#39.30 4/28/72

First Supplement to Memorandum 72-33

Subject: Study 39.30 - Employees' Earnings Protection Law

BACKGROUND

Attached as Exhibit I is an Interim Report of the State Bar Ad Hoc Committee on Attachments. The report discusses SB 88 and also the subject of prejudgment attachment. In this supplement, only the portion of the report relating to SB 88 is considered.

The comments of the State Bar Committee can be considered without having the latest amended version of the bill available since the latest amendments do not significantly change the provisions that concern the State Bar Committee. (For the convenience of the members of the Commission, we attach the latest version of SB 88.)

We have not been advised of the action the Board of Governors took on the State Bar Committee report.

ANALYSIS OF COMMENTS OF STATE BAR COMMITTEE

Deposit Accounts (Sections 690.7, 690.7-1/4, 690.7-1/2)

The State Bar Committee report refers to the reduction in the amount of the deposit account exemption for credit union and savings and loan accounts to $500. The amount has since been reduced to $100, but the credit union exemption has been restored ($1,500). The State Bar Committee continues in its objection to not giving a husband and wife each the benefit of the exemption (formerly $500, now $100). Under SB 88, a husband and wife together get only one $100 exemption. The State Bar Committee also suggests that the standard

for "essential for support" in Section 690.7-1/4 be the same as in Section 723.051.

The deposit account provisions as revised seem to be satisfactory to other groups. The standard for the hardship exemption in Section 690.7-1/4 is different than for the earnings hardship exemption. The deposit account standard is not a "rare and unusual case" standard; rather it is a standard based on whether current earnings and other income are adequate to provide the amount essential for support. The modest $100 exemption (given without a showing of necessity) should be contrasted with the large exemption provided in the case of earnings withholding orders under Section 723.050. Accordingly, the staff believes that the different standards for the two exemptions are justified and that no change should be made in the deposit account sections. Any changes along the lines suggested by the State Bar Committee would certainly arouse opposition from one or more groups.

Difference between exemption for "paid earnings" (Section 690.5-1/2) and exemption for "payments from retirement fund"(Section 690.18-1/2). The State Bar Committee notes that the "paid earnings" exemption covers earnings received in the pay period immediately preceding the levy but the exemption for payments from a retirement fund covers payments during the 30 days immediately preceding the levy. This distinction was noted when the Commission drafted the retirement fund exemption, and it was then concluded that the provisions should be in the form in which they now exist. The staff recommends that no change be made in the provisions.

Withholding Table Exemption (Section 723.050)

The State Bar Committee notes, but does not object to, the revisions made in the automatic exemption for earnings due and owing the employee.

Service by Mail (Section 723.101)

The State Bar Committee objects to the elimination of authority to serve by ordinary mail. You should read the discussion of this point in the committee's report at pages 5-7 and the suggestions of the committee should be considered.

Discharge From Employment (Labor Code Section 2929)

The State Bar Committee recommends that the protection afforded against discharge from employment because of wage garnishment be expanded to protect the employee to the extent of two judgments in any 12-month period. The committee has other objections to Section 2929. However, we have already run into substantial opposition to the modest extention of the protection we had originally proposed and we have determined not to make any significant change in Section 2929. In this connection, it should be noted that the Advisory Commission on the Uniform Consumer Credit Code has recommended that there be no discharge from employment for garnishment. The provision they recommend (Section 5106--which is the official text of the Uniform Act) reads:

> No employer shall discharge an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings directed to the employer for the purpose of paying a judgment arising from a consumer credit sale, consumer lease, or consumer loan.

Also, the Advisory Commission recommends--in Section 5205(f)--a penalty for violation of the prohibition against discharge provision: recovery of lost wages, not to exceed six weeks of lost wages and, in addition, the court "may award reasonable attorney's fees incurred by the employee."

It is apparent that Section 2929 will be reviewed at future sessions of the Legislature, and that the proper course for the Commission at this time is

to confine the changes to be made in Section 2929 by SB 88 to mere conforming changes. Any other course of action will be bound to result in renewed opposition to SB 88.

Respectfully submitted,

John H. DeMoully
Executive Secretary

First Supplement to Memorandum 72-33

EXHIBIT I

INTERIM REPORT OF

AD HOC COMMITTEE ON ATTACHMENTS

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INTERIM REPORT OF AD HOC COMMITTEE ON ATTACHMENTS

TO THE BOARD OF GOVERNORS:

INTRODUCTION

Since the October meeting of the Ad Hoc Committee on Attachments, it has considered a number of matters, including changes to the Law Revision Commission (hereafter referred to as LRC) recommendation relating to the Employees Earnings Protection Law; three conference resolutions; and preliminary steps toward adopting an appropriate attachment law in California.

A letter report regarding one of the actions of the Committee was submitted on March 7, 1972. The purpose of this report is to outline other actions which have been taken.

ACTIONS TAKEN

I. EMPLOYEES EARNINGS PROTECTION LAW

Revisions to the proposed LRC Employees Earnings Protection Law since the November 8, 1971 report to the Board of Governors were considered and the major changes are discussed in this part. It should be noted that the conference resolutions discussed in parts II and III of this report also relate to this particular law; they are separated for the purpose of convenience of reference. The Employees Earnings Protection Law is now known as Senate Bill No. 88, which was introduced by Senator Song on January 18, 1972.

A. Deposit Accounts.- In the November Report[1] it was

1. All references to the November Report are to the report of this Committee entitled "Interim Report of Ad Hoc Committee on Attachments to the Board of Governors," which is dated November 9, 1971.

noted that while the deposit account exemption has been extended to all types of bank and savings and loan accounts, the overall amount of the exemption has been reduced to $500.00. This has not been changed to date.

However, it was also noted that the exemption had been revised so that it was possible that only one $500.00 sum would be available to a husband and wife, even though each would be entitled to a separate $500.00 sum if they were not married. It was also noted that LRC proposal could be read to indicate that a wife's separate property account would have the effect of removing the exemption from a husband's separate property account. The Committee then indicated that neither "policy nor logic" seemed to justify that result. [See pp. 5-7 of November Report.]

The LRC has recognized the ambiguity and has amended the proposed statute [new §690.7][2] to make it clear that this will be the result -- that is, marriage causes loss of one exemption, without regard to whose property is being considered.

Therefore, it is recommended that the State Bar oppose this portion of the proposed statute.

As an adjunct to the above section, new §690.7-1/4 is proposed, which allows exemption of further amounts if they are essential to the support of the debtor or his family. Proposed §690.7-1/4(c) sets out items to be taken into account in determining whether amounts are "essential for support." It is noted that in

2. Unless otherwise stated all references to code sections are to the existing or proposed Code of Civil Procedure provisions.

the wage garnishment area the detailing of matters to be taken into account in determining "essential for support" is contained in proposed §723.124.

It is felt that using different definitions and requirements in different code sections, where that is not absolutely necessary, will create confusion and will unduly complicate this area of the law. Words and phrases used in our codes should have the same content, in so far as that is possible. Otherwise, the codes will become unduly prolix and difficult to comply with. It would be unfortunate to see our codes become a mass of conflicting, differing, and entangled definitions.

Therefore, the Committee recommends that the State Bar seek amendment of §690.7-1/4 for the purpose of having the same financial statement requirements apply to bank accounts as are proposed for wages. It is recognized that "wages" and "bank accounts" are not exactly the same thing. Nevertheless, in determining whether a sum of money is "essential for support" it would seem that the same basic considerations should be taken into account. It is also recognized that some, though not all, of the divergence between the sections is caused by the special spousal bank account provisions, but it is suggested that those provisions be opposed.

B. Execution Upon Earnings in the Hands of the Debtor.- In the November Report it was recommended that the LRC proposal regarding earnings in the hands of the debtor be approved. [See, §690.5-1/2(e) and pp. 3-4 of November Report.] This proposal exempted earnings which had been received in the pay period immediately preceding the levy.

Since the date of that report, however, the LRC has amended the pension plan payment section [new §690.18-1/2(b)] to provide exemption for payments received from such a plan "during the thirty days immediately preceding the levy...." It is possible that the federal authorities will not permit any limitation whatever on either wages or pension plan payments, but that matter is not an issue at this time.

Logic and consistency would seem to suggest that "wages" should be exempt to the same extent as pension plan payments. This is not cited as a fatal flaw in the proposal, because it is felt that the LRC has more expertise in this area and may well have an important reason for establishing the difference, although that reason is not apparent at this time.

Thus, it is recommended that this apparent inconsistency be brought to the attention of the LRC and the sponsor of the bill, for possible correction.

C. Amount of Exempt Wages.- On the November Report the formula for exempt wages was approved by the Committee, but it was noted that the exemption provided for was beyond that required by federal law. [See, pp. 8-9 of November Report.] Further revisions have now been made to the proposed formula. The new formula is not opposed, since the exact amount of any exemption is largely a matter of public policy; however, the following matters are noted:

(1) Social Security and State Disability Insurance withholding amounts will be deducted in determining the exemption, even if they are not, in fact, deducted from the employee's wages. [§723.50(2) and (3)] This, of course, gives those in higher earnings

brackets an added amount of spendable income; and can only be justified on grounds of ease of administration.

(2) No garnishment can be levied on wages of a person whose weekly earnings are less than $98.00. If they are $98.00, the sum of $10.00 can be taken.

(3) The statute does not make reference to certain amounts "required by law to be withheld." 15 U.S.C.A. §1672. For example, state employee retirement program amounts are required by law to be withheld, but are not included in the code section. [See, The Federal WAge Garnishment Law, U.S. Dept. of Labor, WH Publications No. 1324 (March 1971).]

D. Service by Mail.- The November Report approved the suggested form of service by mail (p. 11 of November Report), which was set forth in §723.101. That method contemplated service by first class mail, air mail, registered mail and certified mail.

Since the Report, the LRC has amended this proposal to eliminate the possibility of service by first class or air mail. Upon making the change it became necessary to create rather complicated provisions regarding what will happen if the employer refuses the certified or registered mail. [See, 723.101(d).] Unfortunately the complication goes much beyond the changes which were made, and points up the fact that elimination of other types of mail was unfortunate. The following items are noted:

(1) After commencement of litigation, most papers are now served by ordinary mail and that seems satisfactory in the vast majority of instances. It should be permitted here.

(2) In deciding what will happen if the employer rejects service by the certified or registered mail method, it is provided that the cost of personal service will be borne by the "judgment debtor." [§723.101(c).] But he is, or may be, the least able to do so. It seems most unfair to charge him when his employer is guilty of the wrongdoing. In some cases there may well be collusion between the employee and the employer; but that is not necessarily true. The employer himself might be having legal problems, and might reject all such mail on that ground. It would be more appropriate to charge the employer and to have him incur liability and become subject to the court's jursidiction in a manner similar to §§544 and 545.

(3) In §723.101(d) the creditor whose certified or registered mail is refused is given the right to obtain a court order. The order will give him priority over a creditor whose order is served before the first creditor obtains personal service. The suggested procedure, however, does not:

(a) Provide for any notice to the intervening creditor;

(b) Indicate when the intervening creditor can obtain a new order;

(c) Indicate when, if ever, withholding under the intervening creditor's old order can start; or

(d) Give the intervening creditor any right to appear at the first creditor's hearing so that he can protect his rights.

Therefore, it is recommended that the State Bar oppose

the enactment of §723.101 in its present form and suggest that changes be made to resurrect the possibility of ordinary and air mail, which should allow elimination of §721.101(c) and (d); and if that is not done to amend §723.101(c) to charge the employer and §723.101(d) to protect intervening creditors.

II. CONFERENCE RESOLUTION 12-3

A. The Resolution.- This resolution proposes that Labor Code sections 2922 and 2924 be amended to preclude an employer from laying off or discharging any employee because his wages are garnished, regardless of the number of garnishments levied against him. It would also raise the amount of wages that could be recovered in the event of wrongful discharge from thirty days to sixty days.

B. LRC Recommendation.- The LRC has recommended that a new §2929 be placed in the Labor Code, which will preclude an employer from discharging an employee because garnishment has been threatened, or because of a garnishment "for the payment of one judgment." This complies with federal requirements. See 15 U.S.C.A. §1674. The LRC proposal retains the thirty day penalty of the present law; but provides that if a criminal prosecution is commenced against the employer under the federal act, the employee loses his wage right altogether.

C. Discussion.- The Committee first notes that in the case of Johnson v. Pike Corporation of America, 332 F. Supp. 490 (C.D. Cal. 1971) the court held that dismissals on account of garnishments violate the federal Civil Rights Act of 1964, 42 U.S.C.A. §§2000e et seq, because: "minority group members suffer wage garnishments substantially more often than others...." See, p. 494 of 332 F. Supp.

However, this area will be discussed on the principle of dismissal, without regard to the above case, which the Committee finds of somewhat doubtful authority.

(1) Number of Garnishments.- Protection of employers for garnishments arising out of only one judgment is too chary. A person may easily have two judgments against him without being in serious financial difficulty and without subjecting the employer to undue harassment. However, there does come a point when a person should put his financial house in order and, perhaps, where even job performance may be affected. Also, the employer is entitled to some protection.

Although such determinations are somewhat arbitrary the employee should be protected to the extent of two judgments in any twelve-month period. This recognizes the employer's right to be free from an undue number of levies, and also protects the employee to a greater extent. The time limitation is suggested since widely separated judgments should not be grounds for dismissal.

(2) The Layoff Concept.- Layoff should not be included in the section. If an employer does lay off a person for no reason other than a garnishment, the court should treat this as a kind of discharge (albeit temporary in the first instance) in all events. On the other hand, a law such as this can be very harsh in its actual operation. If an employer (particularly a small employer) had to temporarily cut back his labor force, it is feared that under such a law he would tend to retain those who have been

garnished to the exclusion of others. He may well do this because, other things being even somewhat equal, he could avoid claims that he had violated this section. Presumably he is choosing between employees whose work is otherwise satisfactory. Thus, it would seem better to avoid specific recognition of the layoff concept, as opposed to other types of discharge.

(3) The Days of Penalty.- Again, a 60-day penalty may simply be too large a club over the employer's head. The 30-day penalty (together with the criminal threat) should be sufficient to assure compliance, without unduly interfering in the proper operation of the employer's business. We are particularly concerned about smaller businesses. It is well known that the facts of the case do not always determine the results; sometimes mere power is sufficient. Indeed, the whole reason for attachment law revision is to make facts rather than raw force determine the outcome of disputes. It is felt that sixty days will go too far towards forcing retention of employees, simply because a garnishment has been levied against them.

(4) The Criminal Provision.- There does not appear to be a sufficiently good reason to deprive an employee of his back wage claim simply because the federal authorities decide to prosecute the employer. As far as we know, the federal fine procedure will not lend itself to a qui tam action, and will not inure to the employee's benefit. The civil and criminal matters are and ought to be separate.

In conclusion it is recommended that the Board of Governors approve Resolution 12-3 in part and approve and oppose the provisions of Labor Code §2929, as they appear in S.B. 88 as follows:

(a) §2929(c) should be amended to read:

"No employer may discharge any employee by reason of the fact that his wages have been subjected to garnishment for the payment of two judgments, or less, during any period of twelve months or less. A judgment for which garnishments are levied in more than one twelve month period may only be considered as one of the two judgments during a twelve month period which includes the date on which the first garnishment is made, and shall not be considered as one of the two judgments in any other twelve month period."

(b) The last sentence of proposed §2929(f) should be stricken.

III. CONFERENCE RESOLUTIONS 12-2 AND 12-4

A. The Resolutions.- These resolutions (one referring to levy on private employers and the other on public employers) provide, in effect, a delay and prior hearing before wages can be taken by means of a garnishment. The procedure which is proposed would protect against any taking of wages until the employee's "essential for support" exemption can be determined.

B. LRC Recommendation.- The LRC recommends that earnings withholding orders be issued and served promptly and that the employer start to withhold after a five day delay. In its November Report the Committee suggested that the LRC give further consideration to a prior hearing requirement, so that the creditor would not get a free bite at the employee's wages, regardless of the ultimate court determination. [See, pp. 12-13 of the November Report.]

The LRC did consider this recommendation and responded that it did not feel a change should be made because: (1) the automatic exemptions are liberal; (2) lengthening the period might invite collusion between the employer and the employee; and (3) the creditor may receive nothing if the employee changes jobs rapidly, despite the merits of his claim. [See, LRC Minutes of January 13, 14 and 15, 1972.]

C. Discussion.- After considering the LRC response the Committee is convinced that the provisions proposed by the LRC will give very adequate protection in the vast majority of cases. In particular it is noted that:

(1) There will be a five day delay after service of the order. [§723.022.]

(2) In partial compliance with our prior suggestion, the employee will be served with a notice when the application for the order is filed, and he will be told where to get exemption forms. [§723.122(e).]

(3) A hearing must be held within fifteen days after the application therefor is filed. [§723.105(c).]

(4) The amounts that may be withheld prior to a hearing are relatively small under the LRC proposal. For example, if a person earns $600.00 per week ($31,200.00 per year) only $80.00 can be withheld in any one week under the proposed statute; and if one earns $97.00 per week, nothing whatever can be withheld.

It would not be unduly burdensome to draft a statute that delayed withholding until after a hearing. However, considering what might be accomplished by such a delay in the light of the

present LRC proposal, this does not appear to be warranted.

Therefore, the Committee has receded from its prior views and recommends that Conference Resolutions 12-2 and 12-4 be disapproved at this time.

IV. PREJUDGMENT ATTACHMENT

The case of Randone v. Superior Court, 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P 2d 13 (1971) has required a complete overhaul of California's attachment law. The LRC has undertaken such a revision, but although it had prepared two tentative statutes and members of this Committee had prepared extensive comments upon those statutes, the LRC has decided to put off submission of a bill until the next session of the legislature. Two members (Mr. Frankel and Mr. Jackson) attended the meetings of the LRC on February 10, 11 and 12, 1972, and informed members of the Commission of some of our concerns with the proposal. The LRC staff has now started issuing redrafts of attachment statutes.

The Committee determined that it would be most expeditious to allow the LRC to carry the laboring oar, but there has not yet been an opportunity to comment in detail on a specific LRC statute (other than those already rejected by the LRC itself). This report is limited to a statement of some general driving policies that are recommended for consideration when a statute is drafted.

A. Pre-Attachment Hearings.- It is believed that there should be only one pre-attachment hearing, if that is at all possible. At this hearing all questions regarding issuance of an attachment should be considered, including probable validity, the position of the

parties, exemption claims, and any other relevant matter. Conserving judicial time while preserving justice is of great importance.

It is noted that recent LRC proposals seem to contemplate one hearing for the purpose of determining probable validity, and a later hearing for the purpose of determining what is to be levied upon and claiming exemptions. This Committee believes that neither party should have the right to so bifurcate the proceedings.

B. Determination of Probable Validity, Etc.- Consideration was given to whether "probable validity" should be defined in any proposed legislation. It was decided that while there was some merit in enacting such a definition, it would be better to leave the matter to the discretion of the court.

The members noted that when all is said and done the idea of probable validity may not be very different from the concepts used in granting preliminary injunctions. The requirement of "sufficient grounds" has been interpreted to require some showing of validity of the plaintiff's claim. See, Bueneme, Malibu and Port Los Angeles Ry. v. Fletcher, 65 Cal. App. 698, 224 P. 774 (1924), where the court states, at page 703, 65 Cal. App.: "It is well settled that a preliminary injunction will not issue in a doubtful case. 'The rule has been frequently laid down broadly that a preliminary injunction will not issue where the right which the complainant seeks to have protected is in doubt, where the right to the relief asked is doubtful, or except in a clear case of right.'" In fact, the Committee was of the view that the procedures for issuance of a preliminary injunction can be appropriately adopted in large part to govern pre-judgment attachment, and that the

statutes ought to be drafted so as to incorporate to the greatest extent possible the procedures which have proven themselves in practice in preliminary injunction cases.

At the single attachment hearing proposed here the court should really make a determination that sufficient grounds exist for the attachment, which will include:

(1) An assessment of the merits of the plaintiff's claim, the defendant's defenses, and the probable chance of success of the plaintiff.

(2) All exemptions claimed by the defendant.

(3) The probable effect of the proposed attachment on the defendant, as opposed to the possible harm to the plaintiff if relief is not granted.

(4) Any other factor bearing on the justice of issuing the order prayed for, or some other order.

Upon weighing all of the above, the court would be able to make an appropriate order.

C. The Nature of the Relief to be Granted.- In the past, courts have normally held that when attachment relief is available injunctive relief is precluded. Our present redrafting of attachment rules is a fine opportunity to dovetail attachment and injunctive proceedings to eliminate this concept and to accomplish maximum flexibility and justice. What has traditionally been the area of attachments should now be broadened so that the court will have authority to either order seizure (traditional attachment), restraint (injunctive relief) or the placing of a keeper on the premises of the defendant, if that seems called for. This discretion on the part of the court

should exist, even if the plaintiff asks for the harshest possible remedy. That is, attachment relief should be a flexible remedy and a request for seizure of goods should not preclude a different form of court order.

Any proposed law should make lien rights and priorities turn on factors other than the actual relief ordered -- that is, restraint or seizure. Pre-hearing relief should also be permitted in appropriate circumstances, and with appropriate limitations.

D. Scope of Attachments.- Any statute setting forth the scope of an attachment law should provide that:

(1) Attachment should only be available for claims that are liquidated or reasonably ascertainable at the time of issuance.

(2) The law should no longer require that a plaintiff's security become absolutely worthless before he is entitled to attachment. He should not, however, be entitled to attach for more than the amount by which the value of his claim exceeds the value of his security.

(3) It should be made clear that attachment will be allowed for unsecured rent, as it has been in the past.

(4) Attachment should only be allowed for taxes where the amount claimed to be owed is liquidated, as opposed to a seriously disputed issue. Perhaps language similar to that found in proposed §723.031(d) should be used, that is, where the liability "appears on the face of the taxpayer's return or has been determined in either an administrative or judicial proceeding," where notice and hearing were granted.

E. Exemption Claims.- Without discussing particular types of exemptions in detail it is suggested that in so far as possible the

attachment exemptions should dovetail with execution exemptions. By way of illustrating this concern, the following comments are made regarding the January 27, 1972 LRC proposal in the area of exemptions (section numbers refer to proposed sections):

(1) §538.01(e) would have granted an automatic exemption for one motor vehicle for the use of the debtor or his family. The execution exemption limits this to a vehicle in which the debtor's equity does not exceed $350.00 and the overall value does not exceed $1,000.00. Perhaps a somewhat more generous exemption should be permitted, but it should not be so generous that the defendant can drive around in a Rolls Royce while the creditor waits for years for his trial.

(2) §538.01(f) would have granted an automatic exemption for a house trailer or a houseboat used as the principal residence of the defendant. It is noted that these can have very substantial value under current standards. This exemption should not be any more available than exemptions on houses, and while a defendant should not be put out of his residence before judgment, an attachment of some nature (for example, a restraining order) should be permitted. It is noted that upon execution the maximum exemption on trailers is $5,000.00. [§690.3.]

(3) §538.02(f) would have provided for a claimed exemption that would allow a person doing business in the corporate form to shield his corporate entity with his own personal exemption. This is felt to be unworkable and unfair. For example, (a) would a defendant be allowed to pierce the corporate veil to protect himself and still assert the veil against the attaching creditor or other

creditors, and (b) since all of those who work for the corporation are "employees," should the major employee be the only one to have such an exemption? It is also noted that attempting to allow such an exemption to partnerships and corporations will raise serious questions of multiplication of exemptions where a person is in many ventures. This form of loaned exemptions should not be available.

(4) §538.02(e) would allow a claimed exemption for all money or other property necessary for support of a debtor "in the light of contemporary needs." It is felt that such an exemption will allow a high-living debtor too much leeway, and this diverges too substantially from the concept of "essential for support" which will appear in the execution statutes. The language "in light of contemporary needs" should not appear in such a statute.

The Committee further notes that the flexible order procedure suggested in this Report could allow for much less in the way of broad exemptions, since the court will have discretion to shape its order for the purpose of protecting debtors.

SUMMARY OF RECOMMENDATIONS

The Committee has acted on a number of items and recommends the following actions to the Board of Governors:

I. It is recommended that the following action be taken (in addition to actions proposed in the November Report) regarding the Employees Earnings Protection Law:

A. The provisions that propose limiting a husband and wife to one exemption should be opposed. [§690.7]

B. Amendment of §690.7-1/4(c) to make the claim of exemption requirements the same for bank accounts as they are for

wages should be sought. [See, 723.124 as to wages.]

C. The paid proceeds inconsistency that exists between the "pay period" exemption for wages [690.5-1/2(e)] and the 30-day period for pensions [690.18-1/2(b)] should be noted.

D. The provisions which preclude service by ordinary or air mail should be opposed; and subsections 723.101(c) and (d) should be eliminated. If this is not possible: (1) §723.101(c) should be amended to charge the employer and not the employee for the costs engendered upon refusal of service by mail; and (2) §723.101(d) should be amended to give adequate notice and protection to creditors who intervene between a refusal of the mail of the first creditor and personal service by him.

II. Conference Resolution 12-3 and the LRC proposed Labor Code §2929 should each be approved and opposed in part, so that:

A. Dismissal for garnishments will only be allowed if they are levied on account of more than two judgments in any twelve month period; and

B. A wrongfully discharged employee will be entitled to collect up to thirty days wages, without regard to whether the federal government commences criminal action.

III. Conference Resolutions 12-2 and 12-4 should not be approved, since under the LRC proposal (S.B. 88) employees will have adequate protection, even in the absence of a pre-levy hearing.

IV. As to pre-judgment attachment, some general comments are made at this time for the purpose of indicating areas that the Committee feels are important, and it is recommended that these comments be brought to the attention of the LRC:

A. There should only be one pre-attachment hearing for the purpose of determining all questions arising out of a proposed attachment.

B. The courts should be given broad authority to decide whether issuance of an attachment is proper, which will include consideration of the merits of the plaintiff's claim, the merits of the defendant's defenses, exemption questions, effect of an attachment upon defendant, effect of a denial of attachment upon the plaintiff, and all other relevant factors.

C. If an attachment is to issue, the courts should be given broad authority to shape the type of attachment relief which will be permitted, including injunctive orders, seizure of property, use of a keeper, etc.

D. The scope of attachment should only cover liquidated or reasonably ascertainable claims of all kinds; and a plaintiff should be able to attach before his security becomes "worthless."

E. Exemption provisions should be developed, which will be fair to the plaintiff as well as to the defendant, and with an eye on the court's discretionary power to shape orders.

Dated: March 15, 1972

Respectfully submitted,

AD HOC COMMITTEE ON ATTACHMENTS

Nathan Frankel
Edward N. Jackson
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