October 12, 1973

Time	Place
October 18 - 7:00 p.m. - 10:00 p.m. October 19 - 9:00 a.m. - 4:30 p.m.	San Francisco Hilton Inn Vintage Room 7 San Francisco Airport

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco — October 18 and 19, 1973

1. Minutes of September 20-22, 1973, Meeting (sent 10/10/73)

2. Administrative Matters

   Statement for Annual Report Concerning Use of Comments

   Memorandum 73-82 (sent 9/28/73)

   Election of Chairman and Vice Chairman

   Memorandum 73-88 (sent 10/2/73)

3. Study 39.70 - Prejudgment Attachment

   Memorandum 73-83 (sent 9/28/73)
   Printed Recommendation (attached to Memorandum)
   First Supplement to Memorandum 73-83 (sent 10/10/73)

4. Study 39.100 - Enforcement of Sister State Judgments

   Memorandum 73-84 (sent 10/2/73)
   Revised Recommendation (attached to Memorandum)

5. Study 36 - Condemnation

   Approval for Printing--Review of Comments of State Bar Committee

   Chapters 9 and 10 of Comprehensive Statute

   Memorandum 73-86 (sent 10/2/73)
   Revised Chapters 9 and 10 (attached to Memorandum)
   First Supplement to Memorandum 73-86 (sent 10/10/73)
   Second Supplement to Memorandum 73-86 (sent 10/10/73)

Chapters 5, 8, and 11 of Comprehensive Statute

Memorandum 73-89 (sent 10/11/73)
Revised Chapters 5, 8, and 11 (attached to Memorandum)

Approval for Printing

State Condemnation Authorizations

Memorandum 73-79 (sent 9/26/73)
Draft of Tentative Recommendation (attached to Memorandum)

Comprehensive Statute--Amendments, Additions, Repeals

Memorandum 73-87 (enclosed)
Draft of Amendments, Additions, Repeals (attached to Memorandum)

Conforming Changes in Improvement Acts

Memorandum 73-81 (sent 9/28/73)
Draft of Recommendation (attached to Memorandum)

Conforming Changes in Constitution

Memorandum 73-80 (sent 9/26/73)
Draft of Constitutional Revisions (attached to Memorandum)

Suggested Revision in Chapter 7 (Discovery)

Memorandum 73-91 (sent 10/2/73)

6. Study 63 - Evidence Code (Section 999)

Memorandum 73-90 (sent 10/2/73)
Revised Recommendation (attached to Memorandum)

7. Study 72 - Liquidated Damages

Memorandum 73-78 (sent 10/10/73)
Tentative Recommendation (attached to Memorandum)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

OCTOBER 18 AND 19, 1973

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on October 18 and 19, 1973.

Present: John D. Miller, Chairman
Marc W. Sandstrom, Vice Chairman
Noble K. Gregory
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Robert S. Stevens, Member of Senate
Alister McAlister, Member of Assembly
John J. Balluff
John N. McLaurin
George H. Murphy, ex officio

Messrs. John H. DeMoully, Jack I. Horton, Nathaniel Sterling, and Stan G. Ulrich, members of the Commission's staff, also were present. Professor Stefan A. Riesenfeld, commission consultant on creditors' remedies, was present on Thursday, October 18. Mr. Thomas M. Dankert, commission consultant on condemnation law and procedure, was present on Friday, October 19.

The following persons were present as observers on days indicated:

Thursday, October 18

William J. Kumli, Credit Managers Association of California, San Francisco
Bernard J. Mikell, Jr., California Savings and Loan Ass'n, Pasadena
Anthony J. Ruffolo, Dept. of Transportation, Los Angeles
Vernon D. Stokes, Credit Managers Association of California, San Francisco

Friday, October 19

Jesse M. Bethel, Dept. of Water Resources, Sacramento
Max R. Kahn, Law Offices of Jefferson E. Peyser, San Francisco
Anthony J. Ruffolo, Dept. of Transportation, Los Angeles
James H. Wernecke, Attorney General's Office, Sacramento

ADMINISTRATIVE MATTERS

Approval of Minutes. The Minutes for the September 20-22, 1973, Meeting, were approved as submitted.

Annual Report. The Commission considered Memorandum 73-82 and the attached statement for the Annual Report concerning the use of Commission Comments in construing statutes. The following statement was approved for inclusion in the Annual Report.

> The Commission ordinarily prepares a Comment explaining each section it recommends. These Comments are included in the Commission's report and are frequently revised by legislative committee reports[1] to reflect amendments[2] made after the recommended legislation has been introduced in the Legislature. The Comment often indicates the derivation of the section and explains its purpose, its relation to other sections, and potential problems in its meaning or application. The Comments are written as if the legislation were enacted since their primary purpose is to explain the statute to those who will have occasion to use it after it is in effect.[3] While the Commission endeavors in the Comment to explain any changes in the law made by the section, the

---

1. Special reports are adopted by legislative committees that consider bills recommended by the Commission. These reports, which are printed in the legislative journal, state that the Comments to the various sections of the bill contained in the Commission's recommendation reflect the intent of the committee in approving the bill except to the extent that new or revised Comments are set out in the committee report itself. For a description of the legislative committee reports adopted in connection with the bill that became the Evidence Code, see Arellano v. Moreno, 33 Cal. App.3d 877, 884, ___ Cal. Rptr. ___, ___ (1973). For examples of such reports, see 10 Cal. L. Revision Comm'n Reports 1132-1146 (1971).

2. Many of the amendments made after the recommended legislation has been introduced are made upon recommendation of the Commission to deal with matters brought to the Commission's attention after its recommendation was printed. In some cases, however, an amendment may be made that the Commission believes is not desirable and does not recommend.

3. The Comments are published by both the Bancroft-Whitney and the West Publishing Company in their editions of the annotated codes. They are entitled to substantial weight in construing the statutory provisions. E.g., Van Arsdale v. Hollinger, 68 Cal.2d 245, 249-250, 437 P.2d 508, 511, 66 Cal. Rptr. 20, 23 (1968).

Commission does not claim that every inconsistent case is noted in the Comment, nor can it anticipate judicial conclusions as to the significance of existing case authorities.[4] Hence, failure to note a change in prior law or to refer to an inconsistent judicial decision is not intended to, and should not, influence the construction of a clearly stated statutory provision.[5]

Election of officers. The Commission elected Marc Sandstrom as Chairman and John N. McLaurin as Vice Chairman. The term of the new officers is two years, commencing on December 31, 1973.

Printing of recommendations. Various tentative recommendations were approved for printing. It was recognized that additional sections of existing law may be discovered that will require amendment to conform to the recommendations relating to eminent domain. The staff was authorized to include these additional conforming revisions in the tentative recommendations and recommendations approved for printing. If the staff discovers any existing provisions that present important policy issues that the staff believes should be presented for Commission consideration, the staff should bring these issues to the attention of the Commission before the report is printed if possible.

---

4. See, e.g., Arellano v. Moreno, 33 Cal. App.3d 877, ___ Cal. Rptr. ___ (1973).

5. The Commission does not concur in the Kaplan approach to statutory construction. See Kaplan v. Superior Court, 6 Cal.3d 150, 158-159, 491 P.2d 1, 5-6, 98 Cal. Rptr. 649, 653-654 (1971). For a reaction to the problem created by the Kaplan approach, see Recommendation Relating to Erroneously Ordered Disclosure of Privileged Information, 11 Cal. L. Revision Comm'n Reports 0000 (1973).

Consultant on nonprofit corporations study. The Commission discussed a staff recommendation that a consultant be appointed who is an expert in the field of nonprofit corporation law. The consultant primarily would be a consultant to the staff which is now engaged in collecting and organizing material on the subject, including but not limited to statutes of other states. The consultant would give guidance to the staff on the general approach to be taken and on various specific matters in connection with the study. It is not anticipated that there would be any need for the consultant to prepare written reports under the contract under discussion. It is expected, however, that areas of the law where additional research will be needed will be identified and that perhaps a consultant will be needed to prepare background reports on those areas of the law.

A motion was unanimously adopted that the Executive Secretary be directed to execute a contract on behalf of the Commission with G. Gervaise Davis. III, Post Office Box LAW, Monterey, California 93940, to provide expert advise to the Commission and the staff on the subject of nonprofit corporation law. The amount of compensation is to be $500 ($200 to be paid on March 1, 1974, $200 to be paid on June 30, 1974, and $100 to be paid on December 31, 1974) and the travel expenses are to be limited to $100. The term of the contract is to end on July 1, 1975. The contract is to be in the usual form for contracts with research consultants.

STUDY 36.300 - CONDEMNATION (COMPREHENSIVE STATUTE GENERALLY)

The Commission, having completed its review of the comments of the State Bar Committee on Governmental Liability and Condemnation with respect to the Eminent Domain Law as approved for printing, directed the Executive Secretary to send the Bar Committee a letter expressing the Commission's appreciation for its contribution in the development of the tentative recommendation.

STUDY 36.310 - CONDEMNATION (COMPREHENSIVE STATUTE:

CHAPTER 1--GENERAL PROVISIONS)

The Commission considered Exhibit I to Memorandum 73-86 proposing language explaining the relation between the Eminent Domain Law and inverse condemnation actions. The Commission approved inclusion of the following paragraph in the Comment to Section 1230.020 (law governing exercise of eminent domain power):

> The provisions of the Eminent Domain Law are intended to supply rules for eminent domain proceedings. Whether any of its provisions may also be applicable in inverse condemnation actions is a matter not determined by statute, but left to judicial development. Cf. Section 1263.010 and Comment thereto (right to compensation).

STUDY 36.350 - CONDEMNATION (COMPREHENSIVE STATUTE:

CHAPTER 5--COMMENCEMENT OF PROCEEDING)

The Commission considered Memorandum 73-89 and the attached draft of the chapter relating to commencement of proceedings previously approved for printing. The Commission made the following changes in the previously approved chapter:

§ 1250.310. Contents of complaint. Subdivision (d) was revised to read:

> (d) A map or plat delineating the boundaries of the property described in the complaint and showing its relation to the project for which it is sought to be taken.

§ 1250.380. Amendment of pleadings. This section was revised to eliminate several technical problems in the manner proposed in the draft statute.

STUDY 36.370 - CONDEMNATION (COMPREHENSIVE STATUTE:

CHAPTER 7--DISCOVERY)

The Commission considered Memorandum 73-91 relating to the date by which a demand for exchange must be served. The Commission revised subdivision (a) of Section 1258.210 to read:

> 1258.210. (a) Not later than the tenth day after the trial date is selected, any party may file and serve on any other party a demand to exchange lists of expert witnesses and statements of valuation data. Thereafter, the court may, upon noticed motion and a showing of good cause, permit a party to serve such a demand upon any other party.

STUDY 36.380 - CONDEMNATION (COMPREHENSIVE STATUTE: CHAPTER 8--PROCEDURES FOR DETERMINING RIGHT TO TAKE AND COMPENSATION)

The Commission considered Memorandum 73-89, Exhibit II to Memorandum 73-86, and the attached draft of the chapter relating to procedures for determining the right to take and compensation previously approved for printing. The Commission made the following changes in the previously approved chapter:

§ 1260.220. Procedure where there are divided interests. The following sentence was added at the end of subdivision (b):

> Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, his interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding of the value of, or injury to, his interest in the property is not affected whether or not he avails himself of the right to present evidence during the first stage of the proceeding.

§ 1260.250. Separate assessment of elements of compensation. This section to require separate assessment of elements of compensation was added to the comprehensive statute as set out in Exhibit II to Memorandum 73-86. The Comment was changed to refer to special interrogatories on the issues listed in the section or on any other issues.

STUDY 36.390 - CONDEMNATION (COMPREHENSIVE STATUTE:

CHAPTER 9--COMPENSATION)

The Commission considered Memorandum 73-86, the Second Supplement to Memorandum 73-86, and the attached draft of the chapter relating to compensation in eminent domain proceedings. The Commission approved this chapter for printing after making the following determinations:

§ 1263.230. Improvements removed or destroyed. The portion of this section relating to the shifting of the risk of loss from the property owner to the condemnor at the time the property owner moves from the property in compliance with an order for possession should be revised to permit such shifting prior to the time specified in the order upon 24-hour notice to the condemnor and vacation of the property by the owner.

A provision should also be added to this section that, where property is damaged by the defendant at any time, such damage shall be considered in valuing the property.

The Comment was revised to eliminate the sentence reading, "The removal or destruction of improvements at the times indicated in Section 1263.230 has the effect of requiring valuation of the realty to which they pertained in its unimproved state."

§ 1263.260. Removal of improvements pertaining to realty. The second sentence of this section requiring plaintiff's notice whether improvements sought to be removed are required for public use was revised to require simply notice of refusal to allow removal of improvements. The Comment should refer to improvements pertaining to the realty rather than merely to the "realty."

§ 1263.280. Improvements whose removal will damage structure. The introductory portion of this section relating to cases where the removal of improvements will damage the structure was revised to refer to cases where the removal "may" damage the structure.

§ 1263.330. Changes in property value due to imminence of project. The Comment to this section stating the rule that value of property enhanced by knowledge of a public project may not be included in the compensation should be revised to delete the reference to the project "as proposed" and should refer to some case other than Merced Irr. Dist. v. Woolstenhulme. for a statement of this principle.

§ 1263.410. Compensation for injury to remainder. The first sentence of the Comment to this section should be revised to read, "Section 1263.410 provides the measure of compensation for injury to the remainder in a partial taking."

§ 1263.620. Partially completed improvements; performance of work to protect public from injury. The relationship between this section and Section 1263.240 (improvements made after service of summons) should be made clear.

STUDY 36.400 - CONDEMNATION (COMPREHENSIVE STATUTE:

CHAPTER 10--DIVIDED INTERESTS)

The Commission considered Memorandum 73-86, the First Supplement to Memorandum 73-86, the attached draft of the chapter relating to divided interests in eminent domain proceedings, and a draft revision of Section 1265.410 distributed at the meeting and attached hereto as Exhibit 36.400(a). The Commission approved this chapter for printing after making the following determinations:

§ 1265.010. Scope of chapter. The sentence in the Comment, stating that compensation for particular interests under the California Constitution is unaffected absent a provision in the divided interest chapter to the contrary, should be changed to state that such compensation is unaffected absent a provision in the divided interest chapter "giving greater rights."

§ 1265.110. Termination of lease in whole taking. The Comment to this section should contain a cross-reference to Section 1265.160 (rights under lease not affected).

§ 1265.160. Rights under lease not affected. The Comment to this section should be revised to make clear that "valid" provisions in a lease control over the provisions of Article 2.

§ 1265.200. "Lien" defined. This section was revised to read:

> 1265.200. As used in this article, "lien" means a mortgage, deed of trust, or other security interest in property whether arising from contract, statute, common law, or equity.

§ 1265.220. Allocation of award among encumbrancers in partial taking. This section was revised in the manner proposed in Exhibit I, with the deletion of the words "amount of the" from subdivision (c) and the deletion of subdivision (d) in its entirety. The Comment should be corrected to make clear that this section may alter the contractual rights of a senior lienholder.

§ 1265.230. Prepayment penalty. The following paragraph was added to the Comment to this section:

> Section 1265.230 is intended to apply to penalties for prepayment of liens of all kinds (see Section 1265.200 defining "lien") including but not limited to prepayment penalties under mortgages and deeds of trust and redemption premiums under Streets and Highways Code Sections 6447 and 6464.

§ 1265.410. Contingent future interests. This section was revised in the manner proposed in the draft distributed at the meeting, subject to language revision following consultation between Commissioner Williams and the staff.

EXHIBIT 36.400(a)
(following p.____)

§ 1265.410. Contingent future interests

1265.410. (a) Where property acquired for public use is subject to a use restriction enforced by a contingent future interest and the use restriction is violated by such acquisition:

(1) If violation of the use restriction was otherwise reasonably imminent, the owner of the contingent future interest is entitled to compensation for its value, if any.

(2) If violation of the use restriction was not otherwise reasonably imminent but the benefit of the use restriction was appurtenant to other property, the owner of the contingent future interest is entitled to compensation to the extent that the failure to comply with the use restriction damages the dominant premises to which the restriction was appurtenant.

(b) Where property acquired for public use is subject to a use restriction enforced by a contingent future interest and the use restriction is violated by such acquisition but is not compensable under subdivision (a), if the use restriction is that the property be devoted to a particular charitable or public use, the compensation for the property shall be devoted to the same or similar use subject to the same contingent future interest.

STUDY 36.410 - CONDEMNATION (COMPREHENSIVE STATUTE:

CHAPTER 11--POSTJUDGMENT PROCEDURE)

The Commission considered Memorandum 73-89 and the attached draft of the chapter relating to postjudgment procedure previously approved for printing. The Commission made the following changes in the previously approved chapter:

§ 1268.140. Withdrawal of deposit. Subdivision (a)(2) was revised to read:

> (2) A receipt for the money which shall constitute a waiver by operation of law of all claims and defenses except a claim for greater compensation.

§ 1268.160. Repayment of excess withdrawal. This section was revised in the manner proposed in Exhibit I to conform with the comparable provisions relating to prejudgment deposits.

§ 1268.170. Making deposit does not affect right to appeal. This section was revised to read:

> 1268.170. By making any deposit pursuant to this article, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial.

The Comment to this section might note that the making of a deposit may in some circumstances be indicative that there is little likelihood of abandonment.

§ 1268.230. Taking possession does not waive right to appeal. This section was revised to read:

> 1268.230. The plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial by taking possession pursuant to this article.

§ 1268.310. Date interest commences to accrue. The explanation in the Comment of the reason for deletion of the phrase "or damage to the property accrues" was revised to read:

> The deleted phrase was inadvertently included in the 1961 revision of Section 1255b and was not intended to and has not been construed to require computation of interest on severance damages from a date prior to the earliest date stated in Section 1268.310.

§ 1268.610. Litigation expenses. This section was revised to make clear that, although there is a dismissal of one or more plaintiffs pursuant to Section 1260.202 (determination of more necessary public use where separate proceedings are consolidated), the defendant is not entitled to recover litigation expenses that would not otherwise have been incurred.

STUDY 36.500 - CONDEMNATION (COMPREHENSIVE STATUTE: AMENDMENTS, ADDITIONS, AND REPEALS--CONSTITUTIONAL PROVISIONS)

The Commission considered Memorandum 73-80 relating to conforming changes in Sections 14 and 14-1/2 of Article I of the California Constitution. The Commission approved the amendment of Section 14 and the repeal of Section 14-1/2 as set out in Exhibits II and IV for inclusion in the printed Eminent Domain Law tentative recommendation.

STUDY 36.500 - CONDEMNATION (COMPREHENSIVE STATUTE--AMENDMENTS, ADDITIONS, AND REPEALS)

The Commission considered Memorandum 73-87 and the attached draft of amendments, additions, and repeals that are to be included in the pamphlet containing the comprehensive eminent domain law.

The Commission considered the letter from Mr. Kanner concerning whether the defendant in an eminent domain proceeding should be required to assert in a cross-complaint a cause of action for damages arising from prelitigation activities. After some discussion, it was decided to require that such cause of action be asserted in a cross-complaint (as provided in the provisions set out on pages 6-9 of the draft attached to the memorandum).

The Comment to amended Code of Civil Procedure Section 640 was revised to add the following sentence at the end of the Comment: "The last sentence has been deleted as unnecessary." The Comment is to be further revised to indicate that the special condemnation provision is unnecessary and the existence of such special provisions tend to unnecessarily complicate the law.

With the above revisions, and such additional revisions the staff finds necessary to correct technical deficiencies, the draft of amendments, additions, and repeals was approved for printing. The staff is authorized to add any additional amendments and repeals that are found to be necessary when the staff reviews the various codes to determine provisions that require amendment or repeal to conform to the proposed comprehensive statute.

STUDY 36.510 - CONDEMNATION (STATE CONDEMNATION AUTHORITY)

The Commission considered Memorandum 73-79 and the attached draft of a tentative recommendation relating to condemnation authority of state agencies.

The draft of the tentative recommendation was approved for printing. The staff is to consider revising the preliminary portion of the tentative recommendation to present the material in a clearer manner. The staff was authorized to include in the tentative recommendation any additional conforming amendments or repeals that are discovered before the copy is sent to the printer. In connection with the proposed amendment of Section 21633 of the Public Utilities Code, the staff should check to determine that the authority to acquire property is continued in Public Utilities Code Section 21652 (contained in amendments, additions, and repeals in the comprehensive statute pamphlet). Other technical matters noted in copies turned in by Commissioners should be checked out.

STUDY 36.530 - CONDEMNATION (CONFORMING CHANGES--SPECIAL IMPROVEMENT ACTS)

The Commission considered Memorandum 73-81, the staff draft of a tentative recommendation attached thereto, and a letter from Mr. Eugene K. Sturgis, attached to these Minutes as Exhibit 36.530(a).

The Commission approved the technical revisions suggested by the staff as set out in Exhibit XII and the provisions set out as Exhibit X (attached to Memorandum 73-81).

The Commission discussed the suggestion that the 75-cent limit imposed by statute on the ad valorem assessments for parking districts by a non-charter city be eliminated and that instead the petition requesting the improvement state (as is now the case with chartered cities) the maximum rate of ad valorem taxes that may be imposed for the proposed acquisition and improvement. The Commission decided that it would not recommend such a change, but it was concluded that this was an appropriate revision for interested persons to suggest to the committee of the Legislature that considers the Commission's proposed legislation. The text of the amendment discussed was set out as Exhibit XI of Memorandum 73-81.

The Commission approved the draft as so revised for printing as a recommendation to the 1974 Legislature.

EXHIBIT 36.530(a)
(following p.___)

LAW OFFICES OF
STURGIS, DEN-DULK, DOUGLASS & ANDERSON
1322 WEBSTER STREET
OAKLAND, CALIFORNIA 94612
TELEPHONE 893-8150
AREA CODE 415

EUGENE K. STURGIS
JOHN D. DEN-DULK
WILLIAM D DOUGLASS
ROBERT T. ANDERSON
EDWIN N. NESS
ROBERT BRUNSELL

October 9, 1973

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, Ca. 94305

Re: Proposed Legislation Conforming the Improvement Acts to the Eminent Domain Law - Draft Issued 7/16/73

Dear Mr. DeMoully:

We have received from you the draft of the proposed legislation above described. You had requested comments to be sent to the Commission not later than September 10, 1973. It was impossible for us to do so due to the internal situation in the office. We hope that our brief comments are not too late for you to consider.

As you may or may not know, this firm is and has been for many years past engaged almost exclusively with special assessment bond issues. We also have drafted a good deal of legislation which has gone into these acts, all of which we hope is for their betterment.

The essence of what you are recommending is found in the following paragraph on page two of your transmittal letter:

> "The procedure under these statutes apparently was designed to permit a public entity to obtain a judgment as to the value of the property needed for the improvement and abandon the proceedings if the judgment is too high. In fact, some of the improvement acts contain a provision that--if given effect--would preclude the property owner from recovering litigation expenses and other amounts he is entitled to recover under Code of Civil Procedure Section 1255a upon abandonment of an eminent domain proceeding. These statutes also contain other provisions that will be inconsistent with the new eminent domain law. Some contain special valuation rules and condemnation provisions, provide for special valuation commissions, and permit delay in payment to the property owner until money is received from special assessments or bonds are issued to fund such assessments."

On page three you indicate that the delays in paying the condemnation award brought about by reference to the procedure outlined in the previous pages can be avoided,

> "by advancing funds to cover the cost of property acquisition out of other funds of the public entity, to be reimbursed when moneys are received from special assessments or bonds issued to fund the special assessments. Or special assessments can be made on the basis of the estimated cost of the property acquisition and supplemental assessments made if this amount proves to be inadequate."

It is quite true that both the Improvement Act of 1911 and the Municipal Improvement Act of 1913, both of which are the most widely used of all the improvement acts in California, must use the standard procedure of the Eminent Domain Law (if eminent domain proves to be necessary) under proceedings taken pursuant to either one of those acts. The reason the present provisions were written into the Street Opening Act of 1903 and the other acts mentioned in pages one, two and three of your letter of transmittal is because of the problem of assessment districts. These acts, as you mentioned, provide that payment for the property is not made until after the assessments have been levied and bonds sold. The reason for this is because of the problem of paying for such projects by the municipality in advance of money being raised through the assessment district procedure.

Let me illustrate.

First, if the Improvement Act of 1911 is used, there is no particular problem created. The reason is that no assessment is levied and no bonds are sold until all of the work contemplated to be done is accomplished and the acquisitions are completed. Ordinarily, in using the procedure of the Improvement Act of 1911 there is a long period of time between the time the contract for the work is ordered and the time that an assessment is levied or bonds sold - not infrequently as much as a year. Furthermore, that law now provides that at the time the contractor is awarded the contract for the work, he must advance to the legislative body the estimated amount necessary for acquisition of rights of way, if any are to be acquired. This provision is a recent amendment to the law. It was enacted because of the difficulty we have heretofore mentioned, to wit, legislative bodies have an accelerating scarcity of money, and it is increasingly difficult to get them to advance funds for any purpose except where contribution is part of the project. If enough has not been advanced

and the amount turns out to be greater than the amount advanced at the time of signing of the contract, there is no particular problem because the final amount can be included in the assessment and is firm and secure at the time bonds are sold. Prior to the enactment of those provisions, it was sometimes embarrassing to the municipality because if condemnation action was brought and judgment obtained, the city had to put up the money. With the paucity of funds available by cities for general purposes, there very frequently was no money available for these purposes and the lack of funds killed many districts. The experience of this firm from a practical point of view is that it sounds very simple and easy to say that the funds could be advanced by the city or a supplemental assessment made. Practically, however, we have the feeling that cities will oppose anything which puts a burden on them to advance money except in proceedings where they are making a contribution, and supplemental assessment proceedings are always a headache.

Second, if proceedings are taken under the Municipal Improvement Act of 1913, we have the reverse situation that exists under the Improvement Act of 1911. An estimated assessment is made up including the cost of acquisition of rights of way, a hearing is had and the assessment is confirmed before either (1) the work is done, or (2) the easements or rights of way are acquired. If in condemnation proceedings taken subsequent to this time the amount has been inadequate in the original estimate, it has been necessary to make a supplemental assessment for the deficiency or have the city put up the deficiency.

Assessment district proceedings are difficult at best. Our experience has indicated that when you have to go through a supplemental assessment proceeding it very frequently is embarrassing to the legislative body and creates adverse feeling toward assessment districts. Ordinarily it has to be done this way because the cities are not about to pay a deficiency in an assessment district proceeding where the property was supposed to pay the bill (except on rare occasions).

The practical answer to this, from the standpoint of our office, is that when proceedings under the Municipal Improvement Act of 1913 are used, we are very careful to pressure the entities involved to obtain options or contracts on all of the rights of way to be obtained prior to the time the estimated assessment is filed and levied. In cases where it is then found that eminent domain proceedings will undoubtedly be necessary, blown-up estimates are made and assessed as contingency. This means that

if the eminent domain proceedings do not result in the amount of money estimated, the property owners can get the benefit of it later by distribution of surplus. This is all right but it makes a difficult picture, for the legislative body always has to face the criticism of high costs in any event.

If it is the feeling that all of the acts should be on a uniform basis, those problems can be faced, because the Improvement Act of 1911 and the Municipal Improvement Act of 1913 are the two most workable acts under the law.

It is true that the Parking District Law of 1951 and the Vehicle Parking District Law of 1943 are not widely used, but sometimes one or the other is the act which gives the answers because both are the only acts which permit the pledge of parking-meter revenue toward the payment of bonds. The Parking District Law of 1951 would suffer particularly under the type of legislation proposed. This is because the bonds issued in this district are based upon revenues plus an ad valorem levy, if the ad valorem levy is necessary, and ordinarily there are considerable costs to provide the supporting documents to prove the revenues which will make such an issue sell. The possibility of sale of a supplemental issue in such a district might be questionable if there was a substantial deficiency in the original figures.

Most of the amendments which you have made to the various acts to coordinate the procedures for eminent domain do effect this purpose. We have no quarrel with them. We do question the wisdom of using the standardized procedure in the Parking District Law of 1951 and the Vehicle Parking District Law of 1943. We further believe that cities will oppose any legislation that puts the burden on them of making advances to an assessment district except where there is a contribution on their part.

We think, therefore, as follows:

1. We do not recommend that the uniform procedure be applicable to either the Vehicle Parking District Law of 1943 or the Parking District Law of 1951. We think that making this provision applicable to these two acts would render the use of them very difficult indeed. This is because:

    a. They are basically revenue bond acts in which the original amount of the bond issue has to be pretty exact.

    b. Problems both in having municipalities advance funds and the headache of supplemental proceedings.

2. We would approve amendments to these acts providing that attorneys' fees and costs would be paid by the city in the event of voluntary abandonment of the eminent domain proceedings. This is the one defect of the procedures outlined in these acts for eminent domain.

3. We approve the changes in and repeal of many sections in the Street Opening Act of 1903 and other acts, as outlined by the proposals. The framers of the proposed legislation have done an excellent job in weeding out obsolete sections and coordinating all of the eminent domain procedures.

4. We do not think that there is any breathtaking or high public purpose to be served in changing the procedures in the Vehicle Parking District Law of 1943 or the Parking District Law of 1951 except for the provisions as to costs and attorneys' fees. It is true that neither of these acts are widely used anymore. Ironically the philosophy of parking districts has changed considerably. In the period when these acts were widely used (and they have been), it was the philosophy that property owners who were attracting vehicles to their area should pay for the costs of the off-street parking just the same as shopping centers now do. Now the philosophy is apparently that the burden of parking garages and parking places should be placed upon the motorist by either meters or charges to produce the revenue to pay for them:--or in redevelopment districts that future tax money should be frozen to pay for them from tax increment bonds. Regardless of this we think that they should still be permitted to be used because they are still used, especially in smaller cities.

Yours very truly,

STURGIS, DEN-DULK, DOUGLASS & ANDERSON

Eugene K. Sturgis

EKS:bck

STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission considered Memorandum 73-83, the First Supplement thereto, and two unnumbered memoranda distributed at the meeting: one, from Mr. Harold Marsh representing the Credit Managers Associations of California; the other, from Professor Stefan A. Riesenfeld, a Commission consultant. (copies of these memoranda are attached to the Minutes as Exhibits 39.70(a) and 39.70(b)). The staff was directed to revise the printed tentative recommendation in accordance with the following directions:

Preliminary portion. This portion of the recommendation should be conformed to the changes made in the statutory portion of the recommendation.

Section 482.040. This section should be conformed to Section 516.030 of the new claim and delivery statute, and a cross-reference to Section 2015.5 should be added to the Comment.

Turnover order. A section comparable to Section 512.070 of the new claim and delivery statute should be added to Chapter 2 of this title.

Section 483.010. This section should be revised to permit the aggregation of claims and to refer to security interests in the manner set forth in Professor Riesenfeld's memorandum (page 2). However, the principle was retained that, where the security interest has become valueless, attachment will be permitted.

Sections 484.060 and 484.070. The time limits provided in these sections should be examined to determine to what extent they are subject to abuse in practice.

Section 484.090. This section should be revised in the manner set forth in Exhibit I to the First Supplement to Memorandum 73-83. Sections 484.310,

484.320, and 484.510 should also be revised to eliminate the requirement that a writ of attachment must have previously been issued--of course, the prerequisite is issuance of a right to attach order should be retained.

Section 485.010. Paragraph (1) of subdivision (b) should be revised to provide in substance that the requirement of great or irreparable injury may be satisfied by the showing of a probability that the defendant's property will be placed beyond the process of the court before a writ of attachment can be levied under the usual procedure.

Section 486.020. The second sentence of the Comment to this section should be revised to read: "However, nothing in this section precludes the court from requiring the plaintiff to give informal notice to the defendant or his attorney."

Section 486.050. The fifth sentence of the Comment should be deleted and the sixth sentence should be revised to add a statement that the order may, in the court's discretion, permit the payment of antecedent debts.

Section 487.010. This section should be revised to permit the attachment of all real property (whether or not used or held for use in the defendant's business) owned by a defendant who is an individual partner or other individual engaged in a trade, business, or profession.

Chapter 8 (Section 488.010 et seq.). The method of levy provisions should be reexamined to determine what action, if any, is necessary to make clear that the failure of the sheriff to give notice to the defendant of a garnishment or levy by filing does not invalidate a proper levy.

Section 488.310. This section should be revised to require that, where real property stands in the name of a third person, either alone or together with the defendant, that such third person be identified in the writ of

attachment. The time limit in subdivision (d) should be changed from 10 to 15 days.

Section 488.350. Subdivision (c) of this section should be revised to conform to Section 689b(1). Subdivision (d) should be revised to provide in substance:

> (d) The lien of attachment acquired pursuant to this section does not affect the rights of a person who is a bona fide purchaser of the vehicle or vessel and obtains possession of both the vehicle or vessel and its certificate of ownership.

The Comment to this section should indicate that this section does not affect the rule provided in Section 689b(2) which requires an attaching creditor to pay off a prior security interest if the secured party so demands.

Section 488.360. Subdivision (c) of this section should be revised to make clear that the lien acquired pursuant to this subdivision applies to both the property in the defendant's possession and the proceeds from such property if sold. The staff was also directed to invite the sheriffs to amplify their concerns with both this section and Section 488.370.

Sections 488.390 and 488.400. The order of these two sections should be reversed and present Section 488.390 should be made subject to the provisions of present Section 488.400.

Section 489.220. The statute should provide that the amount of the plaintiff's bond may be reduced by the court to an amount not less than the greater of the value of the property sought to be attached or the probable recovery for wrongful attachment.

Section 490.010. Subdivisions (c) and (d) should be revised to permit the plaintiff to exculpate himself where he reasonably believed under subdivision (c) that no other property was subject to attachment and under

subdivision (d) that the property was not exempt from attachment. The Comment to this section should be revised to indicate more clearly the relationship between this section, prior law, and Section 490.020.

Section 490.020. The staff was directed to review the reason for inclusion of the phrase "whether direct or consequential" in subdivision (a) and to determine whether such phrase is required. The staff was directed also to reexamine the remainder of the section to determine what, if anything, is needed to clarify the effect of these provisions on existing law.

Section 684.2. This section should be revised in the manner set forth in Professor Riesenfeld's memorandum (page 7).

Section 688. Subdivision (b) of this section should be revised to make clear that it deals only with the method of levy and not with what property is subject to execution. Subdivision (c) should be revised in the manner set forth in Professor Riesenfeld's memorandum (page 6).

EXHIBIT 39.70(a)
(following p.___)
Minutes
October 18 and 19, 1973

October 15, 1973

Memorandum to: The California Law Revision Commission

From: Stefan A. Riesenfeld

In re: Pre-judgment Attachment

Reexamination of the California Law Revision Commission's Tentative Recommendation relating to Prejudgment Attachment in the light of comments made by interested associations and parties has revealed the need for technical changes and reconsideration of certain policies.

1.

Definition of Security Interest
Protection of Partly Secured Creditors

a) The staff recommends the inclusion of a definition of security interest. Actually the proposed statute uses the term security interest only in a couple of instances: §483.010 and §488.360(c). Thus a definition is hardly required.

The Uniform Commercial Code includes a broad definition of security interest in §1201(37), i.e. an interest in . . . property which secures payment or performance of an obligation, but restricts it to interests in "personal property" or "fixtures" and moreover limits the application of Division 9 to security interests created by contract §9102(2). Obviously, §483.010 uses security interest in a wider sense than the U.C.C., while §488.360(c) dovetails with the U.C.C.

It escapes me why the proposed act defines "security agreement." I cannot find the term in any section of the proposed statute.

The Motor Vehicle Code §370 refers to a "security interest which is subject to the provisions of the U.C.C."

Since §483.010 is the only provision employing a broad definition of security interest it may be better to define the interests that bar an attachment in that section itself.

I propose that the pertinent sentence in §483.010 should read

> "The contract upon which the claim is based shall not be secured by any interest in real or personal property arising from agreement, statute or other rule of law, including mortgages and deeds of trust of realty, security interests subject to Division 9 of the Commercial Code, and statutory common law and equitable liens."

b) I recommend that a provision of this type be retained. The arguments in Exhibit 1, p. 15 are unpersuasive.

In the first place I do not subscribe to the author's statement that the debtor could waive the protection against attachment granted by the clause in question. Engelman v. Bookasta, 264 C.A.2d 915 (1968) dealt with the applicability of C.C.P. §537(1) to a guarantor who had waived his rights under C.C. §§2845 and 2849 with respect to a deed of trust given by the principal. The statement of the late Justice Peters in Lencioni v. Dan, 128 C.A.2d 105, at 111 (1954) is not contradicted by later cases relating to waivers by guarantors.

Neither do I agree with the foundryman illustration. The possession of the pattern does not secure the performance of the main contract. The purported plight of a partly secured creditor who did exact some but insufficient collateral does not

seem to warrant an extension of attachment into that area.

2.
Attachment of Interests in Real Property
Held by or Standing in Third Party's Name

An attachment defendant may own an interest in realty which does not appear of record. A situation of this type exists, for example, when

a) the attachment defendant holds under an unrecorded conveyance from the record owner,

b) the attachment defendant has transferred title in fraud of creditors or taken title in a third person in fraud of creditors,

c) the attachment defendant is the beneficiary of a resultimg trust under C.C. §853.

Obviously the attachment defendant's equitable or legal interest is subject to levy, although it is in the nature of an unrecorded interest.

There is no real need for identifying the name of the record owner in the writ of attachment. What is attached is not the realty but the attachment defendant's interest in certain realty described by metes and bounds or other appropriate description. This is all the recorder has to know to record the writ. The attachment defendant is the grantor, the attaching creditor the grantee.

Present C.C.P. §542(2) prescribes a double indexing system. The names of the record owner and of the attachment defendant are to be indexed as grantors. Moreover, the section prescribes that the notice of attachment shall state that the real property therein described and [sic] any interest of the defendant therein

held by or standing . . . in the name of the third party are attached. This is a statutory overkill.

§488.310(b) as proposed retains the double indexing system. I can see no virtue in it. The Commission should consider its abolition. If the double indexing system be maintained then the writ of attachment must identify the record owner in addition to the premises. I therefore agree with the proposal of the staff (p. 8) only if the Commission wants to retain this system.

Retention of the system, however, raises Sniadach problems. Since the title of the record owner is clouded by the attachment it could be argued that he is entitled to notice and hearing before the writ issues. This is especially important if attachment is used to attack a fraudulent conveyance under C.C. §3439.09. See Sackin v. Kersting, 10 Ariz. App. 340, 458 P.2d 544 (1969).

3.

Attachment of Personal Property
Subject to Non-possessory Security Interest

a) In the case of equipment and inventory, the case may arise that the goods are subject to a security interest governed by Division 9 of the Commercial Code. The matter is currently governed by Commercial Code, §9311 and C.C.P. §§689a to 689c.

Proposed §488.350 changes the rule of §689b(1). The Comment contains no reference to a repeal of §689b(1). On the other hand, under present law the attaching creditor must pay off a security interest, if the secured party so desires, C.C.P. §689(2). It is doubtful whether Commercial Code, §9312 repeals this section by implication. The Comment should at least alert to that issue.

b) §488.350 protects a bona fide purchaser who obtains possession of the vehicle or vessel and the certificate of ownership. Although this section applies only to equipment, I think it over-extends the protection. "Purchaser" includes a person taking a security interest and even donees, Commercial Code §§1-201(32) and (33). I suggest that only buyers other than buyers of a substantial part of the equipment of the defendant be protected. This is in accord with the policies of Commercial Code, §§9301 (1) (c) and 6102 (2).

4.

Non-resident Attachment

I still have misgivings about the breadth of permissible non-resident attachment, especially since Fuentes v. Shevin, 407 U.S. 67, at 91, ftn. 23, limited the exception to "attachment necessary to secure jurisdiction in a state court," clearly a narrower group of cases than non-resident attachment. I doubt that release on general appearance as proposed in §492.040 cures this overbreadth.

Assuming that the Commission will not re-enter into a reconsideration of this issue other matters remain to be determined, i.e. remedies of a defendant who does not want to enter a general appearance:

a) Obviously, the defendant may obtain a stay of the quasi-in-rem proceedings by a motion to that effect based on the plea of inconvenient forum, C.C.P. §§410.30 and 418.10. Apparently such motion can be made by special appearance.

b) He may defend the action on the merits without subjecting himself to personal jurisdiction, see Turner v. Evans, 107 Cal. Rptr. 390 (Sup.Ct. App. Dep. 1973), relying on Minichiello v. Rosenberg, 410 F.2d 106, at 111.

Can he appear specially just to contest probable validity? On principle he should have that option.

I recommend that the non-resident defendant should be able to have this right (change in text) and that it should be stated in the Comment that the statute does not deal with possible rights of defendant to obtain a stay of further proceedings or defense on the merits without general appearance.

5.
Liability of Garnishee
on Attachment

a) I think that §488.550(c), first sentence, changes the existing law and that the change is undesirable. As I understand the present law, an admission of the garnishee that he owes the amount garnished or that the property garnished belongs to the attachment defendant renders him liable to action "at any time."

If the asset garnished is a debt the garnishee is liable only as long as the attachment has not lapsed and as long as the statute of limitation on the garnished debt has not run. Clyne v. Easton, Eldridge & Co., 148 Cal. 287 (1905) was decided when the statute contained no limitation on attachments of personal property. 542b was enacted in 1929. It would seem that an

attachment plaintiff even after admission of his liability can invoke the lapse of the attachment lien, see Puissegur v. Yarbrough, 29 C.2d 409, 175 P.2d 830 (1947); Durkin v. Durkin, 133 C.A.2d 283; Booloodian v. Ohanesian, 13 C.A. 3d 635, 91 Cal. Rptr. 923 (1970).

If the garnished property is chattels the matter is unsettled. Failure to deliver the chattels to the sheriff or disposition by the garnishee during the life of the attachment may constitute conversion and bring the applicable limitation statute into operation.

In my opinion §488.550(c) should be redrafted by striking the first sentence and the words "the defendant's interest in the property or" in the second sentence.

b) There is a question on the interrelation of §488.550(b) and §488.510. Is the "termination" under 488.510 a "release" under 488.550(b). Strike termination from the heading.

c) I cannot understand why the section includes liability on (not under!!) a negotiable instrument in subsection 488.550a. Negotiable instruments in the possession of defendant are attached by seizure, not garnishment. In that case the sheriff is in possession of the note. He acts pursuant to §588.20. If the statute of limitation in favor of the maker or acceptor threatens to run out, some steps should be taken to commence an action against him. The maker or acceptor while being an obligor is not a garnishee and the combination in 488.550 of these cases is confusing. Under present law a receiver would have to be appointed. The proposed statute should be clarified.

6.

Levy on Property not Subject to Attachment

a) §688(b) is too broad. Under existing law there were assets which could not be reached by any type of levy, such as, for example, patents, income under a spendthrift trust, or shares in partnerships. The second sentence should omit the words "property or".

b) §688(c) should read "Until a levy no property shall be affected by the issuance of a writ of execution or its delivery to the levying officer." The purpose of the statute was to abolish the rule that delivery of the writ to the sheriff binds the chattels of judgment debtor.

7.

Duration of Attachment Lien
(§488.510)

An attachment lien on all property ceases upon the expiration of two years from the issuance of the writ, unless the period is tolled or extended. §488.510.

This applies now also to a lien on the interest in personal property belonging to a decedent's estate. §488.430. This would be a change of the existing law. See Estate of Troy, 1 C.A.2d 732 (1934). Actually, however, Estate of Troy, supra, should be overturne An attaching creditor should obtain judgment in the main action prior to the expiration of the attachment. He may then levy on the attached distributive share and the lien of the execution will be free from the one year limitation, §688(d) as proposed. See Estate of Badivian, 31 C.A.3d 737, 107 Cal. Rptr.____.

Although some cases have expressed doubt, it would seem that after judgment the sheriff should levy an execution on the property attached. Present §551 was unclear. Certainly the writ of execution should not only be issued but also delivered to the sheriff. It would be best if the attachment were followed by a "paper levy," i.e. return that the execution was levied on the property attached. If that view were adopted no durational exception needs to be written into §488.430 or §488.510. See infra, No. 8.

8.

Execution Levy on Attached Property (§684.2)

a) §684.2 as added perpetuates an existing defect. Property which is attached should be levied upon under a writ of execution after the attachment plaintiff recovers a judgment. An execution sale requires the levy of the writ of execution. Because of the provisions governing the duration of levy liens it seems to be proper that the sheriff formally (i.e. by return) levies on the attached property. I suggest that the practice be clarified:

> "and, if any balance remains due and an execution has been delivered to the officer he shall levy on and sell under the execution so much of the property . . ."

b) §684.2 should be broken into two parts, the second beginning with "If, after selling . . ."

EXHIBIT 39.70(b)
(following p.__)

CREDIT MANAGERS ASSOCIATIONS OF CALIFORNIA

Memorandum Re: Tentative Recommendation of the California Law Revision Commission Relating to Prejudgment Attachment

The Legislative Committee of the California Credit Managers Associations has reviewed the tentative recommendation of the Law Revision Commission relating to prejudgment attachment which was issued in March, 1973. This Committee represents the Credit Managers Association of Southern California, the Board of Trade of San Francisco, the San Diego Wholesale Credit Men's Association, the National Association of Credit Management for Northern and Central California and the Wholesale Credit Association (Oakland), which together have more than 6,000 members consisting of manufacturers, wholesalers and financial institutions in the State of California.

The Committee believes that the statute proposed by the Law Revision Commission would, while purporting to continue the remedy of attachment, dilute its effectiveness to such an extent and make so onerous the conditions for obtaining the writ of attachment that for all practical purposes it would virtually be abolished. The Committee objects primarily to the changes proposed to be made in the law which are detailed below and requests that the Commission consider restoring the present law relating to these matters in its final recommendation.

1. The requirement that the plaintiff must show "great or irreparable injury" in order to obtain a temporary protective order pending a hearing on the issuance of the writ of attachment (§486.010). Since there will not be any injury to the plaintiff unless the defendant removes, conceals or disposes of his property subject to levy before the issuance of the writ, when this requirement is coupled with the provisions of §482.040 that all affidavits be based upon personal knowledge, it could only be met if the plaintiff can swear that he knows what the future actions of the defendant are going to be, which is obviously impossible. These requirements would in effect eliminate the temporary protective order in practically all cases.

2. The elimination of the provision that the temporary protective order be issued ex parte (§486.020).

3. The elimination of the requirement that the temporary protective order prohibit transfers not in the ordinary course of business (§486.040), the terms of which are instead left wholly to the discretion of the particular court; and specifically the elimination of the prohibition against payment by the defendant of antecedent debts (§486.050). While it is asserted that the latter provision is "confusing and unnecessary", it can hardly be confusing to anyone who knows what an antecedent debt is, and would appear to be unnecessary only if the intention is to permit the payment of such antecedent debts.

4. The provision that claims may not be aggregated to meet the $500 minimum requirement for the issuance of a writ of attachment (§483.010). No explanation is given as to why elimination of the provision in the present law that claims may be aggregated for this purpose is considered appropriate or desirable. In fact, the Credit Managers Associations believe that consideration should be given to the reduction of the minimum amount to $250.

5. The requirement that all property of any nature, in order to be attachable, must be "used or held for use in the defendant's trade, business, or profession", where the defendant is an individual (§487.010). Aside from certain types of property, such as equipment or inventory, which are by their nature business assets, this provision would virtually immunize all other assets of an individual defendant, such as real property or securities, from liability to attachment, since the plaintiff would rarely be able to determine whether such assets were so held or used.

6. The requirement that the application for the writ and the writ itself both specifically describe the property to be attached (§§484.020 and 484.090). While it is ostensibly provided that additional writs of attachment may be obtained ex parte (§484.510), this provision is effectively negated by the subjection of the plaintiff to unlimited liability in any case where a writ is obtained ex parte (§490.020). Therefore, these provisions taken together would require a new hearing every time the plaintiff discovered additional property upon which he wanted to levy.

7. The elimination of the provision that the court may reduce the amount of the bond required to be posted by the plaintiff from one-half of the amount sought to be recovered in the action (§489.220). This would force a plaintiff suing on a $20,000 debt to post a $10,000 bond in order to levy on a $500 bank account.

8. The failure of the provisions relating to garnishment and levy by filing to provide that the omission of the sheriff to give the subsequent notice to the defendant within the required time period does not invalidate the levy. (For example, §§488.310, 488.340, 488.350, 488.370, 488.380 and 488.420).

9. The restriction of the lien purported to be given on inventory to only the "proceeds" of the sale of the inventory where the levy is made by the alternative method of filing (§488.360). It is suggested by the language of the comment that this is the only lien that a secured party has in inventory under Article 9 of the Uniform Commercial Code, which is wholly erroneous. Such lien is valid on the inventory itself against any other creditor and also against any transferee in bulk or other transferee not in the ordinary course of business.

10. The provision requiring that a levy upon negotiable certificates of deposit issued by a savings and loan association or a bank must be made by garnishing the issuing bank or savings and loan association (§§488.390 and 488.400). The literal meaning of these provisions, that is, that the levying creditor would prevail over a subsequent holder in due course of the negotiable instrument, is incredible. If it is intended that the levying creditor not prevail over such holder in due course, then attachment of such certificates of deposit would in effect be prohibited since the lien would be worthless.

11. The provision prohibiting any levy upon corporate stock which has been pledged, by garnishing the pledgee and thereby obtaining a lien upon the equity of the pledgor (§488.410).

12. The provisions for automatic liability of the plaintiff for wrongful attachment in any case where the property levied upon has a value which is "greatly in excess of the amount of the plaintiff's legitimate claim." (§490.010.) If the defendant owned unencumbered real property worth $1,000,000, this provision would immunize it from attachment by any plaintiff unless he had a claim against the defendant equal to $1,000,000. It has no relationship to the potential injury to the defendant. Furthermore, it would put the burden upon the plaintiff of determining the "value", which is wholly undefined, of any property upon which he proposed to levy, at the risk of incurring liability, and would therefore effectively destroy the remedy of attachment.

13. The provision making the plaintiff liable for wrongful attachment to a completely unlimited extent in any case in which he obtains the writ of attachment ex parte (§490.020). This provision would in effect eliminate the right to an ex parte writ of attachment, which is ostensibly purported to be granted in another portion of the statute.

14. The provision specifying that the amount of damages recoverable for wrongful attachment includes all damages proximately caused to the defendant "whether direct or consequential." (§490.020.)

15. The provision permitting the defendant to recover against the plaintiff for wrongful attachment, whether or not in excess of the bond, by the device of making a "motion" in the same action (§490.030). This provision suggests that a person forfeits his constitutional rights by becoming an attaching creditor. This epitomizes the impression given by the proposed statute as a whole.

The Legislative Committee
Credit Managers Associations
of California

October 12, 1973

Minutes
October 18 and 19, 1973

STUDY 39.100 - ENFORCEMENT OF SISTER STATE JUDGMENTS

The Commission considered Memorandum 73-84 and the attached Recommendation Relating to Enforcement of Sister State Money Judgments. The Commission made the following decisions:

Code of Civil Procedure Section 1710.15(b)(5). The last sentence of this paragraph should read substantially as follows: "Except for facts which are matters of public record in this state, the statements required by this paragraph may be made on the basis of the judgment creditor's information and belief."

Section 1710.65. The Comment to this section should state that the purpose of the section is to make clear that the use of the two separate procedures is not to be regarded as splitting a single cause of action.

Support. The staff was directed to determine whether there is any serious conflict between the recommendation and the Uniform Reciprocal Enforcement of Support Act (Code Civ. Proc. §§ 1650-1697), and was authorized to make any needed revisions to deal with any problems discovered.

Approval for printing. Subject to the above revisions and any editorial suggestions, the recommendation was approved for printing.

STUDY 63 - EVIDENCE CODE SECTION 999

The Commission considered Memorandum 73-90 and the attached draft of the Recommendation Relating to Evidence Code Section 999--The "Criminal Conduct" Exception to the Physician-Patient Privilege. The Commission approved the recommendation for printing and submission to the 1974 session of the Legislature.

STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 73-78 regarding comments on the Tentative Recommendation Relating to Liquidated Damages. The Commission made the following decisions:

Civil Code Section 2954.6. Paragraph (1) of subdivision (c) should read substantially as follows:

> (1) No late payment charge may be collected on an installment payment which is tendered or paid within 10 days after its scheduled due date even though an earlier maturing installment payment, or a late payment charge on an earlier installment payment, may not have been paid in full. Unless the borrower otherwise directs at the time the installment is paid, for the purposes of this subdivision, payments are applied first to current installment payments and then to delinquent installment payments, and an installment payment shall be considered paid as of the date it is received by the lender.

Subdivision (d) should read substantially as follows:

> (d) If the late payment charge referred to in subdivision (c) is not paid within 40 days from the scheduled due date of the delinquent installment payment for which the charge was imposed, the lender may, at his option, add the late payment charge to the principal and thereafter charge interest on it at the contract rate. If the lender elects to add the late payment charge to principal, he cannot thereafter treat the failure to pay the late payment charge as a default.

The Commission decided that the borrower should be informed of the addition of the late payment charge to principal at some time after the addition is made. However, no specific provision of this sort will be necessary in Section 2954.6 unless the staff finds that other provisions of law do not adequately provide for informing the borrower of his principal balance.

The Comment to Section 2954.6 should briefly indicate the nature of the notice requirements of Section 2954.5 referred to in Section 2954.6. The Comment should also make clear that Section 2954.6 is a statutory exception to Section 3302 which provides that "the detriment caused by the breach

of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

Section 3319. The Commission reaffirmed the policy of judging the validity of liquidated damages provisions based on reasonableness at the time the contract was made. Specific elements of reasonableness are to be left to judicial determination and not provided in this section. Section 3319 should provide that it is not intended to govern liquidated damages provisions provided for in Government Code Sections 14376 and 53069.85. Furthermore, the following introductory clause should be added: "Except where there is a statute which otherwise specifically provides, . . ."

Section 3320. A provision should be added to this section to make clear that it does not govern installment land contracts.

APPROVED

_____
Date

_____
Chairman

_____
Executive Secretary