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OPINION	:	No. 79-1009
of	:	November 30, 1979
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SUBJECTS APPLICABILITY OF USURY LAWS TO SALE OF REAL PROPERTY—Sellers of real property, residential or commercial, who take a cash down payment and promissory note for the balance of the purchase price, are nor limited by the usury laws in the interest rate they charge on the promissory note.

The Honorable Louis J. Papan, Assemblyman, 19th Assembly District, has requested an opinion on the following question:

Is the seller of real property, residential or commercial, who takes a cash down payment and a promissory note for the balance of the purchase price, limited by the usury laws in the interest rate he charges on the promissory note?

CONCLUSION

The seller of real property, residential or commercial, who takes a cash down payment and a promissory note for the balance of the purchase price, is not limited by the usury laws in the interest rate he charges on the promissory note.

ANALYSIS

This opinion request refers to a particular discussion contained in a 1958 opinion of this office, 32 Ops. Cal. Atty. Gen. 9 (1958) and by the question posed which essentially asks if that discussion is still a correct statement of the law in California. That discussion was as follows:

> "In a bona fide transaction for the sale of property, deferred payments from the buyer to the seller do not constitute a loan, and the usury laws have no application (*Verbeck v. Clymer*, 202 Cal. 557). In the *Verheck* case the court stated at page 563:
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> ". . . The transaction was not a subterfuge devised to conceal what was in fact a loan . . . the sale of one's own property is not a loan whatever be the terms or conditions of purchase. . . He [the owner] may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not constitute usury however great the difference between the two prices, unless the buying and selling was a mere pretense; . . . ." (*Id*., at p. 11.)[1]

The case cited, *Verbeck v. Clymer* (1927) 202 Cal. 557, is still the law in California. This is evident from the recent decisions of the Court of Appeal in *Fox v. Federated Department Stores, Inc.* (1979) 94 Cal. App. 3d 867, and of the California Supreme Court in *Boerner v. Colwell Co*. (1978) 21 Cal. 3d 37, which relied upon *Verbeck v. Clymer*. In the latter case the California Supreme Court stated.

> "One area of great concern in this respect-to the commentators as well as to the courts-has been that of credit sales. *It has long been the law in this jurisdiction, as well as in the vast majority of other jurisdictions, that a bona fide credit sale is not subject to the usury law because it does not involve a 'loan' or 'forbearance' of money or other things of value.*
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> "The leading case on the subject in this jurisdiction—*Verbeck v. Clymer* (1927) 202 Cal. 557 [261 P. 1017]—was an action in ejectment based

[1] The "usury laws" are found in Article XVI, section 1 of the California Constitution and Statutes of 1919, p. lxxxiii. Prior to its amendment at the November 5, 1979 special election, Article XVI, section 1 provided that the interest charged on "any loan or forebearance of any money, goods or things in action" could not exceed 10 percent per annum, unless the lender was specifically exempted therein. The 1979 amendment permits a higher rate of interest based upon a formula set forth therein for other than "personal, family or household loans." (Some lenders are fully exempt.)

> upon an alleged default in payment under a contract for the sale of real property. The buyers in possession defended on the ground that the transaction represented by the contract was usurious, calling as it did for interest in excess of the legal rate on deferred payments, which were to extend over a 15–year period; they sought not only nullification of the interest provision in the contract but also treble damages. Declaring these claims 'astonishing,' we made haste to reject them: '[W]e have no hesitancy whatsoever in declaring that the transaction set up in the answer and cross-complaint is not in any sense a loan within the meaning of said usury law. The contract is admittedly a bona fide one of sale and purchase of real property where the title is retained by the vendor. The purchase price is therein named and the terms of sale are fixed and certain deferred payments are provided for. There is in the transaction no element of a loan. The parties were unfettered, dealt with each other at arm's-length and in apparent good faith. The transaction was not a subterfuge devised to conceal what was in fact a loan. . . . *"On principle and authority, the owner of property, whether real or personal, has a perfect right to name the price on which he is willing to sell, and to refuse to accede to any other. He may offer to sell at a designated price for cash or at a much higher price on credit, and a credit sale will not consatute [sic] usury however great the difference between the two prices, unless the buying and selling was a mere pretense,' and it has been held that it is not material that the agreement for the purchase price in the future, instead of specifying the whole sum then to be paid, names a particular sum as principal, and declares that it shall draw interest at a rate which, were the transaction a borrowing and lending, would clearly he usurious,' . . .'"* (*Id*., at pp. 562–563.)" (*Id*., at pp. 45–46, emphasis added.)

(See also *Lenis v. Dean* (1976) 64 Cal. App. 3d 845, 848–849; Compare *Crestwood Lumber Co. v. Citizens Say. & Loan Assn.* (1978) 83 Cal. App. 3d 819; and see generally Lowell, *A Current Analysis of the Usury Laws A National View* (1971) 8 San Diego 1. Rev. 193, 220–224: "Thus, in California it makes no difference that the interest charged by the seller on a purchase money credit obligation exceeds the legal rate." (*Id*., at p. 222).)

Accordingly, if the owner of real property, whether residential or commercial, sells his property and receives therefor a down payment and a promissory note for the balance of the purchase price, he may set any interest rate the purchaser agrees upon on the promissory note without violating California's "usury laws."

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