

February 1, 1972

<u>Time</u>	<u>Place</u>
February 10 - 7:00 p.m. - 10:00 p.m.	State Bar Building
February 11 - 9:00 a.m. - 5:00 p.m.	601 McAllister Street
February 12 - 9:00 a.m. - 1:00 p.m.	San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

February 10-12, 1972

1. Minutes of January 13-15, 1972, Meeting (sent 1/25/72)
2. Administrative Matters
 Memorandum 72-14 (enclosed)
3. Study 39 - Attachment, Garnishment, Execution

39.30 - Employees' Earnings Protection Law

Memorandum 72-8 (enclosed)
Recommendation (attached to Memorandum)

Claim and Delivery Statute

Memorandum 72-11 (sent 1/27/72)
FIRST Supplement MEMORANDUM 72-11

39.70 - Prejudgment Attachment Procedure

Memorandum 72-9 (sent 1/18/72)
Memorandum 72-12 (to be sent)
Memorandum 72-10 (sent 1/27/72)
Draft Statute (attached to Memorandum)

4. Study 36 - Condemnation

Questionnaire

Memorandum 72-13 (enclosed)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

FEBRUARY 10, 11, AND 12, 1972

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on February 10, 11, and 12, 1972.

Present: John D. Miller, Chairman
Marc W. Sandstrom, Vice Chairman (February 11)
Noble K. Gregory
John N. McLaurin
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
John J. Balluff
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, and Nathaniel Sterling, members of the Commission's staff, also were present. Professor Stefan A. Riesenfeld and Professor William D. Warren--Commission consultants on attachment, garnishment, and execution--were present. Messrs. Nathan Frankel (February 10 and 12) and Edward N. Jackson (February 11) also were present as special representatives of the State Bar Ad Hoc Committee on Attachment.

The following observers were present for the portions of the meeting indicated:

Thursday, February 10

Marshall Manley, McKenna & Fitting, Los Angeles
Michael A. McAndrews, McKenna & Fitting, Los Angeles

Friday, February 11

James M. Connors, Board of Trade, San Francisco
A. Morgan Jones, California Credit Managers Ass'n, Los Angeles and San Diego
Wilfred J. Kumli, McCord's Daily Notification Sheet, San Francisco

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Marshall Manley, McKenna & Fitting, Los Angeles

Michael A. McAndrews, McKenna & Fitting, Los Angeles

Perry H. Taft, Association of California Insurance Companies, San Francisco

Saturday

A. Morgan Jones, California Credit Managers Ass'n, Los Angeles and San Diego

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ADMINISTRATIVE MATTERS

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The Minutes of the January 13-15, 1972, meeting were approved as submitted.

Schedule for Future Meetings

Future meetings are scheduled as follows:

March 9 - 7:00 p.m. - 10:00 p.m.	State Bar Building
March 10 - 9:00 a.m. - 5:00 p.m.	1230 West Third Street
March 11 - 9:00 a.m. - 1:00 p.m.	Los Angeles 90017
April 13 - 7:00 p.m. - 10:00 p.m.	State Bar Building
April 14 - 9:00 a.m. - 5:00 p.m.	601 McAllister Street
April 15 - 9:00 a.m. - 1:00 p.m.	San Francisco 94102

Meetings for May, June, July, and September not yet scheduled. (No meeting will be held in August.)

October 6	Times to be determined	San Diego
October 7		

The Commission determined that the October meeting should be at the Vacation Village Hotel, Mission Bay, San Diego. The staff is to survey the Commissioners to determine the accommodations they desire and advise Commissioner Sandstrom so he can make the necessary arrangements.

Official Minutes

The Commission considered Memorandum 72-14 and decided that it was unnecessary to have a microfilmed copy of the Minutes prepared for deposit in a state records safekeeping depository.

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State Bar Committee on Attachment, Garnishment, and Execution

The Executive Secretary was directed to write to the Board of Governors of the State Bar to request that the scope of the assignment of the Special Ad Hoc State Bar Committee on Attachments be broadened to cover attachment, garnishment, and execution. Also, the Board of Governors should be requested to authorize the State Bar Committee to send its comments on various tentative proposals of the Commission directly to the Commission so that the comments could be considered by the Commission at the same time comments from other sources are considered. The Commission noted that the comments of the State Bar Committee had been of great assistance in eliminating defects and in formulating sound solutions to various problems.

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STUDY 36 - CONDEMNATION

The Commission considered Memorandum 72-13 and the attached questionnaire. The questionnaire, prepared by the Commission's consultant on the procedural aspects of condemnation, was approved for distribution to interested persons and organizations.

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STUDY 39.30 - ATTACHMENT, GARNISHMENT, EXECUTION
(EMPLOYEES' EARNINGS PROTECTION LAW)

The Commission considered Memorandum 72-8 and the attached recommendation. The substance of the following amendments to Senate Bill 88 was adopted.

AMENDMENTS TO SENATE BILL NO. 88

AMENDMENT 1

On page 1, line 3 of the title of the printed bill, strike out "and" and, after "690.7", insert:

, 690.7-1/4, 690.7-1/2, and 690.18-1/2

AMENDMENT 2

On page 1, line 7 of the title, after "Code," insert:
to amend Sections 270h and 1208 of the Penal Code,

AMENDMENT 3

On page 5, line 27, strike out "723.01" and insert"
723.010

AMENDMENT 4

On page 8, strike out lines 34 through 40, inclusive

AMENDMENT 5

On page 9, strike out lines 1 through 40, inclusive

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AMENDMENT 6

On page 10, strike out lines 1 through 5, inclusive, and insert:

690.7. (a) As used in this section, "debtor" means an individual and does not include a corporation, partnership, or unincorporated association.

(b) As used in this section, "deposit account" means any of the following:

(1) A deposit or account in any "bank" described in Section 102 of the Financial Code.

(2) A deposit or account in any state or federal savings and loan association. As used in this paragraph, "deposit or account" includes investment certificate, share account, and withdrawable share.

(3) A share or certificate for funds received from a member of a credit union and all the accumulation on such share or certificate.

(c) As used in this section, "spouse" means the debtor's husband or wife except (1) after entry of a judgment decreeing their legal separation or (2) while they are living separate and apart after entry of an interlocutory judgment of dissolution of their marriage.

(d) There is exempt from execution an aggregate five hundred dollars (\$500) in all deposit accounts owned by the debtor or his spouse on the date of the first levy on any of such accounts. The amount exempt in any deposit account levied upon shall be computed by applying the exemption first to amounts owned by the debtor or his spouse in accounts not levied

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levied upon, and then to amounts owned by the debtor or his spouse in accounts levied upon in the reverse of the order in which they were levied upon, first exempting amounts in the account last levied upon, then progressing in like manner until the exemption has been exhausted. The amount that is exempt in an account owned by joint debtors is the cumulative amount of the individual exemptions of each debtor in that account, except that spouses who are joint debtors are limited to one exemption between them.

(e) A debtor who claims an exemption under this section shall list in his affidavit of exemption under Section 690.50 all amounts held in all deposit accounts standing in the name of the debtor or his spouse or in which either was listed as a beneficiary or had a beneficial interest, whether alone or with others, on the date of the first levy on any of such accounts. For the purpose of this section, it shall be presumed that all amounts in such accounts were owned by the debtor or his spouse on the date of the levy. The presumption established by this subdivision is a presumption affecting the burden of proof.

(f) The exemption provided by this section is not applicable where the execution is sought to enforce a court order for the support of any person or to collect a state tax liability as that term is defined in paragraph (2) of subdivision (a) of Section 723.031.

(g) Nothing in this section shall affect the rights of a banker under Section 3054 of the Civil Code.

Sec. 9. Section 690.7-1/4 is added to the Code of Civil Procedure, to read:

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690.7-1/4. (a) As used in this section, "deposit account" has the meaning given that term in subdivision (b) of Section 690.7.

(b) A deposit account owned by the debtor is exempt from execution in the amount essential for the support of the debtor or his family. This standard recognizes that the exemption provided by Section 690.7 should be adequate except in rare and unusual cases. Neither the judgment debtor's accustomed standard of living nor a standard of living "appropriate to his station in life" is the criterion for measuring the debtor's claim for exemption under this section.

(c) A debtor who claims an exemption under this section shall include a financial statement as a part of his affidavit of exemption required by Section 690.50. The financial statement shall be in the form prescribed by the Judicial Council and shall include all of the following information:

(1) Name, age, and relationship of all persons dependent upon the debtor or his spouse.

(2) All sources of the earnings and other income of the debtor and of his spouse and the amounts of such earnings and other income.

(3) A listing of all assets of the debtor and of his spouse and the value of such assets.

(4) All outstanding obligations of the debtor and of his spouse.

(5) Any extraordinary prospective expenses of the debtor or of his spouse.

(6) Any other information required by the Judicial Council.

(d) The exemption provided by this section is not applicable where the execution is sought to enforce a court order for the support of

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any person or to collect a state tax liability as that term is defined in paragraph (2) of subdivision (a) of Section 723.031.

(e) Nothing in this section shall affect the rights of a banker under Section 3054 of the Civil Code.

Sec. 10. Section 690.7-1/2 is added to the Code of Civil Procedure, to read:

690.7-1/2. (a) As used in this section:

(1) "Deposit account" has the meaning given that term in subdivision (b) of Section 690.7.

(2) "Earnings" means compensation paid by an employer to an employee for personal services performed by such employee, whether denominated as wages, salary, commission, bonus, or otherwise.

(3) "Employer's payroll agent" means a financial institution that computes for an employer the net amount payable to an employee after making all required and authorized deductions from his gross earnings and credits the net amount to the employee's deposit account in that financial institution.

(4) "Financial institution" includes any "bank" described in Section 102 of the Financial Code and any state or federal savings and loan association.

(b) Where a financial institution acts as the employer's payroll agent for a debtor's employer, the deposit account of the debtor is exempt from levy of execution to the extent of the amount of the debtor's earnings

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that the agent has credited to that account for the last pay period prior to the levy, less all amounts debited to that account after the time the earnings for that pay period were credited to the account.

(c) The debtor is entitled to the exemption provided by this section without filing a claim for exemption as provided by Section 690.60, whether or not the debtor or his spouse has any other deposit accounts. In lieu of the exemption provided by this section, the debtor shall be allowed the exemption provided by Section 690.7 if the amount exempt under that section is greater than the amount exempt under this section, but the amount in the account described in this section shall be included in computing the amount exempt under Section 690.7.

(d) Nothing in this section shall be construed to authorize an employer to pay his employees through an employer's payroll agent. Whether an employer is authorized to pay his employees through such a payroll agent is to be determined by the applicable provisions of law other than this section.

AMENDMENT 7

On page 10, line 6, strike out "Sec. 9." and insert:

Sec. 11.

AMENDMENT 8

On page 11, strike out lines 8 through 31, inclusive, and insert:

Sec. 12. Section 690.18-1/2 is added to the Code of Civil Procedure, to read:

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690.18-1/2. (a) All periodic payments payable by a pension or retirement plan that are not otherwise exempt by law are exempt from levy of execution in the amount that is exempted by Section 723.050 without filing a claim for exemption as provided in Section 690.50.

(b) Periodic payments received by the debtor from a pension or retirement plan during the 30 days immediately preceding the levy of execution which have been retained by him in the form in which received or as cash and which are not otherwise exempt by law from levy of execution are subject to levy of execution only in an amount not to exceed the maximum amount of such payments that could be withheld by the plan under subdivision (a), less any amounts withheld from such payments by the plan pursuant to a levy of execution.

(c) Nothing in this section limits the applicability of any exemption otherwise provided by statute.

AMENDMENT 9

On page 11, line 32, strike out "Sec. 10." and insert"

Sec. 13.

AMENDMENT 10

On page 12, line 25, strike out "690.18" and insert:

690.7-1/4, 690.18-1/2

AMENDMENT 11

On page 15, line 17, strike out "Sec. 11." and insert:

Sec. 14.

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AMENDMENT 12

On page 19, line 10, strike out "Sec. 12." and insert:

Sec. 15.

AMENDMENT 13

On page 21, line 19, after "the" insert:

subsequent order is ineffective and the

AMENDMENT 14

On page 21, line 31, strike out "(a)"

AMENDMENT 15

On page 22, strike out lines 6 through 12, inclusive

AMENDMENT 16

On page 23, line 27, strike out "Unemployment" and insert:

Unemployment

AMENDMENT 17

On page 25, strike out lines 35 through 40, inclusive

AMENDMENT 18

On page 26, strike out lines 1 through 25, inclusive, and insert:

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(1) The amount that would be withheld for federal personal income taxes from the same amount of earnings of a single person who claims one exemption.

(2) The amount that would be withheld for federal social security taxes from the same amount of earnings if earned during the first week of a calendar year by a person subject to withholding for that tax.

(3) The amount that would be withheld for state disability insurance contributions under Sections 984 and 985 of the Unemployment Insurance Code from the same amount of earnings if earned during the first week of a calendar year by a person subject to withholding for that purpose.

(4) The amount that would be withheld for state personal income taxes from the same amount of earnings of a single person who claims one exemption.

(5) An amount equal to 30 times the federal minimum hourly wage prescribed by Section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time the earnings are payable.

(b) Except as otherwise provided in Sections 723.030, 723.031, and 723.106, the maximum amount of the earnings of a judgment debtor in any workweek which can be withheld pursuant to this chapter shall

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be computed as provided in this subdivision. If the nonexempt earnings of the judgment debtor for the workweek are less than thirty dollars (\$30), nothing shall be withheld. If the nonexempt earnings of the judgment debtor for the workweek are thirty dollars (\$30) or more, ten dollars (\$10) plus 25 percent of the nonexempt earnings in excess of thirty dollars (\$30) shall be withheld. Where the nonexempt earnings of the judgment debtor for the workweek are thirty dollars (\$30) or more, if the amount computed under this subdivision is not a multiple of one dollar (\$1), fractional amounts less than one-half dollar (\$0.50) shall be disregarded and fractional amounts of one-half dollar (\$0.50) or more shall be rounded upward to the next higher whole dollar.

AMENDMENT 19

On page 31, strike out lines 26 and 27 and insert:

(d) An earnings withholding order served upon the employer more than 45 days after its date of issuance is void.

AMENDMENT 20

On page 31, line 32, after the period, insert:

If the earnings withholding order is ineffective or void, the employer shall state in his employer's return that he is not complying with the order for this reason and shall return the order to the judgment creditor with the employer's return.

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AMENDMENT 21

On page 33, line 25, after the period, insert:

The notice shall also advise the judgment debtor that the forms needed to apply for a hearing and for the financial statement may be obtained at the office of the county clerk and at the offices of the clerks of such other courts as the Judicial Council may determine. The county clerk and such other clerks shall have the forms available at their offices.

AMENDMENT 22

On page 37, line 31, strike out "Sec. 13." and insert:

Sec. 16.

AMENDMENT 23

On page 38, line 2, strike out "Sec. 14." and insert:

Sec. 17.

AMENDMENT 24

On page 38, line 20, strike out "the rendition" and insert:

entry

AMENDMENT 25

On page 38, line 23, strike out "the rendition" and insert:

entry

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AMENDMENT 26

On page 40, line 39, strike out "Sec. 15." and insert:

Sec. 18.

AMENDMENT 27

On page 42, between lines 16 and 17, insert:

Sec. 19. Section 270h of the Penal Code, as amended by Chapter 1587 of the Statutes of 1971, is amended to read:

270h. In any case where there is a conviction under the provisions of either Section 270 or 270a and there is an order granting probation which includes an order for support, the court may:

(a) Issue an execution on such order for the support payments that accrue during the time such probation order is in effect, in the same manner as on a judgment in a civil action for support payments. This remedy shall apply only when there is no existing civil order of this state or a foreign court order that has been reduced to a judgment of this state for support of the same person or persons included in the probation support order.

~~(b) Require assignment of wages pursuant to Section 4701 of the Civil Code as a condition of probation. This remedy shall apply only when there is no existing civil order for support of the same person or persons included in the probation support order upon which an order of assignment has been entered pursuant to Section 4701.~~ Issue an earnings withholding order under Section 723.030 of the Code of Civil Procedure to enforce the order for support.

These remedies are in addition to any other remedies available to the court.

Sec. 20. Section 1208 of the Penal Code, as amended by Chapter 1313 of the Statutes of 1971, is amended to read:

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1208. (a) The provisions of this section, insofar as they relate to employment, shall be operative in any county in which the board of supervisors by ordinance finds, on the basis of employment conditions, the state of the county jail facilities, and other pertinent circumstances, that the operation of this section, insofar as it relates to employment, in that county is feasible. The provisions of this section, insofar as they relate to education, shall be operative in any county in which the board of supervisors by ordinance finds, on the basis of education conditions, the state of the county jail facilities, and other pertinent circumstances, that the operation of this section, insofar as it relates to education, in that county is feasible. In any such ordinance the board shall prescribe whether the sheriff, the probation officer, or the superintendent of a county industrial farm or industrial road camp in the county shall perform the functions of the work furlough administrator. The board of supervisors may also terminate the operativeness of this section, either with respect to employment or education in the county if it finds by ordinance that, because of changed circumstances, the operation of this section, either with respect to employment or education in that county is no longer feasible.

(b) When a person is convicted of a misdemeanor and sentenced to the county jail, or is imprisoned therein for nonpayment of a fine, for contempt, or as a condition of probation for any criminal offense, or committed under the terms of Section 6404 or 6406 of the Welfare and Institutions Code as a habit-forming drug addict, the work furlough administrator may, if he concludes that such person is a fit subject therefor, direct that such person be permitted to continue in his regular employment, if that is compatible with the requirements of subdivision (d), or may authorize the person to secure employment for himself, unless the court at the time of sentencing or committing has ordered that such person not be granted work furloughs. The work furlough administrator may, if he concludes that such person is a fit subject therefor, direct that such person be permitted to continue in his regular educational program, if that is compatible with the requirements of subdivision (d), or may authorize the person to secure education for himself, unless the court at the time of sentencing has ordered that such person not be granted work furloughs.

(c) If the work furlough administrator so directs that the prisoner be permitted to continue in his regular employment or educational program, the administrator shall arrange for a continuation of such employment or education, so far as possible without interruption. If the prisoner does not have regular employment or a regular educational program, and the administrator has authorized the prisoner to secure employment or education for himself, the prisoner may do so, and the administrator may assist him in doing so. Any employment or education so secured must be suitable for the prisoner. Such employment or educational program, if such educational program

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includes earnings by the prisoner, must be at a wage at least as high as the prevailing wage for similar work in the area where the work is performed and in accordance with the prevailing working conditions in such area. In no event may any such employment or educational program involving earnings by the prisoner be permitted where there is a labor dispute in the establishment in which the prisoner is, or is to be, employed or educated.

(d) Whenever the prisoner is not employed or being educated and between the hours or periods of employment or education, he shall be confined in the facility designated by the board of supervisors for work furlough confinement unless the work furlough administrator directs otherwise. If the prisoner is injured during a period of employment or education, the work furlough administrator shall have the authority to release him from the facility for continued medical treatment by private physicians or at medical facilities at the expense of the employer, workman's compensation insurer, or the prisoner. Such release shall not be construed as assumption of liability by the county or work furlough administrator for medical treatment obtained.

The work furlough administrator may release any prisoner classified for the work furlough program for a period not to exceed 72 hours for medical, dental, or psychiatric care, and for family emergencies or pressing business which would result in severe hardship if the release were not granted.

(e) The earnings of the prisoner may be collected by the work furlough administrator, and it shall be the duty of the prisoner's employer to transmit such wages to the administrator at the latter's request. Earnings levied upon pursuant to ~~writ of attachment or execution or in other lawful manner~~ the Employees' Earnings Protection Law, Chapter 2.5 (commencing with Section 723.010) of Title 9 of Part 2 of the Code of Civil Procedure,

~~shall not be transmitted to the administrator. If the administrator has requested transmittal of earnings prior to levy, such request shall have priority.~~ service of an earnings withholding order under the Employees' Earnings Protection Law, none of the earnings of the prisoner shall be withheld pursuant to such order. In a case in which the functions

of the administrator are performed by a sheriff, and such sheriff receives a writ of attachment or execution for the earnings of a prisoner subject to this section but has not yet requested transmittal of the prisoner's earnings pursuant to this section, he shall first levy on the earnings pursuant to the writ. When an employer or educator transmits such earnings to the administrator pursuant to this subdivision he shall have no liability to the prisoner for such earnings. From such earnings the administrator shall pay the prisoner's board and personal expenses, both inside and outside the jail, and shall deduct so

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much of the costs of administration of this section as is allocable to such prisoner, and, in an amount determined by the administrator, shall pay the support of the prisoner's dependents, if any. If sufficient funds are available after making the foregoing payments, the administrator may, with the consent of the prisoner, pay, in whole or in part, the preexisting debts of the prisoner. Any balance shall be retained until the prisoner's discharge and thereupon shall be paid to him.

(f) The prisoner shall be eligible for time credits pursuant to Sections 4018, 4019, and 4019.2.

(g) In the event the prisoner violates the conditions laid down for his conduct, custody, education, or employment, the work furlough administrator may order the balance of the prisoner's sentence to be spent in actual confinement.

(h) Willful failure of the prisoner to return to the place of confinement not later than the expiration of any period during which he is authorized to be away from the place of confinement pursuant to this section is punishable as provided in Section 4532 of the Penal Code.

(i) As used in this section, "education" includes vocational training, and "educator" includes a person or institution providing vocational training.

(j) This section shall be known and may be cited as the "Cobey Work Furlough Law."

AMENDMENT 28

On page 42, line 17, strike out "Sec. 16." and insert:

Sec. 21.

AMENDMENT 29

On page 42, line 30, strike out "Sec. 17." and insert:

Sec. 22.

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The substance of the following report, prepared for the Senate Committee on Judiciary, was approved.

REPORT OF SENATE COMMITTEE ON JUDICIARY ON SENATE BILL 88

In order to indicate more fully its intent with respect to Senate Bill 88, the Senate Committee on Judiciary makes the following report:

Except for the new or revised comments set out below, the Comments contained under the various sections of Senate Bill 88 as set out in the Recommendation of the California Law Revision Commission Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law (November 1971), reprinted in 10 Cal. L. Revision Comm'n Reports 701 (1971), reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Senate Bill 88.

Code of Civil Procedure § 690.5-1/2 (added)

Comment. Section 690.5½ is added to make clear the relationship between new Chapter 2.5 (commencing with Section 723.010) and the remaining attachment and execution procedures and to satisfy the restrictions upon the attachment of and execution upon earnings imposed by recent judicial decisions and federal legislation. See, e.g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *McCallop v. Carberry*, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Consumer Credit Protection Act of 1968 (§§ 301-307), 15 U.S.C. §§ 1671-1677. Cf. *Randone v. Appellate Department*, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). See also *Recommendation Relating to Attachment, Garnishment, and Exemptions From Execution: Employees' Earnings Protection Law*, 10 CAL. L. REVISION COMM'N REPORTS 701 (1971).

Section 690.5½ states the exemptions from prejudgment levy of attachment for *all* earnings of an employee, both paid and payable. This section is also the source of exemption from postjudgment levy of execution for *paid* earnings of an employee. The exemptions for *unpaid* earnings—i.e., earnings "due and owing"—are provided in Chapter 2.5 (commencing with Section 723.010).

Subdivision (a). Subdivision (a) is based on the definition of "earnings" stated in Section 723.011, and Section 690.5½ is applicable therefore only to persons ("employees") protected under the Employees' Earnings Protection Law. Compare Section 690.6. See also Comment to Section 723.011. However, the definition of earnings used here includes earnings "paid or payable"; Section 723.011 refers only to earnings "payable" by an employer. Earnings which are "payable" are those which are referred to as "due or owing" under this section. "Paid" earnings are covered here by reference to earnings which have been paid to the debtor—whether or not they are still in a form identifiable as "earnings." It should be noted that certain analogous types of periodic payments—for example, retirement payments, welfare assistance, and unemployment benefits—are not covered here but by other provisions of the 690 series. See, e.g., Sections 690.175 (unemployment compensation), ~~690.18~~ (payments pursuant to a pension or retirement program), 690.19 (public assistance).

690.18-1/2

Subdivision (b). Subdivision (b) provides an automatic, total exemption from prejudgment levy of attachment of all earnings "due or owing" to any employee. This continues prior law under former subdivision (a) of Section 690.6.

Subdivision (b) also makes clear that the levy of execution may no longer be used to garnish the wages of an *employee* while they are still in the hands of his employer. A judgment creditor now may only reach this asset of a debtor pursuant to Chapter 2.5 (commencing with Section 723.010).

Subdivision (c). Subdivision (c) exempts from attachment all earnings of the debtor which "are in his possession in a form identified by the levying officer as earnings." It would be inconsistent to exempt earnings payable by an employer but to make these same earnings subject to attachment as soon as they pass into the hands of the employee-debtor. (The term "debtor" is used here to include a defendant or cross-defendant subject to attachment. See Section 690(c).) Accordingly, to avoid such an anomaly, subdivision (c) provides the same total exemption from attachment for all paid earnings still in a form identified as earnings. Included in the latter category would, for example, be an uncashed paycheck. The identification is done by the levying officer—sheriff, constable, or marshal. Where the levying officer mistakenly attaches earnings, the debtor may still claim an exemption under subdivision (d). Under subdivision (c), however, the exemption is automatic; no claim pursuant to Section 690.50 is required. Subdivision (c) is consistent with prior law under former subdivision (a) of Section 690.6.

Subdivision (d). Subdivision (d) provides an exemption from attachment for earnings paid but not in a form identifiable as earnings or, at least, not in fact so identified by the levying officer. Subdivision (d) is intended to cover the relatively rare case where the officer cannot or does not properly identify earnings as earnings. This can happen, for example, where cash in the possession of the debtor is attached. Circumstances may clearly indicate that the money is "earnings"—for example, cash in a pay envelope attached shortly after the debtor leaves his place of employment upon a payday. Nevertheless, in other circumstances, subdivision (d) affords the debtor an opportunity at least to claim an exemption pursuant to Section 690.50 by showing that "earnings" have been attached. Subdivision (d) does not, however, protect earnings after they have been converted into another form. Protection of assets in these other forms must be sought under other exemption provisions. See, e.g., CIVIL CODE § 1240 (homestead); CODE CIV. PROC. §§ 690.1 (household furnishings and appliances), 690.2 (motor vehicles). Subdivision (d) is consistent with prior law under former subdivision (a) of Section 690.6.

Subdivision (e). As noted above, subdivision (b) makes clear that the levy of execution may no longer be used to garnish the wages of an *employee* while they are still in the hands of his employer. A judgment creditor now may only reach this asset under Chapter 2.5. However, Chapter 2.5 deals primarily with unpaid earnings, *i.e.*, earnings which are "due and owing." For a very limited exception to this rule with regard to tips, see Section 723.106 and Comment thereto. Earnings, once paid, are subject to levy of execution. Subdivisions (e) and (f), therefore, provide exemptions from execution for paid earnings comparable to the exemptions provided for unpaid earnings by Sections 723.050 and 723.051. It should be emphasized, however, that subdivision (e) protects only earnings from the employee's most recent pay period and, as noted above, does not protect earnings after they have been converted into another form. Protection of assets in these other forms must be sought under other exemption provisions. See, *e.g.*, Civil Code § 1240 (homestead), Code Civ. Proc. §§ 690.1 (household furnishings and appliances), 690.2 (motor vehicles), 690.7, 690.7-1/4, 690.7-1/2. ~~Compare Section 690.7~~ (money deposited in bank, credit union, or savings and loan association). The amount of the exemption under subdivision (e) is based upon the total amount of the nonexempt earnings of the debtor from his last paycheck—not upon the amount of earnings in his possession at the time of levy. The exemptions provided under subdivisions (e) and (f) must be claimed by the debtor.

Subdivision (f). Subdivision (f) provides an exemption from execution for amounts essential for support comparable to that provided by subdivision (d) of Section 690.6 and Section 723.051. See the Comment to subdivision (e), *supra*, and the Comments to Sections 690.6 and 723.051.

Subdivision (g). Subdivision (g) provides an immunity from liability comparable to that provided by Government Code Section 822.2 (misrepresentation by public employee).

Code of Civil Procedure § 690.7 (repealed)

Comment. Section 690.7 is superseded by new Sections 690.7, 690.7-1/4, and 690.7-1/2. See the Comments to those sections.

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Code of Civil Procedure § 690.7 (added)

Comment. Section 690.7 provides an exemption from execution for various types of savings and commercial accounts.

Accounts protected. The accounts protected under Section 690.7 include savings and loan association accounts, credit union accounts, and bank accounts--whether savings or checking accounts. See subdivision (b) (defining "deposit account"). See also Financial Code Sections 5061 (defining "investment certificate") and 5067 (referring to "withdrawable share"). Under prior law, the amount exempt depended on the type and holder of the account: Checking accounts and bank accounts generally were not protected; \$1,000 in a savings and loan association account and \$1,500 in a credit union account were exempt. See former Section 690.7 and former Financial Code Section 15406. The exemption under former Section 690.7 for "shares of stock" is not continued, thus limiting the exemption to amounts deposited, investment certificates, and the like. These exemptions were cumulative so that a single debtor could exempt a total of \$2,500 by proper allocation of his money. Section 690.7, on the other hand, provides a single aggregate exemption applicable to all types of accounts, including bank savings and checking accounts.

The exemption provided by Section 690.7 is in no way dependent upon a showing by the debtor that the amount claimed as exempt represents his earnings. On the other hand, the debtor may be able to exempt a greater amount in certain accounts containing earnings. See Section 690.7-1/2. And, the debtor is provided an additional exemption in Section 690.7-1/4

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that permits him to protect an amount in excess of the \$500 exemption if he is able to show such amount is essential for the support of himself or his family.

Persons protected. Only an individual may take advantage of the exemption provided by Section 690.7. See subdivision (a). An account owned by joint debtors is exempt in the total amount that each debtor would be able to exempt following application of the exemption formula. A husband and wife, however, are entitled to only one exemption between them even if they are joint debtors; and accounts standing in the name of either or both of them--whether they consist of separate, community, or quasi-community property--must be listed in the claim of exemption even though only one of them is the judgment debtor. See subdivisions (d) and (e). It should be noted, however, that, although the separate property of a nondebtor spouse may be considered in computing the exemption provided in Section 690.7, nothing in the section authorizes the satisfaction of the judgment out of such property. See discussion infra.

Exemption must be claimed. The exemption provided by Section 690.7 must be claimed pursuant to Section 690.50. See Section 690(a). This requirement makes it possible to limit the amount to be exempted by taking into consideration all other accounts owned by the debtor or his spouse. Nevertheless, in the ordinary case, it is anticipated that the release of funds pursuant to the exemption provided by Section 690.7 will be expeditiously accomplished. It will be easy to compute the exempt amount, and there should be little occasion for the filing of counteraffidavits by a creditor;

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the attaching officer will be able to make the necessary distributions on the basis of the debtor's affidavit alone.

Computation of exemption. As much as \$500 owned by the debtor in an account is exempt under Section 690.7(d). This exemption is an aggregate one, however. Hence, a debtor may claim as exempt only that portion of an account levied upon which he owns and which, when added to all other amounts owned by the debtor or his spouse in other accounts in the manner described below, equals \$500. The exemption must be claimed and the burden of proof is on the debtor to show that he is in fact entitled to exempt the amount claimed. See subdivision (e). See also Section 690.50.

In claiming the exemption, the debtor must list in his claim for exemption the amount he or his spouse held in all other accounts or in which he or his spouse was listed as a beneficiary or had a beneficial interest on the date of the first levy even though the other accounts have not been levied upon. See subdivision (e). In computing the amount exempt in any account, the exemption is applied first to amounts in accounts that have not been levied upon, and then to amounts in any accounts that have been levied upon, until the full exemption has been consumed. Further, all amounts in such accounts, including all joint accounts, are presumed to be the debtor's. This presumption is one affecting the burden of proof. See subdivision (e). See also Evid. Code §§ 605, 606.

Some or all of an account levied upon may in fact not be subject to execution to satisfy the debtor's obligation because of the nature of the account or the character of the funds in the account. See Tinsley v. Bauer,

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125 Cal. App.2d 724, 271 P.2d 116 (1954); Spear v. Farwell, 5 Cal. App.2d 111, 42 P.2d 391 (1953). Section 690.7 does not affect this immunity; a nondebtor may make his third-party claim pursuant to Section 689.

The following examples illustrate the operation of the \$500 exemption.

Example 1. Debtor has a \$1,000 account that is levied upon and a \$200 account that is not levied upon. The exemption is applied first to the account not levied upon--\$200. The exemption is applied next to \$300 in the account levied upon, leaving \$700 that the creditor can reach in that account.

Example 2. Debtor has a \$200 account that is levied upon and a \$1,000 joint account with his spouse that is not levied upon. The exemption is applied first to the account not levied upon--\$500. The creditor can reach all \$200 in the account levied upon. Note: This result applies regardless whether the character of the property in the joint account is separate, community, or quasi-community.

Example 3. Debtor has two \$200 accounts in his own name and a \$300 joint account with his brother. Creditor 1 levies on one \$200 account, creditor 2 levies on the \$300 account, the debtor files a claim of exemption. The exemption is applied first to the account not levied upon--\$200. The exemption is applied next to the account last levied upon--\$300 (assuming that all of the account is "owned" by the debtor and none of it by his brother). The total \$500 exemption is exhausted, and creditor 1 can reach \$200. Note: If debtor demonstrates, for example, that \$100 of the joint account is not owned by him, then only \$200 of the exemption is used in that account, and creditor can reach but \$100 from the \$200 account.

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Example 4. Joint debtors have \$1,000 in equal shares in a joint account that is levied upon, \$200 in equal shares in a joint account not levied upon, and one of the debtors has \$100 in a separate account not levied upon. The exemptions are applied as to each debtor. Debtor 1 exempts \$100 in the separate account and \$100 in the joint account, leaving \$300 exempt in the \$1,000 account. Debtor 2 exempts \$100 in the joint account, leaving \$400 exempt in the \$1,000 account. The result is that \$700 is exempt and \$300 can be reached by creditor. Note: If debtors demonstrate, for example, that debtor 1 actually owns only \$50 in each joint account, exemption is computed as follows. Debtor 1 exempts \$100 in the separate account and \$50 in the joint account, leaving all of the \$50 that he owns in the \$1,000 account exempt. Debtor 2 exempts \$150 in the joint account, leaving \$350 exempt in the \$1,000 account. Result is that \$400 is exempt and \$600 can be taken by creditor.

Example 5. Joint debtors are married, having \$1,000 in a joint account that is levied upon, \$200 in a joint account not levied upon, and \$100 in the wife's separate account not levied upon. The debtors exempt \$100 in the wife's account and \$200 in the joint account, leaving \$200 exempt in the \$1,000 account. Creditor can reach \$800. Note: The result is the same whether or not the spouses are joint debtors and regardless whether the accounts are joint or separate or whether the character of the property in any of the accounts is separate, community, or quasi-community.

Orders for support; state tax liabilities. Subdivision (F) eliminates the exemption otherwise provided by this section where execution is sought

to enforce a court order for support or to collect a state tax liability. This special consideration for such creditors is consistent with the special treatment accorded them under Title III of the federal Consumer Credit Protection Act. See 15 U.S.C. § 1673(b)(1), (3). Although the effect of subdivision (f) of Section 690.7 is to give a debtor's first family priority over the debtor's second family, this preference is balanced by the protection afforded the second family under Section 723.051 (exemption from earnings withholding of amount essential for support). See the Comments to Sections 723.030 and 723.051.

Banker's lien. The exemption provided by Section 690.7 is a limitation on garnishment procedures only; it does not in any way affect the exercise of rights pursuant to Civil Code Section 3054 (banker's lien). See subdivision (g).

Code of Civil Procedure § 690.7-1/4 (added)

Comment. Section 690.7-1/4 provides an exemption for deposit accounts comparable to that provided for earnings under Section 723.051. The strict standard provided in the section--"essential for support"--recognizes that the exemption provided by Section 690.7 should be adequate except in extremely rare and unusual cases. Section 690.7-1/4 is not intended to be used for the maintenance of a life style appropriate to the debtor's station in life or an accustomed standard while the debtor owes money on an unsatisfied judgment.

Subdivision (c) is comparable to Section 723.124 which prescribes the content of the judgment debtor's financial statement which is required when

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earnings are sought to be exempt from withholding on the ground that they are essential for the support of the judgment debtor or his family.

Subdivisions (d) and (e) are comparable to provisions found in Section 690.7. See the Comment to that section.

Code of Civil Procedure § 690.7-1/2 (added)

Comment. Section 690.7-1/2 provides an exemption for the earnings of an employee where a financial institution acting as his employer's payroll agent has computed the net amount payable to the employee (by deducting from the employee's gross earnings all required and authorized deductions) and credited that amount to his deposit account. The exemption provided by this section is automatic; the employee need not claim it under Section 690.50.

An exemption of the type provided by Section 690.7-1/2 is needed to satisfy the requirements of Title III of the federal Consumer Credit Protection Act. That act has been interpreted by the federal administrator to cover earnings in an account of the type covered by Section 690.7-1/2. It should be noted that Section 690.7-1/2 does not authorize the use of an employer's payroll agent where such use is otherwise prohibited by law. See subdivision (d). Cf. Labor Code § 212.

Where a financial institution acts as an employer's payroll agent, the employee may not be able to obtain his funds out of the deposit account before the account is garnished by a creditor. The purpose of Section 690.7-1/2 is to protect the employee's earnings in this situation so that the creditor cannot defeat the protection given earnings under the Employees' Earnings

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Protection Law, Chapter 2.5 (commencing with Section 723.010), by levying on the account before the employee can obtain his earnings out of the deposit account.

In applying the exemption provided by this section, the financial institution first determines the amount of the earnings of the employee that were credited to the deposit account for the last pay period prior to the levy. From this amount, the financial institution subtracts all amounts debited to the account after the net earnings for the pay period were credited to the account. The remainder is the amount of the account that is exempt from levy of execution.

The following examples illustrate the method of computation.

Example 1

Assume the following facts and transactions:

	<u>Balance</u>
Balance in account as of March 31.	\$. 0
April 1. Gross earnings for weekly pay period ending March 31 are \$260. Financial institution computes deductions and credits net of \$200 to employee's deposit account.	\$200
April 2. Creditor levies on account.	

Computation of amount of deposit account exempt:

Earnings credited to account for last pay period prior to levy.	\$200
Less amount debited to account after earnings for last pay period credited.	<u>\$ 0</u>
	\$200

Amount of account balance that is exempt is \$200.

Example 2

Assume the following facts and transactions:

	<u>Balance</u>
Balance in account as of March 31.	\$ 20
April 1. Gross earnings for weekly pay period ending March 31 are \$260. Financial institution computes deductions and credits net of \$200 to employee's deposit account.	\$220
April 3. Employee deposits \$20 to account.	\$240
April 4 and 5. Checks totaling \$65 are debited to account.	\$175
April 6. Creditor levies on account.	

Computations of amount of deposit account exempt:

Earnings credited to account for last pay period prior to levy.	\$200
Less amount debited to account after earnings for last pay period credited.	<u>\$ 65</u>
	\$135

Amount of account balance (\$175) that is exempt is \$135.

The remaining \$40 is not exempt under Section 690.7-1/2. (The debtor may, however, be eligible for an exemption under Section 690.7 or Section 690.7-1/4.)

A debtor who qualifies for an automatic exemption under this section may also claim the deposit account exemption provided by Section 690.7. However, the debtor may not cumulate these exemptions; in case of a claimed exemption under Section 690.7, the court may allow an exemption only under the section that will exempt the greater amount. See subdivision (c).

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A debtor who qualifies for an automatic exemption under this section may also claim the deposit account exemption provided by Section 690.7-1/4 (exemption of amount essential for support).

It should be noted that the exemption provided in this section does not insulate an employee's earnings from garnishment pursuant to an earnings withholding order directed to the employer. An employer cannot avoid his duty to withhold earnings as required by the Employee's Earnings Protection Law, Chapter 2.5 (commencing with Section 723.010) of this title, by designating a financial institution to act as his payroll agent.

Code of Civil Procedure § 690.18 (amended)

Comment. Section 690.18 is amended to delete subdivision (c). Subdivision (c) appears to have been intended to provide an exemption "in any bankruptcy proceeding." However, federal law preempts state statutes that conflict with the national bankruptcy laws. Cf. International Shoe Co. v. Pinkus, 278 U.S. 261 (1929). And the policy of the national bankruptcy law is to allow a debtor those exemptions against the claims of creditors that he would be allowed outside bankruptcy. See Cowans, Bankruptcy Law and Practice § 589 (1963). The second sentence of subdivision (c), purporting to deny an exemption to Keogh Act plans, conflicted with the exemption provided such plans under Sections 28002 and 28005 of the Corporations Code. Protection for private pension and retirement plans that meet certain requirements is provided by Sections 28002 and 28005 of the Corporations Code. See also Section 690.18-1/2 (periodic payments from pension or retirement fund).

Code of Civil Procedure § 690.18-1/2 (added)

Comment. Section 690.18-1/2 has been added to satisfy federal restrictions on garnishment of "periodic payments pursuant to a pension or retirement program" provided by Title III of the Consumer Credit Protection Act of 1968. See 15 U.S.C. §§ 1572, 1673. Subdivision (c) makes clear that Section 690.18-1/2 is not the exclusive source of exemptions for payments from retirement funds. See, e.g., Code Civ. Proc. § 690.18 (public employees), Corp. Code § 28005 (plans complying with federal Internal Revenue Code requirements); Educ. Code § 13808 (State Teachers' Retirement System); Govt. Code §§ 21201 (State Employees' Retirement Law), 31452 (County Employees' Retirement Law of 1937).

Code of Civil Procedure § 690.50 (amended)

Comment. Section 690.50 is revised to include appropriate references to Sections 690.5-1/2, 690.7, 690.7-1/4, and 690.18-1/2.

Code of Civil Procedure § 723.011 (added)

Comment. Section 723.011 states definitions used in applying this chapter. This chapter deals only with the garnishment or withholding of earnings for services rendered in an employer-employee relationship. See Section 723.020. Subdivisions (b) and (c) are based on the common law requirements for such relationship. It should be noted that an employee may be given considerable discretion and still be an employee as long as his employer has the legal right to control both method and result. However, no attempt is made here to incorporate specific case law arising out of situations involving problems and issues unrelated to the purposes and procedures

relevant in applying this chapter. "Employee" includes both private and public employees. See subdivision (g). See also Section 710.

"Earnings" embraces all remuneration "whether denominated as wages, salary, commission, bonus, or otherwise." The infinite variety of forms which such compensation can take precludes a more precise statutory definition. Accordingly, the State Administrator, who is authorized and directed to adopt "such rules and regulations as are reasonably necessary for the purpose of administering this chapter," will be required in some circumstances to provide rulings consistent with the statutory definition as to whether certain items are an employee's earnings and, if so, the earnings period to which such earnings are attributable. See Section 723.151. One such item will probably be vacation credits or pay. Different employers will treat this form of compensation differently. Generally speaking, however, vacation pay should be subject to withholding only when paid, *i.e.*, when the employee goes on vacation or terminates his employment in circumstances where he has the right to be paid his accrued benefits.

Unlike the definition of "earnings" used in Title III of the federal Consumer Credit Protection Act of 1968, the term used here does not include "periodic payments pursuant to a pension or retirement program." Separate treatment is accorded such payments under Section ~~690.18-1/2~~.

690.18-1/2.

The Director of Industrial Relations is named in subdivision (h) as the State Administrator. He may, of course, delegate powers, duties, and responsibilities within the Department of Industrial Relations in the manner which he deems most suitable. See GOVT. CODE § 7; LABOR CODE §§ 7, 55.

Code of Civil Procedure § 723.020 (added)

Comment. Section 723.020 makes the Employees' Earnings Protection Law the exclusive judicial method of compelling an employer to withhold earnings. Attachment of earnings before judgment is abolished by subdivisions (b) and (c) of Section 690.5½. For provisions relating to voluntary wage assignments, see Labor Code Section 300. For issuance of an earnings withholding order to enforce an order for support, see Section 723.030, Civil Code Section 4701, and Welfare and Institutions Code Section 11489. This chapter has no effect on judgment collection procedures that do not involve the withholding of an

employee's *earnings*. See, e.g., Section 690.7 (bank and savings accounts) and Section 690.18 (retirement funds). See also Section 690.5½ (paid earnings). As to garnishment of earnings of a person who is not an employee, see Section 690.6. However, where an employee's earnings are sought to be garnished, the creditor must comply with the provisions of this chapter. This rule applies to public entities as well as private persons. This chapter, for example, imposes significant limitations on the state's ability to garnish wages for tax delinquencies pursuant to its warrant and notice procedures. See Section 723.031.

and Section
690.18-1/2 (pay-
ments from retire-
ment funds).

The Employees' Earnings Protection Law has no effect on matters that are preempted by the federal law, such as federal bankruptcy proceedings—including proceedings under Chapter XIII of the Bankruptcy Act—and federal tax collection procedures. E.g., INT. REV. CODE of 1954, § 6334(c). Nor does this chapter apply to deductions which an employer is authorized by statute to make for such items as insurance premiums and payments to health, welfare, or pension plans. See, e.g., GOVT. CODE §§ 1158, 12420; LABOR CODE §§ 224, 300. Finally, this chapter does not affect the procedures for the examination of a debtor of the judgment debtor provided in Chapter 2 (Sections 717-723) of this part. See Comment to Section 723.156.

Code of Civil Procedure § 723.023 (added)

Comment. Section 723.023 establishes the general rules governing priority of earnings withholding orders. Generally speaking, the first order served is given priority. Occasionally, two or more orders will be served on the same day. In this situation, the employer must comply with the order which was issued pursuant to the judgment first entered. The date of entry of judgment will be indicated on the face of the order. See Section 723.125. In rare instances, orders served the same day will also be based on judgments entered the same day. In this situation, the employer has complete discretion to choose the order with which he will comply. He must, of course, comply with one of these orders. For exceptions to these basic priority rules, see Sections 723.030 (support orders) and 723.031 (state taxes) and the Comments thereto. Unless the subsequent ineffective earnings withholding order is for state taxes or for support, an order is ~~void~~ if the employer receives the order while he is required to comply with another. In such a case, the employer

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does not hold such an order and give it effect when the prior order expires, but returns it. See Section 723.108. However, the creditor may serve the same order again within 45 days after its issuance. See Section 723.107(d).

It should be noted that, in some circumstances, the operation of an order may be suspended, but the duty to withhold is not terminated. See, e.g., Section 723.031 (tax order suspends operation of prior order); Labor Code Section 300 (suspension where prior assignment in effect). See also Comment to Section 723.022. In such cases, as well as in cases where the subsequent order is not given effect, the employer is required to advise the creditor who has served the order that is suspended or not given effect of the reason for the employer's action. See Sections 723.031(f)(3), 723.108, 723.127.

An employer is generally entitled to rely upon what is served upon him. See Section 723.156 and Comment thereto. He is not required to inquire as to whether or not a creditor has either obtained or served an order improperly.

An earnings withholding order may be served either personally or by certified or registered mail. See Section 723.101. In the latter case, should the employer refuse service (thus forcing the creditor to serve personally), Section 723.101 makes clear that this action does not cause the creditor to lose his priority and outlines the rights of the various parties in such circumstances.

Code of Civil Procedure § 723.025 (added)

Comment. Section 723.025 specifies when the amounts withheld pursuant to an order must be paid over to the creditor. Generally, this must be done within 15 days after the employee is paid the amount remaining after withholding. However, the employer may elect to make monthly remittances.

Regardless of when, or if, payment is required, the employer is required to send an employer's return to the judgment creditor. See Sections 723.108 and 723.127.

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Code of Civil Procedure § 723.050 (added)

Comment. Section 723.050 provides the standard exemption applicable to all earnings withholding orders other than orders for support, certain orders for taxes, and orders based on multiple sources of earnings. See Sections 723.030 (support); 723.031 (taxes); 723.106 (multiple sources of earnings). See also Section 723.051 (exemption obtained by special hardship showing).

Section 723.050 reflects policies similar to those underlying Sections 302 and 303 of the federal Consumer Credit Protection Act. Thus, in determining the amount of the debtor's earnings subject to garnishment, under both this section and the federal law, certain basic amounts withheld pursuant to law are first deducted. However, federal law requires the deduction of all amounts actually "required by law to be withheld." For example, the amount actually withheld for federal income tax purposes from the debtor's earnings is deducted in determining his earnings subject to garnishment ("disposable earnings"). Thus, a debtor claiming a greater number of exemptions will have less withheld and therefore more subject to garnishment. This produces the anomalous situation that a debtor with a large family and greater needs may have more earnings garnished than a single debtor with the same gross income and with more limited needs. Moreover, the federal statute does not elaborate upon what are considered to be "amounts required by law to be withheld." To alleviate these problems, Section 723.050 ~~specifies~~ specifies the amounts to be deducted in determining the portion of the debtor's earnings which are subject to garnishment ("nonexempt earnings").

These items are related to the types of deductions made under federal law; i.e., they are based on the amounts withheld for federal and state income taxes, social security, and state disability insurance. See paragraphs (1)-(4) of subdivision (a). However, the amount deducted to determine nonexempt earnings is fixed according to a formula and is not necessarily the amount actually deducted from the debtor's earnings. One of the major benefits of this scheme is that it permits tables to be prepared which indicate the exact amount to be withheld from any given amount of earnings. Subdivision (d) directs the State Administrator to prepare tables which will be distributed to every employer required to withhold earnings. See Section 723.107. An employer therefore generally need not make any computations but will simply withhold pursuant to an earnings withholding order the amount listed in the tables provided him.

Both the federal scheme and Section 723.050 make some provisions for the effect of inflation. The federal statute, however, merely provides a floor based on the federal minimum wage. That is, the federal statute does not permit the creditor to reduce the debtor's weekly disposable earnings below an amount equal to 30 times the federal minimum wage. As the federal minimum wage is increased, this floor is increased accordingly. (Under the current federal law, if a debtor's disposable earnings are less than \$48 per week, no garnishment is permitted; if his disposable earnings are between \$48 and \$64, all his disposable earnings above \$48 are subject to garnishment; if his disposable earnings are more than \$64 a week, 25 percent of his disposable earnings are subject to garnishment.) This floor is not an exemption excluded from every debtor's earnings. In contrast, paragraph (5) of subdivision (a) provides a basic minimum exemption that is always deducted in determining nonexempt earnings.)

Moreover, subdivision (b) provides a formula that precludes withholding of less than \$10, thus providing additional protection to low income wage earners and saving employers the expense of withholding an amount less than \$10.

Where an earnings withholding order for support is in effect, the amount withheld pursuant to such order is deducted from the earnings of the employee before computing the amount to be withheld pursuant to any other order. See Sections 723.030 and 723.031 and Comments thereto. Suppose, for example, that an employee's earnings are \$200 and a withholding order for support is in effect which requires \$40 to be withheld. In determining the maximum amount which may be withheld pursuant to another earnings withholding order, the debtor is treated as having \$160 of earnings. The employer should refer to the appropriate withholding table and determine how much is to be withheld from \$160 of earnings and withhold that amount under the ordinary withholding order.

Code of Civil Procedure § 723.108 (added)

Comment: Section 723.108 directs every employer to fill out and mail an employer's return to every judgment creditor who serves an earnings withholding order. Such a return must be made even though the order is not given effect. See Comment to Section 723.023. If the order is not given effect, the employer must indicate the reason and must return the order. For the form of the return, see Section 723.127.

Code of Civil Procedure § 723.109 (added)

Comment. Section 723.109 precludes a creditor who has obtained an earnings withholding order which has gone into effect from serving another order during the 10-day period following the expiration of his prior order. The purpose of this limitation is to give other creditors a 10-day period during which they can serve their earnings withholding orders while the original creditor is precluded from competing with them. The original creditor may apply for the second earnings withholding order either before or after his prior order expires. But service of the second order, while the original order is in effect will be ineffective under Section 723.023, and service during the 10-day period following expiration of the original order is prohibited by Section 723.109. Even though a creditor violates the 10-day moratorium period, the employer may act pursuant to what has been served upon him. See Section 723.156. Of course, after the expiration of the 10-day period, the original creditor is treated like any other creditor.

on the
same employer

It should be noted that each agency of the state is considered a separate entity for the purposes of this chapter. See Section 723.011(e). Hence, even though one agency has been making collection, a second agency may serve an earnings withholding order within the 10-day period provided in this section.

Financial Code § 15406 (repealed)

Comment. Section 15406 is superseded by Sections 690.7, 690.7-1/4, and 690.7-1/2 of the Code of Civil Procedure. See those sections and Comments thereto.

Labor Code § 300 (amended)

Comment. Section 300 is amended to make the section consistent with the Employees' Earnings Protection Law (CODE CIV. PROC. § 723.010 *et seq.*).

Subdivision (a). Subdivision (a) simply makes clear that the shortened phrase "assignment of wages" continues prior law as to the kind of instrument dealt with in this section.

Subdivision (b). Paragraphs (1) through (6) of subdivision (b) continue generally without substantive change provisions formerly contained in Section 300. A sentence has been added to paragraph (2) to provide a limited exception from the requirement of spousal consent. Paragraph (7) continues without substantive change a provision formerly contained in Section 300 except that the former reference to the attachment

or levy on execution against wages or salary is replaced by a reference to an earnings withholding order to conform to the procedure provided by the Employees' Earnings Protection Law, and the former reference to priority of wage assignments has been superseded by paragraph (7) and subdivision (c).

Subdivision (c). Subdivision (c) clarifies the relationship between a valid wage assignment and a subsequently served earnings withholding order. Where a wage assignment is in effect and an earnings withholding order is served, the employer shall not withhold pursuant to the order until after the end of the pay period during which the order was served. Thus, the wage assignment is, in effect, given an exclusive preference for that pay period and the debtor is given an opportunity to put his affairs in order. Such action may include revoking the wage assignment as to unearned wages pursuant to subdivision (f). Even where the debtor revokes the wage assignment prior to the end of the pay period (but after receipt of an earnings withholding order), the operation of the order is suspended until after the current pay period. Hence, the debtor is afforded an opportunity to retain his unearned wages for the current pay period only. After such moratorium, the earnings withholding order has a priority over the assignment if the latter remains in effect. The unlimited preference formerly given to an assignment of unearned wages or salary is not continued because this preference would permit a judgment debtor to give preference to one creditor and to defeat the claims of other creditors who seek to collect on their judgments under the Employees' Earnings Protection Law.

Subdivision (d). See the Comment to subdivision (f).

Subdivision (e). Subdivision (e) continues the substance of a provision formerly found in Section 300 and extends the scope of the former provision to cover the statement provided for in paragraph (2) of subdivision (b).

Subdivision (f). The first sentence of subdivision (f), which makes an assignment of unearned wages or salary revocable at any time by the maker thereof, replaces the former provision of Section 300 which invalidated an assignment of wages or salary unless such wages were earned or the assignment was for necessities or for support. The former provision also restricted the amount of unearned wages or salary that could be assigned. The former 50-percent limitation on the amount of wages or salary that can be assigned has been continued in subdivision (d). The former 25-percent "hardship" limitation has not been continued because subdivision (f) permits the person making the assignment of wages or salary to be earned to revoke the assignment at any time. Thus, where an assignment becomes

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too onerous, especially after service of an earnings withholding order, the assignment may be revoked. The delayed preference given the earnings withholding order under subdivision (c) will generally require persons having judgments, including support orders, to use the procedure provided in the Employees' Earnings Protection Law—rather than Section 300—to enforce their judgments; but it avoids conflict between wage assignments and orders issued pursuant to the Employees' Earnings Protection Law.

Subdivisions (g) and (h). Subdivisions (g) and (h) continue without substantive change provisions formerly contained in Section 300. ~~It should be noted that the inapplicability of Section 300 to the deductions referred to in subdivision (h) means not only that compliance with the formalities and limitations provided in Section 300 is not required but also that Section 300 provides no special preferences for such deductions.~~ It should be noted that the inapplicability of Section 300 to the deductions referred to in subdivision (h) means not only that compliance with the formalities and limitations provided in Section 300 is not required but also that Section 300 provides no special preferences for such deductions.

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

Report on Non-Commission Activities

Professor Warren reported that a committee in Los Angeles made up of persons from the financial lawyers group and the county bar association is studying both claim and delivery and prejudgment attachment. The committee is split up into two groups. One group is to work on an attachment statute, and the other group is to work on the claim and delivery statute and revision of the Uniform Commercial Code. (It is believed that the default provisions under the UCC may soon be ruled unconstitutional.) Of the two topics, the committee believes that the need for a claim and delivery statute is more urgent than the need for an attachment statute.

The attachment group probably will work with Harold Marsh on his attachment statute and will concentrate on a simple commercial attachment statute. For the present, nothing will be done about consumer attachment. The problems presented by the small "mom and pop" business are so complicated that an attempt will be made to exclude such businesses from attachment. The Los Angeles group believes that an attempt to attach in such types of cases would have no chance for enactment this session. The Commission determined that it would not review or comment upon the Marsh draft statute but would concentrate its efforts on its own recommendation.

Commission Action

The Commission considered Memoranda 72-9 and 72-10 and portions of the draft statute attached to the latter memorandum.

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Schedule

The Commission determined that it was not feasible to prepare a satisfactory recommendation in time for submission at the 1972 legislative session. The Commission did, however, determine that the topic is deserving of a high priority and that an effort should be made to prepare a recommendation relating to prejudgment attachment to submit at the 1973 session.

Draft Statute

The Commission did not attempt to draft specific provisions but directed the staff to redraft the proposed statute in conformance with the following directions and taking into consideration the following suggestions.

Definitions. A single term should be substituted for the phrase "judge, justice, or commissioner or referee appointed by the court." Possible terms include: "judicial officer," "magistrate," and "justice."

Types of actions in which remedy is available. An action for the enforcement of a support obligation should be included among the actions in which an attachment may be available. The Comments should make clear that an action on a lease of real property (e.g., unlawful detainer) should be treated as an action on a contract for the purposes of this chapter. Consideration of the provisions relating to jurisdictional attachment was deferred for the time being, and the staff was directed to keep abreast of further developments in Ortleb v. Superior Court and Property Research Fin. Corp. v. Superior Court. It was noted, however, that two possibly distinct situations are involved here: one, where there is no threat that the property will be removed but attachment is the sole basis for jurisdiction; the other,

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where there is a threat of removal or where the defendant has absconded or concealed himself. Problems in the latter area were discussed but without further resolution.

It was decided that the filing of a bulk sales notice should not be a separate basis for an attachment but should perhaps be a ground for temporary relief prior to the defendant's opportunity for a hearing. The Commission did not revise the phrase "reasonably ascertainable" in proposed Section 537.02(a)(1) but directed the staff to review in this regard the present California law in breach of contract cases.

Undertakings. The staff was directed to reorganize the statute so that the provisions relating to undertakings and exemptions follow the provisions relating to the preliminary issuance procedures. The possibility of incorporating by reference the present provisions dealing with undertakings generally, including undertakings by individual sureties, should be considered. The area of liability on the undertaking must be thoroughly examined with a view towards providing adequate protection for both parties.

Exemptions. As noted above, these provisions should be relocated in the statutory scheme. It was suggested that alimony and support payments should be protected in a manner similar to earnings. Some limit on the amount of paid earnings consistent with constitutional and federal requirements should be considered. A bank account exemption in a fixed, nonaggregate amount should be attempted. Tools used by an individual should be treated similarly to household furnishings.

The problem of applying exemptions to an individual or individuals doing business in a corporate or partnership form was discussed. It was

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suggested that limiting the applicable exemptions to the equivalent of a sole proprietorship would not be consistent with Randone. The staff was directed to continue to work on standards based on the number of persons involved in the business, the quantum of business, and the degree to which the defendant claiming the exemption personally participates ("works with the tools"). A simple claim of exemption procedure should be provided which depends for the most part on affidavits and counteraffidavits and avoids where possible hearings and appearances by the parties.

The Commission deferred consideration of the issue of how sweeping may be the exemptions provided here, i.e., can a defendant prior to a decision on the actual, as opposed to probable, validity of a claim ever be forced out of business?

It was suggested that the exemption sections should basically be statements of substantive principles, that the defendant should generally be required to raise the exemption issue, but that the plaintiff should carry the ultimate burden of proving the exemption inapplicable.

Hearing procedures. The staff was directed to redraft the hearing procedures with the following guidelines. Alternate approaches should be provided by which the plaintiff may choose whether or not he wishes to describe prior to the hearing the property sought to be attached. If a description is furnished, the defendant should be required to claim any exemptions at an early stage. In any event, before any relief may be ordered, the plaintiff should be required to tell the court what property is to be affected and the defendant must be entitled to prompt relief from the order where an exemption is available.

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It may be possible to pattern the hearing procedures on the general procedures for a summary judgment. However, the test as to whether relief may be granted should not be as strict as the standard for whether a summary judgment may be granted. The procedures should encourage the use of affidavits and discourage the taking of oral testimony and the need for extensive discovery.

The staff was directed to examine the law in other areas (including Corporations Code Section 834 (share holder's derivative suits)) and in other states in an attempt to provide a suitable test for the "probable validity" issue. It was noted that the more strict the test, the more the defendant would be encouraged to contest the matter at this preliminary stage where it would seem to be to the benefit of both the parties and the judicial system that contests be kept to a minimum. The latter could perhaps be accomplished by lessening the impact of the levy by controlling both the method of levy and the property subject to levy. Nevertheless, it did not seem that a defendant should be subject to an attachment of any nature where he could establish that he had a good defense to the action.

Ex parte relief. These sections were not considered at length, but it was suggested that relief should only be granted ex parte where a showing was made that it was really necessary. Possibly a showing of "irreparable damage" or a danger of dissipation or concealment of assets by the defendant should be required. It was suggested that appropriate language from the receivership provisions could be adopted here.

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STUDY 39.80 - ATTACHMENT, GARNISHMENT, EXECUTION
(CLAIM AND DELIVERY STATUTE)

The Commission considered Memorandum 72-11 and the First Supplement to Memorandum 72-11. It was noted that the Commission does not now have authority to study the claim and delivery statute, and it was determined not to request authority to study this subject.

If the Legislature directs the Commission to study the topic and determines that the topic is one that should be given priority over condemnation and other topics, the Commission would, of course, follow such directions. The Commission declined to submit any analysis or comments on proposed legislation on this subject at the 1972 session since the Commission does not have a background study on the subject and does not consider itself expert on the subject.

It was further noted that the study of claim and delivery is directly related to the study of nonjudicial repossession. A study should cover both of these areas. Moreover, the courts have not yet clearly stated the constitutional requirements for repossession of property. Developments in the courts during the next several years should shed more light on the constitutional requirements.

APPROVED

Date

Chairman

Executive Secretary