March 26, 1973

Time	Place
April 12 - 7:00 p.m. - 10:00 p.m. April 13 - 9:00 a.m. - 5:00 p.m. April 14 - 9:00 a.m. - 12:00 noon	International Hotel 6211 W. Century, Blvd. Los Angeles, CA 90045 (Los Angeles Airport)

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles — April 12, 13, and 14, 1973

April 12

1. Minutes of March 1-3, 1973, Meeting (sent 3/14/73)

2. Administrative Matters

   Memorandum 73-36 (sent 3/20/73)

3. Study 75 - Right of Nonresident Aliens to Inherit

   Memorandum 73-34 (sent 3/20/73)
   Tentative Recommendation (attached to Memorandum)

4. Study 63 - Evidence

Item 4 - Special order of business when Justice Kaus arrives

Physician-Patient Privilege

   Memorandum 73-28 (sent 3/16/73)

"Erroneously Compelled" Disclosure of Privileged Information

   Memorandum 73-3 (sent 3/16/73)
   Tentative Recommendation (attached to Memorandum)

5. Study 52 - Sovereign Immunity (Claims Statute)

   Memorandum 73-25 (sent 3/14/73)
   First Supplement to Memorandum 73-25 (enclosed)

6. Study 26 - Escheat (Unclaimed Property Law)

   Memorandum 73-37 (enclosed)

March 26, 1973

April 13-14

7. Approval of Recommendation for Distribution for Comment

Items 7 and 8--Special order of business at approximately 2:30 p.m. on April 13 when consultant arrives

Study 39.100 - Enforcement of Foreign Judgments

Memorandum 73-27 (sent 3/23/73)
Tentative Recommendation (attached to Memorandum)

8. Study 39.30 - Wage Garnishment and Related Matters

Memorandum 73-35 (enclosed)

9. Study 36 - Condemnation

Approval for Sending to Printer

Study 36.470 - Comprehensive Statute--Chapter 7 (Deposit and Possession Prior to Judgment)

Memorandum 73-19 (sent 3/16/73)
Revised Chapter 7 (attached to Memorandum)

Study 36.206 - Private Condemnation

Memorandum 73-26 (sent 3/14/73)

Study 36.80 - Jurisdiction of Public Utilities Commission

Memorandum 73-29 (to be sent)
Memorandum 72-64 (sent 10/17/72; another copy sent 3/14/73)
First Supplement to Memorandum 72-64 (sent 1/26/73; another copy sent 3/14/73)
Memorandum 72-65 (sent 1/26/73; another copy sent 3/14/73)

Study 36.50 - Compensation and Measure of Damages

Memorandum 73-18 (sent 2/5/73)
Draft of Compensation Chapter (attached to Memorandum)
First Supplement to Memorandum 73-18 (sent 2/20/73)

Study 36.175 - Compensation for Loss of Goodwill

Memorandum 73-30 (sent 3/14/73)
Memorandum 73-22 (attached to Memorandum 73-30)

Study 36.150 - Compensation for Divided Interests

Memorandum 73-31 (to be sent)

Study 36.54 - Assessment for Benefits

Memorandum 73-32 (sent 3/14/73)

Study 36.250 - Special Improvement Acts

Memorandum 73-33 (enclosed)

Consideration of Items 1-6 if not completed on April 12.

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

APRIL 12, 13, AND 14, 1973

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on April 12, 13, and 14, 1973

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.
Howard R. Williams

Absent: Alister McAlister, Member of Assembly
George H. Murphy, *ex officio*

Messrs. John H. DeMoully, Jack I. Horton, Nathaniel Sterling, and Stan G. Ulrich, members of the Commission's staff, also were present. Gideon Kanner, Commission consultant on condemnation law and procedure, was present on Thursday and Friday. Professor Stefan A. Riesenfeld, Commission consultant on creditors' remedies, was present on Friday and Saturday. Professor William D. Warren, Commission consultant on creditors' remedies, was present on Friday.

The following persons were present as observers on days indicated:

Thursday, April 12

Justice Otto M. Kaus, Los Angeles

Friday, April 12

Norval Fairman, State Dept. of Public Works, San Francisco
Richard D. Peters, Franchise Tax Board, Sacramento
Charles E. Spencer, State Dept. of Public Works, Los Angeles
Alvin O. Wiese, Jr., North Hollywood Attorney

Saturday, April 13

Norval Fairman, State Dept. of Public Works, San Francisco
Charles E. Spencer, State Dept. of Public Works, Los Angeles

ADMINISTRATIVE MATTERS

Approval of Minutes of March 1-3, 1973, Meeting

The Minutes of the March 1-3, 1973, meeting of the Law Revision Commission were approved as submitted by the staff.

Schedule for Future Meetings

The schedule for future meetings was revised to include June 7 (evening) as a meeting date. The Executive Secretary solicited views on whether the Commission would prefer that two-day meetings be held on Thursday evening and Friday instead of Friday and Saturday morning. The concensus was that the Commission would prefer to meet on Thursday evening and Friday. It will not be possible, however, to change the meeting dates previously scheduled for the May meeting; the room at the State Bar Building is occupied on Thursday evening May 3. Accordingly, future meetings are now scheduled as follows:

May 4	10:00 a.m. - 5:00 p.m.	San Francisco
May 5	9:00 a.m. - 1:00 p.m.	
June 7	7:00 p.m. - 10:00 p.m.	Los Angeles
June 8	9:00 a.m. - 5:00 p.m.	
June 9	9:00 a.m. - 12:00 noon	
July 12	7:00 p.m. - 10:00 p.m.	San Francisco
July 13	9:00 a.m. - 5:00 p.m.	
July 14	9:00 a.m. - 12:00 noon	
August	no meeting	

New Topic

The Commission considered Memorandum 73-39 and the attached letter from Mr. Guy O. Kornblum suggesting that the Law Revision Commission study the use of videotape by California courts.

The Commission noted that this matter is under study by various other groups in California. The Commission already has an agenda of topics that will require all of its time and resources for a number of years. The Commission suggested that Mr. Kornblum contact Judge Kenneth Chantry, Los Angeles Superior Court; it was reported that Judge Chantry is making a study of the use of videotape in court proceedings. Also, it was suggested that this topic is one that would be more appropriately studied by the Judicial Council than the Law Revision Commission.

Research Contracts

The Commission considered Memorandum 73-36 and approved the following research contracts with consultants:

(1) A contract with Mr. Norman E. Matteoni, who has been serving as a consultant on condemnation procedure. Compensation $1 a year plus not to exceed $250 for travel during the period of the contract (April 16, 1973 - June 30, 1975).

(2) A contract with the law firm of Fadem and Kanner, which has been serving as a consultant on condemnation and inverse condemnation. Compensation $1 a year plus not to exceed $500 for travel during the period of the contract (April 16, 1973 - June 30, 1975).

(3) A contract with Professor Stefan A. Riesenfeld, who has been serving as a consultant on creditors' remedies. Compensation $1 a year plus not to exceed $400 for travel during the period of the contract (April 16, 1973 - June 30, 1975).

Research Consultants

The Commission noted that one of its consultants on condemnation law and procedure, Mr. Paul E. Overton, has been appointed to the Superior Court in San Diego County. The Commission requested Commissioners Sandstrom and McLaurin to recommend the appointment of a replacement consultant so that the new consultant could be approved by the Commission at the May meeting.

Legislative Program

The Executive Secretary reported on the progress of the 1973 legislative program as follows:

Enacted

SB 81 (civil arrest and bail) Chapter 20, Statutes of 1973

Approved by Committee in Second House

SCR 7 (continues authority to study previously authorized topics)

Approved by Committee in First House

AB 103 (claim and delivery statute)

Pending in First House

AB 101 (wage garnishment and related matters)

AB 102 (discharge from employment for wage garnishment)

AB 727 and AJR 27 (unclaimed property)

Introduced

AB 998 (prejudgment attachment) The Executive Secretary will request that this bill be referred to interim study.

STUDY 26 - ESCHEAT (UNCLAIMED PROPERTY LAW)

The Commission considered Memorandum 73-37. No revisions were made in the previously approved recommendation and proposed legislation.

STUDY 36.50 - CONDEMNATION (JUST COMPENSATION AND MEASURE OF DAMAGES)

The Commission considered Memorandum 73-18 and the First Supplement thereto along with the attached draft statute relating to compensation in eminent domain. The Commission made the following decisions with regard to the draft statute:

Section 1245.010. Right to Compensation

The discussion in the Comment commencing with the word "Likewise" should be made a separate paragraph, and the reference in that paragraph to Section 1230.110 ("statute" includes constitution) should be deleted.

A general provision should be incorporated to the effect that double recovery for the same loss under different statutes is not permitted.

Sections 1245.110-1245.150. Date of Valuation

No change was made in these provisions.

Section 1245.210. Compensation for Improvements Pertaining to the Realty

No change was made in this section.

Section 1245.220. Business Equipment

The Commission directed the staff to redraft this section with the aim to make more specific the types of property that must be compensated. Suggestions for appropriate limitations included that the property be "specially" designed for use in a "particular" location or on the "property condemned." The Commission rejected the staff proposal to remove the limitation on compensation for losses on liquidation of a business in Government Code Section 7262(a)(2), appearing on page 4 of the memorandum.

The staff should incorporate a provision permitting the condemnee the option to remove the property and receive relocation costs, not to exceed the acquisition cost of the property.

Section 1245.230. Improvements Removed or Destroyed

A provision should be added to this section to provide that a condemnee is not compensated for any property that he removes following the date the risk of loss shifts.

Section 1245.240. Improvements Made After Service of Summons

The first sentence of subdivision (b)(3) was revised to read:

> (3) The improvement is one authorized to be made by a court order issued after a noticed hearing and upon a finding by the court that the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement.

The word "required" was substituted for the word "necessary" in the paragraph of the Comment explaining subdivision (b)(1).

A sentence was added to the paragraph of the Comment explaining subdivision (b)(2) to the effect that the subdivision leaves it to the parties to work out a reasonable solution rather than forcing them into court and makes clear that the condemnor has authority to make an agreement that will deal with the problem under the circumstances of the particular case.

The phrase "that enhances the value of the land" was deleted from the paragraph of the Comment explaining subdivision (b)(3).

Section 1245.250. Harvesting and Marketing of Crops

Subdivision (b) was revised to read:

> (b) In the case of crops planted before service of summons, if the plaintiff takes possession of the property at a time that prevents

the defendant from harvesting and marketing the crops, the costs reasonably incurred in connection with the crops up to the date of notice of future taking of possession by the plaintiff shall be included in the compensation awarded for the property taken.

Section 1245.310. Compensation for Property Taken

The Comment to this section should contain a cross-reference to Section 1245.010 and Comment (compensation not limited to elements provided in this chapter).

Section 1245.320. Fair Market Value

The phrase "in the open market" was deleted from the section. There should be a cross-reference in the Comment to Section 1245.330 (changes in property value due to imminence of project).

Section 1245.330. Changes in Property Value Due to Imminence of Project

The introductory portion of this section was revised to read:

> 1245.330. Fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:

The Comment to this section should refer to Section 1245.320 (definition of fair market value). The discussion in the Comment of physical deterioration within the control of the defendant should be revised to reflect the fact that normal depreciation of the property is not compensable.

Sections 1245.410-1245.450. Compensation for Injury to Remainder

The Comments to these provisions should indicate that they preserve existing law as to the compensability of damages and benefits, that the general-special distinction has been developed in the cases, and that the law in this area is undergoing continuing development.

Sections 1245.510-1245.540. Interest

No change was made in these provisions.

Section 1245.610. Expense of Plans Rendered Unusable

This section was deleted. Reference should be made in the preliminary part of the recommendation that a provision such as this was not adopted since the existence of plans, specifications, and surveys may enter into the determination of the fair market value of the property.

Section 1245.620. Rental Losses

This section should be revised so that it is applicable only where the owner of property subject to a leasehold interest serves a demand on the plaintiff for a deposit of probable compensation and the plaintiff refuses. Consideration should be given to inserting it among the provisions relating to deposit and possession prior to judgment.

The section should also be revised to make clear that it compensates for losses directly attributable to actions of the plaintiff or the pendency of condemnation proceedings; the issue should be a matter for court determination.

Section 1245.630. Improvements to Protect Public From Injury

The phrase "service of summons" should be substituted for the phrase "the imminence of the eminent domain proceeding." A provision should be added authorizing the plaintiff to enter into an agreement with the owner to pay the cost of protecting against the risk of injury.

Sections 1245.710-1245.730. Proration of Property Taxes

No change was made in these provisions. Charles Spencer undertook to

provide the Commission with a draft statute designed to cure the taxation problems that arise where the public entity has taken possession and there is a rerental of the property.

Section 1245.810. Performance of Work to Reduce Compensation

No change was made in this section.

STUDY 36.54 - CONDEMNATION (ASSESSMENT FOR BENEFITS)

The Commission considered Memorandum 73-32 and the attached research study relating to the assessment of special benefits conferred on property by public improvements. The Commission deferred consideration of this matter until such a time as it takes up the inverse condemnation study.

STUDY 36.65 - CONDEMNATION (DISPOSITION OF EXISTING STATUTES--PROVISIONS RELATING TO PUBLIC UTILITIES)

The Commission considered Memorandum 72-65 proposing the disposition of provisions of the existing eminent domain title. The Commission approved the disposition of Code of Civil Procedure Sections 1247, 1247a, 1248, 1248a, 1251, and 1257 in the manner indicated in Exhibits I and II to Memorandum 72-65.

STUDY 36.80 - CONDEMNATION (JURISDICTION OF PUBLIC UTILITIES COMMISSION)

The Commission considered Memorandum 72-64 and the First Supplement thereto relating to the jurisdiction of the Public Utilities Commission in eminent domain proceedings. The Commission approved for inclusion in the Eminent Domain Law the draft statute attached as Exhibit I to Memorandum 72-64, preserving any jurisdiction the Public Utilities Commission may have in eminent domain cases. The Commission indicated that it proposed to retain authority to review the jurisdiction of the Public Utilities Commission in particular cases after completion of the Eminent Domain Law, thereby preserving its ability to consider such problems at a later time should it prove convenient.

STUDY 36.175 - CONDEMNATION (COMPENSATION FOR LOSS OF GOODWILL)

The Commission considered Memorandum 73-30 and the attached copy of Memorandum 73-22 relating to compensation for business losses. The Commission directed the staff to prepare a business loss statute with fairly broad and general rules along the following lines:

(1) The damages recoverable should be for losses that cannot reasonably be prevented by a relocation of the business. They should be limited to those damages that cannot be avoided by the defendant taking those steps and adopting those procedures that a reasonably prudent person would take in preserving the business income.

(2) Consideration should be given to limiting the losses to a period of a fixed, though arbitrary, duration.

(3) Consideration should be given to limiting recovery to losses suffered by an "established" business.

(4) Damages should be estimated as of the time of trial.

STUDY 36.206 - CONDEMNATION (CONDEMNATION BY PRIVATE PERSONS)

The Commission considered Memorandum 73-26 proposing a uniform procedure whereby a private person might initiate action to have the county condemn byroads, canals, and sewers on his behalf to be paid for and maintained by him. After extended discussion of the practical problems involved in such a scheme and of the constitutionality of and the comparative need for private condemnation, the Commission determined not to adopt such a procedure. The Commission, by a 4-3 vote, further determined to repeal Government Code Sections 1050-1054 relating to condemnation for byroads and Water Code Sections 7020-7026 relating to condemnation for private ways for canals. The reasons for these determinations are that the byroad provision is private legislation that should not be preserved and that the canal provision is obsolete, its functions being presently served by special districts and other local agencies. The Commission did not alter its prior decision to preserve the right of a private person to petition for condemnation of a sewer easement.

STUDY 36.250 - CONDEMNATION (SPECIAL IMPROVEMENT ACTS)

The Commission considered Memorandum 73-33, proposing staff work on and distribution for comment of conforming changes in the eminent domain provisions of the special improvement acts. The Commission authorized the staff to prepare a draft recommendation to conform the various special improvement acts to the eminent domain statute and to distribute the draft to experts in the field for comment so that the staff can review the comments before this matter is brought to the Commission for action.

STUDY 39.30 - WAGE GARNISHMENT AND RELATED MATTERS

The Commission considered Memorandum 73-35 and the attached report from the Commission's consultant--Professor W. D. Warren--concerning the liability of an employer when attempting to comply with overlapping state and federal garnishment limitation laws which may conflict in some instances. After an extended discussion, the Commission concluded that the potential for danger to the employer under this system is not great and is greatly outweighed by other benefits which the Commission's proposed legislation affords employers. Accordingly, the Commission directed that the staff attempt to obtain enactment of the proposed legislation.

The Commission considered various suggestions made by Mr. Alvin O. Wiese, Jr., for revision of Assembly Bill 101, introduced to effectuate the Commission's recommendation relating to wage garnishment and related matters.

Priority of Tax and Support Orders

Mr. Wiese expressed concern that the tax and support orders are given priority under the bill and preclude withholding pursuant to orders of ordinary creditors. Although the bill does not necessarily have this effect (if the tax or support order does not exhaust the amount that can be withheld), the bill does give those orders a priority. It was noted that the federal administrator has advised the Commission that the amount withheld pursuant to a tax or support order must be included in considering the amount that may be withheld in applying the limitations on withholding. This is the reason that the former scheme--which treated amounts withheld for support as "amounts withheld pursuant to law"--was abandoned. The Executive Secretary is to send

Mr. Wiese copies of various letters relevant to this problem that have been received by the Commission from the federal administrator.

Notice to First Creditor to Advise Second Creditor When First Order Satisfied

The bill should be revised to provide that the creditor who serves an earnings withholding order that does not go into effect because a prior order is being given effect may request that the creditor whose order is in effect notify the creditor who served the subsequent order of the expiration or release of the first order by sending him an extra copy of the satisfaction of judgment required by Section 723.027. This requirement would not apply where the State of California is the first creditor.

Accounting for Payments

Section 723.026 was revised to read in substance:

> 723.026. Within 15 days after he receives a request from the judgment debtor for an accounting of the payments received pursuant to an earnings withholding order, the judgment creditor shall send the accounting to the judgment debtor by first-class mail, postage prepaid. The judgment creditor is not required to make such an accounting more frequently than once every 30 days. The accounting shall state the payments received by the judgment creditor during the period covered by the accounting, the maximum additional amount that may be withheld pursuant to the earnings withholding order, and the total amount received by the creditor during the period the order has been in effect.

Section 723.027

The word "certified" which appears in subdivision (b) of Section 723.027 was deleted.

In the introductory clause of Section 723.027, the phrase "10 days" was substituted for "five days (Saturday, Sunday, and holidays excepted)".

Section 723.105

In subdivision (c)(3) and subdivision (d) and subdivision (e), 10 days should be substituted for five days.

Sections 723.121 and 723.122

The references in these sections to the Bankruptcy Act should be deleted. The referee in bankruptcy has more than sufficient powers to enforce orders in bankruptcy. If there is any need for the deleted material in the forms, the Judicial Council will have authority to include it in the form.

Section 723.124

Subdivision (f) of Section 723.124 was deleted. The information described in subdivision (f) should not be required and is not the type of information included in a financial statement.

Labor Code Section 300

The first sentence of subdivision (f) was revised to read: "An assignment of wages ~~to be earned~~ is revocable at any time by the maker thereof as to wages or salary to be earned after the time of the revocation."

Withholding Period on Earnings of State Employees

The Commission approved a 10-day delay in the commencement of the withholding period in the case of withholding on earnings of state employees.

STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission approved for printing in the recommendation on attachment the summary of the recommendation which is attached to these Minutes as Exhibit II. The staff was directed to obtain comments from Professor Riesenfeld and Professor Warren on the summary before printing it.

STUDY 39.100 - ENFORCEMENT OF SISTER STATE MONEY JUDGMENTS

The Commission considered Memorandum 73-27 and the tentative recommendation relating to enforcement of sister state money judgments. A letter from the Ad Hoc Committee on Attachments of the State Bar dated April 5, 1973, was distributed at the meeting and is attached to the Minutes as Exhibit I.

The Commission took the following action:

(1) Where the judgment debtor is a resident of California, the sister state judgment may be registered, but the writ of execution should not issue until 10 days after actual service of notice.

(2) Where the judgment debtor is a nonresident, or is a resident in extraordinary circumstances, the sister state judgment may be registered and the writ of execution may issue on proper application before notice. Notice in this situation should be the same as under the long-arm statute. Sale or distribution of assets would be stayed to give the debtor an opportunity to raise defenses as provided in the tentative recommendation.

(3) The writ of execution and levy should not be released upon the appearance of the judgment debtor.

(4) The registration procedure should be restricted to the enforcement of sister state judgments. Notwithstanding Code of Civil Procedure Section 1713.3, the procedure should not be available for enforcement of foreign nation money judgments.

Preliminary part. Footnote 2 should be reworded to make it clear that the U.S. Supreme Court has not decided whether any nonmoney judgments are entitled to be enforced under the full faith and credit clause.

Section 1710.20. Any problems arising from a situation involving more than one judgment debtor or more than one judgment creditor should be cleared

up in Section 1710.20 and in some others. The Commission indicated that the best way to do this regarding judgment creditors in the application section (Section 1710.20) is to provide that whoever could bring an action to enforce a sister state judgment may apply for registration of a sister state judgment.

Section 1710.20(b)(1). The Commission suggested that the staff work with Professor Riesenfeld to arrive at language which would avoid any problems with the application statement that the sister state judgment is "presently enforceable" in the jurisdiction where rendered. It was also suggested that the application of the judgment creditor state whether or not to his knowledge the enforcement of the sister state judgment has been stayed.

Section 1710.30. The venue provisions should be changed to read:

(a) The county in which any judgment debtor resides; or

(b) If no judgment debtor is a resident, any county in this state.

Nonresident corporations should be treated as nonresident individuals even if they are registered to do business in California. The statement reading "but it seems that this will rarely be worth the time and expense" referring to a change of venue should be deleted from the Comment.

Section 1710.40(b). The clerk should execute a certificate instead of an affidavit of mailing notice of entry of judgment. In addition, the judgment creditor should be allowed to send or serve notice of entry of judgment.

Section 1710.40(c). The procedure for raising defenses should be clarified. It should be made clear that the judgment debtor may not appeal from the sister state judgment or seek a new trial of the original action in the California registration proceeding.

Section 1710.40(d). This subdivision should read "property levied" rather than "property seized."

Section 1710.50. The procedure for seeking a stay should be clarified by providing that the judgment debtor "moves" rather than "shows."

Further editorial changes were suggested. The tentative recommendation was sent back to the staff for the necessary redrafting and for implementation of the new policy decisions.

STUDY 52 - SOVEREIGN IMMUNITY (CLAIMS STATUTE)

The Commission considered the recent case, Whitfield v. Roth, 31 Cal. App.3d 180 (March 20, 1973), and Memorandum 73-25 and the First Supplement to Memorandum 73-25.

After considerable discussion, the Commission decided to defer action on Memorandum 73-25 and the First Supplement to Memorandum 73-25 until the Whitfield case becomes final. There is a possibility that the Supreme Court will hold the claims statute unconstitutional if a petition for hearing is granted by the Supreme Court. When the Whitfield case becomes final, the memorandum and supplement thereto should again be brought to the attention of the Commission.

STUDY 63 - EVIDENCE CODE ("ERRONEOUSLY COMPELLED" DISCLOSURE OF PRIVILEGED INFORMATION)

The Commission considered Memorandum 73-3 and the attached draft of a tentative recommendation. The draft was approved for printing and submission to the Legislature after the following changes were made:

(1) In footnote 5 on page 3, the words "or without opportunity to claim the privilege" are to be omitted.

(2) In the Comment to amended Section 919, a reference should be made to the section defining "presiding officer."

Commissioner Stanton is to be given a short time within which to suggest editorial revisions in the recommendation before it is printed.

STUDY 63 - EVIDENCE (EVIDENCE CODE SECTION 999--
PHYSICIAN-PATIENT PRIVILEGE)

The Commission considered Memorandum 73-28 and attached memorandum. The question presented was what revisions in the Evidence Code, if any, are needed in light of the opinion in Fontes v. Superior Court, 28 Cal. App.3d 589 (Nov. 1972). This opinion involved Evidence Code Section 999, which makes the physician-patient privilege inapplicable in a proceeding to recover damages on account of conduct of the patient which constitutes a crime. Although a rehearing was granted by the court of appeal in Fontes and the decision was based on another ground, the problem identified in the original opinion was the subject of the discussion at the meeting.

At the request of the Commission, Justice Kaus was present at the meeting to give his views on what revision, if any, is needed in Section 999 of the Evidence Code. The staff reported at the meeting that Senate Bill No. 113, introduced at the 1973 session, had been amended so that the bill would repeal Section 999 of the Evidence Code. It was reported that the staff had been advised that the amended bill did not meet the approval of the Senate Judiciary Committee.

It was noted that there are a number of alternatives, any one of which might be adopted:

(1) Repeal of the physician-patient privilege entirely.

(2) Do nothing--leave the physician-patient privilege as is.

(3) Revise Section 999.

(4) Repeal Section 999.

Justice Kaus recommended that Section 999 be repealed. He would not favor the repeal of the physician-patient privilege. He recognizes that this privilege is not in the Federal Rules of Evidence and that all the scholars have opposed the physician-patient privilege. Those who recommend the omission of the privilege argue that the privilege is not needed because patients will go to their doctor and disclose their medical problem anyway. Hence, the privilege is not needed to encourage disclosure. However, this analysis was made 30 or 40 years ago before the notion of privacy really gained hold in our law. Today the right of privacy should be recognized as one of the rights because we are being deprived of privacy more and more. In the limited area where the physician-patient provides protection, it protects the right of privacy. For example, in a malpractice case decided several years ago, the doctor took the position that the treatment given was the treatment he ordinarily gave. The plaintiff sought to obtain medical records of the other instances where such treatment was given, and the physician-patient privilege protected the non-party patients against disclosure of their medical records. Although the medical problem involved in this case was not one that would hold the patient out to social disapproval, the medical problem could be one of that nature. Granted that the patient would seek treatment even though there would be some danger that the physician would later be compelled to disclose in some lawsuit to which the patient is not a party. Nevertheless, there is some value to be preserved because that particular area of the patient's life should be free from intrusion. Accordingly, Justice Kaus would not favor repeal of the physician-patient privilege entirely.

A good case can be made that Professor Morgan was able to include the predecessor to Section 999 into the Model Code of Evidence without telling anyone what he was doing because you can read the comments to the model code and they do not try to justify what is now Section 999. From that point on, the substance of what is now Section 999 was included in the Uniform Rules of Evidence and the California Evidence Code. It was not until the drafters of the California Evidence Code attempted to justify Section 999 that there was any attempt to justify the exception. And the attempt to justify the exception failed; the justification makes no sense.

To retain Section 999 gives rise to an equal protection problem because the section applies only in an action for damages and not, for example, in an injunction action. There can be no logical justification for this exception other than that the Legislature did not favor the physician-patient privilege; but the justification given by the Law Revision Commission for the exception provided by Section 999 fails to hold up under analysis and must be ignored if the constitutional objection is to be defeated. Justice Kaus does not believe that any rational justification can be given for Section 999.

The staff was directed to check to determine why the proposal to repeal Section 999 was not approved by the Senate Judiciary Committee.

After considerable discussion, the Commission directed to staff to prepare a draft of a recommendation to repeal Section 999. The view was expressed that Section 999 can operate as a blackmail lever--you can by suing anyone in an automobile accident "criminally caused" gain entry into the defendant's medical records, and it is not very difficult to get into a "fishing expedition" under the liberal discovery rules, and it simply gives the plaintiff a basis for extorting a settlement. Also, the section as drafted presents

a possible constitutional objection based on lack of "equal protection." The question also is presented whether the testimony at the civil trial could be limited to testimony that would be rèlevant in the criminal trial. Another problem with Section 999 is that, before the exception applies, the court must find the preliminary fact--that the proceeding is to recover damages on account of conduct of the patient which constitutes a crime. This in effect requires that the judge hear the tesimony on both sides of the case and determine whether the patient actually did engage in conduct which constitutes a crime before he can rule on the claim of privilege. The determination is complicated by the requirement that the civil case is actually for conduct that would be a crime, and this requires a determination of what constitutes a crime for the purposes of Section 999. Thus, the case must be tried twice, once to the judge and once to the jury. The question also is presented whether the judge must find the patient guilty beyond a reasonable doubt or only by a preponderance of the evidence. It was suggested that the recommendation to repeal Section 999 mot refer to the equal protection objection to the section. Reference also should be made in the recommendation to Section 2032 of the Code of Civil Procedure (physical, mental, or blood examinations). See also Code of Civil Procedure Section 2034(b)(2)(sanction for failure to submit to examination). Reference may be made to the original opinion if necessary to show that a problem exists.

STUDY 75 - RIGHT OF NONRESIDENT ALIENS TO INHERIT

The Commission considered Memorandum 73-34 and the attached tentative recommendation relating to the right of nonresident aliens to inherit.

The Commission approved the recommendation for printing and submission to the Legislature. The recommendation is to be revised before printing to include in the text of the recommendation a brief discussion of the United States Supreme Court and California court of appeal cases indicating that Probate Code Section 259 and related sections are unconstitutional.

APPROVED

____
Date

____
Chairman

____
Executive Secretary

ALLARD, SHELTON & O'CONNOR
ATTORNEYS AT LAW
100 POMONA MALL WEST, SIXTH FLOOR
POMONA, CALIFORNIA 91766
(714) 622-1041 AND (213) 964-2353

LEONARD A. SHELTON
MAURICE O'CONNOR
EUGENE J. AXELROD
FERDINAND F. FERNANDEZ
THOMAS C. BRAYTON
PAUL M. MAHONEY
TERRENCE J. BRUTOCAO

JOSEPH A. ALLARD
(1887-1968)

ROLAND J. BROWNSBERGER
OF COUNSEL

April 5, 1973

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

Re: Enforcement of Sister State Money Judgments

Dear Mr. DeMoully:

I had hoped to write to you at an earlier time regarding the Law Revision Commission's proposal on enforcement of Sister State Money Judgments.

I am pleased to say that the Ad Hoc Committee on Attachments is in basic agreement with the provisions of the proposal.

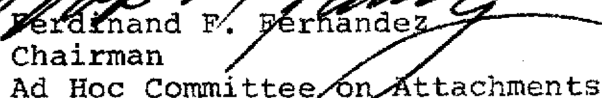
I, personally, had one or two minor questions:

(a) Would it not be a good idea to have a requirement that the notice served upon the judgment debtor contain language something like this: "You may appear in this matter and present any defenses you have to the enforcement to the judgment. You may seek the advice of an attorney as to any matter connected with this judgment, but he should be consulted promptly."; and

(b) Is it really necessary to limit the proposal to judgments "requiring the payment of money?" Constitutional issues aside, it would seem that simplification could be introduced into other areas also.

Thank you for your consideration of this letter.

Very truly yours,



Ferdinand F. Fernandez
Chairman
Ad Hoc Committee on Attachments

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SUMMARY OF RECOMMENDATIONS

Recent judicial decisions of both state and federal courts have prescribed certain constitutional requirements for prejudgment attachment procedures. Included are requirements that, except in extraordinary circumstances, notice and an opportunity for a hearing must be provided before a defendant's property may be attached and that "necessities" must be exempt from attachment under any circumstances. California enacted an interim attachment statute in 1972 which expires on December 31, 1975. At the direction of the Legislature, the Law Revision Commission has made a study of prejudgment attachment and proposes a comprehensive revision which would go into effect upon the expiration of the 1972 act.

The more significant recommendations of the Commission are listed below. The section of the proposed legislation which would implement each recommendation is indicated. The recommendations are discussed in some detail on pages 000-000 of this report.

The Commission recommends:

(1) Attachment should be generally authorized only in actions to recover an otherwise unsecured claim for money in a fixed or reasonably ascertainable amount not less than $500, based upon a contract, and arising out of the conduct by the defendant of a trade, business, or profession (§ 483.010).

(2) Generally, only corporate or partnership property or property held for use or used in a defendant's trade, business, or profession should be subject to attachment (§§ 487.010, 492.040).

(3) All property exempt from execution, all earnings paid by an employer to an employee, and all property which is necessary for the support of an

individual defendant and members of his family should be exempt from attachment (§ 487.020).

(4) Attachment of any nonexempt property of certain nonresidents should be authorized in an action for the recovery of money; but, if the nonresident makes a general appearance in the action, the attachment should be released in any case in which an attachment would not be allowed against a resident defendant (§§ 492.010, 492.050).

(5) A writ of attachment should identify the property sought to be attached (§ 488.010).

(6) A writ of attachment should generally be issued only after hearing on a noticed motion (§ 484.010). At the hearing, the plaintiff should be required to show the probable validity of his claim and to provide a proper undertaking (§§ 481.090, 484.090); the defendant should be required to prove any claim of exemption available to him at the time (§§ 484.070, 484.090). Unless good cause is shown which permits the introduction of additional evidence and authority, the court's determinations should be based upon the written pleadings, papers, and affidavits filed prior to the hearing (§ 484.090).

(7) After the initial hearing, additional writs may be issued either after hearing (§ 484.310 et seq.) or ex parte (§ 484.510 et seq.). In the latter case, the defendant should, of course, be permitted to make a postlevy claim of exemption if such a claim has not been made previously (§ 484.530).

(8) Ex parte issuance of a writ of attachment should be authorized where, in addition to probable validity, the plaintiff shows that delay would cause him great or irreparable injury (§ 485.010) or that the defendant is a nonresident individual, a foreign corporation not qualified to do business in this state, or a foreign partnership which has not designated an agent for

service of process (§ 492.010). After levy, the defendant should have an opportunity to challenge the probable validity of the plaintiff's claim and to claim any available exemption (§§ 485.230-485.240, 492.050).

(9) Ex parte issuance of a temporary protective order should be authorized where the plaintiff shows that he will suffer great or irreparable injury if the order is not issued. Either the plaintiff may apply directly for such relief (§ 486.010) or the court in its discretion may issue such order in lieu of a writ of attachment where the plaintiff has applied for the ex parte issuance of a writ (§ 486.030).

(10) The court should have authority to frame a temporary protective order that is appropriate to the particular case. Generally, the order may prohibit transfers of property by the defendant, but certain payments and transfers in the ordinary course of business should be permitted (§§ 486.050, 486.060). The order should be temporary only and expire not more than 40 days after issuance (§ 486.090).

(11) A notice of attachment explaining the person's rights and duties under the attachment should be served on the defendant and any other person served with an attachment (§§ 488.020, 488.310-488.430).

(12) Interests in real property should continue to be attached by recordation in the county recorder's office (§ 488.310).

(13) Equipment of a going business (except motor vehicles and vessels) should continue to be attached by filing notice in the Office of the Secretary of State (§ 488.340). Motor vehicles and vessels which are equipment of a going business should be attached by filing a notice with the Department of Motor Vehicles (§ 488.350).

(14) Farm products and inventory of a going business should be attached by placing a keeper in the business or, at the plaintiff's option, by filing

a notice in the Office of the Secretary of State (or, in the case of growing crops and timber, in the county recorder's office)(§ 488.360). A special exemption from attachment for farm products and inventory should be provided where, but for the plaintiff's claim, the defendant is solvent and the property exempted is essential for the support of the defendant and his family (§ 488.360).

(15) Accounts receivable, choses in action, and deposit accounts should be attached by garnishing the respective account debtor, obligor, or financial institution (§§ 488.370, 488.390).

(16) Chattel paper, negotiable instruments, and negotiable documents in the possession of the defendant should be attached by seizure; if not in the possession of the defendant, such property should be attached by garnishing the person in possession (§§ 488.380, 488.400). The attachment should not affect the rights and duties of an account debtor or other obligor until he has received notice of the attachment (§§ 488.380, 488.400).

(17) Securities in the possession of the defendant should be attached by seizure; where securities are not in the possession of the defendant, the plaintiff's relief should be governed by Section 8317 of the Commercial Code (§ 488.410).

(18) A final judgment owing to the defendant should be attached by filing notice in the action in which the judgment was entered and serving notice on the judgment debtor in such action (§ 488.420).

(19) The interest of a defendant in personal property belonging to the estate of a decedent should continue to be attached by filing notice in the probate court and serving notice on the personal representative (§ 488.430).

(20) Subject to the specific rules stated above, tangible personal property in the possession of the defendant should be attached by seizure

(§ 488.320); tangible personal property not in the defendant's possession should be attached by garnishing the person in possession (§ 488.330). In the latter case, the garnishee may deliver the property over to the levying officer (§ 488.330).

(21) Claims of third persons to attached personal property should continue to be made in the manner provided for third-party claims after levy of execution (§ 488.090).

(22) The date on which the levy of a writ of attachment creates a lien upon the property levied upon should be prescribed by statute (§ 488.500). The duration of such lien and procedures for extending such lien for a limited period should be standardized (§ 488.510).

(23) The procedures for preserving or selling attached property pending a final determination in the action should be consolidated and clarified (§ 488.530). Procedures for collection of obligations (including the examination of garnishees and authorization of an action by the plaintiff against a garnishee) should be provided (§§ 488.540-488.550, 491.010-491.040).

(24) The circumstances and manner in which attached property should be released should be clearly stated in the statute (§ 488.560; see also §§ 484.530, 485.230-485.240, 489.310, 489.420, 492.050; Code Civ. Proc. § 684.2).

(25) The Attachment Law itself should contain general provisions relating to the undertakings required (§ 489.010).

(26) Undertakings should be executed by two or more sureties (or one corporate surety)(§ 489.040).

(27) All undertakings should be presented to a proper court for approval prior to filing (§ 489.060).

(28) Objection should be permitted to be made to an undertaking, at any time on noticed motion (§ 489.080), on the grounds that either the sureties or the amount of the undertaking are insufficient (§ 489.070).

(29) The liability of a surety should be limited to the amount of his undertaking, but such liability should be enforceable by the beneficiary directly against the surety upon motion pursuant to Section 1058a of the Code of Civil Procedure (§ 489.110).

(30) An undertaking to secure an attachment or protective order should require the payment of any recovery by the defendant for a wrongful attachment (§ 489.210). The amount of the undertaking initially should be one-half of the amount sought to be recovered by the plaintiff in the action. Such amount should be increased, on defendant's motion, to the amount the court determines would be the defendant's probable recovery if it is ultimately determined that there was a wrongful attachment (§§ 489.220, 489.410).

(31) A defendant should be permitted to file an undertaking to obtain the release of an attachment or termination of a protective order (§§ 489.310, 489.320). The undertaking should require the payment by the defendant of any recovery by the plaintiff in the action and be in an amount equal to the value of the property attached, but not exceeding the amount of the plaintiff's claim (§§ 489.310, 489.320).

(32) The common law remedies for malicious prosecution and abuse of process should be supplemented by statutory liability for the following acts (which should be deemed to constitute a "wrongful attachment"): (1) the levy of a writ of attachment or the service of a protective order in an action in which attachment is not authorized or in which the plaintiff does not recover judgment, (2) the levy of a writ of attachment on property possessing a value greatly in excess of the amount of the plaintiff's legitimate claim, (3) the levy of a writ of attachment obtained ex parte (except for jurisdictional purposes) on property exempt from attachment, and (4) the levy of a writ of attachment on property of a person other than the person against

whom the writ was issued unless made in good faith and in reliance on the registered or recorded ownership (§ 490.010).

(33) The liability of a plaintiff for a wrongful attachment should include all damages proximately caused by the attachment, including costs and attorney's fees reasonably expended in resisting the attachment (§ 490.020). However, the plaintiff's liability should be limited by the amount of his undertaking where he has followed the noticed motion procedure for issuance of an attachment (§ 490.020).

(34) The recovery of damages for wrongful attachment by noticed motion in the original action should be authorized (§ 490.030), and a third person who is not originally a party to the action and whose property is wrongfully attached should be permitted to intervene in the action and thereafter use such procedure (§ 490.050).

(35) Modern terminology, including, where appropriate, terms used in the Commercial Code, should be utilized (§§ 481.010-481.230).

(36) Court commissioners should be authorized to perform the judicial duties required by the Attachment Law (§ 482.060).

(37) The Judicial Council should be authorized to (1) provide by rule for the practice and procedure in the proceedings under the Attachment Law and (2) prescribe the form of the applications, notices, orders, and other papers required (§ 482.030).

(38) Except where matters are specifically permitted to be shown by information and belief, the affidavits required under the Attachment Law should show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein (§ 482.040).

CALIFORNIA LAW REVISION COMMISSION

1973 LEGISLATIVE PROGRAM

PASSED FIRST HOUSE

SCR 7 (continues authority to study previously authorized topics)

Set for hearing in Assembly Judiciary Committee on **April 10**

SB 81 (civil arrest and bail)

Approved by Assembly Criminal Justice Committee; to Assembly floor

PENDING IN FIRST HOUSE

AB 103 (claim and delivery statute)

Set for hearing in Assembly Judiciary Committee on **April 10**

AB 101 (wage garnishment and related matters)

Not yet set for hearing

AB 102 (discharge from employment for wage garnishment)

Not yet set for hearing

AB 727 (unclaimed property)

Set for hearing in Assembly Judiciary Committee on April 24

AJR 27 (unclaimed property)

Set for hearing in Assembly Judiciary Committee on April 24