

May 31, 1972

Time

June 8 - 7:00 p.m. - 10:00 p.m.
June 9 - 9:00 a.m. - 5:00 p.m.
June 10 - 9:00 a.m. - 1:00 p.m.

Place

International Hotel
6211 W. Century Blvd.
Room 1232
Los Angeles 90045

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

June 8-10, 1972

June 8 and 9

1. Minutes of May 11-13, 1972, Meeting (sent 5/19/72)
2. Administrative Matters

Brief oral report on status of 1972 legislative program

Research Contracts

Memorandum 72-41 (enclosed)

3. Study 39-70 - Prejudgment Attachment

Legislative Developments

Memorandum 72-40 (sent 5/19/72)

First Supplement to Memorandum 72-40 (to be sent)

Comprehensive Attachment Statute

(Portions of the Comprehensive Attachment Statute are contained in the brown covered binder sent to each member of the Commission. Additional portions will be sent for insertion in this binder.)

Exemptions

First Supplement to Memorandum 72-35 (sent 4/24/72; another copy sent 5/15/72)

Draft Statute (brown binder)

Memorandum 72-38 (to be sent)

Wrongful Attachment; Undertakings

Memorandum 72-39 (to be sent)

Memorandum 72-21 (sent 3/3/72; another copy sent 5/8/72)

May 31, 1972

June 10

4. Study 36.52 - Condemnation (Partial Take)

Memorandum 72-27 (sent 3/21/72; another copy sent 5/15/72)
First Supplement to Memorandum 72-27 (sent 3/17/72)

5. Study 36.51 - Condemnation (Larger Parcel)

Memorandum 72-28 (sent 3/21/72; another copy sent 5/15/72)
First Supplement to Memorandum 72-28 (sent 3/29/72; another
copy sent 5/15/72)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION
JUNE 8, 9, AND 10, 1972
Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on June 8, 9, and 10, 1972.

Present: John D. Miller, Chairman
Marc W. Sandstrom, Vice Chairman (Thursday and Friday)
John J. Balluff
Noble K. Gregory
John N. McLaurin
Thomas E. Stanton, Jr.

Absent: Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
Howard R. Williams
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 William D. Warren, Commission consultant on attachment, garnishment, and execution, was present on Friday. Gideon Kanner, Commission consultant on condemnation law and procedure, was present on Saturday.

The following persons were present as observers on the days indicated:

Thursday, June 8

E. E. Barlough, President, California Association of Collectors, Sacramento

Saturday, June 10

Edward J. Connor, Department of Public Works, Sacramento
James Markle, Department of Water Resources, Sacramento
Terry C. Smith, Los Angeles County Counsel, Los Angeles
Charles E. Spencer, Department of Public Works, Los Angeles

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ADMINISTRATIVE MATTERS

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The Minutes of the May 11-13, 1972, meeting were approved after the following correction was made: On page 2, line 4, delete "present" and insert "absent."

1972 Legislative Program

The Executive Secretary made the following report concerning the 1972 legislative program of the Law Revision Commission.

Measures enacted or adopted. The following measures have been enacted or adopted:

Stats. 1972, Ch. 73 (AB 106) - Technical pleading revision

Res. Ch. 22 (SCR 5) - Continues authority to study topics

Res. Ch. 27 (SCR 6) - Expands scope of two topics

Measure pending. The following measure has been approved by the Assembly Judiciary Committee and is on the consent calendar in the Assembly:

AB 2367 - Technical Evidence Code revision

Measure referred to interim study. The following measure has been referred to interim study. The measure is dead for the current session unless the poverty lawyers are willing to support the bill without any amendment of the so-called "hardship exemption."

SB 88 - Wage garnishment and related matters

Research Contract

The Commission considered Memorandum 72-41 and authorized the following research contract, the Executive Secretary being authorized and directed to

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execute the contract on behalf of the Commission: a contract with Professor Arvo Van Alstyne to prepare a study (consisting of an analysis of alternative methods of resolving problems created by the Nestle decision). Compensation is to be \$1,500 plus not to exceed \$200 for travel expenses.

The Commission determined not to make the other contract suggested in Memorandum 72-41 since the proposed contractor had indicated he was unwilling to enter into the contract.

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STUDY 36.51 - CONDEMNATION (LARGER PARCEL)

The Commission considered Memorandum 72-28 and the First Supplement thereto relating to the definition of the larger parcel. After considerable discussion of the existing California law and the federal integrated economic unit rule, the Commission determined not to codify a definition of the larger parcel, thus leaving this matter to judicial development.

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STUDY 36.52 - CONDEMNATION (PARTIAL TAKE)

The Commission considered Memorandum 72-27 and the First Supplement thereto relating to compensation in a partial taking case. After considerable discussion of the existing California law, the federal rule, the before-and-after rule, and the compromise proposal set out in the memorandum, the Commission determined to retain existing California law. The tentative recommendation should note that the reason for the retention of existing law is that there has been no general concensus of the practitioners in the field that a change would be beneficial. Also, the area is one where the rules are better left to judicial development rather than to statutory statement.

In addition, the Commission requested the staff to examine the existing California law to determine whether there are any facets of its operation that require improvement by legislation. Examples of possible areas for improvement mentioned by the Commissioners include: whether particular items of special damage and special benefit should be coextensive, whether the decision of the Court of Appeal in City of Baldwin Park v. Stoskus (2d App. Dist., Div. 3, 2d Civ. No. 38026, Sup. Ct. No. 921 635, April 27, 1972) is sound, whether the effect of a project to be constructed in the future is adequately discounted, and whether the definition of the scope of a project is sufficient.

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

General approach. After an extensive review of the draft statute, the Commission expressed concern that the statute is becoming longer and more complicated and that the procedures it provides very likely would impose an intolerable administrative burden on the courts. It was decided that, before doing further work on the statute, it would be desirable to examine (1) the basic need for an attachment statute, (2) the alternatives presently available (including private remedies under Article 9 of the Commercial Code and equitable relief under Code of Civil Procedure Sections 525 through 535), and (3) how these alternatives might be best supplemented. The staff was directed to prepare a questionnaire for distribution after the July meeting to determine what the needs and desires are of people affected by this general body of law and to ask Professor Warren if he could review Article 9 for the Commission at the July meeting--explaining its scope, how it works, its advantages, and its disadvantages.

Prior to taking the action outlined above, the Commission had reviewed specific portions of the comprehensive statute and had taken the following action.

Exemptions. The Commission considered the First Supplement to Memorandum 72-35 and the draft statutory provisions attached thereto (Exhibit I). The following action was taken with respect to these sections:

Section 544.010(a). The Commission determined that, for the time being, the existing law providing a complete exemption from prejudgment attachment of all earnings should be retained. The staff was directed to note in the Comment

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that according such treatment to independent contractors raises significant problems and that an attempt to solve these problems would be made in the future.

Section 544.010(b). The deposit account exemption was revised to provide a \$1,000 aggregate exemption. The concept of treating a husband and wife together as one person should be continued here and in other places where joint ownership may be involved, e.g., motor vehicles, household furnishings, and so on.

Section 544.010(c). Subdivision (c) was revised to provide:

(c) Household furnishings, appliances, wearing apparel, personal effects, and provisions and fuel, personally used or procured for use by, an individual defendant and members of his household at his principal place of residence.

Such revision would in essence provide a complete exemption from attachment, but the staff was further directed to provide a procedure which would enable a plaintiff to request and, upon a proper showing, to obtain an order prohibiting the defendant from transferring these assets, thus preserving them for execution. Implicit in this direction was the belief that, when Section 690.1 (household furnishings exemption) is examined in connection with execution procedures, limits will be placed on the value of household furnishings which may be exempted.

Section 544.010(d). The staff was directed to provide an exemption from seizure of any one motor vehicle--such vehicle to be selected by the defendant. However, a plaintiff, upon a proper showing, should be able to obtain a lien on such vehicle, thus preserving a right to eventually execute upon such vehicle after judgment. Moreover, a defendant should, also upon a proper

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showing, be able to obtain an exemption from seizure of additional vehicles necessary for the support of himself and his family, but here again, the plaintiff would be able to maintain a lien on such vehicles. (It should be noted that the method contemplated here for the protection of the plaintiff is a lien and not necessarily an order prohibiting transfer.)

Section 544.010(e). The staff was directed to provide an exemption here comparable to that for a homestead and attempt to provide a method of levy which avoids seizure--e.g., perhaps a lien filed with the Department of Motor Vehicles--thus providing treatment comparable to that for the usual type of dwelling.

Section 544.010(f). This subdivision was deleted. The staff was directed to consider revising Section 690.4 (tools of the trade exemption) to conform the terms used there with those employed here in connection with the method of levy. For example, "equipment" as used in the attachment chapter includes tools, implements, instruments, and so on, and this use of the term "equipment" should be made clear. On the other hand, motor vehicles are separately defined and consideration should be given to treating them separately from equipment, e.g., trucks, tractors, and other vehicles. No exemption from levy should be provided for equipment in this chapter, but a partial exemption will be provided by Section 690.4, and equipment not exempt will not be seized but only be made subject to a lien of attachment.

Section 544.010(g). The staff was directed to inquire concerning the basis for the proposal in Senate Bill 1048 to exempt accounts receivable with a principal balance of less than \$150 and to consider incorporating such an exemption in this article. With this exception, it was decided that

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there should be no exemption for inventory or accounts receivable and that, if further protection for the defendant-businessman seems desirable, it should be accomplished through use of a nonconsensual attachment lien procedure.

Section 544.010(h). Subdivision (h) was revised to provide:

(h) To the extent not otherwise covered by this section, all property exempt from execution.

Section 544.020. This section was deleted. The staff was directed to work out levy procedures generally which permit a defendant to retain possession of property which is "essential for his support" but which permit a plaintiff to protect his priority where such property may be eventually subject to execution. In short, a general "exemption" of necessities from seizure should be provided but not a complete exemption from attachment; the plaintiff should be permitted to secure a lien on all but a few kinds of assets, e.g., earnings, \$1,000 deposit account, and that property exempt even from execution.

Sections 544.030 and 544.040. These sections also were deleted with directions to the staff to provide relief to persons doing business in a corporate or partnership form by making appropriate revisions in the method of levy procedures. These revisions should satisfy Randone principles by prohibiting seizure but permitting imposition of a lien on business property which could be considered a "necessity."

Method of levy. In connection with the consideration of the exemption provisions covered above, the Commission also reviewed a portion of Article 2 of Chapter 8. The following action was taken:

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Section 487.360. As noted above, this section should be revised in a manner that prevents seizure of a vehicle which is a "necessity" but permits the plaintiff in the discretion of the court to secure a lien both in this situation and where the vehicle is exempt from attachment but may be subject to execution. The problems involved in seizing the certificate of ownership caused the Commission to direct the staff to consider whether adequate relief could be provided without taking the certificate of ownership by filing to obtain a lien. In this regard, the treatment of the certificate upon execution should be reviewed, as well as the ability of the DMV to serve as a source of information regarding the present state of the title to a particular vehicle, and the adequacy of protection for transferees of the certificate after the vehicle itself has been seized and the lien recorded.

Section 487.370. The Commission directed the staff to revise this section to provide that, if the defendant shows (1) that but for the plaintiff's claim he is solvent and (2) that his inventory and proceeds therefrom are essential for his support, the defendant can have substituted in place of attachment by seizure a lien on the necessary property and an order providing reasonable restrictions on the disposition of such property--including perhaps directions to maintain adequate insurance on the property to care for and preserve the property; to pay the taxes on the property to account promptly for all proceeds of sale; to permit the plaintiff to inspect the property and books of the defendant; to furnish the plaintiff with periodic accounting information, and so on--but authorizing withdrawal of amounts essential for the defendant's support.

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Protective orders. The Commission considered Chapter 6 of the draft statute and took the following action:

General. The Commission determined that it would be undesirable to provide generally for a prejudgment protective order. The remedies discussed above in connection with motor vehicles and business property would be available after a hearing and a proper showing and a preliminary injunction could be obtained by a plaintiff in a proper case under Sections 525 through 535. These remedies together with the writ of attachment available under this title seem adequate. However, the Commission did determine that an ex parte protective order pending a hearing on an application for the issuance of a writ of attachment would be useful and directed the staff to draft such a procedure within the following guidelines.

Section 485.010. Subdivision (b) was deleted. The Comment should indicate that the remaining provision eliminates the rule that an order or injunction binds any person who knows of the order.

Section 485.110. The title to this article was revised to read "Pre-hearing Protective Order" or "Ex Parte Protective Order." The introductory clause to this section should provide in substance:

485.110. A temporary protective order may be issued ex parte under this article pending a hearing on an application for the issuance of a writ of attachment only if the judicial officer determines that:

The Comment should make clear that, although the order may be issued ex parte, the court as under present practice may require the plaintiff to give notice informally to the defendant.

The brackets around subdivision (c) were deleted.

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Section 485.120. The staff was directed to revise subdivision (a) to specify the procedure for obtaining a temporary protective order including a written application. Subdivision (b) should be made a separate section and should implement the policy that the court should have discretion to issue, in lieu of an ex parte writ of attachment, an ex parte order which provides more limited relief than a writ and which is limited to the property sought to be attached.

Sections 485.130 and 485.140. These sections should be revised to make clear that they provide the greatest restrictions that an order may provide and that a plaintiff must justify whatever relief he seeks within these limits. The separate provisions in the two sections relating to checks should be combined for clarity, and it should be made clear that these limitations on checks apply despite the broader "ordinary course of business" limitations. Subdivision (a) should include payroll expense generally, including premiums for workman's compensation, social security, and unemployment insurance. Subdivision (d) of Section 485.140 was revised to provide: "(d) In payment of reasonable legal fees and reasonable costs and expenses required for the representation of the defendant in the action."

Section 485.150. No change.

Section 485.160. Subdivision (a) was revised to create a lien only upon the property described in the protective order. Subdivision (d) was deleted, and the staff was directed to study further the problems inherent in having the service of an order create a lien upon the defendant's property and to attempt to provide solutions to these problems. The rights of third parties must be protected. It was suggested that perhaps the best way is to treat them in a manner similar to that provided by Article 9 of the Commercial Code, but this issue should be dealt with under the levy procedures generally.

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Section 485.170. Subdivision (b) was revised to provide that a temporary protective order expires as to specific property when that property is levied upon by the plaintiff. Subdivision (c) was rephrased, "(c) When the defendant provides"

Sections 485.180 and 485.190. Section 485.190 was deleted and Section 485.180 was revised to provide the judicial officer authority to modify or vacate the plaintiff's protective order.

Noticed hearing procedure for obtaining writ of attachment. The Commission directed the staff to revise this procedure: (1) to require the defendant to file his notice and any materials in opposition to the plaintiff's application, including any claim of exemption, at least five days prior to the date set for hearing; (2) to permit the defendant to obtain a continuance only in the discretion of the court and for good cause shown; (3) to extend the effective period of any protective order during the time permitted for a continuance; (4) to deny the plaintiff the ability to obtain a continuance; and (5) to require the plaintiff to file any notice and counteraffidavits in opposition to a claim of exemption within two days of the hearing date.

Wrongful attachment; undertaking. The Commission considered Memoranda 72-21 and 72-39. Time permitted review of only a portion of the draft statutory provisions attached to Memorandum 72-39. As a general matter, however, the Commission determined that, where the plaintiff has obtained a writ of attachment following a noticed hearing on the issue of probable validity, his liability for wrongful attachment should be limited to the

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amount of the undertaking. It was suggested that perhaps subdivision (c) of Section 490.010 should be limited to "one-half of the value of property seized."

APPROVED

Date

Chairman

Executive Secretary