

#39.200

8/29/77

First Supplement to Memorandums 77-40 and 77-55

Subject: Study 39.200 - Enforcement of Judgments (Comprehensive
Statute--Redemption From Execution Sales; Exemptions)

Attached hereto is a memorandum prepared by Professor Stefan A. Riesenfeld, the Commission's consultant on creditors' remedies, pertaining to the memorandums concerning redemption (Memorandum 77-40) and exemptions (Memorandum 77-55).

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

MEMORANDUM

August 23, 1977

To : California Law Revision Commission

From: Stefan A. Riesenfeld, Consultant

The following comments pertain to
Memorandum 77-40 (Redemption) and
Memorandum 77-55 (Exemptions).

I am cognizant of the Minutes of May 12, 13 and 14 with reference to Memorandum 77-3 and of the Minutes of July 7 and 8 relating to the consideration on Memorandum 77-37. I have not received Memorandum 77-53, and the Minutes of the June meeting.

Redemption.

1. It may be advisable to point out in the comments that the abolition of the statutory right to redeem from execution or foreclosure sale does not affect:

- a. the statutory right to redeem from a lien under the Civil Code
- b. the equitable right to redeem from defective execution sales
- c. the statutory right to redeem under other statutes, such as 26 USCA §5337, even to the extent that such statutes are implemented by local law.

2. If Section 703.515(1) is retained, it should include the judgment debtor's successor in interest for the reason that

- a. a levy is possible under a judgment lien after the property has been conveyed by the judgment debtor, and
- b. a levy does not prevent a conveyance to a person who might wish to pay off the lien before the sale.

3. It might be pointed out that the three months interval between notice of levy and sale should not create difficulties even where the levy is under a judgment lien or trust deed since under Memo 77-56 a formal levy on real property will now be made "in every case", see comment to §703.310. While the comment to that section refers only to judgment and attachment liens, I assume that trust deeds and mortgages should also now require a formal levy for judicial foreclosure, in change of existing law.

4. It is not clear whether the automatic stay for three months after the notice of levy will or will not extend the one year period under §§703-295(1) and 703.250. In my opinion this should not be the case and the comment should say so.

5. The three months delay should not affect the expiration of executability, retaining the rule of *Alonso Inv. Corp. v. Doff*, 551 P2 1243. This might be said in a comment.

6. Does §703.520(f) cover all leaseholds that are subject to levy and sale? The comment should explain the change in the existing law with respect to leases that are subject to execution. (See §707.510).

Exemptions.

1. I like to call the Commission's attention to HR 8200 which is the last version of the proposed Bankruptcy Act. Exemptions are governed by §522.

2. Attention should also be called to Judge King's decision in *Betts v. Tom*, 431 F. Supp. 1369 (D. Hawaii 1977). This case applied *Sniadach* to post-judgment garnishment and invalidated the Hawaiian garnishment law as applied to post-judgment garnishment of a bank account consisting of AFDC payments. The statute in issue required no affidavit assuring that there was no reason to believe that the account was exempt and did not provide for speedy hearing on the exemption claim. In California the proposed automatic exemption (§707.380) would seem to take care of the matter, especially in view of §707.295.

3. I am troubled by the proposed exemption of matured life insurance, §707.410(c) and (d).

a. In the first place does a matured (or for that matter unmatured) life insurance policy include an endowment or annuity

policy, i.e. a policy which provides payment if the insured reaches a certain age?

It is settled that the present statute includes endowment policies, and it would seem that it also covers annuity policies. I would suggest that the new provision should be explicit on that point, especially since individual retirement annuity policies (for tax reasons) have become quite important.

- b. In my opinion the proposed wording of the exemption is "benefits from matured life policies or death benefits, paid to the judgment debtor or the spouse or a dependent of the judgment debtor" does not provide a proper scope of the exemption. Example: A takes out a policy on his or her life for the benefit of B, a non-dependent brother. C gets a judgment against B. A dies. Under the proposed wording B would be entitled to the exemption because he is the judgment debtor. Apart from the fact that §707.410(c) says "paid" in lieu of "payable", I see no sense in granting the exemption to B, since the overall policy was to restrict the exemption to dependents or spouses of the insured, if the insured takes out a policy on his or her own life.

The statute is also deficient in not stating that it grants the exemption against creditors of the insured effecting the policy as well as creditors of the beneficiary. In my opinion such exemption should be specifically granted, for instance in these terms:

"[c] benefits from a matured life insurance, endowment or annuity policy when payable or paid in a lump sum to the insured or the spouse or a dependent of the insured with respect to the creditors of the insured and the creditors of the beneficiary, the aggregate exemption not to exceed \$5000."

This wording still does not cover cases where the policy is neither effected by the insured (as when A insures A's spouse against A's death) nor by the dependent beneficiary (as when W takes out a policy for benefit, of H's life), but where the person taking out the policy is neither the insured nor the beneficiary (H takes out a policy for the benefit of W on the life of the children, as in In re Gould, 457 F 2d 393). I assume that there is no need to protect a beneficiary who is only potentially dependent on the insured.

- c. §707.410(d) should be rephrased in a similar fashion. Moreover it should state specifically that periodic payments may be due by virtue of the exercise of a settlement option in the policy. (This addition is necessary because of the legislative history: Commission disapproval of §707.180).
- d. The Comment should discuss the relation of §707.410 to §660 of the Probate Code.
- e. I recommend that the \$5000 be raised in cases where insured or the spouse or minor children have no protected homestead. A similar approach is now proposed in §522(d)(5) of H.R. 8200.