

Note. Changes may be made in this tentative agenda. For meeting information, call (415) 497-1731.

March 29, 1977

Time

Place

April 7 - 7:00 p.m. - 10:00 p.m.

Howard Johnson Motor Lodge

April 8 - 9:00 a.m. - 5:00 p.m.

5990 Green Valley Circle

Culver City, CA 90230

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

April 7-8, 1977

April 7

1. Minutes of March 10-12, 1977, Meeting (enclosed)
2. Administrative Matters
  - Schedule for Future Meetings (attached)
  - Report on 1977 Legislative Program Generally
  - Memorandum 77-19 (to be sent)
3. Study 78.50 - Unlawful Detainer Proceedings (AB 13)
  - Memorandum 77-20 (sent 3/24/77)
4. Study 39.32 - Wage Garnishment (AB 393)
  - Memorandum 77-22 (sent 3/25/77)
5. Study 36 - Eminent Domain (Resolution of Necessity)
  - Memorandum 77-23 (sent 3/24/77)
  - Tentative Recommendation (attached to Memorandum)
6. Study 77.100 - Nonprofit Corporations
  - Memorandum 77-21 (sent 3/24/77)
  - Nonprofit corporation bills (to be sent)

] <u>Note. This item will be</u>
] <u>considered at the April</u>
] <u>meeting only if time permits</u>
]

April 8

7. Study 39 - Attachment (General Assignment for Benefit of Creditors)
  - Memorandum 77-24 (sent 3/24/77)
  - Recommendation (attached to Memorandum)

March 29, 1977

8. Study 39 - Attachment (Chattel Paper; Negotiable Instruments)  
Memorandum 77-25 (to be sent)  
Attachment Law With Official Comments (distributed for  
previous meetings)
9. Study 39.250 - Enforcement of Judgments (Homestead Exemption)  
Memorandum 77-26 (to be sent)
10. Study 39.200 - Enforcement of Judgments (Comprehensive Statute)  
Memorandum 77-3 (sent 1/21/77)  
Draft Statute (attached to Memorandum)

Note. We will start with Section 703.310 of the draft statute.

March 18, 1977CALIFORNIA LAW REVISION COMMISSIONSCHEDULE FOR FUTURE MEETINGSAPRIL 1977

April 7 - 7:00 p.m. - 10:00 p.m.  
April 8 - 9:00 a.m. - 5:00 p.m.

Howard Johnson Motor Lodge  
5990 Green Valley Circle  
Culver City, CA 90230

MAY 1977

May 12 - 7:00 p.m. - 10:00 p.m.  
May 13 - 9:00 a.m. - 5:00 p.m.  
May 14 - 9:00 a.m. - 12:00 noon (tentative)

Room 6024  
State Capitol  
Sacramento

JUNE 1977

June 9 - 7:00 p.m. - 10:00 p.m.  
June 10 - 9:00 a.m. - 5:00 p.m.  
June 11 - 9:00 a.m. - 12:00 noon

Los Angeles

JULY 1977

July 7 - 7:00 p.m. - 10:00 p.m.  
July 8 - 9:00 a.m. - 5:00 p.m.  
July 9 - 9:00 a.m. - 4:00 p.m.

San Francisco

Note. Please note addition of May 14 (morning) as an additional meeting day.

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
APRIL 7 AND 8, 1977  
Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on April 7 and 8, 1977.

Present: John N. McLaurin, Chairman, April 7  
Howard R. Williams, Vice Chairman  
John J. Balluff  
Beatrice P. Lawson  
Jean C. Love, April 8  
John D. Miller

Absent: George Deukmejian, Member of Senate  
Alister McAlister, Member of Assembly  
Thomas E. Stanton, Jr.  
Bion M. Gregory, Ex officio

Members of Staff Present:

John H. DeMouilly                      Nathaniel Sterling  
Stan G. Ulrich                          Robert J. Murphy III

Consultants Present:

Thomas M. Dankert, Condemnation Law and Procedure,  
April 7  
Professor Stefan A. Riensenfeld, Creditors' Remedies,  
April 7 and 8

The following persons were present as observers on days indicated:

April 7

Ronald P. Denitz, Tishman Realty, Los Angeles  
Robert E. Leidigh, California Rural Legal Assistance, Sacramento  
Terrence Terauchi, Western Center on Law and Poverty, Sacramento

April 8

Sandor T. Boxer, Coskey, Coskey & Boxer, Los Angeles

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ADMINISTRATIVE MATTERS

The Minutes of the March 10-12, 1977, meeting were corrected so that the last sentence on page 13 (Study 39.250 - Enforcement of Judgments) will read as follows:

The church pew exemption should be retained unless the staff finds from consultation with appropriate church bodies that pews are not generally owned by church members- members in any faith or denomination.

As thus corrected, the Minutes were approved.

Future Meetings

The following schedule for future meetings was approved:

May Meeting

May 12 - 7:00 p.m. - 10:00 p.m.	Room 6024
May 13 - 9:00 a.m. - 5:00 p.m.	State Capitol
May 14 - 9:00 a.m. - 12:00 noon	Sacramento

June Meeting

June 9 - 7:00 p.m. - 10:00 p.m.	Los Angeles
June 10 - 9:00 a.m. - 5:00 p.m.	
June 11 - 9:00 a.m. - 12:00 noon	

July Meeting

July 7 - 7:00 p.m. - 10:00 p.m.	San Francisco
July 8 - 9:00 a.m. - 5:00 p.m.	
July 9 - 9:00 a.m. - 4:00 p.m.	

Consultant to Prepare Background Study on Homesteads

See discussion under "Study 39.250 - Enforcement of Judgments (Homestead Exemption)."

Background Study on Retroactive Application of Exemptions From Execution

It was noted that, at the March 1977 meeting, an article was discussed which summarized the existing California law on exemptions from execution as follows:

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A creditor is bound only by an exemption effective at the time of the extension of credit. Increases in the amounts of the homestead exemption [for example] have, therefore, no retroactive application.

A copy of this article is attached as Exhibit 2 to Memorandum 77-26 which was considered at the April meeting. See also the discussion of this problem on pages 11-12 of Memorandum 77-26.

The staff proposed that an expert consultant be obtained to prepare a background study on:

(1) Whether a statute constitutionally could provide that any law changing an exemption from execution, or any law creating or abolishing an exemption, applies to all levies of execution made after the operative date of the law changing, creating, or abolishing the exemption even though the extension of credit occurred before the law changing, creating, or abolishing the exemption becomes operative.

(2) Whether the statute reserving the right to change, create, or abolish exemptions constitutionally could be made applicable to contracts and obligations entered into prior to the operative date of the statute.

The view was advanced that the constitutional problems presented by the statutory provisions outlined by the staff are not of sufficient difficulty to require the use of an expert consultant. It was the opinion of the Commission that a law student in a few hours could prepare an adequate background study. Accordingly, the staff proposal that an expert consultant be obtained to prepare the background study was not approved.

Letter to Chairman of State Bar Committee on Corporations

The staff suggested that the Chairman of the Commission send a letter to the Chairman of the State Bar Committee on Corporations indicating the willingness of the Commission to cooperate with the State Bar Committee and Select Committee staff in preparing a statute based on that contained in the Commission's recommendation and expressing the view that the Commission probably would be in a position to recommend the jointly prepared statute for enactment by the 1978 Legislature.

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The Commission decided that the Chairman should send a letter to the Chairman of the State Bar Committee on Corporations along the following lines:

A copy of the Law Revision Commission's Recommendation Relating to Nonprofit Corporation Law (November 1976) is enclosed and a copy has been sent to each member of the State Bar Committee on Corporations. The recommended legislation has been introduced by the Senate Member of the Commission as Senate Bills 623 and 624, and copies of these bills previously have been sent to you and to each member of the State Bar Committee.

The Commission would welcome any comments the State Bar Committee on Corporations can offer on the legislation recommended by the Commission.

Study on Assignment for the Benefit of Creditors

The Commission decided to give some priority to the preparation of a recommendation for a statute governing assignments for the benefit of creditors. The statute should deal with practical problems that are revealed by the experience under the existing California common law assignments for the benefit of creditors and should include consideration of statutes that have been enacted in other states. The staff is to make a preliminary review of this area of law with a view to recommending whether the study should be a staff study or a study prepared by an expert consultant and to present its recommendations to a future meeting.

Report on 1977 Legislative Program

The Commission noted Memorandum 77-19 which contained a report on the 1977 legislative program.

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STUDY 36.800 - EMINENT DOMAIN (RESOLUTION OF NECESSITY)

The Commission considered Memorandum 77-23 and the attached staff draft of a tentative recommendation relating to review of the resolution of necessity by writ of mandate. The Commission directed the staff to clarify the relation of subdivision (c) of Section 1245.255 (authorizing rescinding and readoption of the resolution subject to the terms of a conditional dismissal) to the rest of the section. As so clarified, the tentative recommendation should be distributed for comment. The Commission will reconsider the policy of the tentative recommendation at the time it reviews the comments received.



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STUDY 39.33 - WAGE GARNISHMENT (AB 393)

The Commission considered Memorandum 77-22 and the First Supplement to Memorandum 77-22 and a copy of AB 393 as amended in Assembly March 21, 1977. The following decisions were made by the Commission:

Section 723.024

The substance of the following should be substituted for this section:

723.024. The employer may deduct two dollars and fifty cents (\$2.50) from the amount required to be paid over to the levying officer pursuant to Section 723.025 and retain it as a charge for the employer's services in complying with the earnings withholding order. The aggregate of such charges withheld from the amount required to be paid over to the levying officer pursuant to Section 723.025 shall not exceed two dollars and fifty cents (\$2.50) during any month.

Section 723.025

This section may require an amendment to conform to revised Section 723.024.

Section 723.105

The portion of Section 723.105, set out below, was revised as set out below:

(e) If a notice of opposition to the claim of exemption is filed with the levying officer within the 10-day period, the judgment creditor is entitled to a hearing on the claim of exemption. If the judgment creditor desires a hearing on the claim of exemption, the judgment creditor shall file a notice of motion for an order determining the claim of exemption with the court within 10 days after the date the levying officer mailed the notice of claim of exemption. If the notice of motion is so filed, the hearing on the motion shall be held not later than ± 20 days from the date the notice of motion was filed unless continued by the court for good cause. The judgment creditor shall give not less than five days' Not less than 10 days prior to the hearing, the judgment creditor shall give written notice of the hearing to the levying officer and shall serve on the judgment debtor a notice of the hearing and a copy of the notice of ~~opposition~~ opposition on the judgment debtor and, if the claim of exemption so requested, on the attorney for the judgment debtor. Service of the notice of the hearing and the copy of the notice of opposition to the claim of exemption ~~on the judgment debtor~~ shall be made by first-class mail,

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postage prepaid, on the judgment debtor sent to the address of the judgment debtor stated in the claim of exemption, and and, if the claim of exemption so requested, on the attorney for the judgment debtor sent to the address of the attorney stated in the claim of exemption. Service is deemed made when deposited in the mail. The judgment creditor shall file proof of such service on the judgment debtor of the notice of the hearing and the copy of the notice of opposition to the claim of exemption with the court. After receiving the notice of the hearing and before the date set for the hearing, the levying officer shall file the claim of exemption and the notice of opposition to the claim of exemption with the court.

(f) If the levying officer does not receive a notice of opposition to the claim of exemption within the 10-day period after the date of mailing of the notice of claim of exemption and a notice of the hearing not later than 10 days after the filing of the notice of opposition to the claim of exemption, the levying officer shall serve on the employer one of the following:

(1) A notice that the earnings withholding order has been terminated if all of the judgment debtor's earnings were claimed to be exempt.

(2) A modified earnings withholding order which reflects the amount of earnings claimed to be exempt in the claim of exemption if only a portion of the judgment debtor's earnings was claimed to be exempt.

#### Section 723.124

Subdivision (d) of Section 723.124 was revised to read as follows:

(d) A listing of all the assets of the judgment debtor and of the persons listed in subdivision (a) and the value of such assets.

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STUDY 39.160 - ATTACHMENT (GENERAL ASSIGNMENT FOR BENEFIT  
OF CREDITORS AND BANKRUPTCY)

The Commission considered Memorandum 77-24 and the attached Recommendation Relating to The Attachment Law--Effect of Bankruptcy Proceedings, Effect of General Assignments for the Benefit of Creditors and a letter from Mr. Harold Marsh, Jr., which was distributed at the meeting. The Commission decided to submit the recommendation as revised to the Legislature and was agreeable to having the recommended legislation substituted in the Assembly for the present text of the Marsh bill (S.B. 221). The Commission also decided to undertake a study of the law relating to general assignments for the benefit of creditors with a view toward introducing a bill in the near future. The recommendation considered at the meeting should be prefaced with a statement that the Commission plans to study the entire area of general assignments and that any provisions relating to the voiding of liens under the Attachment Law will have to be reexamined when the new Bankruptcy Act (H.R. 6) is enacted.

The recommendation should be revised as follows:

§ 493.010. General assignment for the benefit of creditors defined

The substance of the statement in the Comment, that recognition of preexisting preferences in the assignment does not violate the rule that the assignment may not create preferences if it is to have the effect of voiding attachment liens, should be in the statute.

§ 493.030. Termination of lien of temporary protective order or attachment

The limitation of the terminating effect of filing bankruptcy petitions to petitions filed in California should be deleted. In order to prevent situations where creditors with California writs of attachment lose their liens although creditors with writs of attachment in other states do not lose their liens, a section should be added which provides that the California lien is not terminated by the filing of a petition in bankruptcy or the making of a general assignment if there is an attachment lien in another state which is not terminated.

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§ 493.040. Release of attachment

The staff should draft provisions permitting the immediate release of attached property upon the posting of a bond in favor of the plaintiff in the amount of the attachment lien. The bond would indemnify the attachment plaintiff against any losses caused by the termination of the attachment should the release of the attachment be improper.

§ 493.050. Reinstatement of lien

The words "as a fraudulent conveyance or for some other reason" should be deleted from paragraph (1) of subdivision (a) providing for the reinstatement of a terminated lien where the general assignment is set aside.

§ 493.060. Assignee subrogated to rights of plaintiff

The Comment should contain an example of how the subrogation provision operates.

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STUDY 39.160 - ATTACHMENT (LEVY ON CHATTEL PAPER, ACCOUNTS  
RECEIVABLE, CHOSES IN ACTION, NEGOTIABLE INSTRUMENTS  
AND JUDGMENTS)

The Commission considered Memorandum 77-25 and the policy memorandum prepared by Professor Stefan A. Riesenfeld, the Commission's consultant on creditors' remedies, attached thereto. The Commission also considered a memorandum distributed at the meeting which contained suggested amendments to implement these basic policies. (See Exhibit 1, attached to these Minutes.) The Commission approved the policies outlined in Memorandum 77-25 pertaining to the recognition of prior interests of secured parties in certain types of property and other matters and directed the staff to prepare a tentative recommendation based on the draft amendments prepared by Professor Riesenfeld.

Suggested Amendments  
of California Code of Civil Procedure, §§ 488.330,  
488.380, 488.400, 488.500 and 488.540 and  
Suggested Insertion of a new Section 488.430.5  
to implement prior memo

Stefan A. Riesenfeld  
(consultant)

1. Add new subsection (e) to § 488.330

(e) Where goods are in possession of a bailee which are subject to a perfected security interest of another person whose security interest is perfected by issuance of a non-negotiable document in the name of the secured party, by the bailee's receipt of notification of the secured party's interest or by filing as to the goods, the defendant's interest in the collateral shall be attached by serving upon the secured party a copy of the writ and the notice of attachment. Thereafter the levying officer shall comply with subsection (c) of this section.

Comment. This provision codifies the rule of *Crow v. Yosemite Creek Co.*, 149 Cal. App. 2d 188, 308 P.2d 421 (1957), taking account of Calif. Comm. Code, § 9-304(b).

2. Add two sentences to § 488.380(c)

If the chattel paper results from a lease of tangible personal property, the lessee upon termination of the lease, whether because of the expiration of the term or because of default, shall deliver the leased property to the sheriff except in the case where the property constitutes inventory of the attachment defendant and the plaintiff has levied upon the inventory pursuant to § 488.360(c). In that case the leased property shall be returned to the attachment defendant.

Comment. This section implements § 488.500(a), as amended, which extends the lien resulting from a levy upon chattel paper to the lessor's property interests in the leased chattels. If no paramount interest of a secured party, as recognized in § 488.430.5 as newly inserted, is involved the goods should be delivered to the sheriff. An exception is provided for the case where the leased goods are inventory of the lessor and the creditor of the lessor has levied on the inventory pursuant to § 488.360(c). In that case the leased and returned chattels can be leased out again and the lien on the goods shifts to the chattel paper resulting from that lease, Cal. Comm. Code § 4-306(1). Although Cal. Comm. Code § 9-306(5) applies only to the return of sold goods, the rule relating to the return of leased goods is not inconsistent.

3. Insert new section 488.430.5:

488.430.5 Priority of persons holding a perfected security interest in attached collateral and choses in action

(a) Notwithstanding any provision in Sections 488.370 (accounts receivable) 488.380 (chattel paper), 488.390 (deposit accounts), 488.400 (negotiable instruments), 488.420 (judgments), the defendant's rights in accounts receivable, choses in action, deposit accounts and judgments that are subject to a perfected security interest of another party and the defendant's rights in chattel paper and negotiable instruments that are subject to a security interest of another person that is perfected by possession of these writings shall be attached by serving the secured party with a copy of the writ and the notice of attachment.

(b) Promptly after the levy and in no event more than 45 days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(c) Unless the secured party has left the liberty to collect payments due on the accounts receivable or chattel paper or to accept or enforce the return of goods under sales resulting in accounts receivable or under sales or leases resulting in the chattel paper, the secured party shall remain entitled to collect all payments due from the account debtor or obligors on such accounts receivable, choses in action, chattel paper, deposit accounts, negotiable instruments and judgments and to enforce or accept the return of tangible personal property so sold or leased. The attaching creditor shall be entitled to all payments and proceeds of the collateral remaining in the hands of the secured party after the satisfaction of the secured party's security interest.

(d) In cases where the defendant has the liberty to collect amounts due on the collateral or to enforce or accept the return of tangible personal property sold or leased under sales or leases resulting in the attached accounts receivable or chattel paper. The levying officer shall serve the account debtor or obligors obligated on the attached accounts receivable or chattel paper with a copy of the writ and notice of attachment and with the demand to make payment of all amounts due to the levying officer and to deliver to the officer all returnable tangible personal property, except where such property upon its return would constitute inventory and the creditor has attached the inventory pursuant to § 488.360(c).



Comment: This section implements Calif. Commercial Code § 9-311 and provides for the method of levy of the defendant's rights in collateral when it is subject to a perfected security interest. If the security interest is not perfected the rights of the secured party are subordinate to the attaching creditor's lien, Cal. Comm. Code, § 9-301(1)(b). The section codifies the rules applied in such cases as *Axe v. Commercial Credit Corp.*, 227 C.A.2d 216, 38 Cal. Rptr. 558 (1964), *Crow v. Yosemite Creek Co.*, 149 C.A.2d 188, 308 P.2d 421 (1957); *Deering v. Richardson-Kimball Co.*, 109 Cal. 73, at 84, 41 Pac. 801 (1895); *Dubois v. Spinks*, 114 Cal. 289, at 294, 46 Pac. 95 (1896); *Puissegur v. Yarbrough*, 29 C.2d 409, 175 P.2d 830 (1964); *Robinson v. Tevis*, 38 Cal. 611 (1869). According to the principles of these cases a secured party having a perfected security interest in collateral which involves the indebtedness of an account debtor is entitled to the disposition of the collateral, including the collection of payments due thereon without interference owing to a subsequent levy on the pledgor's interest. A qualification of this rule seems to be appropriate where a) the security interest of the secured party is non-possessory, i.e., where the perfection is by filing rather than possession or b) where the secured party has left the collection to the debtor pursuant to Commercial Code, § 9-205 by virtue of a so-called indirect collection arrangement, see U.C.C. § 9-308 Official Comment, Official Comment No. 1. Such arrangements are made in cases of accounts receivable or chattel paper financing.

It seems proper to extend the applicable rules to the return of goods the sales or leases of which have resulted in the attached accounts receivable or chattel paper. Since the levy on the chattel paper extends the attachment lien to the lessor's property interest in the

leased goods and to the security interest of the seller in goods sold, the attaching creditor should be entitled to a return (whether voluntary or involuntary) of such goods to the sheriff, but only if the secured party has not paramount rights to possession.

Any excess of payments made to the secured party and any excess from the pledgee's sale of the goods returned to the secured party must be turned over to the sheriff to be held under the attachment.

The rules codified in the section assure that secured parties are not deprived of their paramount right to freely enforce their security interests and that the account debtors or obligors obligated on the collateral are not exposed to a splitting of causes of action.

If the secured party has left a negotiable document or chattel paper in the possession of the attachment defendant or has left the attachment defendant with the liberty of collection of chattel paper or accounts receivable, the levying officer should seize the document or chattel paper, exercise the powers of the attachment defendant for the benefit of the persons ultimately entitled thereto and the secured party should assert prior entitlement by means of a third party claim.

It should be noted that these rules apply only to separate levies on accounts receivable and chattel paper and that in the case of an on-going business the attaching creditor may be satisfied with a levy on the inventory and the proceeds therefrom pursuant to § 488.360(c). Even where the creditor has levied on chattel paper and inventory pursuant to § 488.360(c) returned goods should remain inventory.

4. Amend Section 488.400,

by striking the words "or document" in subsection (c).

Comment. In the case of a negotiable document no notice of the levy to the issuer of the negotiable document is necessary or advisable, since the bailee cannot deliver the goods to anyone not in possession of the document.

5. Amend Section 488.500:

Add in Section 488.500(a). The attachment lien on chattel paper shall extend to the interest of the lessor in tangible personal property the lease of which has resulted in the chattel paper.

Comment. It seems to be settled that a perfected security interest in chattel paper gives the secured party a perfected interest in the rights to payments evidenced thereby and the security interest in the goods sold, if that security interest is perfected by filing. In re Western Leasing, Inc., 17 U.C.C. Rep. 1369 (D.Ore., Bankruptcy Judge, 1975). There is conflict, however, whether a security interest in chattel paper which is perfected by possession results in a perfected security interest in the lessor's property interest in the leased goods, since the lessor's interest is no security interest in need of perfection, see Comment, 84 Yale L.J. 1722 (1975). This section clarifies that an attachment lien on chattel paper extends to the property interest in the lessor during the life of the lease and after its termination and lapse only upon authorized delivery to the lessor instead of the levying officer.

6. Amend Section 488.540.

Add in Section 488.540

Add at the end of first sentence after the word officer:

unless the attached property is subject to a perfected security interest which entitles the secured party to such payments pursuant to Section 488.430.5.

Comment. The "unless" clause is added to render Section 488.540 consistent with Section 488.430.5.

7. Amend Section 488.500(e) by changing "Section" to "Sections" and by adding "and 488.430.5" after "488.380(a)(1)" and after "488.400(a)(1)."

8. Add new subsection (i) to Section 488.500 reading:

The lien of attachment levied on the defendant's interest in a judgment, deposit account, chose in action, or account receivable subject to a perfected security interest pursuant to Section 488.430.5(a) becomes effective on the date of service on the secured party.

9. Renumber Section 488.500(i) as 488.500(j).

STUDY 39.200 - ENFORCEMENT OF JUDGMENTS  
(COMPREHENSIVE STATUTE)

The Commission continued its consideration of Memorandum 77-3 and the attached staff draft of the Enforcement of Judgments Law. Articles 3 and 4 of Chapter 3 of the draft statute were tentatively approved subject to the following decisions:

CHAPTER 3. EXECUTION

Article 3. Method of Levy

§§ 703.310-703.320. Method of levy

These sections will be revised in view of the decision that the Enforcement of Judgments Law should be self-sufficient and not incorporate the Attachment Law.

§ 703.330. Manner of taking custody; keeper for farm or business

This section should be revised to conform to the substance of the keeper provisions in the Recommendation Relating to Use of Keepers Pursuant to Writs of Execution (A.B. 1007) which contemplates a mandatory two-day keeper (unless the judgment debtor does not consent).

§ 703.340. Levy on deposit account, contents of safe deposit box, not exclusively in name of judgment debtor

Subdivision (j), which provides that a purported levy that does not comply with this section shall be disregarded, should be revised in light of the decision at the March meeting to provide in Section 703.250 for a narrowly-drawn interrogatory to the garnishee designed to elicit whether the garnishee has any property of the debtor or owes a debt to the debtor, regardless of the defects in the procedure through which the creditor attempted to reach the property.

Article 4. Sale

§ 703.510. Sale of property levied upon

If feasible, this section should be revised to provide for the outright sale of negotiable instruments with a ready market and require collection of consumer paper.

§ 703.520. Notice of sale

Persons holding interests of record in real property should be given notice of an execution sale of the property. The last sentence of subdivision (g) concerning the costs of additional advertising for sale should be deleted. The Comment should make clear that reasonable costs of advertising are collectible under the general provisions pertaining to costs. The Comment should note that the judgment debtor may also advertise if he so desires.

§ 703.530. Sale without notice; defacing notice; liability

Subdivision (b), providing for a \$500 forfeiture for defacing a notice of sale, should be deleted.

§ 703.540. Time and place of sale

This section should be redrafted to make clear which aspects of the time, place, and manner of sale are subject to judicial control. Subject to ultimate judicial control, the levying officer should follow reasonable requests of the judgment debtor as to the order and groups in which property is sold. Such requests should be followed if it is likely that the requested manner of sale will yield no less than a different manner of sale is likely to yield.

§ 703.560. Cash payment; exception

In subdivision (a), the words "cash equivalent" should be replaced by "certified check or cashier's check" to codify existing practice.

§ 703.590. Nonpayment of bid; rejection of subsequent bids

The levying officer should have discretion to reject all subsequent bids of a defaulting bidder. Accordingly, the words "on the resale of such property" should be deleted at the end of this section.

§ 703.610. Certificate of sale of personal property

In this section or elsewhere, a provision should be added which provides for the endorsement of negotiable instruments by the levying officer rather than issuance of a certificate of sale of such instruments.

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§ 703.640. Disposition of proceeds of sale

This provision should be redrafted to properly deal with the priorities of prior lienholders. Professor Stefan A. Riesenfeld, the Commission's consultant on creditors' remedies, agreed to provide the staff with a redrafted provision.

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STUDY 39.250 - ENFORCEMENT OF JUDGMENTS (HOMESTEAD EXEMPTION)

The Commission considered Memorandum 77-26 which presented several policy questions concerning the homestead exemption. The Commission tentatively decided to seek the repeal of the declared homestead provisions in the Civil Code and the revision of the claimed homestead provisions in the Code of Civil Procedure. The Commission decided that a consultant should be retained to study the judgment debtor's homestead exemption, the probate homestead, and the marital dissolution homestead. The consultant's study would involve an examination of the relationship between these bodies of law, a resolution of any problems that might arise from the repeal of the declared homestead provisions, and a codification of any desirable rules arising from case law. The consultant might also determine that existing law concerning the claimed homestead exemption should be amended to deal with specific problems on an interim basis until a comprehensive recommendation relating to homestead laws can be prepared. The staff should propose a consultant at the next meeting.



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STUDY 78.50 - UNLAWFUL DETAINER PROCEEDINGS (AB 13)

The Commission considered Memorandum 77-20 and a copy of Assembly Bill 13 as amended in Senate March 29, 1977 (which was handed out at the meeting and is attached to these Minutes as Exhibit 1). The bill as amended is the same as the text of the bill as set out in Memorandum 77-20.

The substance of the following amendments to Assembly Bill 13 (as set out in Exhibit 1 attached) was approved:

AMENDMENTS TO ASSEMBLY BILL 13 AS AMENDED IN SENATE  
MARCH 29, 1977

AMENDMENT 1

On page 2 of the printed bill as amended in Senate March 29, 1977, strike out lines 10 to 13, inclusive, and on page 3, strike out line 1, and insert:

(b) Unless the lessor amends the complaint as provided in paragraph (1) of subdivision (a) of Section 1952.3 to state a claim for damages not recoverable in the unlawful detainer proceeding, the bringing of an action under the provisions of Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure does not affect the lessor's

AMENDMENT 2

On page 3, line 17, strike out 'surrendered' and insert:  
delivered

AMENDMENT 3

On page 3, line 25, strike out 'pleaded and

AMENDMENT 4

On page 3, line 28, after 'Procedure' insert:  
so that possession of the property is no longer in issue and

AMENDMENT 5

On page 3, line 37, strike out 'giving up' and insert:  
delivering

AMENDMENT 6

On page 3, line 38, strike out 'property,' and insert:  
property to the lessor,

AMENDMENT 7

On page 4, line 3, strike out "surrender" and insert:  
delivery

AMENDMENT 8

On page 4, strike out lines 9 to 12, inclusive, and insert:

(c) The case shall proceed as an unlawful detainer proceeding if the defendant's default (1) has been entered on the unlawful detainer complaint and (2) has not been opened by an amendment of the complaint or otherwise set aside.

The substance of the following revised report prepared for the Senate Judiciary Committee containing a Comment to Section 1952 and revised Comment to Section 1952.3 was approved:

REPORT OF SENATE COMMITTEE ON JUDICIARY  
ON ASSEMBLY BILL 13

In order to indicate more fully its intent with respect to Assembly Bill 13, the Senate Committee on Judiciary makes the following report.

Assembly Bill 13 was introduced to effectuate the Recommendation of the California Law Revision Commission Relating to Damages in Action for Breach of Lease, 13 Cal. L. Revision Comm'n Reports 1679 (1976). The following new comment and revised Law Revision Commission comment reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill 13.

Code of Civil Procedure § 1952 (amended)

Comment. Subdivision (b) of Section 1952 is revised to make clear that the bringing of an unlawful detainer proceeding does not affect the lessor's right to bring a separate action for relief under Sections 1951.2, 1951.5, and 1951.8 unless the unlawful detainer proceeding has become an ordinary civil action and the lessor has amended the complaint to state a claim for damages not recoverable in the unlawful detainer proceeding. The lessor may, of course, elect not to so amend the complaint and instead to prosecute the unlawful detainer proceeding to judgment and to bring a separate action for relief under Sections 1951.2, 1951.5, and 1951.8 if the lessor has a cause of action for such relief.

Code of Civil Procedure § 1952.3 (added)

Comment. Section 1952.3 relates to an unlawful detainer proceeding that has become an ordinary civil action.

The provision of subdivision (a) that delivery of possession of the property to the lessor converts an unlawful detainer proceeding into an ordinary civil action codifies prior case law. If the lessee gives up possession of the property after commencement of an unlawful detainer proceeding, the action thus becomes an ordinary one for damages. Union Oil Co. v. Chandler, 4 Cal. App.3d 716, 722, 84 Cal. Rptr. 756, 760 (1970). This is true where possession is given up "before the trial of the unlawful detainer action. Green v. Superior Court, 10 Cal.3d 616, 633 n.18, 517 P.2d 1168, 1179 n.18, 111 Cal. Rptr. 704, 715 n.18 (1974). Accord, Erbe Corp. v. W. & B. Realty Co., 255 Cal. App.2d 773, 778, 63 Cal. Rptr. 462, 465 (1967); Turem v. Texaco, Inc., 236 Cal. App.2d 758, 763; 46 Cal. Rptr. 389, 392 (1965). In this situation, the rules designed to preserve the summary nature of the proceeding are no longer applicable. See, e.g., Cohen v. Superior Court, 248 Cal. App.2d 551, 553-554, 56 Cal. Rptr. 813, 815-816 (1967) (no trial precedence when possession not in issue); Heller v. Melliday, 60 Cal. App.2d 689, 696-697, 141 P.2d 447, 451-452 (1943) (cross-complaint allowable after surrender). The limitation of Section 1952.3 to unlawful detainer proceedings is not intended to preclude application of rules stated in the section in forcible entry or forcible detainer cases.

Paragraph (1) of subdivision (a) makes clear that, when the statutory conditions for the application of Section 1951.2 are met, the damages authorized by that section are among the remedies available to the lessor when an unlawful detainer proceeding has been converted to an ordinary civil action. The paragraph serves, among other purposes, the salutary purpose of avoiding multiplicity of actions. The statutory conditions for the application of Section 1951.2 are that there be a lease, breach of lease by the lessee, and either abandonment by the lessee before the end of the term or termination by the lessor of the lessee's right to possession. See Civil Code § 1951.2(a). The lessor is not required to seek such damages in the unlawful detainer proceeding which has been thus converted but may elect to recover them in a separate action. See Civil Code § 1952(b).

If damages for loss of rent accruing after judgment are sought by the lessor pursuant to paragraph (3) of subdivision (a) of Section 1951.2, the additional conditions of subdivision (c) of that section must be met. And, if the lessor seeks such damages or

any other damages not recoverable in the unlawful detainer proceeding, the last portion of paragraph (1) of subdivision (a) of Section 1952.3 requires the lessor to amend the complaint so that possession of the property is no longer in issue and to state a claim for such damages. If the case is at issue, the lessor's application for leave to amend is addressed to the discretion of the court. See Code Civ. Proc. § 473. The court is guided by a policy of great liberality in permitting amendments at any stage of the proceeding . . . . 3 E. Witkin, California Procedure, Pleading § 1040, at 2618 (2d ed. 1971). If the lessor makes the election so to amend the complaint, the lessor loses the right to bring a separate action for relief under Sections 1951.2, 1951.5, and 1951.8. See Section 1952(b).

When the defendant has delivered possession of the property to the lessor, the defendant is no longer subject to the restrictive rules of unlawful detainer pleading and may cross-complain, whether or not the lessor has amended the complaint. See subdivision (a)(2). Mere delivery of possession does not, however, extend the defendant's time to plead since such time is necessarily determined by the form of the complaint. Thus, as subdivision (b) makes clear, the defendant's response must be filed within the time provided for unlawful detainer proceedings--see Code Civ. Proc. §§ 1167, 1167.3 (five days)--unless the lessor amends the complaint so that possession is no longer in issue in the case. See subdivision (a)(1). If the complaint is so amended, the defendant has a right to answer within 30 days after service thereof or within such time as the court may allow. Code Civ. Proc. §§ 471.5, 586.

The defendant is not obliged to "allege in a cross-complaint any related cause of action" (Code Civ. Proc. § 426.30) unless after delivering possession to the lessor the defendant files a cross-complaint, or files an answer or an amended answer, in response to the amended complaint. See subdivision (a)(2). This limitation of the application of the compulsory cross-complaint statute will protect the defendant against inadvertent loss of a related cause of action.

Once the defendant's default has been entered on the unlawful detainer complaint, whether before or after possession of the property has been delivered to the lessor, the case will thereafter remain an unlawful detainer proceeding unless the default is set aside or the lessor amends the complaint to open the default. See subdivision (c). If the defendant moves to have the default set aside, the motion is addressed to the discretion of the court. See Code Civ. Proc. § 473; M. Moskowitz, P. Honigsberg & D. Finkelshtein, California Eviction Defense Manual § 7.7, at 53 (1971). If the lessor amends the complaint in some substantial way, the default may be waived. The amended complaint is said to open the default. See 4 E. Witkin California Procedure, Proceedings Without Trial § 147, at 2809 (2d ed. 1971).

Minutes

April 7 and 8 1977

Subdivision (d) makes clear that Section 1952.3 has no effect on existing law with respect to unlawful detainer proceedings where possession remains in issue. In such proceedings, there are a number of affirmative defenses the defendant is permitted to raise. See, e.g., Green v. Superior Court, 10 Cal.3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Abstract Investment Co. v. Hutchinson, 204 Cal. App.2d 242, 22 Cal. Rptr. 309 (1962).

APPROVED

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairman

\_\_\_\_\_  
Executive Secretary

AMENDED IN SENATE MARCH 29, 1977  
AMENDED IN ASSEMBLY FEBRUARY 14, 1977  
AMENDED IN ASSEMBLY JANUARY 24, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL

No. 13

Introduced by Assemblyman McAlister

December 7, 1976

An act to add Section 1950.3 to amend Section 1952 of, and to add Section 1952.3 to, the Civil Code, relating to leases.

LEGISLATIVE COUNSEL'S DIGEST

AB 13, as amended, McAlister. Leases: damages.

Existing case law provides that if the tenant gives up possession of real property after commencement of an unlawful detainer proceeding, the action becomes an ordinary civil action for damages.

This bill ~~codifies~~ *would codify* the above case law where possession of the property has been surrendered to the lessor before trial.

This bill ~~also specifies~~ *would specify* that among the remedies available to a lessor when an unlawful detainer proceeding has been converted to an ordinary civil action are the damages authorized by statute if (1) a lessee breaches the lease and abandons the property before the end of the term or if (2) his right to possession is terminated by the lessor because of a breach. This bill permits the recovery of damages for the amount by which unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided only if the lessor first amends his complaint.

This bill ~~also specifies~~ *would specify* that the defendant in

AB 13

— 2 —

such an action may cross-complain and may plead any defenses to the lessor's action for damages. It also provides that the defendant does not waive any related cause of action he has against the plaintiff unless the defendant after giving up possession of the property either files a cross-complaint or files an answer or amended answer in response to the plaintiff's amended complaint.

*This bill would provide that the defendant's time to respond to a complaint for unlawful detainer is not affected by the surrender of possession of the property to the lessor, but, if the complaint is amended to plead for the recovery of specified damages, the defendant has the same time to respond to the amended complaint as in an ordinary civil action.*

*This bill provides that if the defendant's default has been entered on the unlawful detainer complaint and such default has not been set aside, the case shall proceed as an unlawful detainer proceeding.*

*This bill also provides that nothing in the bill affects the pleadings that may be filed, the relief that may be sought, or the defenses that may be asserted in an unlawful detainer proceeding that has not become an ordinary civil action as provided in the bill.*

*Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.*

*The people of the State of California do enact as follows:*

- 1 **SECTION 4.** Section 1952.3 is added to the Civil Code.
- 2 **SECTION 1.** Section 1952 of the Civil Code is amended
- 3 to read:
- 4 1952. (a) Except as provided in subdivision (c), nothing
- 5 in Sections 1951 to 1951.8, inclusive, affects the provisions
- 6 of Chapter 4 (commencing with Section 1159) of Title 3
- 7 of Part 3 of the Code of Civil Procedure, relating to
- 8 actions for unlawful detainer, forcible entry, and forcible
- 9 detainer.
- 10 (b) The bringing of an action under the provisions of
- 11 Chapter 4 (commencing with Section 1159) of Title 3 of
- 12 Part 3 of the Code of Civil Procedure Procedure, whether
- 13 or not such action becomes an ordinary civil action as

1 provided in Section 1952.3, does not affect the lessor's  
2 right to bring a separate action for relief under Sections  
3 1951.2, 1951.5, and 1951.8, but no damages shall be  
4 recovered in the subsequent action for any detriment for  
5 which a claim for damages was made and determined on  
6 the merits in the previous action.

7 (c) After the lessor obtains possession of the property  
8 under a judgment pursuant to Section 1174 of the Code  
9 of Civil Procedure, he is no longer entitled to the remedy  
10 provided under Section 1951.4 unless the lessee obtains  
11 relief under Section 1179 of the Code of Civil Procedure.

12 *SEC. 2. Section 1952.3 is added to the Civil Code, to*  
13 *read:*

14 *1952.3. (a) Except as provided in subdivisions (b) and*  
15 *(c), if the lessor brings an unlawful detainer proceeding*  
16 *and possession of the property is no longer in issue*  
17 *because possession of the property has been surrendered*  
18 *to the lessor before trial or, if there is no trial, before*  
19 *judgment is entered, the case becomes an ordinary civil*  
20 *action in which:*

21 (1) *The lessor may obtain any relief to which he is*  
22 *entitled, including, where applicable, relief authorized*  
23 *by Section 1951.2; but, if the lessor seeks to recover*  
24 *damages described in paragraph (3) of subdivision (a) of*  
25 *Section 1951.2 or any other damages not pleaded and*  
26 *recoverable in the unlawful detainer proceeding, the*  
27 *lessor shall first amend the complaint pursuant to Section*  
28 *472 or 473 of the Code of Civil Procedure to state a claim*  
29 *for such damages and shall serve a copy of the amended*  
30 *complaint on the defendant in the same manner as a copy*  
31 *of a summons and original complaint is served.*

32 (2) *The defendant may, by appropriate pleadings or*  
33 *amendments to pleadings, seek any affirmative relief,*  
34 *and assert all defenses, to which he is entitled, whether*  
35 *or not the lessor has amended the complaint; but*  
36 *subdivision (a) of Section 426.30 of the Code of Civil*  
37 *Procedure does not apply unless, after giving up*  
38 *possession of the property, the defendant (i) files a*  
39 *cross-complaint or (ii) files an answer or an amended*  
40 *answer in response to an amended complaint filed*



AB 13

— 4 —

1 pursuant to paragraph (1).

2 (b) The defendant's time to respond to a complaint for  
3 unlawful detainer is not affected by the surrender of  
4 possession of the property to the lessor; but, if the  
5 complaint is amended as provided in paragraph (1) of  
6 subdivision (a), the defendant has the same time to  
7 respond to the amended complaint as in an ordinary civil  
8 action.

9 (c) If the defendant's default has been entered on the  
10 unlawful detainer complaint and such default has not  
11 been set aside, the case shall proceed as an unlawful  
12 detainer proceeding.

13 (d) Nothing in this section affects the pleadings that  
14 may be filed, relief that may be sought, or defenses that  
15 may be asserted in an unlawful detainer proceeding that  
16 has not become an ordinary civil action as provided in  
17 subdivision (a). to read:

18 1952.2: If the lessor brings an unlawful detainer  
19 proceeding and possession of the property is no longer in  
20 issue because possession of the property has been  
21 surrendered to the lessor before trial:

22 (a) The case may proceed as an ordinary civil action.

23 (b) The lessor may obtain any relief to which he is  
24 entitled, including, where applicable, relief authorized  
25 by Section 1951.9. If the lessor seeks to recover damages  
26 described in paragraph (3) of subdivision (a) of Section  
27 1951.9, the lessor shall first amend the complaint pursuant  
28 to Section 472 or 473 of the Code of Civil Procedure.

29 (c) The defendant may, by appropriate pleadings or  
30 amendments to pleadings, seek any affirmative relief,  
31 and assert all defenses, to which he is entitled; but  
32 subdivision (a) of Section 196.30 of the Code of Civil  
33 Procedure does not apply unless, after giving up  
34 possession of the property, the defendant (1) files a  
35 cross/complaint or (2) files an answer or an amended  
36 answer in response to an amended complaint filed  
37 pursuant to subdivision (b).

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