#D-300 7/11/79

Memorandum 79-29

Subject: Study D-300 - Enforcement of Judgments

The staff plans to prepare a series of supplements to this memorandum covering each chapter of the tentative recommendation relating to enforcement of judgments and raising separate policy issues or presenting new material. We previously sent you a copy of this tentative recommendation.

This memorandum outlines a suggested method of review of the comments of the staff and other interested persons on the tentative recommendation and makes some other general observations. We have also attached 19 letters commenting on the tentative recommendation. We will review the comments in these letters in the supplements covering the particular chapters to which the comments relate. Additional letters will be attached to particular supplements as we prepare them. The supplements will also refer to the letters attached to this memorandum when necessary.

We also received a letter from Mr. Robert Sprague who requested that we not reproduce and generally distribute his letter. As requested, we have not reproduced his letter, but we will note in the various supplements we plan to prepare the comments Mr. Sprague made with reference to particular provisions of the proposed legislation.

The staff is engaged in a thorough review of the tentative recommendation. Each staff member reads the tentative recommendation with care, noting any defects in drafting, policy issues, or questions that require further research. The four members of the legal staff then meet as a group and discuss each section at length. We have devoted eight days to group meetings, discussing pages 116-176 of the statute. We believe that this discussion has been very profitable and that we will be able to substantially improve the proposed legislation as a result.

In the supplements to this memorandum, we plan to discuss the policy issues raised by the staff and persons who commented on the tentative recommendation. We do not plan to discuss the suggested technical revisions raised by the persons who commented on the tentative recommendation if we believe that the technical revisions are ones that

should be made. If we consider a suggested technical revision to be undesirable, we will note it; the Commission can then consider whether the staff view is correct.

Many of the provisions of the proposed legislation are taken from the Attachment Law. In some cases, we have discovered defects in the Attachment Law or we have improved the language in the comparable provision in the proposed legislation. We plan to conform the Attachment Law provisions to the proposed legislation (where appropriate) in the conforming changes provisions of the proposed legislation so that the two statutes will be consistent.

For the September meeting, we plan to redraft the entire statute to reflect the decisions made at the July meeting and to incorporate the many technical changes suggested by commentators and the staff. If you have technical changes marked on your copy of the tentative recommendation and you turn it in to the staff at the meeting, we will take those into account in preparing the revised draft.

One writer (Mr. Raymond Mushrush--Exhibit 10, page 1) found the entire proposed statute overly cross-referenced. The staff will attempt to eliminate unnecessary cross-references in redrafting the statute, but in many situations it is impractical to repeat the substance of a related section. This matter is further discussed in the Third Supplement to Memorandum 79-29 (Chapter 1. Short Title; Definitions).

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT 1

LAW OFFICES

FRIEDMAN, SHAWN, KIPPERMAN & SLOAN

A PROFESSIONAL CORPORATION

407 SANSOME STREET, SUITE 400

SAN FRANCISCO, CALIFORNIA 94111

TELEPHONE

(415) 788-2200

STANLEY J. FRIEDMAN
JOEL A. SHAWN
STEVEN M. KIPPERMAN
PAUL G. SLOAN
JEFFREY S. ROSS

March 21, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

RE: TENTATIVE RECOMMENDATION RELATING TO ENFORCEMENT OF JUDGMENTS

Dear Sir or Madam:

I have the following comments with respect to the above-referenced tentative recommendation:

You would be doing a great service if you would eliminate sheriffs as the levying officers on writs of execution. I think it would save time and money to all parties concerned if attorneys could serve them in the same manner as a summons and complaint upon the holder of the property, particularly where it is a debtor of the judgment debtor.

Just why an action on a judgment has been eliminated so that no judgment can be extended past 20 years is not clear and it seems to me that there is no logical reason to pick 20 years anymore than any other number. In fact, 10 years probably conferred more protection on judgment debtors because judgment creditors were probably not always filing actions on the judgments in order to extend them. While any fixed term for enforcement is arbitrary, it seems to me you have picked the worst possible solution. At least the way it is now there was a 10 year limit subject on an action on the judgment or subject to court discretion to permit enforcement after 10 years. I should think a more sensible solution would have been to eliminate the discretion and simply allow actions on judgments and then pick an arbitrary term within which that action must be either commenced or completed.

With respect to matters such as orders of examination of judgment debtors or their debtors, the primary problem which I do not think you address is the lax attitude of courts in these procedures. For non-appearance or non-compliance, I should think a mandatory attorney fee award to the judgment creditor would be appropriate, would reduce the repeated necessary trips to court that in some counties are now a foregone conclusion, and would make clear that the procedures are not simply a disfavored device. In fact, conventional discovery

including depositions could eliminate a lot of time and expense by eliminating the need to go to court at all. Most judgment creditors would probably prefer it and most judgment debtors would probably be more impressed with the formality of the proceedings than the way the proceedings are typically handled in the courts.

The abdication of legislative responsibility to the consumer price index makes utterly no sense to me whatsoever.

To the extent existing law precludes execution to enforce a judgment against a public entity, rather than extending the rule I think the rule should be abolished. How abhorrent to have the Government itself disregarding court orders to pay money. Why in the world require a second action in the form of a writ of mandate, particularly without providing for a mandatory award of an attorney fee to a prevailing party. Preferable would be that any money judgment against a public entity have an automatic stay for a period of one year, with interest running, to permit the public entity to pay even if it does not take an appeal or secure any other special stay and after that year period, then to permit execution.

Permitting writs of execution to be issued by attorneys is a leap forward eliminating the cumbersome clerks' offices. It is still unclear to me what the effect is of the limitation that only writ can be out in one county at one time if levying of the writ is accomplished by serving a copy. Can the one outstanding writ be served a 100 times in the same county by delivering a 100 different copies? If not, why should that not be the preferable rule?

Garnishees not complying with their duties should also be subject to mandatory attorney fee awards whether or not an action has to be commenced.

The four month limitation on interrogatories to represented parties should only apply if the first set was timely answered and responded to. There should be mandatory attorney fees for having to compel answers or for having to serve a second set due to incomplete first answers.

The exemptions should be clearly made applicable only to general money judgments. For example, there is now an ambiguity whether certain exemptions apply, for example, to a judgment for specific performance or judgments foreclosing an equitable lien both of which presuppose that a judgment debtor personally promised to convey particular property to the judgment creditor. This now seems to be the law by decision and it should be confirmed by statute.

Very truly yours,

STEVEN M. KIPPERMAN

SMK/lbs

EXHIBIT 2

LAW OFFICES OF
ROBERT L. BAKER

HUDSON PROFESSIONAL BUILDING
111 SOUTH HUDSON AVE. SUITE A
PASADENA, CALIFORNIA 91101

TELEPHONE
(213) 795-1488
(213) 681-1488

May 1, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation Relating
To Enforcement of Judgments

Dear Sir;

We are pleased to see a proposal for a new statute revising the laws relating to enforcement of judgments - it is long overdue. Regarding the issuance and return of Writs of Execution, we are opposed to allowing an attorney to issue a Writ as an officer of the Court. Although we are of the opinion that the present proceedure under existing law is too time consuming and expensive, we feel that it is inappropriate for an attorney to have such latitude, in as much as it may give rise to abuses. We are in favor of the extended time for Writs to be levied.

Regarding the duties of garnishment, we are in favor of the new proposal relative to the furnishing of a memorandum describing the debtor's property. We also like the provision for a continuing levy.

Regarding the special procedures for enforcement of money judgments, we are in favor of the provision allowing the judgment creditor to recover attorney's fees if the debtor does not appear, however, we are opposed to prohibiting an examination unless the debt owed is increased from $50.00 to $250.00.

Regarding exempt property, we are in favor of the changes as it clears up the existing statutes and appears to be more reasonable than existing law.

We have commented on only those provisions in the tentative recommendation that we have been involved with in our day to day operation. We appreciate the opportunity to review your tentative recommendation.

Very truly yours,

Robert L. Baker

Robert L. Baker

RLB/ln

THIS HAS BEEN SENT TO YOU BY A COLLECTION AGENCY

GEORGE BALLARD COMPANY

A CORPORATION

INDUSTRIAL AND WHOLESALE COLLECTIONS

1014 HEARST BUILDING · SAN FRANCISCO, CALIFORNIA 94103 · TELEPHONE (415) 982-9745

May 18, 1979

California Law Revision Committee
Stanford Law School
Stanford, Calif 94305

Re: Tentative Recommendations / Enforcement of Judgments

Gentlemen:

Thank youfor sending me your tentative recommendations and further information. This is a huge work and appears to me to be very well done.I will not comment on items I found acceptable. What follows are questions that come to mind in reading the report in depth:

Levy Under Writ of Execution would require notice to each person served of his rights.....where this levy was directed to monies due and owed rather than wages due, it might tend to confuse. My thinking is a levy upon an account receivible may be confused if the party served incorrectly reads of his rights should they mention exemptions, etc more correctly dealing with wages.

Waiving Homesteads, as called for in the property exemption section may create problems in that I have always been of the thinking that Homesteads were constitutional matters....I'm just a layman though and may well be wrong. The idea you have put forth, however, is a very good one, I feel.

The $2000 total exemption for funds deposited anywhere may lead, I fear, to even further attempts to secrete funds. The idea is good, but perhaps even stronger language might be needed.

Retroactive Application of Exemptions, is, I believe, an unjust idea. Many creditors have offered credit based upon exemption law today. Should that creditor obtain a Judgment somewhat later and find that the exemptions have changed between the sale and the execution, it seems unfair to the creditor's right to protect himself.

Gentlemen, again, for the most part, I feel your recommendations are very well done - fair to all concerned - and up to date in their understanding.

Sincerely,

Roy J Wolcott

Memorandum 79-29

D-300

EXHIBIT 4

DATE: May 21, 1979

TO : California Law Review Commission

FROM : Vern Countryman VC

SUBJECT: Tentative Recommendation Relating to Enforcement of Judgments

The following comments occurred to me as I hastily read your recommendation (not from the viewpoint of one familiar with your existing law):

1. I take it that a person who has not checked the real estate records for a record of execution levy on realty or one who is unaware that a levying officer has taken custody of tangible personalty can be a transferee without "knowledge" under § 702.320. I find this quite strange, particularly in the case of real estate.

2. Should § 702.630(b) relieve the drawee of all liability to the drawer if the judgment debtor was claiming through a forged indorsement?

3. I would suppose that § 703.180 would be limited to cases where the person indebted to the judgment debtor had been designated by the judgment creditor pursuant to § 703.140 as a person to be served.

4. Shouldn't a levy on a residence under § 703.380 require a prior court order as in § 703.170?

5. After notification under § 703.410 is the person obligated under a negotiable instrument to suspend payments or to make them to a third party in possession or levying officer, as the case may be? If the latter, what is the effect of such payments on the obligation of the obligor?

6. Shouldn't § 703.460(e) conform to § 703.450 on appeals?

7. Shouldn't the judgment provided for by § 705.260(c) be limited to the amount of the judgment creditor's claim?

8. I do not see why § 705.470 should be limited to a case where the judgment debtor has contracted to sell his property. Why shouldn't he be able to use it whenever, for whatever reason, he wants to discharge the judgment lien?

9. The "when" in § 705.620 should be "until."

10. Shouldn't § 707.410(a) conform to § 703.450(c) on appeals?

11. There is some tension between § 707.510, exempting a "motor vehicle," and § 707.550 exempting "one vehicle" used in trade, business or profession.

12. Ditto for § 707.560 and § 707.570.

• STANFORD UNIVERSITY • OFFICE MEMORANDUM • STANFORD UNIVERSITY • OFFICE MEMORANDUM • STANFORD UNIVERSITY • OFFICE MEMORANDUM

EXHIBIT 5

GREENBERG & VICTOR
ATTORNEYS AT LAW
15233 VENTURA BOULEVARD, SUITE 414
SHERMAN OAKS, CALIFORNIA 91403
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ARTHUR A. GREENBERG
STEVEN L. VICTOR

SUITE 1600 SECURITY PACIFIC PLAZA
1200 THIRD AVENUE
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (714) 233-6241

May 31, 1979

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

RE: Tentative Recommendation Relating to Enforcement of Judgments

Dear Mr. DeMoully:

This office has reviewed certain portions of the above-captioned recommendation. We generally approve of the changes being recommended. In light of recent experience, we wish to present several brief comments with reference to the examination of judgment debtors and third parties, and third party claims.

The concept of attorney's fees for failure to appear at judgment debtor examinations is attractive. The current remedy relied upon, the warrant procedure, is usually less than satisfactory both in terms of time and expense.

However, there is nothing in the recommendation which sets forth the procedure by which attorney's fees would be added to the amount of the judgment. More to the point, though, is that if the judgment creditor is presented a situation in which the judgment debtor proves to be unable to satisfy the judgment, then the judgment debtor would certainly be unable to satisfy any award of attorney's fees. (We certainly don't presume that it is the recommendation of the Commission that attorney's fees are to be payable from exempt assets.)

The award of attorney's fees after a failure to appear by a third party is more relevant and this concept should be adopted. However, in order to avoid any claims of lack of adequate notice, the notice being tendered to the judgment debtor or to the third party being examined, in addition to potential liability for contempt, should include in bold face type that a failure to appear may subject the party to reasonable attorney's fees and expenses caused by reason of the failure to appear.

The suggested changes are set forth in Exhibit A.

In the area of third party claims, it would seem appropriate that legislation be adopted which would give a third party claimant notice of the activities of the executing or attaching creditor with reference to the hearing to be held upon the third party claim. This activity of the creditor would include the preparation of live testimony, as well as subpoenas ducas tecum which may be served. By giving the third party claimant such notice, the claimant would have an opportunity to attack the propriety of any inquiries being made by the judgment creditor. (It should be noted that, in the ordinary circumstances, the third party claimant has made itself a party to the underlying litigation solely to protect assets which have been levied upon due to the underlying litigation, and the claimant has not made the normal waivers that parties voluntarily make when resorting to litigation.)

In addition to the aforestated obvious question of privacy, the third party claimant must be placed in a position to prepare for the hearing. Without notice of what is transpiring, of what evidence may be presented, the third party claimant is faced with the "sporting theory of litigation", and is at a loss and at a disadvantage in its preparation for a contest. The example which comes to mind is a situation where a judgment creditor levies upon the bank account of a third party. The third party files a timely third party claim, and schedules a hearing. Unbeknownst to the third party claimant, a subpoena ducas tecum is served upon the claimant's bank. The bank honors the subpoena ducas tecum, but only by luck or by virtue of a personal relationship is the third party claimant advised that such a subpoena has been served upon the bank.

Just as the tentative recommendation gives to the judgment debtor notice of third party claim situations, channels for transmission of the type of information set forth above should be created in favor of the third party claimant. California law has begun to provide a method for the transmission of such information. The Commission is respectfully invited to refer to the rules adopted under the Economic Litigation Pilot Project.

Briefly, in cases within the pilot project, certain witness and evidence statements must be filed, and these statements are circulated among the parties. To the extent that there is the failure to list a witness, or a failure to set forth documentary evidence, this evidence may be barred at the time of trial.

Section 706.420 sets forth the notice requirements of the hearing. This section can be expanded to include the witness and evidence statement, with an additional subsection setting forth the sanction for failure to comply.

If the claimant is the petitioner, the notice of hearing to the creditor would set forth the requirements for the statement.

To the extent that this additional paperwork, and therefore the additional disclosure to the third party claimant, might cause the need for a continuance, such a provision is already provided by proposed Section 706.410(c). There is, of course, no reason that the court clerk need be the transmitting agent for the statement. The parties can cause service in the normal manner.

It is our opinion that there does not exist a need for a reciprocal witness and evidence statement to be filed by the third party claimant. The executing or attaching creditor had whatever reason it had to order its levy, and is in a superior position to anticipate the obvious claim to be presented by the third party claimant. Should the Commission find our suggestion with reference to the witness and evidence statement to be attractive, and should it further require reciprocity, the time frames for the hearing set forth throughout Section 706 can be modified.

The pressures of time, and volume of material preclude us from a further review of this recommendation, but we are anxious to learn of the progress being made in this area.

Respectfully,

GREENBERG & VICTOR

ARTHUR A. GREENBERG

AAG/jlf

EHXIBIT "A"

Section 705.120(e). The order shall contain the following statement in boldface type: "Failure to appear may subject the party served to arrest and punishment for contempt of court, and may also subject the party served to pay reasonable attorney's fees and expenses caused by a failure to appear."

Section 705.130(d). An order made pursuant to subdivision (a) shall contain the following statement in boldface type: "Failure to appear may subject the party served to arrest and punishment for contempt of court, and may also subject the party served to pay reasonable attorney's fees and expenses caused by a failure to appear."

Section 705.180(b). If a person ordered to appear for examination has been served with an order to appear for an examination by a person authorized to serve the order pursuant to subdivision (a) and fails to appear, the judgment creditor may recover reasonable attorney's fees incurred in the examination proceeding.

EXHIBIT 6

Collection Service Bureau of Hayward

Affiliated with the Credit Central - Credit Reporting Division

COLLECTIONS ANYWHERE

22789 FOOTHILL BLVD. - P. O. Box 479
HAYWARD, CALIFORNIA 94543

581-1155
351-8261

June 11, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94035

Gentlemen:

The following are my comments on the proposed change in the various laws for the 1980 legislatures as pertaining to our operation:

Judgment Lien

The proposed law of extending all judgments to the 20-year statute and also extending the 20-year statute on abstract of judgments or liens, would be a great improvement. I do not feel, however, that there should be any order permitting the discharge of any abstract lien in order to transfer real property. I feel that this would be a very bad law, as in many cases, the only possibility of recovery is from the judgment lien itself.

Executions

I am in favor of attorneys having the power as an officer of the court to issue writs of execution. At the present time, the courts are in such a position that they are months behind and, in many cases, it takes them 30 to 60 days to issue a writ of execution or enter a judgment. In the meantime, many judgment debtors dispose of their assets. The extention of the execution from 60 to 90 days is a great improvement, as wage garnishments at the present time are in force for 90 days.

Repeal of Statuatory Redemption

The proposed law, in my estimation, would just simply delay matters and further complicate the procedure. I feel that the present law on the books is adequate.

Collection Service Bureau of Hayward

Affiliated with the Credit Central - Credit Reporting Division

COLLECTIONS ANYWHERE

22769 FOOTHILL BLVD. - P. O. Box 479
HAYWARD, CALIFORNIA 94543

581-1155
351-8261

Money Judgments, Special Procedure

I feel that the new proposed law would be beneficial giving the judgment creditor the right to apply to the court for an order requesting assignment of payments of future rents, commissions, and federal wages.

Requesting Notice of Sale

I do not think or feel that the new proposed law would be any advantage. I feel that it would be a disadvantage, as creditors and judgment creditors should have the right to know or have knowledge of any sale that might be taking place.

Sincerely yours,

Emmett Serochi
Vice-President

jrm

EXHIBIT 7

MUNICIPAL COURT OF SAN DIEGO CALIFORNIA
OFFICE OF THE MARSHAL
MICHAEL SGOBBA, MARSHAL

220 W. Broadway
San Diego, Ca. 92101
236-3871

June 13, 1979

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

RE: Tentative Rcommendations Relating to Enforcement of Judgments

This department has reviewed the recommendations relating to enforcement of judgments. We feel that the recommendations are for the most part fair and in some cases long overdue revisions to this area of the law. We do, however, have serious reservations about the proposal contained in Section 703.120(a) which would allow attorneys for judgment creditors to issue their own writs of execution. We feel that the current practice requiring the courts to issue writs of execution should be maintained to protect both the defendant and the levying officer. We offer the following comments for your consideration in the hope that the Commission will modify its recommendation and remove the above mentioned proposal contained in Section 703.120(a).

It has been our experience and that of the local court clerk's office that attorneys, albeit officers of the court, in many cases are not sufficiently familiar with the code sections dealing with enforcement of judgments to assume the responsibility for issuing writs of execution. In a great number of instances attorneys and/or their office staff are not exercising proper care in the preparation of their writs which are now reviewed by the court prior to issue.

Typical errors on writs prepared by attorneys and discovered and corrected by court personnel prior to issue are listed below:

Mistakes in the computation of the amount of the judgment left owing.

Incorrect naming of defendants. (Extremely important in determining ownership of property being levied upon.)

Incomplete writs or writs prepared on the wrong form.

Inadequate description of or failure to describe property to be levied upon in writs of execution for possession of personal property.

It is our opinion that anyone of the above mentioned errors could result in unnecessary corrective litigation, use of additional staff time by court and levying officer personnel and violation of the judgment debtor's rights by a wrongful levy.

Thank you for affording us the opportunity to comment on your proposed recommendations to the legislature.

Sincerely,

Michael Sgobba
Marshal

MS:RA:ft

EXHIBIT 8

California State Sheriffs' Association

CIVIL PROCEDURAL COMMITTEE

Organization Founded by the Sheriffs in 1894

Please reply to:

P.O. Box 28
San Jose, CA 95103

(408-299-2450)

June 15, 1979

California Law Revision Commission
Stanford University Law School
Stanford, California 94305

RE: TENTATIVE RECOMMENDATION RELATING TO ENFORCEMENT OF JUDGMENTS

Dear Commission Members;

Our Committee review of the Commission recommendation has resulted in a favorable overall conclusion and we commend the Commission and its staff. We did find some areas where we believe revisions will better enable levying officer to perform their duties and request your consideration.

Suggested revisions have been identified by recommendation page and section numbers, with deletions stricken and additions underlined, and our rationale for the revision. Substantive revisions of areas outside levying officers' normal interest were generally avoided, except where our experience suggested a revision would serve some generally useful purpose.

Pg. 117, 701.150:

701.150. "Court" means --- .

Comment. Section 701.150, --- . See, e.g., Section 702.120 (court of proper jurisdiction for remedies requiring court jurisdiction on state tax agency warrants), 703.460 --- .

RATIONALE: To cover this special court meaning within comment.

Pg. 117, 701.160:

701.160. "Deposit account" means --- .

(d) --- confined in any ~~county~~ county, city and county or city jail, --- .

RATIONALE: To cover City and County of San Francisco situation.

Pg. 119, 701.220:

701.220. "Levying officer" means --- .

Comment. Section 701.220 is new. --- , 703.260 (garnishment by registered process server), 705.710 (court clerk performing duties of levying officer on collections of judgments where judgment debtor is creditor of public entity), --- .

RATIONALE: To cover this special meaning of levying officer.

Pg. 126, 702.220:

702.220. Where a judgment --- . SOME COMMISSION DEVELOPED LANGUAGE TO CONTINUE THE SUBSTANCE OF FORMER SECTION 685 FOR THE LIMITED PURPOSE OF THIS SECTION.

RATIONALE: Installment creditors having unpaid installments outstanding beyond the 20 year life of Section 702.210 but within this section's 20 year life may have a problem obtaining an appropriately issued writ of execution from the court clerk. This will provide them with a procedural remedy with the court's overview, and, as suggested under the comment to CEB, California Debt Collection Manual (1978), Section 8.54, provide the levying officers with an immediate resolution to any question on the enforceability of such writs.

Pg. 129, 702.340:

702.340. If a lien created --- .

(a) Property held pursuant to the lien may be released, and shall be released on demand.

RATIONALE: Present wording places a duty (SEE: 703.240), and commensurate liability, on the levying officer to release property on expiration of the lien. To do so will require additional record keeping, clerical and sworn personnel time in searching for the debtor/garnishee, postage and supply costs and correspondence, all at the expense of the tax payer, while the parties to the action may have exhibited no interest in the property. The expenses of this procedure may exceed the value of the property. The revised wording will permit the levying officer to release the property if it has substantial value, and require him to do so on demand of the debtor or other proper person.

Pg. 130, 702.510:

702.510. (a) Unless otherwise expressly provided, --- .

(d) --- . If the notice or other paper runs in the favor of a particular party and may be delivered personally by the levying officer, personal

delivery of the notice or other paper may be made by the particular party or the particular party's agent who obtains the levying officer's permission to do so.

RATIONALE: Throughout this title, notices and other papers, especially releases favoring debtors, are required or permitted to be given by levying officers. In such situations, mailing is the normal manner of giving such notices or delivery of such papers. Personal delivery by the debtor or other particular party or the party's agent is a current, common practice which expedites delivery and reduces costs. This approach has been approved in the recent amendment to the Employees Earnings Protection Law under A.B. 11 (Chap. 66, Stat. 1979), and should be provided for in this title.

Pg. 130, 702.520:

702.520. (a) Except as provided in ~~subdivision (b)~~ subdivisions (b) and (c), service of a writ, --- .

(c) Service required under Chapter 4, Wage Garnishment (commencing with Section 704.110), shall be made as set forth in that chapter.

RATIONALE: To cover the special provisions regarding earnings withholding orders under the Employees Earnings Protection Law.

Pg. 136, 703.120:

703.120. (a) Except as provided --- .

OUR COMMITTEE HAS SOME RESERVATION ABOUT CREDITORS' ATTORNEYS ISSUING WRITS.

RATIONALE: Although officers of the court for some purposes, they have not been considered as "ministerial" officers as have clerks and levying officers. This will be a substantial change deserving careful consideration. Many attorneys, or usually their secretaries, now prepare their own writs, with the court clerks issuing them, some certainly without reviewing the court files, but likewise some do. As with attorneys instructions, it is not the least unknown for them to be signed by the secretary or some other office employee, which it is suggested will happen if attorneys are permitted to issue writs. On the brighter side, when writ corrections are needed, dealing through the attorney could well be quicker and easier than with the court through the attorney. We believe this to be a somewhat negative way of resolving court clerks' problems, however recognize there are benefits.

Pg. 137, 703.130:

703.130. The writ of execution --- , the amount of the judgment, and the the amount actually due thereon, the date of the judgment, --- .

RATIONALE: To cover this relevant information on the judgment, including giving levying officers knowledge for computation of the judgments' enforceable 20 year life.

Pg. 142, 703.200:

703.200. (a) Except as provided --- . The running of the lien is not tolled furing a stay of enforcement.

RATIONALE: Incorporating this sentence from your "Comment." into the section will prevent needless misunderstanding, question or litigation in determining the intention of the section.

Pg. 148, 703.310:

703.310. (a) To levy upon --- .

(c) At the time of --- .

(2) A third person identified in the ~~writ~~ creditor's instruction --- .

RATIONALE: Currently this information is provided by the creditor's instructions. For the information to be included on the writ properly requires it to be a part of the judgment upon which the writ issues. Neither the present nor proposed writ form provides space for this information. To require it on the writ would needlessly reduce the space available and require an additional burden as part of the litigation before judgment.

(3) A person identified in the creditor's instructions holding an interest --- .

RATIONALE: As with (2), above, such information should appear in the creditor's instructions, such addition in this subdivision placing the responsibility for providing the information specifically on the creditor rather than placing its possible responsibility on the levying officer.

Pg. 153, 703.370:

703.370. (a) To levy upon --- .

(d) Notwithstanding subdivision (a), at any time that it becomes necessary in order to preserve the property for the purpose of the levy, the levying officer may take the tangible personal property into exclusive custody. The levying officer is not liable for a determination made in good faith under this subdivision.

RATIONALE: As presently worded, the section could be interpreted that continued operation is an absolute right of the debtor. This revision will codify what is common practice of levying officers in instances where the debtor demonstrates an attitude or activity leading the levying officer to reasonably believe continued operation of the business should not be permitted if the property is to be safeguarded.

Pg. 157, 703.420:

703.420. COMPLETE REWRITE.

703.420. (a) To levy upon a security, the levying officer shall:

(1) If the security is held in escrow pursuant to the provisions of the Corporate Securities Law or has been surrendered to the issuer, serve a copy of the writ and a notice of levy on the person in possession of the security.

(2) If the security is in the possession of the judgment debtor, take the security into cusotdy.

(b) At the time of levy or promptly thereafter, the levying officer shall mail a copy of the writ and a notice of levy to the judgment debtor.

(c) In cases not provided for by subdivision (a), the judgment creditor's relief is governed by subdivision (2) of Section 8317 of the Commercial Code.

RATIONALE: This is a non-substantive revision to conform this section's format to that of Sections 703.400 and 703.410, thereby providing for ease of reading.

Pg. 163, 703.620:

703.620. (a) Before property levied upon --- .

(d) In addition to --- or other periodical ~~publication, and may recover reasonable costs of such advertising~~ publication. Reasonable costs of advertising in this manner are a recoverable cost under Section 1033.7.

RATIONALE: Your comment shows intent that Section 1033.7 must be complied with, however some published codes will not contain it. This revision will provide such direction to attorneys and to levying officers including the cost of such advertising as a cost of sale under the instant writ.

Pg. 163, 703.630:

703.630. (a) Not less than 10 days --- and to any person who has requested notice ~~pursuant to Section 702.540~~ from the levying officer.

RATIONALE: Section 702.540 is not in the recommendation. It is presumed it originally continued provision for notice from former Section 692a, but was deleted as unnecessary in accord with your comments, with which we agree. This revision allows an interested person to request notice from the levying officer.

Pgs. 164 & 165, 703.640:

703.640. (a) A notice of sale --- directions may be obtained from the levying officer upon oral or written ~~request~~request, or, at the discretion of the levying officer, may contain directions to locate the property.

--- .

RATIONALE: Two potential advantages may be gained from this revision: (1) More buyer interest may be generated if directions are, if they can be, included on the sale notice; and (2) Levying officers need not be requested to provide directions if already on the notice, hence saving their time.

(d) Notice shall be --- , if one is present at the time the notice is posted under paragraph (2) of subdivision (e). --- .

RATIONALE: To clarify that this service requirement must be met only if the levying officer is able to contact a suitable person for service of the notice and to avoid liability where the occupant may chose to avoid service.

(g) Notice shall be published once a week ~~from the time notice is mailed to the judgment debtor until~~ for three weeks, with the first publication at least 20 days prior to the time of sale --- .

RATIONALE: To conform this section with common practice and case law. (McCabe v Willard, 119 CA 122, 6 P2d 258) Normally, sale notices are mailed to the debtor and others at the same time notice is sent to the newspaper for publication, usually 40-45 days prior to the sale to allow time for proof review and corrections before publication. Present wording requires levying officer to mail notices to different persons at different times, thus increasing error possibility and liability. Also, it could be read that if a sale is postponed by agreement of the parties or court order, that publication must continue until the sale is actually held.

Pg. 166, 703.650:

703.650. Provided that Section 702.610 has been complied with, a ~~A~~ levying officer who sells --- .

RATIONALE: To prevent litigation against the levying officer where the creditor fails to inform him of third parties entitled to notice. (As under Section 703.640(c)(2).)

Pg. 169, 703.690:

703.690. (a) If the highest bidder --- .

(c) If the highest bidder --- , the amount paid shall be applied by the levying officer toward the satisfaction --- .

RATIONALE: To cover any question of who applies the application.

Pg. 171, 703.710:

703.710. (a) When the purchaser --- .

(1) Execute and deliver a certificate of sale to the ~~purchaser,~~ purchaser of real property, and, upon request of the purchaser or when reasonable in regard to the costs of giving such certificate, to the purchaser of personal property.

RATIONALE: Though it is common practice to issue certificates of sale of personal property in most instances, there are situations where this is not practical because of clerical costs (tax dollars) and costs to debtors and creditors. Where items of small value are sold individually to a number of purchasers (for example, portions of inventory of a retail store), the levying officer's fee for issuing the certificate ($3.00, GovtC 26741) could well be excessive in relationship to the sale price. The revision would require the certificate in most instances, allowing the officer flexibility where the cost is not justified. It would not, however, eliminate the requirement for him to give the purchaser a receipt.

Pg. 210, 706.210:

706.210. (a) A third person may --- .

(b) The third-party claim shall contain all of the following:

(1) A detailed description of the property and of the interest claimed, --- .

RATIONALE: The levying officer must have a detailed description of the property in which an interest is claimed in order to determine if he does or does not have the property under levy, and if so, that he may segregate if from other property being held or sold.

Pg. 213, 706.310:

706.310. (a) A secured party may --- .

(b) The third-party claim shall contain all of the following:

(1) A detailed description of the property and of the secured interest claimed, --- .

RATIONALE: SEE: RATIONALE for 706.210, above.

Pg. 217, 706.420:

706.420. ~~Not less than 10 days before the date set for the hearing, the~~ The petitioner shall ~~mail~~ give not less than 10 days written notice of the time and place of the hearing to --- .

RATIONALE: To continue the time frame for giving such notices as under former Sections 689 and 689(b) to insure adequate time for action by the various

Pg. 217, 706.420 (cont.):

persons required to be notified, particularly the levying officer. Under the present wording, the petitioner could mail the notice on the 10th day before the hearing. If he did, mailing delays to the levying officer, his processing delays and delays if mailed to the court could result in arrival at the court either late. Even under former Sections 689 and 689(b), timing sometimes is "close".

Pg. 223, 706.760:

706.760. The judgment creditor may --- .

Comment. Section 706.760 continues --- . See also Section ~~706.160~~ 706.150 (general provisions regarding undertaking).

RATIONALE: To correct code section reference.

Pg. 236, 707.360:

706.360. (a) If the notice of opposition --- .

(b) Not less than 10 days prior to the hearing, the judgment creditor ~~shall mail notice of the hearing to the levying officer and~~ shall mail a notice of the hearing --- .

(c) Not less than 10 days after the notice of opposition to the claim of exemption was filed with the levying officer under Section 707.340, the creditor shall deliver a notice of the hearing to the levying officer. After receiving the notice --- .

RATIONALE: Section 707.370 places a duty on the levying officer to immediately release property if he does not receive a notice of hearing within the time prescribed by Section 707.360, however Section 707.360 does not prescribe a time certain within which he should receive the notice, only that the notice must be mailed within not less than 10 days before the hearing. The revision establishes the time within which the levying officer must receive the notice.

Pg. 237 & 238, 707.380:

707.380. (a) The claim of exemption --- .

(e) The clerk shall immediately transmit a certified copy --- .

RATIONALE: Often the method of transmittal chosen by the clerk is delivery by one of the parties. Only by requiring a certified copy may the levying officer be assured that he is receiving a copy of the actual order, not a proposed order that was perhaps modified by the court prior to issuance. Current common practice is to require a certified copy of such orders, except where received directly from the clerk.

Pg. 238, 707.410:

707.410. (a) Except as provided by Sections 702.620 and 706.750, the ~~The~~ levying officer may not --- .

RATIONALE: The revision authorizes the levying officer to release where his costs are not paid on demand, or where an undertaking for release of property has been filed by a third-party claimant.

Pgs. 239 & 240, 707.510:

707.510. (a) One motor vehicle is exempt --- .

(b) If the motor vehicle is sold, --- . Notwithstanding Section 707.150 --- sale of the motor vehicle. The levying officer may rely upon information obtained from the records of the Department of Motor Vehicles in in making the determination required under this subdivision.

RATIONALE: This revision will provide direction to the levying officer as to how he determines whether the judgment debtor has one or more vehicles for exemption purposes and provides liability protection. It essentially continues that aspect of former Section 690.50.

Pgs. 242 - 244, 707.570:

707.570. (a) For the purposes of this section, --- .

(e) Notwithstanding Article 2 --- .

(1) Within ~~five~~ 10 days after --- ~~or~~ --- .

RATIONALE: To provide a more reasonable time within which the judgment creditor can file his claim with the levying officer. 10 days is more compatible with mailing turn-arounds frequently encountered. Use of "10", rather than "ten" is thought to be more accurately readable.

(7) Upon determining that --- , the clerk shall immediately transmit a certified copy of the order to the levying officer and the levying officer mail or personally deliver the certified copy of the order ~~on~~ to the financial institution. The financial institution --- .

RATIONALE: Throughout the recommendation, similiar notices required after levy may be given by mail or personal delivery. To single out this particular order for personal delivery only seems unreasonable, even considering the nature of the exempt funds. Other exempt funds of similiar magnitude are releasable by a mailing or personal delivery and it is felt this should apply here too. Also, the revision to Section 707.510 will provide a speedy personal delivery remedy for claimants wishing to take advantage of it.

Pgs. 250 - 255, 707.810, 707.830 & 707.840:

SPECIAL NOTE: Our Committee has a divergance of opinion with regard to direction and liability protection for levying officers and for debtors when reading these three sections together. To summarize, there are 3 views:

1. When Sections 707.810, 707.830 and 707.840 are read in conjunction with Sections 262, 702.610 and 702.650 and presuming the levying officer requires the judgment creditor's instructions to specifically cover relevant aspects of the levy, then the levying officer following the procedure applicable to the facts stated in the instructions would be protected.
2. Liability would be protected with a revision to Section 703.140, which would be read in conjunction with the above 6 sections, as follows:

   Pgs. 138 & 139, 703.140:

   703.140. (a) The judgment debtor shall --- and a person to be served. If an interest in real property is to be levied upon as provided by Section 703.310, the instructions shall include a statement as to whether or not the real property contains a dwelling as defined by Section 707.810.

   RATIONALE: Although protecting the levying officer, it would not provide a remedy for the judgment debtor to follow should the creditor's instructions erronously instruct that there is no dwelling on the real property.

3. The third view is more detailed, since it is the view which raised the issue and a revision to deal with the concern, as follows:

   CONCERN: Sections 707.810, 707,830 and 707.840, when read together, places extraordinary responsibility and liability on the levying officer. Although it is believed this was not the Commission's intent, as presently worded these sections require that in every instance of levy on real property the levying officer must determine the debtor's interest in the property(1), wether the property contains a dwelling(2),

(1) If debtor's interest is a leasehold estate of less than 2 years' unexpired term, it is subject to Section 707.830, if he has a greater interest, then Section 707.840 is applicable.

(2) If the property does not contain a dwelling, the exemption statutes do not apply. If so, then Section 707.830 or 707.840 may be applicable. This may appear to be an easy determination for the levying officer to make, however if a large tract is levied on in mountainous terraine, the officer could spend days searching to determine whether it does or not. A "mom & pop" business could well be both business and dwelling without the dwelling being apparent to the levying officer.

and if the debtor or debtor's family legally resides on the property(3).

Under both the current homestead law and the real property exemption law, upon applocation of the creditor, the court must determine whether the debtor meets the legal requirements entitling an exemption. The court has full judicial power and authority to do so. Present language imposes such determinations in the first instance on the levying officer who has limited ability and authority to do so. If he errs in his determination of the facts, he could be liable, either to the creditor or debtor.

It would appear that your proposal is based on a desire to simplify procedures and reduce court hearings while still protecting the interests and rights of the parties

Such goals could be obtained by requiring the delivery of a notice, similiar to that required under Section 690.31, at the time of levy. Such notice could advise the debtor of possible exemption rights and require only his completion of the form and return to the levying officer to claim the exemption, with the levying officer forwarding it to the creditor who would then have 10 days to comply with the remaining provisions of Section 707.840 or the levying officer would release.

This could be accomplished with the following revisions:

Pgs. 148 & 149, 703.310:

703.310. (a) To levy upon real property --- .

(e) Except for a levy under a writ of sale as provided by Section 70.110, the copy of the writ and notice of levy mailed to the judgment debtor under subdivision (c), and served or posted under subdivision (d), shall be accompanied by the following notice in at least 10-point faced type:

"IMPORTANT NOTICE TO JUDGMENT DEBTOR OR FAMILY OF JUDGMENT DEBTOR"

1. Your real property is in danger of being sold to satisfy a judgment in court. If the property described in the attached notice is your residence, or the residence of your family, you may be

---

(3) If the debtor's interest is greater than a leasehold interest of 2 years' unexpired term, and if he or his family resides on the property, then the levying officer must release his levy if the creditor does not comply with the provisions of Section 707.840.

able to protect the property from sale, or you may be entitled to a portion of the proceeds from the sale, under the exemption provided by Code of Civil Procedure Section 707.820.

2. FOR YOUR OWN PROTECTION, YOU SHOULD PROMPTLY SEEK THE ADVICE OF AN ATTORNEY IN THIS MATTER. IF YOU ARE A TENANT AND NOT THE JUDGMENT DEBTOR, OR A MEMBER OF THE FAMILY OF THE JUDGMENT DEBTOR IN THIS ACTION, THIS NOTICE DOES NOT AFFECT YOU. PLEASE GIVE IT TO YOUR LANDLORD.

3. If you believe in good faith that you may be entitled to an exemption, you should complete the form below and date, sign and return the form to the levying officer no later than _____ (insert date 20 days from date of levy).

4. Court and Court Case Number _____

5. Title of Action _____

6. Levying officer's name, title, address and telephone number _____

_____

7. I, as the judgment debtor, or as a member of the family of the judgment debtor, declare that I or the judgment debtor's family reside in this property, and I claim the exemption provided by Code of Civil Procedure Section 707.820.

8. I understand that if the creditor wishes to dispute my right to an an exemption, he must apply to the court for a hearing to determine my right to exemption, and that the creditor will notify me of the date and time of the hearing by mail, at my address given below, and that I must appear at the hearing to protect my rights. If the creditor does not apply to the court for a hearing, the property will be released at the time set by law.

9. My address for the purpose of service of notice by mail is _____

_____

10. I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ (date), at _____ (city or county)

Signature of debtor or member of debtor's family _____

Pgs. 253-255, 707.840:

707.840. (a) ~~If~~ In order to claim an exemption of the debtor's --- at the time of levy, ~~within 10 days after notice of levy is mailed to the judgment debtor the~~ within 20 days after the date of levy the claim form required by paragraph (e) of Section 703.310 shall be completed and delivered to the levying officer. Within 5 days of his receipt of the ~~c~~laim, if delivered within the time provided, the levying officer shall mail a copy of the claim to the creditor together with a notice that the property shall be released unless the officer receives a notice of ~~A~~pplication and of hearing as provided in subdivision (c). Within 10 days of the date of mailing by the levying officer of the copy of the claim and notice required by this section to the jdugment creditor, the judgment creditor shall apply to the ~~c~~ourt for issuance of an order permitting sale of the dwelling. ~~dwelling and shall notify the levying officer of the application.~~ If the dwelling is located --- . If the judgment creditor does not apply for an order permitting sale of the dwelling and file a notice of application and of hearing with the levying officer as provided by subdivision (c) within the time allowed, ~~the dwelling shall be released~~ the levying officer shall release the real property from the lien of execution. --- .

(c) The hearing on the --- . Not later than 10 days from the date of mailing by the levying officer of the copy of the claim and

notice required by subdivision (a) to the judgment creditor, the judgment creditor shall file a notice of application and of hearing with the levying officer. Not later than 10 days --- shall mail a copy of the application and notice of hearing to the judgment debtor and shall serve a copy of the application and notice of hearing on an occupant --- .

RATIONALE: Our Committee believes the three approaches afford the Commission insight into our concern and suggested courses of action. We would hope, particularly since we have a liability concern, that the Commission's final determination will be reflected in any comments relevant to such liability.

P. 258, 708.140:

708.140. (a) Except as provided --- .

(b) Where the property --- .

(2) The levying officer ~~is not required to place a keeper in charge~~ may take immediate exclusive custody of tangible personal property of a going business.

RATIONALE: Since the purpose of the section is to allow the levying officer to take immediate exclusive custody, without the necessity of allowing the business to operate for 2 days, etc., as under a "money judgment" writ, this appears to be a more affirmative statement. Also, with present wording, a creditor, looking for cost saving, might argue against the levying officer who intends to use a "keeper" for inventory and to maintain levy which he would not be able to do in many instances without a "keeper."

(3) Personal property used as a dwelling shall be levied ~~upon as provided by paragraph (1) of subdivision (a) of Section 703.380.~~ upon:

(i) If the personal property is in the possession of the judgment debtor or an agent of the judgment debtor, as provided by paragraph (1) of subdivision (a) of Section 703.380.

(ii) If the personal property is in the possession of a third person, as provided by Section 703.330.

RATIONALE: This revision makes it clear that the manner of levy differs depending upon whose possession the dwelling house is in, specifically providing for the situation where it in the possession of a third person who may be neither a judgment debtor nor an agent of the judgment debtor.

Pgs. 258-259, 708.150:

708.150. (a) If the property described --- , the levying officer shall make a demand upon the judgment ~~debtor~~ debtor, if the judgment debtor can be found within the levying officer's jurisdiction, for the property. If the property --- on the face of the ~~writ~~ writ, or in his return attached thereto. --- .

RATIONALE: To cover the situation where the levying officer is unable to locate the judgment debtor within his jurisdiction to make the demand. This revision will allow the creditor to proceed with his "alternative money judgment" where the demand can not be made. The latter revision allows the levying officer to make the required statement on the writ or in his return attached to the writ, the use of the return being the common practice.

Pg. 261, 709.120:

709.120. NO CHANGE TO SECTION, HOWEVER THE INFORMATION REQUIRED BY SUBDIVISION (B) DOES NOT APPEAR ON THE WRIT FORM ON PAGES 268-269.

Pgs. 261-262, 709.130:

709.130. (a) The judgment creditor --- .

(b) The levying officer shall execute the writ by:

(NOTE: Major revision follows, both as to substance and format, so all is underlined without recommendation language changes as previously given.)

(1) If executing to restore the real property described in the writ to the judgment creditor:

(i) Serving upon an occupant of the real property described in the writ or or posting a copy of the writ as upon a levy under a writ of execution pursuant to Section 703.310. If the copy of the writ is posted, the levying officer shall mail a copy of the writ to the jdugment debtor at the judgment debtor's business or residence address last known to the judgment creditor or, if no such address is known, to the address of the real property.

(ii) If the judgment debtor does not vacate the real property within 5 days after the date of service of a copy of the writ on the occupant or, if a copy

of the writ is posted, within 5 days after the date a copy of the writ is mailed, the levying officer shall remove the judgment debtor from the property and place the judgment creditor in possession.

(2) If executing to satisfy the amounts of costs and damages recovered in the judgment, and accrued costs and interest entered on the writ, together with the levying officer's costs and disbursements as provided by law, levying in the same manner as under a writ of execution.

(3) The levying officer may not execute nor levy the writ upon any real nor personal property under the writ after the expiration of 90 days from the date the writ was issued.

RATIONALE: The format of this revision is changed to appear like prior sections, such as Sections 703.400 - 703.420. The major substantive changes lie in the elimination of language creating an impress or fact of a "levy" where the levying officer is executing the writ with regard to the judgment creditor's being restored the real property. If a "levy" is made, then any of the judgment debtor's personal property turned over to the judgment creditor would be subject to potential exemption claims or third party claims. Historically, the levying officer's actions have not been considered to amount to a "levy", as was clearly stated in Love v Keays (1971), 6 C3d 399. Added time and costs would be created through any such claim proceedings, whereas Section 1174 procedures seem adequate to protect all such claim parties. In addition, if the recommendation language is followed literally as to the application of Section 703.310, a levying officer might well make a "recording" on the real property, thereby creating a potential or actual "cloud" on its title. Recommendation language regarding levying on the "money judgment" has been changes to reflect only those money items normally on the writ, with levying officer costs and disbursements being incorporated "as provided by law", rather than "on the writ." The revision uses the term "execute" initially as a general term, with its use regarding the real property's restoration to differentiate the levying officer's actions as not being a "levy" as they are when he acts on the "money judgment". Both "execute" and "levy" are used in the revision's subdivision (3) to insure it is understood the 90 day limit applies fully. A final minor point is the use of "5" rather than "five", which is believed more consistant with the overall recommendation useage and felt to be more easily read and applied.

Pg. 265, 710.130:

710.310. (a) The judgment creditor shall deliver the writ of sale and a certified copy of the judgment or decree of foreclosure to the levying officer

---

RATIONALE: Note that subdivision (b)(3) requires the sale proceeds to be applied in conformity with the judgment. The court may, and usually does, require special procedures, terms and disbursements in the judgment

that are often too extensive to be included in the writ of sale. Common practice is for the levying officer to require both the writ of sale and a certified copy of the judgment or decree of foreclosure be delivered to him and it is believed the continuation of this practice is desireable and should be incorporated into this section.

Again, our Committee commends the Commission and its staff for their efforts, extending our appreciation for the opportunity to make revision suggestions, which we hope will be a positive contribution.

Very truly yours,

B.W. HARDIN, COMMITTEE CHAIRMAN
Inspector, San Diego County Sheriff's Department

Martin H. LeFevre

MARTIN H. LeFEVRE, COMMITTEE LIAISON - LAW REVISION
Captain, Santa Clara County Sheriff's Department

EXHIBIT 9

MARSHAL OF MUNICIPAL COURTS
COUNTY OF LOS ANGELES
ROOM L-4 CRIMINAL COURTS BUILDING
210 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
974-6331

JOHN F. MAHON, JR.
MARSHAL

June 12, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

I have read your tentative recommendations relating to enforcement of judgments, and have found areas where there are either inaccuracies in the copy provided or potential problems from the viewpoint of the ministerial officer charged with the enforcement.

I

The suggested revision, providing that the attorney for the creditor may issue a writ of execution as an officer of the court, does not appear to be desirable. Not being familiar with the New York law upon which this recommendation is based, or the problems created by such a provision, I can only speculate on the value of this suggested change. However, as a ministerial officer, relying on the writ to accurately reflect the judgment, I feel it is imperative that the court maintain control over the issuance of its enforcement process. I, therefore, wish to go on record as being opposed to this particular suggestion.

II

On page 19 of the Summary and in § 703.170 (Levy on Property in a Private Place), the inclusion of the language from CCP § 512.010, (which requires that the application for a writ of possession [claim and delivery] include a statement, if the property is in a private place, that there is probable cause to believe that the property is located there), in the section on collection of money judgments, while possibly expanding the levying officer's

authority to break into such private place to execute against personal property which otherwise could not be seized peaceably, also appears to restrict the levying officer's authority to seize property where it can be done peaceably. Is this section meant to apply only where peaceable possession cannot be obtained? Or is it the intent that this section be followed whenever property to be levied upon is within a private place? What constitutes a private place?

III

On pages 140 and 141, § 703.180, Payment by Debtor of Judgment Debtor. The comments appear to misstate the present status of the law as set forth in CCP § 716. Present law provides for the discharge of the amount paid to a levying officer "having such execution." The obvious meaning is an execution which has been both issued and delivered to such levying officer.

IV

On page 132, § 702.670(b) provides that the levying officer shall demand orally or in writing that the judgment creditor deposit additional amounts to cover estimated costs of keeping property. This section then provides that a written demand may be mailed to the judgment creditor. And, finally, in the event the money so demanded is not paid within the time specified in the demand, the levying officer shall release the property. Does the provision for releasing apply both to oral demands and written demands, or does this provision only apply if the demand is mailed to the judgment creditor?

V

On page 138, § 703.140(b) provides for the levying officer's costs entered on the writ. While present CCP § 682.2 provides for the levying officer to compute the amount to be satisfied by the execution from the date of issuance to the date of the levy, plus costs, this amount is not entered on the writ. The form for the writ (pages 268 and 269) does not provide for the entry of this information on the writ. Once the writ is issued, no one but the judge or clerk issuing the writ should be allowed to make any changes, additions or deletions to the writ.

VI

On page 145, § 703.240, Release of Property. How does this section operate in relation to § 706.230? In the event that the third person making the claim does not pick up the property, is the property then sold as provided for by this section? If it is, in whose name would the money be deposited in the county treasurer's office?

VII

On page 148, § 703.310, Interest in Real Property.

Subsection (b), makes reference to a third person identified in the Notice of Levy.

Subsection (c)(2), refers to a third person identified in the writ.

Since this proposed section appears to do away with the present procedure to be followed under CCP § 690.31 prior to the issuance of a writ, the writ would not contain the information referred to in § 703.310(c)(2), and the reference should be to information contained in the Notice of Levy.

N.B. We are concerned that the information necessary to comply with § 703.310(c)(2) and (3) be information which the judgment creditor is required to furnish by § 702.610.

§ 703.310(d) also makes reference to property described in the writ. This reference should be to property described in the Notice of Levy.

VIII

On page 159, § 703.440(f), first sentence. Following the word "executed," the language, "by the judgment creditor or judgment creditors, with two or more sufficient sureties," is omitted. Is this omission intentional? It doesn't appear to be. Also, see: Associates Capital Services Corp. v. Security Pacific National Bank, C.A.2nd, 2 Civil No. 54458, April 12, 1979, "Judgment creditor need not sign corporate surety bond."

IX

On page 163, § 703.630(a) refers to "Notice pursuant to section 702.540." No section 702.540 appears in this text. (See note 87, page 25.)

X

On page 164, § 703.640, Notice of Sale of Real Property. Although this section is derived from the present CCP § 692, paragraph 3, the proposed section places the burden of giving out the information regarding directions to the property on the levying officer "upon oral or written request." Suggest that the provisions of § 692, paragraph 3, be retained whereby the notice of sale contains the name and address of the beneficiary and a statement that directions may be obtained from the beneficiary.

XI

On page 175, (comments to § 703.810, second to last paragraph), "New costs are entered on the writ by the levying officer." This procedure is not provided for in the form for the writ (pages 268-269), nor is it desirable. (See comments regarding proposed § 703.140(b)

XII

On page 184, § 705.210, Comment. Reference to subdivision (a) appears to be in error, since there is no subdivision (a) in the text.

XIII

On page 214, § 706.330, Release for Failure to Make Deposit or File Undertaking and Statement.

Subsection (b). In the event that the "secured party making the claim" does not pick up the property, is the levying officer then required to sell the property pursuant to the provisions of § 703.240? If he is, then in whose name does he deposit the money with the county treasurer?

XIV

On page 223, §§ 706.750(c) and 706.760. How will the levying officer be notified that the judgment creditor has made an objection to the undertaking?

XV

On pages 236 and 237, §§ 707.360 and 707.370. These sections provide for the levying officer to immediately release if he does not receive a notice of opposition or a notice of hearing within the times prescribed. Since the times prescribed refer to time for mailing, not time of receipt, how is the time to release to be determined by the levying officer?

XVI

On page 239, § 707.510, Motor Vehicle; Proceeds.

Subsection (b) provides "...If the judgment debtor has only one motor vehicle, no claim of exemption need be made for proceeds of an execution sale of the motor vehicle." How is the levying officer to determine if the judgment debtor has only one motor vehicle?

If the minimum bid required by § 703.740(b) is not received, does the levying officer continue to hold the property so long as the creditor will pay the fees required by § 702.620?

XVII

On page 253, § 707.840(a) provides that the judgment creditor shall apply to the court for issuance of an order permitting sale of the dwelling and shall notify the levying officer of the application. However, there is no provision for the levying officer to notify the judgment creditor as to when the notice of levy is mailed. How is the judgment creditor going to know when the notice of levy is mailed to the judgment debtor so that he can apply within the 10 days required?

XVIII

On page 258, § 708.150. Writ of Possession of Personal Property Unsatisfied.

Any provision for the levying officer entering statements on the face of the writ is undesirable. Since the writ is the document which gives the levying officer his authority for his actions, he should not be allowed to make any change on the writ itself. Suggest, rather, that the levying officer attach his affidavit or certificate to the original writ showing his attempt(s) at levy on the described property, and why the property could not be obtained. If the levying officer then enforces the judgment for the value of the property specified in the writ, the "Not Found" return on the specific personal property would be returned with the writ to show that he first attempted to levy on the property described in the writ before he executed the writ for the value of the property.

XIX

On page 260, § 709.110(a), the references to "levying officer", and "property sought to be levied upon", appear to be misleading and inaccurate. Prefer the language of present CCP § 1174(d) which refers to "officers charged with the enforcement of such writs", and "writ of restitution of the premises", since the property is not property of the debtor being levied upon but property of the creditor being restored to the creditor.

XX

On page 261, § 709.120(a), the description of the property to be restored to the possession of the creditor as "property to be levied upon" is inaccurate for the reasons set forth in paragraph XIX above.

XXI

On page 261, § 709.120(b)(1). The language in this section providing that "the levying officer will remove the judgment debtor from the property....", appears to be more restrictive than present CCP § 1174 which provides, "the enforcing officer shall remove the tenant...."

Is it the intent of the commission to restrict who can be removed by the writ to the named judgment debtor?

The procedure set forth in the proposed § 709.120 would prohibit the enforcing officer from restoring possession to the creditor in the majority of cases. While the enforcing officer would be able to remove the judgment debtor, unless he can remove the debtor's family and others under the debtor not claiming a right to possession accruing prior to the commencement of the proceedings, he would not be able to restore possession to the judgment creditor.

XXII

On pages 261-262, § 709.130, Delivery and Execution of Writ of Possession of Real Property.

The entire section appears to be written based on erroneous assumptions. They are:

(1) That when enforcing a writ for possession of real property, the enforcing officer "levies" on the property.

(2) That the real property described in the writ is the judgment debtor's property.

In particular, § 709.130(b)(1) providing for the levying officer to execute the writ by "levying upon the property described in the writ...in the same manner as upon levy under a writ of execution pursuant to section 703.310", (levy on a debtor's interest in real property) would set up a procedure which appears to be contrary to the intent of the section.

While it is quite possible that there are additional areas where this proposed legislation would present problems for the ministerial officer charged with the enforcement of judgments, the foregoing are some of the areas where additional study and research appear to be called for before this legislation is introduced in bill form.

Thank you for giving consideration to these comments.

Very truly yours,

JOHN F. MAHON, JR., Marshal

Bernard M. Morgan

BERNARD M. MORGAN, Lieutenant
Procedures Officer

BMM:hn

EXHIBIT 10

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June 14, 1979

OUR FILE NO. 17:853

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

re: Tentative Recommendation relating to Enforcement of Judgements

Dear Sir:

The writer is Chairman of the Legislative Committee of the Western Regional Members Association of the Commercial Law League of America. The League is a voluntary association of almost 7,000 attorneys in the United States whose practice is strongly centered in the practice of commercial law, and a proposal such as this is of great interest to us. A special committee was formed to review and analyze the Tentative Recommendation, and spent many hours individually and in committee session to this end, and we respectfully beg to present our views.

In general our committee was very favorably impressed with the proposal, in both its substantive and procedureal approach. It is obvious to us that a great deal of work was done, and the practical effects of the matter carefully and intelligently considered. It seems to us in the mean that a quite fair balance is struck between the interests of judgment creditors and judgment debtors.

That, of course, does not mean we have no criticisms.

The first one, voiced by every member of the committee, is the proliferation of relation back and forward from one section to others. It requires constant flipping throughout the statute in order to understand it. If there is a related section, or an exception to a rule, why can't it be spelled out in the operative section, rather than referring to one or more other sections? This seems to us an unecessary burden on already short research time, and invites confusion as one switches back and forth from one section to the other.

As to specific sections:

701.140: This seemed vague to us. Do "charges, disbursements, and other expenses" include such things as investigative fees, or skip-tracing and other items which would not now be considered as chargeable costs?

702.210: We felt this was an excellent change, and strongly favor it.

703.630: This refers to Section 702.540, but we find no such section in the draft.

703.740: If this means what it says, or appears to say, we would be strongly opposed. Let us suppose that a judgment creditor has a judgment for $3,000.00. The judgment debtor has property worth $200,000.00, against which there are liens of $175,000.00. As we read this, in order to bid his judgment, the judgment creditor would first have to bid in cash a minimum of $175,000.00 first. Obviously that is not practical, and forecloses the creditor. As it is now, the judgment creditor can bid in his judgment, or some portion thereof for the property. He, of course, takes subject to prior valid liens, but he does not first have to raise an enormous sum of cash just to be able to reach the judgment debtor's equity. We think this section should be re-thought and re-drafted.

705.180: Some of our courts have very narrowly interpreted the words 'registered process server' to mean only the licensee, not his employees. We think the phrase should be expanded to read 'or an employee or independent contractor of a registered process server'.

705.190: How is this to be accomplished? If there is no appearance at the first or second hearing on behalf of the judgment debtor, to whom does the bench warrant run? Present practice is for the attorney for the judgment creditor to designate in his papers what person he wants to appear, and when that person is served with the order, the Judges have no trouble in knowing against whom to issue the bench warrant.

705.490: We are philosophically opposedto this rule. The maxim is that the law aids the vigilent. That creditor which first perfects his rights should prevail.

706.460(b): We think this is a bad rule. Obviously the third-party claimant is in possession of much better information as to the nature of his claim or interest. Experience shows that some third-party claims are spurious, and sometimes asserted in collusion with the judgment debtor. We believe the burden should be on the party asserting the affirmative, rather than the other way around.

707.160: It is strongly felt that the concept of this section is unconstitutional, and illogical besides. Previous attempts along these lines have not worked, such as that under Section 688.1 CCP to exclude a Trustee in Bankruptcy from being a lien creditor for purposes of the section. A contract is made when it is made under then prevailing circumstances. How can any creditor reasonable anticipate what the legislature will do with exemption statutes. At the present time there are two bills in the legislative hopper, one to raise the homestead to $50,000.00, another to raise it to $100,000.00. Our commerce is now both national and international. Can we really expect a creditor in New York, shipping goods to California, to practically anticipate what our legislature will do with the exemption statutes?

707.340: The procedure seems needlessly burdensome. Why one thing filed with the levying officer, and the other with the Court? It would be much simpler if both were filed with the Court with proof of service of a copy on the levying officer. If that were the rule, 707.360(b) could be eliminated.

707.380(d): The last sentence of this subsection does not make sense.

707.380(d): Why should it be determined as of the date of the hearing. Prior sections give the creditor a lien at various times, and it seems more logical that that should be the time at which it is determined, and that could substantially pre-date the hearing date.

707.560: We fail to see the logic of this. If wages owed to the judgment debtor can be reached in the hands of his employer, and not be entirely exempt, what magic changes those same wages if the debtor gets his paycheck into a bank before the creditor can levy?

707.560(e): Given the present state of the U..S. Mails, five days is simply too short a time. It should be at least ten, and preferably twelve. Again, this section calls for double filings, which seems unnecessary.

We would appreciate being kept apprised of the progress of this proposal. Thanking you for your attention, I am

Very truly yours,

Raymond L. Mushrush

rm

EXHIBIT 11

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June 15, 1979

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

Re: Tentative Recommendation re Enforcement of Judgments

Dear Mr. DeMoully:

We have had an opportunity to review the California Law Revision Commission's tentative recommendations relating to enforcement of judgments in California.

We believe that the recommendations of the Commission in this area of law are consistent and well prepared, and appear to take significant steps towards making the procedures for enforcing judgments simpler, and more equitable. Save for a few minor exceptions, we have no adverse comments to make to the recommendations in their present form.

If we may be of further assistance to the Commission, please do not hesitate to contact us.

Sincerely yours,

HARVEY L. LEIDERMAN

HLL:jeb

EXHIBIT 12

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June 15, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Tentative Recommendation Relating to Enforcement of Judgment's Study D-300 ("Recommendations")

Gentlemen:

I have reviewed your Recommendations. On the whole I find most of the Recommendations to be long overdue particularly since a substantial number of the code sections have not been significantly changed since 1872. Because these changes will result in substantial economies, simplify many procedures, clarify areas of the law which had become muddled over the last century and create new rights and procedures to take into account this credit oriented society, I urge swift drafting of revisions and submission to the California Legislature.

The comments and suggestions set forth hereinafter are solely my own views and do not represent the views of either of my employers (Bank of America or the University of West Los Angeles School of Law). In addition, the views set forth herein do not represent the views of the State Bar of California Business Law Section Debtor/Creditor Relations and Bankruptcy Committee of which I am a member.

I believe that the revisions to this area of the law are of such importance that the effective date should not be delayed until January 1, 1982 but that the legislation should be introduced early in 1980 with an effective date of January 1, 1981.

EXECUTION PROCEDURES

I do not feel that the deletion of the previously proposed Section 702.540 (Request for notice of execution sale)

is justified. Even though that provision is not frequently used at the present time, it serves a useful purpose and should not be eliminated solely because of infrequent use. The costs of complying with the request for notice provision are minimal and the procedure sometimes is useful. For instance, if a creditor obtained a judgment against the same judgment debtor he might wish to have actual notice of any execution sale by another judgment creditor so that he could protect his own interest by bidding at the sale or by levying through the levying officer to pick up any surplus that might result from the other creditor's sale. The actual notice that the creditor or any other person would obtain on request could result in a substantially higher price being realized at the execution sale. I feel that a procedure for requesting actual notice of execution sales should be continued from present law and included in the final draft. Of course, failure to give such notice would not invalidate the sale. However, the levying officer, clerk or attorney who fails to give a requested notice should be liable for actual damages.

Section 701.240 defines "negotiable instrument" by reference to Section 3104 of the Commercial Code. Section 3104(1)(d) requires that a "negotiable instrument" "be payable to order or to bearer". Numerous banks and savings and loan associations issue "almost" negotiable instruments to depositors as evidence of a deposit. These "savings certificates" are not truly negotiable since they do not contain the magic words of negotiability. Since the statute of limitations to pursue a bank to recover a deposit or property is governed by CCP §348 (no time limitation) and institutions therefore will not wish to pay on a levy when the actual certificate has not been surrendered, (a person could bring in a "savings certificate" after 25 years when all bank records have been destroyed and compel payment) it seems to me that the definition of negotiable instrument set forth in the tentative recommendations should be expanded to cover the situation where a not truly negotiable savings certificate is given to a depositor and that the certificate should be surrendered before the institution is liable to pay over the funds.

Section 703.140(c) limits the life of a writ of execution to 90 days from the date of issuance. There is no logical reason for a writ of execution to be limited to only 90 days. In my view it would save time and money to extend the life of a writ of execution to at least 160 days from the date of issuance. This extension would require

less paper work. Of course, Section 703.120(b) and certain other sections would require changes to conform to this longer period of time.

Upon reviewing Section 703.190 and several other sections which talk about "debt" I am bothered that there is no definition of "debt" in the Recommendations. I believe it is necessary to define the term "debt". It needs to be defined so that there can be no confusion that a debt evidenced by an instrument is not the type of debt talked about in 703.190 and several other sections of the Recommendations.

In addition, Section 703.190(a)(1) would be more clear if in the third sentence after the word "upon" the words "in the third party's possession at the time of levy" were added. Similarly, I believe that those words should be inserted in subsection (c)(1) after the word "upon" and that in subsection (c)(2) after the word "debt" the words "owed to the judgment debtor at the time of levy" should be inserted.

Section 703.200(a) makes the duration of an execution lien one year from the date of issuance of the writ. This continues present law. However, there are several circumstances where creditors could be prejudiced by an execution lien with only one year's duration. I feel that the execution lien should be at least two years and probably should equal the automatic three years of a writ of attachment. Of course any change in the duration of the life of the execution lien under 703.200(a) would require similar changes to 703.250(a).

I feel several periods of time set forth in the Recommendations are inappropriate for the reasons stated. Initially, I feel that 703.630(d) should have a time period greater than ten days except for perishable property. Indeed I feel strongly that the individual judgment debtor (see infra) should have a period beyond ten days within which to file a claim of exemption. I know personally of instances where individual judgment debtors have been out of town on vacation and have returned too late to claim a justifiable exemption on certain property. I do not know if the creditor intentionally levied at the time the judgment debtor was out of town. However, a ten-day period is too short and there is no necessity for having such a short period. I suggest that at least twenty days would be appropriate.

Section 703.640(b) (notice of sale of real property). I believe that thirty days notice instead of twenty days notice

would be in the best interest of all parties. In addition I believe that subsection (g) of said Section should be changed to provide that notice be published once a week for three weeks.

703.680(c) certainly is an ingenious method of probably increasing the amount realized at execution sales. I agree with the Commission that it is unreasonable to expect a bidder at execution sales to carry cash or cashier's checks in the full amount of an unknown purchase price. A provision for credit sales would benefit not only the judgment creditor but the judgment debtor. However, I do not believe that any successful buyer needs thirty days from the date of sale within which to raise the balance of the purchase price and that thirty days is excessive. Five business days should be more than sufficient to allow a successful bidder to acquire the remaining funds. I therefore recommend substantially shortening the thirty-day period to a period between five and ten days. In addition, although I believe it is clear pursuant to the provisions of Section 703.710 it might be beneficial to set forth in subsection (c) of 703.680 that possession and title shall not pass to the bidder under the full purchase price has been timely paid. Failure to pay on time should divest the bidder of any claim to the property and the down payment should be interplead.

The provisions of 703.690 relating to a defaulting bidder should apply where a bidder has not paid the sum within the time permitted by 703.680.

Section 705.120(d) and section 705.420 create a lien upon property of the judgment debtor upon service of a copy of the order for supplemental examination on a judgment debtor and service on the judgment debtor of notice of motion to obtain a charging order on a partnership interest respectively. It appears that the duration of the lien is twenty years. I do not think it is necessary or desirable to have a lien that long but perhaps no harm is done except how does a third party determine the existence of these liens and their life? There is no index procedure. What are the rights of bona fide purchasers for value who may purchase property or lend against property of the judgment debtor without notice of the liens. Indeed, I believe that under 705.120 the only property that should be subject to a lien should be property in the judgment debtor's possession, custody or control at the time of the service of the order. What property is covered is not specified. I presume that the purpose of creating the lien is to somehow

give the judgment creditor protection against the judgment debtor transferring property in his possession and that the lien is not intended to cover other types of property which could be reached by other specified methods of levy. The property covered and rights of innocent (without actual notice) third parties should be spelled out.

Under 705.420 the lien on partnership property is created by serving "notice of motion" on the judgment debtor. There has to be a method of putting the partnership on notice of the creation of the lien and the partnership's duties. Perhaps the lien could be created either by serving notice of motion upon the judgment debtor or the partnership. This would facilitate a levy where the judgment debtor's present whereabouts was unknown. Of course, the judgment creditor could not sit on his laurels since the lien would only protect priority and not result in any payment. I feel there ought to be some provision in the charging order sections setting forth the duties and responsibilities of the partnership when it receives a copy of the notice of motion seeking a charging order. Perhaps it should be prohibited from paying over to the partner whose interest is sought to be charged any profits or other distributions until after hearing upon the motion or 180 days whichever is sooner.

The receiver's lien discussed in 705.340 is unclear since its extent and duration is measured by that obtained by levy under a "writ" "or service of other process." The Commission should specify the particular type of writ such as a writ of execution and delete the words "or service of other process."

While I recognize the need in certain limited circumstances for a procedure to eliminate a judgment lien from real property where there are a number of judgment liens on said property and sale is therefore impossible without consent of the judgment lien creditors, I have substantial problems with section 705.470.

First, in addition to <u>actually</u> serving a judgment creditor, the judgment debtor should also serve under subsection (c) of 705.470 the attorney of record for the judgment creditor. Most judgment creditors appear by counsel; most judgment debtors are in propria persona.

I am particularly troubled by a procedure whereby a judgment debtor could avoid a judgment lien merely by allegedly mailing by first class mail an application to discharge judgment lien to the last known address of the judgment creditor without any proof that said application for discharge of judgment lien was received by the creditor or the creditor's attorney and that they had actual notice of the application. Thirty days is probably too short here because it will take time to dig up the file, contact a client who may be out of state and determine whether to file a response.

If Section 705.470 were enacted in its present form it would create a situation where substantial frauds upon creditors could occur. Indeed, it is likely that most applications mailed by the judgment debtor would be returned marked "undeliverable" by the post office. This is true because most abstracts of judgment contain only the name and address of the attorney representing the judgment creditor. Many times they have been recorded several years ago. It is a known fact that attorneys frequently move. Since the post office will forward mail only for about one year after a change of address is filed, many applications for discharge of judgment lien that are several years old could be returned to the judgment debtor marked "undeliverable". Would the judgment debtor advise the court? Sometimes items are lost in the mail. I have not received two insured parcels that were sent to me so far in 1979!

It is not equitable and possibly unconstitutional to allow a judgment debtor to mail an application to an old address, have the letter returned marked "undeliverable" and then allow the judgment lien released under the provisions of subsection (h) of section 705.470. Because of the clear potential for abuse and fraud in connection with this section service by first class mail is inadequate. I strongly feel that personal service upon the judgment creditor or his attorney of record in the case should be the minimum required.

Most of the time attorneys for judgment creditors will be contacted in connection with an abstract of judgment by an escrow company seeking to determine the amount of the judgment and to obtain a release of the lien. Most sophisticated judgment creditors will consent to a specific release of a judgment lien on the real property being sold if a fair

price is being obtained for the real property and the surplus funds are applied against the judgment creditor's judgment and lien.

I presume the underlying assumption of the Commission regarding the need for 705.470 is because judgment creditors are supposed to be unreasonable and would rather see the property foreclosed or not sold at all than receive less than the full amount due. This is simply not true in the vast majority of situations. I do not believe that Section 705.470 is really needed. If the Commission insists that it is needed, it needs to be tightened up substantially to require the judgment debtor show that he has actually served the judgment creditor or his attorney of record and that the judgment creditor has a reasonable opportunity after adequate notice to compel a hearing.

Section 705.480(a) although it is based upon provisions in present Section 674.5 of the Code of Civil Procedure in my view has certain constitutional problems in that it allows the judgment debtor to certify the amount owing under an instalment judgment lien without notice to the judgment creditor or opportunity for a hearing. I think judgment creditors also have constitutional rights to adequate notice and an opportunity for a hearing before being deprived of their property (the lien). If the judgment creditor or his attorney contest the amounts set forth in the judgment debtor's certificate then a procedure ought to be available for a court to determine the correct amount.

THIRD PARTY CLAIMS

Although I think it is clear by reviewing other sections of the Recommendations I believe that Section 706.120 should have have additional language in it which sets forth that if no third party claim is filed and a superior lien or interest exists then the buyer acquires subject to the superior lien or interest. The only exception should be where the judgment creditor or holder of the security interest of record has been actually served with a demand for claim under Section 706.630 or 706.610. I believe 30 days is again too short a period of time. In connection with a judgment creditor's demand for claim by secured party under 706.610 it ought to be clear that personal service of the demand be made by the levying officer on the branch of the financial institution actually holding the security interest. This would conform with other levy provisions requiring levy upon

the actual branch where the deposit account is held or the personal property is possessed.

EXEMPTIONS

California ought to consider adoption of a blanket exemption to balance the special privileges given "homeowners." The Bankruptcy Code which goes into effect on October 1, 1979 creates a blanket exemption in "any property" up to $7,900.00 if no dwelling house exemption is claimed pursuant to Section 522(d)(1) & (5). Some similar benefit possibly as much as $5,000.00 equity in any property not otherwise exempt ought to be considered for persons who do not claim a dwelling house exemption in California. Few people can afford homes in the present California market. A recognition of this problem was given under Section 707.580(d) where an additional $10,000.00 cash value of an insurance policy could be claimed where no dwelling house exemption was taken. I believe that the $10,000.00 cash value provision ought to be deleted because it is too limited and a separate exemption for not more than $5,000.00 in any property not otherwise exempt ought to be created. In consideration for creating this new exemption California ought to affirmatively decline to allow the use of the federal per debtor exemptions set forth in Section 522(d) of the new Bankruptcy Code. There is no reason why a husband and wife should be able to divide their community property between themselves and then file one bankruptcy petition for the husband claiming California exemptions and another petition for the wife claiming the new federal exemptions. The potential total exempt property vastly exceeds anything reasonably necessary for a debtor. I believe at least $100,000 in assets could be protected between husband and wife if both sets of exemptions are available. It is not necessary for a California debtor to retain $100,000 or more in assets in order to have a fresh start and not be a burden on our welfare system.

Some consideration ought to be given to the possibility of creating certain automatic exemptions or at least creating a statutory penalty for a judgment creditor who willfully levies upon exempt property. It has long been the rule as restated in Section 707.150 that an exemption is waived if not timely claimed. The ability to claim an exemption if it was not claimed timely because of mistake, inadvertense, surprise, or excusable neglect may create more problems than

will otherwise exist particularly if the property has already been sold and the money has been paid over to the judgment creditor. How do you restore the parties? Where the property has been sold and the funds paid over to the judgment creditor the ability to set aside the waiver under Section 473 should probably cease to exist. Of course, I believe certain minimal automatic exemptions should exist, but understand the problem in structuring them.

The time for claiming an exemption under 707.320(a) ought to be extended from ten days to twenty days for the reasons set forth previously in this letter.

I have always thought that the automobile exemption in California was inadequate. Proposed Section 707.510 does not substantially change this inadequacy because it continues to talk in terms of fair market value of the vehicle not exceeding $1,000.00. It seems to me that each judgment debtor ought to be able to claim exempt or have automatically exempt $1,000.00 equity in any motor vehicle. Said $1,000.00 exemption should extend to any execution proceeds to the extent of said exemption. In these inflationary times there are not too many vehicles which have a value of less than $1,000.00. Judgment creditors have been known to harrass and coerce debtors by picking up vehicles with a value exceeding $1,000.00 even though there was little or no equity in said motor vehicle. Since the vehicle is almost a necessity of life, particularly in areas where public transportation is inadequate or unavailable, a $1,000.00 equity test is better than continuing the $1,000.00 total fair market value test.

While I agree that some limitation ought to be placed on the value of individual household furnishings, appliances, etc., I do not feel that the $500.00 limitation of proposed Section 707.520 is adequate. I favor increasing the exempt amount to $750.00 and setting forth that said $750.00 per item exemption applies to the first $750.00 of execution proceeds. If a contrary rule existed a potentially shrewd and unscrupulous creditor could levy upon a color TV set or possibly a more necessary household appliance such as a refrigerator, bid in on his judgment $1.00 over the exempt amount for the item and thereby deprive the judgment debtor of the use of that item. Although the fair market value of the item might be less than the judgment creditor's paper bid, the judgment debtor because he might not have available credit would find it impossible to replace the particular appliance

and would be forced to deal with the judgment creditor. Indeed, the replacement cost of the color television or refrigerator to the judgment debtor might be over the amount of the judgment creditor's bid even though the judgment creditor would not be able to resell the particular item to any other person for the amount of its bid. By creating an exemption for the first $750.00 of proceeds and paying said exempt proceeds to the judgment debtor, the judgment creditor would be required to bid cash for the exempt amount and this type of harrassment of a judgment debtor would be eliminated. I favor retention of a specific piano exemption and suggest that a $2,000 dollar amount be used.

I believe the aggregate exemption provided by Section 707.530 of $500.00 for jewelry, works of art, etc. is unnecessarily low. This section as written would probably deprive many women of their wedding rings. I suggest an aggregate of $2,000.00 would protect most debtors and give creditors a reasonable dollar limitation on what a debtor could protect. Furthermore, for the reasons set forth in my discussions of 707.520 the first $2,000.00 of execution proceeds should be paid to the judgment debtor and the judgment creditor should not be able to bid paper for said exempt amount.

The dwelling house exemption has grown significantly in the last ten years. It has grown beyond its real need. I do not believe a dwelling house exemption of $50,000.00 for a married couple is necessary. I further do not believe that it is equitable or fair for only a homeowner to enjoy such special privileges. Most residents of California are renters who probably will never be able to afford a dwelling house. Clearly the present $40,000.00 exemption for a head of household should be more than adequate. Therefore I would reduce the amount set forth in proposed Section 707.820 to $40,000.00 for a married couple. I think $20,000 is sufficient for other persons and would reduce it from the present $25,000.

I believe the ten day provision in Section 707.840(a) ought to be increased to twenty days.

FORMS

On page 268 is set forth a form writ. Since Section 703.130 requires the names of all judgment debtors to be set forth on the writ, sufficient space ought to exist on the form

to set forth the names of all judgment debtors where a judgment is obtained against several debtors. The space provided on page 268 and 270 for the names of judgment debtors is not adequate and the space ought to be increased so that the full names of all judgment debtors could be set forth thereon. This would facilitate determinations by garnishees such as financial institutions regarding whether or not they held funds or other property of the judgment debtor and whether or not a bond was required because the funds stood in the name of a person not a judgment debtor.

The Memorandum of Garnishee set forth beginning on page 275 should be changed in a few particulars. Under sentence 1 after the words "personal property" I would add the words "in your possession at the time of levy". I do not believe the subsequent words "which have been levied upon" adds anything and they should be deleted from sentences 1 and 2. Indeed, the garnishee might not understand this phrase. In paragraph 2 on page 275 I would add after the word "owed" the phrase "by you to the judgment debtor at the time of levy".

On page 276 in sentence 5 and 6 perhaps the phrase "superior claims or rights" ought to be set forth in a more layman like manner. Most laymen reading these sentences would not understand what "superior claims or rights" means.

In connection with the transition provisions I have already mentioned that I feel that the proposed changes are so important that they should not be delayed until 1982 but ought to become effective in 1981.

I am troubled by proposed Section 713.120 in that I do not feel it sets forth any clear standards by which the court could determine whether or not the rights of the parties or other interested persons have been "substantially interfered with". I do not know if said section is really necessary and feel that there could be a lot of litigation relating to this unclear section.

I am pleased that after the operative date judgment liens will attach to the surplus over the dwelling house exemption. In reading Section 713.170 it appears that the foregoing rule would apply to previously recorded judgment liens. Do these previously recorded judgment liens on homesteaded property attach at the time of the operative date and how is priority

to be determined if several judgment liens attach at the same time? Would this follow the after-acquired property rules? Would the first creditor to levy under a writ of execution have priority over equal judgment liens if the previously recorded judgment liens have equal priority on the operative date?

I will anxiously await receipt of written revisions to the Recommendations in this area.

Very truly yours,

Rick Schwartz
Senior Counsel

RS:cl

EXHIBIT 13

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June 15, 1979

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Stanford, California 94305

Re: Tentative Recommendation Relating to Enforcement of Judgments

Gentlemen:

Messrs. David J. Brown, Frederick D. Holden, Jr., Jared Dreyfus and Robert D. McKinley, and Miss Melinda S. Collins, all of this office, have reviewed portions of the Tentative Recommendation relating to Enforcement of Judgments, dated as of March, 1979 ("Recommendation"). These lawyers have all had substantial experience representing creditors, for the most part a large financial institution, on a fee-for-services-rendered basis. This office engages in the constant representation of financial institutions in their major secured transactions and in other matters, and also often represents substantial business borrowers. The lawyers in this office have had very little experience representing consumer debtors, however, and we do not typically undertake collection work on a contingency fee basis.

From the above-described perspective, we believe the Recommendation generally makes careful, thoughtful and significant improvements in this field of the law of California. We have certain reservations though, and believe some aspects of the proposed legislation may prove troublesome or ill-advised.

Chapter 2. Provisions of General Application

§ 702.210

Fixing of the time within which a judgment may be enforced is a good idea. Twenty years is certainly ample for even the most dilatory judgment creditor to get what relief he is entitled to and it lends certainty to the procedure for the judgment debtor.

Chapter 3. Execution

Article 1 - General Provision

§ 703.120

(a) We have some reservations concerning the provision which permits attorneys to issue writs of execution. We are afraid that certain unscrupulous creditors' attorneys will misuse the power and the time and money saved by having the attorney, rather than the court, issue the writ, is minimal. It would be interesting to examine

New York's experience under this procedure and determine whether misuses in the process have been experienced.

(b) If attorneys are to issue the writs, the writ of execution form should make it clear on its face that only one writ may be issued per county each 90 days. Levying officers should notify judgment creditors when the writ is returned.

§ 703.130

A significant improvement in this area is the elimination of the rule which required execution on personalty ahead of realty, since such a rule did a great disservice to both the creditor and the debtor, causing confusion and hardship to both.

§ 703.140

The expression "designation of persons to be served" is vague.

§ 703.170

The expression "private place" is vague. It is also unclear when the creditor must seek such an order -- before issuing the writ of execution? It would be helpful to have forms provided in connection with such an application to the court (as in the case of claim and delivery actions).

§ 703.180

It is unclear as to what procedure a creditor should use to ensure continued receipt of payments by a debtor of a judgment debtor. Is one writ of execution effective for 90 days or one year?

§ 703.190

(c) In order for this memorandum not to be too onerous on the garnishee, a form should be developed (using simple language) for completion by the garnishee.

(e) It is unclear whether the "costs of any proceedings" include attorneys' fees. If not, what other costs are there? If so, it should be stated in the section (since courts do not generally construe costs to include attorneys' fees).

§ 703.210

This provision is an important improvement to the methods of execution on a judgment and is a simple method of obtaining execution. Again, it would be helpful to have forms available to make the obtaining of such an order as simple as possible. Personal service on the debtor is expensive and can be exceedingly difficult when the debtor is deliberately avoiding service.

§ 703.260

The extensive delays that can be encountered in some sheriff's departments make any use of a private process server beneficial, though there is no reason why a reasonable fee of the process server should not be a recoverable cost if the same fee charged by the sheriff is a recoverable cost.

Article 2 - Method of Levy

§ 703.310

As an alternative to the levying officer doing the acts described in this section, the creditor, his attorney and a registered process server should be permitted to record and serve the necessary forms. Subsection (c)(3) is vague as to who is covered.

§ 703.350

(2) If the levying officer is the sheriff in a county, it is unclear how there can be two levying officers.

§ 703.360

(b) Since a motor vehicle required to be registered cannot be levied on under § 703.370, it makes no sense to say "If a motor vehicle ... is levied upon pursuant to Section 703.370".

§ 703.370

It is unclear why a creditor must go to the expense of a keeper in order to execute on a going business. Why is the debtor given two days to run the business after the levy? What happens if the judgment debtor does not consent to the keeper?

§ 703.380

Two days do not give the debtor enough time to seek a lawyer and obtain a court order to prevent his eviction from his home. Though trailers, mobile-homes and vessels are more mobile than houses, and, therefore, the creditor must be protected from their being removed, they are homes to many people, who should not be summarily evicted without due notice and an opportunity to seek a hearing if they desire.

The acts required in subsections (a) and (b) could be done by the creditor, his attorney or a process server, and do not require use of a levying officer.

§ 703.390

The acts referred to in this section need not be done by a levying officer.

§ 703.410

It is unclear why the last sentence of subsection (c) is not also contained in § 703.400.

§ 703.440

It is unclear why it is necessary for a creditor to obtain a bond (which can be exceedingly expensive) and pay actual damages by the person rightfully entitled to the property in the situation of deposit accounts and safe deposit boxes, but not in other situations. Is the premium on the bond a recoverable cost which is added to the judgment balance? Since the creditor does not know and cannot find out who is entitled to the money in a joint account, he should not be penalized if one of the owners of the account, other than the judgment debtor, claims that the money is really his. The normal third-party claim procedure should be available in this situation. After the levy is made, all joint owners of the account should be immediately notified by the fastest possible means (to avoid bouncing of checks) of the levy, and if they claim ownership in the account, they should present a claim to the levying officer.

It is unclear why the bond must ensure the return of the property to the joint owner, since, if the joint owner acts promptly, the property should still be in the hands of the financial institution or levying officer. The last sentence of (b) is vague.

(c) Why, in this situation, is the burden on the financial institution, rather than the levying officer, to give the notice? The levying officer could obtain the addresses from the financial institution and send the notice himself. It would seem preferable to telephone or mailgram the notice, but if the mail is used, the section should require that mailing take place the same day as the levy, rather than the vague "immediately." This will give the owners of the account notice as soon as possible so that they can make arrangements to have the financial institution pay the checks already written against the account from other funds. How long is the financial institution required to keep the bond if it receives no instructions from the joint owners of the account? The notice of levy should be mailed to all owners of the account, including the judgment debtor.

(d) The language in the first sentence suggests that for the period between the time that proceedings excepting to the sufficiency of the sureties have been commenced and the time that such sureties have been justified, the financial institution should honor checks, etc., i.e., if proceedings excepting to the sureties have been commenced, checks can be honored until the sureties have been justified. This should clearly not be the case. The

financial institution should not cash any checks, etc., until a certain number of days after a court order rejecting the sureties, so that the creditor has time to get new sureties without losing the property levied.

Subsection (g) is phrased in such a way that if the levy is invalid for failure to comply with the section, it must be disregarded. This could impose liability on a financial institution which complies with a levy which is invalid. It would appear to be an unduly onerous burden on the financial institution to make the decision as to whether the levy is valid or not.

§ 703.450

Must the writ and notice of levy be personally served on the judgment debtor in the action? Is the levy effective prior to service? If so, is the judgment debtor exonerated if he pays the judgment prior to service?

§ 703.460 See comments to § 703.450.

Article 3 - Sale

§ 703.610

(b) It is not clear what terms and conditions would be required to sell the property designated in (b) and, thus, this section might cause considerable confusion for creditors' attorneys and lawyers. How does the court, or judgment creditor, know what is fair consideration? Must appraisers be appointed?

(c) What are the obligations of the levying officer to seek payment of these obligations? What if the debtor of the judgment debtor refuses to make payments on the promissory note or judgment? Must the levying officer conduct collection efforts or does the judgment creditor?

§ 703.640

The elimination of the redemption period and its replacement with a 120-day waiting period before sale is an excellent improvement in the law. It will surely increase the price received at the sale, to the benefit of both the creditor and debtor and permit the debtor to sell or refinance the home prior to execution sale and, thus, voluntarily pay off the judgment creditor.

§ 703.680

Subsection (c) is another important improvement in the law, and should encourage higher bidding since the bidder has time to arrange financing for the property being sold.

§ 703.710

Subsection (c) is vague as to what type of assistance the levying officer can render.

§§ 703.740 and 703.750

It appears from these sections that a purchaser at an execution sale takes the property subject to liens

superior to the lien of the judgment creditor upon which execution is being made. If this is the case, it is unclear when a superior lien "is required to be satisfied," as stated in § 703.740.

§ 703.760

It would seem preferable to make execution sales final, so that a purchaser is not subject to forfeiting the property if the judgment is reversed or if the property was, in fact, not leviable. If sales were final, more purchasers might be willing to bid, and, therefore, the price paid would be greater. As with the redemption period, if the purchaser risks losing the property he buys, he is less likely to buy it. This is particularly true in the case of improved real property. The purchaser may buy the property as an investment, pay taxes and make improvements. It gives him no satisfaction to have the property taken back from him and receive only his purchase price, plus interest (presumably at 7%). With the length of time it now takes to have an appeal heard, the state of title to property will be very uncertain if the property can be recovered by the judgment debtor upon reversal of the judgment. In addition, purchasers will be unwilling to bid at execution sales if they risk losing the property and not ever recovering the money paid (because the judgment creditor is insolvent or has disappeared).

There would seem to be no justifiable basis to set aside the sale because of irregularities in the proceedings concerning the sale or because the property was not subject to levy. If the debtor is dissatisfied with the sale procedure or believes the property is exempt, he should seek a court order prohibiting the sale. He should not be able to seek recovery of the property from the good faith purchaser, perhaps years later.

It might be preferable to require the levying officer to hold the sale proceeds for 10 days to permit a judgment debtor to complain on irregularities in the sale, and if no complaint is made within this time, the sale is final and the proceeds delivered to the judgment creditor.

§ 703.810

(a) See comments to §§ 703.740 and 703.750.

Chapter 4. Wage Garnishment

This chapter is a comprehensive regulatory scheme for wage garnishment which seems complete, fair and workable.

Chapter 5. Special Procedures for Enforcement of a Money Judgment

§ 705.110

The requirement that the debtor be represented by counsel is questionable. Often, a debtor who cannot pay his debt cannot afford an attorney and would rather pro per. Such a requirement may discourage the use of this procedure which could be preferable for all concerned. Answers to such interrogatories may be valuable for settlement purposes and that value is increased if the debtor has had time to review his records to provide complete answers, as opposed to the oral exam procedure which tends to produce spontaneous answers. Also, a debtor may prefer this procedure to the oral exam because he is not inconvenienced by travel and time away from his income-producing hours. If the attorney requirement is thought necessary to protect the debtor, it is suggested that interrogatories be prefaced with the suggestion that the debtor obtain counsel to assist him in answering. Written answers signed by the debtor are much more useful to a creditor than the creditor's own notes from an oral exam when facts need to be established for other enforcement procedures.

(b) This subsection appears to allow a creditor to serve interrogatories and to order an oral exam immediately after the answers are received if more information is desired. Such a procedure is appropriate because it encourages diligent and complete responses to interrogatories. Also, it allows a creditor to realistically analyze his options prior to an oral exam which, as a practical matter, may take place in conjunction with settlement negotiation. The elimination of the prerequisite of an issuance of execution is appropriate. The answers obtained from interrogatories can provide the basis for a writ of execution.

§ 705.120

This procedure will be of great assistance to creditors confronted with recalcitrant debtors with sufficient assets to pay the judgment debt. It allows a follow-up exam where it has been established in a prior exam that non-exempt property exists, where the creditor learns, after the prior exam, that the debtor had provided erroneous information or that his circumstances have changed. Generally, this latter situation is known only on information and belief, especially where the creditor is a large institution, and the affidavit allowable on the basis is, therefore, consistent with practical considerations.

§ 705.130

(a) The $250.00 limit creates an unnecessary problem for a judgment credit seeking an indebtedness due from the third person to the judgment debtor where the money becomes due in periodic installments of less than $250.00. Therefore, it is suggested that this section be reworded to the effect that where such a debt is due in installments, the total amount due or to become due within the life of the judgment, must not be less than $250.00.

(c) The creation of the lien should not be dependent on the subsequent application of the property to the satisfaction of the judgment. As the lien can only attach to non-exempt property, it would be better to allow creation of the lien while also providing flexibility in the manner in which the specific property is used. All concerned may deem it advantageous to allow the lien to attach without necessitating the application of that property where other property is available to satisfy the debt. Further, if the third party claims an interest in property adverse to the judgment debtor or denies a debt to him, the lien created should continue for the time necessary to determine such issues, e.g., by a creditor's suit.

§ 705.180

b. This sub-section should prove helpful to judgment creditors because, as a practical matter, debtors who fail to appear will be subjected to this sanction even if not held in contempt of court. The deletion of the current procedure for arrest and imprisonment for absconding debtors is appropriate. An outstanding debt is not a crime and arrest and imprisonment for even a stated intent to violate the attendance order is tantamount to criminal punishment for a state of mind.

§ 705.200

Presently, not all debtor's exams are conducted before a judge or referee. Given that such an exam is an adversary proceeding and that it may result in resolving a dispute as to disposition of the debtor's property, it would seem more in keeping with the requirements of due process if this section were expanded to insure that an examination will actually be conducted before a judge or referee.

§§ 705.210, et seq.

Generally Article 2 strikes a good balance between the interests of the judgment creditor, judgment debtor and third party. Although the restriction on transfer provided in § 705.240 is probably no more consti-

tutionally suspect than the total restraint on transfer currently available pursuant to Temporary Protective Orders (C.C.P. § 486.050), the judgment creditor is allowed some protection by § 705.260(c) should the third person make any transfer of the property. For the sake of certainty, it is suggested that § 705.230 specifically provide that such an action may be pursued to judgment although the 20-year period of enforceability on the subject against the original debtor has elapsed.

§ 705.320

This section is indicative of the trend of this entire chapter to allow more flexibility in choice of enforcement procedure. Once again, the issuance of a writ of execution is discarded as a prerequisite. From the creditor's standpoint, this is a welcome development considering the ever-increasing complexity and variation arising in the enforcement of money judgments. The debtor's exempt property is still protected, and the "market place" of litigation will determine to what extent one method is more useful than another in any set of circumstances.

§ 705.330

It is suggested that a provision be inserted to allow a receiver to similarly cause the transfer of such a

license held by a third person in which the judgment debtor has an interest or which is the subject of a debt owed to the judgment debtor.

§ 705.340

The relation back of the lien will encourage the use of a receiver in appropriate circumstances and will reward creditors who diligently seek satisfaction of the debt.

§§ 705.410, et seq.

In order to avoid an interpretation to the contrary, both sections should provide for the ability of the judgment creditor to reach the partnership property itself to the extent of the debtor's interest, at least where the debt incurred was intended to, or actually did, benefit the partnership.

§ 705.450

(a) From the creditor's point of view, it would be preferable for the statutory language to provide that a judgment lien encompass all interests in real property owned by the debtor, including rights existing by virtue of community property law, reverters, remainders, trusts; contracts contemplating future conveyances and rent and royalty distribution. Otherwise, the debtor whose only substantial assets exist in such interest may be able to avoid this lien by evasive maneuvers.

(c) It would seem to be more procedurally advantageous and more reasonable to allow the lien to attach while suspending its enforceability during a stay of the judgment on appeal. Otherwise, a debtor may encumber his property after filing an appeal, abandon the appeal, and render his property practically free from execution on the judgment. See, Bulmash v. Davis, 87 Cal.App.3d 8 (1978). The 20-year duration of a judgment lien is a welcome development considering the current uncertainty regarding extension of the life of a judgment lien by bringing an action on the judgment to extend the life of the judgment itself. See, Provisor v. Nelson, 234 Cal.App.2d Supp. 876 (1965), Alonso v. Doff, 17 Cal.3d. 539 (1976). The primary problem is when the current 10-year lien expires between the time a complaint on the judgment is filed and an abstract of the second judgment is filed and an abstract of the second judgment is recorded.

§ 705.470

This section allows a purchaser to avoid a windfall to his vendor's judgment creditor, which is fair and equitable.

(c)(3) Should be more explicit in requiring inclusion of the address, legal description and Assessor's

Parcel Number to enable the creditor to quickly ascertain the status of the title to such property. This is particularly important for the unsophisticated judgment creditor.

(c)(6) Should include a requirement that the date of recordation of a lien or encumbrance be provided because priority is the key; and should require the address and, if known, the phone numbers of lienors and encumbrances.

(d)(3) Should include a requirement that the debtor must allow the creditor to cause the appraiser to enter the real property to accurately appraise the property, if the debtor seeks to use this procedure.

§ 705.490

This is certainly a step in the right direction. However, there is no valid reason why a judgment creditor should lose his priority as to subsequent judgment creditors with respect to after-acquired real property and it is suggested that this section preserve that priority.

§ 705.510

For the sake of clarity, it is suggested that the intent of this section be codified by expressly providing that liens on such judgments may be enforced in any manner available for enforcing judgments against the debtor of the judgment lienor.

§ 705.520

It is suggested that (a) include a statement of when the lien was applied for to make the date of priority a matter of record on the face of the judgment and abstract.

§ 705.530

The wording should be changed to clarify that the consent of the judgment creditor or court approval is required in the three situations provided.

§ 705.610

This is a welcome procedure. However, one danger regarding assignment of rent is that the landlord-debtor may be too tempted to increase his rent income to accelerate satisfaction of the judgment. This could have unwarranted harsh consequences for innocent third-party tenants.

§ 705.620

It would seem appropriate to provide that the priority of the lien dates from the date of application for the order. This would be consistent with liens on causes of action and judgments.

§ 705.740

The requirement in (a) that the abstract be filed prior to presentation of the claim to the Controller seems unnecessarily harsh. It is suggested that the

creditor be allowed to file the abstract and affidavit with the controller if the claim has already been presented.

§ 704.760

Given that lengthy litigation may arise on a materialman's claim or the like, it is suggested that, where such a dispute exists, the judgment creditor be paid although the materialman or similar person has not yet been paid. The amount claimed, pursuant to C.C. §§ 3179, et seq., should still be held back from payment of the judgment debt pending resolution of the dispute.

Chapter 6. Third Party Claims

The changes in third-party claims procedure are especially welcome. The joining of the judgment debtor in the proceedings is an important improvement. Judgment debtors, and especially defendants in a pending action where there has been only an attachment, have expressed disbelief that due process can now allow their interests to be ignored. It is to everyone's ultimate benefit to have the various competing interests resolved at once and the debtor often can assist in the dispute between the creditors. Specification of the time for filing claims is a good clarification. In general, the establishment of a

somewhat different procedure for claiming a security interest in the property subject to levy, as opposed to title in, and right to, possession of the property, is the recognition that a claim under a security agreement is presumtively valid is proper. There is, however, one seriously misconceived portion of the proposed statute. In Section 706.310(b)(2), a secured party filing a third-party claim must state " ... the total amount of sum due or to accrue under the security agreement, above setoffs .... " In commercial transactions, obligations usually do not actually accrue under the security agreement, but rather accrue under related promissory notes or a credit agreement which obligations are referred to in the security agreement. Nevertheless, it is apparent that the above-quoted language is meant to refer to payments which are unmatured but will necessarily become due and payable with the passage of time. The language in the statute is unconventional and may prove confusing. More importantly, however, there is no way to ascertain such an amount under a typical commercial security agreement. The obligations secured usually include attorneys' fees which may be later incurred, various indemnity rights which remain wholly contingent, and any future advances to the debtor in any amount. Entitlement of priority regarding such future

advances is expressly recognized by Section 9312(7) of the California Uniform Commercial Code. A secured creditor will be able, of course, to state the outstanding loan balance at the time of filing his third-party claim. To the extent the statutory scheme contemplates his being paid off promptly and in full, such a sum should suffice. To the extent the judgment creditor need only post an undertaking, though, the secured creditor may be left without adequate protection, unless the other obligations eventually secured, when combined with the originally stated loan balance, do not exceed the amount of the undertaking.

Another serious problem, which could cause this proposed statute to be in violaton of secured creditors' rights under the Fifth Amendment to the U. S. Constitution, is the reference to setoffs. It will be impossible to determine what setoffs the secured party will be entitled to at any time even one day in the future. If this clause is meant to refer only to setoffs available at the moment the claim is filed, it will compel secured creditors to exercise fully their right of setoff or be left unsecured when the debtor withdraws his funds from his account. Rights of setoff generally cannot be exercised where the loan is not in default or against unma-

tured portions of the debt. Additionally, the California Court of Appeal has held that exercise of the right of setoff is an "action" under the one-form-of-action rule of Section 726 of the Code of Civil Procedure. Woodruff v. California Republic Bank, 75 Cal.App.3d 108 (1977). What's more, the right of setoff cannot be exercised against public assistance benefits, etc. Kruger v. Wells Fargo Bank, 11 Cal.3d 352 (1974); and, most importantly, the funds that can be withdrawn until the setoff will often be a voidable preference under the Bankruptcy Reform Act of 1978. 11 U.S.C. § 553. Accordingly, it is quite unrealistic to assume that deposits can or will be set off against the debt. In conclusion, this subsection should not require the secured creditor to make any accounting for possible setoffs and the entire scheme regarding third-party claims by secured creditors should be revised to provide that the property cannot be taken simply by the posting of a bond. Any scheme other than prompt payoff of the secured creditor can lead to a taking of the secured creditor's property interest without fairly compensating him. It should be noted that a judgment creditor can always reach the debtor's deposit accounts by levy served on the depository.

It should be noted in the comments in Section 706.410 that one is not entitled to have a hearing before a jury. The present Section 689 expressly leaves the question open, with an opinion of the Appellate Department of the Superior Court, Misrach v. Liederman, 14 Cal.App.2d Supp. 757 (1936), as the only recognized authority that there never has been a right to jury trial in these proceedings. Certain judges of the Superior Court in San Francisco have, on occasion, refused to recognize that a demand for jury trial is a ploy which necessarily causes the speedy hearing clearly intended, to be delayed for up to six months.

The 30-day period provided in Section 706.610(c), within which a secured party must claim his interest or have it deemed waived, seems to be an adequate period of time. Since the consequences of not filing a claim can be quite harsh, the levying officer's notice sent to the secured creditor should contain a prominent warning to this effect.

Chapter 7. Property Subject to Enforcement of Money Judgments and Exemptions

§§ 707.320, et seq.

It is not clear that the lengthening of the times in these sections for the various notices, affidavits and counter-affidavits will work to the benefit of

the judgment debtors as hoped. It allows judgment creditors to tie up assets of the debtor over longer periods of time, putting them beyond the judgment debtor's use and thereby, perhaps, applying unwarranted pressure to the judgment debtor to pay on the debt even though his claim of exemption is good. The provision for having a judgment debtor claiming exemption identify non-exempt property may, in fact, result in fewer bona fide exemptions being claimed by making the claim too "expensive". The proposed procedure would also make the Order of Examination almost unnecessary. Levy on a probably exempt asset will result in the debtor being compelled to reveal the nature and location of non-exempt assets subject to levy, a far stronger procedure than the current order of examination.

Chapter 8. Enforcement of Judgment for Possession of Personal Property

This chapter permits a judgment creditor's attorney as an officer of the Court to issue a writ of possession, as well as the Clerk of the Court. As with the new provision allowing attorneys to issue writs of execution, we have certain reservations about such a procedure.

Chapter 8 permits the appointment of a receiver to enforce a judgment for the possession of personal property pursuant to Section 705.320. If the difficulty in enforcing a judgment for possession of personal property is that the judgment debtor will not comply with the turnover order and the levying officer cannot find the property to seize it, it is unclear how a receiver to whom possession must somehow be entrusted, would at all be helpful. However, there may be circumstances where a receiver will help. Having a provision allowing his appointment for such contingencies is advisable.

Chapter 9. Enforcement of Judgment for Possession of Real Property

This chapter also permits an attorney to issue a writ of possession. The comments made above regarding that procedure are equally appropriate here.

Chapter 10. Enforcement of a Judgment for Sale of Property

This Chapter also has provisions allowing a writ to be issued by an attorney and the comments made above are equally applicable here.

Very truly yours,

BROBECK, PHLEGER & HARRISON

By Frederick D. Holden, Jr.
Frederick D. Holden, Jr.

FDH:chg

City and County of San Francisco

County Clerk
and
Clerk of the Superior Court

June 22, 1979

California Law Revision Commission
Stanford University Law School
Stanford, California 94305

RE: TENTATIVE RECOMMENDATION RELATING TO ENFORCEMENT OF JUDGMENTS

Attention: John H. De Moully
Executive Secretary

Dear Mr. De Moully:

The following comments are submitted for your consideration with the hope they may benefit Court Clerks, levying officers and the legal community.

CARL M. OLSEN
County Clerk
Member, California Sheriffs' Association Civil Procedural Committee

Pg. 136, 703.120:

703.120.(a) _ _ _ _ delete the wording in brackets regarding issuance of writs by attorneys.

also, line five: creditor and be directed to the levying officer in ~~each~~ the county where property sought to be levied upon is located. Separate writs shall be issued to separate counties.

RATIONALE: Some attorneys may prove helpful in issuing writs, most will add a further burden to already harrassed court clerks.

The additional wording has been added to avoid potential cases where creditors could have writs issued which name more than one county on the same writ.

Pg. 145, 703.240:

703.240.(b) last sentence:

The levying officer shall ------ with the ~~county treasurer of the county where the property is located, payable to the order of the person~~. clerk of the court from whom the writ of execution issued.

RATIONALE: Although depositing proceeds of a sale with the county treasurer probably allows the escheat statutes to provide for the eventual disposition of unclaimed funds, it is more logical to look to the clerk of the court for the funds. Provision could be made for a further deposit with the treasurer if the funds were unclaimed after an appropriate period.

Pg. 168, 703.680:

703.680.

(c) Add the following:

(1) The levying officer shall not deliver the property until the total bid and any accruing costs shall be paid.

RATIONALE: To clarify what could occur during the 30 day period when only 10% is paid to the levying officer at the time of sale. In the case of a motor vehicle or other property subject to storage charges, these costs will continue to accrue after the sale.

Pg. 169, 703.690:

703.690.

(c) If the highest bidder - - - -, the amount paid shall be applied by the levying officer toward the satisfaction of the judgment and additional costs incurred during the 30 day period specified in Sec. 703.680(c) and any excess remaining thereafter shall be returned to the bidder.

RATIONALE: Some consideration must be made for those cases where 10% has been paid, additional costs are accruing for 30 days and the bidder defaults. This amendment may not go far enough in a situation where a suit must be filed under subdivision (d) while costs continue to accrue.

Pg. 171, 703.710:

703.710.

(a)

(3) Perhaps it could be clarified as to what type of court order would be used when the purchaser is to receive personal property not capable of manual delivery.

Pg. 174, 703.810:

703.810.

(d)

(1) First, advances to the levying officer for costs accruing after issuance of the writ and daily interest accruing after issuance of the writ to the date of levy.

RATIONALE: To conform this section with Sec. 702.530(b) which continues the substance of present/former Sec. 682.2.

Pg. 217, 706.430:

706.430.

Add:

(c) Any undertakings received pursuant to Sec. 706.250 or Sec. 706.360.

RATIONALE: Former law did not require the levying officer to file undertakings with the court when received pursuant to third party claim procedures. Since undertakings are required

to be filed with the court in other proceedings, it is logical to provide for a uniform procedure in this regard.

Provision should also be made for the filing of undertakings with the court in those cases where the levying officer receives them, no hearing is held and he subsequently returns the writ to court with a return of his proceedings attached.

Pg. 268, Form of Writ of Execution, etc.

11. Levying Officer: Add the following daily interest from date of issuance of writ to date of levy (7% per year on 8e or 10b, whichever is less) at $------ per day: -.-- = $

RATIONALE: To clarify the writ in connection with Sec. 702.530.

END

CMO:se

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY
EDMUND G. BROWN JR., Governor

EMPLOYMENT DEVELOPMENT DEPARTMENT
SACRAMENTO 95814 (916) 445-7656

June 22, 1979

REFER TO: 53:86:bd

California Law
Revision Commission
Stanford Law School
Stanford, California 94305

Attention: John H. DeMoully

Dear Commission Members:

TENTATIVE RECOMMENDATION
RELATING TO ENFORCEMENT
OF JUDGMENTS

Thank you for providing the opportunity for this department to review your tentative recommendation. Overall, we find the recommendation helpful. There are,however, certain sections and concepts that we believe require further review.

The recommendation provides that service on the debtor of a notice of examination creates a lien (§ 705.120). We believe this section will cause confusion and promote litigation as it would allow the first examining creditor to obtain a "secret" lien on all property of the debtor. This approach goes considerably beyond the cases cited in the footnote as authority. In the cited cases, the creditor in both instances was attempting to take action against specific property which was in the hands of a third party. Therefore, the court had in rem or quasi in rem jurisdiction over that specific property. The examination lien is not limited to those situations and would cause a scramble among creditors to be the first to examine the debtor because the lien would relate back to the date of service (§ 702.310), and be effective for a period of 20 years (§ 702.220). It would also reduce the value of property at execution sales because the secret lien would follow the property into the hands of the purchaser pursuant to the third party claim provisions (§ 706.240). We believe the examination lien provision should be reconsidered or deleted from your recommendation.

Recommended Section 705.330 provides for the appointment of a receiver to transfer an alcoholic beverage license in order to satisfy a judgment. This section benefits creditors because it

allows them to reach a valuable asset. Although the proposed section recognizes the priorities set forth in Section 24074 of the Business and Professions Code, it does not mention Section 24049 of that same code which provides that amounts due this department and other taxing agencies are to be paid before the license is transferred. This section should also be amended to take these provisions into account.

Section 705.490 provides that liens of "equal rank" shall be prorated among the judgment lienors. The term "equal rank" is not defined; however, it appears to be aimed at those cases where two or more liens exist when the property (real or personal) is acquired by the debtor. This section should be amended to include a definition of "equal rank."

We would further suggest that the special procedures for levying on a deposit account or safe deposit box, not exclusively in the name of the judgment debtor (§ 703.440), be deleted. The normal third party claim procedures should protect the other person named and the financial institution. Such deletion would make the levy on bank accounts less cumbersome and eliminate what amounts to an exception to the general third party claim proceedings.

The codification of this department's practice for processing third party claims and claims for exemption when an administrative levy is used is helpful. However, there should be added to both subdivisions (c) of Sections 706.130 and 707.210, a sentence requiring the state taxing agency to perform the duties of the levying officer within the applicable time limitations.

Several of the sections in Chapter 7 of the proposal should be amended to be made more specific. Subdivision (b) of Section 707.140 should be amended to clarify that "state tax liens" are subject to the exemption provisions. Since "state tax liens" are not created pursuant to Title 9, it is possible to construe subdivision (b) as not applying to state tax liens.

The information required by Section 707.320(b)(3) and (4) is necessary to the creditor. We suggest that the section be amended to provide that the information on the claim of exemption must be supplied at the hearing if it is not supplied to the creditor on the claim. Section 707.380(d) currently provides that the determination of exemption is to be based on facts

existing at the time of the hearing. We believe that the facts existing at the time of the levy are more appropriate than the facts existing at the time of the hearing. Section 707.410 should be amended to authorize the levying creditor to instruct the levying officer to release the property back to the debtor if the creditor chooses not to oppose the claimed exemption.

Our final comments are concerned with Article 3--Exempt Property, specifically 707.560 and 707.600. Section 707.600 makes unemployment benefits and contributions exempt from execution. This is consistent with the Unemployment Insurance Code and we fully support this provision. There are, however, several points of clarification with this section. First, the section should be amended to include an exemption for personal income tax withholdings that are made from employees' salaries much like the disability insurance contributions. In addition, the section should be amended to allow this department, which is charged with the responsibility for collecting unemployment insurance, disability insurance and personal income tax withholdings, to levy to enforce payment of the withheld amounts. Finally, the section should indicate that this department is authorized to offset current unemployment and disability insurance benefits against previous benefit overpayments by Section 1379 of the Unemployment Insurance Code.

The last section we will comment on, and probably the most signficant from the standpoint of a creditor, is Section 707.560. That section provides for a $2,000 exemption for any combination of deposit accounts and of money. This section should be deleted from the proposal. It fails to recognize the significant difference between amounts deposited as savings (such as in a savings and loan or a share deposit in a credit union) and money merely deposited in a bank account. In addition, there is no distinction drawn between a business account and a personal banking account. We do not believe that a business bank account, should be permitted any kind of exemption. The policy reason for protecting an individual's savings account is not present in the business context. Finally, there is no requirement that the combination include amounts that are community property but possibly shown only in the name of the nondebtor spouse.

We hope our comments on your proposal have been helpful. If further comments or explanation is desired, please feel free to contact me.

Sincerely,

DAVID E. PAULSEN
Counsel

WILLIAM E. HARTFORD
CLERK • ADMINISTRATIVE OFFICER

The Municipal Court

NORTH COUNTY JUDICIAL DISTRICT
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA

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June 25, 1979

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

Dear Mr. DeMoully:

I apologize for the delay in responding to your request regarding enforcement of judgments being handled by the California Law Revision Commission.

I have circulated the materials sent me and have received responses from a variety of courts. There were only two areas of comment from those people within the municipal courts.

The first area dealt with a provision to extend enforceability of judgments to twenty years. It was felt this would be of little use. We have yet to have anyone file for an extension of the judgment period beyond the present ten years. An extension to twenty years would require an additional record keeping problem and therefore additional costs.

The second provision commented upon was the issuance of writs of execution by attorneys for the judgment debtor. There was strong feeling that this would cause many problems. The control of writs is maintained by the court in a very strict sense; and it is generally felt that if attorneys became involved, their clerical errors would surpass any benefit.

I hope the above comments are of use. Please feel free to contact me at any time in the future if either I or the Association of Municipal Court Clerks may be of assistance.

Very truly yours,

WILLIAM E. HARTFORD
Clerk/Administrative Officer

WEH:rpc

EXHIBIT 17

LOYOLA LAW SCHOOL

June 9, 1979

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen: Re: Tentative Recommendations
Relating to Enforcement of Judgments

I wish to thank you for making the above tentative recommendations available to me. You have done an excellent job.

Apart from expressing appreciation for a job well done, I am writing to comment on one aspect of the proposed legislation. I refer in particular to Chapter 5, Article 6 dealing with liens on causes of action and judgments. Your proposals as to the means of enforcing such liens are excellent, as is the provision for permitting court approval of compromise or settlement. Your proposal should clarify the matter of priority of liens.

My comment is directed to the manner provided for obtaining the lien, under proposed §705.510. I note that you propose to continue the existing procedure which requires the judgment creditor to apply to the court for a lien. You further adopt the language of CCP §688.1 that the court may, "in its discretion" grant the lien. I note that under proposed §705.730, these same procedures would be required where the judgment debtor has a pending action against a public entity.

It seems to me that requiring an application to the court serves no useful purpose. This requires an appearance by one or more lawyers with fees in many cases. Of course, if the power to grant the lien rests in the discretion of the court, a motion would be appropriate. However, I see no reason for retaining the discretionary power provision. The only case I am familiar with that deals with this discretionary power is Atiya v. DiBartolo, 63 Cal.App.3d 121, 133 Cal. Rptr. 611 (1976), where a denial of a lien was held to be an abuse of discretion. In a dictum the court, attempting to suggest what might be a basis for denying a lien said that a substantial showing that other assets were available might justify denial. This is a doubtful proposition. Your comments suggest no reason for denying a lien, and I have never heard of a good reason. Thus one may ask: why retain the discretionary power and the motion procedure?

I understand the policy of leaving enforcement procedures flexible

and thus why it would not be appropriate to create the lien by levy under a writ of execution. It seems to me that all that should be required to create a lien is the filing in the pending action of an abstract of judgment together with service of notice thereof upon the judgment debtor, all other parties to the action, and upon any other person who has a filed lien upon the cause of action or who has intervened in the action. This would be consistent with the new procedures for perfecting the state's tax lien upon a pending cause of action. See, for example, subsection (f) of §1703 of the Unemployment Insurance Code, which provides for filing a notice of the tax lien with appropriate notice and which further provides that the lien shall have priority from the time of filing of the notice in the action.

It would be appropriate to continue the provision permitting the judgment creditor to apply to the court for permission to intervene in the action, if he deems it important to do so, and to retain the court's discretionary power to permit or deny such application.

Thank you for the opportunity to offer comment on this proposed legislation.

Very truly yours,

Lloyd Tevis

Lloyd Tevis
Professor of Law

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June 14, 1979

Ms. Jane C. Fennley
Attorney at Law
Graham and James
707 Wilshire Blvd., 35th Floor
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Re: Report on Chapter Seven and Eight of Enforcement of Judgments Act

Dear Ms. Fennley:

The undersigned, as a member of the Enforcement of Judgments Subcommittee of the Debtor/Creditor Relations Bankruptcy Committee section of the State Bar hereby reports to you in your capacity as Chairperson of said Subcommittee regarding the above-referenced chapters of the proposed legislation. As per your prior directive in this matter, please be advised that the thoughts and comments contained herein are solely those of the undersigned and do not constitute and are thus not represented as the opinions or comments of the total Subcommittee or any of its individual members other than the undersigned.

I will only be commenting on those sections which, in my opinion, warrant attention, and my silence on any other section constitutes my approval thereof.

Section 707.160. Time for Determination of Exemption; Reserve Power.

The tentative recommendation of the Law Revision Commission relating to § 707.160 (pp. 90-91) concludes that prior decisions which have interpreted exemption changes as affected by the contract clause of Article 1, § 10, the United States Constitution, and Article 1, § 9 of the California Constitution as precluding retroactive application of exemption changes to be erroneous is, in my opinion misplaced, but, more importantly, chooses to disregard the adverse consequences of this proposed section if a court were to subsequently rule that the Constitutional impediment on retroactive exemption changes is in full force and effect. In short, if the older cases are correct, the Legislature cannot Constitutionally do what it proposes to do by the change set forth in this section. Section 6 of the Bankruptcy Act 11 U.S.C. § 24,

is quite similar to the proposed section under discussion and purports to afford a bankrupt upon commencement of a bankruptcy proceeding exemptions in effect on the date of the commencement of the bankruptcy proceeding. The argument that such exemption rights are not impeded by the provisions of Article 1, § 10 of the United States Constitution have been repeatedly and historically rejected by the courts. 1A Collier on Bankruptcy, 14th Ed., ¶ 6.03, pp. 802-803. A questionable state law will be construed as not affecting obligations existing on its enactment. 1A Collier on Bankruptcy, supra, p. 803, note 16.

Chief Justice Fuller speaking for the Court in the case of Hanover National Bank v. Moyses, 186 U.S. 181, at 189-190 (1902) in discussing exemption rights under the Bankruptcy Act adopted the view of the Court as expressed in In Re Deckect, 2 Hughes 183 that:

> The power to exempt from the operation of law property liable to execution under the exemption laws of the several states, as they were actually enforced. . .has thus far been sustained, for the reason that it was made a rule of the law, to subject the payment of debts under its operation only such property as could be judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law. . .places at the disposal of creditors. One of the effects of a bankruptcy law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy . . .It is quite proper, therefore, to confine to operation to such property as other legal process could reach.

The circuit court in the case of In Re Dillard, 7 Fed. Case 703, Case No. 3, 912, 2 Hughes 190, 9 NBR. 8 (Circuit Court Eastern District of Virginia--1873) apparently was the first court requested to accept the contention that exemption laws can have perspective effect and the contention was flatly and unequivocally rejected. The court stated:

> It is contended at bar that the act of March 3, 1873, is not an act which gives wider scope or more force to the state exemption laws, which heretofore have been the only authority for homestead exemption in the bankruptcy courts, but that it, itself, provides a statutory exemption paramount to all liens of judgments and decrees of whatever date, and is only limited in amount by the provision of the state statute. If the act of March 3, 1873, intends

> to give the state exemption laws quo state laws a force and power which the state could not give them, then it is void because it has been decided by the Supreme Court in Gunn v. Barry (15 Wall. 82 U.S., 610), that to give a bankrupt an exemption from debts or liens created antecedent to the passage of the exemption law is to impair the obligation of a contract. This the states are forbidden to do by the Constitution of the United States. No act of Congress can enable them to do it, in the face of this constituional provision, by declaring that state statutes shall have this force.

The Court in the case of Kener v. LaGrange Mills, 231 U.S. 215 (1913) was presented with a factual situation in point one in time a judgment was obtained against the debtor, in point two in time the state passed a homestead exemption law, in point three in time the debtor filed bankruptcy, and in point four in time the judgment creditor caused the bankrupt's homesteaded property to be sold at an execution sale. The Bankruptcy Act in effect was passed after the judgment creditor obtained his judgment, but before the debtor filed bankruptcy and purported to preserve exemption under state law, and also provided that such exemptions should be valid against debts contracted before the enactment of state exemption statutes and against liens by judgments of any state court.

Justice Holmes in speaking for the Court rejected the contention that the Bankruptcy Act enlarged the bankrupt's exemptions and observed that the Act was passed to meet the Court's decision in Gunn v. Barry, 82 U.S. (15 Wall.) 610 (1872).

> ". . .in the teeth of the declaration that such an attempt would be invalid. But that was a mistake."

Justice Holmes also observed that if the state exemption law should be construed as not attempting to disturb then existing debts, this "the act of Congress hardly would be read as purporting to give a greater scope to the state laws."

Although one can certainly characterize the rationale of the courts in these cases as being outmoded, it seems to me that, notwithstanding a few recent decisions from other state courts, the legislature is proposing to do what it has been specifically told that it cannot do constitutionally. If retroactive application is not given to the new exemptions, it seems to me that the legislature might be inviting the possibility of having persons lose certain existing exemption rights by revoking existing exemptions. On this point, although I know of no traditional authority for same, it seems to me that if the older cases interpreting nonretroactive application of newly created or

exemption rights is still good law, that an equally persuasive argument can be made that the same constitutional impairment prohibits injuring a debtor by taking away exemption rights in existence at the time he entered into a contract by subsequent amendment or appeal. But on the premise that I am in error in this belief, it seems to me that the Legislature by repealing the Civil Code Homestead sections, for example, can be creating a situation where it is taking away a valid existing homestead right in favor of a debtor and substituting in its place a new homestead exemption statute which has no retroactive application to the same creditor as per the reasoning of Daylin Medical and Surgical Supply, Inc. v Thomas, 69 Cal. App. 3d Supp. 37, 41-42, 137 Cal. Rptr. 826 (1977).

Without belaboring the point, it seems to me that the Legislature is interpreting the effect of the federal and state Constitutions and is in an area where the Court's determination is supreme. Such being the case, I would propose that § 707.160 be modified as follows:

> 707.160(a). The determination of whether property is exempt or of the amount of an exemption shall be made pursuant to the exemption statute in effect at the time the claim of exemption is made, to the extent permissible by applicable law.
>
> 707.160(b). All contracts to the extent permissible by applicable law shall be deemed to have been made in recognition of the power of the state to alter and to make additions to statutes providing exemptions from the enforcement of money judgments.

If I am correct in my conclusion that the older cases setting forth the constitutional impediments are still good law, I feel that Subsection (b) will not be given retroactive application but I do not see a constitutional impediment for prospective application in that each contract made after the effective date of the legislation will have this provision written into it by operation of law.

Section 707.520. Household Furnishings, Wearing Apparel, Personal Effects. Section 707.530. Jewelry Heirlooms, Works of Art.

By these two sections exemptions formerly provided by CCP 690.1 are divided, and dollar limitations are set up in each section. The $500 per item limitation of § 707.520 on household furnishings, wearing apparel and personal effects is, in my opinion, inappropriate, or, alternatively, it is too low. By placing a

per item dollar limitation it seems to me that one is establishing an area of abuse by creditors claiming that items are in excess of such value. And it seems to me that so long as the Code Comments points out that the word "reasonably necessary" is to be applied objectively on across the board basis that the unfairness inherent in the station of life test, which this section is designed to address would in fact be accomplished. If, on the other hand, the Legislature believes that a per item limitation should be imposed, I would suggest a figure of at least $750-$1000, and absent such an increase would think that the section should be clarified to provide that the valuation is the expected proceeds of sale at a force liquidation as opposed to a normal buy and sell agreement.

Section 707.530 dealing with jewelry, heirlooms and works of art, seems to be an unnecessary exemption in that the provision for "other personal effects" within § 707.520 would adequately deal with these types of property. If it is decided to keep these special items of personal property separate and apart from the general household furniture exemption, I would suggest raising the aggregate value amount something in the range of $1000 to $1500, in that in light of current prices it is conceivable that the majority of debtors in this state who are married will in all probability have at least one piece of jewelry (wedding ring) of a value in excess of $500.

Section 707.560. Deposit Accounts and Money.

This section sets up as exempt the sum of $2000 maximum aggregate of any combination of deposit accounts and money. This section appropriately does away with the artificial distinction between savings and loan association and credit unions on the one hand versus other types of financial institutions and/or cash. I certainly am in favor of the modification but see no need to limit the deposit to $2000 when under existing law the combined sum of $2500 is available to debtors.

Section 707.630. Damages for Wrongful Death.

This section exempts "an award of damages or a settlement arising out of the wrongful death of a person of whom the judgment debtor was a spouse or a dependent to the extent reasonably necessary for support." In order to keep this exemption in line with the language contained in Section 707.580 (Life Insurance EDC) and Section 707.620 (Damages for Personal Injury) I would suggest that the language "of the judgment debtor and the spouse and dependants of the judgment debtor" be added to the end of the section. This additional language addresses the situation

where the judgment debtor receiving a wrongful death settlement or award is also under a duty of additional support to a wife or other dependent, and I assume that such coverage is implicit in the section but may not be interpreted as such by the courts in light of the explicit language contained in the other two sections.

Section 707.580. Life Insurance, Endowment, Annuity Policies; Death Benefits.

Subsection (d) of this section modifies the "life insurance" exemption upward if there is no homestead exemption, and correspondingly modifies the homestead exemption downward (§ 707.820[b]) if a homestead exemption is claimed. I do not see any particular justification for tying the two sections together in that they seem to deal with entirely different matters. The homestead exemption is designed to keep a roof over the debtor and provide some sense of ongoing stability where the life insurance exemption is designed for the support of the insured and the spouse and dependents of the insured. I would recommend deletion of Subsection (d) of this section.

Section 707.820. Exempt Interest in Dwelling.

As demonstrated by the proposed code comment to Subdivision (d) of Section 707.820 it should be noted that the proposed new dwelling exemption allows both the husband and wife to an exemption in more than one dwelling. I personally have no objection to this, but I think it should be pointed out to the Legislature.

One area of concern which the new proposed legislation does not evidently deal with is the Court's decision in Schoenfeld v. Norberg, 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1970) which is a First District Court of Appeals decision which has the practical effect of doubling up homesteads when the property in question is held in joint tenancy with the judgment debtor's spouse whenever the spouse is not also a judgment creditor. The Court in this decision has stated that in determining the judgment debtor's interest in the property you take the fair market value thereof and subtract all other consensual encumbrances against the property from the fair market value and thus and then apply the homestead to the difference. Under existing law and assuming for the sake of discussion that there is in existence a $30,000 head of family homestead, and if we have real property valued at $100,000 with a $50,000 first deed of trust applying Schoenfeld's teachings, it would divide the fair market value of the property in half ($50,000 and subtract therefrom the entire consensual encumbrance of $50,000 leaving no equity in the property before which a judgment creditor could look to for satisfaction of his judgment. Although this is extremely beneficial to debtors, it is not my belief that this was intended

by the Legislature. In order to clarify the legislative intent, on the premise that Schoenfeld was in fact not intended, I would provide the following suggested modification to Subsection (e) of Section 707.840 which deals with the procedure for liquidating excess value in an exempt real property dwelling:

> (e) At the hearing the Court shall determine by order whether the dwelling is exempt, the amount of the exemption, and, if the dwelling is exempt, whether its value excees the exempt amount and any liens and encumbrances superior to the judgment creditor's lien. In making such determination when the dwelling is jointly owned by the judgment debtor and another or others and the interest of such other joint owner(s) is not subject to satisfaction of the debt of the judgment creditor, the Court shall apportion any liens and encumbrances superior to the judgment creditor's lien on the dwelling which are also liens and encumbrances on the other joint owner(s) interest in the dwelling amongst the judgment debtor's interest and the other joint owner(s) interest on a pro rata basis, and shall reduce the amount of such superior liens and encumbrances to the extent that they are apportioned to another joint owner(s) interest. If the dwelling may be sold, the Court shall issue an order permitting sale. A copy of the order shall be sent to the levying officer to whom the writ of execution is directed and to the Clerk of the Court that rendered the judgment if different from the Court issuing the order permitting sale.

In summary, on Chapter Seven I feel that the drafters have done a very good job and at least as far as my comments regarding substantive objections are concerned, to a large extent they involve value decisions as opposed to a determination of whether the exemption statute is in the correct form. With regard to my initial comments on the constitutionality of retroactive exemption statutes, I cannot too strongly express my concern that the prospective application of the new exemption statutes to existing debtor-creditor obligations is to say the least risky, and legislation which does not have safeguards built into it should be avoided.

With regard to Chapter Eight on Enforcement of Judgments for Possession of Personal Property, I have no comments with regard to same other than I question the propriety of authorizing the attorney for the judgment creditor pursuant to 708.110 to issue the writ. In my opinion, too few attorneys know how to issue the writ properly, and affording this power to a litigant might well lead to abuses. If the Legislature believes that it is beneficial to have an attorney issue the writ, I feel that there

some statutory penalty and/or fine for improper use of this power.

If I can be of any further assistance, or if you have any questions with regard to any of the comments contained herein, please feel free to contact the undersigned.

Very truly yours,

LYNN ANDERSON KOLLER

LAK:ms
cc: Robert H. Shutan, Esq.
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EXHIBIT 19

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July 5, 1979

John DeMouley
Law Revision Commission
Stanford Law School
Stanford, California 94035

Re: Tentative Recommendation Relating to Enforcement of Judgments

Dear Mr. DeMouley:

Attached are comments on certain provisions of the Tentative Recommendations Relating to Enforcement of Judgments. These are personal and do not reflect the attitudes or opinions of the California State Bar or of the Business Law Section, or of Graham & James.

General Comments

Section 703.120. Issuance of Writ of Execution - I approve of the change whereby counsel can issue the writs. The local courts may take as long as six weeks to issue a new writ of execution under the present procedures which severely hampers creditors, e.g., interrupting a wage garnishment levy.

Redemption from Judicial Sales - Agree that this should be shortened to encourage use of judicial foreclosure.

Exemptions - Disagree strongly with time for determination of exemptions. Creditors, particularly those which take real property security (which is often the only valuable asset a debtor holds) do so based on the equity value (including exemptions) at the time the loan is made. This is necessary to avoid the ramifications of CCP 726 which may force a creditor to act upon real property security which has no value.

The use of exemption values at the time of default will inevitably leave creditors with real property security with no realizable equity and subject the creditor to the perils of CCP 726. Thus, the debtor will have received money from the creditor, and the creditor will have security with no value and not be able to sue unsecured to collect on the obligation.

If exemptions are fixed, as today, as of the time the debt is incurred, then neither side will obtain an unfair advantage with the passage of time. If the equity increases, the debtor can refinance and pay the debt off, without sacrificing the rights to repayment of the creditor.

More specifically, with reference to the following chapters:

Chapter One

I agree with conforming definitions to other Code definitions, e.g., chattel paper.

Chapter Two - Provisions of General Application

Section 702.210. Agree that judgment should be good for 20 years. However, creditor should be able to extend under special circumstances by a motion for good cause. Often, it is not creditor's fault that assets cannot be reached.

Section 702.230. Disagree with this. May take creditor some time to locate debtor who has fled original jurisdiction. Creditor should not be penalized because debtor has moved.

Section 702.320. Does "without knowledge of the lien" mean actual or constructive notice, since most liens are recorded with some state agency?

Section 702.630; 650. Am unclear from these two sections if levying officer is liable to credit if under 702.630(c) officer erroneously endorses check which is release of claim. Also what benefit is there if levying officer holds check subject to lien, debtor can merely stop payment and creditor has received nothing. Levying

officer should be able to endorse no matter what language of check says re: release and satisfaction.

Moreover, if check is "held", do these funds count toward satisfaction of writ when creditor has not received money? Debtor could present many items in this manner to levying officer and creditor will receive nothing to satisfy its obligation.

Sincerely,

Jane C. Fennelly

JCF:amf