

March 5, 1971

Time

Place

March 11 - 7:00 p.m. - 10:00 p.m.
March 12 - 9:00 a.m. - 5:00 p.m.
March 13 - 9:00 a.m. - 4:00 p.m.

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

March 11-13, 1971

March 11

1. Minutes of February 19-20 Meeting (sent 3/3/71)
2. Administrative Matters
3. Study 36.60 - Condemnation (Relocation Assistance)
 - First Supplement to Memorandum 71-14 (enclosed)
 - Third Supplement to Memorandum 71-14 (enclosed)
 - Memorandum 71-14 (and attached Tentative Recommendation and Draft Statute)(enclosed)
 - Second Supplement to Memorandum 71-14 (enclosed)
4. Study 36.35 - Condemnation (Interim Financing for the Condemnee for Relocation)
 - Memorandum 70-114 (sent 2/23/71)
5. Study 71 - Pleading
 - Memorandum 71-16 (enclosed)

March 12-13

6. Study 39 - Attachment, Garnishment, Exemptions From Execution
 - Oral Report by Professor Riesenfeld on Overall Progress on Attachment, Garnishment, Exemptions Study
 - Memorandum 71-17 (sent 3/3/71)
 - Discharge From Employment Because of Garnishment
 - Memorandum 71-15 (sent 3/3/71)
 - Recommendation (attached to Memorandum)

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Background Materials

Memorandum 71-6 (sent 1/22/71)
First Supplement to Memorandum 71-6 (sent 1/26/71)
Second Supplement to Memorandum 71-6 (sent 2/23/71)
Third Supplement to Memorandum 71-6 (sent 2/23/71)
Second Supplement to Memorandum 71-9 (sent 2/4/71)

Draft Statute

Memorandum 71-9 (sent 2/4/71)
Revised Draft Statute (attached to Memorandum)
First Supplement to Memorandum 71-9 (sent 1/26/71)
Third Supplement to Memorandum 71-2 (sent 1/7/71; another
copy sent 2/4/71)
Third Supplement to Memorandum 71-9 (sent 2/23/71)

Wage Assignments

Memorandum 71-10 (sent 1/26/71)

Retirement Funds

Memorandum 71-11 (sent 3/3/71)

Bank Accounts

Memorandum 71-12 (sent 2/23/71)
First Supplement to Memorandum 71-12 (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MARCH 11, 12, AND 13, 1971

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on March 11, 12, and 13, 1971.

Present: Thomas E. Stanton, Jr., Chairman
John D. Miller, Vice Chairman
G. Bruce Gourley
Noble K. Gregory
John N. McLaurin
Marc W. Sandstrom (March 11 and 12)

Absent: Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, and Nathaniel Sterling, members of the Commission's staff, also were present; E. Craig Smay of the Commission's staff was present on March 12 and 13. Professor Stefan A. Riesenfeld, Boalt Hall, consultant on the study of attachment, garnishment, and exemptions from execution, was present on March 12 and 13.

The following observers were present for the portions of the meeting indicated:

Thursday, March 11

Garrett H. Elmore, State Bar of California
Norval Fairman, Department of Public Works, Division of Highways
John P. Fraser, Irrigation Districts Association of California

Friday, March 12

John D. Bessey, California Association of Collectors
James M. Connors, Board of Trade of San Francisco
Don Kidder, Stanford Intern for Legal Aid (Redwood City)

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Earl A. Markovitz, Creditors Service of Los Angeles
Carl M. Olsen, Chief Deputy, San Francisco Sheriff's Department
Peter Roos, Western Center on Law and Poverty
Robert Slattery, Legal Aid Society (Redwood City)

Saturday, March 13

John D. Bessey, California Association of Collectors
Earl A. Markovitz, Creditors Service of Los Angeles

Sitting with the Commission on March 12 was Charles A. Legge, Chairman,
Special State Bar Committee on Attachment and Garnishment.

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ADMINISTRATIVE MATTERS

Approval of Minutes of February 19 and 20, 1971, Meeting. The Minutes of the February 19 and 20, 1971, meeting were approved as submitted.

Future meeting schedule. The next two meetings were tentatively scheduled for April 30-May 1, 1971, and May 21-22, 1971. The Chairman and Executive Secretary were directed to explore the possibility of having the first of these meetings in Sacramento and the second in Los Angeles.

Resolution Regarding Lease of Office Space

Upon motion made and duly seconded, the following resolution was unanimously adopted by those Commissioners present:

Resolution

The California Law Revision Commission authorizes the leasing of the space presently occupied by the Commission adjacent to the Stanford Law School; the lease is to be for five years, commencing upon expiration of the lease now in effect for such space; the rent is to be \$5,000 per year; and the lease is otherwise to conform substantially to the lease now in effect.

John H. DeMouly, the Executive Secretary, is authorized and directed to execute the new lease for the California Law Revision Commission.

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**STUDY 36.35 - CONDEMNATION LAW AND PROCEDURE (INTERIM FINANCING
FOR THE CONDEMNEE FOR RELOCATION)**

The Commission briefly considered Memorandum 70-114 and decided to postpone further review of this topic until the topic of compensation generally is presented.

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STUDY 36.60 - CONDEMNATION LAW AND PROCEDURE
(RELOCATION ASSISTANCE)

The Commission considered Memorandum 71-14 (the attached draft statute) and the First, Second, and Third Supplements thereto. In the light of current California legislative activity in this area of the law, the Commission decided to suspend its active review of this area but directed the staff to keep abreast of and to report upon developments as they occur. In the absence of a greater urgency than appears now, the Commission will reexamine the area of relocation assistance in connection with the general topic of compensation.

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**STUDY 39.10 - ATTACHMENT, GARNISHMENT, AND EXEMPTION FROM
EXECUTION GENERALLY**

The Commission received the report of its consultant, Professor Riesenfeld, concerning the difficulties he had encountered in examining the basic source materials necessary for his empirical study of attachment procedures. The Commission directed the Chairman and the Executive Secretary (1) to contact the Alameda County Counsel to determine what, if any, arrangements can be made to permit Professor Riesenfeld to examine certain records held in the Sheriff's Office and (2) to consult with the Legislative Members of the Commission with regard to the possible exercise of their rights as a joint interim investigating committee.

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STUDY 39.20 - ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM EXECUTION
(DISCHARGE FROM EMPLOYMENT BECAUSE OF GARNISHMENT)

The Commission considered Memorandum 71-15, the attached recommendation relating to discharge from employment because of garnishment, and a letter from a representative of the California Conference of Employer Associations critical of the proposed recommendation. The Commission approved the recommendation for printing and submission to the Legislature, after having made the following changes:

(1) Section 2929, which is to be added to the Labor Code, was revised to read in substance as follows:

2929. (a) As used in this section:

(1) "Garnishment" means any judicial procedure through which the wages of an employee are required to be withheld for the payment of any debt.

(2) "Wages" has the same meaning as that term has under Section 200.

(b) No employer may discharge any employee by reason of the fact that the garnishment of his wages has been threatened. No employer may discharge any employee by reason of the fact that his wages have been subjected to garnishment for one judgment. A provision of a contract of employment that provides an employee with less protection against discharge by reason of the fact that his wages have been subjected to garnishment than is provided by this subdivision is against public policy and void.

(c) Unless the employee has greater rights under the contract of employment, the wages of an employee who is discharged in violation of this section shall continue until reinstatement notwithstanding such discharge, but such wages shall not continue for more than 30 days and shall not exceed the amount of wages earned during the 30 calendar days immediately preceding the date of the levy of execution upon the employee's wages. The employee shall give notice to his employer of his intention to make a wage claim under this subdivision within 30 days after being discharged; and, if he desires to have the Labor Commissioner take an assignment of his wage claim, the employee shall file a wage claim

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with the Labor Commissioner within 60 days after being discharged. The Labor Commissioner, may, in his discretion, take assignment of wage claims under this subdivision as provided for in Section 96.

(d) Nothing in this section affects any other rights the employee may have against his employer.

(e) This section is intended to aid in the enforcement of the prohibition against discharge for garnishment of earnings provided in the Consumer Credit Protection Act of 1968 (15 U.S.C. §§ 1671-1677) and shall be interpreted and applied in a manner which is consistent with the corresponding provisions of such act.

(2) Any references to the benefit employers may receive from enactment of a civil penalty were deleted from the recommendation and the Comments.

(3) The reference in the Comment to the Wage and Hour Division interpretative information was qualified by a sentence reading, "It should be noted that this interpretation of the federal statute is subject to continuing revision and is not necessarily a correct interpretation of that statute."

(4) The reference in the Comment to employee rights under a contract allowing discharge for "good cause" was amended to refer simply to "cause."

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STUDY 39.30 - ATTACHMENT, GARNISHMENT, AND EXEMPTION FROM
EXECUTION (EARNINGS PROTECTION LAW)

The Commission considered the Third Supplement to Memorandum 71-2, Memorandum 71-6, and the First, Second, and Third Supplements thereto, Memorandum 71-9, and the First, Second, and Third Supplements thereto, and the revised Draft Statute attached to Memorandum 71-9. The draft statute was carefully reviewed and the staff was directed to prepare a tentative recommendation incorporating such statute, if possible, for the next Commission meeting. The following action was taken regarding specific sections of the statute:

- (1) Section 723.10. Approved without change.
- (2) Section 723.11. The staff was directed to reexamine the term "earnings" and the manner in which it is used throughout the statute to determine whether the term is defined adequately to provide appropriately for tips, advances, employer contributions, vacation pay, room and board, and other forms of compensation. The staff should consider whether and how the term "employee" could be defined. The Comment should be revised to refer to the separate treatment of bank accounts, retirement and other funds, and wage assignments.
- (3) Section 723.20. The third sentence of the Comment was revised to simply refer to Labor Code Section 300 for the provisions relating to wage assignments.
- (4) Section 723.21. The word "may" was changed to "shall."

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(5) Section 723.22. Approved without change. However, the term "earnings" used here should be restricted to those earnings payable by the employer affected.

(6) Section 723.23. Section 723.23 was revised to read substantially as follows:

723.23. Except as otherwise provided by statute, an earnings withholding order expires four months after the last day of the pay period during which the employer receives the order.

(7) Section 723.24. Subdivision (a) was deleted. The Comment should make clear the effect of bankruptcy proceedings on this collection procedure and the informational pamphlet prepared for all employers should warn them of the effects upon the order of the employee filing for bankruptcy.

(8) Section 723.25. Subdivision (a) was revised to provide in substance that, if two or more orders are received by an employer on the same day, the one issued pursuant to the judgment first entered should be given effect. If two or more such orders are also based on judgments entered the same day, then the employer may select one of such orders at his discretion. The reference in subdivision (b) should be corrected as required.

(9) Section 723.26. Paragraph (3) of subdivision (b) was revised to provide:

(3) A withholding order for support remains in effect as a continuous withholding order until it expires by its terms or the court orders its modification or termination.

Subdivision (4) provides a priority for support orders over tax orders. The staff was directed to determine whether this changes existing law and, if so, to note this change in the Comment to Section 723.26.

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(10) Section 723.27. The staff was directed to determine to what extent Section 723.27 would change existing law as to state taxes. The area of local taxes should also be examined to see if these are presently collected in the same manner as an ordinary debt.

(11) Section 723.28. Approved without change.

(12) Section 723.29. This section should be revised to make clear that the agreement referred to must be in writing and its period of effectiveness is limited to the four-month period of the order which the agreement supersedes. The staff was directed to consider whether this period would create a preference which violates federal bankruptcy law. The agreement should not be permitted to defraud creditors. Consideration should be given as to how and under what circumstances the agreement may be rescinded. The statute should make clear that an employer who acts in good faith should be protected throughout in relying upon orders and notices received which appear proper on their face.

(13) Section 723.30. Approved without change.

(14) Section 723.31. Approved without change.

(15) Section 723.32. The notice provided here should be in writing.

(16) Section 723.50. This section was approved as a working model.

The staff was directed to clarify the term "gross earnings" by reference to those earnings which the specific employer is required to report for federal income tax purposes. The staff was also directed to prepare a table comparing the amounts which would be withheld pursuant to this scheme with the amounts withheld pursuant to existing law (federal). The first two sentences of subdivision (e) were revised to provide:

(e) The State Administrator shall prepare withholding tables for determining the amount to be withheld from the gross earnings of employees for representative pay periods.

(17) Section 723.51. Section 723.51 should be revised to make clear that it provides an exemption only where necessary for the support of the debtor and his family at a basic subsistence level--the section is not intended to assist a debtor to maintain his current life style at a level higher than the basic level.

(18) Section 723.100. Approved without change.

(19) Section 723.101. The last sentence of paragraph (3) of subdivision (a) was revised to read: "Both of these forms shall be provided in the number of copies required by the Judicial Council."

Subdivision (b) was revised to provide in substance:

(b) The documents and forms referred to in this section shall be mailed to the judgment debtor at his last known residence address or, if no such address is known, to the judgment debtor in an envelope marked "Personal--Important Documents" addressed to the judgment debtor at the place where he is employed.

The statute should make clear somewhere that the failure of the judgment debtor to receive the notice and forms as provided in Section 723.101 does not affect the validity of the earnings withholding order.

(20) Section 723.102. Deleted.

(21) Section 723.103. This section should be revised to make clear that an order obtained pursuant to stipulation is subject to challenge for collusion and fraud. The Comment should make clear by reference that a debtor may not waive his protection from garnishment and that an order may not be issued which permits the taking of more than federal law would allow. This would not, however, preclude a voluntary wage assignment in a greater amount or a larger share from one employer in a multiple employment situation.

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(22) Section 723.104. Subdivision (b) was revised to provide substantially as follows:

(b) The hearing shall proceed whether or not the judgment debtor or the judgment creditor or their representatives are present. The court shall require that the judgment debtor's claim be established by proof as required by law whether or not the judgment creditor or his representative is present at the hearing.

(23) Section 723.105. Paragraph (2) of subdivision (a) was deleted. The staff was directed to reconsider to what extent a creditor should be entitled to further hearings within the four-month garnishment period. The staff was further directed to draft a provision to be incorporated into the statute at some point which would require a creditor to file a satisfaction of judgment in the court which issues an earnings withholding order when the judgment upon which the order is based is satisfied prior to the expiration date of the order.

(24) Section 723.106. This section should be revised to make clear that "multiple employment" also includes multiple sources of income such as tips and retirement benefits.

(25) Section 723.107. A Comment should be added here to explain the relationship of subdivision (b) to voluntary wage assignments.

(26) Section 723.108. The staff was directed to consider a general provision which authorizes service of the order and other documents required to be served by any means, including personal service, but which limits the recovery of costs of service to an amount not to exceed the cost of service by certified mail.

The first clause of subdivision (a) was deleted.

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- (27) Section 723.109. Approved without change.
- (28) Section 723.110. Approved without change.
- (29) Section 723.111. This section was revised to permit a creditor to apply for another order to collect for the same judgment 10 days after expiration of a prior order. However, the staff was directed to ask Professor Warren to examine the scheme having in mind the possibility that the first creditor to reach a debtor might be able to exclude other creditors indefinitely.
- (30) Section 723.120. Paragraph (4) of subdivision (a) should be revised to refer properly to bankruptcy proceedings.
- (31) Section 723.121. This section should be rephrased in the third person and revised to refer properly to bankruptcy proceedings and to the failure to appear for a hearing.
- (32) Section 723.122. Approved without change.
- (33) Section 723.123. Paragraphs (2) and (3) of subdivision (b) should refer to "earnings and other income."
- (34) Section 723.124. Paragraph (4) of subdivision (a) must be revised to refer properly to bankruptcy proceedings.
- (35) Section 723.125. Approved without change.
- (36) Section 723.126. Subdivision (a) was revised to read:
- (a) The State Administrator shall prepare an Informational Pamphlet for employers.
- (37) Section 723.130. This section was deleted. The introductory Comment to the article was revised to delete the words "not just those violations listed in this article."

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(38) Section 723.131. Approved without change. The staff was directed to draft a section making clear that an employer's failure to comply with a properly served order could subject him to sanctions for contempt of court.

(39) Section 723.132. Deleted.

(40) Section 723.133. Approved without change.

(41) Section 723.134. Deleted.

(42) Section 723.150. Approved without change.

(43) Section 723.151. Approved without change.

(44) Section 723.152. The words "attempting to ascertain" were revised to read "ascertaining."

(45) Section 723.153. Approved without change.

(46) Section 723.154. The staff was directed to revise this section to make clear that ordinarily the State Administrator should first proceed with a cease and desist order. If, however, this would be undesirable, the Administrator should be authorized to obtain from a court a temporary restraining order and preliminary injunction.

(47) Section 723.155. Approved without change.

(48) Section 723.156. Deleted.

(49) Section 723.157. Approved without change.

(50) Section 723.158. Approved without change.

(51) Section 723.159. Deleted.

(52) Section 723.160. Approved without change.

(53) Section 10. Operative date should be July 1, 1973.

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STUDY 39.50 - ATTACHMENT, GARNISHMENT, AND EXEMPTIONS
FROM EXECUTION (EARNINGS PROTECTION LAW--WAGE ASSIGNMENTS)

The Commission considered Memorandum 71-10, including the proposed revision of Section 300 of the Labor Code relating to wage assignments. The Commission directed the staff to reexamine this section in the light of the following decisions:

- (1) The term "assignment" should include "sale or assignment of, or order for."
- (2) The statute should make clear that, as to future wages, an earnings withholding order has priority over a wage assignment.
- (3) It should be determined whether this statute applies to all employees --public as well as private.
- (4) Subdivision (f) should be revised to make clear that the listed deductions for employee contributions may be taken without compliance with the formalities required by Section 300. However, as to future wages, the provisions of the Earnings Protection Law control the treatment of these contributions with regard to whether they are subject to garnishment.

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STUDY 39.60 - ATTACHMENT, GARNISHMENT, AND EXEMPTIONS FROM
EXECUTION (RETIREMENT FUNDS)

The Commission considered Memorandum 71-11 relating to the exemption from execution and attachment of employee pension, retirement, disability, and death benefits. The staff was directed to revise Section 690.18 and proposed Section 690.185 (Exhibit II) to implement the following decisions:

(1) Benefits paid out of a private retirement plan should be exempt upon claim made pursuant to Code of Civil Procedure Section 690.50. Payments from a general benefit plan in the nature of a supplement to or continuation of earnings, for example, during sickness or vacation, should not be given a special exemption.

(2) Accumulated, undistributed benefits of private employees should be automatically exempt from execution and attachment. Benefits here should be phrased or defined broadly enough to cover accumulated benefits of all kinds.

(3) Keogh Act benefit plans should be treated in the same manner as other private benefit plans.

(4) The definition of "vacation credits" provided in proposed subdivision (c) should be deleted.

(5) References to "union retirement plans" throughout Section 690.185 should be changed to "union or joint employer-employee retirement plans."

(6) The Comment to proposed Section 690.185 should make clear the extent to which this section would change existing law.

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(7) The phrase "a resident of the state" should be deleted from the first line of existing Code of Civil Procedure Section 690.18(a) and from proposed Section 690.185.

(8) Consideration should be given to the manner in which the exemption for distributed retirement benefits might be limited in order to prevent an unwarranted abridgment of the rights of creditors.

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STUDY 71 - PLEADING

The Commission considered Memorandum 71-16, Senate Bill 201 introduced to effectuate the pleading recommendation, the printed recommendation relating to pleading, and an oral report by Mr. Elmore of the State Bar as to the actions taken by the Northern Section of the Committee on Administration of Justice. The following actions were taken:

Section 425.20. Separate statement of causes

Mr. Elmore reported that the Northern Section of the Committee on Administration of Justice joined with the Southern Section in opposing this section. In the interest of avoiding objections at the hearing on Senate Bill 201, the Commission decided to amend Section 425.20 to restate the existing California statute (Code of Civil Procedure Section 427). Section 425.20 was revised to read in substance as follows:

425.20. (a) Except as otherwise provided by law, causes of action shall be separately stated.

(b) In any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his wife, moneys expended and indebtedness incurred by reason of such injury to his wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband.

(c) Causes of action for injuries to person and injuries to property, growing out of the same tort, need not be separately stated.

The Comment to this section should state that it continues the substance of the separate statement portion of the last paragraph of former Code of Civil Procedure Section 427.

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Section 426.20. Compulsory joinder of related causes of action

After considerable discussion, the Commission decided not to make any change in Section 426.20. A revision was made in Section 426.60 (see infra), however, as a result of the discussion of Section 426.20.

Section 426.60. Special proceedings and small claims actions excepted

Section 426.60 is to be revised to make the compulsory joinder of causes provisions inapplicable in an action where the only relief sought is a declaratory judgment. This could be accomplished by adding a new subdivision to Section 426.60 to read:

(c) This article does not apply where the only relief sought is a declaration of the rights and duties of the respective parties in an action for declaratory relief under Chapter 8 (commencing with Section 1060) of Title 14 of Part 2 of the Code of Civil Procedure.

The Comment to the new subdivision should contain a reference to collateral estoppel and res judicata.

Section 428.30. Joinder of causes of action against cross-defendant

It was noted that the right to unlimited joinder of causes of action against parties who are properly made parties to the action is permitted by the Federal Rules of Civil Procedure and by perhaps a majority of the states which follow the federal practice. After discussion, the Commission decided to retain Section 428.30.

New Matter: Service of pleadings upon all parties

The Commission discussed whether pleadings should be required to be served on all parties. It was noted that the federal rules include this requirement. However, the change was considered one that should be carefully

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reviewed and comments solicited and reviewed before it would appropriately be proposed by the Commission. Accordingly, the Commission decided not to recommend this change--to require service of pleadings on all parties--to the Legislature and decided not to amend Senate Bill 201 to so require.

Sections 430.10-430.80. "Objections" to pleadings

Mr. Elmore elaborated on the concern of the Southern Section to the use of the term "objection" in Sections 430.10 and 430.20. After discussion, the introductory clause of Section 430.10 and the introductory clause of Section 430.20 were revised to read:

430.10. The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:

430.20. A party against whom an answer has been filed may object, by demurrer as provided in Section 430.30, to the answer upon any one or more of the following grounds:

Section 431.70. Set-off

This section was discussed but no change was made in the section. Mr. Elmore is to give the section further study.

Section 1048. Severance or consolidation for trial

The Commission discussed whether provisions relating to the entry of a separate final judgment should be included in the proposed legislation. The view was expressed that the problem is exceedingly complex under the existing case law and drafting appropriate statutory provisions would be difficult. The Commission decided that an attempt might be made to draft

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such a provision for the next meeting with a possibility of thereafter amending the provision into Senate Bill 201 if a satisfactory provision can be drafted.

The Comment to Section 1048 should be amended to add the following paragraph:

The authority of a court to make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, including separate trial, is contained in Section 379.5.

Conforming Changes

Changes needed to conform the bill and Comments to the policy decisions set out above shall be made. For example, a conforming change is needed in Section 430.10(e).