Memorandum 77-47

Subject: Background Study on Retroactive Application of New or Amended Exemption Provisions

You will recall that a few meetings ago the staff suggested that an expert consultant be obtained to prepare a background study on the retroactive application of new or amended exemptions provisions. The staff view was that this is one of the most important problems that will be presented when a proposal for revision of the exemptions from execution provisions is drafted. The Commission decided that such a study did not require the services of an expert consultant.

This memorandum will give you a progress report on this matter. As suggested by the Commission, the staff first contacted the five law students who work for the Commission on a part-time basis, but none of the students was willing to undertake the study. The staff then contacted the Pacific Law Journal, and we are pleased to report that a student has undertaken to prepare a law review note on the problem and will be working full time on it during the summer. His initial reaction was that the United States Supreme Court cases are clear and that it would be unconstitutional to give retroactive application to new or amended exemption provisions, but he is reviewing the matter in more detail during the summer.

Since we are subject to the production schedule of the Pacific Law Journal and the student writing the note, we are not sure when the background study will be available to the Commission. However, it is possible that it will be available as early as January 1978.

In connection with this matter, you may be interested in the attached decision from the most recent advance sheet. The decision indicates the problem is one of current importance and a difficult one.

Respectfully submitted,
John H. DeMoully

Appellate Department, Superior Court, Los Angeles

[Civ. A. No. 13897. Apr. 19, 1977.]

DAYLIN MEDICAL & SURGICAL SUPPLY, INC.,
Plaintiff and Appellant, v.
STEPHEN L. THOMAS, Defendant and Respondent.

SUMMARY

Prior to the effective date of the residential dwelling house exemption statute (Code Civ. Proc., § 690.235, which provides that a dwelling house in which a judgment debtor or his family actually resides is exempt from execution to the same extent and in the same amount as a homestead), a creditor obtained a default judgment against his debtor on an obligation incurred by the debtor to the creditor. The creditor, however, did not record the abstract of judgment in the county in which the debtor owned a dwelling house until after the effective date of the statute. Upon the levy of execution on the debtor's dwelling house, the debtor claimed an exemption pursuant to the statute. The trial court declared the debtor's claim of exemption to be proper and legally effective, and the creditor appealed from the trial court's order upholding the exemption. (Municipal Court for the Los Angeles Judicial District of Los Angeles County, No. 984723, Lawrence E. Drumm, Judge.)

The appellate department of the superior court reversed. The court held that, though by its terms the residential dwelling house exemption statute was impliedly applicable to obligations incurred and judgments obtained before its effective date where a creditor records an abstract of judgment after the effective date, retroactive application of the statute in the instant case would result in an abridgment of the creditor's preexisting right to execution and would thus constitute an impairment of the contractual obligations to the creditor in violation of U.S. Const., art. I, § 10. (Opinion by Cole, P. J., with Alarcon, J., and Wenke, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Exemptions § 7—Assertion and Enforcement of Exemption—Residential Dwelling House Exemption Statute—Retroactive Operation—Impairment of Contractual Obligations.**—A debtor was not entitled to an exemption from execution of judgment on his dwelling house, even though the levy of execution was made after the effective date of the statute providing for an exemption of a dwelling house if the debtor has no existing declared homestead (Code Civ. Proc., § 690.235), where the debtor's obligation was incurred, and judgment thereon obtained by the creditor, before the effective date of the statute. Though the statute, by its terms, is impliedly applicable so as to abridge a creditor's preexisting right to execution on such property, retroactive application of the statute, resulting in such an abridgment, would constitute, in the absence of a justifying emergency situation, an unconstitutional impairment of a contractual obligation.

[See **Cal.Jur.3d**, Enforcement of Judgments, § 19; **Am.Jur.2d**, Constitutional Law, § 448.]

COUNSEL

Hemar & Warsaw for Plaintiff and Appellant.

Stephen Englander for Defendant and Respondent.

OPINION

COLE, P. J.—

Procedural Considerations

This is a timely appeal by the plaintiff from a ruling of the lower court declaring the validity of the defendant's claim of exemption under Code of Civil Procedure section 690.235.

Pertinent Facts

On April 23, 1975, the plaintiff obtained a default judgment against the defendant. The plaintiff recorded an abstract of judgment in Marin County, wherein the defendant owned a dwelling house, on February 17, 1976. On the same day, but later in time to the recording of the abstract, the defendant recorded a declaration of homestead on this same Marin County property.

Thereafter, a writ of execution was levied by the Marin County Sheriff on that property and the defendant filed an affidavit claiming it was exempt from execution under Code of Civil Procedure sections 690.235 and 690.50.

The plaintiff then instituted proceedings to have the trial court determine the claim of exemption and that court ruled that the defendant's claim of exemption under the above sections was proper and legally effective against the plaintiff's judgment. The court's minute order of June 23, 1976, reads as follows:

"The court has reviewed the law including *Taylor* v. *Madigan* [1975] 53 Cal.App.3d 943 [126 Cal.Rptr. 376]; the tenor of the law is to allow one homestead only; it should not act to prevent the use of both ways to effect one Homestead.

"The court now declares that defendant's claim of homestead [The court meant 'residential exemption'] under C.C.P. 690.235 and 690.50 is proper and legally effective against plaintiff's judgment herein.

"Defendant to notice."

The appeal is from this order.

Code of Civil Procedure section 690.235 as it read in relevant part during the time at issue is as follows:

"(a) A dwelling house in which the debtor, or the family of the debtor actually resides, to the same extent and in the same amount, except as otherwise provided in this section, as the debtor or the spouse of the debtor would be entitled to select as a homestead pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code; provided that neither such debtor nor the spouse of such debtor has an existing declared homestead on any property in this state.

"(b) The exemption provided in subdivision (a) shall not apply to a judgment or an abstract thereof which has been recorded prior to the acquisition of the property by the debtor or the spouse of the debtor or the commencement of residence, whichever last occurs."

The statute has been repealed, effective July 1, 1977, (Stats. 1976, ch. 1000) and replaced by new Code of Civil Procedure section 690.31 which reads in relevant part:

"(a) A dwelling house in which the debtor or the family of the debtor actually resides shall be exempt from execution, to the same extent and in the same amount, except as otherwise provided in this section, as the debtor or the spouse of the debtor would be entitled to select as a homestead pursuant to Title 5 (commencing with § 1237) of Part 4 of Division 2 of the Civil Code. . . .

"(b) The exemption provided in subdivision (a) does not apply:

"(1) Whenever the debtor or the spouse of the debtor has an existing declared homestead on any property in this state other than property which is the subject of a proceeding under subdivision (c) of this section."

ISSUE

(1) The issue presented is whether the retroactive operation of the "residential exemption" amounts to an impairment of the obligation of contract in violation of article I, section 10 of the United States Constitution.

The obligation sued upon was incurred and a default judgment was obtained by the plaintiff prior to July 1, 1975, the effective date of this section. (Stats. 1974, ch. 1251, § 8, p. 2712.) Clearly, if the plaintiff had recorded the abstract prior to July 1, 1975, its status as a lienholder and the encumbrance upon the property would have vested prior to the effective date of the act and the defendant would have been prohibited from claiming the "residential exemption" by the express terms of that act.[1]

[1]Statutes 1974, chapter 1251, sections 6 and 8 read:
"Sec. 6. Nothing in this act shall be construed to alter, change, or modify the rights of any lienholder or encumbrance vested prior to the operative date of this act."
"Sec. 8. This act shall become operative on July 1, 1975."

However, the Legislature in enacting the "residential exemption" and establishing the recording of the abstract vesting the encumbrance as the cutoff point, impliedly made the act applicable to obligations incurred and judgments obtained before its effective date but not vested as encumbrances until after. By so doing they have raised a constitutional issue dealing with the impairment of the plaintiff's expectations under the original contract.

The defendant's argument is essentially that no new exemption is created by section 690.235. He views this provision as merely extending the homestead exemption provision of the Civil Code to those otherwise entitled to it by removing the condition precedent of recording. In other words he is saying that both at the time the obligation was incurred and at the time of the judgment he was entitled to the homestead exemption and thus he is getting nothing more by this new exemption than that to which he was otherwise entitled.

We find this argument unconvincing. The law was at the time of the obligation and judgment herein, and still is, that you are not entitled to a homestead exemption unless you record it. If this section had not been enacted the defendant could assert no exemption and the plaintiff could have executed against the defendant's dwelling in satisfaction of his judgment. The defendant is given an exemption where none existed before and the plaintiff is denied an avenue of recovery which existed before.[2] That the plaintiff is deprived of a preexisting right and that the new section is here retroactively applied to the defendant's obligation to the plaintiff is beyond question. We must decide whether contractual rights have been unconstitutionally abridged in this situation.

The cases cited by the plaintiff all stand for the general proposition that statutes cutting down the creditor's rights by granting the debtor exemptions, in the absence of an emergency situation (such as the great depression)[3] are unconstitutional as an impairment of contractual obligations. (See 5 Witkin, Summary of Cal. Law (8th ed.) §§ 628, 629, pp. 3926-3928.)

[2]The defendant's argument totally ignores the realities of the situation. It is like saying that a new statute eliminating registration requirements for voting would confer no new rights upon a nonregistered voter because he was always a citizen and thus always entitled to vote.

[3]See 5 Witkin, Summary of California Law (8th ed.) section 629, pages 3927-3928 and 1 Stan.L.Rev. 352-354 citing *Home Building and Loan Ass'n* v. *Blaisdell* (1934) 290 U.S. 398 [78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481].

The leading case is *In re Rauer's Collection Co.* (1948) 87 Cal.App.2d 248, 253-254 [196 P.2d 803]. In that case it was held that the court must apply the homestead exemption amount provided by statute at the time the obligation was incurred. To apply the increased homestead exemption amount at the time of the judgment would impair the contractual relationship of the parties. The court emphasized that the creditor is entitled to rely upon the exemption in existence at the time the obligation is incurred.

Medical Finance Assn. v. *Wood* (1936) 20 Cal.App.2d Supp. 749, 751 [63 P.2d 1219], and *Smith* v. *Hume* (1937) 29 Cal.App.2d Supp. 747, 749 [74 P.2d 566], both involved the situation where a new exemption from execution for automobiles was enacted subsequent to the incurring of the obligation leading to the execution. Both courts held that the new exemption could not be applied retroactively even though no lien had attached prior to the enactment of that statute.

In accord is *Turner* v. *Donovan* (1944) 64 Cal.App.2d 375, 378-379 [148 P.2d 912], which held that an amendment to the Code of Civil Procedure prohibiting execution sales of causes of action and judgments, had no retroactive effect on the rights of a creditor whose levy was prior to the effective date of the amendment.

At least two federal bankruptcy cases arising out of the northern district of California and decided by the United States Court of Appeals, Ninth Circuit, are also in accord with the above decisions. They both involved the situation where the homestead exemption amount had been increased subsequent to the time the bankrupts had incurred the debts leading to their bankruptcy, but prior to the recording of their declarations of homestead. The bankrupts were held not to be entitled to take advantage of such increases, but were limited to the value at which the exemption was set when their debts were incurred. (*In re Towers* (N.D.Cal. 1956) 146 F.Supp. 882, 885-886, affd. *sub nom, Towers* v. *Curry* (9th Cir. 1957) 247 F.2d 738, 739; *England* v. *Sanderson* (9th Cir. 1956) 236 F.2d 641, 643, reversing *In re Sanderson* (N.D.Cal. 1955) 134 F.Supp. 484, 485.)

The order appealed from is reversed. Appellant to recover its costs on appeal.

Alarcon, J., and Wenke, J., concurred.