

September 30, 1971

Time

October 8 - 9:30 a.m. - 5:00 p.m.
October 9 - 9:00 a.m. - 3:00 p.m.

Place

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

October 8-9, 1971

OCTOBER 8

1. Minutes of September 9-11 Meeting (sent 9/28/71)

2. Administrative Matters

Memorandum 71-70 (sent 9/28/71)

Memorandum 71-71 (sent 9/28/71)

Memorandum 71-73 (enclosed)

3. Study 36.50 - Condemnation (Compensation)

Philosophy of Compensation

Memorandum 71-36 (sent 7/21/71)

The Larger Parcel

Memorandum 71-63 (sent 8/26/71)

Background Study (attached to Memorandum)

Compensation in Case of Partial Take

Memorandum 71-64 (sent 8/26/71)

4. Study 36 - Approval of Various Provisions of Comprehensive Statute

Memorandum 71-67 (sent 9/28/71)

Statutory Provisions (attached to Memorandum) - 1st Supp. Memo 71-67

Memorandum 71-72 (sent 9/28/71)

5. Study 36.80 - Procedural Aspects

Memorandum 71-68 (sent 9/29/71)

Draft Statute (attached to Memorandum)

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6. Study 39 - Attachment, Garnishment, Execution

Employees' Earnings Protection Law

Memorandum 71-69 (sent 9/29/71)

First Supplement to Memorandum 71-69 (to be sent)

Tentative Recommendation (You received a copy for the September meeting; please bring it to the October meeting.)

Prejudgment Attachment

Presentation by Commission's consultant

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
OCTOBER 8 AND 9, 1971
San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on October 8 and 9, 1971.

Present: Thomas E. Stanton, Jr., Chairman
John D. Miller, Vice Chairman
G. Bruce Gourley
John N. McLaurin
Marc W. Sandstrom

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

Messrs. John H. DeMouilly, Jack I. Horton, E. Craig Smay, and Nathaniel Sterling, members of the Commission's staff also were present. On October 8, Sideon Kanner and Norman E. Matteoni--Commission consultants on condemnation law and procedure--were present; on October 9, Professor Riesenfeld--Commission consultant on attachment, garnishment, and execution--also was present.

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

Friday, October 8

Edward J. Connor, Jr., State Department of Public Works, Sacramento
Norval Fairman, State Department of Public Works, San Francisco
Lloyd Hinkelman, Office of Attorney General, Sacramento
James Markle, State Department of Water Resources, Sacramento
John M. Morrison, Office of Attorney General, Sacramento
Terry C. Smith, Los Angeles County Counsel
Gerald J. Thompson, Santa Clara County Counsel

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Saturday, October 9

Barbara Banoff, University of Santa Clara School of Law
E. E. Barlangl, President Elect, California Association of Collectors
Lawrence H. Cassidy, Treasurer, California Association of Collectors
Loren S. Dahl, Sacramento Attorney
Max Ferber, California Association of Collectors, Los Angeles
John Folcarelli, Secretary, California Association of Collectors
Jay D. Hanson, Stanford Law Student
O. J. LeBaron, President, California Association of Collectors
Robert P. Leonardini, Vice President, California Association of
Collectors
Emil A. Markovitz, Creditor's Service, Los Angeles
Howard L. Nicola, Legislative Chairman, California Association of
Collectors
Albert J. Reyff, Dept. of Industrial Relations, San Francisco
Richard A. Weiss, Los Angeles Attorney

ADMINISTRATIVE MATTERS

Correction and Approval of Minutes of September 9-11, 1971, Meeting

The following correction was made in the Minutes for the September 9-11, 1971, meeting, and the Minutes as so corrected were approved: On page 17, line 2, substitute "amendments" for "amendmants."

Schedule for Future Meetings

The following is the schedule for future meetings:

<u>Date</u>	<u>Time</u>	<u>Place</u>
November 4 (evening)	7:00 p.m. - 10:00 p.m.	Stanford Law School
November 5	9:00 a.m. - 5:00 p.m.	Stanford University
November 6	9:00 a.m. - 11:00 a.m.	Stanford, CA. 94305
December 9 (evening)	7:00 p.m. - 10:00 p.m.	State Bar Building
December 10	9:00 a.m. - 5:00 p.m.	601 McAllister Street
December 11	9:00 a.m. - 1:00 p.m.	San Francisco, CA. 94102

1971 Legislative Program

The following is the status of the 1971 Legislative Program.

Resolutions Adopted

SCR 22 (continues authority to study previously authorized topics) Res. Ch. 74

SCR 23 (authorizes study of two new topics) Res. Ch. 75

Bills Enacted

Assembly Bill 333 (inverse condemnation insurance) Ch. 140

Senate Bill 201 (pleading revision) Ch. 244

Senate Bill 953 (technical pleading revision) Ch. 950

Bill Pending

Senate Bill 954 (discharge from employment)

Note: This bill has passed the Senate and is presently pending in the Assembly Labor Relations Committee. The bill is opposed by the Conference of California Employers.

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Indexing of Volume 10

The Commission considered Memorandum 71-71, containing a staff suggestion that Mrs. Margaret Wyman, who is employed by the Continuing Education of the Bar, be retained as the indexer for Volume 10 of the Commission's Reports, Recommendations, and Studies. Mrs. Wyman indexed Volume 9.

The staff estimated that Volume 10 will consist of approximately 800 pages. Past contracts have provided compensation at approximately one dollar a page.

A motion was unanimously adopted that the Executive Secretary be directed to execute a contract with Mrs. Margaret Wyman for the indexing of Volume 10 of the Commission's Reports, Recommendations, and Studies, compensation to be \$800, and travel expenses authorized only when she is directed to meet with the Executive Secretary to discuss the index.

Approval of Sick Leave and Vacation for Executive Secretary

The Chairman, Vice Chairman, Assistant Executive Secretary, and (in the absence of the Assistant Executive Secretary) the Administrative Assistant are authorized to approve vacation and sick leave requests by the Executive Secretary.

STUDY 36 - CONDEMNATION (APPROVAL OF VARIOUS PROVISIONS OF
COMPREHENSIVE STATUTE)

The Commission considered Memorandum 71-67, the First Supplement to Memorandum 71-67, and the attached supplement to the Comprehensive Eminent Domain Statute. The Commission approved the provisions as set forth in the supplement, subject to technical and editorial changes, and subject to the following substantive changes:

Eminent Domain Code Section 304. The Commission revised subdivision (b) of Section 304 to read:

(b) Subject to any applicable procedures governing the disposition of property, a person may acquire property under subdivision (a) with the intent to sell, lease, exchange, or otherwise dispose of such property or an interest therein subject to such reservations or restrictions as are necessary to protect or preserve the attractiveness, safety, and usefulness of the public work or improvement.

The Commission also deleted from the Comment on page 4 the following sentence: Section 304 is an extremely flexible grant of condemnation authority.

Eminent Domain Code Sections 450-471. The Commission determined to re-draft the more necessary and compatible use provisions to accomplish as nearly as possible the following scheme:

(1) Any person authorized to condemn may acquire property appropriated to a public use for a compatible public use.

(2) Any person authorized to condemn property for a more necessary public use may do so except that property may be taken only for compatible use if the person who has already appropriated the property to a public use establishes that his public use is compatible or could be made compatible without significant alteration of the more necessary use.

The Commission directed the staff to work on such a scheme and, in so doing, to consider both the problems that might be encountered by a judge making decisions based on engineering data as well as the possibility of using an "encroachment permit" type scheme in lieu of condemnation proceedings.

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Code of Civil Procedure Section 1238. The Commission directed the staff to expand the Comment to repealed Code of Civil Procedure Section 1238 to indicate that the former listing of public uses was surplusage.

Public Utilities Code Section 21635. The Commission directed the staff to investigate the question whether the more necessary use question should be justiciable in cases of utility relocations by the Department of Aeronautics as currently provided in Public Utilities Code Section 21635.

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STUDY 36.50 - CONDEMNATION (COMPENSATION GENERALLY)

The Commission considered Memorandum 71-36 relating to the general philosophy of compensation. After a limited discussion, the Commission determined to proceed by addressing itself to particular compensation problems and to recall the philosophical and policy considerations identified in Memorandum 71-36 in resolving the particular problems.

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STUDY 36.50 - CONDEMNATION (COMPENSATION--LARGER PARCEL)

The Commission considered Memorandum 71-63 and the attached background study relating to the problem of delineating those property interests that are so interrelated that, where the condemnor acts with regard to one, the effect on the value of the others may be considered. This problem is referred to here for convenience as the "larger parcel" question.

The Commission tentatively determined, with the view toward drafting a statutory definition of the larger parcel, that all property owned by the condemnee that is capable of an integrated use as its highest and best use may be valued together as one larger parcel. The property need not be contiguous, and the highest and best use need not be actual or existing. The degree of unifying ownership was not specified, but the sense of the Commission was that the requirement of ownership should be liberally drawn.

The Commission determined that this definition should be applicable whether the condemnor or condemnee argues that property should be valued together.

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STUDY 36.50 - CONDEMNATION (COMPENSATION IN CASE OF PARTIAL TAKE)

The Commission considered Memorandum 71-64 and the attached research study and background materials relating to valuation of a condemnee's remaining property where a condemnor acquires only a portion of his property.

The Commission determined that the measure of damages in the case of a partial taking should be the difference between (1) the value of the whole property before the taking and (2) the value of the remainder after the taking as affected by the project for which it was taken. This formula in effect ignores general and special damages as well as general and special benefits and uses a strict market value test.

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STUDY 36.65 - CONDEMNATION (AIRPORTS)

The Commission considered Memorandum 71-72 relating to the manner by which airport obstructions are to be eliminated: police power or condemnation. The Commission approved the amendment to Government Code Section 50485.2 and Comment, as set out in Exhibit I, with the underscored language revised to read: by appropriate exercise of the police power or the authority conferred by Article 2.6 (commencing with Section 21652) of Part I of Division 9 of the Public Utilities Code.

The Commission further instructed the staff to include in the tentative recommendation relating to the right to take a notation that the general problem of the relation between zoning and condemnation is a significant one, but is not dealt with in the present recommendation. References to the Commission's background study on this subject prepared by Professor Van Alstyne, and to appropriate statutory provisions, might be included in the notation.

STUDY 36.80 - CONDEMNATION (PROCEDURAL ASPECTS)

The Commission considered Memorandum 71-68 and the attached draft statute relating to the procedure for raising and resolving right to take issues in an eminent domain proceeding.

The Commission approved Sections 200-203 for inclusion in the Comprehensive Statute, subject to reconsideration on various aspects of the effective date of the Eminent Domain Code.

The Commission reviewed a portion of Sections 2080-2250 and made the following general decisions for redrafting purposes:

(1) Consideration should be given to combining in one section the provisions declaring the requirements for raising objections to the right to take.

(2) The objections should be capable of being raised in the answer as well as by separate pleading.

(3) The requirement of specific facts on which objections are based should be clarified in the Comments.

(4) The grounds for objection should be rearranged in separate related provisions and should not be made exclusive by statute.

(5) The reference to "bribery" in the Comment to subdivision (e) of Section 2081 should be deleted.

(6) Language in the Comments referring to "intervention" and "documents" should be altered to reflect more accurately the intent of the provisions.

(7) The provisions enabling a person to object within the time in which he may answer, and enabling a court to extend the time for objection, should be reviewed for consistency.

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STUDY 39.10 - ATTACHMENT, GARNISHMENT, EXECUTION GENERALLY

The Commission's consultant, Professor Riesenfeld, presented an oral report, summarized in written material prepared by him and set out below, concerning the effect of the Randone decision.

The Commission asked Professor Riesenfeld to prepare a draft statute for the December meeting along the lines outlined below.

Report of Professor Riesenfeld
Attachment and the Shadows of Randone

Randone necessitates a revision of the California attachment law. Justice Tobriner, speaking for the Court, prescribes the contours of such act as delineated by the constitutions of the U.S. (XIV Amendment) and California (Article 1, section 13). The crucial language is as follows:

"We do not doubt that a constitutionally valid prejudgment attachment statute, which exempts 'necessities' from its operation, can be drafted by the Legislature, to permit attachment generally after notice and a hearing on the probable validity of a creditor's claim,... and even to permit attachment before notice in exceptional cases where, for example, the creditor can additionally demonstrate before a magistrate that an actual risk has arisen that assets will be concealed or that the debtor will abscond."

This prescription then contemplates a triplicate approach:

- 1) Define necessities and exempt them from any attachment.

- 2) Provide for cases where attachment after notice and hearing on the probable validity of the creditor's claim is permissible.
- 3) Define special cases where no prior notice and hearing on the probable validity of the claim is required but only "demonstration" before a magistrate that exceptional circumstances are present which require dispensation from the prior notice and hearing on the probable validity.

The remaining portion of the opinion suggests, however, that this only applies to attachments depriving the debtor of his right to use the attached property. Hence attachments without use deprivation might be constitutional. (see 5 C.3d 536, at 544, ftn. 4).

- 1) The Randone decision seems to go significantly beyond Sniadach because it holds

" ... due process requires that all 'necessities' be exempt from prejudgment attachment as an initial matter"

(C3d 536 at 536 at call to ftn. 28)

- A. In these cases not even a hearing on the probable validity of the claim will suffice, the hearing must be upon the validity (not only the probable validity) of the claim, i.e. a judicial determination, see 5 C.3d 536 at 547 and 562. "The state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action before an impartial confirmation of the actual, as opposed to probable, validity of the creditor's claim after a hearing on that issue". (italics ours)

Even in the special circumstances where attachment of other

assets without notice on the probable validity may be condoned complete determination of the claim is required (5 C.3d at 562). See also 5 C.3d at 556, ftn. 19.

B. What are necessities within that constitutional context?

Justice Tobriner mentions examples, among them bank accounts of low wage-earners or unemployed persons or the accounts receivable of the corner grocer, the self-employed mechanic, or the neighborhood shopkeeper. He refused, however, to approve of the present exemptions as adequate in the light of contemporary needs (5 C.3d at 563, ftn. 28).

Hence it may well be that a separate set of exemptions from attachment, different from exemptions from execution, may have to be drafted.

2) The second task is to sort out the cases where only the demonstration of a risk of concealment of assets or absconding of the defendant suffices.

3) The third problem is to define the other cases where attachment of assets other than necessities is permitted, provided there is previous notice and hearing on the probable validity of the claim. It must be noted that Justice Tobriner finds §537(1) "unusually" [and perhaps "unduly"] broad as compared with other states.

4) While Randone applies directly only to resident debtor attachments, it casts the shadow of unconstitutionality also on non-resident attachments.

Other decisions or dissents have intimated that attachment for jurisdictional purposes merits the exceptional circumstance status only where no in personam jurisdiction under long-arm statutes is available, see

Lebowitz v. Forbes Leasing & Finance Corp., 326 F.Supp.

1335 at 1348 (1971);

Tucker v. Burton, 319 F.2. 567, at 578 (1970).

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In California the Supreme Court declared the whole subsection of the attachment statute authorizing attachment of a resident's property to be unconstitutional, even after the legislature had enacted a total exemption from attachment of wages, *Randone v. Appellate Department*, 5 C.2d 536, 96 Cal. Rptr. 709 (1971). The decision constitutes the culmination of a series of adjudications dealing with attacks on the California local attachment statute. The property attached in *Randone* was a checking account containing \$176.20. The Supreme Courts of Minnesota and Wisconsin likewise invalidated the state pre-judgment garnishment statutes as applicable to assets other than wages, *Jones Press, Inc. v. Motor Travel Services, Inc.* 286 Minn. 205, 176 N.W.2d 87 (1970) (accounts receivable); *Larson v. Fetherstone*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969) (bank deposits).

Conversely a number of jurisdictions have read *Sniadach* as applying only to wages and invalidated their attachment statutes only with respect to that type of property, *Termplan Inc. v. Superior Court of Mariposa County*, 105 Ariz. 270, 463 P.2d 68 (1969) (wages); *Andrew Brown Company v. Painters Warehouse, Inc.*, 11 Ariz. App. 568, 466 P.2d 787 (1970) (bank account and accounts receivable); *Black Watch Farms Inc. v. Dick*, 323 F.Supp (D.Conn. 1971) (domestic attachment of real estate); *Michael Jewelers v. Handy*, 6 Conn. Cir. 103, 266 A.2d 904 (1969) (checking account of apparently resident defendant); *Reeves v. Motor Contract Company of Georgia*, 324 F.Supp. 1011 (N.D.Ga. 1971); *American Olean Tile Co. v. Zimmerman*, 317 F.Supp. 150 (D.Haw. 1970) (checking and payroll accounts). In Washington the issue was left undecided in *National Bank of Commerce of Seattle v. Green*, 1 Wash. App. 713, 463 P.2d 187 (1969) (joint bank account). See also *Hehr v. Tucker*, 256 Ore. , 472 P.2d 797 (1970) (actually involving a writ of execution).

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Sniadach was extended to attachment of wages of a non-resident wage earner in *Mills v. Bartlett*, 265 A.2d 39 (Del.Super.Ct. 1970); but contra, *Tucker v. Burton*, 319 F.Supp 567 (D.C. 1970); foreign attachment of other assets was upheld in *Lebowitz v. Forbes Leasing & Finance Corp.*, 326 F.Supp. 1335 (E.D. Pa. 1971)(bank account, the judge expressing grave doubts); see also *Cored Panels, Inc. v. Moore & Hanks Company*, 323 F.Supp. 1111 (E.D. Pa. 1971)(upholding a Pennsylvania foreign attachment, although plaintiff had also attached property in a sister state and the attachment in each state seized property in excess of the claim); *Robinson v. Loyola Foundation, Inc.*, 236 So. 2d 154 (D.C.A. Fla. 1970)(real property of non-resident).

Sniadach has been commented by Kennedy, *Due Process Limitations on Creditors Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 Am. U. L. Rev. 158 (1970) and in 83 Harv. L. Rev. 113 (1969); 48 N.C.L. Rev. 164 (1969); 5 New England L. Rev. 113 (1969); 64 N.W.L. Rev. 750 (1969); 22 Vand. L. Rev. 1400 (1969); 70 Col. L. Rev. 942 (1970); 17 U.C.L.A. L. Rev. 837 (1970); 22 Stan. L. Rev. 1254 (1970); 7 Harv. J. on Legis. 231 (1970); 1970 Wis. L. Rev. 181.

Sniadach has been extended to other summary proceedings entailing the taking of property, *Blair v. Pitchess*, 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971)(claim and delivery law); *Laprease v. Raymours Furniture Co.*, 315 Fed. Sup. 716 (N.D.N.Y. 1970)(replevin statute); *Klim v. Jones*, 315 F.Supp. 109 (N.D.Cal. 1970)(inkeeper's lien law); *Gray v. Whitmore*, 14 C.A.3d 784, 92 Cal. Rptr. 505 (1971)(part of unlawful detainer law); but contra, *Fuentes v. Faircloth*, 317 F.Supp. 954 (S.D.Fla. 1970)(replevin), probable jurisdiction noted 401 U.S. 906, 27 L.Ed.2d 804, 91 S.Ct. 893 (1971), Docket No. 70-5039; *Brunswick Corp. v. J & P Inc.*, 324 F.2d 100 (10 Cir. 1970)(replevin); *Lawson v. Mantell*, 33 A.D.2d 689, 306 N.Y.S.2d 316 (Sup.Ct.Spec. T. 1969)(replevin). See Comment, 71 Col. L. Rev. 886 (1971).

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The rationale of Sniadach has also caused a constitutional attack on notes confessing judgment. While the Supreme Court of Pennsylvania rejected such an attack in Lebanon Valley Nat. Bk v. Fleming, 436 Pa. 446, 260 A.2d 462 (1970), the Court of Appeals of New York refused to give full faith and credit to a judgment entered upon such anticipatory confession, Atlas Credit Corp. v. Ervine, 25 N.Y.2d 219, 303 N.Y.S.2d 282, 250 N.E. 474 (1969) and the U.S. District Court for the Eastern District of Pa. issued a permanent injunction against the entry and enforcement of such judgments recovered against low income debtors, 314 F.Supp. 1091 (E.D. Pa. 1970), probable jurisdiction noted, 401 U.S. 999, 28 L.Ed.2d 529, 91 S.Ct. 1220 (1971).

Is Sniadach applicable to writs of execution levied on property of an alleged fraudulent grantee? See Sackin v. Kersting, 10 Ariz. App. 340, 458 P.2d 544 (1969).

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STUDY 39.30 - ATTACHMENT, GARNISHMENT, EXECUTION
(EMPLOYEES' EARNINGS PROTECTION LAW)

The Commission considered Memorandum 71-69, the First Supplement to Memorandum 71-69, and the Tentative Recommendation relating to the Employees' Earnings Protection Law.

The following decisions were made relating to the statutory portion of the recommendation:

Code of Civil Procedure

Section 690.5-1/2. Subdivision (b) was amended to provide as follows:

(b) All earnings of the debtor which are due or owing to him are exempt from levy of attachment and execution without filing a claim for exemption as provided in Section 690.50 and are subject to levy only by means of an earnings withholding order in the manner and to the extent provided in Chapter 2.5 (commencing with Section 723.10).

Subdivision (e) was amended to provide as follows:

(e) The earnings of the debtor for the pay period immediately preceding the levy which have been paid to him and are retained in the form in which paid or as cash are subject to levy of execution only in an amount not to exceed the maximum amount of such earnings that could be withheld by his employer under Section 723.50 less any amounts withheld from such earnings by the debtor's employer pursuant to any earnings withholding order.

Section 690.6. Subdivision (a) was amended to provide substantially as follows:

(a) As used in this section, "earnings" means those earnings not included within the definition of "earnings" stated in subdivision (a) of Section 690.5-1/2.

Commissioner Sandstrom voted against this revision.

Section 723.11. The staff was directed to make appropriate revisions which make clear that the State Administrator (Director of Industrial Relations) has authority to delegate within the Department duties and responsibilities regarding this chapter.

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Section 723.20. The staff was directed to make appropriate revisions which make clear that this chapter is not intended to affect the ability of a judgment creditor to examine an employer of the judgment debtor pursuant to Section 717 et seq. Such revisions should not, however, make any reference to whether or not Section 717 and related provisions provide an alternative means of enforcement of an earnings withholding order.

Section 723.22. The staff was directed to reexamine the treatment of earnings attributable to past pay periods and to attempt to draft provisions which permit these amounts to be garnished where they are due and owing to the employee and not subject to another earnings withholding order.

Section 723.29. The substance of the following statement was added to the Comment to this section:

This section also makes clear that, where an employer complies with a prior order, he is not liable for failing to comply with a subsequent valid order, even though the prior order is in fact invalid unless he is actively participating in a fraud.

Section 723.30. The Commission noted the decision in Henry v. Henry, 182 Cal. App.2d 707 (1960) and determined that the treatment of attorney's fees should be left to the courts.

Section 723.31. The introductory clause of subdivision (f) was rephrased as follows:

(f) The following special provisions apply to a withholding order for taxes:

The next to last sentence of paragraph (1) of subdivision (f) was revised to read:

No fee shall be charged for filing such application.

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Section 723.32. A Comment to this section was added in substantially the following form:

Comment. Section 723.32 is the counterpart of Section 688 of the Code of Civil Procedure. Section 688 provides that the levy of an execution creates a lien on the property levied upon for a period of one year from the date of the issuance of the execution. Service of an earnings withholding order also constitutes a levy (see Section 723.31), but it is not the levy of an execution, and, therefore, a separate provision is required to regulate the existence, commencement, and duration of the lien on each installment.

Provision for a lien is necessary in order to entitle the senior levying creditor to the installments which fell due during the running of the "withholding period" (see Section 723.22) but were not paid because of a dispute about the amount owed or its due date as, e.g., in a case of bonuses. The priority created by the lien will protect the creditor-lienor against, inter alia, (a) a lapse of his rights if payments are not made because of a dispute; (b) a junior creditor who has garnished the same earnings in another jurisdiction (see Saunders v. Armour Fertilizer Works, 292 U.S. 190 (1934)); and (c) the trustee in an intervening bankruptcy if the lien is more than four months old or the judgment debtor was not insolvent at the time the levy became effective on the installment. See Section 67(a) of the Bankruptcy Act, 11 U.S.C. § 107(a)(1964).

Although the lien is limited to one year, it will not expire if, before the end of the one-year period, the creditor brings suit against the employer for the settlement of the dispute about the amount or maturity date of the unpaid earnings. See Boyle v. Hawkins, 71 Cal.2d 229, 455 P.2d 97, 78 Cal. Rptr. 161 (1969). The dating of the lien from the due date of the payment accruing during the withholding period corresponds to the policy expressed in Section 674.5.

Section 723.50. The last paragraph of the Comment to this section was revised to read substantially as follows:

Where an earnings withholding order for support is in effect, the amount withheld pursuant to such order is deducted from the earnings of the employee before computing the amount to be withheld pursuant to any other order. See Sections 723.30 and 723.31 and Comments thereto. Suppose, for example, that an employee's earnings are \$150 and a withholding order for support is in effect which requires \$40 to be withheld. In determining the maximum amount which may be withheld pursuant to another earnings withholding order, the debtor is treated as having \$110 of earnings. The employer would refer to the appropriate withholding table (see Section 723.50(e)) and determine how much is to be withheld on \$110 earnings and withhold that amount under the ordinary withholding order. See Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law, 10 Cal. L. Revision Comm'n Reports 701, n.32 (1971).

Section 723.101. The staff was directed to revise this section to authorize the recovery of costs for personal service but only where service by certified or registered mail is refused by the person being served.

Section 723.105. Subdivision (f) was revised to read in part as follows:

(f) If, prior to the receipt of notice of termination, an employer has withheld and paid over

Section 723.106. Subdivision (a) was revised to provide as follows:

(a) As used in this section, "earnings" includes all compensation (whether denominated as wages, salary, commission, bonus, tips, or otherwise) for personal services performed by an employee, whether paid or payable by the employer or by any other person.

Paragraph (1) of subdivision (c) was revised to provide as follows:

(1) The amount of earnings payable to the judgment debtor by the employer after deducting all amounts required to be withheld by law or by any contract which is not revocable by the employee or at his instance.

Section 723.123. The introductory clause--"In addition to other matters required by the Judicial Council"--of the second sentence of this section was deleted.

Section 723.127. The name of the judgment creditor who secured the prior earnings withholding order was added to the information required by paragraph (3) of subdivision (b).

Article 6. Sections 723.152 and 723.154 through 723.158 were deleted and the staff was directed to make appropriate revisions throughout the statute where reference is made to the enforcement powers of the State Administrator.

Labor Code

Section 300. Paragraph (2) of subdivision (b) was revised to provide substantially as follows:

~~(b)~~(2) Where such the assignment of, ~~or order for wages or salary~~ is made by a married person, the written consent of the ~~husband or wife~~ spouse of the person making such the assignment ~~or order~~ is attached to ~~such the assignment or order; and~~ . No such consent is required of any married person (1) after the rendition of a judgment decreeing his legal separation from his spouse; or (2) if the married person and his spouse are living separate and apart, after the rendition of an interlocutory judgment of dissolution of their marriage if a written statement by the person making the assignment, setting forth such facts, is attached to or included in the assignment.

Section 2929. This section was added to the recommendation in substantially the following form:

Sec. 15. Section 2929 of the Labor Code is amended to read:

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.

(c) No employer may discharge any employee by reason of the fact that his wages have been subjected to garnishment for the payment of one judgment.

(d) No employer may discharge any employee by reason of the fact that his wages have been subjected to garnishment pursuant to Section 723.30 of the Code of Civil Procedure (support order), and the fact that an employee's wages have been subjected to garnishment pursuant to that section shall not be counted for the purposes of subdivision (c).

(e) 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~~ subdivisions (b), (c), and (d) is against public policy and void.

~~(e)~~(f) 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 which resulted in his discharge. The employee shall give notice to his employer of his intention to make a wage claim under this subdivision within 30 days

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

(e)(h) 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. Secs. 1671-1677) and shall be interpreted and applied in a manner which is consistent with the corresponding provisions of such act.

The remainder of the statute was carefully reviewed in the light of the comments received and the Commission determined that no further changes were required at this time. The staff was authorized to have the statute preprinted in bill form subject to the revisions noted above.

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STUDY 63 - EVIDENCE CODE

The Commission considered Memorandum 71-73 concerning a recent law review article by Justice Otto M. Kaus. See Kaus, All Power to the Jury --California's Democratic Evidence Code, 4 Loyola U. L. Rev. 233 (1971).

The Commission determined that the statutory revisions suggested by Justice Kaus should be distributed to evidence experts and others so that the views of these persons would be available when the Commission considers what, if any, changes should be made with respect to the law relating to preliminary fact determinations by the court.