of homestead is filed. On May 2, 1979, C, O's creditor, records a judgment for $10,000. The property at that time has a value of $50,000. On June 10, 1979, O records a declaration of homestead. On June 15, O and O's spouse execute a deed of trust to secure a loan of $8,000. On August 10, 1979, C starts proceedings to obtain a writ of execution.

Mr. Adams seems to recommend that C's judgment lien is "dissolved" in the amount of $5,000, because the value of the premises at the time of the recordation of the lien was only $5,000 above $30,000 + $15,000. He seems to recommend that the property may be sold for $15,000 + $30,000 + $5,000 = $50,000 and that the proceeds would

be distributed to the senior encumbrances ($15,000), the junior trust deed holder ($8,000), the owner ($20,000) and the balance of $5,000 to the creditor C.

In other words, the minimum bid would be the amount of the senior encumbrance, the amount of the exemption and the non-disolved portion of the lien. The amount of the junior trust deed would reduce the amount of the exemption distributable to the owner. It is not clear whether the "dissolved" portion of the judgment lien is determined as of the time of the sale or as of the time of the recording.

It is clear that this solution differs greatly from the results based on the present law. Under the declared homestead law, C could have sold the premises subject to the senior deed of trust at any price bid at the sale. He would retain an unsatisfied enforceable judgment for the balance. Because of the new exemption law, however, C cannot have an execution sale, unless the minimum bid covers (1) the senior trust deed, (2) his own judgment lien, (3) the exempt amount, and (4) the junior trust deed ($15,000 + $10,000 + $30,000 + $8,000) i.e. $63,000. If C could waive the judgment

lien and have an execution sale for an amount not covering the amount of C's execution lien, the minimum bid would be $53,000, C.C.P. § 690.31 and § 674(c). The result is based on the construction that C has a lien on the property senior to the second trust deed and that a sale is possible only if the bid exceeds the amount of all liens and encumbrances plus the exempt amount. Even if C releases the judgment lien and the levy lien is not included in the "sum of all liens and encumbrances" a creditor could not have a sale, unless all other encumbrances are satisfied and the owner receives his full exemption. In other words, a sophisticated debtor could block any execution sale by encumbering the property after the recording of the judgment lien.

Mr. Adams suggests that any voluntary incumbrances made after the recording of the judgment lien should not be included in the computation of the minimum bid and should reduce the amount of the exempt amount payable to the debtor.

At first blush this suggestion seems to amount not only to a reversal of the policy adopted in 1977 but also to contravene the principle that the owner of homestead

property may encumber the property with the consent of the spouse without reducing the amount of the exemption distributable to such owner. As has been pointed out in 5f, this principle should no longer apply after an actual levy.

As Mr. Adams pointed out, the denial of a judgment lien after the recordation of a homestead declaration and the possibility of the creation of intervening liens are a strong inducement to creditors of homestead owners to rush to a levy and sale. In effect, the proposal of Mr. Adams attributes to the recording of a judgment lien the effect of a levy of an execution without the need of appraisal proceedings within 60 days and a sale during the life of the levy lien.

Much can be said in favor of such a solution since it would not deprive the owner of the exempt amount, unless he subsequently voluntarily exhausts it by trust deeds, and it affords time to find funds to pay off the lien. The judgment lien would not be "dissolved" or limited to an excess value, but would remain subordinate to the exempt amount which, in addition to senior encumbrances, must be covered by the minimum bid.

Like under the new law, the effect of recording on prior judgment liens should only affect liens which were recorded on property that at that time was owned and used as residence by the debtor. Although this rule would reduce the reliability of land records, it would be consistent with the general principles of "inquiry notice."

Of course, in cases where the judgment lien is the last encumbrance on record, it could be said that the lien attaches on the excess value. Actually, however, this is only another formulation of the idea that the lien is subject to the exempt amount distributable to the owner. There is no policy reason why junior encumbrances should benefit from the exempt character of the property.

8. What is the situation if the owner sells the property? Since under the declared homestead law a judgment lien cannot attach after the recordation of a homestead declaration, a subsequent sale would not subject the purchaser to such lien and he will not reduce the purchase price because of the existence of such encumbrance. Of course, if the lien attached prior to

the recording of such declaration, both the owner and the purchaser would be subject to the judgment lien without exemption rights.

The legislation of 1977 modifies the situation existing in the absence of the recordation of a homestead declaration prior to the recordation of the judgment: The judgment lien still attaches to the property. However, so long as the judgment debtor is protected by the homestead exemption, the lien is subject to the payment of the exempt amount to the owner. If the realty is sold prior to the enforcement of the judgment lien, the purchaser cannot claim the benefit of that exemption. Hence the price offered by the purchaser will be reduced by the amount of the lien and the owner in effect loses the benefits of the exemption. For example, O owns residential property used as O's dwelling worth $35,000 over prior encumbrances. C, a creditor of O, records a judgment for $25,000. So long as O owns the premises C can only get $5,000 out of an execution sale. If O sells to P, P is subject to the whole $25,000. Therefore, P would buy the property subject to the encumbrances and pay only $10,000. O would have only $10,000 toward the purchase of a new home and lose the benefit of $20,000 of additional exemption.

In order to avoid that the subjection of the homestead to a judgment lien enforceable in the hands of a successor "makes the homestead a prison for the debtor and his family" (see Lacey, Homestead Exemption -- Oregon: Still More, 8 Will. L. Rev. 327 (1972); Marshall, Homestead Exemption: Oregon Law, 20 Or. L. Rev. 328, 344 (1941)), it has been advocated that the lien should only attach to the excess of the debtor's equity over the exempt amount. This, for example, is the law of Oregon, where a purchaser is entitled to proceeds in the exempt amount prior to the distribution of the execution proceeds from a sale under the judgment lien, Clawson v. Anderson, 248 Or. 347, 434 P.2d 462 (1967); Shepard & Morse Lumber Co. v. Clawson, 259 Or. 154, 486 P.2d 542 (1971); Smith v. Popham, 513 P.2d 1172 (1973). If the property value increases after the sale to the new owner and before the execution sale, such increase enures to the benefit of the judgment creditor. Since in Oregon execution sales of homesteads are made subject to prior encumbrances, the bid at which property bought subject to a judgment lien against a prior homestead owner can be sold under such lien must exceed the exempt amount without addition of prior liens.

In order to facilitate sales of homestead property and to assure that the sales price is not reduced by the existence of a lien on the excess of the owner's equity above the exempt amount, Oregon has enacted legislation permitting discharge of the lien in toto, by paying the amount of the excess of the seller's equity over the exempt amount, if any, or after determination that there is no such excess. The statute follows a proposal by Prof. Lacey made in 8 Will. L. Rev. 327 and is codified as OR Rev. Stat. Secs. 23.280-23.300 (1975). It can be justified on the analysis that the homestead owner in effect has a prior equitable charge in the amount of the exemption on the property and that a foreclosure of such charge would close out any junior lien not covered by excess proceeds.

Of course the purchaser would still be subject to junior consensual liens. This result, however, is in conformity with the theory that voluntary encumbrances created after the recording of a judgment lien reduce the amount of the exemption otherwise available to the homestead owner.

Adoption of a statute, similar to the Oregon provision, would reduce the rigors of C.C.P. § 674c.

Wisconsin likewise permits attachment of judgment liens only on the excess over the exempt value, W.S.A. § 815.20. An owner or a grantee of an owner may obtain a release from such judgment, if the value of the property is less than the maximum exemption, W.S.A. § 815.20. Apparently, if a lien attaches on the excess it remains confined to that amount after the sale since the statute provides that the exemption shall not be impaired by the sale of the premises, W.S.A. § 815.20. The Wisconsin law on that point, however, is not clearly settled by case law, although apparently it was the intention of the 1858 amendment to permanently withdraw the exempted homestead from "the pangs of a judgment lien," Crow, The Wisconsin Homestead Exemption, 20 Marqu. L. Rev. 1 (1935).

In conclusion, it seems to be advisable to consolidate the two California homestead systems and to permit an attachment of a judgment lien only on the excess. This could be achieved by providing that in the case of the enforcement of the judgment lien the judgment debtor

or a successor (i.e., a grantee or holder of a junior consensual security) shall be entitled to a prior distribution not exceeding the exempt amount, if the lien attached on property protected by a homestead exemption. In my opinion, a "dissolution" of the judgment is not the proper approach.

9. In my opinion, the Adams proposal of how to deal with Schoenfeld v. Norberg is subject to severe objections. The result of the case was the combined effect of two rules: (1) that the execution sale of a homestead must result in satisfaction of all liens encumbering the property sold, and (2) that encumbrances on joint tenancy property burden each share in the full amount. The latter rule applies to encumbrances of land held in co-ownership whether or not used as homestead by the co-owners.

In ordinary co-ownership cases the Schoenfeld problem does not occur because usually the share of a co-owner is sold subject to prior liens, without need of their satisfaction. The purchaser then can clear up the situation by means of a partition sale. The general rules of marshalling will usually not afford adequate

relief, see C.C.P. §§ 771, 775; C.C. §§ 2899 and 3433.

The rule in the proposed Bankruptcy Act which Mr. Adams cites as pattern for the execution sale of the non-debtor's share is based on the fact that the trustee in bankruptcy succeeds to the bankrupt's title and thus has partition rights. Under California law, however, one spouse has no partition right against a co-owner-spouse with respect to homestead property held in co-ownership, (supra 3b) and judgment lien creditors are likewise not entitled to partition of the encumbered property.

The solution proposed by Mr. Adams seems to be an unwarranted and unnecessary interference with the rights of a non-debtor. The desired result can be accomplished by permitting execution sales of homestead property subject to prior liens, a possibility which existed until the unfortunate amendment of 1945 and should be restored, see supra nr. 6).

II.

The New Exemption System

Much of the substance of the new exemption legislation could be achieved by a consolidation of the two systems in form of a rule which permits assertion of the exemption after the recordation of a judgment lien on property which was owned and used as residence by the debtor at the time of the attachment of the judgment lien. This assertion could be either by the recordation of a declaration with all other effects attendant thereto under the Civil Code or by a claim in opposition to the issuance of a writ of execution as specified in C.C.P. § 690.31.

The substantive rules of C.C.P. § 690.31 should be consolidated with rules of the Civil Code relating to execution in the case of declared homesteads. It should be noted that Section 690.31(b)(3)(ii) needs correction or clarification.

The statute excepts from the exemption encumbrances on the premises executed and acknowledged by husband and wife. This casts doubts on the validity or enforceability of encumbrances executed by the owner alone. Obviously,

encumbrances executed by the debtor alone at a time when the property was owned by the debtor but not used as a residence should be enforceable, although neither § 690.31(3)(ii) nor (iii) deals with that situation. In addition, the statute, while permitting unlimited enforceability of encumbrances executed by both spouses does not settle the question of whether encumbrances executed by the owner-spouse alone are invalid or merely subject to the exemption. The second alternative would seem to be preferable.

III.

Conclusion

A consolidation of the two systems seems to be advisable and feasible. However, it would require an extensive revision of the sections dealing with levy, sale and distribution of proceeds along the lines suggested in I and II.

The principal task to be performed is a revision of C.C. §§ 1241, 1246, 1254, 1255 and 1256 so as to reflect the possibility to file declarations at any time before the execution sale, the effect of judgment liens on premises owned and used as residence by the debtor at the time of their attachment, new rules determining minimum bids, and detailed rules for the distribution of proceeds, including rules spelling out the priorities resulting from liens attaching on exempt realty with value exceeding the exempt amount.

Exhibit 2

Declared Homestead Exemption Statute
Civil Code §§ 1237-1304

TITLE 5. HOMESTEADS

CHAPTER 1. GENERAL PROVISIONS

§ 1237. Property constituting homestead

The homestead consists of the dwelling house in which the claimant resides, together with outbuildings, and the land on which the same are situated, selected as in this title provided.

The dwelling house may be in a condominium, as defined in Section 783 of the Civil Code, a planned development, as defined in Section 11003 of the Business and Professions Code, a stock cooperative as defined in Section 11003.2 of the Business and Professions Code, or a community apartment project, as defined in Section 11004 of the Business and Professions Code, or may be situated on real property held under long-term lease rather than a freehold. In such cases, an agreement, covenant, or restriction between or binding upon the owners of a title, interest, or estate in a condominium, planned development, stock cooperative, or community apartment project, or a lien arising under such agreement, covenant, or restriction, or an underlying lease or sublease, indebtedness, security, or other interest or obligation may be enforced in the same manner as if no homestead were declared, and the homestead shall include the interest in and right to use common areas and other appurtenances subject to the terms and conditions applicable thereto. For the purposes of this section "long-term lease" is a lease of 30 years or more.
(Amended by Stats.1970, c. 687, p. 1316, § 1; Stats.1973, c. 281, p. 677, § 1.)

§ 1237.5 Quasi-community property and separate property defined

As used in this title:

(a) "Quasi-community property" means real property situated in this state heretofore or hereafter acquired in any of the following ways:

(1) By either spouse while domiciled elsewhere which would have been community property * * * if the spouse * * * who acquired the property had been domiciled in this state at the time of its acquisition * * *.

(2) In exchange for real or personal property, wherever situated, * * * which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

(b) "Separate property" does not include quasi-community property.

(Added by Stats.1961, c. 636, p. 1841, § 11. Amended by Stats.1970, c. 312, p. 707, § 1.)

§ 1238. Property from which selected; property defined

If the claimant be married, the homestead may be selected:

(a) From the community property; or

(b) From the quasi-community property; or

(c) From the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the husband * * * or the wife.

When the claimant is not married, but is the head of a family, within the meaning of Section 1261, the homestead may be selected from any of his or her property. If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Property within the meaning of this title, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive, and includes land held under long-term lease, as specified in Section 1237, and ownership rights in a condominium, planned development, stock cooperative, or community apartment project even though the title, interest, or estate of the condominium, planned development, stock cooperative, or community apartment project is in a leasehold or subleasehold.
(Amended by Stats.1961, c. 636, p. 1842, § 12; Stats.1970, c. 687, p. 1316, § 2; Stats. 1976, c. 463, p. —, § 1.)

§ 1240. Exemption from execution or forced sale

EXEMPT FROM FORCED SALE. The homestead is exempt from execution or forced sale, except as in this Title provided. (Enacted 1872.)

§ 1241. Execution or forced sale; when subject to

The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead is recorded, and which, at the time of such recordation, constitute liens upon the premises.

2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises.

3. On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant.

4. On debts secured by encumbrances on the premises, executed and recorded before the declaration of homestead was filed for record. (As amended Stats.1957, c. 1317, p. 2639, § 1; Stats.1959, c. 1805, p. 4290, § 2.)

§ 1242. Conveyance of homestead; restrictions

Except as provided in Chapter 2a (commencing with Section 1435.1) Division 4 of the Probate Code where one or more spouses is incompetent, and except in the case of a married person's separate homestead, the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife or unless each spouse executes and acknowledges a separate instrument so conveying or encumbering the homestead in favor of the same party or his successor in interest; provided, however, that a conveyance of the homestead between husband and wife need be executed and acknowledged only by the spouse conveying, and unless the one conveying expressly reserves his homestead rights, the spouse to whom the conveyance is made may convey or encumber the homestead property in the same manner and to the same extent as though no homestead had been declared. (As amended Stats.1957, c. 1619, p. 2966, § 1; Stats.1959, c. 125, p. 2016, § 24; Stats.1959, c. 1805, p. 4291, § 3.)

§ 1243. Abandonment; declaration or conveyance

Except as provided in Chapter 2A (commencing with Section 1435.1) of Division 4 of the Probate Code where one or both spouses are incompetent, a homestead can be abandoned only by:

1. A declaration of abandonment executed and acknowledged by the husband and wife, jointly or by separate instruments, if the claimant is married.

2. A declaration of abandonment or a conveyance by the claimant if unmarried.

3. A declaration of abandonment or a conveyance by the grantee named in a conveyance by which one spouse conveys the homestead to the other spouse without expressly reserving his homestead rights.

4. A conveyance or conveyances by both spouses as provided in Section 1242.

5. A declaration of abandonment or a conveyance by the claimant alone in the case of a married person's separate homestead. (As amended Stats.1959, c. 125, p. 2016, § 25; Stats.1959, c. 1805, p. 4291, § 4; Stats.1959, c. 1960, p. 4564, § 1.)

§ 1244. Declaration of abandonment; effectual from filing

A declaration of abandonment is effectual only from the time it is * * * recorded in the office in which the homestead was recorded.

(As amended Stats.1967, c. 70, p. 981, § 4.)

§ 1245. Execution against homestead; time for application for appointment of appraisers; expiration of liens; subsequent levies prohibited

When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section one thousand two hundred and forty-one is levied upon the homestead, the judgment creditor may at any time within sixty days thereafter apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof, and if such application shall not be made within sixty days after the levy of such execution the lien of the execution shall cease at the expiration of said period, and no execution based upon the same judgment shall thereafter be levied upon the homestead. (Enacted 1872. As amended Code Am.1880, c. 41, p. 7, § 18; Stats.1911, c. 436, p. 888, § 1.)

§ 1246. Execution against homestead; petition; contents

The application must be made upon a verified petition of the judgment creditor showing:

1. The fact that an execution has been levied upon the homestead within 60 days prior to the filing of said petition.

2. A description of the homestead and the name of the claimant.

3. That the value of the homestead, over and above all liens and encumbrances thereon, exceeds the amount of the homestead exemption.

4. That no previous execution arising out of the same judgment has been levied upon said homestead. (Enacted 1872. As amended Stats.1911, c. 436, p. 888, § 2; Stats.1945, c. 789, p. 1476, § 2.)

§ 1247. Execution against homestead; petition; filing

The petition must be filed with the clerk of the superior court. (Enacted 1872. As amended Code Am.1880, c. 41, p. 8, § 19.)

§ 1248. Execution against homestead; service of petition and notice of hearing; failure to serve; termination of execution lien

Within ninety days from the date of filing the petition, a copy thereof, with the notice of the time and place of hearing, must be served upon the claimant or his attorneys at least two days before the hearing; and if such notice shall not be so served, the lien of the execution shall cease at the expiration of said period of ninety days, and no execution based upon the same judgment shall thereafter be levied upon the homestead. (Enacted 1872. As amended Stats.1911, c. 436, p. 889, § 3.)

§ 1249. Execution against homestead; appointment of appraisers

SAME. At the hearing the Judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents of the county to appraise the value of the homestead. (Enacted 1872.)

§ 1250. Execution against homestead; oath of appraisers

SAME. The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same. (Enacted 1872.)

§ 1251. Execution against homestead; appraisal; determination of divisibility of land

They must view the premises and appraise the value thereof, and if the appraised value, less the aggregate of all liens and encumbrances thereon, exceeds the homestead exemption they must determine whether the land claimed can be divided without material injury. (Enacted 1872. As amended Stats.1945, c. 789, p. 1476, § 3.)

§ 1252. Execution against homestead; report of appraisers

Within 15 days after their appointment they must make to the judge a report in writing, which report must show the appraised value, the amount of all liens and encumbrances, and their determination upon the matter of a division of the land claimed. (Enacted 1872. As amended Stats.1945, c. 789, p. 1476, § 4.)

§ 1253. Execution against homestead; order setting off homestead; enforcement against remainder

If, from the report, it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence and outbuildings, as will amount in value to the homestead exemption over and above all liens and encumbrances, and the execution may be enforced against the remainder of the land. (Enacted 1872. As amended Stats.1945, c. 789, p. 1476, § 5.)

§ 1254. Execution against homestead; order directing sale

If, from the report, it appears to the judge that the land claimed exceeds in value, over and above all liens and encumbrances thereon, the amount of the homestead exemption, and that it can not be divided, he must make an order directing its sale under the execution. (Enacted 1872. As amended Stats.1945, c. 789, p. 1477, § 6.)

§ 1255. Execution against homestead; minimum bids

At such sale no bid shall be received, unless it exceeds the amount of the homestead exemption plus the aggregate amount of all liens and encumbrances on the property. (Enacted 1872. As amended Stats.1945, c. 789, p. 1477, § 7.)

§ 1256. Execution against homestead; sale; distribution of proceeds

If the sale is made, the proceeds thereof must be applied in the following order of priority, first, to the discharge of all liens and encumbrances, if any, on the property, second, to the homestead claimant to the amount of the homestead exemption, third, to the satisfaction of the execution, and fourth, the balance, if any, to the homestead claimant. (Enacted 1872. As amended Stats.1945, c. 789, p. 1477, § 8.)

§ 1257. Execution against homestead; protection of money paid claimant

The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband or wife, which the law gives to the homestead.
(Amended by Stats.1976, c. 463, p. —, § 3.)

§ 1258. Execution against homestead; compensation of appraisers

The court must fix the compensation of the appraisers * * * in an amount as determined by the court to be reasonable, but such fees shall not exceed similar fees for similar services in the community where such services are rendered.
(Amended by Stats.1968, c. 450, p. 1069, § 1.)

§ 1259. Execution against homestead; costs

COSTS. The execution creditor must pay the costs of these proceedings in the first instance; but in the cases provided for in Sections 1253 and 1254 the amount so paid must be added as costs on execution, and collected accordingly. (Enacted 1872.)

§ 1260. Persons who may select homesteads; valuation; automatic increase in value

Homesteads may be selected and claimed:

1. By any head of a family, of not exceeding forty thousand dollars ($40,000) in actual cash value, over and above all liens and encumbrances on the property at the time of any levy of execution thereon:

2. By any person 65 years of age or older, of not exceeding forty thousand dollars ($40,000) in actual cash value, over and above all liens and encumbrances on the property at the time of any levy of execution thereon.

3. By any other person, of not exceeding twenty-five thousand dollars ($25,000) in actual cash value, over and above all liens and encumbrances.

Any declaration of homestead which has been filed prior to January 1, 1977 shall be deemed to be amended on such date by increasing the value of any property selected and claimed to the value permitted by this section on such date to the extent that such increase does not impair or defeat the right of any creditor to execute upon the property which existed prior to such date.

§ 1261. Head of family defined

The phrase "head of a family," as used in this title, includes within its meaning:

1. The husband or wife, when the claimant is a married person.

2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either:

(a) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband;

(b) A minor brother or sister, or the minor child of a deceased brother or sister;

(c) A father, mother, grandfather, or grandmother;

(d) The father, mother, grandfather, or grandmother of a deceased husband or wife;

(e) An unmarried sister or brother, or any other of the relatives mentioned in this section, who have attained the age of majority, and are unable to take care of or support themselves.
(Amended by Stats.1976, c. 463, p. —, § 4.)

§ 1261.1 New claim of homestead not considered abandonment of prior homestead

Whenever a claim of homestead is made pursuant to subdivision 1 or 2 of Section 1260 which includes property previously homesteaded, to the extent that such prior homestead is still valid such new claim of homestead shall not be considered an abandonment of the prior homestead.
(Added by Stats.1969, c. 1090, p. 2098, § 2.)

Chapter 2

HOMESTEAD OF THE HEAD OF A FAMILY

§ 1262. Declaration of homestead; execution and acknowledgment; recording

In order to select a homestead, * * * either spouse or head of a family * * * must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.
(Amended by Stats.1976, c. 463, p. —, § 5.)

§ 1263. Declaration of homestead; contents; evidence

The declaration of homestead must contain:

1. A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, when the declaration is made by * * * a married person without the joinder of his or her spouse in the execution and acknowledgment of the declaration, showing that the other spouse has not made such declaration and that he or she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. Such declaration of homestead may further contain a statement of the character of the property sought to be homesteaded, showing the improvement or improvements which have been affixed thereto, with sufficient detail to show that it is a proper subject of homestead, and that no former declaration has been made, or, if made, that it has been abandoned * * * and if it contains such further statement and the declaration is supported by the affidavit of the declarant, annexed thereto, that the matters therein stated are true of his or her own knowledge, such declaration, when properly recorded, shall be prima facie evidence of the facts therein stated, and conclusive evidence thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

The declaration of a homestead shall not affect the property rights of spouses as between themselves other than as provided by this title.

(Amended by Stats.1969, c. 564, p. 1190, § 1; Stats.1970, c. 80, p. 93, § 1; Stats.1976, c. 463, p. —, § 6.)

§ 1264. Declaration of homestead; place of recording

DECLARATION MUST BE RECORDED. The declaration must be recorded in the office of the Recorder of the county in which the land is situated. (Enacted 1872.)

§ 1265. Establishment of homestead; descent on death of claimant; exemption

From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, or from the quasi-community property, or from the separate property of the spouse making the selection or joining therein, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, except in the case of a married person's separate homestead, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale. (As amended Stats.1959, c. 1805, p. 4291, § 5; Stats.1961, c. 636, p. 1842, § 13.)

§ 1265a. Reinvestment of proceeds of sale; effect of new declaration

If the proceeds arising from the sale of property selected as a homestead are used for the purchase of real property within the period of six months following such sale, the property purchased may be selected as a homestead in the manner provided in this title within the period of six months following such sale, and such selection, when the declaration has been filed for record, shall have the same effect as if it had been created at the time the prior declaration of homestead was filed for record. (Added Stats. 1939, c. 515, p. 1902, § 1.)

Chapter 3

HOMESTEAD OF OTHER PERSONS

§ 1266. Declaration of homestead; execution and acknowledgment

MODE OF SELECTION. Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a "Declaration of Homestead." (Enacted 1872.)

§ 1267. Declaration of homestead; contents; evidence

The declaration * * * shall contain everything required by the second and third * * * subdivisions of Section 1263, and in addition thereto may contain the statement and affidavit provided for by subdivision * * * 4 of * * * such section, with like effect as therein provided. If the homestead is selected and claimed pursuant to subdivision 2 of Section 1260, the declaration shall also contain a statement that the person making it is 65 years of age or older.
(Amended by Stats.1960, c. 564, p. 1190, § 2; Stats.1969, c. 1099, p. 2098, § 3.)

§ 1268. Declaration of homestead; place of recording

DECLARATION MUST BE RECORDED. The declaration must be recorded in the office of the County Recorder of the county in which the land is situated. (Enacted 1872.)

§ 1269. Establishment of homestead

EFFECT OF FILING FOR RECORD THE DECLARATION OF HOMESTEAD. From and after the time the declaration is filed for record, the land described therein is a homestead. (Enacted 1872.)

CHAPTER 5. MARRIED PERSON'S SEPARATE HOMESTEAD

§ 1300. Declaration following decree of legal separation or dissolution of marriage; execution and acknowledgment

Following the entry of a * * * judgment decreeing legal separation of the parties or an interlocutory * * * judgment of dissolution of a marriage, each spouse may execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of a married person's separate homestead from the separate property of the spouse so declaring same, or from any property awarded to such spouse by said * * * judgment.

(Added by Stats.1959, c. 1805, p. 4289, § 1. Amended by Stats.1971, c. 1210, p. 2325, § 2.)

§ 1301. Contents of declaration

The declaration must contain:

(1) A statement that the declarant is a married person, and that there is in existence a * * * judgment decreeing legal separation of the parties or an interlocutory * * * judgment of dissolution of the marriage between declarant and his or her spouse.

(2) A statement showing that declarant is the head of a family, as defined in this chapter, if such is the case.

(3) The matters required by the second and third subdivisions of Section 1263, and in addition thereto may contain the statement and affidavit provided for by subdivision 4 of said section, with like effect as therein provided.

(Added by Stats.1959, c. 1805, p. 4289, § 1. Amended by Stats.1969, c. 564, p. 1190, § 3; Stats.1971, c. 1210, p. 2325, § 3.)

§ 1302. Head of a family; definition

For the purpose of this chapter, the phrase "head of a family" includes every person who has residing on the premises with him or her and under his or her care and maintenance one or more of the persons enumerated in paragraphs (a), (b), (c), (d) and (e) of subdivision 2 of Section 1261, and such person shall receive the exemption allowed the head of a family by Section 1260. Any married person declaring a homestead under this chapter who is not the head of a family, as defined in this section, shall receive the exemption allowed other persons by Section 1260. (Added Stats.1959, c. 1805, p. 4290, § 1.)

§ 1303. Recordation of declaration; establishment of homestead

From and after the time the declaration is recorded in the office of the recorder of the county in which the land is situated, the land described therein is a homestead. (Added Stats.1959, c. 1805, p. 4290, § 1.)

§ 1304. Subsequent reconciliation of parties; dismissal of dissolution action; joint protection homestead; reduction of exemption

When a homestead has been declared under this chapter by a married person following the entry of an interlocutory * * * judgment of dissolution of a marriage upon property awarded to such person by such * * * judgment, a subsequent reconciliation of the parties when evidenced by a dismissal of such * * * dissolution action executed by both parties or their attorneys of record shall transform such homestead into a joint protection homestead, which shall thereafter have the force and effect of a homestead selected under Chapter 2 of this title. If each such married person has selected a homestead under this chapter, and such a dismissal has been filed after reconciliation, one of the homesteads must be abandoned or the exemption under each shall be reduced by one-half.

(Added by Stats.1959, c. 1805, p. 4290, § 1. Amended by Stats.1971, c. 1210, p. 2326, § 4.)

Exhibit 3

Claimed Homestead Exemption
Code of Civil Procedure § 690.31

690.31. (a) (1) A dwelling house in which the debtor or the family of the debtor actually resides shall be exempt from execution, to the same extent and in the same amount, except as otherwise provided in this section, as the debtor or the spouse of the debtor would be entitled to select as a homestead pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code. For the purpose of this section, "dwelling house" means the dwelling house together with the outbuildings and the land on which the same are situated.

(2) A mobilehome as defined in Section 18008 of the Health and Safety Code in which the debtor or the family of the debtor actually resides, together with the outbuildings and the land on which the same are situated, shall be exempt from execution, to the same extent and in the same amount, as is provided for a dwelling house by this section. For the purposes of this section, "dwelling house" includes such a mobilehome.

(b) The exemption provided in subdivision (a) does not apply:

(1) Whenever the debtor or the spouse of the debtor has an existing declared homestead on any property in this state other than property which is the subject of a proceeding under subdivision (c) of this section. The existence of a homestead declared by the debtor or the debtor's spouse under Section 1300 of the Civil Code shall not affect the right of the other spouse to an exemption under this section.

(2) Whenever a judgment or abstract thereof or any other obligation which by statute is given the force and effect of a judgment lien has been recorded prior to either:

(i) The acquisition of the property by the debtor or the spouse of the debtor; or

(ii) The commencement of residence by the debtor or the spouse of the debtor, whichever last occurs.

(3) Whenever the execution or forced sale is in satisfaction of judgments obtained:

(i) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, or materialmen's or vendors' liens upon the *dwelling house or* premises;

(ii) On debts secured by encumbrances on the *dwelling house or* premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant; or

(iii) On debts secured by encumbrances on the *dwelling house or* premises, executed and recorded prior to or in connection with the acquisition of the property by the debtor or the spouse of the debtor.

(c) Whenever a judgment creditor seeks to enforce a judgment against a dwelling house, whether or not the judgment was rendered in another county, the judgment creditor shall apply to the proper court in the county in which the dwelling house is located for the issuance of a writ of execution. The proper court shall be determined in the same manner as provided in Section 392. The application shall be verified and describe the dwelling house and state that either or both of the following facts exist:

(1) The dwelling house is not exempt, the reasons therefor, and (i) that a reasonable search of the records of the office of the county recorder has not resulted in the finding of a declared homestead of the debtor or the spouse of the debtor on the subject dwelling house, and further, that a reasonable search of the records of the county tax assessor indicates that there is no current homeowner's exemption claimed by either the debtor or the spouse of the debtor on the subject dwelling house, or (ii) that the records of the county tax assessor indicate that there is a current homeowner's exemption claimed by either the debtor or the spouse of the debtor on the subject dwelling house but the judgment creditor believes for reasons which shall be stated in the application that the debtor or the spouse of the debtor is not entitled to the exemption provided in this section.

(2) The current value of the dwelling house, over and above all liens and encumbrances thereon, exceeds the amount of the allowable exemption.

If an application alleges facts solely pursuant to paragraph (2) or the court determines that a writ may issue only under the circumstances described in paragraph (2), the court shall determine whether the current value of the dwelling house, over and above all liens and encumbrances thereon, exceeds the amount of the allowable exemption in the manner provided by Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code.

At the time the application is filed, if the judgment was rendered in another county, there shall be paid to the clerk or judge, as a filing fee, the sum of four dollars ($4) when filed in a justice court, or the sum of six dollars ($6) when filed in a superior or municipal court.

Whenever a judgment creditor seeks to enforce a judgment pursuant to this section and the judgment was rendered in another county, the judgment creditor shall file with the clerk or judge of the proper court in the county in which the dwelling house is located an abstract of judgment in the form prescribed in Section 674.

(d) Upon receipt of a completed application of a judgment creditor, the court shall set a time and place for hearing and order the debtor to show cause why a writ of execution should not issue. Prior to the hearing, a copy of the order to show cause, a copy of the application filed by the judgment creditor and a copy of the following notice, in at least 10-point bold type, shall be served as prescribed in subdivision (*l*):

"IMPORTANT LEGAL NOTICE TO HOMEOWNER AND RESIDENT

1. Your house is in danger of being sold to satisfy a judgment obtained in court. You may be able to protect the house and real property described in the accompanying application from execution and forced sale if you or your family now actually reside on the property and presently do not have a declared homestead legally recorded with the county recorder on any other property in the State of California. YOU OR YOUR SPOUSE MUST COME TO THE HEARING TO SHOW THESE FACTS.

2. If you or your spouse want to contest the forced sale of this property, you or your spouse must appear at

_____ on _____

(location set forth in OSC) (date and time)

and be prepared to answer questions concerning the statements made in the attached application. THE ONLY PURPOSE OF THE HEARING WILL BE TO DETERMINE WHETHER THE PROPERTY CAN BE SOLD, NOT WHETHER YOU OWE THE MONEY.

3. FOR YOUR OWN PROTECTION, YOU SHOULD PROMPTLY SEEK THE ADVICE OF AN ATTORNEY IN THIS MATTER. IF YOU ARE A TENANT AND DO NOT CLAIM TO BE THE OWNER OR BUYER OF THIS PROPERTY, THIS NOTICE DOES NOT AFFECT YOU. PLEASE GIVE IT TO YOUR LANDLORD."

(e) The burden of proof at the hearing shall be determined in the following manner:

(1) Where the application of the judgment creditor states a claim of nonexempt status, the debtor or the spouse of the debtor shall have the burden of proving his or her entitlement to the exemption; and

(2) Where the application of the judgment creditor asserts that the current value of the dwelling, over and above all liens and encumbrances thereon, exceeds the amount of the allowable exemption, the judgment creditor shall have the burden of proof on that issue.

(f) Upon a determination by the court that the dwelling house is not exempt or that, although exempt, the judgment creditor is entitled to levy against any excess, it shall make an order directing the issuance of a writ of execution. The order shall state whether or not the dwelling house is exempt and, if not exempt, state that the judgment creditor is entitled only to execution against the excess over the exempt amount. It shall also specify the amount of the exemption. A copy of the order shall be transmitted by the clerk of the court to the clerk of the court in which the judgment was rendered.

The writ of execution shall specify the amounts for distribution under the levy, including names and addresses of each person or entity having an encumbrance against the dwelling and the name and address of any exempt debtor and the exempt amount.

(g) Any such writ of execution issued upon a hearing at which the debtor, the spouse of the debtor, or his or her attorney did not appear shall be served in the manner prescribed in subdivision (*l*) and be accompanied by the following notice in at least 10-point bold type:

"IMPORTANT LEGAL NOTICE TO HOMEOWNER AND RESIDENT

1. You were recently served with a court order requiring your presence at a hearing to determine why the court should not issue a writ of execution for the forced sale of your home. YOU AND YOUR SPOUSE FAILED TO APPEAR AT THE HEARING AND THE COURT HAS ORDERED THAT YOUR HOME BE SOLD TO SATISFY A JUDGMENT AGAINST YOU.

2. Your absence at the hearing has contributed to the issuance of the accompanying writ of execution. If the absence of you or your attorney at the hearing was legally excusable and you believe in good faith that your home may be entitled to an exemption from execution, you should complete the form below and date, sign, and return the form below no later than _____. (Insert date no later than five days prior to date of sale.)

3. FOR YOUR OWN PROTECTION, YOU SHOULD IMMEDIATELY SEEK THE ADVICE OF AN ATTORNEY. IF YOU ARE A TENANT AND DO NOT CLAIM TO BE THE OWNER OR BUYER OF THIS PROPERTY, THIS NOTICE DOES NOT AFFECT YOU. PLEASE GIVE IT TO YOUR LANDLORD.

..... (Cut Out and Return This Form to) .....

_____

(Name and Title of Levying Officer)

_____

(Street Address and City)

_____

(Area Code and Telephone Number of Levying Officer)"

I declare that my absence from the previous hearing on whether or not this property should be sold was legally excusable. I, or my spouse, currently reside in this property and I wish a further hearing so that I may assert my exemption rights under Code of Civil Procedure Section 690.31 and contest the sale of my home. I understand that the clerk of the court will notify me of the date and place for this hearing if I return this form immediately and that I must attend this hearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ at _____ , California
(date) (city or county)

_____ "

(Signature of Debtor or Debtor's Spouse)

(h) If the debtor or spouse of the debtor declares that his or her absence or the absence of his or her attorney at the hearing was due to mistake, inadvertence, surprise or excusable neglect and declares that the subject dwelling house may be entitled to an exempt status, the levying officer shall, upon receipt of the declarations of the debtor five days prior to the scheduled sale date, postpone the sale pending further orders of the court and transmit the notice forthwith to the court. Upon receipt of the notice, the clerk shall set a hearing to determine whether the writ of execution should be recalled, and shall give at least 10 days' notice to the parties.

(i) Subsequent applications by a judgment creditor within 12 months of a denial of a writ of execution shall be supported by a statement under oath alleging that there is a material change of circumstances affecting the exemption, and setting forth facts supporting such claimed material change of circumstances.

(j) In the event of an execution sale, the proceeds of the sale shall be applied in the following order and priority: first, to the discharge of all liens and encumbrances, if any, on the property; second, to the debtor, or the debtor's spouse if such person is the exemption claimant, in the amount of the exemption if allowed pursuant to this section; third, to the satisfaction of the execution; and fourth, to the debtor, or the debtor's spouse if such person is the exemption claimant.

(k) That portion of the proceeds from the sale of real property pursuant to an order of the court directing the issuance of a writ of execution pursuant to subdivision (f) of this section, which portion represents the amount of the exemption, shall be exempt for a period of six months from the date of receipt of the proceeds. Where such exempt proceeds are used for the purchase of a dwelling house, in which the debtor or the family of the debtor actually reside, within a period of six months following receipt, the subsequently acquired dwelling shall be exempt from execution. The exemption for the subsequently acquired real property shall have the same effect as if allowed on the date of the acquisition of or the commencement of residence by the debtor or the spouse of the debtor, whichever last occurred, in the property previously determined to be exempt, except with respect to a judgment or other obligation which by statute is given the force and effect of a judgment lien against the subsequently acquired property prior to its acquisition.

(*l*) Promptly upon receipt of the application filed by the judgment creditor, the order to show cause, and the notice specified in subdivision (d), or promptly upon receipt of the writ of execution and the notice specified in subdivision (g), and in no event less than 10 days prior to the date of the hearing specified in the notice under subdivision (d) or the date of sale, as the case may be, the levying officer shall mail copies of the documents to the defendant and to any third person in whose name the property stands upon the records of the office of the tax assessor of the county where the property is located on the last business day preceding the date of mailing. Such copies shall be mailed first-class mail, postage prepaid, to the address of the defendant and any such third person as shown by the records of the office of the tax assessor. The levying officer shall also serve an occupant of the property with copies or, if there is no occupant on the property at the time service is attempted, the levying officer shall post a copy in a conspicuous place on the property. Service upon the occupant may be made by leaving the copies with the occupant personally, or, in the occupant's absence, with any person of suitable age and discretion, found upon the property at the time service is attempted and who is either an employee or agent of such occupant or a member of his family or household.

(m) The provisions of subdivisions (j), and (*l*) of Section 690.50 shall apply to proceedings under this section.

(n) An appeal lies from any judgment under this section. Such appeal shall be taken in the manner provided for appeals in the court in which the proceeding is had.

(o) The notice specified in subdivision (d) shall also be provided in Spanish as follows:

"IMPORTANTE AVISO LEGAL AL PROPIETARIO DE CASA Y RESIDENTE

1. Su casa está en peligro de ser vendida para cumplir con una orden judicial obtenida en la corte. Usted podría proteger la casa y los bienes raíces descritos en la solicitud adjunta de la ejecución y venta forzosa si usted o su familia actualmente residen en la propiedad y no tienen una casa propia legalmente registrada con el registrador del condado en alguna otra propiedad en el Estado de California. USTED O SU ESPOSO(A) DEBEN VENIR A LA AUDIENCIA PARA DEMOSTRAR ESTOS PUNTOS.

2. Si usted o su esposo(a) quieren disputar la venta forzosa de esta propiedad, usted o su esposo(a) deberán presentarse a

_____ el _____

(location set forth in O.S.C.) (date and time)

y estar preparados para contestar las preguntas acerca de las declaraciones puestas en la solicitud adjunta. EL ÚNICO PROPÓSITO DE ESTA AUDIENCIA SERÁ EL DE DETERMINAR SI LA PROPIEDAD PUEDE SER VENDIDA, Y NO SI USTED DEBE DINERO.

3. PARA SU PROPIA PROTECCIÓN, USTED DEBERÍA PRONTAMENTE DE BUSCAR EL CONSEJO DE UN ABOGADO EN ESTE ASUNTO. Si usted es un inquilino y no reclama ser el dueño o el comprador de esta propiedad, este aviso no le afecta a usted. Por favor déselo a su arrendador."

(p) The notice specified in subdivision (g) shall be provided in Spanish as follows:

"IMPORTANTE AVISO LEGAL AL PROPIETARIO DE CASA Y RESIDENTE

1. Recientemente se le entregó una orden de la corte pidiendo su presencia para una audiencia para determinar el porque la corte no debería de extenderle una orden de ejecución para la venta forzosa de su casa. USTED Y SU ESPOSA NO VINIERON A LA AUDIENCIA Y LA CORTE HA ORDENADO QUE SU CASA SEA VENDIDA PARA SATISFACER EL JUICIO EN CONTRA DE USTEDES.

2. Su ausencia a la audiencia ha contribuido para la emisión de la orden de ejecución. Si la ausencia de ustedes o de su abogado en la audiencia es excusable legalmente y creen de buena fe que su casa puede tener derecho a estar exonerada de ejecución, debería de completar el formato que está debajo y fecharlo, firmarlo, y devolverlo no a más tardar del _____. (Insert date no later than five days prior to sale.)

3. PARA SU PROPIA PROTECCIÓN, USTED DEBERÍA INMEDIATAMENTE BUSCAR EL CONSEJO DE UN ABOGADO. Si usted es un inquilino y no reclama ser el dueño o el comprador de esta propiedad, este aviso no le afecta a usted. Por favor déselo a su arrendador.

..... (Corte y Devuelva Este Formato a) .....

_____

(Name and title of levying officer)

_____

(Street address and city)

_____

(Area code and telephone number of levying officer)

Declaro que mi ausencia en la pasada audiencia sobre si esta propiedad debería de ser vendida o no fue legalmente excusable. Yo, o mi esposo(a), actualmente residimos en esta propiedad y deseo una audiencia adicional para hacer valer mis derechos de exención bajo el Código de Procedimiento Civil Sección 690.31 y disputar la venta de mi casa. Entiendo que el oficial de la corte me notificará de la fecha y del lugar de esta audiencia si devuelvo este formato inmediatamente y que debo asistir a esta audiencia.

Declaro bajo pena de perjurio que lo anterior es verdadero y está correcto.

Firmado el_____ en _____ , California
(fecha) (ciudad o condado)

_____ "

(Firma del Deudor(a) o de la Esposa(o) del Deudor(a))

Timely completion and return of the return portion of the Spanish translation of this form shall have the same force and effect as timely completion and return of the English language form.

Exhibit 4

Mobilehome and Vessel Used as a Dwelling Exemption
Code of Civil Procedure § 690.3

Section 690.3. (a) One housetrailer, mobilehome, houseboat, boat, or other waterborne vessel in which the debtor, or the family of such debtor, actually resides, of a value not exceeding the following values:

(1) For any head of a family, of a value not exceeding forty thousand dollars ($40,000) in actual cash value, over and above all liens and encumbrances on that housetrailer, mobilehome, houseboat, boat, or other waterborne vessel;

(2) For any person 65 years of age or older of a value not exceeding forty thousand dollars ($40,000) in actual cash value, over and above all liens and encumbrances on that housetrailer, mobilehome, houseboat, boat, or other waterborne vessel; and

(3) For any other person, of a value not exceeding twenty-five thousand dollars ($25,000) in actual cash value, over and above all liens and encumbrances on that housetrailer, mobilehome, houseboat, boat, or other waterborne vessel.

(b) The exemption provided by this section shall not apply if such debtor or the spouse of such debtor has an existing homestead as provided by Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code or has obtained a prior judicial determination that the dwelling house of the debtor or the family of the debtor is exempt from execution under Section 690.31.

Exhibit 5

Probate Homestead
Probate Code §§ 660-668

§ 660. Possession pending inventory; discretion to set apart; mandatory setting apart of homestead selected by spouses

The decedent's surviving spouse and minor children are entitled to remain in possession of the homestead, the wearing apparel of the family, the household furniture and other property of the decedent exempt from execution, until the inventory is filed. Thereupon, or at any subsequent time during the administration, the court, on petition therefor, may in its discretion set apart to the surviving spouse, or, in case of his or her death, to the minor child or children of the decedent, all or any part of the property of the decedent exempt from execution, and must set apart the homestead selected by the spouses, or either of them, and recorded while both were living, other than a married person's separate homestead, in the manner provided in this article. (As amended Stats.1959, c. 1805, p. 4292, § 6.)

§ 661. Selection and designation of homestead; property from which selected; duration; subjugation to administration

If no homestead has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children, or, if there be no surviving spouse, then for the use of the minor child or children, out of the community property or quasi-community property or out of real property owned in common by the decedent and the person or persons entitled to have the homestead set apart, or if there be no community property or quasi-community property and no such property owned in common, then out of the separate property of the decedent. If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority; and, subject to such homestead right, the property remains subject to administration.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code. (As amended Stats.1957, c. 490, p. 1522, § 5; Stats.1961, c. 636, p. 1842, § 14.)

§ 662. Setting for and notice of hearing

When such petition is filed, the clerk must set it for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. (Stats.1931, c. 281, p. 626, § 662.)

§ 663. Vesting of homestead; exemption from liability for debts of spouses

If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, other than a married person's separate homestead, was selected from the community property or quasi-community property, or from the separate property of the person selecting or joining in the selection of the same, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on the death of either spouse, absolutely in the survivor.

If the homestead was selected from the separate property of the decedent without his consent, or if the surviving spouse has conveyed the homestead to the other spouse by a conveyance which failed to expressly reserve homestead rights as provided by Section 1242 of the Civil Code, the homestead vests, on death, in his heirs or devisees, subject to the power of the court to set it apart for a limited period to the family of the decedent as hereinabove provided. In either case the homestead is not subject to the payment of any debt or liability existing against the spouses or either of them, at the time of the death of either, except as provided in the Civil Code.

For the purposes of this section, the terms "quasi-community property" and "separate property" have the meanings given those terms in Section 1237.5 of the Civil Code. (As amended Stats.1950, c. 1805, p. 4292, § 7; Stats.1961, c. 636, p. 1843, § 15.)

§ 664. Setting apart homestead within exemption limits; appraisement; division of property where homestead exceeds exemption

If the homestead so selected and recorded, as provided in Section 663, is returned in the inventory appraised at not over the amount of the homestead exemption, as provided in the Civil Code and in effect at the date of death of the decedent, or was previously appraised as provided in the Civil Code and such appraised value did not exceed that amount, the court shall order it set apart to the persons in whom title is vested by the preceding section. If it is returned in the inventory appraised at more than that amount, the * * * inheritance tax referee must, before * * * he makes his return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeds that amount, or if the homestead was appraised as provided in the Civil Code and such appraised value exceeded that amount, * * * he must determine whether the premises can be divided without material injury, and if * * * he finds that they can be thus divided, * * * he must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling house, as will equal in value that amount, and make report thereof, giving an exact description of the portion set apart as a homestead.
(Amended by Stats.1970, c. 1282, p. 2329, § 16, operative July 1, 1971.)

§ 665. Homestead exceeding exemption; report of indivisibility; order for sale and distribution of proceeds

If the * * * inheritance tax referee finds that the value of the premises at the time of their selection exceeded the amount referred to in Section 664, and that they cannot be divided without material injury, * * * he must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto.
(Amended by Stats.1970, c. 1282, p. 2329, § 17, operative July 1, 1971.)

§ 666. Report of referee; hearing; confirmation; procedure on rejection of report

* * * When the report of the * * * inheritance tax referee is filed, the clerk shall set the same for hearing by the court and give notice thereof for the period and in the manner required by Section 1200 of this code. If the court is satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint * * * a new referee to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of * * * his report, as upon the first report.
(Amended by Stats.1970, c. 1282, p. 2329, § 18, operative July 1, 1971.)

§ 667. Nonhomestead property set apart to use of family

When property, other than a homestead selected and recorded during the lifetime of the decedent, is set apart to the use of the family, in accordance with the provisions of this article, such property, if the decedent left a surviving spouse and no minor child, is the property of such spouse; if the decedent left also a minor child or children, one-half of such property belongs to the surviving spouse and the remainder to the child or in equal shares to the children; if there is no surviving spouse, the whole belongs to the minor child or children. (Stats.1931, c. 281, p. 627, § 667.)

§ 668. Rights of successor to holder of homestead right

A person succeeding by purchase or otherwise to the interest of a surviving spouse in a homestead which has been declared in the lifetime of the decedent, shall have the same right to apply for an order setting aside the homestead to him as is conferred by law on the person whose interest he has acquired. (Stats.1931, c. 281, p. 628, § 668.)

Exhibit 6

Judgment Lien Statutes
Code of Civil Procedure §§ 674, 674.5, 674.7

§ 674. Abstract of judgment; recording; lien judgment; scope, duration

674. (a) An abstract of the judgment or decree of any court of this state, including a judgment entered pursuant to Chapter 1 (commencing with Section 1710.10) of Title 11 of Part 3, or a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal or pursuant to Section 1710.50, certified by the clerk, judge or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward and before the lien expires, acquire. Such lien continues for 10 years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal or pursuant to Section 1710.50 by the execution of a sufficient undertaking or the deposit in court of the requisite amount of money as provided in this code, or by the statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action, unless otherwise by statutes of the United States provided, ceases, or upon an undertaking on release of attachment, or unless the judgment or decree is previously satisfied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: title of the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree, and where entered in judgment book or minutes. It shall also contain the social security number or driver's license number or both of the judgment debtor if they are known to the judgment creditor. If such numbers are not known to the judgment creditor, that fact shall be indicated on the abstract of judgment.

(b) An order made pursuant to subdivision (b) of Section 908 of the Welfare and Institutions Code shall be considered a judgment for the purposes of subdivision (a) of this section.

(c) With respect to real property containing a dwelling house judicially determined to be exempt from levy of execution pursuant to the provisions of Section 690.31, as distinguished from property subject to a declared homestead created pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code, a judgment lien created pursuant to subdivision (a) of this section shall attach to such real property notwithstanding the exemption provided by Section 690.31.

§ 674.5 Lien of judgment or order for spousal or child support; duration; effect

A certified copy of any judgment or order of the superior court of this state for * * * spousal or child support, when recorded with the recorder of any county, shall from such recording become a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire, for the respective amounts and installments as they mature (but shall not become a lien for any sum or sums prior to the date they severally become due and payable) which lien shall have, to the extent herein provided and for the period of 10 years from such recording, the same force, effect and priority as the lien created by recordation of an abstract of a money judgment pursuant to Section 674.

The certificate of the judgment debtor, or in the event of legal disability, the affidavit of the personal representative of the judgment debtor, certified by him under penalty of perjury, that all amounts and installments which have matured under said judgment prior to the date of such certificate have been fully paid and satisfied shall, when acknowledged and recorded, be prima facie evidence of such payment and satisfaction and conclusive in favor of any person dealing in good faith and for a valuable consideration with the judgment debtor or his successors in interest; however, if any amount of child support provided in a support order has been directed to be made to an officer designated by the court pursuant to Section 4702 of the Civil Code or any other provision of law and such directive is set forth in the copy of the recorded judgment or order, or in a recorded certified copy of an amended or supplemental order, such certificate shall not affect the lien unless also approved in writing by such designated officer.

Whenever a certified copy of any judgment or order of the superior court for * * * spousal or child support has been recorded with the recorder of any county, the expiration or satisfaction thereof made in the manner of an acknowledgment of a conveyance of real property may be recorded.

(Added by Stats.1959, c. 2087, p. 4819, § 1. Amended by Stats.1976, c. 612, p. —, § 1.)

§ 674.7 Lien of periodic payment judgment; duration; effect

A certified copy of any judgment or order of the superior court of this state issued pursuant to Section 667.7, when recorded with the recorder of any county, shall from such recording become a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire, for the respective amounts and installments as they mature (but shall not become a lien for any sum or sums prior to the date they severally become due and payable) which liens shall have, to the extent herein provided and for the period of 10 years from such recording, the same force, effect and priority as the lien created by recordation of an abstract of a money judgment pursuant to Section 674.

The certificate of the judgment debtor, or in the event of legal disability, the affidavit of the personal representative of the judgment debtor, certified by him under penalty of perjury, that all amounts and installments which have matured under said judgment prior to the date of such certificate have been fully paid and satisfied shall, when acknowledged and recorded, be prima facie evidence of such payment and satisfaction and conclusive in favor of any person dealing in good faith and for a valuable consideration with the judgment debtor or his successors in interest.

Whenever a certified copy of any judgment or order of the superior court issued pursuant to Section 667.7 has been recorded with the recorder of any county, the expiration or satisfaction thereof made in the manner of an acknowledgment of a conveyance of real property may be recorded.

(Added by Stats.1975, 2nd Ex.Sess., c. 1, p. 3972, § 26.4. Amended by Stats.1976, c. 612, p. ——, § 1.5.)

Exhibit 7

RICK SCHWARTZ
ATTORNEY AT LAW
555 SOUTH FLOWER STREET, SUITE 900
LOS ANGELES, CALIFORNIA 90071
(213) 683-2522

January 25, 1978

Professor John H. DeMoully
California Law Revision Commission
Stanford University
Stanford, California 94305

Re: Homesteads and Community Property
Memorandum 78-5

Dear Professor DeMoully:

Unfortunately it is unlikely that I will be able to attend the hearings set for February 2-3.

I am quite interested in the status of homesteads in California, and in particular the interplay between community property, separate property, judgment liens and creditors rights.

I have not received a copy of Memorandum 78-5 or of any draft statutes in connection with homesteads and community property. However, in the community property area I feel that one of the greatest inequities existing under current law is the artificial distinction made between real property owned by a husband and wife which is held as "community property" and property which is held as "joint tenants". The inequities are adequately demonstrated in the case of Schoenfeld v. Norberg, 11 C.A. 3d, 755 (1970). In Schoenfeld, it was determined that if real property is held by husband and wife as joint tenants then, in determining whether or not a creditor can reach one of the joint tenant's interest, the value of the property must be divided by the number of joint tenants and the entire amount of all encumbrances must be deducted from that one-half of the property and the entire head of household homestead exemption

is also deducted from that one-half of the property. The Schoenfeld principal is still alive and well. I enclose herewith a memorandum opinion recently entered by Bankruptcy Judge Lloyd King in the matter Alper L. Goldberg, Bankruptcy No. 3-76-1098 which opinion was filed on November 18, 1977.

In this case the parties stipulated that the home in question was worth $100,000, that the liens against the property totaled $44,000 and that the appropriate homestead exemption was $20,000. The Bankruptcy Court followed the Schoenfeld case and refused to allow the husband's trustee to reach any part of the $56,000 equity in the home.

I find the result particularly inequitable because under Civil Code Section 5116 the property of the community is liable for the contracts of either spouse which are made after marriage. In my opinion there should be a rebuttable presumption that when a husband and wife acquire a dwelling house in California during marriage that the dwelling house is community property regardless of the manner in which they take title.

Unfortunately Civil Code Section 5110 seems to preserve the inequitable result in the Schoenfeld case when it says in pertinent part "when a single-family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single family residence is the community property of said husband and wife." (Emphasis added). This is particularly true since the immediate prior sentence in Section 5110 states "except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife." Thus it appears that if the instrument provides that the single-family residence acquired by the husband and wife is acquired by them as "joint tenants"

amount of the current homestead exemptions because of the Schoenfeld case. An amendment to Civil Code Section 5110 would remedy this problem.

I do not believe that the Legislature of California intended that a husband and wife could protect in essence $60,000 in equity merely by taking title in the real property as joint tenants instead of as community property.

I feel strongly that the entire area of homesteads should be rewritten and revised by the California Law Revision Commission with the following ultimate goals:

1. The homestead exemption should be automatic, float in amount and cover any principal residence of a debtor in the State of California;

2. The present bias forcing creditors to execute on property that is either occupied as a dwelling house or is homesteaded should be eliminated by allowing the judgment lien to attach to the surplus over the homestead amount; and

3. There should be provisions preventing execution and "forced sale" of a person's residence for at least 10 years after judgment is obtained (assuming the judgment lien is extended to 20 years).

The goal expressed in 2 hereinabove would overrule the Boggs v. Dunn decision (recently reaffirmed in Swearingen v. Byrne, 67 Cal. App. 3d 513 (1977).) The Boggs rule is a minority view and not effective in the majority of states. If the judgment lien was extended to 20 years and allowed to attach to the surplus over the homestead amount then creditors would not be forced to execute on a residence either under Civil Code Section 1245 et. seq. or under C.C.P. Section 690.31 in order to obtain priority and a lien. This would comport with the California Constitutional requirement that the legislature adopt procedures to prevent the "forced sale"

of the family homestead. The attachment of the judgment lien to the surplus could be combined with a prohibition against execution against a person's residence for a period of ten or more years after entry of judgment. In this manner the priority of the judgment creditor would be preserved and the debtor would be allowed to continue to reside in his property for at least ten years after entry of judgment.

In addition, the cumbersome and almost totally unworkable procedures set forth in 690.31 could be eliminated. C.C.P. 690.31 is defective because the creditor has no way to insure his priority position. While he is trying to have a writ issued the debtor could sell or encumber the property. Civil Code Section 1245 at least allows the creditor to insure his priority by executing first. Since execution creates the lien, the creditor's rights are preserved.

I would be very interested in receiving any and all studies that the California Law Revision Commission has with respect to homesteads, the judgment lien and execution on a dwelling house and/or homesteaded property.

Very truly yours,

Rick Schwartz

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