

January 3, 1973

Time

January 19 - 9:30 a.m. - 5:00 p.m.
January 20 - 9:00 a.m. - 12:00 noon

Place

Department of Airports
Administration Bldg., Control Tower
(inquire at reception desk for
location of meeting place)
1 World Way
Los Angeles Airport

REVISED

TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

January 19-20, 1973

Friday, January 19

1. Minutes of December 1-2, 1972, Meeting (sent 12/14/72)
2. Administrative Matters

Suggested Schedule for Future Meetings

The staff suggests that the February 8-10 meeting of the Commission not be held and that the dates of the March 15-17 meeting be changed to March 1-3. This change is suggested because we will not have sufficient material for the meeting on February 8-10 if we complete the agenda for the January 19-20 meeting. If the change is approved, the following schedule is suggested:

March 1 (7:00 p.m. - 10:00 p.m.)	San Francisco
March 2 (9:00 a.m. - 5:00 p.m.)	
March 3 (9:00 a.m. - 1:00 p.m.)	

April 5 (7:00 p.m. - 10:00 p.m.)	Los Angeles
April 6 (9:00 a.m. - 5:00 p.m.)	
April 7 (9:00 a.m. - 12:00 noon)	

May 4 (10:00 a.m. - 5:00 p.m.)	San Francisco
May 5 (9:00 a.m. - 1:00 p.m.)	

June 1 (10:00 a.m. - 5:00 p.m.)	Los Angeles
June 2 (9:00 a.m. - 1:00 p.m.)	

July 12 (7:00 p.m. - 10:00 p.m.)	San Francisco
July 13 (9:00 a.m. - 5:00 p.m.)	
July 14 (9:00 a.m. - 12:00 noon)	

August--no meeting

Topics on Agenda

Memorandum 73-14 (enclosed)

January 3, 1973

3. Study 26 - Escheat (Unclaimed Property Law)

Memorandum 73-6 (to be sent)
Draft of Recommendation (attached to Memorandum)

4. Study 72 - Liquidated Damages

Memorandum 73-1 (to be sent)

5. Study 39.30 - Wage Garnishment and Related Matters

Memorandum 73-2 (sent 12/14/72)

6. Study 39.70 - Prejudgment Attachment

Nonresident Attachment

Memorandum 73-4 (enclosed)
Background Memorandum (attached to Memorandum)

Tentative Recommendation

Memorandum 73-5 (sent 12/29/72)
Revised Tentative Recommendation (attached to Memorandum)

Bring to meeting: Recommendation Relating to Claim and Delivery
Statute (sent 1/5/73)

Saturday, January 20

7. Study 36 - Condemnation

36.20 - Right to Condemn Generally

Memorandum 73-12 (enclosed)

36.40 - Excess Condemnation

Memorandum 73-7 (sent 12/14/72)
Revised Excess Condemnation Article (attached to Memorandum)
First Supplement to Memorandum 73-7 (enclosed)

36.50 - Just Compensation and Measure of Damages

Memorandum 73-8 (enclosed)
Memorandum 73-11 (sent 12/14/72)

36.32 - Indemnification Requirement in Joint Use Cases

Memorandum 73-13 (to be sent)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JANUARY 19 AND 20, 1973

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on January 19 and 20, 1973.

Present: John D. Miller, Chairman
John J. Balluff
Noble K. Gregory
John N. McLaurin
Thomas E. Stanton, Jr.

Absent: Marc W. Sandstrom, Vice Chairman
Alfred H. Song, Member of Senate
Howard R. Williams
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, Nathaniel Sterling, Stan G. Ulrich, and Bruce Donald, members of the Commission's staff, also were present. Professor Stefan A. Riesenfeld, and Professor William D. Warren, Commission consultants on creditors' remedies, were present Friday, January 19. Jerrold Fadem and Paul Overton, Commission consultants on condemnation law and procedure, were present Saturday, January 20.

The following persons were present as observers: on days indicated:

Friday, January 19

John E. Balluff, California Bankers Association, Sacramento
W. Dean Cannon, Jr., California Savings & Loan League, Pasadena
Samuel J. Cord, State Controller, Sacramento
C. G. Gordon, Real Estate Consultant, Los Angeles
C. C. Myroup, Travelers Express Company, Los Angeles
J. A. Seedman, Union Manufacturing Company, Los Angeles
Paul L. Spooner, Jr., Counsel, Travelers Express Company, Inc., Minneapolis

Saturday, January 20

Charles Spencer, Department of Public Works, Los Angeles

ADMINISTRATIVE MATTERS

Approval of Minutes of December 1 and 2 Meeting

The Minutes of the December 1 and 2, 1972, meeting of the Law Revision Commission were approved as submitted by the staff.

Schedule for Future Meetings

The schedule set out below was approved for future meetings.

March 1 (7:00 p.m. - 10:00 p.m.)	San Francisco
March 2 (9:00 a.m. - 5:00 p.m.)	
March 3 (9:00 a.m. - 4:30 p.m.)	
April 5 (7:00 p.m. - 10:00 p.m.)	Los Angeles
April 6 (9:00 a.m. - 5:00 p.m.)	
April 7 (9:00 a.m. - 12:00 noon)	
May 4 (10:00 a.m. - 5:00 p.m.)	San Francisco
May 5 (9:00 a.m. - 1:00 p.m.)	
June 1 (10:00 a.m. - 5:00 p.m.)	Los Angeles
June 2 (9:00 a.m. - 1:00 p.m.)	
July 12 (7:00 p.m. - 10:00 p.m.)	San Francisco
July 13 (9:00 a.m. - 5:00 p.m.)	
July 14 (9:00 a.m. - 12:00 noon)	
August--no meeting	

Topics on Agenda

The Commission considered Memorandum 73-14 which reported that recent law review articles suggest that legislation is needed in areas of the law covered by topics that the Commission has recommended be dropped from its agenda. So that it will be possible for the Commission to study these areas of the law when and if time permits, the Commission directed that the resolution introduced at the 1973 session to continue the Commission's authority to study previously authorized topics be amended to permit continued study of the "powers of appointment" topic and the "liability of unincorporated associations and their members" topic.

Personnel Matters

The Executive Secretary announced that Mr. Sterling is planning to resign from the Commission's staff about September 1, 1973, to go into private practice.

The Executive Secretary reported that difficulties were being encountered in appointing Mr. Ulrich as Legal Counsel on the Commission's staff. Unless Mr. Ulrich can be appointed pursuant to Civil Service requirements, his employment with the Commission will terminate in March 1973. The State Personnel Board has certified a list of persons eligible for appointment to this position and it appears that it will not be possible to reach Mr. Ulrich on the list. The Executive Secretary reported on the background of the two persons who have been interviewed for the position. It was agreed that these persons, who have indicated that they are unwilling to waive this appointment, do not possess the minimum qualifications required to perform the duties as a member of the Commission's legal staff. The Executive Secretary reported that he planned to leave the position vacant until it is possible to appoint a qualified person to this position.

Contract With Professor Warren

The Commission discussed the scheduling of work on the topics on its agenda in light of the anticipated loss of two members of its legal staff. Mr. Sterling will be leaving about September 1, 1973, and it is likely that Mr. Ulrich will be terminated in March 1973 because it will not be possible to continue his employment in view of civil service regulations.

The major area of research needed to continue work on the creditors' remedies topic is the portion on execution. Work on the claim and delivery

Minutes
January 19 and 20, 1973

statute (covered by a contract with Professor William D. Warren--Agreement 1971-72(5), dated May 15, 1972) is substantially complete, a recommendation on this subject having been submitted to the 1973 legislative session. It has been planned that the staff would prepare the necessary background research study on execution, Professor Warren providing expert advice to the staff and Commission on this subject pursuant to a prior contract (Agreement 1970-71(8), dated May 28, 1971). If it becomes necessary to terminate Mr. Ulrich as a staff member, it will be impossible for the staff to prepare the background material.

The Commission discussed with Professor Warren the possibility of his preparing a background study on execution. Professor Warren reported that he would be willing to undertake this task if he could be provided sufficient funds to employ needed research assistants. He reported that he had in mind a recent law graduate who he believes could assume a substantial portion of the burden of preparation of the study. It is planned to have the study take the form of a draft statute with explanatory Comments and that the study will be completed by June 30, 1973. The amount of the contract would be \$5,000.

The Commission authorized the following research contract, the Executive Secretary being authorized and directed to execute the contract on behalf of the Commission: A contract with Professor William D. Warren, Stanford Law School, to prepare a study (consisting of a draft statute and explanatory Comments) for legislation covering execution. Compensation is to be \$5,000 for the study. The contract should limit the amount that can be paid to research assistants employed by Professor Warren as follows:

Law graduate not admitted to California Bar -- \$1,007 per month (\$5.81 per hour).

Lawyer admitted to California Bar -- \$1,111 per month (\$6.41 per hour).

The contract should require periodic payments to cover Professor Warren's costs for research assistants actually employed so that Professor Warren can pay such assistants promptly.

In other respects, the contract should follow the form ordinarily used in Law Revision Commission research contracts. The provisions providing reimbursement for travel expenses should not be included in the contract, this matter being covered by Agreement 1970-71(8), dated May 28, 1971, which contract covers providing expert advice at meetings on all aspects of creditors' remedies.

Restricting Commission Attention to Final Cases Only

The staff was instructed not to bring to Commission attention for action by the Commission any cases unless such cases have become final. Although cases may be brought to Commission attention for informational purposes, it was considered not to be profitable to discuss such cases with a view to taking Commission action unless such cases have become final.

Minutes
January 19 and 20, 1973

STUDY 26 - ESCHEAT (UNCLAIMED PROPERTY LAW)

The Commission considered Memorandum 73-6 and the First Supplement to Memorandum 73-6, together with the comments of observers present at the meeting.

Attention was directed to the staff draft of a tentative recommendation which was attached to Memorandum 73-6. The following actions were taken:

Section 1511. The repeal of this section was approved.

Section 1513. The amendment of this section was approved.

Section 1530. The staff withdrew its recommendation that this section be amended. No amendment of this section was considered necessary.

Section 1542. The amendment of this section was approved.

Section 1564. The staff withdrew its recommendation that this section be amended. No amendment of this section was considered necessary in order to provide for the payment of the expenses referred to in the staff memorandum.

Section 1581. The Commission determined that this section should be revised so that the record-keeping requirement can be satisfied by (1) asking the purchaser of a travelers check or money order whether or not he resides in California and (2) making and maintaining a record of those travelers checks and money orders that are sold to persons who do not reside in California. It should also be made clear that the record-keeping requirement applies to check sellers. The representatives of persons issuing travelers checks and money orders who were in attendance at the meeting expressed approval of this approach and indicated that it would not be unreasonably burdensome.

New section. A new provision should be added to the Unclaimed Property Law, to read substantially as follows:

Minutes
January 19 and 20, 1973

Notwithstanding any other provision of this chapter, intangible personal property escheats to this state under this chapter in any case where such property escheats to this state under any statute of the United States. To the extent that the escheat of property to this state is governed by the terms of a statute of the United States which does not require the keeping of the record in order to accomplish such escheat, such record need not be made or maintained.

Resolution to United States Congress. The Commission directed the staff to include in the recommendation a recommendation that California adopt a resolution urging enactment of legislation to provide for escheat of travelers checks and money orders on the basis of the state where originally issued. The text of the resolution should be included in the Commission's recommendation.

Revised recommendation. A revised recommendation is to be prepared for the March meeting with a view to approving a recommendation on this subject for printing and submission to the 1973 legislative session.

Minutes
January 19 and 20, 1973

STUDY 36.20 - CONDEMNATION (THE RIGHT TO CONDEMN GENERALLY)

The Commission considered Memorandum 73-12. After discussion, the Commission approved the following section and Comment for inclusion in the comprehensive statute.

§ 1240.170. Interpretation of grants of eminent domain authority;
separate authorizations

1240.170. (a) None of the provisions of this article is intended to limit, or shall limit, any other provision of this article, each of which is a distinct and separate authorization.

(b) None of the provisions of Article 2 (commencing with Section 1240.110), Article 3 (commencing with Section 1240.210), Article 4 (commencing with Section 1240.310), Article 5 (commencing with Section 1240.410), Article 6 (commencing with Section 1240.510), Article 7 (commencing with Section 1240.610), or Article 8 (commencing with Section 1240.810) is intended to limit, or shall limit, the provisions of any other of the articles, each of which articles is a distinct and separate authorization.

Comment. Section 1240.170 makes clear that the various articles contained in this chapter are distinct and separate authorizations. For example, the authority granted by Article 6 (condemnation for compatible use) is independent of the authority contained in Article 7 (more necessary public use) and is not limited in any way by the rules set forth therein. Likewise, condemnation of property appropriated to a public use may be accomplished under Article 7 independent of any authority stated in Article 6. Section 1240.170 is based on former Section 104.7 of the Streets and Highways Code.

Minutes
January 19 and 20, 1973

STUDY 36.32 - CONDEMNATION (INDEMNIFICATION REQUIREMENT IN JOINT
USE CASES)

The Commission considered Memorandum 73-13 relating to provision for indemnity in situations where joint use of property is required by eminent domain. The Commission directed that the statute provide in substance that the parties are authorized to agree on the terms and conditions of joint use, including an indemnity provision and, failing agreement, the court is to specify such terms and conditions. The Commission directed that no standard be imposed on the court in its determination of the allocation of liability.

Minutes
January 19 and 20, 1973

STUDY 36.40 - CONDEMNATION (EXCESS CONDEMNATION)

The Commission considered Memorandum 73-7 and the First Supplement to Memorandum 73-7. The following actions were taken with respect to the redraft of the excess condemnation article which was attached as Exhibit I of Memorandum 73-7.

Section 1240.410

Subdivision (c) of Section 1240.410 was revised to read:

(c) Property may not be acquired under this section if the defendant proves that the public entity has a reasonable, practicable, and economically sound means for preventing the property from becoming a remnant.

On page 2, a portion of lines 7, 8, and 9 was revised to read: "(2) it will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change"

On page 3, line 2, the phrase "litigating the issue of damages" was substituted for "litigating damages" and on page 3, line 4, the word "price" was substituted for "value." The third sentence of the first whole paragraph on page 3 was deleted.

Section 1240.420

This section, which dealt with condemnation of the remainder of a structure, was deleted. Objections were made that the section was too restrictive in that it did not permit condemnation of an unsafe structure, was too restrictive in the test for when the entire structure could be condemned, and was unnecessary because such authority is not now specifically provided by statute generally and condemnors nevertheless are able

Minutes
January 19 and 20, 1973

to deal with the problem under their general excess condemnation authority. A suggestion was made that the condemnor should be able to force the property owner to accept a relocation of a structure located partly on property to be taken but, when the section was deleted, this suggestion was dropped. Conforming changes should be made to reflect the deletion of Section 1240.420.

Minutes
January 19 and 20, 1973

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

The Commission considered Memorandum 73-8 and first two articles of the attached draft statute of the compensation chapter. The Commission made the following changes in the sections considered:

Section 1245.010. This section and Comment were combined with Section 1245.020 and Comment.

Section 1245.020. The phrase, "may require amounts less than are provided" in the last sentence of the Comment was replaced by the phrase "may not require payments as great as those provided."

Article 2. Date of Valuation. The Comment appearing under the article heading should include an indication of the date of valuation in the case of a taking of public utility property.

Section 1245.140. The sentence in the Comment immediately following the citation of People v. Murata should be revised to read: "Section 1245.140 changes the result of that decision" The Comment should also be expanded to indicate the reason for the change.

Section 1245.150. The citation to the unreported case in the Comment should be deleted and the Comment adjusted accordingly. Also, the discussion in the Comment of the difference between the rules for date of valuation for a retrial following a mistrial and a retrial following an appeal should be made clear.

Minutes
January 19 and 20, 1973

STUDY 36.53 - CONDEMNATION (JUST COMPENSATION--ADDITIVES)

The Commission considered Memorandum 73-11 and the attached copy of Memorandum 72-76 relating to compensation for business losses in eminent domain.

The Commission decided not to propose a statute that would purport to codify Article I, Section 14, of the California Constitution, but directed the staff to include in a Comment in the compensation chapter a statement to the effect that, in addition to the compensation specifically provided in the chapter, the condemnee is entitled to any additional compensation required by the "just compensation" clause of the state or federal Constitution.

The Commission directed the staff to prepare a statute providing for compensation for loss of goodwill for consideration at a future meeting.

Minutes
January 19 and 20, 1973

STUDY 39.30 - WAGE GARNISHMENT AND RELATED MATTERS

The Commission considered Memorandum 73-2 and approved the addition of the following sentence at the end of Section 723.101:

At least 10 days before the hearing on the application, the judgment creditor who obtained the original earnings withholding order shall serve on the judgment creditor who served the intervening order a notice of the time and place of the hearing on the application and a copy of the application.

Minutes
January 19 and 20, 1973

STUDY 39.70 - PREJUDGMENT ATTACHMENT

The Commission considered Memorandum 73-4 relating to nonresident attachment and an unnumbered memorandum prepared by Professor Riesenfeld (Exhibit I attached to these Minutes). Time did not permit consideration of Memorandum 73-5. The material presented therein is to be considered at the March meeting.

The following action was taken with respect to the matters considered:

Nonresident Attachment

The Commission directed the staff to prepare provisions which implement the principle of the 1964 Uniform Enforcement of Foreign Judgments Act, taking note of the problem discussed in Knapp v. McFarland, 426 F.2d 935 (2d Cir. 1972), and other difficulties which might arise in adopting the Act in California.

After lengthy discussion, the staff's recommendation that jurisdictional attachment and quasi in rem jurisdiction be completely abolished was rejected. The Commission indicated its reluctance to affect quasi in rem jurisdiction and expressed its preference for leaving the question of the continued vitality of quasi in rem jurisdiction to the courts under the basic jurisdiction statute, Code of Civil Procedure Section 410.10. However, the Commission directed the staff to reconsider whether attachment should be authorized in any action brought against a nonresident or whether some types of actions, e.g., tort actions, should be excluded.

The Commission also directed the staff to investigate whether the statute should only allow attachment of the assets of nonresident defendants based on an ex parte showing of the probable validity of the plaintiff's claim

and a showing of a danger that the assets in the state will be dissipated or removed or whether nonresidency itself should be grounds for ex parte issuance of a writ of attachment.

Prejudgment Attachment Statute

Agricultural Code Section 281. This section was revised to retain the authority to attach but to make clear that the issuance of the attachment shall be in the manner provided by the attachment provisions of the Code of Civil Procedure. In connection with this section and similar authorizing provisions, Section 483.010 (Code Civ. Proc.) must be revised to provide: "Except as otherwise provided by statute."

Civil Code Section 4380. Approved as drafted.

Code of Civil Procedure Section 481.030. The Comment to this section should refer to those cases which provide that an attachment levy is effective only as to a debt which has accrued at the time of the levy.

Code of Civil Procedure Section 487.010. The first portion of this section was revised as follows:

487.010. The following property shall be subject to attachment:

(a) Where the defendant is a corporation, all corporate property subject to levy.

(b) Where the defendant is a [partner or] partnership, all partnership property subject to levy.

* * * * *

The Comment to this section should make clear that certain property is not subject to levy, e.g., copyrights and patents, hence is not subject to attachment. The staff was directed to make certain that a method of levy is provided for all property which should be subject to attachment. (See also Section 688 below.)

Minutes
January 19 and 20, 1973

Code of Civil Procedure Section 488.400. This section was revised to provide for seizure only where the defendant is the person in possession.

Code of Civil Procedure Section 488.410. The order of subdivisions (b) and (c) should be reversed. Subdivision (a) should be limited to only defendants in possession. Paragraph (2) of Section 8317 of the Commercial Code should be incorporated by reference to deal with third persons in possession.

Code of Civil Procedure Section 491.010. The staff was directed to make clear that, where a garnishee claims any interest in property sought to be attached, a turnover order may not be issued under subdivision (c).

Code of Civil Procedure Section 688. The first sentence of this section was revised as follows:

688. All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, except as provided for in Section 690.6, and all property and rights of property levied upon seized-and-held under attachment in the action, are liable to execution. . . .

The staff was directed to provide either here or in the attachment statute a method of levy (garnishment) for property subject to execution (intangibles--debts and credits) for which a levy procedure is not provided in the present draft.

The staff was further directed to consider the appropriate treatment here for causes of action and judgments.

Minutes
January 19 and 20, 1973

STUDY 39.90 - CLAIM AND DELIVERY STATUTE

The following letter from the Office of the Legislative Counsel was brought to the attention of the Law Revision Commission.

Sacramento, California
January 17, 1973

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

Claim and Delivery - #967

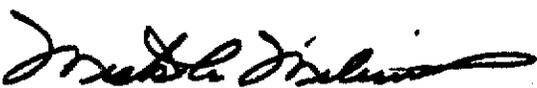
Dear Mr. DeMouilly:

We have prepared the enclosed draft of a bill relating to claim and delivery for introduction pursuant to your request.

The proposal, among other things, authorizes an ex parte writ of possession for property feloniously taken and for credit cards. In this connection, while we have not had an opportunity to consider the matter fully, we think this might raise issues of procedural due process in that the defendant may be deprived of his property without prior notice and hearing (see Sniadach v. Family Finance Corp. (1969), 23 L. ed. 2d 349).

Very truly yours,

George H. Murphy
Legislative Counsel

By 
Mirko A. Milicevich
Deputy Legislative Counsel

MAM:ww

Minutes
January 19 and 20, 1973

STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 73-1 and a letter from the California Bankers Association concerning the late payment charge on loans secured by real estate.

The Commission discussed the staff proposed Section 2954.6 set out in Exhibit IV to Memorandum 73-1. The suggested section was approved in substance, but various technical deficiencies were noted for staff attention in preparing a recommendation for consideration at the next meeting. The following actions were taken:

(1) Subdivision (c) should make clear that a provision that satisfies the requirements of that subdivision is valid under Section 3319 and deemed to satisfy the requirements of Section 3319.

(2) Subdivision (a)(2), defining "installment," should be revised in light of the following comment submitted by Commissioner Gregory:

Section 2954.6 applies to the "default, delinquency, or late payment charges" referred to in section 2954.5. Section 2954.5, however, fails to define these charges and I'm concerned that the same definitional problems might exist as exist with the similar reference to "late payment, delinquency, default * * * or other such charges" in section 226.4(c) of Regulation Z, promulgated by the Federal Reserve Board to implement the Truth in Lending Act. For example, this section probably covers such charges as attorneys' fees upon default, and in fact an Iowa court has recently held that the lender's right to accelerate is a late charge under Truth in Lending. To avoid any such problems, as well as to eliminate the problem whether increases in the interest rate upon default constitute late charges, I think the Law Revision Commission should consider a precise definition of late charges.

(3) It was suggested that the limitation provided by the statute could be avoided by dividing the balloon payment into two payments of more than

\$500. The staff is to give consideration to this problem and revise the statute to preclude using this method of avoiding the limitation.

(4) It should be made clear that the requirements of Sections 2954.5 and 2954.6 cannot be avoided by calling the late charge "interest." In other words, Sections 2954.5 and 2954.6 apply even where the late payment charge is designated as interest.

(5) The Commission specifically approved computing the late payment charge on the basis of including the portion of the payment that consists of funds for property tax and property insurance.

(6) The Commission specifically determined that Section 2954.6 should not be limited to single family dwellings. The \$500 and below standard is designed to avoid controversy as to the validity of a late payment charge in cases where the amount of the payment is \$500 or less. The no-more-than-four-units (one of which is occupied by the debtor) standard was also discussed and rejected. This test also does not recognize that the problem is one of when the issue of the validity of the amount of the late payment should be subject to judicial decision rather than being governed by statute. The \$500 standard is a rational basis for segregating those cases where the amount of the payment is sufficiently high to permit judicial determination whether the amount of the late payment charge is manifestly unreasonable.

The Savings and Loan Association representative indicated that he had some technical revisions that he would provide in a letter he will send to the staff.

APPROVED

Date

Chairman

Executive Secretary

UNIVERSITY OF CALIFORNIA, BERKELEY

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
 BERKELEY, CALIFORNIA 94720
 TELEPHONE [415] 642-0330
 January 16, 1973

MEMORANDUM

To: Law Revision Commission
 From: Stefan A. Riesenfeld

I am dissatisfied with some of the sections of the proposed Attachment law and comments thereto which have been tentatively approved by the Commission and I respectfully suggest that the Commission reconsider the same. My main concern relates to §§688, 488.400 and 488.040, but I am also troubled by §§481.050 and 488.410.

A.

Under the present law as codified in §688 "all goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor not exempt by law . . . and all property and rights of property seized and held under attachment in the action are liable to execution."

The methods of levy under writ of attachment and under a writ of execution were identical.

The proposed attachment statute introduces two important changes:

1. It narrows the scope of assets which are liable to attachment, especially by contracting the chose in action definition. (§481.050)

2. It abolishes seizure as a proper method of attachment in certain cases.

Since §688 permitted a levy of execution on "debts" not constituting choses in action under the present definition, a gap is created, unless a) provisions are made for levy of execution on debts not constituting choses in action and b) the proper method is indicated. An important case in point is presented by Houghton v. Pacific Southwest T & S Bank, 111 Cal. App. 509, as explained in Lynch v. Cunningham, 131 Cal. App. 164. The Houghton case concerned levy on the interest of a beneficiary in a trust created for the purpose of selling the real property and paying the money from such sale to the beneficiary. It was held that in such a case "the beneficiary had no title, legal or equitable, in the real property but only the right to receive from the trustee money, a bare chose in action." Under the proposed draft such interest would not be subject to a levy of execution for lack of appropriate provisions for levy, and at best would be subject to supplementary proceedings.

B.

I see no reason why the interest of a pledgor in negotiable instruments or negotiable documents should not be reached by garnishment as before. I think that the rule that garnishment in such case was the proper proceeding was sufficiently established in California as well as in other jurisdictions, Deering v. Richardson-Kimball Co., 109 Cal. 73, Puissegur v. Yarbrough,

29 Cal. 2d 409. Levy by seizure was required only where the negotiable note was in the hand of a holder who was the debtor. The leading case in point is Hoxie v. Bryant, 131 Cal. 85. See also Haulman v. Crumal, 13 Cal. App. 2d 612. The situation in the case of negotiable instruments was not different from that in the case of other tangible personal property. The principal California precedent governing pledged chattels is Treadwell v. Davis, 34 Cal. 601. In that case the Supreme Court of California pointed out that if a creditor of the pledgor wanted greater security than under a levy by garnishment he was to proceed pursuant to CCP §545, if need be, by paying off the pledge. The same rule applied in New York, as follows from the leading case of Warner v. Fourth National Bank, 115 N.Y. 251, 22 N.E. 172 cited as precedent in California in Houghton v. Pacific Southwest T & S Bank, 111 C.A. 509 at 513. Section 488.400 as drafted seems to authorize the sheriff to divest the pledgee of his possession without court order. This seems to be too drastic an interference with the pledgee's right. The pledgee may have a legitimate interest in undisturbed possession in order to be able to promptly liquidate the pledge in case the pledgor defaults. It might be mentioned in the case of McCoy v. Justices Court, 23 C.A.2d 99, the court made the following statement:

"It is argued that the manner of levying execution when the property is in the possession of a third party is governed by §§543 and 648 of the CCP and that, therefore, such a levy may only be made by way of garnishment. While §688 permits a garnishment in such a

case that remedy is not made exclusive and under preceding sections of the Code execution could be levied by seizing the property as that of the judgment debtor, 'if the interested parties desire to take that risk.'" Reference should also be made to Gault v. Wiens, 32 Cal. App. 1. In that case the pledgee himself levied on the pledgor's right by surrendering the property to the sheriff. The court held that the levy was valid but that the pledgee had lost his right under the pledge, since possession is necessary for a pledge.

Under the present UCC a pledge does not need a security agreement in writing. §9-203. Moreover, a security interest perfected by possession ceases to be perfected if the secured party parts with possession. So far as negotiable documents are concerned, §7-602 provides that "no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document or title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court." This section, which is enacted for the protection of the bailee does not require seizure of the document for a valid attachment but an injunction of a negotiation such as by garnishment is sufficient. I see no reason why the California law should depart from and be more restrictive than the UCC. The last sentence of §7-602 sufficiently protects bona fide purchasers of the document. The view here taken was endorsed under prior law by the cases Castriotis v. Guaranty Trust Co., 229 N.Y. 74, Lutes v. Shank, 285 Sup. Ct. 416, 137 N.Y.S.2d 653 (App. Div.)

C.

In my mind §488.410 suffers from the same defect. UCC, §8.317, par. 1, provides that no attachment or levy upon a security shall be valid without actual seizure, but it nowhere authorizes deprivation of a pledgee of his possession without court order and I do not think that California should attempt such a regulation. Section 817, par. 2, in conjunction with C.C.P. §545 should remain a valid method to reach a pledgor's interest. At any rate, it would be much better if §8.317 were literally reproduced in the proposed draft or if the matter would be noted as being left to the California UCC.

D.

Section 488.040 seems to change the law substantially, especially in regard to items pledged to or held for collection by banks. The relation between §488.040 and §§488.330, 488.380, 488.400 and 488.410 should be clarified. Is the change good policy?

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January 12, 1973

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

Re: Liquidated Damages Study

Gentlemen:

Senator Alfred H. Song, on your behalf, has requested a statement of the views of the California Bankers Association as to what would constitute an appropriate formula for computing the late payment charge on a loan secured by real property and for supporting information stating the actual late payment charges now made, including data showing the actual costs incurred by the lender as a result of the failure to make a timely payment on such a loan.

As you may be aware, the Association has sponsored legislation to limit the charges for late payments on loans secured by real property containing single-family, owner-occupied dwellings to 10% of the installment due. In 1972, Assemblyman Pierson carried A.B. 1516 which would have imposed such a limitation. While this measure was unsuccessful, we are in hopes that other types of lending institutions will be able to support some limitation in the future.

With respect to the actual charges now made by members of the Association for late payments on loans secured by real property, I am advised that the majority

California Law Revision Commission

Page 2.

January 12, 1973

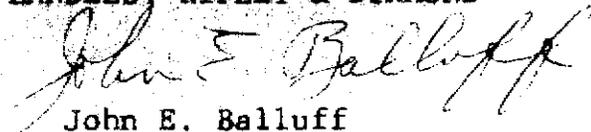
of the major banks impose a charge of 4% of the delinquent installment on conventional loans. There are, of course, variations from this figure as each bank sets its own policy based upon the character of its loan portfolio. As to cost data, I am unable to furnish you with that information because I am advised that the primary purpose of such a charge is to encourage installment payments be made in a timely manner.

I note that the Commission will be considering a staff recommendation that, with respect to loans with installments of not less than \$500, the late payment charge, whatever the amount, would be subject to invalidation on the grounds it was manifestly unreasonable. It is not uncommon for sophisticated commercial borrowers to deliberately default on installments when conditions in the money market make it advantageous to do so. I would suggest that the Commission consider limiting the likelihood of litigation to situations where the late payment charge is in excess of 10% of the delinquent installment. While the Commission has found it desirable to permit the parties more freedom in negotiating late payment charges on large loans, it would appear inconsistent, as well as undesirable, to permit litigation as to the reasonableness of the charge if it does not exceed 10%. I am also concerned that such a distinction would raise the issue of whether it is a reasonable classification. The comments on the foregoing recommendation are my personal views in that the members of the Association have not had an opportunity to consider this particular recommendation.

The California Bankers Association appreciates this opportunity to make its views known to the Commission. In order that this letter be available to the members of the Commission prior to the January 19th meeting, I am sending copies to each of you individually.

Very truly yours,

LANDELS, RIPLEY & DIAMOND



John E. Balluff

Counsel
California Bankers Association

JEB:rm

cc: Honorable Alfred H. Song