January 6, 1972

Time

January 13 - 7:00 p.m. - 10:00 p.m.
January 14 - 9:00 a.m. - 5:00 p.m.
January 15 - 9:00 a.m. - 1:00 p.m.

Place

State Bar Building
1230 West Third Street
Los Angeles 90017

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

January 13-15, 1972

JANUARY 13

1. Minutes of December 9-11, 1971, Meeting (sent 12/27/71)

2. Administrative Matters

Comments of Justice Reynolds--Function of Commission

Memorandum 72-1 (sent 12/14/71)
First Supplement to Memorandum 72-1 (sent 12/28/71)

3. Study 36 - Condemnation (Schedule)

Memorandum 72-4 (sent 12/14/71)

4. Study 36.50 - Condemnation (Compensation in Case of Partial Take)

Memorandum 71-64 (sent 11/9/71)
Research Study (attached to Memorandum 71-64)
First Supplement to Memorandum 71-64 (sent 11/24/71)
Second Supplement to Memorandum 71-64 (sent 12/29/71)
Third Supplement to Memorandum 71-64 (sent 1/4/72)

5. Study 36.80 - Condemnation (Procedure--Contesting Right to Take)

Memorandum 72-5 (enclosed)

JANUARY 14 AND 15

6. Study 39 - Attachment, Garnishment, Execution

Study 39.30 - Employees' Earnings Protection Law

Memorandum 72-2 (sent 1/5/72)
Recommendation (attached to Memorandum)
First Supplement to Memorandum 72-2 (sent 1/5/72)
Second Supplement to Memorandum 72-2 (enclosed)
Third Supplement to Memorandum 72-2 (enclosed)

Study 39.70 - Prejudgment Attachment Procedure

Memorandum 72-6 (sent 12/27/71)
First Supplement to Memorandum 72-6 (enclosed)

7. Study 71 - Pleading

Memorandum 72-7 (sent 1/4/72)

8. Topics on Agenda

Memorandum 71-97 (sent 12/3/71)
Memorandum 72-3 (sent 12/14/71)
Memorandum 71-96 (sent 11/29/71)
First Supplement to Memorandum 71-96 (sent 12/3/71)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 13, 14, AND 15, 1972

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on January 13, 14, and 15, 1972.

Present: John D. Miller, Chairman
Marc W. Sandstrom, Vice Chairman
John J. Balluff
Noble K. Gregory
John N. McLaurin
Howard R. Williams

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

Messers. John H. DeMoully, Jack I. Horton, and Nathaniel Sterling, members of the Commission's staff, also were present. On January 13, Jerrold A. Fadem, Commission consultant on condemnation law and procedure, was present. On January 14 and 15, Professors Riesenfeld and Warren, Commission consultants on attachment, garnishment, and execution, were present.

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

Thursday, January 13

Norval Fairman, Department of Public Works, San Francisco
Lloyd Hinkelman, Attorney General's Office, Sacramento
John N. Morrison, Attorney General's Office, Sacramento
Terry C. Smith, Los Angeles County Counsel
Charles E. Spencer, Department of Public Works, Los Angeles

Friday, January 14, 1972

John D. Bessey, Attorney for CAC, Sacramento
Harry C. Gault, San Diego Wholesale Credit Mgrs. Ass'n
Robert Hecht, Fidelity & Deposit Co., Los Angeles
A. Morgan Jones, San Diego Attorney
W. J. Kumli, Credit Managers Ass'n Legislative Committee, Los Angeles
Emil A. Markovitz, Creditor's Service of Los Angeles
Harold Marsh, Jr., Los Angeles Attorney
Charles E. O'Brien, Sears, Roebuck & Co., Los Angeles
Glen Woodmansee, Legal Aid Society, Orange County, Anaheim

Saturday, January 15, 1972

John D. Bessey, Attorney for CAC, Sacramento
Harry C. Gault, San Diego Wholesale Credit Mgrs. Ass'n
A. Morgan Jones, San Diego Attorney
Harold Marsh, Jr., Los Angeles Attorney
Charles E. O'Brien, Sears, Roebuck & Co., Los Angeles
Bernard Shapiro, Chairman, Commercial Law & Bankruptcy Section, Los Angeles County Bar

ADMINISTRATIVE MATTERS

Minutes

The December 9-11, 1971, Minutes were approved after a number of typographical errors (listed below) were corrected:

On page 1, lines 3 and 8, substitute "December 10 and 11" for "December 11 and 12'."

On page 1, line 18, after "sultant on condemnation law and procedure" insert a comma.

On page 3, last line, insert a period at the end of the line.

On page 14, third paragraph, change the third sentence to read as follows:

> The general definitional standard for necessities should be more liberal than "essential for support," and "necessities" should not be limited to those items which are commonly required by all or nearly all persons but should include those items which are necessary for the particular defendant and his family.

On page 15, third full paragraph, change "issues" to "issue."

Schedule for Future Meetings

Future meetings are scheduled as follows:

February 11	9:30 a.m. - 5:00 p.m.	State Bar Building
12	9:00 a.m. - 1:00 p.m.	601 McAllister Street
		San Francisco 94102
March 9 (evening)	7:00 p.m. - 10:00 p.m.	State Bar Building
10	9:00 a.m. - 5:00 p.m.	1230 West Third Street
11	9:00 a.m. - 1:00 p.m.	Los Angeles 90017

Note: There is a possibility that this meeting will be held the following week.

April 6 (evening)	7:00 p.m. - 10:00 p.m.	State Bar Building
7	9:00 a.m. - 5:00 p.m.	601 McAllister Street
8	9:00 a.m. - 1:00 p.m.	San Francisco 94102

May, June, July--no date set

August--no meeting

September--no date set

October 6 7 times to be determined later San Diego

Note: These dates are very tentative.

Official Minutes

The Executive Secretary was directed to check with the appropriate state authority to determine whether it is required that a copy of the Minutes be microfilmed for deposit in the state records safekeeping depository. If it is essential that such microfilmed record be maintained, the Commission will comply with the requirement. If the Commission has discretion in the matter, a report should be made to the Commission so the Commission can determine whether the Minutes should be microfilmed.

Plaque for G. Bruce Gourley

The Commission determined to present an appropriate plaque to G. Bruce Gourley in recognition of his distinguished service as a member of the Commission.

Conduct of Meetings

The Commission discussed Memorandum 72-1 and the First Supplement to Memorandum 72-1.

The Commission did not discuss in detail the portion of the materials relating to the function of the Commission. The Executive Secretary suggested that each Commissioner read the one-page attachment to the

First Supplement to Memorandum 72-1 because this attachment states the view of the Department of Finance and presumably the view of the Legislature as to the proper function of the Commission.

The Chairman expressed his appreciation to the Commission for the confidence it has expressed in electing him as Chairman. He stated that he felt that the Commissioners brought to the meetings a background of experience and judgment that was invaluable, that the staff was excellent, and that a substantial and essential contribution is made by the representatives of various groups that attend Commission meetings. He also noted the comment of Mr. Justice Reynolds concerning the opportunity to state views without interruption. The Chairman stated that he felt that some control will be needed in the conduct of deliberations so that the input of Commissioners, staff, and representatives of various groups can be presented in such a way that progress can be made and, at the same time, the views of everyone can be received and considered.

The Commission noted that it is anticipated that at least six and usually seven members of the Commission will be in attendance at meetings in the future. This will make it desirable that members of the staff and Commissioners exercise some restraint so that all members of the Commission are given an opportunity to concisely state their views on matters without interruption. The Chairman should take appropriate action during the course of the meetings so that this objective can be accomplished.

There was also a brief discussion of the problem of determining policy as compared with drafting detail. It was generally agreed that drafting

details cannot be ignored and that a substantial and essential part of the Commission's deliberations is the careful consideration of the language used to effectuate policy determinations. No rule was adopted as to the extent to which drafting details are to be discussed; the matter of the extent to which statutory language is to be considered in detail was left to the discretion of the Commissioners.

The Commission discussed the extent to which the chances of passing proposed legislation should be taken into account in making recommendations. It was recognized that, although the Commission's integrity must be maintained, practical compromises of conflicting positions on problems were often productive of needed reform. The concensus was that each Commissioner must resolve any conflict (between what solution is believed "best" and what is "practically possible") for himself each time the problem arises.

STUDY 36 - CONDEMNATION (SCHEDULE FOR STATE BAR COMMITTEE)

The Commission considered Memorandum 72-4, which presented for Commission consideration a tentative schedule for the State Bar Committee on the condemnation study.

The Commission discussed the schedule and directed that it be sent to the State Bar Committee. However, it was noted that the work on the prejudgment attachment study makes it unlikely that the suggested schedule for consideration of comments can be met by the Commission. The Executive Secretary should revise the schedule to reflect the date when the redraft of the comprehensive statute will actually be sent to the State Bar Committee. Also, the committee should be advised that the Commission probably will be unable to devote a substantial amount of time to the condemnation study within the next few months because of the prejudgment attachment study and, if this is the case, the schedule may need to be revised.

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

The Commission considered Memorandum 71-64, the attached research study, and the First, Second, and Third Supplements to Memorandum 71-64, relating to compensation for partial takings in eminent domain proceedings.

The Commission determined to limit its efforts at this time to the development of a workable scheme for compensating partial takings and to defer until a later time consideration of analogous problems relating to inverse condemnation and special assessments where there is no taking.

The Commission directed the staff to develop, for its preliminary consideration, a scheme that would compensate partial takes along the following general lines:

(1) The condemnor has the initial choice whether to apply a before-after or some other measure of value to the partial take.

(2) If the condemnor selects a before-after measure, the condemnee has the option to compel a taking of the whole property and to have the taking valued as such.

In connection with this scheme, the Commission directed the staff to investigate the operation of a before-after test of value. The investigation should include illustrations of general damages and benefits that such a test would encompass and should reveal any disparities in present law between the treatment of items of general damage and general benefits.

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

The Commission considered the following materials: Memorandum 72-2, Recommendation Relating to the Employees' Earnings Protection Law (attached to Memorandum 72-2), First, Second, and Third Supplements to Memorandum 72-2, letter from Eric W. Wright (December 7, 1971), Memorandum to California Law Revision Commission from Nicholas C. Dreher and James A. Fletcher (January 7, 1972), a staff suggested conforming amendment to Section 1208 of the Penal Code, and a law review article by William T. Kerr, "Wage Garnishment Should Be Prohibited," 2 Prospectus 371 (1969).

PRINTING OF RECOMMENDATION

The Executive Secretary reported that the printed recommendation is now in page proof form and that only the most serious errors can be corrected in the page proofs. Revisions made in the page proofs may cause considerable delay in the printing of the recommendation. The printing of the recommendation has already been delayed considerably because it was necessary to make substantial revisions to reflect changes made at the December 1971 meeting and to reflect 1971 enactments.

FURTHER REVISIONS

The need for further revision in the proposed legislation and Comments to sections of the proposed legislation was recognized. The Commission will make these changes in the bill which Senator Song has already or will soon introduce. Changes in the Comments will be made by having the appropriate legislative committees adopt reports making necessary revisions in Comments.

ESSENTIAL CHANGES

The following changes in the printed recommendation were considered essential. The withholding table should reflect the new federal withholding requirements which took effect on January 1, 1972, if these requirements are not already reflected in the table. Also, on page 55 of the recommendation (line 3), the words "to be" should be inserted before the word "withheld." The bill should be amended at the first opportunity to reflect this revision.

If other suggested revisions would not delay the printing of the recommendation, they should be incorporated before it is printed; otherwise, they should be made at the first opportunity when the bill is amended or the Comments revised. Members of the Commission handed in drafts of the recommendation on which they had noted these other changes.

RECOMMENDATIONS OF STATE BAR COMMITTEE

The Commission considered the Third Supplement to Memorandum 72-2 and the attached Interim Report of the State Bar's Ad Hoc Committee on Attachment.

The Commission noted that the State Bar Committee generally approved the recommendation and gave specific approval to a number of significant provisions. The State Bar Committee also raised questions concerning various provisions and these questions and the Commission action concerning them are indicated below:

Self-employed debtor (independent contractors). The State Bar Committee suggested that the provisions for levy on the earnings of a self-employed debtor should be amended to more clearly define "earnings" and for the purpose of applying the usual exemption amount to those earnings. The Commission

agrees that there is a need for revision and improvement of the provisions relating to the levy on the earnings of a self-employed debtor, but the Commission believes that the procedure provided in the provisions dealing with withholding of earnings of an employee by his employer cannot appropriately be applied to self-employed debtors. This matter will require considerable study and the Commission plans to study this matter at a later time. Pending the completion of this study, the Commission decided to retain (with one significant change) the existing law governing garnishment of earnings of self-employed debtors. (The significant change is that the "hardship exemption" provision for self-employed debtors has been broadened by conforming it to the hardship exemption provided employees.)

Exemption for deposit accounts. The State Bar Committee specifically approved the principle of extending an exemption to all deposit accounts, but noted that the overall exemption has been significantly decreased in amount.

The Commission considered the amount of the overall exemption and concluded that the amount previously determined ($500) is fair and reasonable in view of the fact that a greater amount can be exempted if it is essential for support.

The State Bar Committee suggested that the "husband and wife" concept should be clarified to account for the fact that they are separate individuals with possibly varying ownership interests. After considerable discussion, the Commission agreed that the deposit account section (Section 690.7) is unclear and directed the staff to prepare a revised section along the following lines:

(1) The conflict between subdivision (a) and subdivisions (e) and (f) should be avoided by clarifying revisions. Subdivision (e), for example, should be revised to require the debtor to list all accounts standing in his own name or in the name of his spouse, whether alone or with others, or in

which the debtor is listed as a beneficiary or has a beneficial interest. A comparable revision may be needed in subdivision (f).

(2) It should be made clear that a husband and wife have only one $500 exemption, whether one or both are the judgment debtor, and, in determining whether the exemption applies, no distinction is made between separate and community property.

(3) The staff should consider whether the wording of subdivision (c) of Section 690.7 can be improved. Examples should be added to the Comment at the first opportunity to explain various applications of subdivision (c) where the other accounts are more or less than $500.

The staff is to prepare a revised draft of Section 690.7 and the Comment thereto for consideration by the Commission at the February meeting. The staff is also to prepare a draft of an alternative bank account exemption provision to cover the case where a bank operates as the employer's payroll agent. See discussion in these Minutes, infra.

Orders for withholding for state taxes. The State Bar Committee disapproved the provisions allowing the state to take a larger amount of the debtor's wages for state taxes than would be available to other creditors, noting that the provisions allow the state to take amounts essential for the support of the debtor or his family.

The Commission agreed that there is no justification for the state taking amounts essential for support under a withholding order for state taxes. Nevertheless, the Commission's proposal represents a compromise that has been worked out with the cooperation of the state taxing authorities. The Commission believes that its proposal represents a substantial improvement over the existing law. If the suggested revision is made, the taxing authorities

would oppose the bill from the start; and, in addition to opposition on the basis of state cost of administration (the cost to the Director of Labor Relations in developing earnings withholding tables and regulations relating to how various forms of earnings are to be treated and the cost to the Judicial Council in developing court forms and procedures), there would be opposition on the basis of significant loss of state tax revenues. Accordingly, the Commission decided not to revise the provision relating to withholding orders for state taxes, thus leaving to the legislative committees that consider the bill introduced to effectuate the Commission's recommendation the question whether the bill should be amended to reduce the amount to be withheld under orders for state taxes. The Commission would not oppose such an amendment if the legislative committee determines the amendment to be desirable.

Providing debtor with form for hearing application and financial statement form. The State Bar Committee suggested that the debtor's form for hearing application and the debtor's financial statement should be among the documents that the creditor is required to serve upon the employer when applying for a withholding order.

The Commission was reluctant to require the providing of such forms in every case since it is believed that the number of hearings will not be significant, especially if the withholding formula is revised to preclude withholding in some of the lower brackets where the original proposal would have permitted withholding. However, in recognition of the problem, the Commission decided to revise the form of the notice of application for the order to require that the creditor advise the employee where the forms necessary to claim the hardship exemption can readily be obtained.

Providing opportunity for hearing before order served. The State Bar Committee suggested that further consideration be given to providing a delay in service of an earnings withholding order so that a hearing can be conducted prior to service if the debtor so desires. It was noted that the withholding table will be revised to provide protection for wage earners in the lowest earnings brackets, and the cases where a hardship exemption will be appropriate will be rare. The Commission again discussed the ramifications of various methods that might be used to permit the hearing to be held prior to the time the order is effective. Concern was expressed that lengthening the period could result in the employer and employee conspiring to defeat the garnishment by manipulating pay periods, and the like. Also, it would unfairly deprive the creditor from recovering anything in cases where the employment is intermittent or where the employee is changing jobs frequently. It was further noted that, under existing law, there is not even a five-day delay such as is provided in the recommendation. Accordingly, the Commission decided not to change the recommended legislation in this respect.

Powers of State Administrator. The State Bar Committee believes that the State Administrator should not have broad investigatory and prosecution powers. The Commission noted that no powers are granted in the proposed legislation that are not essential to the administration of the statute. No special investigatory or prosecution powers are granted to the administrator, and the Commission does not believe that it would be desirable to attempt to draft restrictions on the general powers inherent in all state administrators.

AMOUNTS OF EARNINGS TO BE WITHHELD

The Commission discussed the First Supplement to Memorandum 72-2, a memorandum from Nicholas C. Dreher and James A. Fletcher, Stanford law students (January 7, 1972), a letter from Professor Eric W. Wright, University of Santa Clara Law School, and a law review article by William T. Kerr, "Wage Garnishment Should Be Prohibited," 2 Prospectus 371 (1969).

The Commission rejected the new withholding formula contained in the First Supplement to Memorandum 72-2 because it believes that such a formula would make an undesirable increase in the lower income brackets.

The Commission directed the staff to give further consideration to the formula that determines the amount that may be withheld from earnings. The Commission believes that it would be desirable to avoid burdening the employer with the requirement that he withhold an amount less than $10. The cost to the employer of withholding an amount less than $10 would probably be equal to a substantial portion of the amount withheld, and the formula should be revised to avoid this burden on the employer.

It was suggested that the staff work on a formula that would deduct nothing if the earnings are less than $100 per week and, if the earnings are $100 a week or more, the deduction would be $10 plus 25 percent of the amount in excess of $100. In effect, this formula would assure that the debtor would always have at least $90 of gross earnings. (If he earns $100, $10 would be deducted, leaving the debtor with $90 gross earnings.) This formula appeared to be satisfactory, but the formula was not finally approved because it was felt that the new federal tax withholding tables

that took effect on January 1, 1972, may cause such a formula to violate federal requirements.

SPECIAL EXEMPTION FOR FORMER PRISONERS OR WELFARE RECIPIENTS

The Commission considered the memorandum submitted by Nicholas C. Dreher and James A. Fletcher (January 7, 1972) and an oral staff report.

Prisoners. The staff reported the results of its review of the statutes of other states. Minnesota appears to be the only state that exempts the earnings of prisoners, and its statute covers only prisoners in a special program for inmates who work during the day and are in custody at night. Protection is afforded the earnings of prisoners in this program from garnishment. California has a similar work furlough program, but has made a decision not to provide an absolute exemption of the earnings of such prisoners from garnishment. See Penal Code § 1208.

During the discussion, the following were some of the questions raised. What prisoners are we concerned about? Prisoners in state prisons? Persons in county jail for one day? For one year? Only those in work furlough programs? Which prisoners will be eligible for protection against wage garnishment?

The Commission noted that it has exempted the lower income brackets from wage garnishment, and it was concluded that the complications involved in drafting an exemption would merely add additional complex statutory provisions to the California statutes that would seldom, if ever, be needed to protect prisoners.

The Commission determined that a conforming amendment is needed in Penal Code Section 1208. Subdivision (e) of Section 1208 should be amended to read:

(e) The earnings of the prisoner shall be collected by the work furlough administrator, and it shall be the duty of the prisoner's employer to transmit such wages to the administrator at the latter's request. Earnings levied upon pursuant to ~~writ of attachment or execution or in other lawful manner~~ the Employees' Earnings Protection Law, Chapter 2.5 (commencing with Section 723.010) of Title 9 of Part 2 of the Code of Civil Procedure, shall not be transmitted to the administrator. If the administrator has requested transmittal of earnings prior to ~~levy, such request shall have priority.~~ service of an earnings withholding order under the Employees' Earnings Protection Law, none of the earnings of the prisoner shall be withheld pursuant to such order. ~~In a case in which the functions of the administrator are performed by a sheriff, and such sheriff receives a writ of attachment or execution for the earnings of a prisoner subject to this section but has not yet requested transmittal of the prisoner's earnings pursuant to this section, he shall first levy on the earnings pursuant to the writ.~~ When an employer or educator transmits such earnings to the administrator pursuant to this subdivision he shall have no liability to the prisoner for such earnings. From such earnings the administrator shall pay the prisoner's board and personal expenses, both inside and outside the jail, and shall deduct so much of the costs of administration of this section as is allocable to such prisoner, and, in an amount determined by the administrator, shall pay the support of the prisoner's dependents, if any. If sufficient funds are available after making the foregoing payments, the administrator may, with the consent of the prisoner, pay, in whole or in part, the preexisting debts of the prisoner. Any balance shall be retained until the prisoner's discharge and thereupon shall be paid to him.

This amendment should be made to the bill introduced to effectuate the Commission's recommendation at the first opportunity.

Welfare. Professor Riesenfeld raised the question whether the proper method of protecting certain classes--such as former prisoners and welfare recipients--should not be to have the execution of the judgment stayed. This would seem to provide a much more sensible scheme for overall protection rather than merely protecting earnings.

The Commission decided not to provide any special provision in the wage garnishment statute to give special protection to former welfare

recipients. Problems of defining the class to be covered, similar to those involved in defining the class of prisoners who might be covered, were discussed. Professor Riesenfeld was asked to consider this problem at some future time when he considers when a stay of execution on a judgment should be provided in order to protect particular types of debtors.

General problems. It was felt that providing former prisoners and welfare recipients with special protection would not make them more attractive to employers. Employers would be required to provide special treatment for them, and the employer's payroll agent would have to exercise special care not to fail to provide them with the special treatment. In other words, the special rules applying to the special types of employees would make compliance with the wage garnishment procedure more complex for employers.

Response to law students. The Executive Secretary was directed to advise the law students who prepared the memorandum that their memorandum was useful and that it was an excellent piece of work. The Commission plans to consider the problem of former welfare recipients and former prisoners when it consideres the circumstances under which the execution of a judgment should be stayed. The Commission was influenced by the analysis in the memorandum of the effect of the withholding formula set out in its proposed legislation. The Commission has asked the staff to prepare a formula for consideration at the February meeting that will exempt wage earners whose gross earnings are less than $100 from any withholding at all and that will assure that a wage earner has at least $90 of gross earnings protected.

COMPLIANCE WITH FEDERAL REQUIREMENTS

The Commission discussed Memorandum 72-2 and the problem of compliance with federal requirements. Also discussed was the Second Supplement to Memorandum 72-2 and the attached draft of a letter to the U.S. Department of Labor. The following actions were taken by the Commission.

Bank accounts. The Commission discussed the effect of the federal interpretations insofar as they apply to bank accounts. The Commission determined that an exemption should be provided to cover cases where a bank serves as the employer's payroll agent--that is, where the bank computes the net amount of the employee's earnings and credits that amount to the employee's deposit account in that bank. In such a case, the debtor's earnings for his pay period immediately preceding the levy which have been credited to his deposit account by the bank acting as his employer's payroll agent are subject to levy of execution only in an amount not to exceed the maximum amount of such earnings that could have been withheld by his employer under Section 723.050 less any amounts withheld from such earnings by his employer pursuant to any earnings withholding order. The debtor is entitled only to an exemption under Section 690.7 ($500) or under the proposed provision, whichever will result in exempting the greater amount, but not under both provisions. The staff is to draft a provision to carry out these policy decisions for consideration at the February meeting. The Comment to the provision should point out that the exemption provided only deals with the deposit account. A withholding order directed to the employer would permit withholding of earnings by the employer before the earnings are deposited in the deposit account. The employer cannot

avoid his duty to withhold earnings as required by the Employees' Earnings Protection Law by designating a bank to act as his payroll agent.

Support orders. The Commission determined that the support order scheme is sound and should be submitted for federal approval. The Commission determined that the staff should not draft an alternative wage assignment scheme for dealing with support obligations.

Paid earnings. The suggestion of the staff for revision of subdivision (e) of Section 690.5-1/2 was withdrawn by the staff and was not adopted by the Commission.

Retirement payments. Section 690.18 was revised to add the following subdivision (e) and to renumber existing subdivision (e) as subdivision (f):

> (e) Periodic payments received by the debtor from a pension or retirement plan during the 30 days immediately preceding the levy of execution which have been retained by him in the form in which received or as cash are subject to levy of execution only in an amount not to exceed the maximum amount of such payments that could be withheld by the fund under subdivision (d), less any amounts withheld from such payments by the fund pursuant to a levy of execution.

Treatment of various types of earnings. Noting the statements concerning federal treatment of various types of earnings, such as tips, the Commission concluded that this type of detail is best left to regulations adopted by the State Administrator. Such regulations will permit conformance with federal interpretations.

Multiple sources of earnings. The Commission determined that the provisions governing the procedure for withholding orders where there are multiple employers are satisfactory and should not be changed.

LETTER TO U.S. DEPARTMENT OF LABOR

The Commission considered the letter to the U.S. Department of Labor that is attached to the Second Supplement to Memorandum 72-2. The letter was approved after various revisions were made. Except for a few minor editorial revisions, these revisions are listed below.

Letter. The last three sentences of the first complete paragraph on page 2 were revised to read substantially as follows:

> Creditors' representatives have expressed their concern that the restrictions on the amount of earnings that can be withheld are too stringent and that the bank account exemption is too large. Legal aid and poverty lawyers have urged the Commission to provide more stringent restrictions on the amount of the earnings that can be garnished. There are other objections. However, the Commission anticipates that these areas of controversy will be worked out satisfactorily during the passage of the bill through the Legislature.

The last sentence on page 2 was made a separate paragraph.

The first paragraph on page 3 was deleted.

The first sentence of the last paragraph on page 3 was revised to read substantially as follows:

> It is important that we receive within 60 days any revisions in the recommended legislation which you believe are necessary so that they can be considered before the bill is enacted. The Commission also believes that it would be of great value if you or your representative could be present at the Commission's April meeting in San Francisco. This meeting will be held on April 6 (evening), 7 and 8 (morning), 1972. We can schedule this matter for a time during the meeting that will be most convenient to you or your representative.

Analysis. The last sentence of the first paragraph on page 2 was deleted.

Following the second sentence of the second paragraph on page 2, the substance of the following was inserted: "See the Comment to Section 690.18 (page 33 of recommendation)."

On page 4, everything after the third sentence was deleted.

On page 5, the heading "Paid earnings of independent contractors" was changed to "Amounts paid independent contractors," and the sentence under this heading was revised to read: "Amounts paid to independent contractors for personal services are entitled to an exemption on a tracing theory under Section 690.6 (pages 27-29 of recommendation)."

On page 5, in the paragraph discussing withholding tables, the last sentence was revised to read substantially as follows: "The only deduction not considered in preparing the tables is the deduction made for employees under a public retirement system, but we believe that public employees will be afforded greater protection under tbe proposed statute than under the federal law."

On page 6, the second sentence was deleted. The third sentence was revised by deleting "Also, any" and inserting "Any."

On page 8, last sentence, after "withholding order for support", insert: "(See Section 723.030, pages 49-50 of recommendation.)".

On page 10, second line of last paragraph, "for" should be "on".

On page 12, the last paragraph was deleted.

The last sentence of the first paragraph on page 13 may need revision and expansion. The staff draft of the additional bank account exemption should

be forwarded with the analysis with an indication that the Commission is still working on the draft.

Various Commissioners turned in drafts on which they had marked possible revisions of the letter and analysis. Also, the analysis should be reviewed in light of decisions made at the meeting.

STUDY 39.70 - ATTACHMENT, GARNISHMENT, EXECUTION
(PREJUDGMENT ATTACHMENT PROCEDURE)

The Commission considered Memorandum 72-6, the First Supplement to Memorandum 72-6, and a letter from Mr. Harold Marsh to Mr. John H. DeMoully, dated January 10, 1972, a copy of which is attached as Exhibit I to these Minutes. The Commission also considered the oral presentations of its consultants, Professor Stafan A. Riesenfeld and Professor William D. Warren, and the many helpful suggestions of those observers present at the meeting on January 14 and 15.

The Commission determined that, if possible, it would submit a recommendation at the 1972 legislative session relating to prejudgment attachment. In pursuance of this goal, the staff was directed to draft a statute for the February meeting which satisfies the following guidelines:

(1) The provisional remedies provided should be available in an action: (a) for the recovery of money in a fixed or reasonably ascertainable amount (but not less than five hundred dollars, exclusive of interest and attorney's fees) upon a contract either express or implied where the contract is unsecured or the original security has become valueless without the act of the plaintiff; (b) for the recovery of money if the remedy is necessary for the exercise of jurisdiction; (c) for the collection of taxes or an obligation or penalty imposed by law; (d) for the recovery of public funds paid over to a person engaged in the unlawful sale of narcotics in the course of an investigation of such activities.

(2) The plaintiff, in one of the actions described above, should be permitted to apply ex parte (without notice to the defendant) and upon a

showing of the probable validity of his claim and the posting of a bond in the amount required, obtain from a magistrate a temporary restraining order preventing the defendant from disposing of the assets covered by the order other than in the ordinary course of the defendant's business.

(3) Following the issuance of a temporary restraining order, the defendant should be afforded notice and an opportunity for a hearing regarding the probable validity of the plaintiff's claim. Following this hearing, if the defendant prevails, the order will be terminated. If the plaintiff prevails, he may either levy an attachment on the assets (i.e., have the assets seized) or permit the defendant to continue in possession of the assets, but such assets will be subjected to a lien in the plaintiff's behalf. Such lien should be perfected by filing with the Office of the Secretary of State. The date of the lien as against other creditors should relate back to the date of service of the original restraining order. However, a bona fide purchaser should be protected prior to the date of filing. The buyer in the ordinary course of business should be protected in all circumstances.

(4) The defendant, even though he does not prevail at the intermediate hearing, should, of course, be permitted to obtain a release of the attachment upon the posting of a bond in the proper amount.

(5) Where the plaintiff can show to the magistrate at the time of the ex parte application that an actual risk has arisen that the defendant will fraudulently conceal or remove property, the magistrate should be authorized to issue an order permitting attachment (seizure) of the assets

covered by the order. However, such proof does not constitute an independent ground for relief. That is, the action in which this relief is sought must be one of those described above in paragraph (1).

(6) The staff was directed to work within the general guidelines established at the December meeting in drafting a definition of "necessities." Under no circumstances may "necessities" be seized. Necessities may, however, be made subject to a lien. Normally, a corporation or partnership should not be entitled to an exemption for necessities. However, even where a defendant is doing business in a corporate or partnership form, he should be permitted to show that he is substantially equivalent to a self-employed sole proprietor and, hence, should be afforded an exemption for necessities. The defendant should have the burden of proof in making such a showing. The test for so-called business necessities should make clear that it is not intended to be used to keep the business going but, rather, to maintain the defendant through a short transitional period and to keep him self-supporting, although not necessarily self-employed. Hence, a defendant should be permitted to exempt the essential "tools of his trade" without regard to a fixed dollar limit. His bank account should be protected in the amount of $500. (The staff was directed to incorporate the substance of Section 690.7 as set forth in the Employees' Earnings Protection Law recommendation.) Accounts receivable and inventory of the sole proprietor (or a person equivalent to a sole proprietor) should be exempted in a fixed amount. However, the court should be permitted to increase these fixed exemptions (for bank accounts, accounts receivable, and inventory) on a

showing of need by the defendant. To obtain a temporary restraining order prohibiting a defendant from using his bank account other than in the ordinary course of business, the plaintiff should post a bond in twice the amount of the account affected. Liability on the bond should include liability for a wrongful attachment. The amount of the bond should be subject to increase prior to a hearing on the probable validity of the claim where the defendant can show that the impact of the restraining order upon his activity causes the security of the bond to be inadequate.

(7) The Commission considered the problem of defining "in the ordinary course of business" and directed the staff to attempt to provide standards that would preclude a defendant from making preferential transfers to other creditors, but which would permit such action as the payment of ordinary wages to employees, the payment of rent and utilities, and perhaps the payment for goods delivered and services rendered after the date of service of the order.

STUDY 65 - INVERSE CONDEMNATION (COMPULSORY DEDICATIONS)

The Commission considered Memorandum 71-96 (and the attached letter from Judge J. B. Lawrence) and the First Supplement to Memorandum 71-96 (and the attached letter from Mr. Gideon Kanner).

The Commission determined the study of the problem of compulsory dedications should be deferred until an appropriate time in the future in view of the fact that the Commission is now engaged in studies of prejudgment attachment and condemnation law and procedure, both of which legislative committees have indicated should be given priority over other topics, and that the Commission does not have time to consider compulsory dedication, and compulsory dedication is a matter worthy of a great deal of thought on the part of the Commission. The Commission did decide that the matter is worthy of Commission study in the future when time permits.

The Executive Secretary is to advise Judge Lawrence of the Commission's decision with respect to compulsory dedications.

STUDY 71 - PLEADING

The Commission approved the substance of the bill attached to Memorandum 72-7. This bill is designed to eliminate an inconsistency between Sections 471.5 and 472 of the Code of Civil Procedure.

STUDY 77 - NONPROFIT CORPORATIONS LAW

The Commission considered Memorandum 71-97 relating to the study of nonprofit corporations law.

The Commission discussed its agenda of topics and concluded that it will be a number of years before it is ready to take up the study of nonprofit corporations. It is anticipated that the attachment and condemnation studies will occupy substantially all of the Commission's time for a number of years. In addition, the Commission has four or five completed or substantially completed studies on hand that are now ready for consideration. Finally, the funds available for research during the current and next fiscal year are substantially limited and would not permit financing the study of nonprofit corporations at this time.

The Executive Secretary was directed to advise Mr. Davis of the situation and to indicate that we would be interested in discussing at a future time (when funds are available) the possibility of his preparing a background study on nonprofit corporations.

Minutes
January 13, 14, and 15, 1972

STUDY 80 - PREJUDGMENT INTEREST IN CIVIL ACTIONS

The Commission considered Memorandum 72-3 and the attached letter from the State Bar transmitting a copy of a conference resolution relating to prejudgment interest.

The Executive Secretary was directed to advise the State Bar that the topic of prejudgment interest has been discussed by the Commission. The Commission believes that the topic is one that will require a substantial background study, and funds are not available to the Commission to finance the study at this time. Moreover, the Commission is now working on prejudgment attachment and condemnation law and procedure, and these studies are taking substantially all of the Commission's time and resources and will continue to do so for a number of years. The legislative committees have indicated that these topics should be given a priority. We are also aware that the matter of prejudgment interest is being studied by a special committee appointed by the Chief Justice. For these reasons, the Commission has not scheduled the prejudgment interest study for consideration in the immediate future. The Commission does plan to consider the topic in due course.

APPROVED

_____
Date

_____
Chairman

_____
Executive Secretary

EXHIBIT I

Minutes
January 13, 14, and 15, 1972

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January 10, 1972

REFER TO FILE NUMBER
31-167

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

Re: Proposed California
Attachment Statute

Dear John:

Thank you for your letter of January 4, 1972, transmitting the materials relating to the study of the Law Revision Commission with respect to the proposed revision of the California Attachment Statute in the light of the decision in Randone v. Appellate Department of the Superior Court. As I indicated to you on the telephone, I am representing the Credit Managers' Association of Southern California, the San Francisco Board of Trade and the San Diego Wholesale Credit Men's Association in connection with their consideration of the effects of this decision and any remedial legislation which might be proposed to the California Legislature. We are anxious to cooperate with the Law Revision Commission in connection with its study of the same subject and we appreciate your invitation to submit comments in writing for consideration by the Commission at its scheduled meeting on January 14-15, 1972.

This letter is being written in response to that invitation, but I should emphasize at the outset that we have just begun our consideration of the problem and that the ideas and suggestions set forth below are tentative in nature. Also, there has not been sufficient time to attempt to reduce these ideas to statutory language.

Therefore, the suggestions below merely constitute an outline of our present thinking regarding an approach which might strike a reasonable balance between the interests of creditors and of debtors in this area and which, we believe, would be upheld by the court under the rationale of the Randone case. I would appreciate it if you could distribute copies of this letter to the members of the Commission, if possible prior to the meeting on Thursday evening, January 13, but in any event at the commencement of that meeting, so that they may have an opportunity to review these tentative suggestions prior to the discussion on Friday.

Before setting forth our specific suggestions, I would like to discuss certain underlying principles upon which they are based. These principles in turn are based in large part upon the vast experience of the organizations above mentioned in representing their members in connection with the extension of business credit in the State of California.

1. We believe that it is necessary in any revision of the attachment statute to take into consideration the varying factual situations in which the remedy of attachment might be utilized, both from an economic and sociological point of view. In fact, as we understand the opinion, the Randone case held that the primary vice of the present attachment statute was that if failed to make such discriminations. The Court in effect invited the Legislature to revise the statute to separate out those situations where a prejudgment attachment could legally and constitutionally be provided.

Specifically, the principle upon which our suggestions are based is that commercial cases should be dealt with separately from consumer cases and that the prejudgment remedy of attachment, with a modified procedure to meet the objections in Randone to the present statute, be preserved in those cases where credit is extended to a business.

It seems apparent from a reading of the entire Randone opinion that the Court is focusing almost entirely

upon the plight of a consumer who is being deprived, without a hearing, of the necessities of life upon the basis of a claim which (in the Court's eyes) is probably fraudulent. In footnote 26 the Court quotes a Congressman, who was previously quoted in the Sniadach case, to the effect that "In a vast number of cases the debt is a fraudulent one, settled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up a pound of flesh." It is clear that the Court was preoccupied with the plight of a poverty striken person who has bought a color TV set for five times the list price and is forced to let his family starve by the legal process employed by the seller to collect the debt.

On the other hand, the factual situation with which we are concerned involves as a typical case one business corporation selling goods on open account to another business corporation for $10,000 or $50,000 or $100,000 and desiring to have some effective means of enforcing the obligation, which has never been disputed, short of waiting for a case come to trial on the trial calendar two or three years after it is filed.

We do not believe that there is any reason to assume that the California Supreme Court would take the same view of a properly restricted prejudgment attachment statute applied to the latter case as they did with respect to the former. We doubt that a statute can be devised which is both constitutional (in the view of the present members of the California Supreme Court) and provides any effective prejudgment remedy for the collection of consumer debt. Therefore, the suggestions which are made below exclude the remedy of attachment in that situation.

2. We believe that the suggestion, that the remedy of attachment be granted only in cases where the creditor alleges that the debtor has removed or concealed his assets or intends to remove or conceal his assets, is impractical and furnishes no remedy to any creditor in a business context. In the first place, if the debtor has already removed or concealed his assets, the sheriff will

not be able to find them in order to levy the writ of attachment. On the other hand, if the creditor alleges that the debtor intends to remove or conceal his assets, he can have no conclusive proof of this state of mind of the debtor and only one of two things can happen. Either the creditor was right and the debtor succeeds in removing or concealing his assets before the writ is levied, in which case the procedure is pointless. Or the debtor is prevented from doing that by the levy and he then asserts that the fact that the goods were still available to be levied upon is proof that he never had the intention in the first place. The creditor is then subjected to an action for wrongful attachment for which he would probably have no defense. While the remedy thus restricted might be marginally useful in a handful of cases, as a practical matter it would generally be a delusion to creditors.

3. In any event, to focus attention upon the "fraudulent" debtor is completely to misconceive the problem as far as business creditors are concerned. When a business gets into financial difficulty, the natural tendency in almost all cases is for its managers to try to stall off all of its creditors, hoping for some miracle; and in the meantime to dissipate the assets, not through any fraudulent activities of the owners, but simply due to the fact that every day it keeps running it is losing money. The vain hope of the managers (who may or may not be the beneficial owners) is that somehow things will be turned around; and in the majority of cases they will continue running the business into the ground until there is nothing left for the creditors, unless the creditors are given a legal right to prevent this.

If a business cannot pay its debts, then it belongs of right to its creditors, and not to its previous owners, and the creditors should be able to stop the dissipation of its assets. The way in which this has been possible in the past was through the levy of an attachment.

It is not an answer to this problem to say that the creditors can put the business into bankruptcy. The fact is that they cannot do that unless an act of bankruptcy has occurred. One of the most common acts of bankruptcy

which has been used in the past is the levy of an attachment by one creditor while the business is insolvent, which permits other creditors to file an involuntary petition. The only other act of bankruptcy which would commonly be available in this situation would be a preferential payment to one creditor while the business is insolvent. However, if the remedy of attachment is abolished and the debtor decides to keep running by making no payments whatever to any of its creditors, the managers can survive until every last dime in the business has been used up for salaries and other expenses and nothing whatever is left for the creditors.

Nor is it any answer to this problem to say that New York has gotten along without any general prejudgment attachment statute. Professor Charles Seligson, who is one of the most experienced bankruptcy practioners in New York, has stated on several occasions at meetings of the Commission on the Bankruptcy Laws of the United States that one of the most serious problems concerning the bankruptcy laws is that, in his experience, by the time a business finally goes into bankruptcy there is literally nothing left for the creditors. I do not have any data to prove that this situation is worse in New York than in California; but it is undeniably true that in California in the past the creditors had a legal remedy (if they choose to use it) which could be employed to terminate the dissipation of assets by a failing business, whereas in New York they did not. Assuming that creditors in California have not generally used this remedy as soon as they should have, in their own self interest (which may be true), that is no reason to deprive them of it.

4. We do not proceed on the assumption, which seems to underlie some of the discussions of this problem, that all creditors are asserting fraudulent claims and that every alleged debtor has a valid defense to any action against him. Whatever the situation may be in the consumer area, we think that this assumption is untenable and indeed absurd in the type of credit situation to which we are directing our attention. We think that in this type of situation the Legislature can and should make a finding, which we believe would be respected by the Court, that

there is not one case in a thousand where the debtor has any defense whatever or has ever denied owing the money.

Based upon the foregoing general principles we have the following suggestions regarding the restriction and revision on the remedy of prejudgment attachment in California, which we believe would clearly survive the constitutional tests set down in the Randone case.

I. Restrict the remedy of attachment to an action against a business or a non-resident.

While there obviously is a problem in formulating a satisfactory definition which will distinguish "businesses" from "consumers," we believe that the following avenues of approach to that distinction are worth consideration:

A. In one respect it is very easy to distinguish debtors who are in business and that is simply to provide that the remedy of attachment is always available against a corporation or against a partnership with respect to partnership property. A business corporation or a partnership exists only to engage in business and the assets contributed to those artificial entities are a trust fund for their creditors. Any concern about depriving the defendant of the "necessities of life," with which the Randone case was so preoccupied, is obviously irrelevant in connection with a corporate or partnership debtor. We suggest that in addition to providing for the remedy of attachment against such business entities in the Code of Civil Procedure, an amendment should be made to the Corporations Code to make it a condition to the charter of every domestic corporation and of the qualification to do business in this State of every foreign corporation, and a condition of the formation of any general or limited partnership under the provisions of the Corporations Code, that the entity is subject to the rights of its creditors to attach its property in accordance with the provisions of the Code of Civil Procedure.

B. With respect to a sole proprietorship, there is obviously greater difficulty in distinguishing between a true business situation and the small artisan without employees or capital goods who is merely working for himself rather than for an employer, and who therefore

should probably be treated the same as an employee (or, in other words, as a "consumer"). However, at least one approach would be to provide that those businesses referred to in Division 6 of the Uniform Commercial Code dealing with bulk sales notices, even though conducted as sole proprietorships, would be treated in the same manner as corporations and partnerships with respect to the right of attachment. These businesses include retail and wholesale merchants and certain service businesses (baker, cafe or restaurant owner, garage owner, cleaner and dyer). It might also be possible to include in the "business" category a sole proprietorship based upon the number of its employees, even though it is not a merchant or one of the specific types of service businesses listed in Division 6 of the Uniform Commercial Code. In particular, a suggestion has been made that building contractors should be included in this category even when they are operated as sole proprietorships.

In any event, we do not believe that it is an impossible task to formulate a reasonable definition of an individual who should be treated like a corporation or partnership because he is "in business" on a substantial scale.

C. In addition to the foregoing categories, we believe that the remedy of attachment should be available with respect to non-residents and persons who are not subject to personal service of process, in order to permit a California creditor to obtain jurisdiction in this State. In our opinion, the definition of non-resident should include all foreign corporations which are not qualified to do business in this State and all individuals who are in fact non-residents, without regard to the wholly indeterminable question of whether they may or may not be subject to service of process through some "long-arm statute." It seems to us to be an impractical suggestion to say that the plaintiff must anticipate how far the courts are going to permit such non-resident service, at the risk of being sued for wrongful attachment. In addition, this category should include, in the precise terms of the sections of the Code of Civil Procedure dealing with service by publication, those persons who abscond or conceal themselves so that personal service is not feasible.

D. In addition to the preceding categories

of debtors, an attachment should unquestionably be permitted with respect to any goods which have been made the subject of a bulk sales notice. There is no conceivable constitutional reason why a creditor should not be permitted to levy upon goods when the debtor has advertised that he is turning them into cash, which can easily be concealed or dissipated. In fact, this is the only remedy available to a creditor under Division 6 of the California Uniform Commercial Code once a bulk sales notice is published. Unless this remedy is restored in that situation, it will be necessary either to completely rewrite Division 6 of the Uniform Commercial Code or to repeal it as being useless to the creditors whom it is designed to protect.

II. Restrict the nature of the claims for which an attachment can be levied to debts consisting of liquidated claims for money based upon money loaned, goods sold and delivered, rent, or services rendered.

One of the problems with the way in which the remedy of attachment has been broadened in California has been its extension to cover claims where there is a rather large probability that the defendant has at least an arguable defense to the claim, as opposed to those claims where such a defense probably will exist in only a minute fraction of the claims asserted. For example, to permit an attachment in an action for personal injury is to permit it in a situation where there is no reason to suppose that the claimant is more likely to prevail than the defendant and where it is virtually impossible to judge the relative merits of their positions without a full scale trial.

On the other hand, we believe that the concept behind the restriction in resident cases in the past to actions on a contract "for the direct payment of money" was a sound one. In other words, the Legislature was groping for a formula which would segregate those cases where it is highly improbable that the defendant is going to have any valid defense to the claim. Unfortunately, the California courts paid no attention to this limitation in the statute and extended the remedy to cases of "implied contract" where there had been a rescission of a previous transaction, or where a plaintiff "waived the tort and sued in assumpsit," and where probably a complex legal dispute was involved in

which either party was as likely to be in the right as the other.

We believe that restricting the remedy of attachment to those types of business debts mentioned above, where the debtor has agreed to pay a specified sum of money for goods or services or in repayment of a loan, would mean that in the overwhelming proportion of the cases there could be no legitimate argument as to whether the debt was or was not owed.

There would of course be a minority of cases in these categories where the defendant had a valid defense, and the procedure which we suggest below would give him every reasonable opportunity to assert that defense at the initiation of the proceeding.

III. Revise the procedure for attachment to authorize the issuance ex parte by the Clerk of a Temporary Restraining Order against the defendant prohibiting him from making any transfers of his non-exempt property otherwise than in the ordinary course of business, and the simultaneous issuance of a Notice of Hearing on the question whether an attachment should be issued, to be held five days after the service upon the defendant of the Temporary Restraining Order and Notice, if such hearing is demanded by the defendant.

The Constitution only requires that an opportunity for hearing be afforded the defendant, not that a hearing be held if the defendant does not want or request one. Therefore, in order to save the judicial time which would be involved in thousands of useless hearings, since most defendants will not deny under oath that they owe the debt, the defendant upon whom such a Notice is served should be required to file a request for the hearing within a four day period after such service; otherwise, the writ of attachment would be issued as a matter of course at the time the hearing is scheduled. Also, there should be a provision that if the plaintiff makes reasonable efforts to serve the Temporary Restraining Order and the Notice upon the defendant during a five day period and is unable to effect service, he should then be entitled to obtain the writ of attachment from the Court without such service or any hearing, since it has been

demonstrated that one of the situations where an attachment is clearly proper (i.e., where the defendant is concealing himself or has absconded) exists in that case.

The suggested procedure does not deprive any defendant of the use of his property prior to an opportunity for a hearing and he would be afforded a speedy right to have a judicial determination, if he so desires, that the attachment should not be permitted. He would, of course, be entitled to contest the issuance of the attachment on the basis that the conditions regarding the type of cases in which it is available do not exist. In addition, however, the defendant should be permitted to contest the issuance of the attachment on the ground that there is a reasonble probability that he has a valid defense to the claim of the plaintiff. Also, the defendant should in any case be permitted to prevent or lift the attachment by the posting of a bond as he is currently permitted to do.

The Temporary Restraining Order should by its terms prevent the defendant from removing or concealing any of his nonexempt property or making any transfer of any such property otherwise than in the ordinary course of business. It should also specifically enjoin him from moving his bank account or withdrawing any funds by any checks written after the service of the Temporary Restraining Order and until the hearing is held. This will, of course, prevent him from using the funds on deposit to pay other creditors; but it will not be substantially prejudicial to such a business defendant to suspend his payments to other creditors for a period of five days, in view of the fact that he will undoubtedly have already stalled them for months. In fairness to the creditor who is seeking the attachment, the debtor should not be permitted to prefer other creditors after the hearing has been noticed.

This arrangement would avoid the dishonoring of any checks already written by the debtor, with the consequent adverse effect upon his credit which was referred to by the Court in the Randone case, but at the same time would not permit him to move his bank account or write large checks to other creditors whom for one reason or another he may prefer to pay rather than the plaintiff, whether or not these other debts are legitimate.

If the defendant does not demand a hearing, or the defendant cannot be served with the Temporary Restraining Order, or the defendant is unable at the hearing to establish one of the above mentioned grounds for denying the attachment, the writ of attachment should then immediately issue to permit the plaintiff to levy upon the assets of the debtor or to place a keeper in his business.

IV. The lien created by the attachment process should arise upon the service of the Temporary Restraining Order upon the debtor or, if service proves to be impossible, upon the levy of the writ of attachment which is issued upon a showing that such service could not be effected.

The plaintiff's priority vis-a-vis other creditors of the debtor should date from the time such lien arises as under the present California law.

V. Attachment of real estate and securities.

With respect to the attachment of real estate and securities such as corporate stock, we suggest that this should be permitted substantially upon the present terms without regard to the type of defendant, although we believe that the type of claim for which an attachment is available should probably be restricted in these cases to the same ones suggested above. The reason for this is that the levy of attachment upon real estate does not deprive the defendant of its use, but merely prevents its transfer. Similarly, in the case of registered securities, the seizure of the certificate does not effect any transfer of the registered ownership and the dividends or interest would still be paid to the owner. He would merely be prevented from negotiating or concealing these highly fugitive types of property.

As a practical matter, since the plaintiff must seize the certificate under the Uniform Commercial Code in order to effect a levy upon corporate stock, the plaintiff will not often be in a position to make a valid levy. However, where he can do so, he should be permitted to have the sheriff take the certificates into custody so that the defendant cannot sell them or conceal them.

Whether or not negotiable instruments which are not in registered form should be treated similarly is also a question which should be considered.

As I indicated at the outset, these suggestions have not been definitively formulated and have not yet been thoroughly reviewed by the officers of the Credit Associations of California. Also, there has been no time to put them into detailed statutory language. However, we believe that some approach along these or similar lines can preserve the remedy of attachment as a useful and proper remedy in the commercial context. If that remedy is abolished, the accomodation which should be attempted between the interests of creditors and debtors will have been unfairly tilted in favor of debtors.

We do not believe that the tentative draft statute which has been submitted to the Commission by its Consultant is a workable or satisfactory solution to this problem. Nor do we believe that its proposed abolition of domestic attachment is required by the Randone case, if that case is read in the light of the facts to which the Court was addressing its discussion. We see no reason to assume that a consciencious balancing of the rights and interests of creditors and debtors in commercial transactions, which is judged to be fair and reasonable by the Law Revision Commission and by the California Legislature, would be declared unconstitutional by the California Supreme Court.

I want to thank you again for the opportunity to submit these comments. In response to your invitation I expect to attend the meeting of the Commission Friday afternoon and Saturday morning, January 14-15, and will be happy to discuss these thoughts with the members of the Commission if I can be of further assistance.

Sincerely yours,

Harold Marsh, Jr.
of NOSSAMAN, WATERS,
SCOTT, KRUEGER & RIORDAN

HM:pf

cc: Mr. Lee J. Fortner
Mr. W. J. Kumli
A. Morgan Jones, Esq.
Vernon D. Stokes, Esq.
Mr. Lawrence Holzman

P.S. I am enclosing fifteen additional copies of this letter for your convenience if you wish to distribute them to members of the Commission and others.