

May 8, 1972

Time

Place

May 11 - 7:00 p.m. - 10:00 p.m.

SAN FRANCISCAN HOTEL
Market Street at Civic Center
San Francisco 94103

May 12 - 9:00 a.m. - 5:00 p.m.

STATE BAR BUILDING
601 McAllister Street
San Francisco 94102

May 13 - 9:00 a.m. - 1:00 p.m.

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

May 11-13, 1972

1. Minutes of April 13-14, 1972, Meeting (sent 4/20/72)

2. Administrative Matters

Meeting Schedule

Memorandum 72-36 (sent 4/20/72)

Research Contracts

Memorandum 72-32 (sent 4/24/72)

3. Study 39-30 - Employees' Earnings Protection Law

Memorandum 72-33 (sent 5/1/72)

First Supplement to Memorandum 72-33 (sent 4/28/72)

Second Supplement to Memorandum 72-33 (sent 5/5/72)

4. Study 39.80 - Civil Arrest and Bail

Memorandum 72-34 (sent 4/26/72)

Tentative Recommendation (attached to Memorandum)

Background Study (attached to Memorandum)

First Supplement to Memorandum 72-34 (sent 5/5/72)

5. Study 39.70 - Prejudgment Attachment

Memorandum 72-26 (sent 4/4/72; another copy sent 4/20/72)

Memorandum 72-31 (sent 4/20/72)

Memorandum 72-35 (sent 4/20/72)

First Supplement to Memorandum 72-35 (sent 4/24/72)

Second Supplement to Memorandum 72-35 (sent 5/5/72)

Third Supplement to Memorandum 72-35 (sent 5/5/72)

Memorandum 72-21 (sent 3/3/72; another copy enclosed)

6. Study 52 - Sovereign Immunity

Memorandum 72-37

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MAY 11, 12, AND 13, 1972

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on May 11, 12, and 13, 1972.

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

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

Messrs. John H. DeMouilly, Jack I. Horton, and Nathaniel Sterling, members of the Commission's staff, also were present. Professor Stefan A. Riesenfeld was present on all three days, and Professor William D. Warren was present on Thursday and Friday.

Mr. James T. Philbin, Franchise Tax Board, Sacramento, was present as an observer on Thursday, May 11, 1972.

Minutes
May 11, 12, and 13, 1972

ADMINISTRATIVE MATTERS

Minutes

The Minutes of the April 13 and 14, 1972, meeting were approved after the following corrections were made:

- (1) In the listing of the Commissioners present on page 1, substitute "John D. Miller" for "John W. Miller."
- (2) On page 2, third line of third paragraph, delete "but" at the end of the line.

Research Contracts

The Commission considered Memorandum 72-32 and authorized the following research contracts, the Executive Secretary being authorized and directed to execute the contracts on behalf of the Commission.

(1) Repossession of property. A contract with Professor William D. Warren to prepare a study (consisting of a draft statute and explanatory comments) for legislation dealing with the present claim and delivery statute and covering also self-help repossession and any needed revisions in the Commercial Code provisions relating to repossession of property. Compensation is to be \$2,000 plus not to exceed \$300 for travel expenses.

(2) Partition procedures. A contract with Garrett Elmore to prepare a study on whether the various sections of the Code of Civil Procedure relating to partition should be revised and whether the provisions of the Code of Civil Procedure relating to confirmation of partition sales and the provisions of the Probate Code relating to confirmation of sales of real property of estates of deceased persons should be made uniform and, if not, whether

Minutes
May 11, 12, and 13, 1972

there is need for clarification as to which of them governs confirmation of private judicial partition sales. The background study is to include any needed legislation with explanatory comments to the sections of such legislation. Compensation is to be \$1,500 plus not to exceed \$200 travel expenses.

(3) Adoption. A contract with Professor Brigitte M. Bodenheimer to prepare a study identifying needed revisions in the adoption statute. Compensation is to be \$2,500 plus not to exceed \$200 travel expenses.

(4) Consultants on Condemnation. The Commission determined to extend the existing contract with Fadem and Kanner through June 30, 1974, and to encumber an additional \$400 for this purpose.

The Commission also determined to make a contract the same in substance as the existing contract with Fadem and Kanner with another consultant (a lawyer who represents private property owners and who has extensive trial experience), preferably a Northern California lawyer. This contract would, like the Fadem and Kanner contract, provide travel expenses (subject to state limitations) and \$20 for each day attending Commission meetings. The consultant is to be recommended by Commissioners McLaurin and Sandstrom and approved by the Chairman. Compensation and travel to be limited to \$500 for the contract which would cover the period through June 30, 1974.

Priority of Topics

The Commission reaffirmed its decision that the meeting on Saturday should be devoted to the subject of condemnation.

Minutes
May 11, 12, and 13, 1972

Soliciting Cooperation of League of Cities

The Executive Secretary reported that a difficult problem in the condemnation study is elimination of the special condemnation provisions from various improvement acts. The Commission authorized the Executive Secretary to solicit the cooperation of the League of Cities and to offer assistance of the Commission's staff in drafting needed revisions in the improvement acts for consideration by the Commission as conforming amendments to be included in the comprehensive condemnation statute.

Minutes
May 11, 12, and 13, 1972

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

The Commission considered Memorandum 72-33, the First and Second Supplements thereto, and a letter from the Franchise Tax Board (handed out at the meeting).

The following amendments to Senate Bill 88, recommended in Memorandum 72-33, were approved for incorporation into the bill:

AMENDMENT 1

On page 27, line 27, after "termination", insert:
except that the order shall automatically terminate one year after the employee is no longer employed by the employer

AMENDMENT 2

On page 32, strike out lines 33 and 34, and insert:
723.075. (a) This section applies to any withholding order for taxes issued under this article.

AMENDMENT 3

On page 33, line 8, after "notice", insert:
except that immediate delivery shall be made where a jeopardy withholding order for taxes has been served

AMENDMENT 4

On page 34, line 32, after the period, insert:
Together with the temporary earnings holding order, the state shall serve upon the employer an additional copy of the order and a notice informing the taxpayer of the effect of the order and of his right to remedies provided in this

Minutes
May 11, 12, and 13, 1972

chapter. Upon receipt of the order, the employer shall deliver to the taxpayer a copy of the order and notice. If the taxpayer is no longer employed by the employer and the employer does not owe him any earnings, the employer is not required to make such delivery.

AMENDMENT 5

On page 35, line 25, after "face," insert:
is a withholding order for taxes that

AMENDMENT 6

On page 35, line 36, after "full", insert:
or the order is withdrawn except that the order shall automatically terminate one year after the employee is no longer employed by the employer

AMENDMENT 7

On page 36, line 10, after "prepaid", insert:
, or by any authorized state employee

AMENDMENT 8

On page 40, line 23, strike out "debtor" and insert:
creditor

AMENDMENT 9

On page 40, line 23, after "days", insert:
(Saturday, Sunday, and holidays excepted)

AMENDMENT 10

On page 40, line 26, after "days", insert:
(Saturday, Sunday, and holidays excepted)

Minutes
May 11, 12, and 13, 1972

The Commission also directed that Senate Bill 88 be amended to incorporate the substance of the following amendment requested by the Franchise Tax Board:

AMENDMENT

On page 32, line 24, after the period, insert:

In determining whether the earnings are sufficient so that a portion of earnings would be withheld pursuant to Section 18806 of the Revenue and Taxation Code, the tables issued under that section applicable to single persons or married persons without allowance for additional exemptions shall be used.

The following amendment was authorized to make possible the enactment of Senate Bill 88:

AMENDMENT

On page 29, line 39, after the period, insert:

This standard also recognizes that the exemption provided by Section 723.050 may not be adequate, for example, in cases where there are a large number of members of the judgment debtor's family who are dependent upon his earnings for their support.

The Commission discussed whether the Comment to Section 723.051 should contain citations to cases dealing with the judgment debtor's accustomed standard of living. There do not appear to be any cases construing the existing hardship exemption for earnings, and it was not considered desirable to insert references to cases not affected by Section 723.051.

The Executive Secretary noted that the State Bar Committee had been authorized to communicate directly with the Commission and that the scope of the authority of the State Bar Committee had been expanded as previously

Minutes
May 11, 12, and 13, 1972

requested by the Commission. It was agreed that the Board of Governors should be requested to further expand the scope of the study by the State Bar Committee to cover the subject of repossession of property and other matters included under amended SCR 6.

Professor Riesenfeld noted that he had agreed to bring to the Commission's attention a suggestion that a wage assignment include a provision indicating the extent to which the assignment is binding and the circumstances under which it can be revoked. The Commission decided to consider this matter at a future time.

The Commission considered the report of the State Bar Committee. It was first noted that the bill as amended, with the additional amendments approved at the May meeting, should make the bill acceptable to all other groups (other than the sheriffs, marshals, and constables). It was agreed that the Commission would consider the suggestions of the State Bar and other groups for legislation to be submitted at the 1973 session if such suggestions are not incorporated into Senate Bill 88.

The following decisions were made on the State Bar Committee report.
(See First Supplement to Memorandum 72-33.)

Deposit account exemption. The State Bar Committee made a number of suggestions for revision of the deposit account exemptions. It was noted that the various amendments made to Senate Bill 88 take a different approach to the exemption than the bill as introduced. The \$100 exemption is available upon a showing that the debtor has no other deposit accounts. The hardship exemption has been liberalized (no longer limited to rare and unusual cases)

Minutes
May 11, 12, and 13, 1972

and is available to the extent necessary to provide the amount essential for the support of the debtor or his family. There is no limit on the amount that may be exempt under the hardship exemption for deposit accounts. This new scheme has been accepted as satisfactory by all interested groups--those representing creditors, those representing consumers, and those representing debtors. It was decided not to further revise the deposit account exemption because to do so would be to have the bill defeated by one group or another.

Difference between standards in Sections 690.5-1/2 and 690.18-1/2. The Commission noted that the difference between the standards in these two sections was intentional and was designed to protect the debtor.

Service by ordinary mail. The Commission was advised that both the representatives of creditors and debtors felt that the change suggested by the State Bar Committee should be given careful study, but both groups indicated that such change should be considered for the 1973 session and that the bill should not be changed at this time since the matter of the manner of service was one that would require considerable study before the suggested change was adopted.

Discharge from employment. The Commission noted that the bill had been amended to make no substantive change in the protection against discharge from employment because of wage garnishment. The Commission agreed that it would consider revisions in this matter for submission to the 1973 session. However, because of the strong opposition from employer groups to any change in this area, it was considered essential that this matter not be dealt with in Senate Bill 88.

Minutes

May 11, 12, and 13, 1972

State tax withholding. The provisions dealing with withholding for delinquent state taxes were considered to provide the maximum protection to delinquent taxpayers as is politically possible.

Minutes
May 11, 12, and 13, 1972

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

Procedural Aspects

The Commission considered Memorandum 72-35 and the draft statutory provisions attached thereto (Exhibit I). As a matter of general organization, it was determined that, in the usual case, a plaintiff must request a noticed hearing at which he is required to show that the action is one in which an attachment may issue and that the claim on which the attachment is based is probably valid and to identify property which he seeks to attach. Once he has established probable validity in a noticed hearing, he may subsequently apply for additional writs of attachment either ex parte (without a showing of irreparable injury) or upon notice where he seeks to attach additional property. Upon a showing that irreparable injury would be caused to him if the matter were heard on notice, the plaintiff may obtain an attachment ex parte, subject, of course, to the showing required above and a showing that the property which he seeks to attach is nonexempt property. Here also the plaintiff, after showing probable validity ex parte, may apply for additional writs ex parte without a further showing of probable validity but subject here to the condition that he must show irreparable injury.

The following action was taken with respect to specific sections; however, these actions were taken subject to the general organization changes outlined above.

Section 837.010. No change was made in the provisions drafted. The staff was directed to consider adding (1) a provision that provides in substance that "probable validity" means it is more likely than not that the

Minutes
May 11, 12, and 13, 1972

plaintiff will recover judgment against the defendant on the claim in question and (2) a provision that, for the purposes of this chapter, a "security interest" includes both consensual and possessory liens.

Section 537.020. No change. However, the Comment to Section 537.020 should state that, a verified complaint which satisfies the requirements of this section, may be used in lieu of or to supplement an affidavit in regular form.

Section 537.030. This section was deleted and the staff was directed to make conforming changes in Sections 904.1, 904.2, and 904.3 which will preserve the policy of existing law.

Section 537.040. The staff was directed to conform this section to the comparable provisions in Senate Bill 88.

Section 538.010. The staff was directed to use the phrase "action for the recovery" consistently throughout the chapter. The Commission considered whether paragraph (1) should be revised to permit attachment where a security interest had been lost in part or collateral had become impaired in value; i.e., whether an attachment should be permitted to the extent that a claim has become unsecured. The Commission determined that such a change in existing law would seem to be undesirable, primarily because of the additional valuation problems involved; i.e., it would be necessary to determine both the probable recovery and the value of the collateral remaining, as well as the value of the property sought to be attached. Moreover, the Commission believed that in no event should the plaintiff be permitted to waive the security interest he had obtained in order to secure an attachment. However, the staff (with the help of Professor Riesenfeld) was directed to provide further background on these issues.

Minutes

May 11, 12, and 13, 1972

Paragraph (2) was revised to provide substantially as follows:

(2) In an action by, or on behalf of, a spouse, relative, or kindred for the recovery of any sums owned by the other spouse, or other relative or kindred, for support, maintenance or care.

Paragraph (3) was revised to provide substantially as follows:

(3) In an action by the State of California, or any other public entity, for the recovery of taxes due the state or such public entity or for the recovery of any moneys due upon any other obligation or penalty imposed by law.

It was noted that the issue of jurisdictional attachment has been deferred for consideration and it was suggested that perhaps a special note indicating that such action had been taken would be desirable at this place in the statute.

Section 540.010. This section should be revised to reflect that the purpose of the noticed hearing provided in this article is to determine the general right of the plaintiff to attach and to specify certain property which may be attached. The Comment to this section should make clear that attachment is a prejudgment remedy and that, after judgment, the plaintiff will proceed by execution.

Section 540.020. This section was revised to provide substantially as follows:

540.020. The application required by Section 540.010 shall be executed under oath and shall include all of the following:

(a) A statement showing that the action is one in which an attachment may issue.

(b) A statement that the applicant has no information or belief that the indebtedness upon which the action is brought has been discharged in a proceeding under the National Bankruptcy Act or that the prosecution of the action has been stayed in a proceeding under the National Bankruptcy Act.

Minutes
May 11, 12, and 13, 1972

(c) A statement that the attachment is not sought for a purpose other than the recovery for which the action is brought.

Section 540.030. This section was revised to provide substantially as follows:

540.030. The application required by Section 540.010 shall be supported by an affidavit which provides evidence sufficient to entitle the plaintiff to a judgment in the action.

The Comment to this section should make clear that the singular "affidavit" includes the plural and that the requirements of Section 537.020 must be satisfied. Similar changes should be made to Sections 540.060, 541.090, 542.040, and 543.050.

Section 540.040. This section was revised to provide substantially as follows:

540.040. No order shall be issued under this article unless, at least 10 days prior to the hearing, the defendant has been served with:

- (a) A copy of the summons and complaint.
- (b) A Notice of Application and Hearing.
- (c) A copy of the application and of the affidavits in support of the application.

The verb "to issue" should be used in place of "to grant" with reference to orders made under the procedures provided by this chapter.

Section 540.050. Subdivision (a) was revised to provide substantially as follows:

- (a) The plaintiff has applied for an order granting him the right to attach and, if such order is issued, any nonexempt property of the defendant may be attached.

The phrase "has probable validity" was substituted for "is probably valid" in subdivision (b).

The introductory portion of subdivision (d) was revised to provide:

(d) In order to claim at this hearing, that his property is exempt from attachment, in whole or in part, the defendant shall file

Section 540.060. The last sentence of subdivision (a) was revised in the same manner as Section 540.030.

Section 540.070. The last portion of subdivision (b) was revised to read: "to enable him to oppose the issuance of the order."

Section 540.080. The last sentence was revised to read: "In such case, the judicial officer shall hear and determine the issue at the earliest possible time."

Section 540.090. This section was revised to provide substantially as follows:

540.090. (a) Except as provided in subdivision (b), the judicial officer shall determine whether the plaintiff has complied with Section 540.020 and shall issue an order granting the plaintiff the right to attach if he finds all of the following:

- (1) The action is one in which an attachment may issue.
- (2) The plaintiff has established the probable validity of the claim upon which the attachment is based.
- (3) The attachment is not sought for a purpose other than the recovery for which the action is brought.

(b) If the defendant has shown that his property is exempt from attachment, in whole or in part, the order shall be limited accordingly.

The Comment to this section should make clear that, although no special finding is required, no order will be issued if the defendant shows that, to

do so, would violate the National Bankruptcy Act. Further revisions will be required to accommodate the joining of the procedure leading to the actual issuance of a writ with the order granting the plaintiff the right to attach.

Section 540.100. This section was deleted in contemplation of the issuance of an order under this article which both determines the right to attach and authorizes the attachment of certain property. Some provision will, however, be required to make clear that additional writs may be issued subsequently on a proper showing.

Section 540.110. The staff was directed to consider the collateral estoppel problems raised by this section. It was suggested that the policy should perhaps be that the plaintiff should be collaterally estopped, but the defendant should not be and the determinations made in the instant action should be binding on both parties subject, of course, to the overriding supremacy of bankruptcy proceedings.

Section 540.120. The staff was directed to consider combining this section with Section 540.110.

Section 541.010. This section and the other sections of this chapter must be revised to reflect the decision made to combine in one article the ex parte procedures for determining the right to attach and for the issuance of a writ of attachment.

Section 541.020. This section was revised in the same manner as Section 540.020.

Section 541.030. This section was revised in the same manner as Section 540.030.

Minutes
May 11, 12, and 13, 1972

Section 541.040. The phrases "beyond a reasonable doubt" and "or by the verified complaint" were deleted from subdivision (a). Under paragraph (1) of subdivision (b), the plaintiff must show that specific nonexempt property will probably be unavailable for attachment if the matter is heard on notice, and the ex parte writ issued must be limited to such property. The staff was directed to reexamine the term "lost" (which was borrowed from Section 564) to determine what meaning it has and whether a better term might be employed here.

Section 541.050. This section was revised in the same manner as Section 540.090 and must also be revised to reflect the fact that a writ of attachment will be issued under this ex parte procedure permitting the attachment of specific property.

Subdivision (b) was revised to provide substantially as follows:

(b) If the judicial officer finds that the applications and affidavits do not satisfy the requirements of Section 541.040, he shall so state and deny the order. If denial is solely on the ground that Section 541.040 is not satisfied, such denial shall not preclude the plaintiff from making application pursuant to Article 4 (commencing with Section 540.010).

The staff was directed to keep in mind that a plaintiff should not be permitted to recover attorney's fees incurred in an unsuccessful attempt to secure an ex parte writ.

Section 541.060. This section was deleted in contemplation of the issuance of a writ directly under Section 541.060.

Sections 541.070 through 541.120. The staff was directed to revise these sections in view of the decision that the ex parte procedure provided herein will lead directly to the issuance of a writ of attachment authorizing the

attachment of specific property. It was tentatively determined that, even though the writ has been issued ex parte, the defendant's opposition to the issuance should be heard on noticed motion unless the defendant shows that such delay would cause him irreparable injury, having in view his right to release on an undertaking and the other procedural safeguards, including the plaintiff's undertaking and liability for wrongful attachment.

Articles 6 and 7. As noted previously, the Commission determined that, under both the noticed motion procedure and the ex parte procedure to determine the plaintiff's general right to attach (i.e., probable validity and other prerequisites), the plaintiff must identify specific property which he seeks to attach. Nevertheless, procedures for the subsequent issuance of additional writs should be provided, and Articles 6 and 7 should be revised in accordance with this need.

Plaintiff's Protective Order

The Commission considered Memorandum 72-26 and determined that a restraining order should be available in lieu of a writ of attachment both on ex parte application and after a noticed hearing but may only be directed against non-exempt property and may only be issued in circumstances where a writ itself could be issued. Either the plaintiff may request the issuance of a restraining order or the court, in its own discretion without such request, may issue such an order. The plaintiff may obtain a protective order ex parte and then proceed for a writ on noticed motion, but the requirements for the issuance of the order should be the same as those for issuance of a writ.

Minutes
May 11, 12, and 13, 1972

The Commission believed that it was impractical to attempt to determine the scope of the plaintiff's protective order at this stage. However, it was suggested that an order issued ex parte should be more limited in the kinds of restraints placed on the defendant than an order issued after noticed motion. The staff draft proposed on page 3 of Memorandum 72-26 appeared to provide a satisfactory starting point for the latter type order. It did not seem desirable to have the order provide a plaintiff priority over a subsequent attachment.

Method of Levy

The Commission considered the Second Supplement to Memorandum 72-35 and the draft statutory provisions attached thereto (Exhibits I and II) and two memoranda prepared by Professor Riesenfeld and distributed at the meeting ("Creditor's Remedies Respecting Patents, Copyright and Trade Marks" and "Meacham v. Meacham: A Critique"). The following action was taken.

Section 547.010. As a matter of general organization, it was suggested that each of the definitions set forth in this section be made the subject of a separate section and that the Comments to those sections set forth the bases for these definitions.

The definition of "account receivable" should be revised to make clear that the right to payment has been earned.

The definition of "choses in action" should be revised to make clear that the right to payment is not subject to further performance by the defendant or to any event other than the passage of time. As to the issue whether the account debtor must perform any act other than payment, the staff was directed to review the case law (as to debts "reasonably ascertainable" in

Minutes
May 11, 12, and 13, 1972

amount) with a view towards continuing existing rules and preventing levy on speculative or uncertain claims which might result in the plaintiff obtaining a windfall or the defendant losing property that is ultimately determined to be of great value but for which the defendant receives little value. The staff was further directed to prepare a memorandum reviewing the other procedures--charging order, creditor's bill, and supplementary proceedings generally--available for reaching property not subject to attachment.

The definition of "deposit account" should be revised to include all financial institutions holding comparable accounts.

The term "tangible [personal] property" should be substituted for "goods" in subdivisions (f), (g), and (h), and the problem of dealing with trade fixtures should be further reviewed.

As to all types of property subject to attachment, the staff was directed to make clear what happens to the particular property after it has been attached.

Section 547.020. Subdivision (e) was split into two subdivisions providing as follows:

(e) Service of a writ and a notice of attachment upon (1) a bank, (2) a savings and loan association, (3), a credit union, (4) a title insurance company or underwritten title company (as defined in Section 12402 of the Insurance Code), or (5) an industrial loan company (as defined in Section 18003 of the Financial Code) shall be made at the office or branch thereof which has actual possession of the property levied upon or at which the deposit account levied upon is carried and shall be made upon the officer, manager, or other person in charge of such office or branch at the time of service.

(f) Except as provided in subdivision (e), service of a writ and a notice of attachment shall be made upon the person upon whom summons may be served.

Section 547.030. Subdivision (a) was revised to provide substantially as follows:

Minutes
May 11, 12, and 13, 1972

547.030. (a) The levying officer shall attach an interest in real property by recording with the office of the county recorder of the county where the property is located a copy of the writ and the notice of attachment.

The staff was directed to provide a section dealing with fees for the various filing provisions both here and in subsequent sections, e.g., Sections 547.070, 547.080, 547.090.

Subdivision (c) was revised to provide substantially as follows:

(c) Promptly after recordation and in no event more than sixty (60) days after the date of recording, the levying officer shall serve

The bracketed clause in subdivision (c) of the proposed draft was deleted and the last sentence of subdivision (c) as proposed on page 3 of the Second Supplement to Memorandum 72-35 was substituted in brackets subject to further review of the problem of providing adequate protection for the rights of third persons.

Sections 547.040, 547.050, and 547.060. The staff was directed to revise these sections in the manner proposed on pages 3-5 of the Second Supplement to Memorandum 72-35 except that a plaintiff should be permitted to levy on tangible personal property of a business by filing with the Secretary of State. Such levy would provide the plaintiff with priority over other creditors but would not protect him against a bona fide purchaser or buyer in the ordinary course of business.

As suggested in the memorandum, a procedure should be provided which enables the defendant to apply for a less onerous method of levy which still provides the plaintiff adequate security for his claim.

Goods subject to a nonnegotiable document of title should be levied upon by notice to the bailee. Goods subject to a negotiable document of title should be levied upon by levy upon the negotiable document.

Section 547.070. Subdivision (a) was revised in part to provide substantially as follows:

547.070. (a) The levying officer shall attach growing crops, or any interest therein by (1) recording with the office of the county recorder of the county where the real property on which the crops are growing is located a copy of the writ

Subdivision (e) should be revised to conform to subdivision (c) of Section 547.030.

Section 547.080. No change. Reference to this section should be included in subdivision (c) of Section 547.240.

Section 547.090. The staff was directed to redraft this section to provide: (1) motor vehicles which are equipment of a going business should not be seized but should be levied on by filing with the Department of Motor Vehicles; (2) motor vehicles which are inventory also should not be seized but should be levied on by filing with the Secretary of State; (3) as to all other motor vehicles, the plaintiff should have the option whether to seize or to levy by taking the "pink slip" and filing with the Department of Motor Vehicles.

Section 547.100. The staff was directed to redraft this section:

(1) To permit both cash sales and the equivalent of cash sales, e.g., payment by a check or a credit or charge card other than a card issued by the defendant and, if necessary, to provide authority for the levying officer to collect payments made in such manner;

(2) To make clear that the involuntary lien created by filing or by seizure (through a keeper) can be continued without interruption under an agreement between the parties;

Minutes
May 11, 12, and 13, 1972

(3) To make clear what the effect of the lien created is upon proceeds of inventory held at the time of the initial levy and upon after-acquired property;

(4) To make clear that inventory may only be attached on ex parte application where there has been a showing of irreparable injury; i.e., a plaintiff may not use the type of ex parte writ obtained after an earlier noticed hearing on probable validity to attach inventory;

(5) To provide only the plaintiff the power to select a method of levy less onerous than seizure after the initial keeper period.

Section 547.110. No substantive change was made in this section as proposed; however, the staff was directed to consider drafting provisions which would prevent an insurer or plaintiff from cancelling an insurance policy during the period it is attached and which would permit a plaintiff or defendant to keep a policy in force during the same period.

Sections 547.120 and 547.130. The Commission determined that the levying officer should attach both chattel paper and negotiable instruments by serving the person in possession of the chattel paper or instrument with a copy of the writ and notice of attachment and taking possession of such paper or instrument. The Commission directed the staff to consider to whom (e.g., account debtor, obligor, and the like) the plaintiff should give notice, the manner of giving such notice, the effect of such notice on the liability of the person notified, and the duties of the levying officer with regard to payments paid on the attached property. As to chattel paper, the staff was directed to make clear that levy on chattel paper takes priority over levy on the goods subject to such paper.

Minutes
May 11, 12, and 13, 1972

Section 547.140. The staff was directed to resubmit this section together with the Hawaiian provisions relating to garnishment of securities and a memorandum covering the problem of how to treat the dividends from attached securities and how best to handle attached securities.

Section 547.150. This section was revised to provide substantially as follows:

547.150. The levying officer shall attach a judgment owing to the defendant by (1) filing in the action in which the judgment was entered a copy of the writ and the notice of attachment and (2) serving a copy of the writ and the notice upon the judgment debtor in such action and the defendant.

The statute should make clear that an attaching creditor should have no right to intervene in the manner provided in Section 688.1 and, moreover, should not be permitted to levy on a claim which is the subject of litigation.

Section 547.160. The staff was directed to prepare a memorandum dealing with the manner of levy on the interest of a defendant in real property belonging to or subject to administration in the estate of a decedent and indicating what the existing law on this matter is.

As a collateral issue, the staff was directed to also prepare a memorandum indicating what happens to an attachment upon the death of the defendant.

Section 547.170. As noted above, the definition of financial institution should be expanded. Subdivision (b) should be revised to provide that the plaintiff should give the required notice to persons other than the financial institutions.

Section 547.180. This section was only briefly considered and the staff was directed to determine whether other sections in the Financial Code deal with this same subject.

Minutes
May 11, 12, and 13, 1972

Section 547.190. Subdivision (b) should be revised to more clearly state the limits on the levying officer's liability.

Section 547.200. The title to this section should be limited to the types of commercial paper dealt with. The statute should make clear what is to be done following levy on all types of commercial paper (as well as all other property).

Section 547.210. The staff was directed to revise this section in a manner that does not expand the situations in which a receiver may be obtained beyond those in which a receiver may now be appointed and to prepare a memorandum outlining the existing law. The keeper appointed to take custody of property under previous sections should be under the direction and control of the plaintiff and not under the supervision of the court. The staff was directed to reconsider the provision authorizing sale of attached property under court supervision with the lien of attachment continuing in effect on the proceeds of the sale.

Sections 547.220 through 547.240. Consideration of these sections was deferred.

Sections 689 and 689b. The Commission briefly considered these sections. It was determined that a secured party should not lose his secured interest on a sale after attachment and that he may (but is not required to) demand that he be paid off prior to a sale after attachment if his security agreement provides for acceleration. If such a demand is not made, the sale is made subject to the prior security interest. If the security agreement does not contain an acceleration clause, the secured party may not demand payment and any sale should be subject to the prior security interest.

Minutes
May 11, 12, and 13, 1972

STUDY 39.80 - ATTACHMENT, GARNISHMENT, EXECUTION
(CIVIL ARREST AND BAIL)

The Commission considered Memorandum 72-34, the First Supplement to Memorandum 72-34, and the attached tentative recommendation, study, and letter of transmittal relating to civil arrest. The Commission decided to distribute for comment the tentative recommendation and study, with the letter of transmittal, after making the following changes:

(1) The sentence reading, "It imposes a substantial hardship on defendants and debtors and is more often abused than properly used", was deleted from page 2 of the tentative recommendation.

(2) Code of Civil Procedure Section 478 was revised to read:

478. A person may not be imprisoned in a civil action for debt or tort, whether before or after judgment. Nothing in this section shall affect the power of a court to enforce its orders.

(3) Code of Civil Procedure Section 539 was amended to delete the reference to bail on arrest and to substitute a reference to Chapter 7 (commencing with Section 830) of Title 10 of Part 2 of the Code of Civil Procedure.

(4) Code of Civil Procedure Sections 513, 515, and 516 are not to be amended, but it should be noted in the tentative recommendation that these sections have not been adjusted because the claim and delivery procedure has been held unconstitutional.

(5) Code of Civil Procedure Section 684.2 was deleted from the tentative recommendation.

Minutes
May 11, 12, and 13, 1972

(6) Government Code Section 202 was revised to read:

202. The State may imprison or confine for ~~+(a)--The~~ the protection of the public peace or health or of individual life or safety.

~~(b)--The-purpose-of-enforcing-civil-remedies.~~

In addition to these changes, the Commission requested the staff to investigate the Great Britain recommendation on prejudgment civil arrest referred to in Professor Riesenfeld's initial study for the Commission and possibly to note such recommendation in the background study.

Minutes
May 11, 12, and 13, 1972

STUDY 52 - SOVEREIGN IMMUNITY (NUISANCE LIABILITY)

The Commission considered Memorandum 72-37, Memorandum 70-102, and the tentative recommendation (attached to Memorandum 70-102). After considerable discussion of the decision of the California Supreme Court in Nestle v. City of Santa Monica, the Commission determined that the theory of common law nuisance is not a good approach to solving problems such as airport noise. Common law nuisance as a theory of governmental liability should be eliminated and appropriate legislation should be enacted, if necessary, to deal with such problems as liability for airport noise. The Commission determined that its earlier recommendation was sound and that the statute section set out below, and the accompanying Comment, reflect the Commission's present view.

Govt. Code § 815.8 (new). Liability based on nuisance

Section 1. Section 815.8 is added to the Government Code, to read:

815.8. A public entity is not liable for damages under Section 731 of the Code of Civil Procedure and Part 3 (commencing with Section 3479) of Division 4 of the Civil Code.

Comment. Section 815.8 expressly eliminates the liability of a public entity for damages based on a theory of common law nuisance under the Civil Code provisions—Part 3 of Division 4—which describe in very general terms what constitutes a nuisance and permit recovery of damages resulting from such a nuisance. It makes clear and carries out the original intent of the Legislature when the governmental liability statute was enacted in 1963 to eliminate general nuisance damage recovery and restrict liability to statutory causes of action. See Section 815 and the Comment thereto; *Recommendation Relating to Sovereign*

Minutes
May 11, 12, and 13, 1972

Immunity: Number 10—Revisions of the Governmental Liability Act, 9 CAL. L. REVISION COMM'N REPORTS 801, 809 (1969); A VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.10 (Cal. Cont. Ed. Bar 1964, Supp. 1969).

Section 815.8 does not affect liability under Section 14 of Article I of the California Constitution (inverse condemnation), nor does it affect liability under any applicable statute excluding Part 3 of Division 4 of the Civil Code. Moreover, Section 815.8 is concerned only with the elimination of liability for damages; the right to obtain relief other than money or damages is unaffected. See Section 814.

APPROVED

_____ Date

_____ Chairman

_____ Executive Secretary