

February 29, 1972

Time

March 9 - 7:00 p.m. - 10:00 p.m.
March 10 - 9:00 a.m. - 5:00 p.m.
March 11 - 9:00 a.m. - 1:00 p.m.

Place

State Bar Building
1230 West Third Street
Los Angeles 90017

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

March 9-11, 1972

1. Minutes of February 10-12, 1972, Meeting (sent 2/23/72)
2. Administrative Matters

Schedule for Future Meetings

Memorandum 72-12 (sent 2/15/72)

Oral Report on Status of 1972 Legislative Program

3. Study 39 - Attachment, Garnishment, Execution

Study 39.30 - Employees' Earnings Protection Law

Memorandum 72-15 (to be sent)

Study 39.70 - Prejudgment Attachment

(1) Generally

Memorandum 72-16 (sent 2/25/72)

(2) Determination of Probable Validity

Memorandum 72-18 (sent 2/28/72)

First Supplement to Memorandum 72-18 (to be sent)

(3) Issuance of Writ

Memorandum 72-20 (enclosed)

(4) Levy Procedure

Memorandum 72-19 (to be sent)

(5) Liability for Wrongful Attachment

Memorandum 72-21 (to be sent)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

MARCH 9 AND 10, 1972

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on March 9 and 10, 1972.

Present: John D. Miller, Chairman
John J. Balluff
Noble K. Gregory
Thomas E. Stanton, Jr.
Howard R. Williams

Absent: Marc W. Sandstrom, Vice Chairman
Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
John N. McLaurin
George H. Murphy, ex officio

Messrs. John H. DeMouly and Jack I. Horton, 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.

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

Thursday, March 9

John E. Balluff, Judicial Council, Sacramento
E. E. Barlough, California Association of Collectors, Sacramento
Mark W. Jordan, Attorney General, Los Angeles
Emil A. Markovitz, Creditor's Service, Los Angeles
Richard D. Peters, Franchise Tax Board, Sacramento
James T. Philbin, Franchise Tax Board, Sacramento

Friday, March 10

Ronald P. Denitz, Tishman Realty & Construction Co., Los Angeles
Glen Woodmansee, Orange County Legal Aid Society, Anaheim

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ADMINISTRATIVE MATTERS

Minutes

The Minutes of the February 10-12, 1972, meeting were approved as submitted.

Change in meeting place for March 10. Because the construction noise made it impossible to conduct the meeting at the State Bar Building on March 10 (where originally scheduled), the meeting place was changed to the California Club.

Cancellation of meeting scheduled for March 11. The meeting originally scheduled for March 11 was cancelled because a number of the members of the Commission were unable to attend the meeting on that date.

Schedule for Future Meetings

The following schedule for future meetings was adopted:

April

April 13 - 7:00 p.m. - 10:00 p.m.
April 14 - 9:00 a.m. - 5:00 p.m.
April 15 - 9:00 a.m. - 1:00 p.m.

State Bar Building
601 McAllister Street
San Francisco 94102

May

May 12 - 9:00 a.m. - 5:00 p.m.
May 13 - 9:00 a.m. - 1:00 p.m.

Sacramento

June

June 8 - 7:00 p.m. - 10:00 p.m.
June 9 - 9:00 a.m. - 5:00 p.m.
June 10 - 9:00 a.m. - 1:00 p.m.

State Bar Building
1230 West Third Street
Los Angeles 90017

July

July 13 - 7:00 p.m. - 10:00 p.m.
July 14 - 9:00 a.m. - 5:00 p.m.
July 15 - 9:00 a.m. - 1:00 p.m.

State Bar Building
601 McAllister Street
San Francisco 94102

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August

No meeting

September

September 7 - 7:00 p.m. - 10:00 p.m.
September 8 - 9:00 a.m. - 5:00 p.m.
September 9 - 9:00 a.m. - 1:00 p.m.

State Bar Building
1230 West Third Street
Los Angeles 90017

October

October 6 - 9:30 a.m. - 5:00 p.m.
October 7 - 9:00 a.m. - 1:00 p.m.

Vacation Village Hotel
Mission Bay
San Diego 92109

Report on 1972 Legislative Program

The Executive Secretary gave an oral report on the 1972 legislative program. The following is a summary of his report.

Budget. The Commission's budget has been approved as budgeted by sub-committees of the Senate Finance Committee and Assembly Ways and Means Committee.

Senate Bill 88 (Employees' Earnings Protection Law). Originally scheduled for hearing on March 14, Senate Bill 88 has been put over for hearing until April 4.

Assembly Bill 106 (technical pleading revision). Assembly Bill 106 was reported "do pass" by the Assembly Judiciary Committee and will be put on the consent calendar.

SCR 5 and 6 (authority to study topics). SCR 5 and 6 were reported "do pass" by the Senate Judiciary Committee and will be rereferred to the Senate Finance Committee.

Authority to Study Claim and Delivery Statute

The Executive Secretary was directed to write to Assemblyman Warren urging that the resolution directing the Commission to study the claim and delivery

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statute be adopted before June 1, 1972, if the Commission is to present a recommendation on this subject to the 1974 Legislature. Also, it was suggested that the resolution might be expanded to include study of "self-help repossession" (now before the U.S. Supreme Court), Commercial Code repossession provisions, confession of judgment procedures, and abuse of default procedures.

We expect that some funds will be available during the current fiscal year to finance a background study on repossession of property (since the Commission will have an unfilled legal staff position until June 1972), and it is unlikely that there would be funds to finance the study during the fiscal year that begins on July 1, 1972.

Uniform Eminent Domain Act

The Executive Secretary reported that he had been invited to serve as a member of an advisory committee to the committee drafting a Uniform Eminent Domain Act for the National Conference of Uniform State Laws.

A motion was unanimously adopted that the Executive Secretary cooperate with the Uniform Laws Commission, and the Commission authorized the Executive Secretary, with the approval of the Chairman, to serve on the advisory committee if the Executive Secretary finds that this would be possible without a great commitment of time and money and believes that the advantages to the Commission would outweigh the cost and time involved. The Executive Secretary is to check further on the time that would be involved and value of spending time on that activity as distinguished from spending it on Commission work. For example, would any valuable materials be received as a result of serving on the advisory committee and would the information obtained be worth the time and money that would be expended in serving on the committee? Would the critical review of the Uniform Laws materials be of sufficient value to justify the time and money to be expended?

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Distribution of Mimeographed Tentative Draft of Portions of Eminent Domain Statute

The Commission tentatively plans to publish a report containing the tentatively approved provisions of the right to take portions of the eminent domain statute early in 1973. The Executive Secretary asked for instructions on whether mimeographed drafts of the eminent domain statute should be distributed to interested persons. He noted that it is costly to distribute the material and that only a very limited number of copies are produced. Copies have been provided to members of the Commission, the Commission's consultants, and members of the State Bar Committee and copies will be provided to persons who regularly attend Commission meetings.

The Commission noted that the statutory provisions are revised at almost every meeting and that it would not be desirable in view of the limited funds available to the Commission to make a more general distribution of the mimeographed version of the statute. Persons requesting copies should be advised that the Commission plans to publish the tentatively approved provisions and solicit comments on them before it determines the content of its recommendation to the Legislature.

Priorities and Scheduling of Topics

The Commission considered Memorandum 72-17 and the First Supplement to Memorandum 72-17.

One-half day at each meeting to be devoted to condemnation. The Commission determined that one-half day (at least) should be devoted at each meeting to the subject of condemnation. Despite the priority that must be given to prejudgment attachment, the Commission concluded that some progress should be made on the condemnation study at each meeting so that the members of the Commission will not become stale on the subject.

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Priority to be given to study of problems arising when tenant abandons property on leased premises. Mr. Ronald P. Denitz, Assistant General Counsel, Tishman Realty & Construction Company, made an oral presentation concerning the need to resolve the problems arising when a tenant leaves property on the leased premises after the term of the lease expires or after the lease is terminated. The Commission directed the staff to send Professor Friedenthal's study out to the Commission members as soon as it is received and to place this topic on the agenda for the next meeting thereafter so that the Commission can determine how a recommendation on the matter can expeditiously be prepared.

Research consultants. As soon as it is possible to determine the amount of funds that appear to be available for research consultants with some degree of certainty, the staff should present for Commission consideration its suggestions as to topics on which a research consultant should be obtained, its suggestions for consultants on those topics, and any related matters that it believes should be considered in connection with those decisions. The Chairman suggested that the staff not ignore the water damage study and the custody study in considering topics on which a research consultant might be obtained.

Tentative five-year schedule. The Commission approved the following as a tentative schedule for the next five years.

APRIL 1972--JANUARY 1973

Recommendations to 1973 Session (ready to print October 1, 1972)

Prejudgment Attachment
Liquidated Damages
Evidence Code revisions (Justice Kaus)

Other Work

Tentative Recommendation on Condemnation (The Right to Take)(ready to print January 31, 1973)

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FEBRUARY 1973--JANUARY 1974

Recommendations to 1974 Session (ready to print October 1, 1973)

Claim and Delivery Statute (assuming that Legislature will direct this be given priority)
Procedural Aspects of Inverse Condemnation (Van Alstyne study in progress)
Right of Nonresident Aliens to Inherit
Lease Law--Tenant's Abandoned Property

Other Work

Tentative Recommendations on Condemnation:

Compensation and Measure of Damages
Apportionment of the Award
Procedural Aspects

FEBRUARY 1974--JANUARY 1975

Recommendations to 1975 Session (ready to print October 1, 1974)

Comprehensive Eminent Domain Statute
Oral Modification of Written Contract

FEBRUARY 1975--January 1976

Recommendations to 1976 Session (ready to print October 1, 1975)

Various aspects of custody of children, adoption, guardianship, freedom from parental custody and control, and related matters
Partition Procedures

Other Work

Major portion of time will be devoted to overall revision of law relating to attachment, garnishment, and exemptions

FEBRUARY 1976--JANUARY 1977

Recommendations to 1977 Session (ready to print October 1, 1976)

Comprehensive Statute on Attachment, Garnishment, Execution
Confession of Judgment Procedures; Abuse of Default Procedures

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Bills that might be submitted during next few years. If possible, bills to deal with narrow problems of attachment, garnishment, and execution might be submitted during the next few years if the problems are ones that can be solved on a piecemeal basis. Recommendations on inverse condemnation (arising out of Van Alstyne's study now in progress) might also be submitted on a piecemeal basis. Portions of the expanded custody study might be submitted on a piecemeal basis. To the extent possible, consideration should be given to submitting reforms on a piecemeal basis on other topics so that there will be a continuing flow of recommendations to the Legislature.

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STUDY 39.30 - ATTACHMENT, GARNISHMENT, EXECUTION (EMPLOYEES'
EARNINGS PROTECTION LAW--SB 88)

The Commission considered Memorandum 72-15, SB 88 as amended, the First Supplement to Memorandum 72-15, and the draft of the report revising the Comments to reflect changes made by amendment to SB 88 (pages 21-43 of Minutes of February 1972 meeting).

Action at federal level. The Executive Secretary reported that he had received a letter from the Federal Administrator indicating that a representative of the federal agency would be present at the Commission's April meeting.

Compromise with creditors. The Executive Secretary reported that representatives of creditors are concerned about various provisions of SB 88. The major concern is the \$500 exemption for deposit accounts. The representatives of creditors indicate that they can live with the bill if this exemption is reduced to \$100 and a conforming revision is made in Section 690.7-1/4.

After considerable discussion, the Commission agreed to recommend to Senator Song that he amend the bill as suggested by representatives of the creditors. This compromise was subject to review if it is later determined that the federal agency will not approve the state exemption because of the method of treating deposit accounts. However, subject to this qualification, the Commission will see that the bill is amended according to the compromise agreement and will make every effort to have the bill enacted as thus amended.

The precise amendments to Sections 690.7 and 690.7-1/4 are set out infra in these minutes.

Administration of statute. The Commission made a careful review of the duties imposed on the Director of Industrial Relations and on the Judicial Council. After considerable discussion, it was concluded that the bill should

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be revised to impose all of its administration on the Judicial Council rather than dividing the duties between the Director of Industrial Relations and the Judicial Council. The bill is to be amended to reflect this decision.

Not only should there be a significant savings in administrative costs (since only one agency will need to become expert on the statute) but also only one agency will need to be contacted concerning the construction and interpretation of the statute.

Operative date. The Commission determined that the operative date of the bill should be delayed until January 1, 1974. This delay is to permit the printing of the necessary forms using the normal bid requirement and to avoid the additional expense that will result if emergency printing procedures are used by the county clerks.

Transitional provisions. The Commission determined that a continuing levy made under the law in effect prior to the time SB 88 becomes operative should continue until the 90-day period for such levy expires. Consistent with this general policy decision, the staff with the cooperation of the Judicial Council is to draft any needed transitional provisions, possibly by providing the Judicial Council with authority to cover any transitional problems by rules adopted by the Judicial Council.

Bank accounts. The Commission asked that the staff (Mr. Sterling) prepare an analysis of the effect, if any, the bank account exemption sections would have on the right of a creditor to resort to funds under a spendthrift trust. Consideration should be given to whether the policy reflected in the bank account exemption provisions would be applied by analogy in the spendthrift trust field.

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Serve, mail, notify, send, and provide. The words "serve," "mail," "notify," "send," and "provide" are used in various provisions of the statute. The Commission determined that the statute should be examined to provide for uniform terminology where other than service is required to the extent different terminology is used but the same meaning is intended.

Service of copy of earnings withholding order rather than original order. The Commission agreed that a copy of the earnings withholding order--rather than the original order which would remain in the court file--would be served on the employer. If necessary, this should be made clear in the amendments drafted to SB 88.

Time when service effective. The Comment to Section 723.101 should indicate that special provisions are included in Sections 723.022(e)(withholding period) and 723.023(b)(priority of orders).

Withholding order for taxes. The Commission considered various suggested revisions in connection with withholding orders for taxes. The substance of the revisions made as a result of the Commission's consideration of these suggestions is set out infra. The Commission determined not to authorize the issuance of a withholding order for taxes where the taxpayer had been given no notice and opportunity for a hearing on the tax liability. It was generally agreed by the members of the Commission and the Commission's staff that such a procedure would violate due process requirements of the United States and California Constitutions. The Commission discussed also the request that withholding orders for taxes be given immediate effect (rather than deferring their effect for five days as with other orders) in certain circumstances. The Commission did not make any revision in the bill in response to this request and

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requested the taxing authorities to draft language they considered appropriate to provide for immediate effect of the order in carefully described circumstances. Any such draft will be considered at the Commission's April meeting.

Amount to be withheld pursuant to earnings withholding order for taxes.

It was agreed that the withholding table for tax withholding orders should permit withholding of \$10 when nonexempt earnings are \$20 or more but less than \$30. This in effect would permit withholding of \$10 in a case where nothing would be withheld for an ordinary creditor because the earnings were not sufficient (\$98 or more) to permit withholding. Under the special provision, \$10 would be withheld on a tax order if the earnings were \$88.

Comment to Section 723.150. The Comment to Section 723.150, formerly Section 723.151(b), should refer to commissions, bonuses, retroactive pay increases, vacation benefits, prepaid earnings, advances, draw account payments, and similar prepaid or deferred forms of earnings.

Credit union exemption. The Commission considered a letter from the California Credit Union League objecting to the repeal of Section 15406 of the Financial Code. After discussion, the Commission decided not to change its recommendation that Section 15406 be repealed and be replaced by the exemption for deposit accounts (which includes credit union shares) provided by proposed Sections 690.7, 690.7-1/4, and 690.7-1/2. Under the sections proposed by the Commission, the exemption is related to the individual and his needs rather than the existing system of a variable exemption, depending on the type of institution in which his money may be deposited.

Comment to Penal Code Section 1208. The Comment to Section 1208 should indicate that the protection against garnishment continues so long as the earnings are paid over to the administrator pursuant to his request.

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Amendments to SB 88. The substance of the following amendments to Senate Bill 88 (as amended in Senate February 29, 1972) was adopted.

AMENDMENTS TO SENATE BILL 88 AS AMENDED IN SENATE FEBRUARY 29, 1972

AMENDMENT 1

On page 8, between lines 11 and 12, insert:

(d) For the purposes of this section, a deposit account is "beneficially owned" by the debtor or his spouse if the account is subject to withdrawal by the debtor or his spouse or both for the use of the debtor or his spouse or both.

AMENDMENT 2

On page 8, line 12, strike out "(d)" and insert:

(e)

AMENDMENT 3

On page 8, line 12, strike out "five" and insert:

one

AMENDMENT 4

On page 8, line 13, strike out "(\$500)" and insert:

(\$100)

AMENDMENT 5

On page 8, line 13, before "owned" insert:

beneficially

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AMENDMENT 6

On page 8, line 17, before "owned" insert:
beneficially

AMENDMENT 7

On page 8, line 19, before "owned" insert:
beneficially

AMENDMENT 8

On page 8, line 24, before "owned" insert:
beneficially

AMENDMENT 9

On page 8, line 28, strike out "(e)" and insert:
(f)

AMENDMENT 10

On page 8, line 36, before "owned" insert:
beneficially

AMENDMENT 11

On page 8, line 40, strike out "(f)" and insert:
(g)

AMENDMENT 12

On page 9, line 3, strike out "paragraph (2)" and strike out all of
line 4 and insert:

subdivision (b) of Section 723.070 or amounts due to the Department of Human
Resources Development under Sections 1375 to 1380, inclusive, Sections 2735 to
2741, inclusive, or Section 3751 of the Unemployment Insurance Code.

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AMENDMENT 13

On page 9, line 5, strike out "(g)" and insert:

(h)

AMENDMENT 14

On page 9, line 14, strike out "This standard recognizes that"

AMENDMENT 15

On page 9, strike out line 15

AMENDMENT 16

On page 9, line 16, strike out "adequate except in rare and unusual cases." and insert:

An exemption shall be allowed under this section only to the extent that the earnings and other current income of the debtor and his spouse are not adequate to provide the amount essential for the support of the debtor or his family.

AMENDMENT 17

On page 10, line 1, strike out "in" and insert:

is

AMENDMENT 18

On page 10, line 3, strike out "paragraph (2)" and strike out all of line 4 and insert:

subdivision (b) of Section 723.070.

AMENDMENT 19

On page 10, line 35, strike out "690.60" and insert:

690.50

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AMENDMENT 20

On page 19, line 22, before "employee" insert:
officer or

AMENDMENT 21

On page 19, line 23, before "employee" insert:
officer or

AMENDMENT 22

On page 19, between lines 24 and 25, insert:
(h) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any overpayment of tax, penalty or interest, or interest allowable with respect to such overpayment, under Part 10 (commencing with Section 17001), or Part 11 (commencing with Section 23001), of Division 2 of the Revenue and Taxation Code.

AMENDMENT 23

On page 20, line 1, strike out "an" and insert:
a public officer and any

AMENDMENT 24

On page 20, strike out lines 17 and 18

AMENDMENT 25

On page 22, line 29, strike out "35" and insert:
10

AMENDMENT 26

On page 22, line 32, after "mail" insert:
, postage prepaid

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AMENDMENT 27

On page 22, line 39, after "employer" insert:
by first-class mail, postage prepaid

AMENDMENT 28

On page 23, line 23, strike out "who receives" and insert:
upon whom

AMENDMENT 29

On page 23, line 24, after "support" insert:
is served

AMENDMENT 30

On page 23, strike out lines 37 through 40, inclusive.

AMENDMENT 31

On page 24, strike out lines 1 through 40, inclusive.

AMENDMENT 32

On page 25, strike out lines 1 through 40, inclusive.

AMENDMENT 33

On page 26, strike out lines 1, 2, and 3.

AMENDMENT 34

On page 27, line 23, strike out "723.031" and insert:
723.074, 723.075, 723.076

AMENDMENT 35

On page 28, line 1, strike out "State Administrator" and insert:
Judicial Council

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AMENDMENT 36

On page 28, line 2, strike out "regulation" and insert:

rule

AMENDMENT 37

On page 28, line 6, strike out "State Administrator" and insert:

Judicial Council

AMENDMENT 38

On page 28, line 11, strike out "State Administrator" and insert:

Judicial Council

AMENDMENT 39

On page 28, between lines 23 and 24, insert:

Article 4. Earnings Withholding Orders

for Taxes

723.070. As used in this article:

(a) "State" means the State of California and includes any officer, department, board, or agency thereof.

(b) "State tax liability" means a liability, including any penalties and accrued interest and costs, for which the state would be authorized to issue (1) a warrant pursuant to Section 1785 of the Unemployment Insurance Code or Section 6776, 7881, 9001, 10111, 16071, 18906, 26191, 30341, or 32365 of the Revenue and Taxation Code or (2) a notice of levy pursuant to Section 1755 of the Unemployment Insurance Code or (3) a notice or order to withhold pursuant to Section 6702, 7851, 8952, 10051, 11451, 16101, 18817, 26132, 30311, or 32381 of the Revenue and Taxation Code.

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723.071. No method of collection of an unpaid state tax liability from the earnings of an employee may be used by the state except as provided in this chapter.

723.072. (a) A "withholding order for taxes" is one issued pursuant to this article and shall be denoted as such on its face.

(b) A withholding order for taxes may only be issued where:

(1) The existence of the state tax liability appears on the face of the taxpayer's return, including a case where such tax liability is disclosed from the taxpayer's return after errors in mathematical computations in the return have been corrected; or

(2) The state tax liability has been assessed or determined, as provided in the Revenue and Taxation Code or Unemployment Insurance Code, and the taxpayer had notice of the proposed assessment or determination and had available an opportunity to have the proposed assessment or determination reviewed by appropriate administrative procedures, whether or not he took advantage of that opportunity.

(c) In any case where a state tax liability has been assessed or determined prior to January 1, 1974, and the state determines that the requirements of subdivision (b) may not have been satisfied, the state may send a "Notice of Proposed Issuance of Withholding Order for Taxes" to the taxpayer at his last-known address by first-class mail, postage prepaid. The notice shall advise the taxpayer that he may have the assessment or determination reviewed by appropriate administrative procedures and how he may obtain such a review. If the taxpayer is sent such a notice and requests such a review within 15 days from the date the notice was mailed to him, the state shall provide appropriate administrative procedures for review of the assessment or

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determination and shall not issue the withholding order for taxes until the administrative review procedure is completed. If the taxpayer is sent such a notice and does not request such a review within 15 days from the date the notice was mailed to him, the state may issue the withholding order for taxes.

(d) A withholding order for taxes may be issued whether or not the state tax liability has been reduced to judgment.

723.073. Except as otherwise provided in this article, the provisions of this chapter govern the procedures and proceedings concerning a withholding order for taxes.

723.074. (a) The state may itself issue a withholding order for taxes under this section to collect a state tax liability. The order shall specify the maximum amount that may be withheld pursuant to the order (unpaid tax liability including any penalties, accrued interest, and costs).

(b) The amount to be withheld by the employer pursuant to an order issued under this section shall be the amount required to be withheld pursuant to subdivision (c) or such lesser amount as is specified in the order.

(c) Unless a lesser amount is specified in the order, the amount to be withheld pursuant to an order issued under this section is two times the maximum amount that is to be withheld under Section 723.050, except that the state may require that ten dollars (\$10) be withheld if the taxpayer's nonexempt earnings (as defined in Section 723.050) are twenty dollars (\$20) or more but less than thirty dollars (\$30). The state shall prepare withholding tables for determining the amount to be withheld from the earnings of employees for representative pay periods pursuant to orders issued under this section. The tables may prescribe the amounts to be withheld according to

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reasonable earnings brackets. The tables shall be used to determine the amount to be withheld in all cases where the tables permit computation of the amount to be withheld.

723.075. (a) This section applies only to a withholding order for taxes issued under Section 723.074.

(b) At the time of issuance of a withholding order for taxes, the state shall serve upon the taxpayer both of the following:

- (1) A copy of the order.
- (2) A notice informing the taxpayer of the effect of the order and of his right to review and modification of the order.

(c) The state may provide for an administrative hearing to reconsider or modify the amount to be withheld pursuant to the withholding order for taxes, and the taxpayer may request such a hearing at any time after service of the order. If the taxpayer requests a hearing, the hearing shall be provided, and the matter shall be determined, within 15 days after the request is received by the state.

(d) After the state has made its determination under subdivision (c), the taxpayer may apply in the manner provided in Section 723.105 to a court of record in his county of residence for a hearing to claim the exemption provided by Section 723.051. No fee shall be charged for filing such application. After hearing, the court may modify the withholding order for taxes previously issued, but in no event shall the amount required to be withheld be less than that permitted to be withheld under Section 723.050.

723.076. (a) A withholding order for taxes may be issued pursuant to this section that requires the employer of the taxpayer to withhold an

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amount in excess of the amount that may be required to be withheld pursuant to an order issued under Section 723.074.

(b) The state may, at any time, apply to a court of record in the county where the taxpayer was last known to reside for the issuance of a withholding order for taxes under this section to collect a state tax liability.

(c) The application for the order shall include an affidavit stating that the state has served upon the taxpayer both of the following:

- (1) A copy of the application.
- (2) A notice informing the taxpayer of the purpose of the application and his right to appear in regard to the application.

(d) Upon the filing of the application, the court shall immediately set the matter for hearing and the court clerk shall send a notice of the time and place of the hearing by first-class mail, postage prepaid, to the state and the taxpayer. The notice shall be deposited in the mail at least 10 days before the day set for the hearing.

(e) After hearing, the court shall issue a withholding order for taxes which shall require the taxpayer's employer to withhold and pay over all earnings of the taxpayer other than that amount which the taxpayer proves is exempt under Section 723.051, but in no event shall the amount to be withheld be less than that permitted to be withheld under Section 723.050.

723.077. (a) Subject to subdivision (b), an employer upon whom a withholding order for taxes is served shall withhold and pay over earnings of the employee pursuant to such order and shall cease to withhold earnings pursuant to any prior order except a withholding order for support. When an employer is required to cease withholding earnings pursuant to a prior order,

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he shall notify the judgment creditor who obtained the prior order that a supervening withholding order for taxes is in effect.

(b) An employer shall not withhold earnings of an employee pursuant to a withholding order for taxes if a prior withholding order for taxes is in effect, and, in such case, the subsequent withholding order for taxes is ineffective.

723.078. An employer shall continue to withhold pursuant to a withholding order for taxes until the amount specified in the order has been paid in full. The state shall promptly serve on the employer a notice terminating the withholding order for taxes if the state tax liability for which the withholding order for taxes was issued is satisfied before the employer has withheld the full amount specified in the order, and the employer shall discontinue withholding in compliance with such notice.

723.079. No receipt need be sent to the taxpayer for amounts paid over to the state pursuant to a withholding order for taxes unless the taxpayer has requested in writing that he be sent receipts for such amounts.

723.080. Service of a withholding order for taxes or of any other notice or document required under this chapter in connection with a withholding order for taxes may be made by first-class mail, postage prepaid. Service of a withholding order for taxes is complete when it is received by the employer. Service of, or the providing of, any other notice or document required to be served or provided under this chapter in connection with a withholding order for taxes is complete when the notice or document is deposited in the mail addressed to the last known address of the person on whom it is served or to whom it is to be provided.

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723.081. Except for the forms referred to in Section 723.076, the state shall prescribe the form of any order, notice, or other document required by this chapter in connection with a withholding order for taxes notwithstanding Sections 723.100 and 723.120, and any form so prescribed is deemed to comply with this chapter.

723.082. No review of the taxpayer's tax liability shall be permitted in any court proceedings under this article.

AMENDMENT 40

On page 28, line 25, strike out "4" and insert:

5

AMENDMENT 41

On page 28, strike out lines 28, 29, and 30 and insert:

723.100. Notwithstanding any other provision of law, the Judicial Council may provide by rule for the practice and procedure in proceedings under this chapter.

AMENDMENT 42

On page 29, line 29, strike out "mail" and insert:

send

AMENDMENT 43

On page 29, line 29, after "debtor" insert:

by first-class mail, postage prepaid

AMENDMENT 44

On page 30, line 19, strike out "notify", strike out all of line 20, and in line 21, strike out "10 days before the hearing of its time and place" and insert:

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send a notice of the time and place of the hearing to the judgment debtor and judgment creditor by first-class mail, postage prepaid,

AMENDMENT 45

On page 30, line 24, after the period insert:
The notice shall be deposited in the mail at least 10 days before the day set for the hearing.

AMENDMENT 46

On page 30, strike out lines 27, 28, and 29 and insert:
shall promptly send a copy of the order modifying or terminating the earnings withholding order to the employer of the judgment debtor by first-class mail, postage prepaid.

AMENDMENT 47

On page 30, line 30, strike out "withholding order has been terminated."

AMENDMENT 48

On page 32, line 9, strike out "notify" and insert:
send a notice of the time and place of the hearing to

AMENDMENT 49

On page 32, lines 10 and 11, strike out "at least 10 days before the hearing of its time and place." and insert:
by first-class mail, postage prepaid. The notice shall be deposited in the mail at least 10 days before the day set for the hearing.

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AMENDMENT 50

On page 32, line 28, after "debtor" insert:
by first-class mail, postage prepaid

AMENDMENT 51

On page 32, lines 36 and 37, strike out "State Administrator" and
insert:

Judicial Council

AMENDMENT 52

On page 32, line 38, strike out "State Administrator" and insert:
Judicial Council

AMENDMENT 53

On page 33, line 5, strike out "void" and insert:
ineffective

AMENDMENT 54

On page 33, line 9, after "it" insert:
by first-class mail, postage prepaid,

AMENDMENT 55

On page 33, line 11, strike out "or void"

AMENDMENT 56

On page 33, line 23, strike out "5" and insert:

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AMENDMENT 57

On page 33, line 29, strike out "Such forms shall require the" and
strike out lines 30 and 31 and insert:

Any such form prescribed by the Judicial Council is deemed to comply with this
chapter.

AMENDMENT 58

On page 34, strike out lines 17 and 18 and insert:

723.122. The

AMENDMENT 59

On page 36, line 9, strike out "date and place" and insert:
court

AMENDMENT 60

On page 36, line 10, after "entered" insert:
, the date the judgment was entered,

AMENDMENT 61

On page 36, line 25, after "mail" insert:
, postage prepaid,

AMENDMENT 62

On page 36, strike out lines 29 through 33, inclusive

AMENDMENT 63

On page 36, line 34, strike out "723.127." and insert:
723.126.

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AMENDMENT 64

On page 36, line 35, after "oath" insert a period and strike out the remainder of the line, strike out line 36, and in line 37 strike out "Administrator, the" and insert:

The

AMENDMENT 65

On page 37, line 1, after "person" insert:
by first-class mail, postage prepaid,

AMENDMENT 66

On page 37, between lines 21 and 22, insert:
(4) If the employer elects to make payments to the judgment creditor monthly as authorized under Section 723.025, a statement that the employer has made such election.

AMENDMENT 67

On page 37, line 22, strike out "723.128. (a) The State Administrator" and insert:

723.127. (a) The Judicial Council

AMENDMENT 68

On page 37, line 26, strike out "State Administrator" and insert:
Judicial Council

AMENDMENT 69

On page 37, line 28, strike out "by him"

AMENDMENT 70

On page 37, line 28, strike out "He" and insert:
The Judicial Council

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AMENDMENT 71

On page 37, line 32, strike out "6" and insert:

7

AMENDMENT 72

On page 37, strike out lines 34 through 40, inclusive

AMENDMENT 73

On page 38, strike out lines 1 through 10, inclusive, and insert:

723.150. The Judicial Council shall adopt rules for the administration of this chapter, including rules prescribing the pay period or periods to which various forms of prepaid or deferred earnings are to be allocated and the method of computing the amount to be withheld from such forms of earnings under Section 723.050.

723.151. The Judicial Council may perform all acts

AMENDMENT 74

On page 38, strike out lines 33, 34, and 35

AMENDMENT 75

On page 38, line 36, strike out "723.154." and insert:
723.152.

AMENDMENT 76

On page 39, line 1, strike out "723.155." and insert:
723.153. (a)

AMENDMENT 77

On page 39, line 3, strike out "satisfaction of a judgment" and insert:
creditor's rights under an earnings withholding order issued

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AMENDMENT 78

On page 39, between lines 4 and 5, insert:

(b) If an employer violates this section, the judgment creditor may bring a civil action against the employer to recover the amount that would have been payable to the judgment creditor pursuant to this chapter had the employer not violated this section. The remedy provided by this subdivision is not exclusive.

AMENDMENT 79

On page 39, line 5, strike out "723.156." and insert:

723.154.

AMENDMENT 80

On page 39, line 9, after the period, insert:

The remedy provided by this subdivision is not exclusive.

AMENDMENT 81

On page 39, line 16, strike out "723.157." and insert:

723.155.

AMENDMENT 82

On page 41, line 36, after the period, insert:

For the purposes of this section, "garnishment" includes the withholding of the wages of an employee pursuant to an earnings withholding order for taxes issued pursuant to Article 4 (commencing with Section 723.070) of Chapter 2.5 of Title 9 of Part 2 of the Code of Civil Procedure, and the withholding of wages pursuant to such an order shall be deemed to be a garnishment for the payment of a judgment for the purposes of subdivision (c).

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AMENDMENT 83

On page 46, line 15, after "order" insert:

unless and until the administrator terminates his request that the prisoner's employer transmit the prisoner's earnings to the administrator

AMENDMENT 84

On page 47, strike out lines 22 through 31, inclusive, and insert:

Sec. 22. (a) Any levy made pursuant to a writ of execution against the earnings of an employee that has been served on the employer prior to January 1, 1974, shall be given effect after the operative date of this act to the same extent as it would have been given effect had this act not been enacted, and the law in effect prior to the operative date of this act shall govern such levy. No earnings withholding order served pursuant to this act after January 1, 1974, shall be given any effect during the period that a levy made pursuant to a writ of execution against the earnings of an employee has been given effect, and any earnings withholding order served on an employer during the period such a levy is in effect shall be ineffective.

(b) The Judicial Council may prescribe any rules it determines are necessary to effectuate the legislative intent expressed in this section.

Sec. 23. This act shall become operative on January 1, 1974, but the Judicial Council, the state agencies concerned with Article 4 (commencing with Section 723.070) of the Employees' Earnings Protection Law, and the court clerks may, prior to that date, do whatever is necessary so that this act may become operative on January 1, 1974.

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

General Organization

The Executive Secretary orally reviewed Memorandum 72-16. No Commission action was taken regarding the general organization of the attachment chapter. The issue of what rights might be waived by a defendant was raised. Action by the Commission was deferred but the staff was directed to examine and distribute, if desirable, the recent United States Supreme Court cases upholding a confession of judgment procedure in a commercial situation. The staff was further directed to consider proposing substantial dollar limits on the cases in which an attachment may issue in order to restrain the use of attachment in consumer cases.

Determination of Probable Validity and That Grounds for Attachment Exist

The Commission considered Memorandum 72-18 and the First Supplement to Memorandum 72-18. Exhibit I (attached to Memorandum 72-18) containing proposed Article 4 of the attachment chapter was reviewed section by section and the following action was taken.

Section 540.010. The staff was directed to consider the use of more descriptive terms in this section; e.g., "application for attachment" or "attachment application" and "order of attachment" or "attachment order."

Section 540.020. Use of the term "magistrate" in place of "judicial officer" should be considered here.

Section 540.030. The introductory phrase to this section should be revised to read substantially as follows: "Upon the filing of the complaint or at any time thereafter,"

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Section 540.040. Subdivision (b) was eliminated, but the Comment to this section should make clear that its substance is duplicated by subdivision (d), i.e., subdivision (d) prohibits attachment by one creditor for the purpose of hindering, delaying, or defrauding any other creditor. The term "indebtedness" in subdivision (d) was retained; however, its use should be reviewed and perhaps the term "claim" substituted if attachment in tort actions is eventually permitted.

Section 540.050. The staff was directed to consider drafting a section which defines the type of affidavits to be used under the procedure provided in this chapter. The affidavit itself should be referred to in a manner sufficient to avoid confusion with other types of affidavits. The affidavit should not be as restrictive as the affidavit in support of a summary judgment; e.g., the incorporation of business records should be permitted here. In addition to an affidavit, other competent evidence (e.g., a verified complaint) should be permitted to support an application for attachment. The affidavit should show, state, or set forth facts sufficient to entitle the plaintiff to judgment, but the staff was directed to consider whether the phrasing of this requirement can be improved.

Section 540.060. This section should make clear that service of process has been completed on the defendant prior to the time of hearing on probable validity in the normal case.

Section 540.070. A provision should be added to this section informing the defendant that he has the right at the hearing on probable validity to raise the issue of necessities; i.e., that certain (or all) of his property should be exempt from attachment regardless of the probable validity of the plaintiff's claim. The existence of this right should not, however, preclude the defendant

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from later contesting the plaintiff's right to attach property when the plaintiff has finally identified what specific property he seeks to attach. Subdivision (c) should be revised to permit an appearance in person or by an attorney or both. Subdivision (d) should be revised to permit opposition solely on the grounds that the plaintiff's affidavits and other supporting materials are deficient and should specify when the notice (and affidavits, if any) must be filed.

Section 540.080. The staff was directed to revise this section in conformity with the decisions made above regarding (1) the form and substance of the affidavits used under this chapter and (2) the ability of the defendant to oppose the plaintiff's application on the basis that the plaintiff's own supporting materials are inadequate to obtain the relief sought. If the defendant wishes to controvert factual matters or raise an affirmative defense, he must file appropriate affidavits and a notice stating the grounds of opposition. If the defendant seeks only to show that plaintiff's presentation is inadequate or to raise the issue of necessities, no notice or affidavit should be required.

Section 540.090. Subdivision (c) should be revised to grant the court discretion whether to grant or deny the plaintiff a continuance where the defendant has not filed a notice or affidavit in opposition to the application prior to two days before the hearing.

Section 540.100. This section must be revised in conformity with the decisions made above regarding the manner of raising and the scope of the issues which may be heard at this stage. In addition, the provisions here must be revised to integrate the provisions relating to preliminary protective orders. In this respect, special attention must be given to the effect of

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the granting of a continuance upon an order previously issued. It was suggested that an attempt be made to limit the taking of oral testimony; i.e., the court should, as to factual matters, generally decide such matters on the basis of the affidavits presented to it. It was tentatively determined that there should be no right to appeal from an order either granting or denying an application for an attachment (this would not, however, preclude a petition for an extraordinary writ); and the court should have no power to issue an order preserving the status quo pending a petition to an upper court.

Section 540.110. Paragraphs (1) and (3) of subdivision (b) should be combined. Paragraph (2) should be eliminated and the Comment should make clear that a stay issued in a bankruptcy proceeding would prevail here. The Commission considered whether the court should be required to make some finding as to the probable amount of the plaintiff's judgment thereby providing a limit on the amount (value) of property which may be attached. The Commission tentatively determined that the court need only find that it is more probable than not that the plaintiff will obtain a judgment in some amount and that the sanctions for wrongful attachment would provide adequate protection against excessive attachments.

Section 540.120. No change.

Section 540.130. The Commission directed the staff to redraft this section to provide a preference only if a preliminary protective order is in effect but, even in these circumstances, to provide no preference over criminal matters and older matters of the same character (i.e., any case in which a temporary restraining order has been issued).

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Section 540.140. The staff was directed to consider an affirmative statement that affidavits and similar competent evidence may be admitted, but determinations of the court may not be referred to in the presence of the jury.

Section 540.150. No change.

Issuance of Writ of Attachment

The Commission considered Memorandum 72-20. A portion of Exhibit I (attached to Memorandum 72-20) was reviewed section by section and the following action was taken.

Section 541.010. The staff was directed to make any changes necessary to conform this section to the decisions made previously which permit the defendant to raise the issue of necessities at the hearing on the probable validity of the claim. If the defendant has taken advantage of such opportunity, it seems he should not be permitted to renew a claim that has been rejected unless perhaps there has been a change in circumstances.

Section 541.020. This section should be reworded to make clear that the application for issuance of a writ can be combined with the application for a hearing on the probable validity of the claim and both applications may be filed at or after the time of filing of the complaint.

Section 541.030. Subdivision (b) was revised to read substantially as follows:

(b) A statement of the amount of the defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery or

The requirement that the plaintiff state the value of the property sought to be attached was deleted subject to review in connection with fixing the amount of the plaintiff's undertaking.

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Section 541.040. The last sentence was deleted, and the staff was directed to make further conforming changes, if necessary.

Section 541.050. No change.

Section 541.060. No change.

Section 542.010. No change.

Section 542.020. The Commission deferred making a decision whether the plaintiff under this article should be required to file an affidavit stating that the property sought to be attached is subject to attachment.

Sections 542.030-542.110. These sections were not considered by the Commission.

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STUDY 39.90 - ATTACHMENT, GARNISHMENT, EXECUTION
(CIVIL ARREST AND BAIL)

The staff was directed to prepare a tentative recommendation repealing Chapter 1 (Arrest and Bail) of Title 7 of Part 2 of the Code of Civil Procedure. It was suggested that past recommendations reflecting similar action by the federal Bankruptcy Rules Committee with regard to comparable provisions are available, and Professor Riesenfeld offered to furnish the staff a copy of these recommendations.

APPROVED

Date

Chairman

Executive Secretary