

#39.70

10/24/72

Memorandum 72-70

Subject: Study 39.70 - Prejudgment Attachment

Attached to this memorandum is a tentative recommendation relating to prejudgment attachment. Because of the length of this recommendation, our plan is to have the tentative recommendation printed before distribution for comment. At the November meeting, we hope to review as much of the recommendation as possible with a view towards approving the recommendation for printing probably after the December meeting. Much of the recommendation has previously been tentatively approved. Nevertheless, our plan is to go through the recommendation again section-by-section and permit anyone who has questions or suggestions to raise them at that time. We hope, however, that this can be done expeditiously. The remainder of this memorandum is devoted to a discussion of those matters which the staff wishes to raise regarding particular portions of the recommendation.

Preliminary portion. We have finally drafted a preliminary portion to the recommendation. We are ~~concerned~~ that it is rather long; yet, on the other hand, we are not sure that it is comprehensive enough. In any event, we earnestly solicit your editorial changes and any suggestions which you may have regarding the substance of this material. Are there matters which you believe should be discussed but which have been omitted or is there material which can be shortened or deleted?

Section 480.100. This section as presently drafted contains the word "personal" in brackets []. The staff suggests that the brackets be removed. They were originally inserted as a reminder to the staff to consider how "fixtures" should be treated. The staff, after some investigation, has

concluded that the problem of fixtures should be ignored. A similar conclusion was reached when the California Commercial Code was drafted. One basis for the latter decision was the following report from Professors Marsh and Warren to the Senate Judiciary Committee.

[W]e believe that the basic characteristic of . . . [the law of fixtures] can be stated rather simply: It is that the courts attach the label 'fixture' to an object when they have decided that the owner of an interest in the land should prevail, and they attach the label 'personalty' or 'non-fixture' to an object when they have decided that the owner of an interest in the object apart from the land should prevail; and they may attach both labels to exactly the same object in different circumstances, depending upon the positions and equities of the contesting parties. In other words, the determination that an object is a 'fixture' is not a factual classification but a statement of a legal conclusion. As Professor Horowitz says: 'When the word "personalty", . . . is used to mean that one person owns a particular chattel as against another person, or to mean that a particular chattel is not included in a particular conveyance, or to mean that a conditional seller will prevail against a bona fide purchaser, or to mean any of many other legal conclusions in various other cases, the terminology loses its utility for the statement and solution of legal problems. . . . The word "fixture" itself tends to be a barrier to clear analysis, for it is used to describe not only the status of legal relations between persons in all of the legal problems discussed in this paper, but at the same time has a factual connotation of physical attachment to land.'

* * * * *

It would probably be a great advance in the law if the law of fixtures could be codified and separated into two distinct problems: A factual classification of an object as a 'fixture', which is recognized as something different both from 'realty' and 'personalty'; and, secondly, a statement of the legal results in various circumstances which follow from such a classification. It is impossible, however, to do only half of this job without making a greater mess than there was before. . . .

If "equipment" is defined as "tangible personal property," the statute will at least be logically consistent in that one method of levy will be provided for real property and one method will be provided for personal property. Where the property in question is equipment, there may be situations where the proper characterization of the property is in doubt but, at worst, the problem could generally be resolved by simply filing with both the Secretary of State and the county recorder. Compare Section 487.340 with Section

487.310. We suggest that the problem merely be noted in the Comments to Sections 480.100 and 487.340, and the suggestion be made that levy be accomplished under both Section 487.310 and Section 487.340 in situations of real doubt.

The brackets in Sections 480.110 (farm products) and 480.120 (inventory) should also be deleted. Here, we believe, there will seldom, if ever, be any question that property is in fact personalty.

Section 480.220. This definition is new; however, we have simply incorporated the term used in the Vehicle Code to refer to vessels which are registered pursuant to the provisions of that code.

Chapters 4, 5, and 6. The procedures for obtaining a right to attach order and a writ of attachment may be summarized as follows. At the time the plaintiff files his complaint, or at any time thereafter, he may apply for an order and writ in the court where his action is brought.

Noticed hearing procedure. In the absence of exceptional circumstances, the plaintiff must apply under a noticed hearing procedure. Notice of the hearing on the application, a copy of the summons and complaint, and a copy of the plaintiff's application must be served on the defendant at least 20 days before the hearing. The defendant, if he wishes to oppose the issuance of the right to attach order, must file and serve on the plaintiff at least five days before the date of the hearing a notice of opposition. If he also desires to make a claim of exemption from attachment, the defendant must include such claim with his notice of opposition. If he does not wish to oppose the issuance of the right to attach order, the defendant may still claim an exemption from attachment by filing and serving on the plaintiff any such claim together with supporting affidavits at least five days before the hearing. The defendant may claim exemptions as to property not described in the plaintiff's application but, if he fails to prove that such property is exempt, he may not again

claim an exemption as to such property at a later time unless he shows that there has been a change in circumstances. As to property described in the plaintiff's application, the defendant must make his claim within the time provided, or the claim is barred, absent changed circumstances occurring after the hearing on the plaintiff's application.

If the plaintiff wants to contest a claim of exemption, he must serve on the defendant a notice of opposition to such claim at least two days before the hearing. If the plaintiff does not oppose a defendant's claim in this manner, then the property claimed to be exempt may not be attached and, if all the property sought to be attached is thus exempted, the hearing will not be held.

If the defendant neither makes a claim of exemption nor serves a notice of opposition, he may not oppose the application for a right to attach order and a writ of attachment, but the court is still required to review the application to see if the plaintiff has made an adequate showing to entitle him to the order and writ.

Temporary protective order procedure. When the plaintiff applies for a right to attach order, he may also apply for a temporary protective order. An ex parte hearing is then held upon such application and, if the plaintiff shows that he would suffer great or irreparable injury (under the same requirements provided for an ex parte right to attach order), the judicial officer issues the order on such terms as are considered appropriate. The statute does, however, provide certain limitations applicable to any temporary protective order. If the temporary protective order is granted, notice is served on the defendant of that fact, along with the notice of the hearing on plaintiff's application for the order and writ. The temporary protective order expires

30 days after service, or when a levy of attachment on the restrained property is made by the plaintiff, or when the defendant gives an undertaking to secure the payment of the plaintiff's judgment, whichever occurs first. The defendant may apply for the vacation or modification of the temporary protective order, and the judge may order its vacation or modification ex parte or at his discretion after a noticed hearing.

Ex parte procedure. When extraordinary circumstances are thought to exist, the plaintiff may seek an ex parte right to attach order and writ of attachment. However, the plaintiff must be able to show that he would suffer great or irreparable injury if the issuance of the order were delayed until notice and an opportunity for a hearing could be given the defendant.

On application for an ex parte right to attach order and writ of attachment, the judicial officer may issue a temporary protective order in lieu of a writ and require the plaintiff to proceed for his order and writ pursuant to the noticed hearing procedure. If he does this, the plaintiff's application is processed under the procedures described above requiring notice to the defendant and a hearing on the application. The plaintiff is still required to show that extraordinary circumstances exist, but the order is issued in lieu of the writ where the latter form of relief seems unnecessary or unreasonable.

Where the right to attach order and writ are issued ex parte, the defendant may apply for an order to set aside the right to attach order and to quash the writ and, if any property has been levied upon, to release such property. This application is served on the plaintiff and, at the noticed hearing, the judicial officer determines if the plaintiff is entitled to the right to attach order. The defendant may also claim pursuant to Section 690.50 an exemption as to any property attached under the ex parte procedure. Such claim may be joined with the application in opposition to the order.

All these procedures are also outlined in the diagram set forth in Exhibit I attached hereto (pink). The staff believes that these procedures are generally satisfactory. We do, however, suggest that Sections 484.020 and 484.030 be relocated at the end of Article 2 of Chapter 5, i.e., after Section 484.220. This seems to be a more logical placement since the defendant's opposition to the writ will obviously follow in time the plaintiff's application for such writ. We also ask that you consider whether the claim of exemption procedures provided by Section 690.50 (which is incorporated by Section 484.020) are adequate for this purpose. The staff believes that, generally speaking, they are adequate; however, they do require the defendant to make his claim within 10 days of the levy. This provision might perhaps be somewhat short and could cause problems if the defendant's right to the exemption arises from facts which occur after the 10-day period has passed. Do you believe that these concerns are serious enough to require the drafting of a separate claim of exemption procedure designed for this chapter alone?

The staff also recommends that the following sentence be added to subdivision (c) of Section 484.030:

(c) . . . If he finds that the plaintiff is entitled to the right to attach order, thereafter the plaintiff may apply for additional writs pursuant to Article 2 (commencing with Section 483.310) or Article 3 (commencing with Section 483.510) of Chapter 4.

Where the plaintiff's right to attach has been established after a noticed hearing, he should be able to utilize the Chapter 4 procedures for additional writs; it should make no difference that the noticed hearing came on the defendant's motion rather than the plaintiff's. Arguably, the plaintiff should be able to use the Chapter 4 procedures for additional writs even where there has been no hearing but the defendant has had an opportunity for one. We have not, however, gone that far. Do you believe that we should?

Section 486.010. It still seems to the staff that corporations and partnerships could be treated the same as individuals under this section, but we have drafted subdivisions (a) and (b) as directed at the October meeting. One advantage to treating all businesses the same would be that we could specify precisely what property is subject to attachment and be sure that we have provided a proper method of levy for each type of property.

Subdivision (c) is drafted with two phrases in brackets. The purpose of these phrases is to raise two separate issues: Should subdivision (c) contain a limitation to the effect that only property used or held for use or in some direct way connected with the business be subject to levy? Should all business property be subject to levy? We think the list in subdivision (c) is complete, and it certainly includes more types of property than the Marsh bill, but we suspect that, when the recommendation is distributed for comment, someone will raise something which we have not included or at least have not thought about. One difficulty with referring to all business property is that we may inadvertently include something for which we have not provided a suitable method or which we would prefer to have exempt from levy. In view of these problems, we suggest that the first phrase be deleted and the second phrase be retained with or without a specific limitation to business property.

Section 486.020. The staff apologizes but neither the tapes nor our notes from the last meeting made clear how the Commission wanted to treat the exemption of earnings. The present law exempts "all earnings" from attachment and a portion of earnings from execution. The term "earnings" has been construed to apparently include the earnings of an independent contractor. The wage garnishment recommendation recommends repeal of the state execution exemption. We think that, at the last meeting, the Commission also decided to repeal the attachment exemption, leaving, of course, the "necessary for

support" provision in subdivision (b) of Section 486.020. Is this correct? This action would not, of course, affect the federal exemptions from garnishment if, or to the extent, they apply to individuals doing business.

Section 487.310. Please note the questions raised by the Note to this section. These issues should be resolved before the tentative recommendation is approved for printing.

Section 487.340. Please note the question raised in the Note concerning the treatment of present Section 542.3.

Section 487.350. This section provides a method of levy for motor vehicles comparable to that provided for equipment generally. Due to the greater mobility of motor vehicles, some consideration might be given to seizure as a more secure method of levy; however, the latter method would perhaps entail drafting exemption provisions for vehicles which are "necessities" in order to satisfy the Randone requirements. Whether the DMV has the ability to serve as a source of information regarding the present state of the title to a particular vehicle is something which we should be able to determine when the tentative recommendation is distributed for comment. Similarly, whether the notice provided by filing is adequate is something which we would expect to receive comment upon.

The Commission asked previously how the certificate of ownership of a vehicle is treated when a vehicle is subject to execution. In this regard, Vehicle Code Section 5909 provides:

5909. (a) Whenever the title or interest of any owner or legal owner in or to a vehicle registered under this code passes to another otherwise than by voluntary transfer the new owner or legal owner may obtain a transfer of registration upon application therefor and upon presentation of the last certificate of ownership and registration card issued for the vehicle, if available, and any instruments or documents of authority or certified copies thereof as may be required by the department, or required by law, to evidence or effect a transfer of title or interest in or to chattels in such case.

(b) The department when satisfied of the genuineness and regularity of the transfer shall give notice by mail to the owner and legal owner of the vehicle as shown by the records of the department and five days after the giving of the notice, if still satisfied of the genuineness and regularity of such transfer, shall transfer the registration of the vehicle accordingly. Such notice shall not be required for a transfer described in Section 5601.

The purchaser at an execution sale gets possession of the vehicle and a certificate of sale. See Code Civ. Proc. § 698. The certificate of sale, we assume, provides evidence of the involuntary transfer which is sufficient to satisfy Vehicle Code Section 5909. See also Code Civ. Proc. § 689 (procedure for satisfying claim of legal owner under conditional sales contract or chattel mortgage). There is no indication of what is done concerning the old certificate of ownership, but presumably cancellation notices are sent out and perhaps branch offices of the DMV are notified to be alert to attempted transfers of the old certificate.

Section 487.360. The staff recommends that the bracketed phrase in the first portion of subdivision (a) be deleted. It seems unnecessary since the defendant can always refuse to consent to the use of a keeper if he wishes.

Section 487.370. In connection with the levy upon insurance policies, the staff presents these thoughts. As far as we can determine, Section 487.370 conforms to existing law, and we do not know of any problems under or criticism of these provisions. We note, however, that, since this section does not provide for seizure of the policy itself, rights under the policy might be assigned by the insured to an innocent third person after levy on the insurer. The third person could presumably learn of the levy by inquiring of the insurer prior to taking the assignment, and perhaps this is adequate enough protection, but we note the issue.

The Commission previously suggested that consideration be given to drafting provisions which would prevent an insurer or plaintiff from cancelling

an insurance policy during the period it is attached and which would permit both the plaintiff and the defendant to keep a policy in force during the same period. Section 70 of the Bankruptcy Act (11 U.S.C. § 110) accomplishes a similar purpose in a different way. The bankrupt-insured can free any policy with a cash surrender value from the claims of his creditors by paying to the trustee in bankruptcy an amount equivalent to such value. We suspect that the insured can obtain the money to make such payment by borrowing on the policy since generally, if not invariably, an insurer will loan an amount at least equal to the cash surrender value. This solution permits the insured to determine whether or not he wishes to maintain the policy as protection for his beneficiaries and yet preserves for the creditors the present value of the policy. A similar solution could, we think, be worked into the provisions dealing with execution to supplement the present exemption from execution. See Section 690.9.

The payment of an accrued claim does not, of course, present any of the problems of cancellation or further payment of premiums. In this situation, the insurer is basically a simple debtor subject to the filing of a proof of claim and so on.

Section 487.400. Do you wish to retain subdivision (c) of this section? There is no comparable provision under existing law, but such a provision would help to give notice to persons obligated on a note that payments made to the former holder of the note would be made at the obligee's risk.

Section 487.420. The provisions relating to judgments in subdivision 5 of Section 542 were added in 1970. Cal. Stats. 1970, Ch. 1523, § 4, at 3061. The substance of these provisions is retained by Section 487.420. However, no change was made in Section 688 which previously provided and still provides "that no cause of action or judgment as such . . . shall be subject to levy or sale on execution." The Marshal's Manual resolves this conflict by simply

ignoring the special procedure and providing for garnishment of the defendant's judgment debtor on the underlying debt. The staff believes that the judgment should be attached as provided in Section 487.420 and Section 688 should be revised to permit levy on a judgment but to prohibit sale except on application to the court. In lieu of sale, some provision should be made for collection of the judgment both when it is attached and when it is executed upon.

An attaching creditor is not permitted to intervene in a pending lawsuit. See Section 688.1 (relief limited to "judgment creditor"). Implicit under Section 688.1 is that a claim in litigation thereby becomes immune from attachment, and the Commission has directed that this policy be continued and made explicit. However, what happens to a claim (e.g., chose in action) that has been attached and subsequently becomes the subject of litigation? What provision should be made to permit litigation to be commenced to toll the statute of limitations? to collect on the claim from a debtor who refuses to pay?

Section 487.430. Please see the Note to this section.

Section 487.530. This section replaces the following overlapping provisions relating to the disposition of attached property.

Subdivision 1a of Section 542 provides in part as follows:

1a. . . . Whenever growing crops have been attached under the provisions of this subdivision, which will greatly deteriorate in value, unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the person in whose favor the writ runs, and after due notice to the owner of said property, may direct the sheriff to take possession of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold on execution and the proceeds must be retained by the sheriff to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall order said applicant to pay such expenses in advance if the court may deem it proper, or may direct that the whole or any part of such expenses be paid from the proceeds of any sale of such property.

Subdivision 2a of Section 542 relating to crops growing on real property held or standing in the name of a third person has a virtually identical

paragraph except that the court may direct the sheriff to take possession of the crops with or without notice to the owner of "said property." Subdivision 2a is ambiguous as to whether "said property" refers to the crops or the real property. However, it hardly makes sense to require notice to the defendant under subdivision 1a and not require a similar notice under subdivision 2a. Hence, we suspect that the only additional decision the court must make is whether to serve the owner of the underlying realty.

Section 547 provides as follows:

547. If any of the property attached be perishable, the officer levying the attachment must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the levy of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The receipt of such officer is a sufficient discharge for the amount paid.

Section 547a provides as follows:

547a. Whenever a writ of attachment is issued and the holder of such writ desires to attach, or has attached, property which is perishable, or which will greatly deteriorate in value unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the holder thereof, and after due notice to the owner of said property, may appoint a receiver to take charge of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold on execution and the proceeds must be retained by such receiver to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall fix the fee per day of such receiver and may order said applicant to pay such fee and expenses of said receiver in advance if the court may deem it proper, or may direct that the whole or any part of such fee and expenses be paid from the proceeds of any sale of such property.

Section 548 provides as follows:

548. Whenever property has been taken by an officer under a writ of attachment and it is made to appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the

judgment in the action. Such order can be made only (1) after notice to the adverse party or his attorney in case such party has been personally served with a summons in the action or, (2) after an order of service of summons by publication has been made.

Section 487.530 attempts to combine these provisions into one section which does in substance what is done under the existing law. Three questions are posed by the bracketed material in Section 487.530. (1) Should a third person whose interest in the property has been established be permitted to apply for immediate disposition of the property? (2) Should sales be conducted in the same manner as under execution (this is the existing law) or should the statute require that sales be conducted in a commercially reasonable manner? (3) Should the present ability to appoint a receiver under Section 547a be generalized or eliminated?

Section 487.540. Please consider the questions raised in the Note to this section.

Section 487.550. Please consider the question raised in the Note to this section.

Section 487.560. Please see the Note to this section.

Section 489.310. The bracketed material in subdivision (a) would continue a provision in the present law. See Section 540 set out in the Comment to this section. The staff, however, believes that it would be preferable to have all undertakings applied for and filed in the court in which the action is pending. What is your desire?

Section 491.010. Subdivision (c) is based on the last sentence of the first paragraph of Section 545 set out in the Comment to this section. The staff believes the provision is unnecessary but probably unobjectionable.

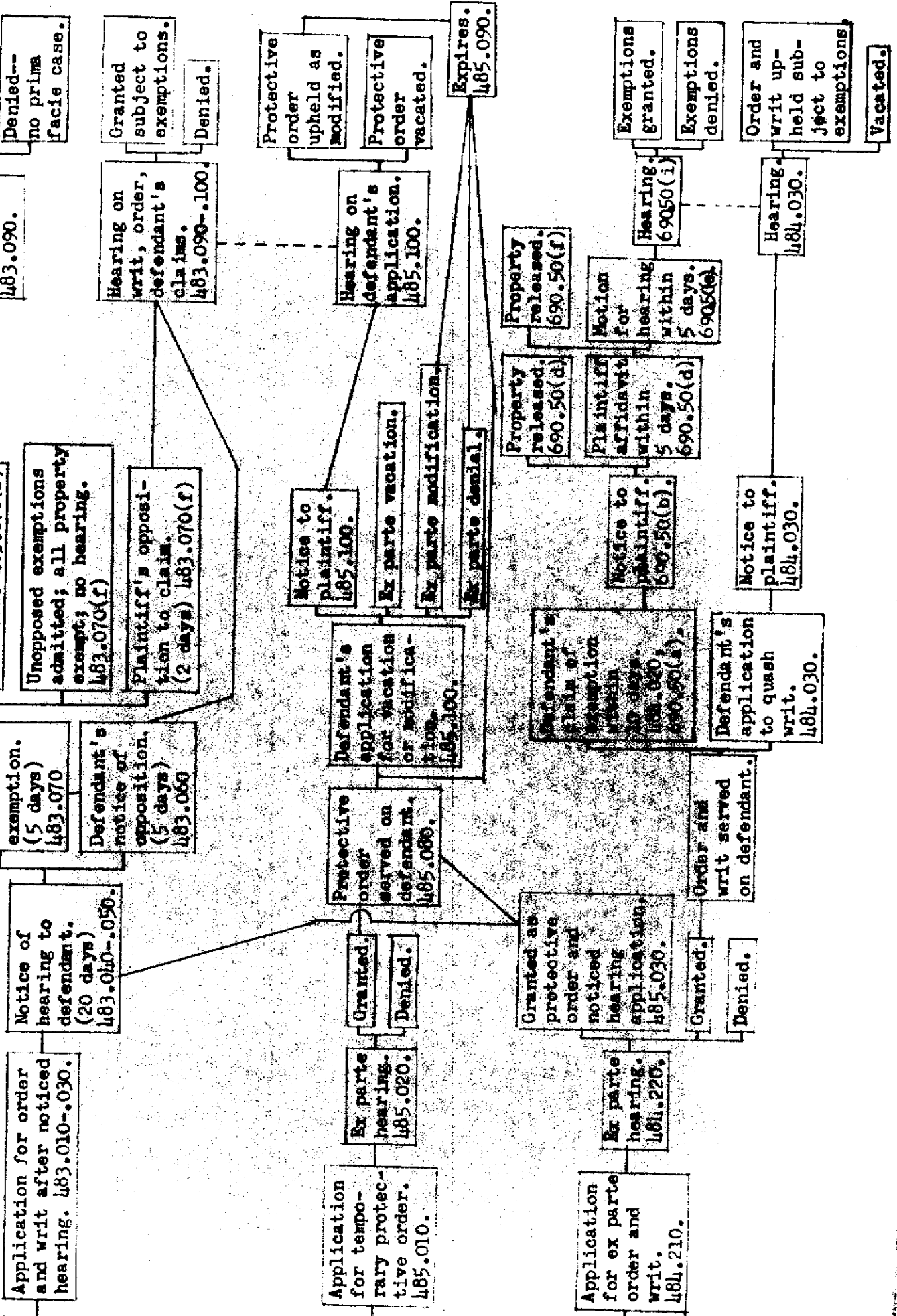
There are also a number of editorial changes and some typographical errors in the recommendation which we will attempt to bring to your attention as we proceed through the recommendation at the meeting.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

EXHIBIT I

Complaint filed.



STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE
RECOMMENDATION

relating to

PREJUDGMENT ATTACHMENT

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

PREJUDGMENT ATTACHMENT

INTRODUCTION

In 1969, the United States Supreme Court in Sniadach v. Family Finance Corporation,¹ held unconstitutional a Wisconsin procedure for the prejudgment garnishment of wages. In the wake of this decision, in 1971, the California Supreme Court in Randone v. Appellate Department² declared unconstitutional California's basic prejudgment attachment procedure on the grounds that it violated the due process requirements of both the California and United States constitutions.³ The court indicated that a more narrowly drawn statute would be necessary to meet the constitutional requirements of the Sniadach

1. 395 U.S. 337 (1969).
2. 5 Cal.3d 535, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
3. Actually, the court in Randone held unconstitutional only subdivision (1) of Section 537 of the Code of Civil Procedure; that subdivision authorized attachment in an action on a debt, including liability for support, against a resident defendant. Randone did, however, cast doubt on other subdivisions of Section 537. Subsequently, subdivision (4), authorizing attachment in an action in unlawful detainer for unpaid rent, was held unconstitutional in Damazo v. MacIntyre, 26 Cal. App.3d 18, Cal. Rptr. (1972). Subdivision (5), insofar as it authorized attachment for the collection by the state of an obligation or penalty imposed by law, was declared unconstitutional in People v. Allstate Leasing Corp., 24 Cal. App.3d 973, 101 Cal. Rptr. 470, as modified, 25 Cal. App.3d 602a (1972).

On the other hand, subdivisions (2) and (3), authorizing attachment in actions against nonresidents, were held constitutional in National General Corp. v. Dutch Inns of America, Inc., 15 Cal. App.3d 490, 93 Cal. Rptr. 343 (1971); Property Research Financial Corp. v. Superior Court, 23 Cal. App.3d 413, 100 Cal. Rptr. 233 (1972); and Damazo v. MacIntyre, supra. Finally, subdivision (6), which authorized attachment to recover funds expended in narcotics investigations, was also held constitutional in Damazo v. MacIntyre, supra.

case and that a "wholesale redrafting" of the basic attachment provisions⁴ would be required.

In order to provide immediate interim attachment remedies for creditors and to remedy the constitutional defects in the scheme invalidated by Randone,⁵ the 1972 Legislature enacted Senate Bill 1048. However, at the same time, the Law Revision Commission was directed to continue its study of the area of attachment with a view towards proposing a comprehensive revision of these⁶ procedures. On the basis of this study, the Commission makes the following recommendations.

CASES IN WHICH ATTACHMENT IS AUTHORIZED

A dominant theme of the California and federal court decisions in the area of prejudgment remedies is that assets of an individual which are "necessities of life" are constitutionally entitled to special consideration because of the extreme hardship to the individual which results when he is deprived of their use.⁷ In its discussion of "necessities," the court in Randone referred in part to such consumer goods as "television sets, refrigerators, stoves, sewing machines and furniture of all kinds."⁸ Certainly, a partially effective, if indirect, way of preventing attachment of such

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4. 5 Cal.3d at 547, 563, 488 P.2d at , , 96 Cal. Rptr. at , .
 5. Cal. Stats. 1972, Ch. 550.
 6. Cal. Stats. 1972, Res. Ch. 27.
 7. See, e.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Randone v. Appellate Dep't, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
 8. 5 Cal.3d at 560, 488 P.2d at , 96 Cal. Rptr. at , quoting from Blair v. Pitchess, 5 Cal.3d 258, 279, 486 P.2d 1242, , 96 Cal. Rptr. 42, (1971).

consumer necessities is to deny the use of the remedy in actions based on obligations generally and to authorize attachment only in actions to recover debts arising out of the conduct by the defendant of a trade, business, or profession. The 1972 legislation took just such an approach. The statute enacted provides for attachment where the action is for an unsecured liquidated sum of money based on money loaned, a negotiable instrument, the sale, lease, or licensed use of real or personal property, or services rendered and is against any corporation, partnership, or individual engaged in a trade or business.⁹ In essence, then, the 1972 act tends to restrict the availability of attachment to commercial situations by generally permitting attachment only against persons or organizations engaged in commercial activities. Unfortunately, the 1972 act does not specifically tie the types of alleged debts which may form the basis for attachment to the business activities of the defendant. Hence, for example, the 1972 act would not permit the attachment of

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9. Code Civ. Proc. §§ 537.1(a), 537.2(a), (b), (c). In contrast, at the time Randone was decided, the California law provided for attachment against any person where the action was based upon an unsecured contractual obligation, liability for support, or nonpayment of rent (in an unlawful detainer action). Cal. Stats. 1970, Ch. 1523, § 2, at 3058 (former Code Civ. Proc. § 537(1), (4)).

The pre-1972 law also authorized attachment where the defendant was a nonresident (or had departed from the state), could not be found, or had concealed himself to avoid service, and the grounds were expanded to include an action based upon any contract or any action for damages whether based on "negligence, fraud, or other wrongful act." Id. (former Code Civ. Proc. § 537(2), (3)). This aspect of the law was continued in part by the 1972 legislation which authorizes attachment in an action for the recovery of money where the defendant is a nonresident (including any foreign corporation or partnership which has not designated an agent for service of process within this state) or cannot be found or has concealed himself to avoid service of summons. Code Civ. Proc. §§ 537.1(b), 537.2(d). In such case, however, the defendant need merely make a general appearance to obtain a discharge of the attachment. Code Civ. Proc. § 538.5(d).

Note. The Commission has deferred consideration of whether and to what extent nonresident defendants will be treated uniquely and whether attachment will be permitted to secure jurisdiction. The answers to these questions will, however, be determined before a final recommendation in this area is submitted to the Legislature.

the property of an ordinary wage earner in an action based on the furnishing of medical services or the sale of a consumer good to such individual. The act would, however, permit the attachment of the property of an individual doing business as a grocer or self-employed plumber on the same type of debt. This inconsistency should be eliminated. The Commission recommends that the policy implicit in the 1972 act be continued by authorizing attachment only in those cases where the claim is based on an unsecured contract, whether express or implied, and arises out of the conduct by the defendant of a trade, business, or profession.

Prior to 1972, attachment was authorized only if the amount of recovery claimed, exclusive of interest and attorney's fees, was at least 200 dollars.¹⁰ In 1972, this limitation was increased to 500 dollars.¹¹ This limitation also has some tendency to eliminate those cases where consumer necessities might be attached. Moreover, the elimination of these relatively small cases also helps to save court time and resources which are inefficiently employed to collect such debts. The Commission recommends that these policies also be continued and that attachment be authorized only in those cases where the recovery sought is not less than 1,000 dollars. The 1,000-dollar minimum claim provision doubles the present limitation of 500 dollars but seems more likely to restrict use of the attachment procedure to cases which are economically worth the expense of full-scale litigation.

PROCEDURES FOR ISSUANCE OF WRIT; CLAIMS OF EXEMPTION

Three major prerequisites established by the California Supreme Court's decision in Randone must be satisfied by any attachment procedure. First,

10. Cal. Stats. 1970, Ch. 1523, § 2.7, at 3070 (former Code Civ. Proc. § 538). See also former Code Civ. Proc. § 537(1).

11. Code Civ. Proc. § 537.1.

in all but "extraordinary circumstances," a notice and hearing must be provided before the defendant's property is attached. Second, the "extraordinary circumstances" which permit the use of ex parte, summary procedures for the issuance of writs of attachment must be strictly limited. Finally, the statute must provide for the exemption of necessities from attachment. These prerequisites and the manner in which they are satisfied by this recommendation are discussed below.

Requirement of Notice and Hearing

Perhaps the primary failing of the California attachment procedure prior to the enactment of the 1972 amendments was the failure to provide for notice to the debtor of the threatened attachment of his property and an opportunity to be heard before the attachment--the essence of due process.¹² Under the 1972 amendments, if the judicial officer finds on the plaintiff's ex parte application that the plaintiff has established a prima facie case for attachment, he is required to issue a notice of hearing on the application for the writ.¹³ The hearing on the application is held seven business days after service of the notice on the defendant, or on the first regular date that law and motion matters are heard thereafter, whichever occurs later.¹⁴ Each party is required to serve upon the other any affidavits intended to be introduced at the hearing at least 24 hours before the hearing. If the defendant does not appear in person or by counsel, the statute requires the court to direct the issuance of a writ without further review. If the defendant does appear, the plaintiff must establish the probable validity of his claim and, if the

12. 5 Cal.3d at , 488 P.2d at , 96 Cal. Rptr. at .

13. Code Civ. Proc. § 538.1.

14. Code Civ. Proc. § 538.2.

court so finds, a writ is issued.

This procedure appears to satisfy the Randone requirement that adequate notice and opportunity for a hearing be given before a writ of attachment may issue. The Commission, however, recommends a number of changes. First, it is recommended that 20 days' notice of the hearing be given the defendant. This allows enough time for the defendant to prepare and serve the plaintiff with notice of his opposition to the application. Second, the defendant should be required to serve notice of his opposition and any claim of exemption on the plaintiff at least five days before the hearing. If such service is not made, the defendant should be prohibited from appearing in opposition to the application. The plaintiff, in turn, should give notice that he will contest the claims of exemption at least two days before the hearing. These procedures should insure an early framing of the issues, eliminate surprise, and obviate any need for continuances and extended hearings. If no notice of opposition is served by the defendant, the plaintiff must still establish a prima facie case as under existing law.

Under the 1972 amendments, if the plaintiff has established a prima facie case for attachment, the court is required to issue not only a notice of hearing but also a temporary restraining order.¹⁶ The temporary restraining order prohibits any transfer by the defendant of his property in the state which is "subject to the levy of a writ of attachment" except in the ordinary course of business. The order also prohibits the opening of new bank accounts and the issuance of any checks in excess of an aggregate of 1,000 dollars from funds subject to levy if the remaining funds would be reduced to less than the amount of the plaintiff's claim. Notwithstanding this

15. Code Civ. Proc. § 538.4.

16. Code Civ. Proc. § 538.1.

prohibition, the defendant may issue checks to cover payrolls, to pay for goods delivered C.O.D. for his business, to pay taxes where penalties would otherwise accrue, and to pay legal fees in the action. ¹⁷ The Commission believes that the ex parte issuance and sweeping nature of the temporary restraining order may not satisfy the Randone requirement that a defendant not be deprived of the use of his property except in exceptional circumstances without notice and an opportunity for a hearing.

The Commission recommends that the plaintiff be permitted to obtain a temporary protective order only if he can show ex parte that he will probably suffer great or irreparable injury if no order is issued. If a temporary protective order is issued, the defendant should be permitted to apply for its vacation or modification. This procedure should adequately protect the plaintiff in situations of need. On the other hand, it should prevent unnecessary infringement of the defendant's rights where such protection is not needed. By basing the issuance of the temporary protective order on an affirmative showing of need by the plaintiff, rather than issuing a temporary restraining order in every case, the recommended procedure avoids the due process objections which might exist if the defendant's use of his property could be restrained without a showing of a sufficient state or creditor interest in that restraint. The recommended temporary protective order procedure also has the additional virtue of flexibility by allowing the judicial officer to fashion the restraints of the order shown to be necessary for the protection of the plaintiff. The statute should, however, provide certain guidelines as to the ambit of the temporary protective order. The Commission's recommendation includes such guidelines; for example, the order must permit the defendant to issue checks in the same manner as under existing law.

17. Code Civ. Proc. § 538.3.

Ex Parte Attachment

The Randone decision criticized former Code of Civil Procedure Section 537(1) on the ground that it:

does not narrowly draw into focus those "extraordinary circumstances" in which summary seizure may be actually required. Instead, the provisions sweep broadly, approving attachment over the entire range of "contract actions", a classification which has no rational relation to either the public's or creditor's need for extraordinary prejudgment relief.

The court explained that the rule laid down by the United States Supreme Court in Sniadach is that:

the entire domain of prejudgment remedies [is subject to the] long-standing procedural due process principle which dictates that, except in extraordinary circumstances, an individual may not be deprived of his life, liberty or property without notice and hearing.

For this basic constitutional principle to be satisfied, an ex parte attachment procedure must serve some "'state or creditor interest' . . . 'of overriding significance' . . . which requires the procedure" and the statute must restrict ex parte attachments to such extraordinary situations. The court listed several cases involving extraordinary situations justifying summary deprivation of property: e.g., a procedure allowing government officers to seize operational control of a bank's assets in an emergency and a procedure allowing federal Food and Drug Administration officials to seize branded drugs which had been determined to be dangerous or misleading. The court found that a number of factors coalesced to justify these summary procedures:

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18. 5 Cal.3d at 541, 488 P.2d at , 96 Cal. Rptr. at .
 19. 5 Cal.3d at 547, 488 P.2d at , 96 Cal. Rptr. at .
 20. 5 Cal.3d at 552, 488 P.2d at , 96 Cal. Rptr. at .
 21. Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. v. Bennett, 277 U.S. 29 (1928).
 22. Ewing v. Myfinger & Casselberry, Inc., 339 U.S. 594 (1950).
 23. 5 Cal.3d at 554, 488 P.2d at , 96 Cal. Rptr. .

First, the seizures were undertaken to benefit the general public rather than to serve the interests of a private individual or a single class of individuals. Second, the procedures could only be initiated by an authorized governmental official, charged with a public responsibility, who might reasonably be expected to proceed only to serve the general welfare and not to secure private advantage. Third, in each case the nature of the risks required immediate action, and any delay occasioned by a prior hearing could potentially have caused serious harm to the public. Fourth, the property appropriated did not vitally touch an individual's life or livelihood. Finally, the "takings" were conducted under narrowly drawn statutes that sanctioned the summary procedure only when great necessity actually arose.

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The court noted that the United States Supreme Court had also cited a case upholding the constitutionality of a statute permitting prejudgment attachment of property on a nonresident debtor by a resident creditor. All these cases, however, the court said:

involved statutes which carefully confined the operation of their summary procedures to the "extraordinary" situation in which a governmental interest necessitated such measures.

Finally, both in Blair v. Pitchess and in Randone the court recognized that:

in some instances a very real danger may exist that the debtor may abscond with the property . . . [and that in] such situations a summary procedure may be consonant with constitutional principles.

However, former Section 537(1) did

not require the creditor to point to special facts which demonstrate an actual and significant danger that the debtor, if notified of the suit or potential attachment, will flee from the jurisdiction with his assets or will conceal his property to prevent future execution.

This failure of former Section 537(1) to meet any of the standards set forth caused the court to hold it unconstitutional.

24. Ownbey v. Morgan, 256 U.S. 94 (1921).

25. 5 Cal.3d at 554, 488 P.2d at , 96 Cal. Rptr. at .

26. 5 Cal.3d at 554, 488 P.2d at , 96 Cal. Rptr. at .

27. 5 Cal.3d at 278, 488 P.2d at , 96 Cal. Rptr. at .

28. 5 Cal.3d at 556, 488 P.2d at , 96 Cal. Rptr. at .

29. 5 Cal.3d at 557, 488 P.2d at , 96 Cal. Rptr. at .

It follows that one problem involved in drafting a constitutional statute is to adequately define and delimit "those 'extraordinary circumstances' in which a state or creditor interest of overriding significance might justify summary procedures."³⁰ The court suggested that "the kind of 'extraordinary situation' that may justify summary deprivation cannot be precisely defined."³¹ However, the statutory draftsman must still come as close as possible to a precise definition of the situations in which extraordinary circumstances may be said to exist.

The legislation enacted in 1972 attempted to meet the requirements of Randone by providing for the immediate issuance of a writ without notice or hearing only under the following conditions: when the plaintiff shows the court that "there is a substantial danger" that the defendant will transfer, remove, or conceal the property; when the notice cannot be served with reasonable diligence after 10 days and the court finds that the defendant has departed from the state or concealed himself to avoid service; when a bulk sales notice has been recorded and published (the writ in this case to apply only to such goods); when an escrow has been opened regarding defendant's sale of a liquor license (the writ in this case to apply only to the pro rata share of proceeds of sale in escrow); or when the defendant is a nonresident.³²

The Commission recommends that the substance of these provisions be retained but that issuance of a right to attach order and a writ of attachment be authorized only where the plaintiff shows that great or irreparable injury would result to him if issuance of the order were delayed until the matter

30. 5 Cal.3d at 557, 488 P.2d at , 96 Cal. Rptr. at .

31. 5 Cal.3d at 553, 488 P.2d at , 96 Cal. Rptr. at .

32. Code Civ. Proc. § 538.5.

could be heard on notice. Moreover, the Commission also recommends that the judicial officer be authorized to issue a temporary protective order, in lieu of a writ, where such order would better serve the ends of justice and equity, taking into consideration the rights and needs of both plaintiff and defendant. Such authorization should provide desirable flexibility as well as a less onerous remedy where there is any doubt as to whether the situation may constitutionally be characterized as extraordinary.

Exemption of Necessities

An additional reason cited in Randone for finding the former attachment procedure unconstitutional was that a writ of attachment was allowed to issue even in situations where the attachment deprived the defendant of his necessities of life. The procedure did allow the defendant to obtain the release of his property by establishing that it was exempt under a set of statutory exemptions.³⁴ However, the burden of seeking and proving the exemption was placed on the defendant, and necessities were subject to attachment until such time as the defendant proved his right to the exemption. The procedural steps required could delay the release of the exempt property for at least 25 days.³⁵ The court emphasized that:

the hardship imposed on a debtor by the attachment of his "necessities of life" is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and hearing on the validity of the creditor's claim. . . .³⁶

* * * * *

33. The Commission has deferred consideration of whether and to what extent nonresident defendants will be subject to ex parte attachment. The Commission has also postponed its consideration of the use of attachment to secure jurisdiction over nonresident defendants. See note 9, supra.

34. See Code Civ. Proc. §§ 690-690.29, 690.50.

35. 5 Cal.3d at 546, 488 P.2d at , 96 Cal. Rptr. at .

36. 5 Cal.3d at 448, 488 P.2d at , 96 Cal. Rptr. at .

[P]lacing the burden on the debtor to seek exemption, does not satisfy the constitutional requirements. . . . Instead, due process requires that all necessities be exempt from prejudgment attachment as an initial matter.³⁷

[A]t a minimum . . . [the defendant must] be afforded a meaningful opportunity to be heard on the merits of the plaintiff's claim . . . , the state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action, before an impartial confirmation of the actual, as opposed to probable, validity of the creditor's claim after a hearing on that issue.³⁸

The attachment provisions enacted in 1972 do permit the defendant to raise any claim of exemption at the noticed hearing on the plaintiff's application for a writ of attachment.³⁹ Thus, generally, no property will be attached before the defendant has an opportunity to claim his exemptions. Moreover, the statutory exemptions have been supplemented by a provision requiring the exemption of any property found to be necessary for the support of the defendant and his family.⁴⁰ As noted previously, an attempt has been made to restrict attachment to commercial situations.⁴¹ Finally, an attempt has also been made to limit the type of property which is subject to attachment to commercial property.⁴² All these features tend to remove consumer necessities from the reach of the attachment procedure and to satisfy the constitutional standards set by Randone. The Commission recommends that these policies be continued.

37. 5 Cal.3d at 563, 488 P.2d at , 96 Cal. Rptr. at .

38. 5 Cal.3d at 562, 488 P.2d at , 96 Cal. Rptr. at , citing Goldberg v. Kelly, 397 U.S. 254 (1970), and Boddie v. Connecticut, 401 U.S. 371 (1971).

39. Code Civ. Proc. § 537.3.

40. Id.

41. See text accompanying note 9 supra.

42. Code Civ. Proc. § 537.3.

Unfortunately, the 1972 legislation also provides for the automatic is-
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suaunce of a temporary restraining order pending the hearing referred to above
and provides only for the ex parte issuance of a writ of attachment in extraor-
44
dinary circumstances. The order is subject to certain limitations; how-
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ever, its impact may violate the Randone standards. 46 Similarly, there is no
alternative to the issuance of an ex parte writ in extraordinary circumstances,
and the writ may be used to attach necessities in violation of Randone. The
Commission recommends that the issuance of a temporary protective order be
limited to situations where the plaintiff has shown a real need for such re-
lief and that the court be authorized to issue a temporary protective order
in lieu of an ex parte writ where this action seems appropriate. Both changes
will permit the court to protect potential necessities and still provide adequate
relief for the plaintiff. Finally, the Commission recommends that, where the
plaintiff has sought to attach or actually attached particular property, the
defendant may claim as exempt not only that property but any other property
which he wishes to protect in the future. Thus, he may establish an exemption
in advance, thereby precluding the attachment of necessities.

The recommendations suggested above are directed towards satisfying the
constitutional dictates of Randone. This was essentially all that the 1972
legislation attempted to accomplish. The Commission, on the other hand, pro-
poses a comprehensive revision and modernization of the entire area of attach-
ment. The discussion which follows covers the major points of change in this
area.

43. Code Civ. Proc. § 538.1.

44. Code Civ. Proc. § 538.5.

45. Code Civ. Proc. § 538.3.

46. See p. 7, supra.

ADDITIONAL WRITS PROCEDURE

Existing law simply provides for the issuance of additional writs on the basis of the plaintiff's original affidavit and undertaking. ⁴⁷ The Commission recommends that more specific procedures which provide adequate protection for defendants be created. Where a right to attach order and a writ of attachment have been issued after a noticed hearing, the plaintiff should have two alternatives. He may apply either ex parte or by a noticed motion for an additional writ describing additional property. In the latter case, 20 days' notice should be given to the defendant. If the defendant makes no claim of exemption as to the additional property sought to be attached and the plaintiff has filed the necessary undertaking, the additional writ should be issued. If the defendant wants to claim an exemption, such claim should be made at least five days before the hearing. The plaintiff, in turn, should be required to serve any opposition to such claims at least two days before the hearing. If no opposition is made, the claim should be granted. If the defendant files a claim and the plaintiff files notice of opposition to at least some of the claimed exemptions, a hearing should be held and the judicial officer should make the necessary determinations and orders. The defendant may not later claim any of the property described in the plaintiff's application is exempt without showing a change in circumstances.

Alternatively, the plaintiff should be permitted to utilize an ex parte procedure for obtaining an additional writ. A writ should issue if at the ex parte hearing the court finds that a right to attach order has been issued after notice and hearing, that the plaintiff's affidavit shows the property sought to be attached is not exempt, and that the plaintiff has provided an

47. Code Civ. Proc. §§ 540, 559-1/2.

undertaking. After the writ is issued, the defendant may claim exemptions under the procedure provided by present Section 690.50 of the Code of Civil Procedure.

Where, in extraordinary circumstances, the plaintiff has obtained an order and writ under the ex parte hearing procedure,⁴⁸ the plaintiff should be able to apply ex parte for additional writs if he can show that the extraordinary circumstances still exist. Claims of exemption would again be made pursuant to Section 690.50.

These procedures, together with the claim of exemption procedures, permit the defendant to adequately protect his interests. Where a noticed hearing is held on the additional writ, the defendant can present his case before the writ is issued. Where the additional writ is sought ex parte but after a right to attach order and writ of attachment have been obtained at a noticed hearing, the defendant has two opportunities to claim his exemptions: at the time the original order and writ are issued⁴⁹ and then later after the ex parte writ has been served. Similarly, where in extraordinary circumstances the plaintiff has obtained an initial order and writ under the ex parte procedure, the defendant again has an opportunity to claim an exemption in advance at the time the initial writ is served and, if not previously made, after the additional writ is served.

METHOD OF LEVY

California law now provides for various methods of levy depending on the type of property involved. The Commission recommends a more detailed and orderly scheme utilizing modern terminology. Most of the provisions recommended are based on present law, but certain changes are suggested.

48. See pp. 10-11, supra.

49. See p. 13, supra.

General Provisions

The Commission recommends that the writ of attachment (or a separate statement incorporated thereby) be required to identify the property or interest to be levied upon. Existing law provides only that the property be described in the plaintiff's instructions to the levying officer. However, the procedures recommended for issuance of a writ would make the matter of what property is to be attached always subject to prior judicial consideration. If the writ then issued identifies the property to be levied on, this should help avoid any discrepancies between what the court has determined may be attached and what is actually levied upon by the sheriff.

Contents of Notice

The Commission recommends that a notice of attachment which informs the defendant of the capacity in which he is served, the property sought to be attached, and his rights and duties under the attachment always be served on the defendant. Existing law does not specify the contents of the notice of attachment, and some statutory guidance seems desirable.

Method of Levy for Particular Types of Property

The Commission recommends that specific methods of levy for various different types of property--real property, tangible personal property in the defendant's possession, tangible personal property in possession of a third person, equipment of a going business, motor vehicles and vessels, farm products and inventory of a going business, accounts receivable and choses in action, chattel paper, negotiable instruments and money, securities, judgments owing to the defendant as a judgment debtor, and deposit accounts--be provided. Without detailing the treatment of each type of property, some differences between existing law and the recommended provisions should be noted.

Real Property

The Commission recommends that mere occupants of real property no longer be served with a notice of attachment.⁵⁰ Such service seems to be an indirect means at best of giving notice to the owner of the property and at worst could cause undue worry and inconvenience to a person whose possession will not be disturbed. Service should still be required on the defendant and any record owner of the property.

Levy by Custody--Tangible Personal Property in Hands of Defendant

The Commission recommends that the distinction between property capable of manual delivery and property incapable of manual delivery be discontinued⁵¹ and that the statute speak instead in terms of tangible personal property generally or specially defined types of property. Under existing law, when property is not capable of manual delivery, levy is by notice even when it is in the possession of the defendant.⁵² The necessity to determine whether property is or is not capable of manual delivery involves the risk of an incorrect choice and the resulting invalidity of the attachment. The risk is removed by eliminating the distinction. Furthermore, by leaving the property in the hands of the defendant and attaching by notice, subsequent transferees may not be adequately protected. This problem should be avoided by requiring levy by custody where tangible personal property is in the possession of the defendant except in carefully prescribed situations.

50. Compare Code Civ. Proc. § 542(1).

51. See Code Civ. Proc. § 542(3), (5).

52. Code Civ. Proc. § 542(5). See *Raventas v. Green*, 57 Cal. 254 (1881); *Irillary v. Byers*, 84 Cal. App. 28, P. (1927).

Levy by Notice--Tangible Personal Property in Hands of Third Person

Tangible personal property, which is capable of manual delivery and in the hands of a third person, is not covered by the present statute; tangible personal property not capable of manual delivery in the hands of a third person is attached by serving notice on that person.⁵³ Under the recommended statute, tangible personal property not covered by some special statute would always be levied upon by service on that person. The third person would be able to demand that the levying officer take the property into custody. Otherwise, the third person would be liable to the plaintiff for the value of the defendant's interest in the property until the attachment is released.

Motor Vehicles and Vessels as Equipment of Going Business

Under existing law, equipment generally is levied upon by filing with the Secretary of State and serving notice upon the defendant.⁵⁴ The Commission recommends that motor vehicles and vessels which are equipment of a going business be treated similarly but that the notice be filed with the Department of Motor Vehicles instead of the Secretary of State.

Inventory of a Going Business and Farm Products

Under existing law, the inventory of a going business is attached, with the defendant's consent, by placing a keeper in charge of the business, thereby allowing final cash sales to continue for a short period.⁵⁵ The Commission recommends that a similar procedure be retained but that the defendant be able to seek an order removing the keeper and returning the property if

53. Code Civ. Proc. § 542(5).

54. Code Civ. Proc. § 542.1.

55. Code Civ. Proc. § 542(3).

the property attached is essential for his support and that of his family and if he can show that he is solvent but for the plaintiff's claim.

The Commission also recommends that the plaintiff be permitted, as an alternative to the keeper, to obtain an attachment lien on the inventory by filing with the Secretary of State. This would give him the same type of priority as a secured party with a perfected security interest. Finally, the Commission recommends that farm products held for sale be treated in the same manner as the inventory of a business.

Negotiable Instruments and Chattel Paper

The Commission recommends that the law relating to negotiable instruments be clarified and that this type of property be attached by serving notice and taking custody in all situations--whether the instrument is in the possession of the defendant or a third person. This procedure avoids the problem arising from transfers to subsequent holders and eliminates the ambiguities in existing law.

56. Under existing law, a promissory note belonging to the defendant but in the possession of a third person is characterized as both a "credit" and "personal property capable of manual delivery." Compare Deering v. Richardson-Kimball Co., 109 Cal. 73, P. (1895)(credit), and Gow v. Marshall, 90 Cal. 565, P. (1891)(credit), with Haulman v. Crumal, 13 Cal. App.2d 612, 57 P.2d 179 (1936)(property capable of manual delivery). Subdivision 5 of Section 542 provides in part:

[C]redits . . . shall be attached by leaving with the persons . . . having in his possession, or under his control, such credits . . . a copy of the writ . . . and . . . a notice that . . . the credits . . . in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

Levy accordingly would be by notice and the note would not be required to be taken into custody. Cf. Puissegur v. Yarbrough, 29 Cal.2d 409, 175 P. 830 (1946)(levy by notice to financial institution regardless of the character of the property). However, no procedure is specified for levy on property capable of manual delivery and in the hands of a third person. Nevertheless, it has been suggested that the proper method of levy on a negotiable instrument in the possession of a third person is by seizure. See Haulman v. Crumal, supra (dictum). A note in the possession of the defendant has been treated as personal property capable of manual delivery and attached by seizure. See Jubelt v. Sketers, 84 Cal. App.2d 653, 191 P.2d 460 (1948).

Lien of Attachment

California law currently provides three different periods for the duration of attachment liens: five years for equipment,⁵⁷ three years for real property,⁵⁸ and one year for personal property.⁵⁹ Furthermore, different procedures are provided for extending these liens. The Commission recommends that the duration and the provisions for the extension of liens be standardized. All types of property should be subject to a lien which expires two years from the date of the issuance of the writ of attachment. In order to extend the lien, the plaintiff should apply upon noticed motion before the expiration of the two-year period for an order extending the lien for not more than one year. If the order is issued, it would then be served on the person holding the property and properly recorded or filed. The aggregate of such extensions should be limited to five years.

UNDERTAKINGS

The existing law of prejudgment attachment is strewn with confusing and repetitive provisions concerning undertakings. The Commission recommends that these provisions be simplified and clarified as follows. Certain general principles should be provided common to undertakings given for any purpose under the title relating to attachment. As under existing law, the undertakings should be executed by two or more sureties (or one corporate surety).⁶⁰ If the amount of the undertaking depends on the value of property, the principal should be required to state his estimate of the market value of the

57. Code Civ. Proc. § 542.2.

58. Code Civ. Proc. § 542a.

59. Code Civ. Proc. § 542c.

60. See Code Civ. Proc. §§ 539, 539a, 540, 553, 555, 1056.

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property. If the beneficiary of the undertaking objects to the principal's valuation of the property, the court should have discretion to order an appraisal. All undertakings should be approved by a judicial officer and then filed at which time they would become effective. This generalizes the procedure now existing with regard to undertakings given to release attached property.⁶² Requiring judicial approval in every case assures that the undertaking is valid on its face and that the affidavits of the sureties are technically sufficient. All undertakings should also be filed in the court where the action is pending; under present law, some undertakings are filed in court⁶³ and some with the levying officer.⁶⁴

As under existing law, the beneficiary should be permitted to object to the undertaking either on the ground that the sureties are insufficient or that the amount is insufficient.⁶⁵ Such objections should be made by noticed motion and, if the beneficiary's objection involves the value of the property, he should be required to state his estimate of such value in the motion. This requirement should facilitate voluntary agreement between the beneficiary and principal as to the proper market value. Under existing law, objections⁶⁶ have to be made within five days after notice of levy or filing. There seems to be no reason for this limitation, and the limitation could be detrimental to the beneficiary should the reason for an objection to the undertaking occur after five days have passed. The Commission recommends that no time limit be placed on objections to undertakings.

61. Compare Code Civ. Proc. §§ 677, 710c.

62. Compare Code Civ. Proc. § 540.

63. Code Civ. Proc. § 540.

64. Code Civ. Proc. § 539a.

65. Compare Code Civ. Proc. §§ 539, 554, 555, 678, 711-1/2.

66. Code Civ. Proc. §§ 539, 539a, 553.5, 554.

The hearing on the motion, appraisal of property, or the examination of sureties should be held within two to five days of the objection. If the judicial officer determines that the undertaking is insufficient, then the principal should be allowed five days to remedy the insufficiency. If this is not done, the rights obtained by the filing of the undertaking should cease. Until replaced, the old undertaking should remain in effect. If the undertaking is determined after the hearing to be sufficient, then the beneficiary should not be permitted to object again unless and until changed circumstances exist. As indicated above, if the beneficiary's objection is that the property's market value is higher than stated by the principal, the principal may accept the beneficiary's estimate and give an undertaking on that basis, in which case no hearing would be held on the objection and the beneficiary would be bound by his estimate. Most of these procedures are based on existing law.⁶⁷

Under existing law, the beneficiary has to attempt to satisfy his judgment from the assets of the principal before trying to enforce it against the sureties. The Commission recommends that the beneficiary be allowed to pursue the sureties first if he so desires. Since the undertaking is in his favor, the law should facilitate the satisfaction of his claims. The surety would still be able to seek his satisfaction from the principal. In addition, the surety would be liable only for the amount of the undertaking whereas the principal would be liable for the full amount of damages caused. Motions to enforce the liability on an undertaking should have to be made within a year after the final judgment in the main action and the time for appeal has expired as under existing law.⁶⁸

67. See Code Civ. Proc. §§ 678, 678-1/2, 679, 711-1/2, 712, 712-1/2, 833-835, 1030, 1057.

68. See Code Civ. Proc. § 1166a.

Also, as under existing law, undertakings should be required to be given by a plaintiff before a writ of attachment or a temporary protective order is issued. Undertakings for this purpose should be required in one-half the amount the plaintiff seeks to recover. Existing law provides that undertakings may be increased on the defendant's motion, but no guide is given as to the new amount.⁶⁹ The Commission recommends that the undertaking be increased⁷⁰ to the amount of the probable recovery for wrongful attachment.⁷¹

The defendant whose property is subject to attachment should be permitted to obtain its release by appearing in court and obtaining an order allowing him to file an undertaking equal to the lesser of (1) the plaintiff's valuation of the property or (2) the amount specified in the writ to be secured by the attachment. This procedure is similar to that under existing law.⁷¹

LIABILITY FOR WRONGFUL ATTACHMENT

California law does not currently provide any statutory remedy for wrongful attachment. Persons seeking to recover for damages brought about by the plaintiff's use of prejudgment attachment are required to proceed by way of the common law actions of malicious prosecution and abuse of process.⁷² The Commission recommends that the case law in this area be supplemented by statute in order to make a remedy more readily available to persons injured by an attachment. By providing a useful remedy to such persons, overreaching by plaintiffs should be deterred.

69. See Code Civ. Proc. § 539(a).

70. See discussion under **Liability for Wrongful Attachment**, infra.

71. See Code Civ. Proc. §§ 540, 554, 555.

72. See 2 B. Witkin, California Procedure Provisional Remedies § 214 at 1612-1613 (2d ed. 1970); *White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

The Commission recommends that the following acts be characterized as a wrongful attachment: levy of a writ of attachment or service of a temporary protective order where attachment is not authorized or where the plaintiff does not recover judgment, levy of a writ of attachment on property greatly in excess of the plaintiff's legitimate claim, levy of an ex parte writ of attachment on property exempt from attachment, and levy of the writ of attachment on property of a third person. In each of these cases, the plaintiff should be liable for all damages proximately caused, whether direct or consequential, and all costs and expenses including attorney's fees reasonably expended in the wrongful attachment suit. However, the plaintiff's liability should be limited to the amount of the undertaking if the writ of attachment was issued under the noticed hearing procedure.

The defendant or third person should not be required to bring an independent action but should be permitted to proceed by motion, filed in the original action and served on plaintiff within a year after final judgment and the time for appeal has expired or the appeal is disposed of. ⁷³ Sureties could be joined in the proceeding, but their liability should be limited by their undertaking.

Since the cause of action for wrongful attachment is intended to handle only certain readily identifiable cases, the common law remedies should not be limited by the recommended procedure.

73. This procedure would be the same as that provided under existing law for recovery on an undertaking. Compare Code Civ. Proc. § 1058a.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Title 6.5 (commencing with Section 480.010) to Part 2 of, and to repeal Chapter 4 (commencing with Section 537) of Title 7 of Part 2 of, the Code of Civil Procedure relating to attachment.

The people of the State of California do enact as follows:

C O N T E N T S

TITLE 6.5 ATTACHMENT

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Sec. . Title 6.5 (commencing with Section 480.010) is added
to Part 2 of the Code of Civil Procedure, to read:

Title 6.5. Attachment

CHAPTER 1. WORDS AND PHRASES DEFINED

§ 480.010. Application of definitions

480.010. Unless the provision or context otherwise requires, these definitions govern the construction of this title.

Comment. Section 480.010 is a standard provision found in the definitional portion of recently enacted California codes. See, e.g., Evid. Code § 100; Veh. Code § 100.

Additional definitions are found in the preliminary provisions of the Code of Civil Procedure. E.g., Section 17 provides "the singular number includes the plural and the plural the singular."

§ 480.020. Account debtor

480.020. "Account debtor" means the person who is obligated on an account receivable, chattel paper, or chose in action.

Comment. Section 480.020 is based on the definition of "account debtor" provided by paragraph (a) of subdivision (1) of Section 9105 of the Commercial Code. Paragraph (a) of Section 9105 provides:

(a) "Account debtor" means the person who is obligated on an account, chattel paper, contract right or general intangible. . . .

Section 480.020 merely substitutes the term "account receivable" for "account" and "chose in action" for "general intangible." See Sections 480.030 ("account receivable" defined), 480.050 ("chose in action" defined). Attachment of "contract rights" (as that term is defined by the Commercial Code) is not permitted. See Comment to Section 480.050. "Chattel paper" is defined by Section 480.040.

§ 480.030. Account receivable

480.030. "Account receivable" means any right to payment which has been earned for goods sold or leased or for services rendered which is not evidenced by a negotiable instrument, security, or chattel paper.

Comment. Section 480.030 is based on the definition of "account" provided by Section 9106 of the Commercial Code. Section 9106 provides in part:

9106. "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.

The term "account receivable" is used in this title because it is a more descriptive phrase than "account" and to avoid confusion with the term "deposit account." Compare Section 480.080. The term "instrument" used in Section 9106 is defined by paragraph (g) of subdivision (1) of Section 9105 as follows:

(g) "Instrument" means a negotiable instrument (defined in Section 3104), or a security (defined in Section 8102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;

Section 480.030 substitutes the terms "negotiable instrument" and "security" for "instrument" but retains the substance of the Commercial Code. See Sections 480.160 ("negotiable instrument" defined), 480.210 ("security" defined).

Section 480.030 makes clear that the right to payment covered by this section must have been earned by specifically including this requirement.

The method of levy on an account receivable is provided by Section 487.370.

§ 480.040. Chattel paper

480.040. "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper. As used in this section, "instrument" means a negotiable instrument, or a security, or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in the ordinary course of business transferred by delivery with any necessary indorsement or assignment.

Comment. Section 480.040 is substantively the same as paragraph (b) of subdivision (1) of Section 9105 of the Commercial Code. Paragraph (b) of Section 9105 provides:

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper

The term "instrument" used in subdivision (b) of Section 9105 is defined in paragraph (g) of subdivision (1) of Section 9105. Section 480.040 incorporates the same definition in its third sentence. Thus, "chattel paper" under this title has basically the same meaning as "chattel paper" under Section 9105 of the Commercial Code, and the following excerpt from the Comment to Section 9105 should help to explain the term.

§ 480.040

A dealer sells a tractor to a farmer on conditional sales contract. The conditional sales contract is a "security agreement", the farmer is the "debtor", the dealer is the "secured party" and the tractor is the type of "collateral" defined in Section 9-109 as "equipment". But now the dealer transfers the contract to his bank, either by outright sale or to secure a loan. Since the conditional sales contract is a security agreement relating to specific equipment the conditional sales contract is now the type of collateral called "chattel paper". In this transaction between the dealer and his bank, the bank is the "secured party", the dealer is the "debtor", and the farmer is the "account debtor".

Under the definition of "security interest" in Section 1-201(37) a lease does not create a security interest unless intended as security. Whether or not the lease itself is a security agreement, it is chattel paper when transferred if it relates to specific goods. Thus, if the dealer enters into a straight lease of the tractor to the farmer (not intended as security), and then arranges to borrow money on the security of the lease, the lease is chattel paper.

The method of levy on chattel paper is provided by Section 487.380.

§ 480.050 Chose in action

480.050. "Chose in action" means any right to payment of a fixed or reasonably ascertainable amount which arises out of the conduct of any trade, business, or profession and which (a) is not conditioned upon further performance by the defendant or upon any event other than the passage of time, (b) is not an account receivable, (c) is not a deposit account, and (d) is not evidenced by a negotiable instrument, security, chattel paper, or judgment. The term includes an interest in or a claim under an insurance policy.

Comment. Section 480.050 defines "chose in action" as the term is used in this title. It should be noted that, in contrast with the term "contract right" under the Commercial Code, the right must be earned and must be in a fixed or reasonably ascertainable amount. Compare Com. Code § 9106 ("'contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper"; "'general intangibles' means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents, and instruments. Any interest or claim in or under any policy of insurance is a general intangible.").

The phrase "which arises out of the conduct of any trade, business, or profession" limits the term to business-oriented debts. See Section 486.010 and Comment thereto.

The method of levy on a chose in action is provided by Section 487.370.

§ 480.060. Complaint

480.060. "Complaint" includes a cross-complaint.

Comment. Section 480.060 continues former law. See Rose v. Pearman, 163 Cal. App.2d 480, 329 P.2d 501 (1958); Allers v. Beverly Hills Laundry, Inc., 98 Cal. App. 580, 277 P. 337 (1929).

§ 480.070. Defendant

480.070. "Defendant" includes a cross-defendant.

Comment. See Comment to Section 480.060.

§ 480.080. Deposit account

480.080. "Deposit account" means any of the following:

(a) An account in any "bank" described in Section 102 of the Financial Code.

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

(c) An account for funds received from a member of a credit union.

Comment. Section 480.080 defines "deposit account" as the term is used in this title. Industrial loan companies (as described in Financial Code Section 18003) are not included under this section because they only issue investment or thrift certificates. See Fin. Code § 18402. See also Fin. Code § 18003 (referring to certificates as "choses in action"). These companies are expressly prohibited from receiving deposits or issuing certificates of deposit. See Fin. Code § 18403.

The method of levy on deposit accounts is provided by Section 487.390.

§ 480.090. Document

480.090. "Document" means a "document of title" as defined by subdivision (15) of Section 1201 of the Commercial Code.

Comment. Section 480.090 defines document by incorporating by reference the term document of title defined by subdivision (15) of Section 1201 of the Commercial Code. Subdivision (15) provides:

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, compress receipt, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

Goods subject to a nonnegotiable document are levied upon pursuant to Section 487.330. A negotiable document is levied upon in the same manner as a negotiable instrument. See Section 487.400.

§ 480.100. Equipment

480.100. "Equipment" means tangible [personal] property in the possession of the defendant and used or bought for use primarily in the defendant's trade, business, or profession if it is not included in the definitions of inventory or farm products.

Comment. Section 480.100 is based on the definition of "equipment" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . ."equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods

Farm products and inventory are defined by Sections 480.110 and 480.120 respectively.

The method of levy on equipment of a going business except motor vehicles and vessels is provided by Section 487.340. Motor vehicles and vessels which are equipment of a going business are levied upon pursuant to Section 487.350. See also Sections 480.150 (motor vehicle defined); 480.220 (vessel defined).

§ 480.110. Farm products

480.110. "Farm products" means crops or livestock or supplies used or produced in farming operations or products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, honey, milk, and eggs), while in the possession of a defendant engaged in raising, fattening, grazing, or other farming operations. If tangible [personal] property is a farm product, it is neither equipment nor inventory.

Comment. Section 480.110 is based on the definition of "farm products" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple sirup, honey, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory

Equipment and inventory are defined by Sections 480.100 and 480.120 respectively.

The method of levy on farm products is provided in Section 487.360.

§ 480.120. Inventory

480.120. "Inventory" means tangible [personal] property in the possession of a defendant who holds it for sale or lease or to be furnished under contracts of service or if it is raw materials, work in process, or materials used or consumed in his trade, business, or profession. Inventory of a person is not to be classified as his equipment.

Comment. Section 480.120 is based on the definition of "inventory" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has leased or so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

The phrase "or if he has leased or so furnished them" has been deleted to make clear that inventory under this title is limited to property in the possession of the defendant.

The method of levy on inventory of a going business is provided by Section 487.360. Levy generally on tangible personal property in the possession of the defendant is provided by Section 487.320. Levy generally on tangible personal property not in the possession of the defendant is provided by Section 487.330.

§ 480.130. Judicial officer

480.130. "Judicial officer" means any judge or any commissioner or other officer appointed by the trial court to perform the duties required by this title.

§ 480.140. Levying officer

480.140. "Levying officer" means the sheriff, constable, or marshal who is directed to execute a writ or order issued under this title.

§ 480.150. Motor vehicle

480.150. "Motor vehicle" means a "motor vehicle" as defined by Section 415 of the Vehicle Code.

Comment. Section 480.150 defines "motor vehicle" by incorporating by reference the same term as defined by Section 415 of the Vehicle Code. Section 415 provides: "415. A 'motor vehicle' is a vehicle which is self-propelled." This definition includes not only cars, trucks, and buses but all sorts of heavy equipment and miscellaneous vehicles; e.g., golf carts, snowmobiles, forklifts, farm and cemetery equipment. It should be noted, however, that Section 486.010 provides significant limitations on the nature of property which is subject to attachment.

The method of levy on motor vehicles which are equipment of a going business is provided by Section 487.350. Levy on other vehicles which are subject to attachment is accomplished pursuant to Sections 487.320, 487.330, and 487.360.

§ 480.160. Negotiable instrument

480.160. "Negotiable instrument" means a "negotiable instrument" as defined by Section 3104 of the Commercial Code.

Comment. Section 480.160 defines "negotiable instrument" by incorporating by reference the same term as defined by Section 3104 of the Commercial Code. Section 3104 provides:

3104. (1) Any writing to be a negotiable instrument within this division must

(a) Be signed by the maker or drawer; and

(b) Contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this division; and

(c) Be payable on demand or at a definite time; and

(d) Be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

(a) A "draft" ("bill of exchange") if it is an order;

(b) A "check" if it is a draft drawn on a bank and payable on demand;

(c) A "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

(d) A "note" if it is a promise other than a certificate of deposit.

* * * * *

The method of levy on a negotiable instrument generally is provided by Section 487.400. But see Section 487.390 (deposit account).

§ 480.170. Person

480.170. "Person" includes an individual, a corporation, a partnership or other unincorporated association, and a public entity.

§ 480.180. Plaintiff

480.180. "Plaintiff" means a person who files a complaint or cross-complaint.

Comment. See Comment to Section 480.060.

§ 480.190. Probable validity

480.190. A claim has "probable validity" where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.

§ 480.200. Public entity

480.200. "Public entity" includes the state, the Regents of the University of California, a county, a city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Comment. Section 480.200 adopts the language of the definition found in Section 811.2 of the Government Code.

§ 480.210. Security

480.210. "Security" means a "security" as defined by Section 8102 of the Commercial Code.

Comment. Section 480.210 defines "security" by incorporating by reference the same term as defined by Section 8102 of the Commercial Code. Section 8102 provides in part:

8102. (1) In this division unless the context otherwise requires

(a) A "security" is an instrument which

(i) Is issued in bearer or registered form; and

(ii) Is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

(iii) Is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(iv) Evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

(b) A writing which is a security is governed by this division and not by Uniform Commercial Code--Commercial Paper even though it also meets the requirements of that division. This division does not apply to money.

(c) A security is in "registered form" when it specifies a person entitled to the security or to the rights it evidences and when its transfer may be registered upon books maintained for that purpose by or on behalf of an issuer or the security so states.

(d) A security is in "bearer form" when it runs to bearer according to its terms and not by reason of any indorsement.

* * * * *

The method of levy on a security is provided by Section 487.410.

§ 480.220. Vessel

480.220. "Vessel" means a numbered vessel as that term is used in Division 3.5 of the Vehicle Code.

Comment. Section 480.220 defines "vessel" by incorporating the term "numbered vessel" used in the registration of vessels provisions of the Vehicle Code. See Veh. Code §§ 9840, 9850, 9873. The method of levy on vessels which are equipment of a going business is provided by Section 487.350. Levy on other vessels which are subject to attachment is accomplished pursuant to Sections 487.320, 487.330, and 487.360.

CHAPTER 2. GENERAL PROVISIONS

§ 481.010. Short title

481.010. This title shall be known and may be cited as "The Attachment Law."

§ 481.020. Rules for practice and procedure

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

Comment. Section 481.020 is the same as Civil Code Section 4001 (The Family Law Act).

§ 481.030. Forms

481.030. The Judicial Council shall prescribe the form of the applications, notices, orders, and other documents required by this title. Any such form prescribed by the Judicial Council is deemed to comply with this title.

Comment. Section 481.030 requires the Judicial Council to prescribe the forms necessary for the purposes of this title. Various sections prescribe information to be contained in the forms, but the Judicial Council has complete authority to adopt and revise forms as necessary and may require additional information in the forms or may omit information from the forms that it determines is unnecessary.

§ 481.040. General requirements for affidavits

481.040. The facts stated in each affidavit filed pursuant to this title shall be set forth with particularity. Each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. The affiant may be a party to the action or any other person having knowledge of the facts.

Comment. Section 481.040 provides standards for affidavits filed pursuant to this title. These standards are comparable to but not as restrictive as those provided for affidavits filed in support of or in opposition to a motion for summary judgment. Compare Section 437c. A verified complaint that satisfies the requirements of Section 481.040 may be used in lieu of or in addition to an ordinary affidavit.

§ 481.050. Secrecy prior to return of service; exception; form of request

481.050. (a) If the plaintiff so requests in writing at the time he files his complaint, the clerk of the court with whom the complaint is filed shall not make available to the public the records and documents in such action before either (1) thirty (30) days after the filing of the complaint or (2) the filing pursuant to this title of the return of service of the notice of hearing and any temporary restraining order, or of the writ of attachment if issued without notice, whichever event occurs first.

(b) Notwithstanding the provisions of subdivision (a) of this section, the clerk of court shall make the entire file in the action available for inspection at any time to any party named in the complaint or to his attorney.

(c) The request by plaintiff that the fact of filing of a complaint or application for relief not be made public may take the form of a notation to that effect, made by rubber stamp or other suitable means, at the top of the first page of the complaint filed with the clerk.

Comment. Section 481.050 is substantively the same as former Section 537.5. Section 537.5 provided:

537.5. In cases of attachment the clerk of the court with whom the complaint is filed, if requested by plaintiff in writing at the time of filing the complaint, shall not make public the fact of the filing of the complaint, or of the issuance of the attachment, until after the filing of the return of service of the notice and temporary restraining order or of the writ of attachment if issued without notice, except that if the return of service of the notice and temporary restraining order or of the writ of attachment is not made within 30 days after the filing of the complaint in the action, the clerk of the court with whom the complaint is filed shall make available to the public the records and documents in such action. However, the clerk of such court shall make the entire file in the action available for inspection at any time to any party named in the complaint, or to his attorney.

§ 481.050

The request by plaintiff that the fact of filing of a complaint or issuance of an attachment not be made public may take the form of a notation to that effect, made by rubber stamp or other suitable means, at the top of the first page of the complaint filed with the clerk.

CHAPTER 3. ACTIONS IN WHICH ATTACHMENT AUTHORIZED

§ 482.010. Claims arising out of conduct of trade, business, or profession

482.010. (a) An attachment may only be issued to secure the recovery on a claim for money in a fixed or reasonably ascertainable amount, based upon a contract, express or implied, and arising out of the conduct by the defendant of a trade, business, or profession. The amount of recovery claimed shall be not less than one thousand dollars (\$1,000) exclusive of interest and attorney's fees. The contract upon which the claim is based shall not be secured by a security interest upon real or personal property or, if originally so secured, such security interest shall have become valueless without act of the plaintiff.

(b) An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

Comment. Section 482.010 is based upon a portion of former Section 537.1. Section 537.1 provided in part:

537.1. An action referred to in Section 537 is an action or actions by the same plaintiff in which the total sum claimed, exclusive of interest, attorneys' fees and costs, is five hundred dollars (\$500) or more and which is one or more of the following:

- (a) An action against a defendant described in subdivision (a), (b) or (c) of Section 537.2 for a liquidated sum of money based upon
 - (1) Money loaned; or
 - (2) A negotiable instrument; or
 - (3) The sale or lease of, or a license to use, real or personal property (including, without limiting the generality of the foregoing, goods sold and delivered on open account); or

(4) Services rendered, if the claim is not secured by any mortgage, deed of trust or security interest on real or personal property or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. The fact that interest, attorneys' fees, costs, or any combination thereof are claimed by the plaintiff in addition to the principal amount of the debt shall not make the claim unliquidated within the meaning of this section.

* * * * *

Section 482.010 raises the minimum limit claimed from 500 dollars to 1,000 dollars. With this exception, Section 482.010 is substantively similar to former Section 537.1. Subdivision (a) of former Section 537.1 referred to actions "against a defendant described in subdivisions (a), (b), or (c) of Section 537.2" These defendants were:

537.2.

(a) All corporations organized under the General Corporation Law or under Part 4 (commencing with Section 13400) of Division 3 of Title 1 of the Corporations Code, or organized under a law of any foreign state or jurisdiction authorizing the formation of business corporations.

(b) All partnerships organized under the Uniform Partnership Act (Chapter 1 (commencing with Section 15001) of Title 2 of the Corporations Code) or the Uniform Limited Partnership Act (Chapter 2 (commencing with Section 15501) of Title 2 of the Corporations Code) or a law of any foreign state or jurisdiction authorizing the formation of general or limited partnerships.

(c) Individuals engaged in a trade or business.

* * * * *

Subdivision (a) of former Section 537.1 also listed a number of bases for the claim on which an attachment could be based. Section 482.010 accomplishes

these same ends by limiting the claims on which an attachment to those "based upon a contract, express or implied, and arising out of the conduct of a trade, business, or profession."

Note. Sections 537.1 and 537.2 also provided that an attachment could be issued in any action for the recovery of money against

any person not residing in this state (including any foreign corporation not qualified to do business in this state under the provisions of Chapter 3 (commencing with Section 6403) of Part 11 of Division 1 of Title 1 of the Corporations Code, and any foreign partnership which has not filed a designation pursuant to Section 15700 of the Corporations Code), or who cannot after due diligence be found within this state, or who conceals himself to avoid service of summons.

The Commission has deferred consideration of whether and to what extent nonresident defendants will be treated uniquely and whether attachment will be permitted to secure jurisdiction. When this question has been determined, any needed revisions will be made in this chapter and elsewhere.

Section 482.010 (and the remainder of this statute) attempts to do no more than implement the basic policy behind Senate Bill 1048. The grounds for attachment formerly provided by Section 537 (before its repeal in 1972) were as follows:

1. Unsecured contract; support actions.

1. In an action upon a contract, express or implied, for the direct payment of money, (a) where the contract is made or is payable in this state; or (b) where the contract is made outside that state and is not payable in this state and the amount of the claim based upon such contract exceeds five thousand dollars (\$5,000); and where the contract described in either (a) or (b) is not secured by any mortgage, deed of trust, or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or

the person to whom the security was given, become valueless. An action upon any liability, existing under the laws of this state, of a spouse, relative, or kindred, for the support, maintenance, care, or necessities furnished to the other spouse, or other relatives or kindred, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section. An action brought pursuant to Section 1692 of the Civil Code shall be deemed an action upon an implied contract within the meaning of that term as used in this section.

2. Contracts of nonresidents and absentees.

2. In an action upon a contract, express or implied, against a defendant not residing in this state, or who has departed from the state, or who cannot after due diligence be found within the state, or who conceals himself to avoid service of summons.

3. Damages for injuries by nonresidents or absentees.

3. In an action against a defendant, not residing in this state, or who has departed from the state, or who cannot after due diligence be found within the state, or who conceals himself to avoid service of summons, to recover a sum of money as damages, arising from an injury to or death of a person, or damage to property in this state, in consequence of negligence, fraud, or other wrongful act.

4. Unlawful detainer; unsecured rent.

4. In an action in unlawful detainer where it appears from the verified complaint on file therein that rent is actually due and payable from the defendant to the plaintiff for the premises sought to be recovered in said action; provided, the payment of such rent is not secured by any mortgage or lien upon real or personal property, or pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff or the person to whom the security was given, become valueless.

5. Actions by state or political subdivisions for taxes or on obligations.

5. In an action by the State of California or any political subdivision thereof, for the collection of taxes due said state or political subdivision, or for the collection of any moneys due upon any obligation or penalty imposed by law.

6. Actions for recovery of funds expended in narcotics investigations.

6. In any action by the State of California, or any political subdivision thereof, for the recovery of funds pursuant to Section 11680.5 of the Health and Safety Code. In such cases, funds on the defendant's person at the time of his arrest which are retained in official custody shall also be subject to attachment.

CHAPTER 4. NOTICED HEARING PROCEDURE FOR
OBTAINING WRIT OF ATTACHMENT

Article 1. Right to Attach Order; Issuance of Writ
of Attachment

§ 483.010. Application for order and writ

483.010. Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought.

Comment. Section 483.010 is similar in content and purpose to former Section 537 which provided in part:

537. The plaintiff, . . . at the time of issuing the summons, or at any time afterward, may have the property . . . of a defendant . . . attached in accordance with the procedure provided in this chapter

This chapter provides a noticed hearing procedure for the issuance of a writ of attachment which should be utilized in most situations. A procedure for the ex part issuance of a writ of attachment prior to a noticed hearing on the probable validity of the plaintiff's claim is provided in Chapter 5 (commencing with Section 484.010) for use in exceptional circumstances.

Attachment is, of course, a prejudgment remedy; after final judgment, the plaintiff may, if necessary, proceed by way of execution.

§ 483.020. Contents of application

483.020. The application shall be executed under oath and shall include all of the following:

(a) A statement showing that the attachment is sought to secure the recovery on a claim upon which an attachment may be issued.

(b) A statement of the amount the plaintiff seeks to recover from the defendant (the amount of defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery) or, if an attachment is sought for only a part thereof, such partial amount.

(c) A statement that the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(d) A statement that the applicant has no information or belief that the claim has been discharged in a proceeding under the National Bankruptcy Act or that the prosecution of the action has been stayed in a proceeding under the National Bankruptcy Act.

(e) A description of the property to be attached under the writ of attachment, including plaintiff's estimate of its fair market value, and a statement that the plaintiff is informed and believes that such property is subject to attachment.

Comment. Section 483.020, together with Section 483.030, are substantively similar to former Section 538. Section 538 provided:

538. A plaintiff desiring the issuance of a writ of attachment shall file with the court an application supported by an affidavit or affidavits based upon the personal knowledge of the persons subscribing thereto and showing all of the following:

(a) That the action is one in which the issuance of a writ of attachment is proper under the provisions of Sections 537 to 537.3, inclusive.

(b) That the indebtedness claimed in the complaint is justly due and presently owing to the plaintiff by the defendant, over and above all legal setoffs or cross-complaints, or, if the action is one against a defendant described only in subdivision (d) of Section 537.2, the amount claimed by the plaintiff against the defendant and that the plaintiff believes that he has a valid cause of action for an amount of money equal to that sum.

(c) That the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any other creditor of the defendant.

(d) That the plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors, or, if any such proceeding has been terminated, that the claim of the plaintiff was not discharged in such proceeding.

§ 483.030. Affidavit in support of application

483.030. The application shall be supported by an affidavit showing that the plaintiff is entitled to a judgment on the claim upon which the attachment is based.

Comment. Section 483.030 continues the requirement of former Section 538 that the plaintiff's application for the issuance of a writ of attachment be supported by appropriate affidavits. See Comment to Section 483.020. General requirements for these affidavits are provided in Section 481.040. Of course, several affidavits may be used which together provide evidence sufficient to entitle the plaintiff to a judgment in the action. See Code Civ. Proc. § 17 (singular number includes the plural). Moreover, the application itself may contain the necessary supporting evidence.

§ 483.040. Notice to defendant

483.040. No order or writ shall be issued under this article unless, at least twenty (20) days prior to the hearing, the defendant has been served with all of the following:

- (a) A copy of the summons and complaint.
- (b) A Notice of Application and Hearing.
- (c) A copy of the application and of the affidavit in support of the application.

Comment. Section 483.040 is similar to former Section 538.2 which provided:

538.2. The notice of hearing issued pursuant to Section 538.1 shall provide for a hearing on the question whether a writ of attachment shall issue to be held seven business days (exclusive of Saturdays, Sundays and legal holidays) after the service of the notice upon the defendant or upon the first regular date law and motion matters are heard thereafter, whichever occurs later. The notice and temporary restraining order shall be served and return of service shall be made as provided in this code for the service of a summons and complaint. The notice shall be accompanied by a copy of the complaint and a copy of the affidavit or affidavits filed by the plaintiff under Section 538.

§ 483.050. Contents of Notice of Application and Hearing

483.050. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) A hearing will be held by a judicial officer at a place and at a time, to be specified in the notice, on plaintiff's application for a right to attach order and a writ of attachment.

(b) The order will be issued if the judicial officer finds that the plaintiff's claim is probably valid and the other requirements for issuing the order are established. The hearing is not for the purpose of determining whether the claim is actually valid; the determination of the actual validity of the claim will be made in

subsequent proceedings in the action and will not be affected by the decision of the judicial officer at the hearing on the application for the order.

(c) If the right to attach order is issued, a writ of attachment will be issued to attach the property specified in the plaintiff's application unless the court determines that such property is exempt from attachment. The order will not be limited to the property specified in the application but may later be extended to any nonexempt property of the defendant.

(d) If the defendant desires to oppose the issuance of the order, he must file a notice of opposition and supporting affidavit as required by Section 483.060.

(e) If the defendant claims that the property specified in the application, or a portion thereof, is exempt from attachment, he must include such claim in the notice of opposition filed pursuant to

Section 483.060 or file a separate claim of exemption with respect to the property as provided in Section 483.070. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(f) The defendant may obtain a determination at the hearing whether property not specified in the application is exempt from attachment, but the failure to claim that property not so specified is exempt from attachment will not preclude him from making a claim of exemption with respect to such property at a later time.

(g) The plaintiff's address within this state for the purpose of service by mail upon him of any notice of opposition, claim of exemption, or affidavit referred to in Section 483.060 or 483.070.

(h) Either the defendant or his attorney or both of them may be present at the hearing. The following statement shall be included in the notice: "You may seek the advice of an attorney in any matter connected with the plaintiff's application. Such attorney should be consulted promptly so that he will be ready to appear for you at the hearing."

Comment. Section 483.050 had no counterpart under former law. This section simply outlines the basic requirements for the "Notice of Application and Hearing." See Section 481.030 (Judicial Council to prescribe forms).

§ 483.060. Notice of opposition by defendant and supporting affidavit

483.060. (a) If the defendant desires to oppose the issuance of the right to attach order in the form sought by plaintiff, he shall file and serve upon the plaintiff no later than five (5) days prior to the date set for the hearing a notice of opposition. The notice shall state the grounds on which the defendant opposes the issuance of the order and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the defendant fails to file a notice of opposition within the time prescribed, he shall not be permitted to submit opposition to the issuance of the order.

(b) If a defendant filing a notice of opposition desires to make any claim of exemption as provided in Section 483.070, he shall include such claim in the notice of opposition filed pursuant to this section.

Comment. Section 483.060 had no precise counterpart under former law. Former Section 538.4 provided in part:

538.4. . . . Each party shall serve upon the other at least 24 hours before the hearing any affidavits intended to be introduced at the hearing, unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served.

Section 483.060 requires the defendant to file a notice of opposition and supporting affidavits or points and authorities in every case where he seeks to oppose issuance of a writ. In turn, the plaintiff is required to file any counteraffidavits in opposition to a claim of exemption not later than two days before the hearing date. See Section 483.070. See also former Sections 556 and 557 which provided:

556. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice

\$ 483.060

to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

557. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

§ 483.070. Claim of exemption and supporting affidavit; notice of opposition

483.070. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

(b) If the defendant desires to claim at the hearing that property not described in the plaintiff's application is exempt from attachment, in whole or in part, the defendant shall claim such exemption as provided in this section. Failure to make such claim does not preclude the defendant from later claiming the exemption. If the claim is made as provided in this section but the defendant fails to prove that the property is exempt from attachment, he may not later claim that the property, or a portion thereof, is exempt unless he shows a change in circumstances occurring after the hearing.

(c) The claim of exemption shall:

- (1) Describe the property claimed to be exempt.
- (2) Specify the statute section supporting the claim.
- (3) State the defendant's address within this state for the

purpose of permitting service by mail upon him of the notice of opposition provided for in subdivision (f).

(d) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues so raised.

(e) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five (5) days before the date set for the hearing.

(f) If the plaintiff desires to oppose the claim of exemption, he shall file and serve on the defendant, not less than two (2) days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues so raised. If the plaintiff does not file and serve a notice of opposition as provided in this subdivision, (1) no writ of attachment shall be issued as to the property claimed to be exempt and (2) if all of the property described in the plaintiff's application is claimed to be exempt, no hearing shall be held and no right to attach order shall be issued.

(g) If the plaintiff files and serves a notice of opposition to the claim as provided in this section, the defendant has the burden of proving that the property is exempt from attachment.

Comment. Section 483.070 provides a preseizure procedure for claiming an exemption from attachment. Compare Section 690.50 (postseizure claim). See also former Section 537.3 (authorizing defendant's preseizure claim of exemption for property "necessary for support").

§ 483.080. Readiness for hearing; continuances

483.080. (a) At the time set for the hearing, the plaintiff shall be ready to proceed. If the plaintiff is not ready, or if he has failed to comply with Section 483.040, the judicial officer shall deny the application for the order.

(b) The court may, in its discretion and for good cause shown, grant the defendant a continuance for a reasonable period to enable him to oppose the issuance of the right to attach order. The effective period of any protective order issued pursuant to Chapter 6 (commencing with Section 485.010) may be extended by the court during the period of such continuance.

Comment. Section 483.080 had no counterpart under former law.

§ 483.090. Hearing; issuance of order and writ

483.090. (a) At the hearing, the judicial officer shall consider the showing made by the parties appearing and shall issue a right to attach order and writ of attachment if he finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(4) The defendant has failed to prove that the property sought to be attached, or the portion thereof specified in the writ, is exempt from attachment.

(5) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

(b) If the judicial officer determines that property of the defendant is exempt from attachment, in whole or in part, the order shall describe such property and exclude it from the scope of the writ.

(c) The writ of attachment shall specify the amount to be secured by the attachment and the property to be levied on.

(d) The judicial officer shall make his determinations upon the basis of the pleadings and other papers in the record provided that, upon good cause shown, he may receive and consider additional evidence and authority produced at the hearing or he may continue the hearing for the production of such additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.

Comment. Section 483.090 is similar in content and purpose to former Section 538.4. Section 538.4 provided:

538.4 The hearing shall be held before the court or a commissioner thereof on the day specified and shall take precedence over all other matters not of a similar nature pending on that day. If the defendant does not appear at the hearing, in person or by counsel, the court, without taking further evidence, shall direct the clerk to immediately issue a writ of attachment. Each party shall serve upon the other at least 24 hours before the hearing any affidavits intended to be introduced at the hearing, unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served. Either party may also introduce oral evidence at the hearing and the defendant shall make available for oral examination at the hearing himself or an officer or agent of the defendant with knowledge of the transaction on which the complaint is based, unless the court for good cause shown excuses compliance with this requirement. Upon the basis of the evidence introduced at the hearing, the court shall determine whether the case is one in which an attachment is properly issuable and whether there is any reasonable probability that the defendant can establish a successful defense to the claim asserted by the plaintiff. If the court finds on the basis of a preponderance of the evidence that grounds for the issuance of an attachment exist and that the plaintiff has established the probable validity of his claim and the absence of any reasonable probability that a successful defense can be asserted by the defendant, the court shall direct the clerk to immediately issue a writ of attachment; otherwise, the court shall dissolve the temporary restraining order. The court may direct the order in which the writ shall be levied upon different assets of the defendant, if in the aggregate they exceed in value an amount clearly adequate to secure any judgment which may be recovered by the plaintiff.

The preference for hearing provided by former Section 538.4 is not continued. The explicit direction that a writ be issued automatically if the defendant does not appear is also eliminated. However, Section 483.060 does require the defendant to file a notice of opposition if he plans to oppose the issuance of a writ; if he does not file, he may not

oppose the application. The court must still review the application but it seems that it would be rare for the plaintiff to fail to make an adequate prima facie showing.

Former Section 538.4 authorized either party to submit oral evidence. Section 483.090 provides that the court, on good cause shown, may permit the introduction of oral evidence as well as further documentary evidence and points and authorities. See subdivision (d).

The time limits for filing the required affidavits are provided in Sections 483.060 and 483.070.

Section 483.090 does not continue the requirement of former Section 538.4 that the defendant make himself or an agent or officer available for examination regarding the plaintiff's claim.

Although no special finding is required, no right to attach order will be issued if the defendant shows that such order would violate the National Bankruptcy Act. See Section 483.020(d).

Subdivision (c) of Section 483.090 requires the writ to specify the amount to be secured by the attachment and the property to be levied upon. The writ does not require that levy be made in any particular order. Contrast the last sentence of former Section 538.4. Liability for levy on an excessive amount of property is dealt with in Chapter 10 (commencing with Section 490.010).

Concerning the question of multiple writs, additional writs, and alias writs, see Comment to Section 483.310.

§ 483.100. Effect of determinations of judicial officer

483.100. The determinations of the judicial officer under this chapter shall have no effect on the determination of any issues in the action other than the issues relevant to proceedings under this chapter nor shall they affect the rights of the defendant in any other action arising out of the same claim. The determinations of the judicial officer under this article shall not be given in evidence nor referred to in the trial of any such action.

Comment. Section 483.100 makes clear that the determinations of the judicial officer under this article have no effect on the determination of the validity of the plaintiff's claim in the action he has brought against the defendant nor do they affect the defendant's right to oppose an attachment or to claim that property is exempt in another action brought by the plaintiff on the same claim. However, if the judicial officer determines that the plaintiff is not entitled to an attachment because he has failed to establish the probable validity of his claim or that certain property of the defendant is exempt, such determinations are binding on the plaintiff in a subsequent action on the same claim unless the defendant is no longer entitled to the exemption because of changed circumstances. Section 483.100 does not, however, make inadmissible any affidavit filed under this chapter. The admissibility of such an affidavit is determined by rules of evidence otherwise applicable.

§ 483.110. Defendant's defense to action on claim not affected

483.110. Neither the failure of the defendant to oppose the issuance of a right to attach order under this chapter nor the defendant's failure to rebut any evidence produced by the plaintiff, in connection with proceedings under this chapter shall constitute a waiver of any defense to plaintiff's claim in the action or any other action or have any effect on the right of the defendant to produce or exclude evidence at the trial of any such action.

Article 2. Noticed Hearing Procedure for

Obtaining Additional Writs

§ 483.310. Application for additional writ

483.310. At any time after a right to attach order and writ of attachment have been issued under Article 1 (commencing with Section 483.010), the plaintiff may apply for an additional writ of attachment under this article by filing an application with the court in which the action is brought.

Comment. Article 2 (commencing with Section 483.310) provides a noticed hearing procedure for the issuance of additional writs of attachment after a right to attach order has been issued. The purpose of the prior hearing is to determine whether the defendant can establish that the property sought to be levied upon is exempt. If no claim is made the writ is issued and any claim of exemption is barred subject to a change in circumstances occurring after the hearing. See Section 483.350. An alternative ex parte procedure is provided by Article 3 (commencing with Section 483.510) but under the latter procedure the defendant can establish that property is exempt after it is levied upon.

Both Article 2 and Article 3 serve the purpose of providing a procedure for the issuance of additional writs. This was formerly accomplished under Sections 540 and 559-1/2. The third paragraph of former Section 540 provided:

540. . . . Several writs may be issued upon the same affidavit and undertaking simultaneously or from time to time within 60 days after the filing of the affidavit and undertaking, to the sheriffs, constables, or marshals of any county or counties, whether or not any writ previously issued has been returned.

Section 559-1/2 provided:

559-1/2. After the return and filing of the writ of attachment, or upon filing by the plaintiff of a verified affidavit setting forth the loss of the writ of attachment, the clerk, upon demand of the plaintiff at any time before judgment, may issue an alias writ which shall be in the same form as the original, without requirement of a new affidavit for attachment or of a new undertaking as provided in Section 539 of the Code of Civil Procedure.

The provisions of this section do not prohibit the issuance of several writs as provided for in Section 540.

It would seem that the court has inherent power to issue multiple writs where necessary--e.g., to levy upon property located in different counties. Similarly, the Judicial Council can provide by rule for the issuance of duplicate writs where one has been lost. The procedure for obtaining additional writs in a new form is provided by Articles 2 and 3 of this chapter and Article 3 of Chapter 5.

§ 483.320. Contents of application

483.320. The application shall be executed under oath and shall include all of the following:

(a) A statement that the plaintiff has been issued a right to attach order and writ of attachment under Article 1 (commencing with Section 483.010) in the action.

(b) A statement of the amount the plaintiff seeks to recover from the defendant (the amount of defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery) or, if an attachment is sought for only a part thereof, such partial amount.

(c) A description of the property to be attached under the writ of attachment, including plaintiff's estimate of its fair market value, and a statement that the plaintiff is informed and believes that such property is subject to attachment.

Comment. Section 483.320 is comparable to Section 483.020 except that a statement that a right to attach order has been issued is substituted for certain prerequisites to that order.

§ 483.330. Notice to defendant

483.330. No writ of attachment shall be issued under this article unless the plaintiff has served on the defendant at least twenty (20) days prior to the hearing both of the following:

- (a) A Notice of Application and Hearing.
- (b) A copy of the application.

Comment. Section 483.330 is comparable to Section 483.040. Service of a copy of the summons and complaint is not required here because it has presumably already been accomplished.

§ 483.340. Contents of Notice of Application and Hearing

483.340. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) The plaintiff has applied for a writ of attachment to attach the property described in the application.

(b) A hearing will be held by a judicial officer at a place and at a time, to be specified in the notice, to determine whether the plaintiff is entitled to the writ.

(c) A writ of attachment will be issued to attach the property specified in the plaintiff's application unless the court determines that such property is exempt from attachment.

(d) If the defendant claims that the property specified in the application, or a portion thereof, is exempt from attachment, he must file a claim of exemption with respect to the property as provided in Section 483.350. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(e) The plaintiff's address within this state for the purpose of service by mail upon him of any claim of exemption and supporting affidavit pursuant to Section 483.350.

(f) Either the defendant or his attorney or both of them may be present at the hearing. The following statement shall be included in the notice: "You may seek the advice of an attorney in any matter connected with the plaintiff's application. Such attorney should be consulted promptly so that he will be ready to appear for you at the hearing."

Comment. Section 483.340 is comparable to Section 483.050. Of course, the hearing here is concerned only with the defendant's right, if any, to an exemption and the notice is accordingly so limited.

§ 483.350. Claim of exemption and supporting affidavit

483.350. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

(b) The claim of exemption shall:

(1) Describe the property claimed to be exempt.

(2) Specify the statute section supporting the claim.

(3) State the defendant's address within this state for the purpose of permitting service by mail upon him of the notice of opposition provided for in Section 483.360.

(c) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues so raised.

(d) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five (5) days before the date set for the hearing.

Comment. Section 483.350 is comparable to subdivisions (a), (c), (d), and (e) of Section 483.070.

§ 483.360. Plaintiff's notice of opposition

483.360. (a) If the defendant files and serves a claim of exemption and the plaintiff desires to oppose the claim, he shall file and serve on the defendant, not less than two (2) days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues so raised.

(b) If the defendant files and serves a claim of exemption and supporting affidavit as provided in Section 483.350 and the plaintiff does not file and serve a notice of opposition as provided in this section, (1) no writ of attachment shall be issued as to the property claimed to be exempt and (2) if all of the property described in the plaintiff's application is claimed to be exempt, no hearing shall be held and no writ of attachment shall be issued.

(c) If the plaintiff files and serves a notice of opposition to the claim as provided in this section, the defendant has the burden of proving that the property is exempt from attachment.

Comment. Section 483.360 is comparable to subdivisions (f) and (g) of Section 483.070.

§ 483.370. Hearing; issuance of writ

483.370. The hearing shall be conducted in the manner prescribed in Section 483.090 and the judicial officer shall issue a writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) A right to attach order has been issued in the action pursuant to Article 1 (commencing with Section 483.010).

(b) The defendant has failed to prove that the property sought to be attached, or the portion thereof specified in the writ, is exempt from attachment.

(c) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 483.370 is comparable to Section 483.090.

Article 3. Ex Parte Procedure for
Obtaining Additional Writs

§ 483.510. Application for additional writ and supporting affidavit

483.510. (a) At any time after a right to attach order and writ of attachment have been issued under Article 1 (commencing with Section 483.010), the plaintiff may apply for an additional writ of attachment under this article by filing an application which meets the requirements of Section 483.320 with the court in which the action is brought.

(b) The application shall be accompanied by an affidavit showing that the property sought to be attached is subject to attachment.

Comment. Article 3 (commencing with Section 483.510) provides an ex parte procedure for the issuance of additional writs after a right to attach order has been issued following a noticed hearing. See Comment to Section 483.310. In contrast, Chapter 5 (commencing with Section 484.010) provides a procedure for the ex parte issuance of both the right to attach order and a writ. Such relief is, however, available only in exceptional circumstances. See Section 484.010 and Comment thereto.

§ 483.520. Ex parte hearing; issuance of writ

483.520. The judicial officer shall examine the application and supporting affidavit and shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) A right to attach order has been issued in the action pursuant to Article 1 (commencing with Section 483.010).

(b) The affidavit accompanying the application shows that the property sought to be attached is subject to attachment.

(c) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 483.520 is comparable to Section 483.370 except here the determinations are made ex parte and the plaintiff must show that the property sought to be attached is subject to attachment. This determination may be subsequently challenged by the defendant. See Section 483.530.

§ 483.530. Ex parte hearing; defendant's right to claim exemption

483.530. (a) If a writ of attachment is issued under this article, the defendant may claim an exemption as to the property levied on by following the procedure set forth in Section 690.50. For this purpose, references in Section 690.50 to "the debtor" shall be deemed references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed references to the plaintiff.

(b) Notwithstanding subdivision (a), a claim of exemption shall be denied if such claim has been denied earlier in the action and there is no substantial change in circumstances affecting such claim.

Comment. Section 483.530 authorizes the defendant to make a claim of exemption pursuant to the procedure provided by Section 690.50. Where, however, a similar claim has been previously denied, the defendant must show that a change in circumstances has now made the claim viable. See Section 483:070(b).

A "Notice of Attachment" (see Section 487.020) will be served on the defendant at or about the time his property is levied upon. The notice will advise him of his right to make a claim of exemption where the writ has been issued ex parte.

CHAPTER 5. EX PARTE HEARING PROCEDURE FOR OBTAINING
WRIT OF ATTACHMENT

Article 1. General

§ 484.010. Prerequisite of great or irreparable injury

484.010. (a) No right to attach order or writ of attachment may be issued pursuant to this chapter unless it appears from facts shown by affidavit that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice.

(b) The requirement of subdivision (a) is satisfied if any of the following are shown:

(1) An immediate danger that property sought to be attached would be transferred other than in the ordinary course of business, concealed, removed from the state, or substantially impaired in value unless the order is issued without delay.

(2) A bulk sales notice has been recorded and published by the defendant pursuant to Division 6 (commencing with Section 6101) of the Commercial Code.

(3) An escrow has been opened pursuant to the provisions of Section 24074 of the Business and Professions Code with respect to the sale by the defendant of a liquor license.

(4) Any other circumstance showing that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice.

(c) A writ issued solely on a showing under paragraph (2) of subdivision (b) shall be limited to the goods covered by the bulk sales

notice or the proceeds of such goods. A writ issued solely on a showing under paragraph (3) of subdivision (b) shall be limited to the proceeds of the sale of the license.

Comment. Section 484.010 is based on former Section 538.5. Section 538.5

provided in part:

538.5. Notwithstanding the provisions of Sections 538 to 538.4, inclusive, the court shall, upon application by the plaintiff, direct the immediate issuance of a writ of attachment without any notice of hearing (or, under subdivision (c) below, without any hearing) if any one or more of the following conditions exist:

(a) A bulk sales notice has been recorded and published with respect to property of the defendant pursuant to the provisions of Division 6 (commencing with Section 6101) of the Commercial Code, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the goods covered by the bulk sales notice; or an escrow has been opened pursuant to the provisions of Section 24074 of the Business and Professions Code with respect to the sale by the defendant of a liquor license, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the attaching creditor's pro rata share of the proceeds of the sale in escrow.

(b) The plaintiff establishes to the satisfaction of the court that there is a substantial danger that the defendant will transfer, other than in the ordinary course of business, remove or conceal the property sought to be attached, such writ to be issued upon the filing of the application provided for in Section 538.

(c) The notice and order issued pursuant to Section 538.1 cannot be served with the use of reasonable diligence upon the defendant within 10 days after its issuance and the court is satisfied that the defendant has departed from this state or conceals himself to avoid service of the notice, such writ to be issued after the expiration of such 10-day period.

(d) The defendant is one described in subdivision (d) of Section 537.2, such writ shall be issued upon the filing of the application provided for in Section 538. A writ of attachment (1) which is issued under this subdivision and levied upon property of a defendant described in subdivision (d) of Section 537.2 but who is not described in subdivision (a), (b) or (c) of Section 537.2, or (2) which is issued under this subdivision based upon a claim

which is not described in subdivision (a) of Section 537.1, shall be released and discharged by the court upon motion of the defendant if the defendant files a general appearance in the action. . . .

Subdivision (a) of former Section 538.5 has been replaced by the substantively similar provisions of paragraphs (2) and (3) of subdivision (b) and subdivision (c) of Section 484.010. Subdivision (b) of former Section 538.5 is reenacted in paragraph (1) of subdivision (b) of Section 484.010. Subdivision (c) of former Section 538.5 is not retained. Instead, paragraph (4) of subdivision (b) of Section 484.010 provides for an alternate showing of any circumstance that indicates that the plaintiff would suffer great or irreparable injury if issuance of the writ were delayed until the matter could be heard on notice.

Note. Subdivision (d) of former Section 538.5 provides for the ex parte issuance of a writ against a nonresident defendant. The Commission has deferred consideration of whether and to what extent attachment will be permitted to secure jurisdiction and nonresident defendants will be treated uniquely. When these issues have been resolved, any needed revisions will be made in this section and elsewhere.

§ 484.020. Right to claim exemption

484.020. If a writ of attachment is issued under this chapter, the defendant may claim an exemption as to the property levied on by following the procedure set forth in Section 690.50. For this purpose, references in Section 690.50 to "the debtor" shall be deemed references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed references to the plaintiff.

§ 484.030. Setting aside right to attach order and quashing writ

484.030. (a) Any defendant whose property has been attached pursuant to a writ issued under this chapter may apply for an order that the right to attach order be set aside, the writ of attachment quashed, and any property levied on pursuant to the writ be released. Such application shall be made by filing with the court and serving on the plaintiff a notice of motion.

(b) The notice of motion shall state the grounds on which the motion is based and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. It shall not be grounds to set aside an order that the plaintiff would not have suffered great or irreparable injury (within the meaning of Section 484.010) if issuance of the order had been delayed until the matter could have been heard on notice.

(c) At the hearing on the motion, the judicial officer shall determine whether the plaintiff is entitled to the right to attach order. If he finds that the plaintiff is not entitled to the right to attach order, he shall order the right to attach order set aside, the writ of attachment quashed, and any property levied on pursuant to the writ released.

(d) The judicial officer shall make his determinations upon the basis of the pleadings and other papers in the record provided that, upon good cause shown, he may receive and consider additional evidence and authority produced at the hearing or he may continue the hearing for the production of such additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.

(e) The hearing provided for in this section shall take precedence over all other civil matters on the calendar of that day except older matters of the same character.

Comment. Section 484.030 is similar in content and purpose to the last two sentences of former Section 538.5. These sentences provided:

If a writ of attachment is issued under this subdivision and levied upon property of a defendant who is described in subdivision (a), (b) or (c) of Section 537.2 based upon a claim described in subdivision (a) of Section 537.1, the defendant may at any time after such levy, upon seven business days' notice to the plaintiff, request a hearing pursuant to Section 538.4. At such hearing, unless the court makes the findings required by that section for the issuance of a writ of attachment, it shall release and discharge the writ.

See also former Section 556 set forth in the Comment to Section 483.060. Section 556 provided a procedure for setting aside a writ that had been improperly or irregularly issued. Former Section 558 provided in part:

that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.

The latter provision is not continued by statute, but the court has the inherent power to permit a plaintiff to amend his application or supplement his showing in support of the attachment at or prior to the hearing.

Article 2. Order Determining Right
to Attach; Issuance of Writ of Attachment

§ 484.210. Application for order and writ; supporting affidavit

484.210. (a) Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought.

(b) The application shall satisfy the requirements of Section 483.020 and, in addition, shall include a statement showing that the requirement of Section 484.010 has been satisfied.

(c) The application shall be supported by an affidavit showing that:

(1) The plaintiff is entitled to a judgment on the claim upon which the attachment is based;

(2) The plaintiff would suffer great or irreparable injury (within the meaning of Section 484.010) if issuance of the order were delayed until the matter could be heard on notice; and

(3) The property sought to be attached is subject to attachment.

Comment. Section 484.210 outlines the procedure for applying ex parte for the issuance of a writ of attachment prior to a noticed hearing on the probable validity of the plaintiff's claim. Compare Sections 483.010-483.030 and 483.510. See also the first paragraph of former Section 538.5 set forth in the Comment to Section 484.010.

§ 484.220. Issuance of order and writ

484.220. (a) The judicial officer shall examine the application and supporting affidavit and, except as provided in Section 485.030, shall issue a right to attach order and writ of attachment if he finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(4) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof specified in the writ, is subject to attachment.

(5) The plaintiff would suffer great or irreparable injury (within the meaning of Section 484.010) if issuance of the order were delayed until the matter could be heard on notice.

(6) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

(b) The writ of attachment shall specify the amount to be secured by the attachment and the property to be levied on.

(c) If the judicial officer finds that the application and supporting affidavit do not satisfy the requirements of Section 484.010, he shall so state and deny the order. If denial is solely on the ground that Section 484.010 is not satisfied, the judicial officer shall so state and such denial does not preclude the plaintiff from applying for a right to attach order and writ of attachment under Chapter 4 (commencing with Section 483.010).

Comment. Section 484.220 outlines the procedure for the ex parte issuance of a writ of attachment prior to a noticed hearing on the probable validity of the plaintiff's claim. Compare Sections 483.090 and 483.520.

The exception provided in subdivision (a) recognizes that the court may, in its discretion, issue a temporary protective order in lieu of a writ of attachment even where the requirements of this section are satisfied.

Article 3. Procedure for Obtaining Additional Writs

§ 484.510. Application for additional writ

484.510. At any time after a right to attach order and writ of attachment have been issued under Article 2 (commencing with Section 484.210), the plaintiff may apply for an additional writ of attachment under this article by filing an application with the court in which the action is brought.

Comment. Sections 484.510 through 484.530 are comparable to Section 483.510 only here the additional writ is obtained after an order to attach has been issued ex parte and the plaintiff must show therefore that exceptional circumstances continue his need for the ex parte issuance of a writ.

§ 484.520. Contents of application

484.520. The application shall be executed under oath and shall include all of the following:

(a) A statement that the plaintiff has been issued a right to attach order and writ of attachment under Article 2 (commencing with Section 484.210) in the action.

(b) A statement of the amount the plaintiff seeks to recover from the defendant (amount of defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery) or, if an attachment is sought for only a part thereof, such partial amount.

(c) A description of the property to be attached under the writ of attachment, including plaintiff's estimate of its fair market value, and a statement that the plaintiff is informed and believes that such property is subject to attachment.

(d) A statement showing that the requirement of Section 484.010 has been satisfied.

Comment. See Comment to Section 484.510.

§ 484.530. Supporting affidavit

484.530. The application shall be supported by an affidavit showing that (a) the plaintiff would suffer great or irreparable injury (within the meaning of Section 484.010) if issuance of the order were delayed until the matter could be heard on notice and (b) the property sought to be attached is not exempt from attachment.

Comment. See Comment to Section 484.510.

§ 484.540. Issuance of writ

484.540. The judicial officer shall examine the application and supporting affidavit and shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) A right to attach order has been issued in the action pursuant to Article 2 (commencing with Section 484.210).

(b) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof specified in the writ, is subject to attachment.

(c) The plaintiff would suffer great or irreparable injury (within the meaning of Section 484.010) if issuance of the order were delayed until the matter could be heard on notice.

(d) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 484.540 is comparable to Section 483.520 except here the court must make a finding that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice. See Comment to Section 484.510.

CHAPTER 6. PREHEARING PROTECTIVE ORDER

§ 485.010. Application for temporary protective order; supporting affidavit

485.010 (a) At the time of applying for a right to attach order under Chapter 4 (commencing with Section 483.010), the plaintiff may apply pursuant to this chapter for a temporary protective order by filing an application for the order with the court in which the action is brought.

(b) The application shall state what relief is requested and shall be supported by an affidavit showing that the plaintiff will suffer great or irreparable injury (within the meaning of Section 484.010) if the temporary protective order is not issued.

Comment. Section 485.010 replaces former Section 538.1. Section 538.1 provided in part:

538.1. The court or a commissioner thereof, if satisfied that the affidavits submitted by the plaintiff pursuant to Section 538 have established a prima facie case and that the action is one in which an attachment is properly issuable under the provisions of this chapter, shall issue without any prior notice to the defendant a . . . temporary restraining order conforming to the provisions of Section . . . 538.3 for service upon the defendant.

* * * * *

In contrast to former Section 538.1 which provided for the issuance of a temporary restraining order as a matter of right in every case, Section 485.010 requires the plaintiff to apply for relief and show that such relief is required to avoid great or irreparable injury to him.

The application required by this section will accompany that required by Section 483.020, thus permitting the court to make the determinations required by Section 485.020.

§ 485.010

Sections 485.010 and 485.020 provide for the situation where the plaintiff initially requests the relief afforded. A temporary protective order may also be issued on the court's own motion in lieu of the ex parte issuance of a writ of attachment pursuant to Section 485.030.

§ 485.020. Ex parte hearing; issuance of order

485.020. The judicial officer shall examine the application, supporting affidavit, and other papers on record and shall issue a temporary protective order if he finds all of the following:

(a) The claim upon which the application for attachment is based is one upon which an attachment may be issued.

(b) The plaintiff has shown that he is entitled to a judgment in the action on the claim upon which the application for the attachment is based.

(c) The order is not sought for a purpose other than the recovery upon the claim upon which the application for the attachment is based.

(d) The plaintiff has shown that he will suffer great or irreparable injury (within the meaning of Section 484.010) if the temporary protective order is not issued.

(e) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 485.020 provides for an ex parte determination of the right to a temporary protective order. However, as under present practice, the court may require the plaintiff to give informal notice to the defendant or his attorney. See also Comment to Section 485.010.

§ 485.030. Issuance of temporary protective order in lieu of writ of attachment

485.030. (a) In any case where the plaintiff has applied for a right to attach order and writ of attachment under Chapter 5 (commencing with Section 484.010), the judicial officer may in his discretion deny the application for the order and writ and issue instead a temporary protective order under this chapter if he determines that the requirements of Section 485.220 are satisfied but that the issuance of the temporary protective order instead of the right to attach order and writ would be in the interest of justice and equity to the parties, taking into account the effect of issuing a writ of attachment ex parte on the defendant, the effect on the plaintiff of issuing the order instead of the writ, and other factors that bear on equity and justice under the circumstances of the particular case.

(b) If the judicial officer issues a temporary protective order under this section, the plaintiff's application for a right to attach order and writ shall be treated as an application for a right to attach order and writ under Chapter 4 (commencing with Section 483.010) and the plaintiff shall comply with the requirements of service provided in Section 483.040.

Comment. Section 485.030 has no counterpart under former law. See Comment to Section 485.010. Where a temporary protective order is issued in lieu of a right to attach order and writ, the plaintiff's application for the order and writ is treated as an application under Article 1 of Chapter 4. The plaintiff must serve the application, Notice of Application, and other papers required by Section 483.040 and the procedures provided thereafter are then followed.

§ 485.040. Contents of temporary protective order; general limitation

485.040. The temporary protective order issued under this chapter shall contain such provisions as the judicial officer determines are appropriate under the circumstances of the particular case.

Comment. Section 485.040 had no counterpart under the former law. This section impliedly directs the court to consider what provisions in the temporary protective order would be fair and equitable.

§ 485.050. Contents of temporary protective order; transfers in the ordinary course of business

485.050. Except as otherwise provided in Sections 485.040 and 485.060, the temporary protective order may prohibit any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business.

Comment. Section 485.050 is based on a comparable provision in former Section 538.3. Section 538.3 provided in part:

538.3. The temporary restraining order issued pursuant to Section 538.1 shall prohibit prior to the hearing any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business

Exceptions similar to those provided by Section 485.060 were also provided by Section 538.3. See Comment to Section 485.060. Section 538.3 also provided:

Without limiting the generality of the phrase "not in the ordinary course of business," the payment by the defendant of an antecedent debt shall not be considered in the ordinary course of business within the meaning of this section.

This clause has been eliminated. It seemed both confusing and unnecessary. The court should be able to frame an effective order under the guidelines provided in Sections 485.050 and 485.060.

Section 485.050 merely authorizes the issuance of an order prohibiting transfers where appropriate (see Section 485.040); former Section 538.3 seemed to require the issuance of an order prohibiting transfers.

§ 485.060. Contents of temporary protective order; deposit accounts

485.060. Notwithstanding Section 485.050, the temporary protective order issued under this chapter shall permit the defendant to issue any number of checks:

(a) In an aggregate amount of not more than one thousand dollars (\$1,000) against any of his deposit accounts in this state for any purpose.

(b) In any amount so long as the aggregate amount remaining on deposit in this state is more than the amount of the plaintiff's claim.

(c) In any amount in payment of any payroll expense (including taxes and premiums for workmen's compensation and unemployment insurance) falling due in the regular course after the service of the temporary protective order and prior to the levy of a writ of attachment.

(d) In any amount in payment for goods thereafter delivered to the defendant C.O.D. for use in his trade or business.

(e) In any amount in payment of taxes if penalties will accrue for any delay in payment.

(f) In any amount in payment of reasonable legal fees and reasonable costs and expenses required for the representation of the defendant in the action.

Comment. Section 485.060 is based on comparable provisions in former Section 538.3. Section 538.3 provided in part:

538.3. The temporary restraining order issued pursuant to Section 538.1 shall prohibit prior to the

hearing any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business, and the issuance by the defendant of any checks in excess of an aggregate of one thousand dollars (\$1,000) against any of his bank accounts in this state to withdraw any sums subject to such levy, which would reduce the aggregate amount remaining on deposit to less than the amount of the plaintiff's claim, and the opening of any new bank accounts by the defendant. Without limiting the generality of the phrase "not in the ordinary course of business", the payment by the defendant of an antecedent debt shall not be considered in the ordinary course of business within the meaning of this section. Notwithstanding the foregoing, checks may be issued by the defendant for any of the following purposes:

(a) To cover any payrolls (including all fringe benefits and withholding taxes) falling due in the regular course after the service of the temporary restraining order and prior to the levy of a writ of attachment, but not exceeding the amount of three hundred dollars (\$300) per week for any individual employee.

(b) In payment for goods thereafter delivered to the defendant C.O.D. for use in his trade or business.

(c) In payment of taxes if penalties will accrue for any delay in payment.

(d) In payment of legal fees for the representation of the defendant in the action.

* * * * *

§ 485.070. Persons bound by temporary protective order

485.070. Except as otherwise provided by Section 485.110, a temporary protective order issued under this chapter binds only the defendant.

Comment. Section 485.070 greatly expands the coverage of a provision in former Section 538.1. Section 538.1 provided in part:

538.1. . . . Neither notice of the restraining order issued pursuant to this section nor service of a copy thereof upon any bank shall require any bank to observe the terms of the restraining order.

Section 485.070 does not affect any other provisions of law such as, for example, the law relating to fraudulent conveyances. See Civil Code §§ 3439-3440.1.

§ 485.080. Service on defendant

485.080. The temporary protective order shall be served on the defendant together with the documents referred to in Section 483.040.

§ 485.090. Expiration of order

485.090. Except as otherwise provided in Section 485.110, the temporary protective order shall expire at the earliest of the following times:

(a) Thirty (30) days after the service of the order.

(b) As to specific property described in the order, when a levy of attachment upon that property is made by the plaintiff.

(c) When the defendant provides an undertaking pursuant to Section 489.310 in the amount of plaintiff's claim as security for the payment of any judgment recovered by the plaintiff.

Comment. Section 485.090 is based on a comparable provision in former Section 538.3. Section 538.3 provided in part:

538.3. . . . The temporary restraining order shall expire by its terms unless a writ of attachment is issued and levied within 30 days after the service of the order or if the defendant gives an undertaking as provided in Section 555 in the amount of plaintiff's claim as security for the payment of any judgment recovered by the plaintiff. . . .

§ 485.100. Modification or vacation of order on defendant's application

485.100. Upon ex parte application of the defendant or, if the judicial officer so orders, after a noticed hearing, the judicial officer may modify or vacate the temporary protective order if he determines that such action would be in the interest of justice and equity to the parties, taking into account the effect on the defendant of the continuance of the original order, the effect on the plaintiff of modifying or vacating the order, and **any other factors.**

Comment. Section 485.100 expands a comparable provision in former Section 538.3. Section 538.3 provided in part:

538.3. . . . The restraining order shall be vacated by the court upon ex parte application by the defendant if the court is satisfied that there is no danger that sufficient property of the defendant to secure the plaintiff's claim will not be available and subject to the levy of a writ of attachment, if one is directed to be issued at the hearing provided for in Section 538.4.

§ 485.110. Lien

485.110. (a) The service upon the defendant of a temporary protective order pursuant to Section 485.080 creates a lien upon such property, or the proceeds thereof, which is described in the order and which is subject to the levy of a writ of attachment pursuant to this title and owned by him at the time of such service. The lien is not valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business.

(b) The lien terminates thirty (30) days after the service of the order upon the defendant except with respect to property upon which a writ of attachment issued upon application of the plaintiff has been levied during that period. The levy of a writ of attachment shall perfect the lien created by the service of the temporary protective order.

(c) Upon the filing by the defendant of a proceeding under the National Bankruptcy Act or the making by the defendant of a general assignment for the benefit of creditors, the lien terminates with respect to all property upon which a writ of attachment has not been levied prior to such event.

Comment. Section 485.110 is based on former Section 542b. Section 542b provided:

542b. The service upon the defendant of a notice and order pursuant to Section 538.2 creates a lien upon all of his personal property subject to the levy of a writ of attachment pursuant to this chapter and owned by him at the time of such service or the proceeds thereof. Such lien, however, shall not be valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business. Such lien shall terminate 30 days after the service of the notice and order upon the defendant; except with respect to property upon which a writ of attachment has been levied during that period and upon the filing by the defendant of a proceeding under the National Bankruptcy Act or the making by the defendant of a general assignment for the benefit of creditors, such lien shall terminate with respect to all property upon which a writ of attachment has not been levied prior to such event. The levy of a writ of attachment shall perfect the lien created by the service of the notice and order against a bona fide purchaser and a transferee in the ordinary course of business and the levy of a writ of attachment in those cases where it is not preceded by the service of a notice and order shall create a lien upon the property levied upon which is valid against all third persons.

The levy of a writ of attachment perfects only the lien that could be initially created by the temporary protective order; hence, levy of a writ does not affect the prior rights of bona fide purchasers or buyers in the ordinary course of business who are not bound by the temporary protective order. Of course, transfers subsequent to the levy are subject to the lien of attachment. See Section 487.500(a).

CHAPTER 7. PROPERTY SUBJECT TO ATTACHMENT

§ 486.010. Property subject to attachment

486.010. The following property shall be subject to attachment:

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

(b) Where the defendant is a partner or partnership, all partnership property.

(c) Where the defendant is an individual engaged in a trade, business, or profession, [property used or held for use in the defendant's trade, business, or profession, including but not limited to] [all of the following]:

(1) Accounts receivable, chattel paper, and choses in action except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

(2) Deposit accounts except the first one thousand dollars (\$1,000) deposited in any single financial institution or branch thereof; provided, however, if the defendant has more than one deposit account, a judicial officer, upon application of the plaintiff, may direct that the writ of attachment be levied on balances of less than one thousand dollars (\$1,000) if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of levy.

(3) Equipment.

(4) Farm products.

(5) Inventory.

(6) Judgments arising out of the conduct of the trade, business, or profession.

(7) Money.

(8) Negotiable documents.

(9) Negotiable instruments.

(10) Real property.

(11) Securities.

Comment. Section 486.010 is substantially the same as former Section

537.3. Section 537.3 provided:

537.3. The property referred to in Section 537 is the following property not exempt from execution (without regard to whether a claim of exemption shall be filed):

(a) With respect to corporations and partnerships referred to in subdivisions (a) and (b) of Section 537.2, all corporate property and all partnership property.

(b) With respect to individuals referred to in subdivision (c) of Section 537.2 all of the following:

(1) Inventory.

(2) Accounts, contract rights, chattel paper, and general intangibles consisting of any right to payment of money (exclusive of those referred to in paragraph (3) of this subdivision), except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

(3) Bank accounts and other deposit accounts, except the first one thousand dollars (\$1,000) balance in any single bank or branch bank (but, if the defendant has accounts in more than one bank or branch bank, the court, upon application of the plaintiff at the hearing provided for in Section 538.4, may direct that the writ be levied on balances of less than one thousand dollars (\$1,000) in a given bank or branch bank if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of the levy).

(4) Securities.

(5) Equipment.

(6) Real estate, including any leasehold estate with an unexpired term of one year or more.

The court, however, upon application of the defendant at the hearing provided for in Section 538.4 or at any time thereafter upon five days' notice to the plaintiff, shall exclude from the effect of the levy or release from the levy, as the case may be, any of the foregoing property which the court finds is necessary for the support of the defendant and his family after taking into consideration all of his other income and assets not subject to levy or not levied upon.

The terms used in this subdivision which are defined in the Commercial Code shall have the meanings therein specified.

(c) With respect to a defendant referred to in subdivision (d) of Section 537.2, all property of the defendant.

Section 486.010 is subject to the exception that property exempt from execution as well as property necessary for the support of the defendant and his family shall not be subject to attachment. See Section 486.020. Compare the introductory paragraph of former Section 537.3 and the next to last paragraph of subdivision (b) of that section.

Subdivisions (a) and (b) are substantively the same as subdivision (a) of former Section 537.3.

Subdivision (c) is substantially the same as subdivision (b) of former Section 537.3. Some terms have been changed, but their meaning is still substantially the same, and some types of property have been added. For example, farm products and negotiable instruments and documents were apparently not always subject to levy under former Section 537.3 because neither were listed under subdivision (b) of Section 537.3. See Com. Code §§ 9106 ("general intangibles" does not include instruments), 9109 ("inventory" does not include farm products). Both have been listed under subdivision (c) of Section 486.010.

Note. Subdivision (c) of former Section 537.3 has been deleted. The Commission has deferred consideration of whether and to what extent attachment will be permitted to secure jurisdiction and nonresident defendants will be treated uniquely. When these issues have been resolved, any needed revisions will be made in this section and elsewhere.

§ 486.020. Property exempt from attachment

486.020. Notwithstanding Section 486.010, the following property is exempt from levy of attachment:

(a) Property exempt from execution.

(b) Property which is necessary for the support of an individual defendant and members of his household when a proper claim for the same is made by the defendant.

Comment. Section 486.020 is substantively the same as the first paragraph of Section 537.3 and the next to last paragraph of subdivision (b) of that section. See Comment to Section 486.010.

Subdivision (a) embraces not only the exemptions provided in the 690 series of the Code of Civil Procedure but also homesteads, spendthrift trusts, and any other special exemptions provided in other codes.

Subdivision (b) provides an additional claimed exemption available to an individual defendant upon a showing of need.

The California Supreme Court in Randone v. Appellate Department, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), held that:

the state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action, before an impartial confirmation of the actual, as opposed to the probable, validity of the creditor's claim after a hearing on that issue.

This title attempts to satisfy the foregoing requirement (1) by generally subjecting only business property to levy, (2) by providing a nonseizure form of levy in many circumstances, (3) by providing a claimed exemption for necessities which will be available prior to levy in all but exceptional circumstances, and (4) by authorizing the court to issue a temporary protective order in lieu of a writ in the exceptional circumstances where a writ may be issued ex parte.

CHAPTER 8. LEVY PROCEDURES; LIEN OF ATTACHMENT;
MANAGEMENT AND DISPOSITION OF ATTACHED PROPERTY

Article 1. General Provisions

§ 487.010. Writ of attachment

487.010. The "Writ of Attachment" shall identify the defendant whose property is to be attached and the property or interest therein to be levied upon. The description of such property may be set forth in the writ or in a separate statement attached to and incorporated by the writ.

Comment. Section 487.010 requires the writ of attachment to identify the defendant and the property sought to be attached. The description of the property was formerly provided in the instructions to the sheriff. See the first paragraph of Section 542 set forth in the Comment to Section 487.030. However, under the procedures provided here, the issue of what property may be attached is always subject to a prior review by a judicial officer. Accordingly, it is feasible and desirable to have the writ itself identify the property that that officer has determined should be attached. This should help to avoid discrepancies between what the court has determined may be attached and what the sheriff eventually attaches.

§ 487.020. Notice of attachment

487.020. The "Notice of Attachment" shall inform the person who is served with the attachment of: (a) the capacity in which he has been served; (b) the specific property in his possession which is sought to be attached; (c) his rights under the attachment, including the right to make a third-party claim pursuant to Section 689; and (d) his duties under the attachment.

Comment. Section 487.020 had no counterpart under former law. The form of the "Notice of Attachment" was not prescribed by statute. Section 487.020 provides general guidance to the Judicial Council as to certain matters which should be included in the notice of attachment. See Section 481.030 (Judicial Council to prescribe form of notices and other documents used under this title).

§ 487.030. Levying officer shall promptly comply with writ

487.030. (a) A writ of attachment shall be directed to a levying officer in the county in which property of the defendant described in the writ is located.

(b) Upon the receipt of written instructions from the plaintiff, the levying officer to whom the writ is directed and delivered shall execute the same without delay in the manner provided in this chapter.

Comment. Subdivision (a) of Section 487.030 is based on the first portion of the first sentence of former Section 540. Section 540 provided in part:

540. The writ must be directed to the sheriff, or a constable, or marshal of any county in which property of such defendant may be, and must require him to attach and safely keep all of the property of such defendant within his county not exempt from attachment, or so much of the property of such defendant as may be sufficient to satisfy the plaintiff's demand against such defendant

Subdivision (b) of Section 487.030 incorporates the substance of the introductory paragraph of former Section 542. This paragraph provided as follows:

542. The sheriff, constable, or marshal, to whom the writ is directed and delivered, must, upon receipt of instructions in writing, signed by the plaintiff or his attorney of record, and containing a description of the property, and in the case of real property or growing crops the name of the record owner of the real property to be attached, or upon which the crops are growing, execute the same without delay, and if the undertaking mentioned in section 540 of this code be not given, as follows

See also former Section 543 which provided in part:

543. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or owes any debt to the defendant, the sheriff, constable, or marshal shall serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ

§ 487.040. Manner of service of writ and notice of attachment

487.040. (a) Service of a writ and a notice of attachment upon (1) a bank, (2) a savings and loan association, (3) a credit union, (4) a title insurance company or underwritten title company (as defined in Section 12402 of the Insurance Code), or (5) an industrial loan company (as defined in Section 18003 of the Financial Code) shall be made at the office or branch thereof which has actual possession of the property levied upon or at which the deposit account levied upon is carried and shall be made upon the officer, manager, or other person in charge of such office or branch at the time of service.

(b) Except as provided in subdivision (a), service of a writ and a notice of attachment shall be made upon the person upon whom summons may be served.

Comment. Section 487.040 provides for the manner of service of a writ and a notice of attachment. Subdivision (a) is based on the last sentence of subdivision (5) of former Section 542. This sentence read as follows:

However, debts owing to the defendant by any of the following financial institutions: (a) banks; (b) savings and loan associations; (c) title insurance companies or underwritten title companies (as defined in Section 12402 of the Insurance Code); (d) industrial loan companies (as defined in Section 18003 of the Financial Code), maintaining branch offices, or credits or other personal property whether or not the same is capable of manual delivery, belonging to the defendant and in the possession of or under the control of such financial institution shall be attached by leaving a copy of the writ and the notice, together with a copy of the complaint if required hereunder, with the manager or other officer of such financial institution at the office or branch thereof at which the account evidencing such indebtedness of the defendant is carried, or at which such financial institution has credits or other personal property belonging to the defendant in its possession or under its control; and no attachment shall be effective as to any debt owing by such financial institution if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served.

Subdivision (b) is new. The former law provided no general direction as to the manner of service of the writ. But see first sentence of subdivision (5) of former Section 542. Subdivision (b) incorporates the provisions of Sections 416.10 through 416.90.

§ 487.050. Prerequisites to the seizure of property under a levy of attachment

487.050. As a prerequisite to the taking of property by the levying officer under this chapter, whether by keeper or otherwise, the plaintiff shall be required to deposit with the levying officer a sum of money sufficient to pay the expenses of taking and keeping safely such property for a period of not to exceed fifteen (15) days. In the event that further detention of the property is required, the levying officer shall, from time to time, make written demand upon the plaintiff or his attorney for further deposits to cover estimated expenses for periods not to exceed ninety (90) days each. Such demand shall be served as provided in Section 1011 or by depositing such notice in the post office in a sealed envelope, as first-class registered mail, postage prepaid, addressed to the person on whom it is served at his last known office or place of residence. In the event that the money so demanded is not paid, the levying officer shall release the property to the defendant in the manner provided in Section 487.550.

Comment. Section 487.050 is substantively similar to the first four sentences of subdivision 4 of former Section 542. These sentences provide:

4. In cases where the sheriff, constable, or marshal is instructed to take into possession personal property capable of manual delivery, whether the same is to be placed in a warehouse or in custody of a keeper, the sheriff, constable or marshal shall require, as a prerequisite to the taking of such property, that in addition to written instructions the plaintiff or his attorney of record deposit with the sheriff, constable or marshal, a sum of money sufficient to pay the expenses of taking and keeping safely said property for a period not to exceed 15 days. In the event that a further detention of said property is required, the sheriff, constable or marshal must, from time to time, make written demand upon the plaintiff or his attorney for further deposits to cover estimated expenses for periods not to exceed five days each. Such demand must be served as provided in Section 1011 of this code, or by depositing such notice in the post office in a sealed envelope, as first-class registered mail, postage prepaid, addressed to the person on whom it is served at

his last known office or place of residence. In the event that the money so demanded is not paid, the sheriff, constable or marshal shall release the property to the person or persons from whom the same was taken. . . .

Section 487.050, however, gives the levying officer authority to demand additional deposits for expenses (after the first 15 days) for 90 days rather than the present five days provided by subdivision 4. There was no reason to have such a short period after it had become apparent that the property would probably be held for substantial periods pending a final determination in the action.

§ 487.060. Limitations on liability of levying officer

487.060. (a) There shall be no liability upon the part of the levying officer to take or hold personal property unless the plaintiff has fully complied with the provisions of Section 487.050.

(b) There shall be no liability upon the part of the levying officer either to the plaintiff or the defendant for loss by fire, theft, injury, or damage of any kind to personal property while in the possession of the levying officer either in a warehouse or in the custody of a keeper or en route to or from a warehouse unless the levying officer is negligent in his care or handling of the property.

Comment. Section 487.060 is substantively identical to the last two sentences of former subdivision 4 of Section 542. These sentences provided:

4. . . . There shall be no liability upon the part of the sheriff, constable or marshal to take or hold personal property unless the provisions of this section [-- Section 487.050] shall have been fully complied with. There shall be no liability upon the part of the sheriff, constable or marshal, either to the plaintiff or the defendant for loss by fire, theft, injury or damage of any kind to personal property capable of manual delivery while in the possession of the sheriff, constable or marshal either in a warehouse or in the custody of a keeper or en route to or from a warehouse unless the sheriff, constable or marshal shall be negligent in his care or handling of the property.

§ 487.070. Return of writ

487.070. The levying officer shall return the writ to the clerk of the court from which the writ issued with a certificate of his proceedings endorsed thereon or attached thereto. Such return shall be made promptly after service and in no event later than sixty (60) days after the officer receives the writ.

Comment. Section 487.070 is based on a portion of former Section 559. Section 559 provided:

559. The sheriff, constable, or marshal must return the writ of attachment with the summons, if issued at the same time, and may return it separately from the summons if issued at a later time. The writ of attachment must be returned forthwith after levy and service in accordance with the instructions given to the officer at the time such writ or writ and summons are delivered to him, but in no event later than 30 days after its receipt, with a certificate of his proceedings endorsed thereon or attached thereto, together with the undertaking given under the provisions of Section 540 of this code to prevent or release the levy of the attachment, to the clerk of the court from which said writ of attachment was issued, except that if cash has been deposited with such levying officer in lieu of an undertaking as permitted by Section 540 of this code, such cash shall be retained in such levying officer's trust fund, and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be recorded in the offices of the county recorders in which the notices of attachment have been recorded, and be indexed in like manner.

The provisions in Section 559 relating to the defendant's undertaking in lieu of attachment have been replaced generally by Section 489.310.

§ 487.080. Inventory

487.080. (a) The levying officer shall make a full inventory of property attached and return such inventory with the writ as provided in Section 487.070.

(b) The levying officer shall request any person who retains property in his possession or any account debtor or judgment debtor levied upon to give him a memorandum, describing the property or debt and stating its value or the amount owing, within ten (10) days after such service. If the person fails to give such memorandum within the time specified, the levying officer shall state such fact at the time he makes his return pursuant to Section 487.070. A person failing to give such memorandum within the time specified may be required to pay the costs of any proceedings taken for the purpose of obtaining the information required by such memorandum.

Comment. Section 487.080 restates the substance of former Section 546.

Section 546 provided:

546. The officer levying the attachment must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached and other personal property not in the possession of the defendant, he must request, at the time of service, the party owing the debt or having the credit or other personal property belonging to the defendant to give him a memorandum, stating the amount and description of each, within 10 days after such service; and if such memorandum be refused, he must return the fact of such refusal with the writ. The party refusing to give the memorandum within the time specified may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debts or credits or other personal property.

§ 487.090. Third-party claims to attached property

487.090. A third person shall claim an interest in property attached in the manner provided for third-party claims after levy under execution.

Comment. Section 487.090 restates the substance of former Section 549.

Section 549 provided:

549. In cases where a third person claims, as his property, any personal property attached, the rules and proceedings applicable in cases of third party claims after levy under execution shall apply.

Both sections incorporate the procedures provided by Section 689.

Note. We do, however, plan to make significant changes in the procedures provided by Section 689.

Article 2. Method of Levy on Particular

Types of Property

§ 487.310. Real property

487.310. (a) To attach an interest in real property, the levying officer shall record with the office of the county recorder of the county where the property is located a copy of the writ and the notice of attachment.

(b) Where, on the date of recording, the property stands in the name of a third person, either alone or together with the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such third person.

(c) Promptly after recordation and in no event more than [()] days after the date of recording, the levying officer shall serve the defendant and any third person in whose name the property stands on such date with a copy of the writ and the notice. [Where such service is not made, the plaintiff shall be subject to liability to such third person for any pecuniary damage caused to such person by the attachment upon a showing that, at the time of the attachment, the defendant had no interest in the property attached.]

Comment. Section 487.310 provides the method by which real property is attached. This section is based on subdivisions 1 and 2 of former Section 542. These subdivisions provided as follows:

542. . . . 1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by recording with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached,

and by serving an occupant of the property, if there is one upon the property at the time service is attempted, with a similar copy of the writ, description and notice, or if there is no occupant then on the property, then, by posting the same in a conspicuous place on the property attached. Service upon the occupant may be made by leaving said copy of the writ, description and notice with the occupant personally, or, in his absence, with any person, of suitable age and discretion, found upon the property at the time service thereof is attempted and who is either an employee or agent of such occupant or a member of his family or household. Where the property described in the notice consists of more than one distinct lot, parcel or governmental subdivision and any of such lots, parcels, or governmental subdivisions lie with relation to any of the others so as to form one or more continuous, unbroken tracts, one service or posting need be made as to each such continuous, unbroken tract.

* * * * *

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached in the same manner as is real property standing upon the records of the county in the name of the defendant by the provisions of subdivision 1 of this section and the notice of attachment shall state that the real property therein described, and any interest of the defendant therein held by or standing on the records of the county in the name of such other person (naming him), are attached. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if within the county. The recorder must index such attachment when recorded, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands of record.

Section 487.310 eliminates the requirement of service on an occupant or posting as an element of a proper levy. Compare former Section 542(1) and (2). See Schwartz v. Cowell, 71 Cal. 306, 12 P. 252 (1886); Clark v. Andrews, 109 Cal. App.2d 193, 240 P.2d 330 (1952); Alpha Stores, Ltd. v. You Bet Mining Co., 18 Cal. App.2d 252, P. (1937). Service on an occupant has been eliminated because at best it was an indirect means of giving notice to the owners of the property and at worst it could cause undue worry and inconvenience to a person (e.g., lessee) whose possession will not be disturbed. Service is

still required upon the defendant and upon any third person in whose name the property stands of record on the date of levy, but such service is not a condition of a valid levy. [Subdivision (c) does, however, provide strict liability for any pecuniary damage caused to a third person by the attachment if such person is not properly served within the prescribed time.]

Note. Should the service required by subdivision (c) be made by the plaintiff? It is not an element of the levy and only the plaintiff is subject to liability if such service is not made. The provision for service on the defendant is directory only; no sanction is provided for a failure to serve. Should a sanction be provided? If so, what should the sanction be? It should be noted that, in most situations, levy will follow a noticed hearing; even where levy does not follow a noticed hearing, no seizure of property is involved here.

§ 487.320. Tangible personal property in the possession of the defendant

487.320. (a) Except as otherwise provided by this article, to attach tangible personal property in the possession of the defendant, the levying officer shall take such property into custody.

(b) At the time of levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

Comment. Section 487.320 provides the general method by which tangible personal property in the possession of the defendant is attached. This section is based on subdivision 3 of former Section 542 which provided in part: "3. Personal property, capable of manual delivery, in the possession of the defendant, must be attached by taking it into custody" Former law distinguished between property capable and property not capable of manual delivery. As to the latter, subdivision 5 provided in part:

[P]ersonal property not capable of manual delivery shall be attached by leaving with the [person] . . . having in his possession, or under his control, such . . . personal property . . . , a copy of the writ, and . . . a notice that the . . . personal property in his possession, or under his control, belonging to the defendant, [is] attached in pursuance of such writ.

It was held that this provision authorized levy by notice even on the defendant where property was not reasonably capable of being moved. See Raventas v. Green, 57 Cal. 254 (1881)(growing crops prior to the enactment of a specific provision dealing with such property); Irilarry v. Byers, 84 Cal. App. 28, ___ P. ___ (1927)(steam shovel). Apparently under former law, the plaintiff determined which class of property the particular asset fell into and instructed the sheriff accordingly. If his determination was wrong, the attachment was invalid. The major difficulty with that scheme was that, where levy was properly made by notice alone, the protection for subsequent transferees of

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the property was inadequate. In place of this, Section 487.320 provides for levy by custody (whether by keeper or storage) subject to certain broad exceptions provided by other sections. See Sections 487.340 (equipment), 487.350 (motor vehicles), 487.360 (crops and business inventory). Levy by seizure, while sometimes more expensive for the parties to the action, eliminates any ambiguity and protects innocent transferees.

§ 487.330. Tangible personal property in the possession of a third person; demand for removal; liability of third person; memorandum

487.330. (a) Except as otherwise provided in this article, to attach tangible personal property, belonging to the defendant but in the possession of another person, the levying officer shall personally serve upon such person a copy of the writ and the notice of attachment.

(b) At any time, upon the demand of such third person, the levying officer shall take such property into custody, by keeper or otherwise. In such case, the levying officer shall make demand on the plaintiff for expenses in the manner provided in Section 487.050. In the event that the money so demanded is not paid, the levying officer shall release the property to the person from whom it was taken in the manner provided in Section 487.550.

(c) If, at the time of service of the copy of the writ and notice, a person has in his possession personal property belonging to the defendant and he does not deliver such property to the levying officer, he shall be liable to the plaintiff for the value of the defendant's interest in such property until the attachment is released or discharged or the property is delivered to the custody of the levying officer pursuant to subdivision (b).

(d) Promptly after levy and in no event more than [()] days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(e) Notwithstanding subdivision (a), goods subject to a negotiable document shall be attached by attaching the document in the manner provided by Section 487.400.

Comment. Section 487.330 provides the general method by which tangible personal property in the possession of a person other than the defendant is attached. Curiously, such property, where capable of manual delivery, was not covered at all under the former statute. Two older cases suggested that, at least where the third person was a pledgee, such property should have been levied upon by notice to the third person. Moreover, possession could only be obtained by court order (see Treadwell v. Davis, 34 Cal. 601 (1868)), and seizure by the levying officer without such an order could subject him to liability as a convertor of the goods. See Dubois v. Spinks, 114 Cal. 289 (1896). Personal property, not capable of manual delivery, was covered by subdivision 5 of former Section 542 which provided also for levy by notice. See Comment to Section 487.320. Section 487.330 makes clear that levy upon tangible personal property in the possession of a third person shall generally be by notice. Subdivision (e), however, states a specific exception for goods subject to a negotiable document of title. See Section 487.400.

Subdivisions (b) and (c) are based on the first paragraph of former Section 544. This paragraph provided:

544. All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in this chapter, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, constable, or marshal, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment or garnishment be released or discharged or any judgment recovered by him be satisfied.

The duty of the person in possession to provide the levying officer with an inventory of any property which he retains in his possession is set forth in Section 487.080.

§ 487.340. Equipment of a going business

487.340. (a) Except as provided by Section[s 487.310 and] 487.350 to attach equipment of a going business, the levying officer shall file with the Office of the Secretary of State a notice complying with the provisions of subdivision (b).

(b) The notice filed with the Office of the Secretary of State shall (1) contain the name and mailing address, if known, of both the plaintiff and the defendant in the described action, (2) describe the specific property attached, (3) state that the plaintiff in the action has acquired an attachment lien in the specified property of the defendant, and (4) be in the form prescribed by the Secretary of State.

(c) Promptly after filing and in no event more than [()] days after filing, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(d) The fee for filing and indexing each notice of attachment, notice of extension, or notice of release in the Office of the Secretary of State is three dollars (\$3)..

Comment. Subdivisions (a) through (c) of Section 487.340 are comparable to former Section 542.1. Section 542.1 provided:

542.1. Notwithstanding the provisions of Section 542, a writ of attachment shall be levied upon any equipment (as defined in the Commercial Code), other than a motor vehicle or boat required to be registered, belonging to the defendant by the filing of a notice with the Secretary of State, which shall be signed by the sheriff, constable or marshal and shall contain the name of the plaintiff as lienor, the name of the defendant as debtor and shall indicate that the plaintiff has acquired an attachment lien in the equipment of the defendant. The form of such notice shall be prescribed by the Secretary of State and shall be filed and indexed by him in accordance with the provisions applicable to financing statements in Division 9 (commencing with Section 9101) of the Commercial Code.

The term "equipment" is defined by Section 480.100. It should be noted that the operation of this section is limited to equipment of a going business. Where a business has failed or ceased, the provisions of Section 487.320 would apply.

The exception provided for motor vehicles under the former law is also recognized here by Section 487.350.

Subdivision (d) is substantively identical to subdivision (a) of former Section 542.2.

Note. The exception provided by Section 487.310 (in brackets) is for real property. This is included at this time pending consideration of the treatment of fixtures. See also Note to Section 480.100.

Section 542.3 presently provides:

542.3. Upon the request of any person, the Secretary of State shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of attachment lien, naming a particular person, and if a notice is on file, giving the date and hour of filing of each notice and the name of the plaintiff-lienor. The fee for the certificate issued by the Secretary of State is two dollars (\$2). A combined certificate may be issued pursuant to Section 7203 of the Government Code. Upon request, the Secretary of State shall furnish a copy of any notice of attachment lien or notice affecting a notice of attachment lien for a fee of one dollar (\$1) per page.

Does the Commission desire to retain this provision? If so, shall we add the substance of Section 542.3 as a subdivision (e) to this section?

§ 487.350. Motor vehicles and vessels

487.350. (a) To attach a motor vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles and which is equipment of a going business, the levying officer shall file with the Department of Motor Vehicles a notice complying with the provisions of subdivision (b).

(b) The notice filed with the Department of Motor Vehicles shall (1) contain the name and mailing address, if known, of both the plaintiff and the defendant in the described action, (2) identify the vehicle or vessel attached, and (3) state that the plaintiff in the action has acquired an attachment lien in such vehicle or vessel.

(c) Promptly after filing and in no event more than [()] days after filing, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(d) Promptly after filing and in no event more than thirty (30) days after the date of filing pursuant to this section, the levying officer shall serve the legal owner, if any, of the vehicle or vessel as shown by the records of the department on such date with a copy of the writ and the notice of attachment.

Comment. Section 487.350 is new. Subdivision (a) provides an exception to the method of levy on equipment of a going business provided by Section 487.340. Where the equipment is a motor vehicle or a vessel, subdivision (a) substitutes filing with the Department of Motor Vehicles (DMV) in place of filing with the Secretary of State. The requirement of filing with the DMV is comparable to the procedure for perfection of a consensual security interest in motor vehicles and vessels. See Veh. Code §§ 6300 and 6301 (motor vehicles); 9919 and 9920 (vessels). See also Com. Code § 9302(4) ("A security interest

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in a vehicle or vessel required to be registered under the Vehicle Code which is not inventory may be perfected only as provided in the Vehicle Code."). Note that this section deals only with motor vehicles and vessels which are equipment of a going business. It does not deal with inventory (see Section 487.360) nor does it deal with motor vehicles or vessels generally. See Sections 487.320 (levy on tangible personal property in the possession of the defendant); 486.010-486.020 (property subject to attachment).

§ 487.360. Farm products and inventory of a going business

487.360. (a) To attach farm products or inventory of a going business [conducted in premises separate from the defendant's principal place of residence], if the defendant consents, the levying officer shall place a keeper in charge of such property for a period not to exceed ten (10) days. During such period, the defendant may continue to operate his farm or business at his own expense provided all sales are final and are for cash or the equivalent of cash. For the purposes of this subdivision, payment by check or by a credit card issued by a person other than the defendant shall be deemed the equivalent of a cash payment. The proceeds from all sales shall be given to the keeper for the purposes of the levy unless otherwise authorized by the plaintiff. If the defendant does not consent or, in any event, after the end of such period, the levying officer shall take such property into his exclusive custody unless other disposition is made by the parties to the action. At the time of levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(b) Where property is levied upon pursuant to subdivision (a), the defendant may apply for an order pursuant to this subdivision. Such application shall be made by filing with the court and serving on the plaintiff a notice of motion. Service on the plaintiff shall be made not less than three (3) days prior to the date set for hearing. The hearing shall be held not more than five (5) days after the filing of the motion, unless for good cause, the court orders otherwise. The notice of motion shall state the relief requested and shall be accompanied by an affidavit supporting any factual issues raised and

points and authorities supporting any legal issues raised. At the hearing on the motion, the defendant has the burden of showing (1) that, but for the plaintiff's claim, he is solvent and (2) that the property attached pursuant to subdivision (a) and the proceeds therefrom are essential for the support of himself and his family. Upon such showing, the judicial officer shall order the removal of the keeper and return the defendant to possession of such property as is essential for the support of himself and his family and may make such further order as he deems appropriate to protect the plaintiff against frustration of the collection of his claim. Such order may permit the plaintiff to levy by filing pursuant to subdivision (c) and may provide reasonable restrictions on the disposition of the property previously levied upon.

(c) Notwithstanding the provisions of subdivision (b), upon the election and the instructions of the plaintiff, the levying officer shall attach farm products or inventory of a going business by filing a notice in the form prescribed by the Secretary of State which indicates that the plaintiff has acquired an attachment lien in the farm products or inventory of the defendant. When the property is crops or timber to be cut, the notice shall be filed in the office of the county recorder in the county where the land on which the crops are growing or on which the timber is standing is located. In all other cases, the notice shall be filed in the Office of the Secretary of State. A lien acquired pursuant to this subdivision shall provide the plaintiff the same rights and priorities in proceeds of the attached property as has a secured party with a perfected security interest in proceeds of collateral where the filed financing statement covering the original collateral also covers proceeds. Promptly after filing and in no event more than [()]

days after the date of filing pursuant to this subdivision, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

Comment. Section 487.360 provides special methods for attaching farm products and the inventory of a going business. The terms "farm products" and "inventory" are defined by Sections 480.110 and 480.120, respectively. As to businesses, this section replaces a portion of subdivision 3 of former Section 542. That subdivision provided in part as follows:

3. . . . Whenever a levy under attachment or execution shall be made on personal property, other than money, or a vehicle required to be registered under the Vehicle Code belonging to a going concern, then the officer making the levy must, if the defendant consents, place a keeper in charge of said property levied upon, at plaintiff's expense, for at least two days, and said keeper's fees must be prepaid by the levying creditor. During said period defendant may continue to operate in the ordinary course of business at his own expense provided all sales are for cash and the full proceeds are given to the keeper for the purposes of the levy unless otherwise authorized by the creditor. After the expiration of said two days the sheriff, constable, or marshal shall take said property into his immediate possession unless other disposition is made by the court or the parties to the action.

Subdivision (a) preserves the basic approach of installing a keeper for a short period of time while permitting the business to continue to operate and then taking exclusive custody. However, this section is limited to farm products and inventory. Equipment is attached only by filing pursuant to Section 487.340. Subdivision (a) also makes some additional minor changes. It makes clear that the defendant must be served with a copy of the writ and notice of attachment and permits sales where payment is by check or by a credit card not issued by the defendant, e.g., BankAmericard or Master Charge. It should be noted that subdivision (a) (as does existing law) permits the parties to make an alternate disposition of the property; this may include the creation of a consensual security interest with adequate provisions for accounting for proceeds and so on. The plaintiff has substantial leverage,

however, because, if an agreement cannot be reached or the defendant cannot obtain relief under subdivision (b), the property is simply seized. Subdivision (a) also replaces the first paragraph of both subdivision 1a and subdivision 2a of former Section 542. These paragraphs provided for levy upon growing crops by recordation by the county recorder. Levy by recordation is now provided as an alternative method pursuant to subdivision (c). See discussion infra. See also Com. Code § 9401(1).

Subdivision (b) provides a procedure for certain relief where the defendant can show that, but for the plaintiff's claim, he (the defendant) is solvent and that the property attached is essential for the support of himself and his family. In these circumstances, the court must order the return of essentials to the defendant but he may also require the defendant to care for the property and may place reasonable restrictions on the disposition of such property. For example, he may direct the defendant to maintain adequate insurance, to care for and preserve the property, to account for proceeds of sale, to permit reasonable inspections of the property and his books, and to furnish the plaintiff with periodic accounts.

Subdivision (c) permits the plaintiff to elect initially an alternate method of levy comparable to the perfection by filing of a consensual security interest in inventory under the Commercial Code. Compare Com. Code § 9302. The attachment lien acquired by filing not only provides the plaintiff with a "floating lien" on inventory but also gives the plaintiff the same rights and priorities in proceeds as has a secured party who has obtained rights in proceeds of collateral under Section 9306 of the Commercial Code. Section 9306 provides in part:

9306. (1) "Proceeds" includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are "cash proceeds." All other proceeds are "noncash proceeds."

(2) Except where this division otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

* * * * *

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest

(a) In identifiable noncash proceeds and in a separate bank account containing only proceeds;

(b) In identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) In identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) In all cash and bank accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) Subject to any right of setoff; and

(ii) Limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subdivision (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under Section 9308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

Subdivision (e) creates a lien in inventory, including after-acquired property, and in "proceeds." Although subdivision (2) of Section 9306 appears to continue a security interest in the original collateral after it is sold as well as in proceeds, the appearance is deceiving because Section 9307 provides that a buyer in the ordinary course of business takes free from the security interest in inventory (except farm products) even though he knows of it. Subdivision (e) accomplishes this same result by granting the plaintiff rights and priorities only in proceeds (and, of course, in whatever property of the defendant can be classified as "inventory"). Obviously, subdivision (e) does not provide a plaintiff the same degree of security as does subdivision (a). It does, however, provide a priority over other creditors and, if the business continues to be solvent, it may offer an adequate measure of security with a minimal interference with the defendant's affairs.

§ 487.370. Accounts receivable; choses in action

487.370. (a) To attach an account receivable or a chose in action, the levying officer shall serve the account debtor or, in the case of an interest in or a claim under an insurance policy, the insurer with a copy of the writ and the notice of attachment.

(b) Promptly after service on the account debtor or insurer and in no event more than [()] days after the date of service on the account debtor or insurer, the levying officer shall serve the defendant and any other person identified by the account debtor or insurer as an obligee with a copy of the writ and the notice of attachment.

Comment. Section 487.370 provides the method by which accounts receivable and choses in action are attached. The term "account receivable" is defined by Section 480.030; "chose in action" is defined by Section 480.050. Both types of property are attached by serving the "account debtor" who is defined by Section 480.020. This procedure is comparable to that provided by subdivision 5 of former Section 542. Subdivision 5 provided in part:

5. . . . [D]ebts . . . shall be attached by leaving with the persons owing such debts . . . a copy of the writ and . . . a notice that the debts owing by him to the defendant . . . are attached in pursuance of such writ.

The duty of the obligor to give an account of the amount owing is set forth in Section 487.080.

§ 487.380. Chattel paper

487.380. (a) To attach chattel paper, the levying officer shall (1) serve the person in possession of such chattel paper with a copy of the writ and the notice of attachment and (2) if the chattel paper is in the possession of the defendant, take the chattel paper into custody.

(b) If the chattel paper is not in the possession of the defendant, promptly after levy and in no event more than [()] days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(c) The plaintiff shall serve the account debtor obligated on the attached chattel paper with a copy of the writ and the notice of attachment. Until such service is completed, the attachment shall in no way affect the rights and duties of the account debtor. After such service is completed, the account debtor shall make any payments required under the chattel paper to the levying officer.

(d) Any payments made by the account debtor to the person in possession of the chattel paper after levy shall be delivered by such person to the levying officer to be held pursuant to the attachment.

Comment. Section 487.380 provides the method by which chattel paper is attached. The term "chattel paper" is defined by Section 480.040. Chattel paper is attached by serving the person in possession of such chattel paper with a copy of the writ and the notice of attachment and, if the chattel paper is in the possession of the defendant, taking the chattel paper into custody. This procedure will prevent further transfers of the chattel paper and provide the plaintiff priority over other attaching creditors. Former attachment law simply did not use the term "chattel paper." However, the procedure provided by subdivision (a) is comparable to that formerly used

to attach promissory notes. See Comment to Section 487.400.

Attachment pursuant to subdivision (a) does not, however, affect the rights and duties of the account debtor until he is served (by the plaintiff) with a copy of the writ and the notice of attachment. The notice of attachment will advise the account debtor of his duties under the attachment (see subdivision (d) of Section 487.020), including the duty to make any payments still required to the levying officer.

The duty of the obligee (person in possession of the chattel paper) to give an account of the amount owing is set forth in Section 487.080. [Because the plaintiff (and not the levying officer) serves the account debtor under subdivision (c), the account debtor has no duty to give a memorandum.] The person in possession also has a duty to forward payments received subsequent to levy to the levying officer to be held pursuant to the attachment.

§ 487.390. Deposit accounts

487.390. (a) To attach a deposit account, the levying officer shall serve the financial institution holding such account with a copy of the writ and the notice of attachment.

(b) Promptly after the attachment of the deposit account and in no event more than [()] days after the deposit account is attached, the levying officer shall serve the defendant, and any other person in whose name the account is held, with a copy of the writ and the notice of attachment.

[(c) While the attachment is in force, the financial institution shall not be liable to any person by reason of:

- (1) Its compliance with the levy;
- (2) The nonpayment of any check or other order for the payment of money drawn or presented against the account;
- (3) The refusal to pay any withdrawal in respect to the account.]

Comment. Section 487.390 provides the method by which a deposit account is attached. The term "deposit account" is defined by Section 480.080. A deposit account is attached by serving the proper branch or office of the financial institution with a copy of the writ and the notice of attachment. See Section 487.040(a)(manner of service of writ and notice on financial institution). The procedure provided by Section 487.390 (together with Section 487.040) is substantively identical to that provided under former law by subdivision 5 of former Section 542.

The duty of the financial institution to give an account of the amount owing is set forth in Section 487.080.

§ 487.400. Negotiable instruments; negotiable documents; money

487.400. (a) Except as provided by Section 487.390, to attach a negotiable instrument, a negotiable document, or money, the levying officer shall (1) serve the person in possession of such instrument, document, or money with a copy of the writ and the notice of attachment and (2) take the instrument, document, or money into custody.

(b) If the instrument, document, or money is not in the possession of the defendant, promptly after levy and in no event more than [()] days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

[(c) Promptly after the negotiable instrument or document is attached and in no event more than thirty (30) days after the negotiable instrument or document is attached, the plaintiff shall serve any person liable under the instrument or document with a copy of the writ and the notice of attachment.]

Comment. Section 487.400 provides the method by which a negotiable instrument, a negotiable document, or money is attached. The term "negotiable instrument" is defined by Section 480.160. Because the definition includes a "certificate of deposit," the introductory clause of this section makes clear that a certificate of deposit representing a deposit account in a savings and loan association shall be levied upon as a deposit account pursuant to Section 487.440.

Subdivision (a) makes clear the law relating to promissory notes. Under the former law, a promissory note belonging to the defendant but in the possession of a third person was characterized as both a "credit" and "personal

property capable of manual delivery." Compare Deering v. Richardson-Kimball Co., 109 Cal. 73, P. (1895)(credit), and Gow v. Marshall, 90 Cal. 565, P. (1891)(credit), with Haulman v. Crumal, 13 Cal. App.2d 612, 57 P.2d 179 (1936)(property capable of manual delivery). Subdivision 5 of former Section 542 provided in part:

[C]redits . . . shall be attached by leaving with the persons . . . having in his possession, or under his control, such credits . . . a copy of the writ . . . and . . . a notice that . . . the credits . . . in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

Levy accordingly would be by notice and the note would not be required to be taken into custody. Cf. Puissegur v. Yarbrough, 29 Cal.2d 409, 175 P.2d 830 (1946)(levy by notice to financial institution regardless of the character of the property). However, no procedure was specified for levy on property capable of manual delivery and in the hands of a third person. See Comment to Section 487.330. Nevertheless, it had been suggested that the proper method of levy on a negotiable instrument in the possession of a third person was by seizure. See Haulman v. Crumal, supra (dictum). A note in the possession of the defendant had been treated as personal property capable of manual delivery and attached by seizure. See Jubelt v. Sketers, 84 Cal. App.2d 653, 191 P.2d 460 (1948). In order to make the procedure clear and to preclude transfer of the types of property dealt with here, subdivision (a) provides for seizure whether or not the property is in the hands of the defendant or some third person.

§ 487.410. Securities

487.410. (a) Except as provided in subdivision (b), to attach a security, the levying officer shall (1) serve the person in possession of such security with a copy of the writ and the notice of attachment and (2) take the security into custody.

(b) If the security is not in the possession of the defendant, promptly after levy and in no event more than [()] days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(c) Where the security is held in escrow pursuant to the provisions of the Corporate Securities Law or where the security has been surrendered to the issuer, the levying officer shall not take such security into custody but shall attach the security by serving copies of the writ and the notice as provided in subdivision (a).

Comment. Section 487.410 provides the method by which a security is attached. The term "security" is defined by Section 480.210. A security is attached pursuant to Section 487.410 by serving the person in possession of the security with a copy of the writ and notice of attachment and seizing the security. This procedure continues the substance of former law as provided by subdivision (1) of Section 8317 of the Commercial Code. Subdivision (1) provided:

8317. (1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until: (a) the security is actually seized by the officer making the attachment or levy, or (b) in the case of a security held in escrow pursuant to the provisions of the Corporate Securities Law, a copy of the writ and a notice that the securities are attached or levied upon in pursuance of such writ is served upon the escrow holder; but a security which has been surrendered to the issuer may be attached or levied upon at the source.

§ 487.410

Section 8317 of the Commercial Code was incorporated by reference by Section 541 of the Code of Civil Procedure which provided that securities shall be levied upon in the manner provided by Division 8 of the Commercial Code. Section 487.410 simply sets forth the procedure to be followed instead of incorporating the procedure by reference.

§ 487.420. Judgments owing to the defendant as a judgment creditor

487.420. (a) To attach a judgment owing to the defendant, the levying officer shall (1) file in the action in which the judgment was entered a copy of the writ and the notice of attachment and (2) serve a copy of the writ and the notice upon the judgment debtor in such action.

(b) Promptly after levy and in no event more than [()] days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

Comment. Section 487.420 provides the method by which a judgment owing to the defendant is attached. Section 487.420 is based on a portion of subdivision 5 of former Section 542 which provided as follows:

5. . . . [J]udgments . . . shall be attached by leaving with the persons owing such debts . . . a copy of the writ . . . and . . . a notice that the debts owing by him to the defendant . . . are attached in pursuance of such writ. However, whenever a judgment has been attached under the provisions of this subdivision, a copy of the writ and notice shall be filed in the action from which the judgment arose and served upon the judgment creditor of such action. . . .

The duty of the judgment debtor to give an account of the amount owing is set forth in Section 487.080.

[§ 487.430. Interest in personal property of estate of decedent

487.430. (a) To attach the interest of a defendant in personal property belonging to the estate of a decedent, whether by testate or intestate succession, the levying officer shall (1) file a copy of the writ and the notice in the office of the clerk of the court in which the estate is being administered and (2) serve the personal representative of the decedent with a copy of the writ and the notice of attachment.

(b) Promptly after levy and in no event more than [()] days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(c) The personal representative shall report such attachment to the court when any petition for distribution is filed.

(d) Such attachment shall not impair the powers of the representative over the property for the purposes of administration.

(e) If a decree orders distribution to the defendant, delivery of the property shall be ordered to the officer making the levy subject to the claim of the defendant or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing the interest has become final.]

Note. We have retained Section 487.430 pending consideration of what property shall be subject to attachment. It is very possible that, if business property only is made subject to levy, this section can be eliminated.

Section 487.430 is substantially the same as present Section 561. Section 561 provides as follows:

561. The interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered and the personal representative shall report such attachment to the court when any petition for distribution is filed, and in the decree made upon such petition distribution shall be ordered to such heir, legatee or devisee, but delivery of such property shall be ordered to the officer making the levy subject to the claim of such heir, legatee or devisee, or any person claiming under him. The property shall not be delivered to the officer making the levy until the decreer distributing such interest has become final.

As indicated above, both sections are limited to personal property in the estate of the decedent. The interest of an heir or devisee in real property must be levied upon in the manner provided for real property generally. Estate of Troy, 1 Cal. App.2d 732, P.2d (1934). See Martinovich v. Marsicano, 150 Cal. 597, P. (1907). (Under our scheme, this procedure is provided by Section 487.310). If the real property during the course of administration is converted into personalty (e.g., cash), it should subsequently be levied upon as personalty. See Estate of Troy, supra. Where real property has been properly levied upon, the levy does not apparently affect the power of the court to administer the property, and the lien attaches to whatever property is eventually distributed to the person whose interest has been levied upon. See Noble v. Beach, 21 Cal.2d 91, P.2d (1942)(rights obtained in real property under recorded abstracts of judgment may be followed into property allocated to judgment debtor after partition by probate court); Reed v. Hayward, 23 Cal.2d 336, 342, P.2d (1943).

These two separate procedures for realty and personalty seem to work adequately at present. On the other hand, it would not be burdensome to include realty under Section 487.430 (together with a provision for recording). What is the Commission's desire?

As Professor Riesenfeld advised us at the May meeting, "the death of a defendant destroys the lien of an attachment upon his property." Clary v. Rupert, 93 Cal. 844, 210 P.2d 44 (1949)(see cases cited therein and Prob. Code § 732; Code Civ. Proc. § 686). This rule does not seem to make sense (see Myers v. Mott, 29 Cal. 359 (1866)(dissenting opinions)), and the staff will investigate this matter further and propose the changes we believe would be desirable.

Article 3. Lien of Attachment; Management and Disposition
of Attached Property

§ 487.500. Lien of attachment; effective date

487.500. (a) The levy of a writ of attachment shall create a lien upon the property levied upon which is valid against all subsequent transferees of the property.

(b) The lien of attachment on property levied upon pursuant to Section 487.310 [real property] shall become effective upon the date of recording pursuant to that section.

(c) The lien of attachment on property levied upon pursuant to Sections 487.320(a)[tangible personalty in possession of defendant], 487.360(a)[inventory and farm products, alternate method], 487.400 [negotiable instruments and documents or money], and 487.410 [securities] shall become effective upon the date the levying officer takes custody of the property pursuant to those sections.

(d) The lien of attachment on property levied upon pursuant to Sections 487.340 [equipment, other than motor vehicles, of a going business], 487.350 [motor vehicles and vessels which are equipment of a going business], and 487.360(c)[farm products and inventory, alternate method] shall become effective upon the date of filing pursuant to those sections.

(e) The lien of attachment on property levied upon pursuant to Sections 487.330 [tangible personalty in possession of third person], 487.380 [chattel paper], and 487.390 [deposit accounts] shall become effective upon the date of service on the person in possession of such property.

§ 487.500

(f) The lien of attachment on property levied upon pursuant to Section 487.370 [accounts receivable, choses in action] shall become effective upon the date of service on the account debtor or insurer.

(g) The lien of attachment on a judgment levied upon pursuant to Section 487.420 shall become effective on the date of service on the judgment debtor.

(h) The lien of attachment on property levied upon pursuant to Section 487.430 shall become effective on the date of filing pursuant to that section.

(i) Notwithstanding subdivisions (b) through (h) of this section, and except as otherwise provided by Section 485.110, where a temporary protective order has been issued pursuant to Chapter 6 (commencing with Section 485.010), the lien of attachment on property described in such order and subsequently attached shall be effective from the date of service of such order.

Comment. Section 487.500 replaces the following provisions under the former law:

542.2. . . . (c) A filed notice of attachment lien is effective . . . from the date of filing.

542a. The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated; provided, however, that in the event that the sheriff, constable, or marshal does not complete the execution of said writ in the manner prescribed in Section 542 of this code within a period of 15 days next following said recording in the recorder's office then said lien shall cease at the expiration of said period of 15 days.

* * * * *

§ 487.510. Lien of attachment; duration; termination; extension

487.510. (a) Unless sooner released or discharged, any attachment shall cease to be of any force or effect, and the property levied upon shall be released from the operation of such attachment at the expiration of two (2) years from the date of issuance of the writ of attachment under which such levy was made.

(b) Notwithstanding subdivision (a), upon motion of the plaintiff, made not less than ten (10) or more than sixty (60) days before the expiration of such period of two (2) years and upon notice of not less than five (5) days to the defendant whose property is attached, the court in which the action is pending may, by order filed prior to the expiration of the period and for good cause, extend the time of such attachment for a period not exceeding one (1) year from the date on which the attachment would otherwise expire.

(c) Notice of such order shall be served upon any person holding property pursuant to an attachment and shall be recorded or filed in any office where the writ and notice of attachment is recorded or filed prior to the expiration of the period described in subdivision (a) or any extension thereof.

(d) Any attachment may be extended from time to time in the manner herein prescribed provided that the aggregate period of such extensions shall not exceed five (5) years.

Comment. Section 487.510 replaces the following provisions under the former law.

542.2. . . . (c) A filed notice of attachment lien is effective for a period of five years from the date of filing. The effectiveness

of the filed notice of attachment lien lapses on the expiration of such five-year period unless sooner terminated pursuant to subdivision (b) or unless a notice of continuation is filed pursuant to Section 542.4 prior to such lapse.

542.4. When more than four years and six months has elapsed after the filing of the notice of attachment lien and there is no final judgment in the action, the plaintiff may, upon notice to the defendant, apply to the court for an order directing the sheriff, marshal or constable to sign a notice of continuation of notice of attachment lien for filing with the Secretary of State if the lien is still in effect under Section 542c.

The court shall issue the order if it finds that the lien has been extended or the court concurrently extends the lien under Section 542c for a period beyond the expiration of the five years specified in Section 542.2. Upon issuance of the order, the sheriff, marshal or constable shall sign a notice of continuation of notice of attachment lien for filing with the Secretary of State prior to the lapse of the notice of attachment lien. Upon timely filing of the notice of continuation, the effectiveness of the original notice of attachment lien is continued for five years from the time when it would otherwise have lapsed, whereupon it shall lapse thereafter in the same manner as provided in subdivision (c) of Section 542.2.

§ 542a. . . .)

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the recording with the recorder of an abstract of the judgment in the action. At the expiration of three years the lien shall cease and any proceeding or proceedings against the property under the attachment shall be barred; provided, that upon motion of a party to the action, made not less than five nor more than 60 days before the expiration of said period of three years, the court in which the action is pending may extend the time of said lien for a period not exceeding two years from the date on which the original lien would expire, and the lien shall be extended for the period specified in the order upon the recording before the expiration of the existing lien, of a certified copy of the order with the recorder of the county in which the real property attached is situated. The lien may be extended from time to time in the manner herein prescribed.

§ 487.510

542c. An attachment of personal property shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on shall be released from the operation of the attachment at the expiration of one year from the date of the levy of the writ unless a notice of readiness for trial is filed or a judgment is entered against the defendant in the action in which the attachment was issued within that period, in which case the attachment shall continue in effect until released or vacated after judgment as provided in this chapter. However, upon motion of the plaintiff, made not less than 10 nor more than 60 days before the expiration of such period of one year, and upon notice of not less than five days to the defendant, the court in which the action is pending may, by order filed prior to the expiration of the period, extend the duration of the attachment for an additional period or periods as the court may direct, if the court is satisfied that the failure to file the notice of readiness is due to the dilatoriness of the defendant and was not caused by any action of the plaintiff. The attachment may be extended from time to time in the manner herein prescribed.

Note. The present law has three similar but slightly different provisions for equipment, real property, and personal property (other than equipment). The staff sees no apparent reason for these different provisions, and we have accordingly provided in Section 487.510 a single, simple procedure for extending the effectiveness of a lien of attachment.

§ 487.520. Execution of certain commercial paper by levying officer

487.520. (a) When a check, draft, money order, or other order for the withdrawal of money from a banking corporation or association, or the United States, or any state or public entity within any state, payable to the defendant on demand, comes into the possession of a levying officer under a writ of attachment, the officer shall promptly endorse the same and present it for payment.

(b) The levying officer shall endorse the check, draft, money order, or other order by writing the name of the defendant thereon and the name and official title of the levying officer and giving the title of the court and the cause in which the writ was issued. Such endorsement shall constitute a valid endorsement. No banking corporation or association or public entity on which the check, draft, money order, or other order is drawn shall incur any liability to any person, firm, or corporation by reason of paying to the officer the check, draft, money order, or other order by reason of such endorsement. No levying officer shall incur any liability by reason of his endorsing, presenting, and obtaining payment of the check, draft, money order, or other order. The funds or credit resulting from the payment of the check, draft, money order, or other order shall be held by the levying officer subject to the levy of the writ of attachment.

(c) If it appear from the face of the check, draft, money order, or other order that the same has been tendered to the defendant in satisfaction of a claim or demand and endorsement thereof shall be considered a release and satisfaction by defendant of such claim or demand, the officer making the levy shall not endorse the check, draft,

Money order, or other order unless the defendant shall first endorse the same to the officer making the levy. If the defendant shall not endorse the check, draft, money order, or other order to the officer making the levy, the officer shall hold such check, draft, money order, or other order subject to the levy and shall incur no liability to the defendant or to any other person, firm, or corporation for delay in presentment of the same for payment.

Comment. Section 487.520 authorizes and directs the levying officer to execute certain types of commercial paper. The section is virtually identical to subdivision 6 of former Section 542. Subdivision 6 provided:

6. When checks, drafts, money orders and other orders for the withdrawal of money from a banking corporation or association, the United States, any state or public entity within any state, payable to the defendant or judgment debtor on demand, come into the possession of a levying officer under a writ of attachment or execution, the sheriff, constable, or marshal, to whom the writ is directed and delivered, shall promptly thereafter endorse the same and present, or cause the same to be presented, for payment. The sheriff, constable, or marshal shall endorse such check, draft, money order or other order for the withdrawal of money by writing the name of the defendant or judgment debtor thereon and the name and official title of the officer making the levy with the statement that such endorsement is made pursuant to levy of writ of attachment or execution and giving the title of court and cause in which such writ was issued, and such endorsement shall be sufficient endorsement and no banking corporation or association or public entity on which said check, draft, money order or other order for the withdrawal of money is drawn shall incur any liability to any person, firm or corporation by reason of paying to such officer such check, draft, money order or other order for withdrawal of money by reason of such endorsement, nor shall the officer making the levy incur any liability by reason of his endorsing and presenting for and obtaining payment of such check, draft, money order or other order for the payment of money; provided, however, that the funds or credit resulting from the payment of such check, draft, money order or other order for withdrawal of money shall be held by said officer subject to the levy of said writ of attachment or execution. If it appear from the face of such check, draft, money order or other order for the withdrawal of money that the same has been tendered to the defendant or judgment debtor in satisfaction of a claim or demand and that endorsement thereof shall be considered a release and satisfaction by defendant or judgment debtor of such claim or demand, then, in such event, the officer making the levy shall not endorse said check, draft, money order or other order for the withdrawal of money unless the defendant or judgment debtor shall first endorse the same to the officer making the levy; provided, however, that if said defendant shall not endorse said check, draft, money order or other order for withdrawal of money to the officer making the levy, said officer may thereafter hold such check, draft, money order or other order for the withdrawal of money subject to such levy and shall incur no liability to the defendant or judgment debtor or to any other person, firm or corporation for delay in presentment of the same for payment.

§ 487.530. Sale of [or receiver] or keeper for attached property; proceeds [; receiver's expenses]

487.530. (a) Whenever property is or may be attached, upon application of either party [or any third person whose interest has been determined pursuant to Section 689], after reasonable notice to the other party [parties] and upon a showing that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason that the interests of the parties will be best served thereby, the court may order that such property be sold [or may appoint a receiver] or direct the levying officer to take charge of, cultivate, care for, preserve, collect, harvest, pack, or sell such property.

(b) Any sale of such property shall be made in [the same manner that property is sold on execution][a commercially reasonable manner], and the proceeds shall be deposited in the court to abide the judgment in the action.

(c) Where [a receiver or] keeper is appointed, the court shall fix the daily fee of such [receiver or] keeper and may order the plaintiff to pay such fee and expenses of the [receiver or] keeper in advance or may direct that the whole or any part of such fee and expenses be paid from the proceeds of any sale of such property.

[(d) Except as otherwise provided in this section, the provisions of Chapter 5 (commencing with Section 564) and Chapter 5A (commencing with Section 571) of this title shall govern the appointment, qualifications, powers, rights, and duties of a receiver appointed under this section.]

§ 487.540. Collection of account receivable, chattel paper, chose in action, negotiable instrument, or judgment

487.540. Where an account receivable, chattel paper, chose in action, negotiable instrument, or judgment is attached, the account debtor or obligor may pay the amount owing on such obligation to the levying officer. The receipt of such officer is a sufficient discharge for the amount paid.

Comment. Section 487.540 replaces a portion of former Section 547 which provided:

547. . . . Debts and credits attached may be collected by him [levying officer], if the same can be done without suit. The receipt of such officer is a sufficient discharge for the amount paid.

Note. Section 487.540 treats the matter of voluntary payment. Should the parties [or the levying officer] be permitted or required to file suit to collect a debt owing? Should suit be filed or should some exception be made to toll the statute of limitations on a due debt? Should the levying officer have a duty to collect a debt? Should the attaching creditor (prior to judgment) be given some means of collecting an amount due? Note Chapter 11 (Section 491.010) gives the creditor the means to determine whether an amount is owing but that procedure gives no other special relief.

§ 487.550. Release of attachment

487.550. (a) The levying officer shall release an attachment whenever he receives a written direction from the plaintiff, or a certified copy of an order of the court in which the action is pending, discharging or dissolving the attachment or releasing the property.

(b) Where the property to be released has been taken into custody, it shall be delivered to the person from whom it was taken. If such person cannot be found within the county where the property was levied upon, the levying officer shall retain the property but give reasonable notice to such person as to where he may secure its possession. If, after thirty (30) days from the giving of such notice, such person has not claimed the property, the levying officer shall sell such property in the same manner that property is sold on execution and deposit the proceeds, after first deducting his costs and expenses, in the court to abide the judgment in the action.

(c) Where the property to be released has not been taken into custody, the levying officer shall release the attachment by issuing a written release addressed to the person served with the copy of the writ and notice and, where the writ and notice were recorded or filed, by recording or filing such written release in the same office.

(d) There shall be no liability for persons acting in conformity with the release of the levying officer or for such officers releasing such attachments in accordance with this section.

Comment. Section 487.550 replaces the following provisions under the former law:

542.2. . . . (b) When a notice of attachment lien has been filed and the plaintiff, for whatever reason, no longer has an attachment lien in the equipment of the defendant, the sheriff, marshal or constable shall sign a notice to that effect for filing with the Secretary of State.

* * * * *

544. . . . The levying officer shall release such attachment or garnishment in full or in part as required, by issuing a written release addressed to the person served with the copy of the writ and notice, (1) upon written direction of the plaintiff or his attorney, or (2) upon receipt by the officer of an order of the court in which the action is pending, or a certified copy thereof, discharging or dissolving the attachment or garnishment or releasing the property . . . or (3) in all other cases provided by law. There shall be no liability for such persons acting in conformity with such releases or for such officers releasing such attachments or garnishments in accordance with the foregoing.

560. An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property.

Note. Section 487.550 authorizes only the levying officer to file a notice that an attachment is released. This continues the procedure provided by Section 542.2. Section 560, however, permits the plaintiff, or his attorney, to also file such a notice. Should this latter procedure be retained? for real property only? or for all property where levy is by filing?

§ 487.560. Judgment for defendant; release of property and return of proceeds

487.560. If the defendant recovers judgment against the plaintiff and no timely motion for vacation of judgment or for judgment notwithstanding the verdict or for a new trial is filed and served and is pending and no appeal is perfected and undertaking executed and filed as provided in Section 921 of this code, any undertaking received from the defendant in the action, all the proceeds of sales and money collected by the levying officer, and all the property attached remaining in such officer's hands shall be delivered to the defendant; and the court shall order the discharge of any attachment made in the action and the release of any property held thereunder.

Comment. Section 487.560 is substantively identical to the first portion of former Section 553. Section 553 provided in part:

553. If the defendant recovers judgment against the plaintiff, and no timely motion for vacation of judgment, or for judgment notwithstanding the verdict, or for a new trial, is filed and served, and no appeal is perfected and undertaking executed and filed as provided in Section 921 of this code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, constable, or marshal and all the property attached remaining in such officer's hands, must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom

Note. It might be noted that, under the levy procedures provided in the draft statute, generally only property in the possession of the defendant is required to be taken into custody; property in the possession of third persons is generally left in their possession (they may, of course, demand that it be removed). Therefore, although Section 487.560 requires that property in the levying officer's hands be returned to the defendant, rather than the person from whom it was taken, this should cause no problems and seem simpler where as much time has passed as is required to obtain a judgment. We could, however, provide a procedure here comparable to that under Section 487.550 where property is returned to the person from whom it was taken.

This section provides for disposition where the defendant recovers judgment. Provisions relating to release on the posting of an undertaking are provided in Chapter 9 (Undertakings). The staff believes that the provisions covering disposition where the plaintiff recovers judgment should be located in the chapter dealing with execution generally. We propose that Section 684.2 be added as set forth on the following pages.

§. 684.2 (added). Satisfaction of judgment from attached property; proceeds of perishable property sold, money collected, sales under execution; notices; delivery of balance

Sec. . Section 684.2 is added to the Code of Civil Procedure, to read:

684.2. Where an attachment has previously been issued and judgment is recovered by the plaintiff, the sheriff, constable, or marshal shall satisfy the same out of any property attached by him which is still subject to such attachment:

(a) First, by paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any money collected by him, or so much as shall be necessary to satisfy the judgment;

(b) If any balance remain due and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance if enough for that purpose remain in his hands. Notices of the sales shall be given and the sales conducted as in other cases of sales on execution. If, after selling the property attached by him remaining in his hands, deducting his fees, and applying the proceeds, together with the money collected by him, to the payment of the judgment, any balance shall remain due, the sheriff, constable, or marshal shall proceed to collect such balance as upon an execution in other cases.

(c) Whenever the judgment shall have been paid, the sheriff, constable, or marshal shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment.

Comment. Section 684.2 combines the substance of former Sections 550 and 551. These sections provided:

§ 550.

If judgment be recovered by the plaintiff, the sheriff, constable, or marshal must satisfy the same out of the property attached by him which has not been delivered to the defendant, or released because of a third party claim, or subjected to a prior execution or attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

§ 551.

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff, constable, or marshal must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, constable, or marshal upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

CHAPTER 9. UNDERTAKINGS

Article 1. General Provisions

§ 489.010. Application of article

489.010. Unless expressly provided by statute, the provisions of this article apply only to undertakings required in this title.

Comment. Section 489.010 limits the application of this article to undertakings in attachment proceedings. The provisions of this article supplement the general provisions that govern undertakings in Sections 1041-1059 of the Code of Civil Procedure and are in turn supplemented by specific provisions relating to particular undertakings in other articles of this chapter.

§ 489.020. Definitions

489.020. As used in this article:

- (a) "Beneficiary" means the person to be benefited by an undertaking.
- (b) "Principal" means the person who files an undertaking.

§ 489.030. Waiver of undertaking

489.030. An undertaking may be waived in writing by the beneficiary.

Comment. Section 489.030 is modeled after a portion of Section 920 (waiver of appeal bond). See also Merritt v. J. A. Stafford Co., 68 Cal.2d 619, 440 P.2d 927, 68 Cal. Rptr. 447 (1968)(parties may agree to appeal bond in less than required amount). Compare former Section 539(a)(failure to object deemed a waiver of objection).

§ 489.040. Number of sureties required

489.040. An undertaking shall be executed by two or more sureties.

Comment. Section 489.040 generalizes the provision for at least two sureties, formerly found throughout the attachment chapter. See former Sections 539, 539a, 540, 553, 555. The requirement formerly found in many of these sections that the sureties be "sufficient" is continued in Sections 1057 (affidavit of sureties), 489.060 (approval of undertaking), and 489.080 (objection to undertaking). Cf. Tibbet v. Tom Sue, 122 Cal. 206, 54 P. 741 (1898)(provision for attachment undertaking incorporates Section 1057).

Any undertaking required in this title may, in lieu of two or more personal sureties, be executed by a single corporate surety. See Section 1056. Cf. Brandt v. Superior Court, 67 Cal.2d, 437, 432 P.2d 31, 62 Cal. Rptr. 429 (1967)(undertaking in libel and slander action may be made by corporate surety as well as by personal sureties).

§ 489.050. Estimate of value of property in undertaking

489.050. Where the amount of an undertaking depends upon the value of property, the undertaking shall include the principal's estimate of the market value of such property.

Comment. Section 489.050 adopts the method used under Sections 677 (action to set aside fraudulent conveyance) and 710c (third-party claims on execution), whereby the person filing the undertaking supplies the estimate of value. The provision of former Section 555 for a court-appointed appraisal of property is not continued. However, the judicial officer may order an appraisal of property upon a subsequent objection by the beneficiary. See Section 489.100(b).

§ 489.060. Filing and approval of undertaking

489.060. (a) An undertaking shall be presented to a judicial officer for approval and upon approval shall be filed with the court in which the action is pending. The undertaking becomes effective upon filing.

(b) Nothing in this chapter shall be construed to preclude approval of an undertaking in an amount larger than that required.

Comment. Section 489.060 requires approval of any undertaking under this title by a judicial officer before it may be filed. This generalizes the requirement of former Section 540 (undertaking for release of attached property). The judicial officer approves the undertaking if he determines that the undertaking on its face and the affidavits of the sureties are sufficient. Such approval has no effect on the right of the beneficiary to object to the sufficiency of the undertaking.

The undertaking is filed with the court in which the action is pending. Under prior law, the undertaking was filed with the court in some instances (former Section 540) and with the levying officer in others (former Section 539a). However, since an undertaking must be approved by a judicial officer in all cases, all undertakings are required to be filed with the court. See also Section 1057 (clerk to enter undertaking in register of actions).

Subdivision (b) of Section 489.060 is based on a sentence found in former Section 539.

§ 489.070. Grounds for objection to undertaking

489.070. The beneficiary may object to the sufficiency of an undertaking on either of the following grounds:

- (a) The sureties are insufficient.
- (b) The amount of the undertaking is insufficient.

Comment. Section 489.070 continues prior law. See, e.g., former Sections 539 (exceptions to sureties, increase of undertaking on motion), 554 (justification of sureties), 555 (justification of sureties). The combination of both exception to sureties and adequacy of the amount of the undertaking in a single objection to the sufficiency of the undertaking is modeled upon Sections 678 (undertaking in action to set aside transfer of property) and 711-1/2 (undertaking by third-party claimant on execution).

The qualifications of sureties are set out in Sections 1056 and 1057. The amount of the undertaking is prescribed in Sections 489.220, 489.310, 489.410, and 489.420. See also Section 917.9.

§ 489.080. Manner of making objection

489.080. (a) An objection to the sufficiency of the undertaking shall be made by a noticed motion. The notice of motion shall specify the precise ground for the objection.

(b) Where the objection is made on the ground that the market value of the property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the notice of motion shall state the beneficiary's estimate of the market value of the property.

Comment. Section 489.080 provides a procedure for objecting to the sufficiency of the undertaking but places no limitation on the time within which objections must be made. Contrast former Sections 539, 539a, 553.5, 554 (five days).

Subdivision (b) is new. Its purpose is to facilitate voluntary agreement on the amount of an undertaking by the parties. See Section 489.100. Where the parties are unable to agree on property valuation, the court determines the amount of the undertaking. See Section 489.090.

§ 489.090. Hearing and determination of objection

489.090. (a) Unless the parties otherwise agree, the hearing on the objection shall be held not less than two nor more than five days after service of notice of motion.

(b) The hearing shall be conducted in such manner as the judicial officer determines is proper. He may permit witnesses to attend and evidence to be procured and introduced in the same manner as in the trial of a civil case. He may appoint one or more disinterested persons to appraise property for the purpose of ascertaining its value.

(c) If the judicial officer determines that the undertaking is insufficient, he shall specify in what respect it is insufficient and shall order that an undertaking with sufficient sureties and in a sufficient amount be filed within five days. If the order is not complied with, all rights obtained by filing the original undertaking shall immediately cease.

(d) Where the judicial officer determines an undertaking is insufficient, the undertaking shall remain in effect until an undertaking with sufficient sureties and in a sufficient amount is filed in its place.

(e) Where the judicial officer determines an undertaking is sufficient, no future objection may be made to the undertaking except upon a showing of changed circumstances.

Comment. Section 489.090 is derived from numerous provisions of the Code of Civil Procedure. See, e.g., Sections 678, 678-1/2, 679, 711-1/2, 712, 712-1/2, 833-835, 1030, and 1057.

§ 489.090

The time for hearing on the sufficiency of an undertaking in subdivision (a) continues prior law. See former Section 539.

Subdivision (b) is intended to provide the judicial officer with a wide variety of tools. He may examine sureties under oath; he may appoint appraisers; he may order a full-dress hearing. Subdivision (b) is permissive rather than restrictive.

If a new undertaking is filed after the original undertaking is found insufficient, it must of course be approved by a judicial officer before it may take effect. Section 489.060. The new or increased undertaking is subject to objection in the same manner as the original undertaking. Section 489.070. However, a judicial officer's determination that an undertaking is sufficient is binding in any subsequent proceedings, absent changed circumstances. Subdivision (e).

Orders for a sufficient undertaking made under this section are not subject to appeal. See Murillo v. Toole, 47 Cal. App.2d 725, 118 P.2d 895 (1941). See also Section 904.1 et seq.

Subdivision (d) is new. The effect of this provision is to continue the liability of the surety on an insufficient undertaking until the surety is exonerated either by the filing of a sufficient undertaking, or the failure of the condition of the surety's liability.

§ 489.100. Hearing unnecessary where undertaking increased to amount of beneficiary's estimate of property value

489.100. Where an objection to an undertaking is made on the ground that the market value of property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the principal may accept the beneficiary's estimated value of the property and file at once an increased undertaking based upon such estimate. In such case, no hearing shall be held on the objection, and the beneficiary is bound by his estimate of the value of the property in any hearing on the sufficiency of an undertaking filed by the principal in the action.

Comment. Section 489.100 is derived from Sections 678, 679, 711-1/2, and 712-1/2. The beneficiary is bound by his estimate of the value of the property on which the amount of the undertaking depends but may object to the sufficiency of the increased undertaking on any other ground.

§ 489.110. Liability of surety

489.110. Notwithstanding Section 2845 of the Civil Code, a judgment of liability on an undertaking shall be in favor of the beneficiary and against the sureties and may be enforced by the beneficiary directly against the sureties. The liability of a surety is limited to the amount of the undertaking. Nothing in this section affects any right of subrogation of a surety against his principal.

Comment. Section 489.110 supplements Section 1058a. Under Section 1058a, a motion to enforce liability on an undertaking is directed to the sureties. Section 489.110 makes clear that the liability may be enforced directly against the sureties. In contrast with former law, the beneficiary need not attempt to satisfy his judgment first from the assets of the principal. Cf. former Section 552; Bezaire v. Fidelity & Deposit Co., 12 Cal. App.3d 888, 91 Cal. Rptr. 142 (1970); Civil Code § 2845. This provision in no way interferes with the contractual relation between principal and surety.

Section 489.110 limits only the liability of a surety; the principal is liable to the beneficiary to the extent of the full amount of damages caused. See Section 490.020.

§ 489.120. Limitations period for recovery on undertaking

489.120. A motion to enforce liability on an undertaking shall be filed and notice served no later than one year after final judgment in the action in which the undertaking is given has been entered and the time for appeal has expired.

Comment. Section 489.120 is derived from Section 1166a.

Article 2. Undertakings to Obtain Writ of
Attachment or Protective Order

§ 489.210. Undertaking required

489.210. Before issuance of a writ of attachment or a protective order, the judicial officer shall require that the plaintiff have filed an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action.

Comment. Section 489.210 supersedes the first sentence of former Section 539.

For damages on wrongful attachment, see Chapter 10 (Section 490.010 et seq.). The recovery for a wrongful attachment includes not only damages but also attorney's fees. See Section 490.020. See also Section 490.010 (acts constituting wrongful attachment).

§ 489.220. Amount of undertaking

489.220. (a) Except as provided in subdivision (b), the amount of an undertaking filed pursuant to this article shall be one-half of the amount sought to be recovered by the plaintiff in the action in which the writ of attachment or protective order is sought.

(b) If, upon objection to the undertaking, the judicial officer determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, he shall order the amount of the undertaking increased to the amount he determines to be the probable recovery for wrongful attachment if it is ultimately determined that there was a wrongful attachment.

Comment. Section 489.220 supersedes portions of former Section 539 but provides no authorization for decrease of the amount of an undertaking.

Subdivision (a). Subdivision (a) makes no provision for attachment based on a partial amount of a plaintiff's claim. Compare the second sentence of former Section 539.

Subdivision (b). Under former law, the undertaking could be increased only to the amount for which the writ was issued. See the last sentence of former Section 539.

§ 489.230. Notice to defendant

489.230. (a) The notice of levy of the writ of attachment shall include a statement, in a form adopted by the Judicial Council, advising the defendant that the undertaking has been filed and informing him of his right to object to the sufficiency of the undertaking.

(b) A protective order shall include a statement comparable to the one required by subdivision (a), the content of which shall be prescribed by rule adopted by the Judicial Council.

§ 489.240. Deposit account, or contents of safe deposit box, not wholly in name of defendant

489.240. (a) In addition to any other provision of law, the provisions of this section shall be complied with where the following personal property is sought to be attached:

(1) A deposit account, or interest therein, not standing in the name of the defendant alone.

(2) Property in a safe deposit vault or box maintained by a bank, trust company, savings and loan association, or other corporation authorized and empowered to conduct a safe deposit business and rented by it to a person other than a defendant.

(b) The amount of an undertaking filed to obtain a writ of attachment of property described in subdivision (a) shall be an amount not less than twice the amount sought to be recovered by the plaintiff in the action in which the writ is sought. The undertaking shall secure the payment of any recovery for wrongful attachment by any person, other than the defendant whose interest is sought to be attached, rightfully entitled to such property (which person need not be named specifically in the undertaking but may be referred to generally in the same manner as in this sentence).

(c) Objections to the undertaking may be made by any person claiming to be the rightful owner of the property sought to be levied upon.

Comment. Section 489.240 continues the substance of a portion of former Section 539a except that the provision for delivery of the undertaking to the beneficiary through the sheriff and bank is not continued. See Comment to Section 489.060.

Article 3. Undertaking to Obtain Release of
Attachment or Protective Order

§ 489.310. Application for release of attachment; proper court; undertaking;
multiple defendants

489.310. (a) Upon reasonable notice to the plaintiff, a defendant whose property has been or is subject to being attached and who has appeared in the action may apply to the court in which the action is pending, [or, if a writ of attachment is levied in another county, to a court in such county having jurisdiction in cases involving the amount specified in the writ,] for an order permitting him to file an undertaking in lieu of any property which has been or is subject to being attached.

(b) The application shall include a statement, executed under oath, describing the character of the defendant's title to the property and the manner in which he acquired such title.

(c) Before making such order, the court shall require the defendant to file with the court in which the application is made an undertaking to pay the plaintiff the value of the property released not exceeding the amount of such judgment against such defendant. The amount of the undertaking filed pursuant to this section shall be equal to the lesser of (1) the value of the property in the plaintiff's application for a writ or (2) the amount specified by the writ to be secured by the attachment. The court shall issue such order upon being satisfied that a valid and sufficient undertaking has been filed.

(d) Where an action is against more than one defendant, any defendant may make such application. The filing of an undertaking by such defendant shall not subject him to any demand against any other defendant; however, the levying officer shall not be prevented thereby from

attaching, or be obliged to release from attachment, any property of any other defendant. Where two or more defendants have an interest in the same property, a joint application and undertaking shall be filed to secure the release of such property.

Comment. Section 489.310 is based on former Sections 540, 554, and 555. These sections provided:

540. The writ must be directed to the sheriff, . . . and require him to attach and safely keep all the property of such defendant . . .

unless such defendant give him security by the undertaking of at least two sufficient sureties, which must first be approved by a judge of the court issuing the writ, or if said writ of attachment is issued to another county then by a judge of a court, having jurisdiction in cases involving the amount specified in the writ, in the county where the levy shall have been, or is about to be, made, or deposit a sum of money with the sheriff, constable, or marshal in an amount sufficient to satisfy such demand against such defendant, in addition to those costs actually incurred to the time of giving the undertaking or the deposit of money with the sheriff, constable, or marshal, a sum not to exceed 25 percent of the amount of the plaintiff's demand, and in no event more than one thousand dollars (\$1,000), or in an amount equal to the value of the property of such defendant which has been or is about to be attached, in which case to take such undertaking or sum of money in lieu of the property which has been or is about to be attached.

In the event that the action is against more than one defendant, any defendant whose property has been or is about to be attached in the action may give the sheriff, constable, or marshal such undertaking which must first be approved by the judge as hereinabove provided, or deposit such sum of money, and the sheriff, constable, or marshal shall take the same in lieu of such property. Such undertaking, or the deposit of such sum of money, shall not subject such defendant to, or make him answerable for, any demand against any other defendant, nor shall the sheriff, constable, or marshal thereby be prevented from attaching or be obliged to release from attachment, any property of any other defendant. However, such defendant, at the time of giving such undertaking to, or depositing such sum of money with the sheriff, constable, or marshal, shall file with the sheriff, constable, or marshal a statement, duly verified by his oath, wherein such defendant shall state the character of his title to the attached property and the manner in which he acquired such title, and aver and declare that the other defendant or defendants, in the action in which said undertaking was given or such sum of money was deposited, has or have not any interest or claim of any nature whatsoever in or to said property.

* * * * *

§ 554.)

Whenever any defendant has appeared in the action, such defendant may upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment wholly, or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment, any or all of the property of such defendant attached; and all of the property so released and all of the proceeds of the sales thereof, must be delivered to such defendant upon the justification of the sureties on the undertaking, if required by the plaintiff. Such justification must take place within five days after the notice of the filing of such undertaking.

§ 555.)

Before making such order, the court or judge must require an undertaking on behalf of such defendant, by at least two sureties, residents and freeholders, or householders in the State to the effect that in case the plaintiff recovers judgment in the action against the defendant, by whom, or in whose behalf such undertaking shall be given, such defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of any judgment in such action against said defendant, or in default thereof, that such defendant and sureties will, on demand, pay to the plaintiff the full value of the property released not exceeding the amount of such judgment against such defendant. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge and the property attached cannot be released from the attachment without their justification if the same is required.

Article 4. Undertaking on Appeal.

§ 489.410. Postjudgment continuance of attachment; increase in undertaking

489.410. (a) At any time after entry of judgment in favor of the defendant and before perfection of an appeal under the provisions of Section 921, upon motion of the defendant, the trial court may order an increase in the amount of the original undertaking on attachment in such amount, if any, as is justified by the detriment reasonably to be anticipated by continuing the attachment. Unless such undertaking is filed within ten (10) days after such order, the order of attachment shall be discharged, and the property released therefrom.

(b) If an order increasing the undertaking is made, the amount of the undertaking on appeal required by Section 921 of this code shall be the same as the amount fixed by the trial court in such order.

(c) Neither the pendency nor granting of a motion timely filed and served by the plaintiff for vacation of judgment, or for judgment notwithstanding the verdict or for new trial shall continue an attachment in force, unless an undertaking is made by the plaintiff to pay all costs and damages sustained by continuing the attachment. The undertaking may be included in the undertaking specified in Section 921. If not so included, the same procedure shall apply as in case of an undertaking pursuant to Section 921.

Comment. Section 489.410 is based on former Section 553 which provided in Part:

553. [A]t any time after entry of judgment and before perfection of the appeal under the provisions of Section 921 of this code, upon motion of the defendant, the trial court may order an increase in the amount of the original undertaking on attachment in such amount, if any,

as is justified by the detriment reasonably to be anticipated by continuing the attachment. Unless such undertaking shall be executed and filed by at least two sureties within 10 days after such order, the order of attachment shall be discharged, and the property released therefrom. The sureties may be required to justify before the court within 10 days after the undertaking is filed and if they fail to do so, the order of attachment shall be discharged and the property released therefrom. If an order increasing the undertaking is made, the amount of the undertaking on appeal required by Section 921 of this code shall be the same as the amount fixed by the trial court in said order. Neither the pendency nor granting of a motion timely filed and served for vacation of judgment, or for judgment notwithstanding the verdict or for new trial shall continue force an attachment, unless an undertaking be executed and filed on the part of the moving party by at least two sureties that the moving party will pay all costs and damages sustained by continuing the attachment. The undertaking may be included in the undertaking specified in Section 921. If not so included, the same procedure shall apply as in case of an undertaking pursuant to Section 921.

§ 489.420 Release from attachment upon filing of undertaking on appeal

489.420. Where a defendant appeals and the enforcement of the judgment against him is stayed by the filing of a sufficient undertaking on appeal as provided by this code, all property of such defendant which has been attached in the action shall be released from the attachment upon the justification of the defendant's sureties, or written waiver thereof, or upon the failure of the respondent to except to said sureties within five days after written notice of the filing of the undertaking.

Comment. Section 489.420 is based on former Section 553.5 which provided:

553.5. Whenever a defendant appeals and the enforcement of the judgment against him is stayed by the filing of a sufficient undertaking on appeal as provided by this code, all property of said defendant which has been attached in said action shall be released from the attachment levy upon the justification of the defendant's sureties, or written waiver thereof, or upon the failure of the respondent to except to said sureties within five days after written notice of the filing of the undertaking. If the officer's fees for services rendered on the attachment are unpaid, such officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

Note. Section 489.420 provides for release where the defendant appeals and the trial court in its discretion requires an undertaking and the undertaking is given. See Section 917.9. Perfection of an appeal by the defendant stays the enforcement of the judgment but does not otherwise affect the lien of attachment. See Section 916. The defendant may, of course, always obtain a release pursuant to Section 489.410. The provision for the levying officer's fees has been eliminated. These can be recovered eventually as costs, pending the final determination in the action.

CHAPTER 10. LIABILITY FOR WRONGFUL ATTACHMENT

§ 490.010. Acts constituting wrongful attachment

490.010. A wrongful attachment consists of any of the following:

- (a) The levy of a writ of attachment or the service of a protective order in an action in which attachment is not authorized.
- (b) The levy of a writ of attachment or the service of a protective order in an action in which the plaintiff does not recover judgment.
- (c) The levy of a writ of attachment on property possessing a value greatly in excess of the amount of the plaintiff's legitimate claim.
- (d) The levy of a writ of attachment obtained [ex parte][pursuant to Article 3 (commencing with Section 483.510) of Chapter 4 or Chapter 5 (commencing with Section 484.010)] on property exempt from attachment.
- (e) The levy of a writ of attachment on property of a person not a party to the action.

§ 490.020. Liability for wrongful attachment

490.020. (a) The liability of a plaintiff for causing a wrongful attachment includes both of the following:

(1) All damages proximately caused to the defendant or any other person by the wrongful attachment, whether direct or consequential.

(2) All costs and expenses, including attorney's fees, reasonably expended in recovering for wrongful attachment.

(b) The liability of a plaintiff for wrongful attachment pursuant to Section 490.010 is limited by the amount of the undertaking where the writ of attachment was issued pursuant to Article 1 (commencing with Section 483.010) or Article 2 (commencing with Section 483.310) of Chapter 4 of this title.

Comment. Section 490.020 provides a standard that will make the defendant whole. Contrast Vesper v. Crane Co., 165 Cal. 36, 130 P. 876 (1913).

Subdivision (a). The extent of wrongful attachment liability is the actual damage caused by the attachment and includes such items as loss of credit and business losses. Contrast Gray v. American Sur. Co., 129 Cal. App.2d 471, 277 P.2d 436 (1954); Atlas Dev. Co. v. National Sur. Co., 190 Cal. 329, 212 P. 196 (1923); Elder v. Kutner, 97 Cal. 490, 32 P. 563 (1893); Bailey v. McDougal, 196 Cal. App.2d 178, 16 Cal. Rptr. 204 (1961).

Subdivision (b). Compare Section 489.120 (liability of surety limited). See Finn v. Witherbee, 126 Cal. App.2d 45, 271 P.2d 606 (1954). The limitation provided in subdivision (b) does not, however, limit liability or recovery on a claim based on a common law theory of relief. See Section 490.060.

§ 490.030. Procedure for recovery for wrongful attachment

490.030. (a) A defendant may recover damages for wrongful attachment by motion filed in the trial court without necessity of an independent action.

(b) A motion under this section shall not be filed or served on the plaintiff until after entry of the final judgment in the action for which damages are sought and expiration of the time for appeal from such judgment or, if an appeal is filed, until such appeal is disposed of. The motion may not be filed or served more than one year after the latest of the preceding dates.

(c) The defendant may join in such motion the sureties on an undertaking for wrongful attachment liability, and any judgment of liability shall bind the plaintiff and sureties jointly and severally, but the liability of a surety is limited to the amount of the undertaking.

(d) The procedure for recovery of wrongful attachment damages on motion of the defendant shall be as provided in Section 1058a for recovery on an undertaking.

Comment. Section 490.030 provides for recovery of wrongful liability damages in the same manner as recovery on an undertaking. See subdivision (d).

Subdivision (a). Subdivision (a) provides for a direct wrongful attachment action against the plaintiff. See Section 490.020.

Subdivision (b). Compare Section 489.130.

Subdivision (c). For the extent of the liability of a surety, see Section 489.120.

Subdivision (d). Section 1058a was enacted by Cal. Stats. 1972, Ch. 391 (AB 605).

§ 490.040. Setoff of wrongful attachment recovery

490.040. The amount of any recovery for wrongful attachment shall be offset insofar as possible against any unsatisfied amounts owed to the plaintiff by the defendant on the judgment in the action for which wrongful attachment damages are awarded.

§ 490.050. Recovery by third-party claimants

490.050. A person not a party to an action whose property is wrongfully attached is entitled to recover damages for wrongful attachment to the same extent and in the same manner as a defendant in the action. For this purpose, the person whose property is attached shall be deemed to be the beneficiary of the undertaking for the attachment of such property and shall have all rights of the beneficiary, including the right to recover such damages by using the procedure provided by Section 490.030.

§ 490.060. Common law remedies not limited

490.060. Nothing in this chapter limits the right to recover for damages caused by an attachment or protective order on any common law theory of recovery.

Comment. Section 490.060 makes clear that this chapter does not limit the common law remedies for wrongful attachment such as malicious prosecution and abuse of process. See, e.g., White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

CHAPTER 11. EXAMINATION OF THIRD PERSON INDEBTED

TO DEFENDANT; ADDITIONAL WITNESSES

§ 491.010. Third person indebted to defendant or possessing or controlling property or credits of defendant; examination

491.010. (a) Any person owing debts to the defendant, or having in his possession or under his control any personal property belonging to the defendant, may be required to appear before a judicial officer and be examined on oath regarding such property.

(b) If the person ordered to appear pursuant to this section fails to appear, and if the order requiring his appearance has been served by a sheriff, or some person specially appointed by the court in the order, the judicial officer may, pursuant to a warrant, have such person brought before the court to answer for such failure to appear.

[(c) After such examination, the judicial officer may order that property belonging to the defendant be attached in the manner and under the conditions provided by this chapter.]

Comment. Sections 491.010 through 491.040 reenact the substance of Sections 545 through 545.3 of the Code of Civil Procedure. Section 491.010 is based on Section 545. Section 545 provides as follows:

545. Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court, judge, or referee may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff, constable, or marshal on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

If the defendant or other person ordered to appear pursuant to this section fails to do so, and if the order requiring his appearance has been served by a sheriff, constable, marshal, or some person specially appointed by the court in the order, the judge may, pursuant to a warrant, have such defendant or other person brought before the court to answer for such failure to appear.

The apparent ability of the plaintiff under Section 545 to examine the defendant regarding his property is limited to an examination concerning matters relating to the examination of the third person and does not include a general examination of the defendant regarding his property. In short, Section 545 does not provide the equivalent of the postjudgment creditor's examination. See Ex parte Rickleton, 51 Cal. 316, ___ P. ___ (1876). Compare Code Civ. Proc. § 714.

§ 491.020. Examination; attendance of persons outside county; 150-mile limit

491.020. No person shall be required to appear pursuant to Section 491.010 outside of the county in which he resides or in which he has a place of business unless the distance to the place of hearing is less than 150 miles from his place of residence or place of business.

Comment. Section 491.020 is substantively identical to Section 545.1 of the Code of Civil Procedure. Section 545.1 provides as follows:

545.1. No person shall be required, pursuant to Section 545 of this code, to attend before a judge or referee outside of the county in which he resides or in which he has a place of business, unless the distance to the place of trial is less than 150 miles from his place of residence or place of business.

See ~~Comment~~ to Section 491.010.

§ 491.030. Order for examination of third person outside county of residence or place of business

491.030. (a) When the third person does not reside or have a place of business in the county where the action is pending, an order for his examination, authorized by Section 491.010, may be made by any judicial officer of a court of similar jurisdiction of the county where the third person resides or has a place of business or, if no court of similar jurisdiction is in the county, by a court of higher jurisdiction therein, upon filing with the clerk of the court a certified copy of the complaint in the pending action and an affidavit showing the existence of the facts required to be shown herein.

(b) The fee for filing pursuant to this section shall be four dollars (\$4) when filing is in a municipal court and five dollars (\$5) when filing is in a superior court.

Comment. Section 491.030 is substantively identical to Section 545.2 of the Code of Civil Procedure. Section 545.2 provides as follows:

545.2. When a defendant or a garnishee does not reside or have a place of business in the county where the action is pending, an order for his examination, authorized by Section 545 of this code, may be made by any judge of a court of similar jurisdiction of the county where the defendant or garnishee resides or has a place of business, or if no court of similar jurisdiction is in the county, by a court of higher jurisdiction therein, upon filing with the clerk or the judge of the court a certified copy of the complaint in the pending action and upon presenting to the judge of the court an affidavit showing the existence of the facts required to be shown herein. At the time of filing the certified copy of the complaint, there shall be paid to the clerk or judge, as and for a filing fee, the sum of four dollars (\$4) when filed in a justice court; the sum of five dollars (\$5) when filed in a superior court.

See . Comment to Section 491.010.

§ 491.040. Witnesses; compelling appearance; testimony

491.040. In any proceeding for the examination of a third person under this chapter, witnesses, including the defendant, may be required to appear and testify as to matters relating to the examination of such person in the same manner as upon the trial of an issue.

Comment. Section 491.040 is substantially the same as Section 545.3 of the Code of Civil Procedure. Section 545.3 provides as follows:

545.3. In any proceeding for the examination of a defendant or a garnishee under this chapter, witnesses may be required to appear and testify before the judge or referee in the same manner as upon the trial of an issue.

See Comment to Section 491.010.

Sec. . Chapter 4 (commencing with Section 537) of Title 7 of
Part 2 of the Code of Civil Procedure is repealed.

Note. The text of the repealed sections and their present disposition
is set out in the Appendix.

A P P E N D I X

CODE OF CIVIL PROCEDURE SECTIONS 537-561
(disposition under draft statute indicated in the margin)

537. The plaintiff, in an action specified in Section 537.1, at the time of issuing the summons, or at any time afterward, may have the property specified in Section 537.3 of a defendant specified in Section 537.2 attached in accordance with the procedure provided for in this chapter, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as provided for in this chapter. § 483.010

537.1. An action referred to in Section 537 is an action or actions by the same plaintiff in which the total sum claimed, exclusive of interest, attorneys' fees and costs, is five hundred dollars (\$500) or more and which is one or more of the following:

(a) An action against a defendant described in subdivision (a), (b) or (c) of Section 537.2 for a liquidated sum of money based upon

(1) Money loaned; or

(2) A negotiable instrument; or

(3) The sale or lease of, or a license to use, real or personal property (including, without limiting the generality of the foregoing, goods sold and delivered on open account); or

(4) Services rendered,

if the claim is not secured by any mortgage, deed of trust or security interest on real or personal property or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. The fact that interest, attorneys' fees, costs or any combination thereof are claimed by the plaintiff in addition to the principal amount of the debt shall not make the claim unliquidated within the meaning of this section. § 482.010

(b) An action against a defendant described in subdivision (d) of Section 537.2 for the recovery of money.

Not continued. See
Note to § 482.010.

537.2. The defendants referred to in Section 537 are:

(a) All corporations organized under the General Corporation Law or under Part 4 (commencing with Section 13400) of Division 3 of Title 1 of the Corporations Code, or organized under a law of any foreign state or jurisdiction authorizing the formation of business corporations.

(b) All partnerships organized under the Uniform Partnership Act (Chapter 1 (commencing with Section 15001) of Title 2 of the Corporations Code) or the Uniform Limited Partnership Act (Chapter 2 (commencing with Section 15501) of Title 2 of the Corporations Code) or a law of any foreign state or jurisdiction authorizing the formation of general or limited partnerships.

(c) Individuals engaged in a trade or business.

(d) Any person not residing in this state (including any foreign corporation not qualified to do business in this state under the provisions of Chapter 3 (commencing with Section 6403) of Part 11 of Division 1 of Title 1 of the Corporations Code, and any foreign partnership which has not filed a designation pursuant to Section 15700 of the Corporations Code), or who cannot after due diligence be found within this state, or who conceals himself to avoid service of summons

see § 482.010

Not continued. See Note to § 482.010.

537.3. The property referred to in Section 537 is the following property not exempt from execution (without regard to whether a claim of exemption shall be filed):

see § 486.020(a)

(a) With respect to corporations and partnerships referred to in subdivisions (a) and (b) of Section 537.2, all corporate property and all partnership property.

§ 486.010(a), (b)

(b) With respect to individuals referred to in subdivision (c) of Section 537.2 all of the following:

§ 486.010(c)

(1) Inventory.

§ 486.010(c)(5)

(2) Accounts, contract rights, chattel paper, and general intangibles consisting of any right to payment of money (exclusive of those referred to in paragraph (3) of this subdivision), except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

§ 486.010(c)(1).

§ 537.3

(3) Bank accounts and other deposit accounts, except the first one thousand dollars (\$1,000) balance in any single bank or branch bank (but, if the defendant has accounts in more than one bank or branch bank, the court, upon application of the plaintiff at the hearing provided for in Section 538.4, may direct that the writ be levied on balances of less than one thousand dollars (\$1,000) in a given bank or branch bank if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of the levy):

§ 486.010(c)(2).

(4) Securities.

§ 486.010(c)(8)

(5) Equipment.

§ 486.010(c)(3)

(6) Real estate, including any leasehold estate with an unexpired term of one year or more.

§ 486.010(c)(7)

The court, however, upon application of the defendant at the hearing provided for in Section 538.4 or at any time thereafter upon five days' notice to the plaintiff, shall exclude from the effect of the levy or release from the levy, as the case may be, any of the foregoing property which the court finds is necessary for the support of the defendant and his family after taking into consideration all of his other income and assets not subject to levy or not levied upon.

§§ 483.070, 483.090(b),
486.020

The terms used in this subdivision which are defined in the Commercial Code shall have the meanings therein specified. See definitions, Chapter 1 (§§ 480.010-480.220)

(c) With respect to a defendant referred to in subdivision (d) of Section 537.2, all property of the defendant.

not continued

537.5. In cases of attachment the clerk of the court with whom the complaint is filed, if requested by plaintiff in writing at the time of filing the complaint, shall not make public the fact of the filing of the complaint, or of the issuance of the attachment, until after the filing of the return of service of the notice and temporary restraining order or of the writ of attachment if issued without notice, except that if the return of service of the notice

§ 481.050(a)

§ 537.5

and temporary restraining order or of the writ of attachment is not made within 30 days after the filing of the complaint in the action, the clerk of the court with whom the complaint is filed shall make available to the public the records and documents in such action. However, the clerk of such court shall make the entire file in the action available for inspection at any time to any party named in the complaint, or to his attorney.

§ 481.050(a)

§ 481.050(b)

The request by plaintiff that the fact of filing of a complaint or issuance of an attachment not be made public may take the form of a notation to that effect, made by rubber stamp or other suitable means, at the top of the first page of the complaint filed with the clerk.

§ 481.050(c)

538. A plaintiff desiring the issuance of a writ of attachment shall file with the court an application supported by an affidavit or affidavits based upon the personal knowledge of the persons subscribing thereto and showing all the following:

§§ 483.020, 483.030

(a) That the action is one in which the issuance of a writ of attachment is proper under the provisions of Sections 537 to 537.3, inclusive.

§ 483.020(a)

(b) That the indebtedness claimed in the complaint is justly due and presently owing to the plaintiff by the defendant, over and above all legal setoffs or cross-complaints, or, if the action is one against a defendant described only in subdivision (d) of Section 537.2, the amount claimed by the plaintiff against the defendant and that the plaintiff believes that he has a valid cause of action for an amount of money equal to that sum.

§ 483.020(b)

(c) That the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any other creditor of the defendant.

§ 483.020(c)

(d) That the plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors, or, if any such proceeding has been terminated, that the claim of the plaintiff was not discharged in such proceeding.

§ 483.020(d)

538.1. The court or a commissioner thereof, if satisfied that the affidavits submitted by the plaintiff pursuant to Section 538 have established a prima facie case and that the action is one in which an attachment is properly issuable under the provisions of this chapter, shall issue without any prior notice to the defendant a notice of hearing and temporary restraining order conforming to the provisions of Sections 538.2 and 538.3 for service upon the defendant.

§§ 485.010-485.030

Neither notice of the restraining order issued pursuant to this section nor service of a copy thereof upon any bank shall require any bank to observe the terms of the restraining order.

see § 485.070

538.2. The notice of hearing issued pursuant to Section 538.1 shall provide for a hearing on the question whether a writ of attachment shall issue to be held seven business days (exclusive of Saturdays, Sundays and legal holidays) after the service of the notice upon the defendant or upon the first regular date law and motion matters are heard thereafter, whichever occurs later. The notice and temporary restraining order shall be served and return of service shall be made as provided in this code for the service of a summons and complaint. The notice shall be accompanied by a copy of the complaint and a copy of the affidavit or affidavits filed by the plaintiff under Section 538.

§§ 483.040, 485.080

538.3. The temporary restraining order issued pursuant to Section 538.1 shall prohibit prior to the hearing any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business, and the issuance by the defendant of any checks in excess of an aggregate of one thousand dollars (\$1,000) against any of his bank accounts in this state to withdraw any sums subject to such levy, which would reduce the aggregate amount remaining on deposit to less than the amount of the plaintiff's claim, and the opening of any new bank accounts by the defendant. Without limiting the generality of the phrase "not in the ordinary course of business", the payment by the defendant of an antecedent debt shall not be considered in the ordinary course of business within the meaning of this section.

§ 485.050

§ 485.060

§ 485.050

§ 538.3

Notwithstanding the foregoing, checks may be issued by the defendant for any of the following purposes:

(a) To cover any payrolls (including all fringe benefits and withholding taxes) falling due in the regular course after the service of the temporary restraining order and prior to the levy of a writ of attachment, but not exceeding the amount of three hundred dollars (\$300) per week for any individual employee.

§ 485.060

(b) In payment for goods thereafter delivered to the defendant C.O.D. for use in his trade or business.

(c) In payment of taxes if penalties will accrue for any delay in payment.

(d) In payment of legal fees for the representation of the defendant in the action.

The temporary restraining order shall expire by its terms unless a writ of attachment is issued and levied within 30 days after the service of the order or if the defendant gives an undertaking as provided in Section 555 in the amount of plaintiff's claim as security for the payment of any judgment recovered by the plaintiff. The restraining order shall be vacated by the court upon ex parte application by the defendant if the court is satisfied that there is no danger that sufficient property of the defendant to secure the plaintiff's claim will not be available and subject to the levy of a writ of attachment, if one is directed to be issued at the hearing provided for in Section 538.4.

§ 485.090

§ 485.100

538.4. The hearing shall be held before the court or a commissioner thereof on the day specified and shall take precedence over all other matters not of a similar nature pending on that day. If the defendant does not appear at the hearing, in person or by counsel, the court, without taking further evidence, shall direct the clerk to immediately issue a writ of attachment. Each party shall serve upon the other at least 24 hours before the hearing any affidavits intended to be introduced at the hearing, unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served. Either party may also introduce oral evidence at the hearing and the defendant shall make available for oral examination at the hearing himself or an officer or agent of the defendant with knowledge of the transaction on which the complaint is based, unless the court for good cause shown excuses compliance with this requirement. Upon the basis of the evidence introduced at the hearing, the court shall determine whether the case is one in which an attachment is properly issuable and whether there is any reasonable probability that the defendant can establish a successful defense to the claim asserted by

not continued

§§ 483.060, 483.070

see generally

§ 483.090

not continued

§ 538.4

the plaintiff. If the court finds on the basis of a preponderance of the evidence that grounds for the issuance of an attachment exist and that the plaintiff has established the probable validity of his claim and the absence of any reasonable probability that a successful defense can be asserted by the defendant, the court shall direct the clerk to immediately issue a writ of attachment; otherwise, the court shall dissolve the temporary restraining order. The court may direct the order in which the writ shall be levied upon different assets of the defendant, if in the aggregate they exceed in value an amount clearly adequate to secure any judgment which may be recovered by the plaintiff.

§ 483.090(a)

§ 483.090(c)

538.5. Notwithstanding the provisions of Sections 538 to 538.4, inclusive, the court shall, upon application by the plaintiff, direct the immediate issuance of a writ of attachment without any notice of hearing (or, under subdivision (c) below, without any hearing) if any one or more of the following conditions exist:

§§ 484.010, 484.210, 484.220

(a) A bulk sales notice has been recorded and published with respect to property of the defendant pursuant to the provisions of Division 6 (commencing with Section 6101) of the Commercial Code, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the goods covered by the bulk sales notice; or an escrow has been opened pursuant to the provisions of Section 24074 of the Business and Professions Code with respect to the sale by the defendant of a liquor license, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the attaching creditor's pro rata share of the proceeds of the sale in escrow.

§ 484.010(b)(2), (c)

(b) The plaintiff establishes to the satisfaction of the court that there is a substantial danger that the defendant will transfer, other than in the ordinary course of business, remove or conceal the property sought to be attached, such writ to be issued upon the filing of the application provided for in Section 538.

§ 484.010(b)(3), (c)

§ 484.010(b)(1)

(c) The notice and order issued pursuant to Section 538.1 cannot be served with the use of reasonable diligence upon the defendant within 10 days after its issuance and the court is satisfied that the defendant has departed from this state or conceals himself to avoid service of the notice, such writ to be issued after the expiration of such 10-day period.

see § 484.010(b)(4)

§ 538.5

(d) The defendant is one described in subdivision (d) of Section 537.2, such writ shall be issued upon the filing of the application provided for in Section 538. A writ of attachment (1) which is issued under this subdivision and levied upon property of a defendant described in subdivision (d) of Section 537.2 but who is not described in subdivision (a), (b) or (c) of Section 537.2, or (2) which is issued under this subdivision based upon a claim which is not described in subdivision (a) of Section 537.1, shall be released and discharged by the court upon motion of the defendant if the defendant files a general appearance in the action. If a writ of attachment is issued under this subdivision and levied upon property of a defendant who is described in subdivision (a), (b) or (c) of Section 537.2 based upon a claim described in subdivision (a) of Section 537.1, the defendant may at any time after such levy, upon seven business days' notice to the plaintiff, request a hearing pursuant to Section 538.4. At such hearing, unless the court makes the findings required by that section for the issuance of a writ of attachment, it shall release and discharge the writ.

Not continued. See
Note to § 484.010.

§ 484.030

539. (a) Before issuing the notice and order pursuant to Section 538.1 or the writ pursuant to Section 538.5, the plaintiff must file with the clerk or judge a written undertaking with two or more sufficient sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the restraining order or the attachment, not exceeding the sum specified in the undertaking, and that if the restraining order or the attachment is discharged on the ground that the plaintiff was not entitled thereto under Sections 537 to 537.2, inclusive the plaintiff will pay all damages which the defendant may have sustained by reason of the restraining order or the attachment, not exceeding the sum specified in the undertaking. The sum specified in the undertaking shall be one-half ($\frac{1}{2}$) of the principal amount of the total indebtedness or damages claimed, excluding attorneys' fees. Nothing herein shall be construed to preclude the acceptance of an undertaking in which a larger sum is specified, if such undertaking be offered. The court on ex parte application of the plaintiff, may by written order, direct the issuance of the restraining order or the writ on the filing of an undertaking in a lesser sum, if the court is satisfied that the defendant will be adequately protected thereby. The damages recoverable by the defendant pursuant to this section shall include all damages proximately caused by the service of the restraining order or the levy of the writ of attachment.

§ 489.210

§ 489.040

Compare § 490.020

§ 489.220

§ 489.060

Not continued. See
§ 489.220.

Compare § 490.020.

§ 539

At any time after the issuing of the restraining order or the attachment, but not later than five days after actual notice of the levy of the writ of attachment, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When excepted to, the plaintiff's sureties, within five days from service of written notice of exception, upon notice to the defendant of not less than two nor more than five days, must justify before the judge or clerk of the court in which the action is pending, in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the writ of attachment must be vacated.

§§ 489.070, 489.080,
489.120

Compare § 489.030

§ 489.090

The court, at any time after issuance of the restraining order or the writ, on motion of the defendant, after notice to the plaintiff, or at the hearing pursuant to Section 538.4, may order the amount of the undertaking increased.

§ 489.220(b)

(b) The liability of any surety furnishing a bond pursuant to this section, if any, may be enforced on motion in the trial court without the necessity of an independent action. Notice of the motion shall be served on the persons whose liability is sought to be enforced at least 30 days prior to the time set for hearing of the motion. The notice shall state the amount of the claim and shall be supported by an affidavit or affidavits setting forth the facts on which the claim is based. Such notice and affidavit may be served in accordance with any procedure authorized by Chapter 5 (commencing with Section 1010), Title 14, Part 2. Judgment may be entered in accordance with the notice against the person or persons served therewith, unless such person or persons shall serve and file an affidavit or affidavits in opposition to the motion showing such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such showing is made, the issues to be tried shall be specified by the court and trial thereof shall be set for the earliest date convenient to the court, allowing sufficient time for discovery. The surety shall not obtain a stay of the proceedings pending the determination of any third-party claims. Affidavits filed pursuant to this section shall conform to the requirements prescribed for affidavits filed pursuant to Section 437c.

Not continued here;
Compare Cal. Stats.
1972, Ch. 391
(A.B. 605).

§ 539a. Levy on bank account, savings and loan association share or certificate, or property in safe deposit box not wholly in name of defendant

If the debt, credit, or other personal property sought to be attached is (a) any bank account, or interest therein, not standing in the name of the defendant or defendants or standing in the name of the defendant or defendants and one or more other persons who are not defendants, or (b) any savings and loan association share, investment certificate, or account, or interest therein, not standing in the name of the defendant or defendants or standing in the name of the defendant or defendants and in one or more other persons who are not defendants, or (c) property in a safe deposit vault or box maintained by a bank, trust company, savings and loan association, or other corporation authorized and empowered to conduct a safe deposit business and rented by it to a person or persons other than a defendant or defendants or rented by it to one or more such defendants and to one or more other persons who are not defendants, the provisions of this section and of Section 539 shall be complied with; otherwise, the levy shall not be effectual for any purpose and shall be disregarded. The plaintiff shall provide and concurrently with the levy of the writ of attachment the sheriff, constable, or marshal shall deliver to such bank, trust company, savings and loan association, or safe deposit corporation a bond in an amount not less than twice the amount of the plaintiff's claim indemnifying the person or persons, other than the defendant or defendants whose interest is sought to be attached, rightfully entitled to such debt, credit, or other personal property (which person or persons need not be named specifically in said bond but may be referred to generally in the same manner as in this sentence), against actual damage by reason of the taking or holding of such debt, credit, or other personal property and assuring to such person or persons the return thereof to him or them upon proof of his or their right thereto. Upon delivery to it of the aforesaid bond such bank, trust company, savings and loan association, or safe deposit corporation shall comply with the writ of attachment and shall not be liable to any person by reason of such compliance or by reason of the nonpayment of any check or other order for the payment of money drawn against the account or other credit so attached and presented while the attachment is in force or by reason of refusal to pay any withdrawal in respect of the share, investment certificate or account so attached while the attachment is in force or by reason of the removal, pursuant to the levy, of any of the contents of such safe deposit vault or box or by reason of the refusal of such bank, trust company, savings and loan association, or safe deposit corporation to permit access to such safe deposit vault or box by the renter thereof. The bond described above shall be executed by the plaintiff or plaintiffs with two or more sufficient sureties. Exceptions to the sufficiency of the sureties may be taken by any person claiming to be the rightful owner of the debt, credit, or other personal property levied upon, in the same manner as that provided in Section 539 of this code and when excepted to the sureties must justify in the same manner as that provided in said

§ 489.240(a)

Compare § 489.060

§ 489.240(b)

§ 487.440(c)

§ 489.040, 489.070,
489.080, 489.240(c)

§ 539a

Section 539. The bank, trust company, savings and loan association, or safe deposit corporation to whom any such bond is delivered shall deliver it as directed by the obligees thereof. Before giving access to any safe deposit vault or box the bank, trust company, savings and loan association, or safe deposit corporation may demand payment to it of all costs and expenses of opening the safe deposit vault or box and all costs and expenses of repairing any damage to the safe deposit vault or box caused by the opening thereof.

Not continued. See
Comment to § 489.240.

relocate to Fin. Code
§ 16507

§ 540. Direction and command of writ; undertaking in lieu of property; statement of nature of defendant's title; multiple writs

The writ must be directed to the sheriff, or a constable, or marshal of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from attachment, or so much of the property of such defendant as may be sufficient to satisfy the plaintiff's demand against such defendant, the amount of which must be stated in conformity with the amount stated in plaintiff's affidavit filed pursuant to Section 538, not exceeding the amount of the complaint, unless such defendant give him security by the undertaking of at least two sufficient sureties, which must first be approved by a judge of the court issuing the writ, or if said writ of attachment is issued to another county then by a judge of a court, having jurisdiction in cases involving the amount specified in the writ, in the county where the levy shall have been, or is about to be, made, or deposit a sum of money with the sheriff, constable, or marshal in an amount sufficient to satisfy such demand against such defendant, in addition to those costs actually incurred to the time of giving the undertaking or the deposit of money with the sheriff, constable, or marshal, a sum not to exceed 25 percent of the amount of the plaintiff's demand, and in no event more than one thousand dollars (\$1,000), or in an amount equal to the value of the property of such defendant which has been or is about to be attached, in which case to take such undertaking or sum of money in lieu of the property which has been or is about to be attached.

§ 487.030

Not continued. See
§ 487.010.

§ 489.310(a)-(c)

In the event that the action is against more than one defendant, any defendant whose property has been or is about to be attached in the action may give the sheriff, constable, or marshal such undertaking which must first be approved by the judge as hereinabove provided, or deposit such sum of money, and the sheriff, constable, or marshal shall take the same in lieu of such property. Such undertaking, or the deposit of such sum of money, shall not subject such defendant to, or make him answerable for, any demand against any other defendant, nor shall the sheriff, constable, or marshal thereby be prevented from attaching or be obliged to release from attachment, any property of any other defendant. However, such defendant, at the time of giving such undertaking to, or depositing such sum of money with the sheriff, constable, or marshal, shall file with the sheriff, constable, or marshal a statement, duly verified by his oath, wherein such defendant shall state the character of his title to the attached property and the manner in which he acquired such title, and aver and declare that the other defendant or defendants, in the action in which said undertaking was given or such sum of money was deposited, has or have not any interest or claim of any nature whatsoever in or to said property.

§ 489.310(d)

§ 540

Several writs may be issued upon the same affidavit and undertaking simultaneously or from time to time within 60 days after the filing of the affidavit and undertaking, to the sheriffs, constables, or marshals of any county or counties, whether or not any writ previously issued has been returned. See Chapter 4, Articles 2 and 3, and Chapter 5, Article 3. See also Comment to Section 483.310.

541. Securities, as defined in the Commercial Code, shall be levied upon as provided by Division 8 (commencing with Section 8101) of the Commercial Code. § 487.410

§ 542. Instructions; manner of execution of writ

The sheriff, constable, or marshal, to whom the writ is directed and delivered, must, upon receipt of instructions in writing, signed by the plaintiff or his attorney of record, and containing a description of the property, and in the case of real property or growing crops the name of the record owner of the real property to be attached, or upon which the crops are growing, execute the same without delay, and if the undertaking mentioned in Section 540 of this code be not given, as follows: see §§ 487.010, 487.030

1. Real property in name of defendant.

1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by recording with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by serving an occupant of the property, if there is one upon the property at the time service is attempted, with a similar copy of the writ, description and notice, or if there is no occupant then on the property, then, by posting the same in a conspicuous place on the property attached. Service upon the occupant may be made by leaving said copy of the writ, description and notice with the occupant personally, or, in his absence, with any person, of suitable age and discretion, found upon the property at the time service thereof is attempted and who is either an employee or agent of such occupant or a member of his family or household. Where the property described in the notice consists of more than one distinct lot, parcel or governmental subdivision and any of such lots, parcels, or governmental subdivisions lie with relation to any of the others so as to form one or more continuous, unbroken tracts, one service or posting need be made as to each such continuous, unbroken tract. § 487.310

1a. Crops growing on real property in name of defendant.

1a. Growing crops (which, until severed, shall be deemed personal property not capable of manual delivery), growing upon real property standing upon the records of the county in the name of the defendant, must be attached by recording with the recorder of the county a copy of the writ, together with a description of the growing crops to be attached, and of the real property upon which the same are growing, and a notice that such growing crops are attached in pursuance of the writ, and by serving an occupant of the real property, if there is one upon the real property at the time service is attempted, with a similar copy of the writ description and notice, or if there is no occupant then on the real property, then, § 487.340(a)

by posting the same in a conspicuous place on the real property. Service upon the occupant may be made by leaving said copy of the writ, description and notice with the occupant personally, or, in his absence, with any person, of suitable age and discretion, found upon the real property at the time service thereof is attempted and who is either an employee or agent of such occupant or a member of his family or household. Where the real property described in the notice consists of more than one distinct lot, parcel or governmental subdivision, and any of such lots, parcels or governmental subdivisions lie with relation to any of the others so as to form one or more continuous unbroken tracts, one service or posting need be made as to each such continuous unbroken tract.

§ 487.340(c)

§ 487.340(a)

Whenever growing crops have been attached under the provisions of this subdivision, which will greatly deteriorate in value, unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the person in whose favor the writ runs, and after due notice to the owner of said property, may direct the sheriff to take possession of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold on execution and the proceeds must be retained by the sheriff to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall order said applicant to pay such expenses in advance if the court may deem it proper, or may direct that the whole or any part of such expenses be paid from the proceeds of any sale of such property.

§ 487.510

2. Real property in name of third party.

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached in the same manner as is real property standing upon the records of the county in the name of the defendant by the provisions of subdivision 1 of this section and the notice of attachment shall state that the real property therein described, and any interest of the defendant therein held by or standing on the records of the county in the name of such other person (naming him), are attached. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if within the county. The recorder must index such attachment when recorded, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands of record.

§ 487.310

2a. Crops growing on real property in name of third party.

2a. Growing crops (which, until severance, shall be deemed personal property not capable of manual delivery), or any interest therein, belonging to the defendant, and growing upon real property held by any other person or standing upon the records of the county in the name of any other person, must be attached in the same manner as growing crops growing upon real property standing upon the records of the county in the name of the defendant are attached by the provisions of subdivision 1a of this section, and the notice of attachment shall state that the crops therein described or any interest of the defendant therein, held by, or standing upon the records of the county in the name of, such other person (naming him), are attached in pursuance of the writ. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if known and within the county. The recorder must index such attachment when recorded, in the names of both the defendant and of the person by whom the real property is held, or in whose name it stands on the record.

§ 487.340(a), (c)-(e)

§ 487.340(b)

Whenever growing crops have been attached under the provisions of this subdivision, which will greatly deteriorate in value unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the person in whose favor the writ runs, and with or without notice as the court directs to the owner of said property, may direct the sheriff to take possession of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold under execution and the proceeds must be retained by the sheriff to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall order said applicant to pay such expenses in advance if the court may deem it proper, or may direct that the whole or any part of such expenses be paid from the proceeds of any sale of such property.

§ 487.510

3. Deliverable personal property.

3. Personal property, capable of manual delivery, in the possession of the defendant, must be attached by taking it into custody. When the personal property is used as a dwelling, such as a housetrailer, mobilehome, or boat, the same is to be attached by placing a keeper in charge of the property, at plaintiff's expense, for at least two (2) days. At the expiration of said period the officer shall remove its occupants, and take the property into his immediate custody, unless other disposition is made by the court or the parties to the action. Whenever a levy under attachment or execution shall be made on personal property, other than money, or a vehicle required to be registered under the Vehicle Code belonging to a going concern, then the officer making the levy must, if the defendant consents, place a keeper in charge of said property levied upon, at plaintiff's expense, for at least two days, and said keeper's fees must be prepaid by the levying creditor. During said period defendant may continue to operate in the ordinary course of business at his own expense provided all sales are for cash and the full proceeds are given to the keeper for the purposes of the levy unless otherwise authorized by the creditor. After the expiration of said two days the sheriff, constable, or marshal shall take said property into his immediate possession unless other disposition is made by the court or the parties to the action.

§ 487.320

Not continued. See Note to § 487.320.

§§ 487.350-487.370

4. Deliverable personal property; deposit for expenses of taking and keeping.

4. In cases where the sheriff, constable, or marshal is instructed to take into possession personal property capable of manual delivery, whether the same is to be placed in a warehouse or in custody of a keeper, the sheriff, constable or marshal shall require, as a prerequisite to the taking of such property, that in addition to written instructions the plaintiff or his attorney of record deposit with the sheriff, constable or marshal, a sum of money sufficient to pay the expenses of taking and keeping safely said property for a period not to exceed 15 days. In the event that a further detention of said property is required, the sheriff, constable or marshal must, from time to time, make written demand upon the plaintiff or his attorney for further deposits to cover estimated expenses for periods not to exceed five days each. Such demand must be served as provided in Section 1011 of this code, or by depositing such notice in the post office in a sealed envelope, as first-class registered mail, postage prepaid, addressed to the person on whom it is served at his last known office or place of residence. In the event that the money so demanded is not paid, the sheriff, constable or marshal shall release the property to the person or persons from whom

§ 487.050

the same was taken. There shall be no liability upon the part of the sheriff, constable or marshal to take or hold personal property unless the provisions of this section shall have been fully complied with. There shall be no liability upon the part of the sheriff, constable or marshal, either to the plaintiff or the defendant for loss by fire, theft, injury or damage of any kind to personal property capable of manual delivery while in the possession of the sheriff, constable or marshal either in a warehouse or in the custody of a keeper or en route to or from a warehouse unless the sheriff, constable or marshal shall be negligent in his care or handling of the property.

§ 487.060

5. Debts, credits, judgments, and personal property not capable of manual delivery.

5. With the exception of earnings of the defendant which are exempt as provided in Section 690.6, debts, credits, judgments, and other personal property not capable of manual delivery shall be attached by leaving with the persons owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent or, in the case of a corporation, with the president of the corporation, vice president, secretary, assistant secretary, cashier, or managing agent thereof, a copy of the writ, and, if the demand as stated in the writ does not exceed three hundred dollars (\$300) exclusive of interest, attorney's fees and costs, a copy of the complaint in the action from which the writ issued, and, in every case, a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ. However, whenever a judgment has been attached under the provisions of this subdivision, a copy of the writ and notice shall be filed in the action from which the judgment arose and served upon the judgment creditor of such action. However, debts owing to the defendant by any of the following financial institutions: (a) banks; (b) savings and loan associations; (c) title insurance companies or underwritten title companies (as defined in Section 12402 of the Insurance Code); (d) industrial loan companies (as defined in Section 18003 of the Financial Code), maintaining branch offices, or credits or other personal property whether or not the same is capable of manual delivery, belonging to the defendant and in the possession of or under the control of such financial institution shall be attached by leaving a copy of the writ and the notice, together with a copy of the complaint if required hereunder, with the manager or other officer of such financial institution at the office or branch thereof at which the account evidencing such indebtedness of the defendant is carried, or at which such financial institution has credits or other personal property belonging to the defendant in its possession or under its control; and no attachment shall be effective as to any debt owing by such financial institution if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served.

§§ 487.320,
487.380-487.400,
487.440

see § 487.040

§ 487.420

§ 487.040

6. Commercial paper.

6. When checks, drafts, money orders and other orders for the withdrawal of money from a banking corporation or association, the United States, any state or public entity within any state, payable to the defendant or judgment debtor on demand, come into the possession of a levying officer under a writ of attachment or execution, the sheriff, constable, or marshal, to whom the writ is directed and delivered, shall promptly thereafter endorse the same and present, or cause the same to be presented, for payment. The sheriff, constable, or marshal shall endorse such check, draft, money

§ 487.500

order or other order for the withdrawal of money by writing the name of the defendant or judgment debtor thereon and the name and official title of the officer making the levy with the statement that such endorsement is made pursuant to levy of writ of attachment or execution and giving the title of court and cause in which such writ was issued, and such endorsement shall be sufficient endorsement and no banking corporation or association or public entity on which said check, draft, money order or other order for the withdrawal of money is drawn shall incur any liability to any person, firm or corporation by reason of paying to such officer such check, draft, money order or other order for withdrawal of money by reason of such endorsement, nor shall the officer making the levy incur any liability by reason of his endorsing and presenting for and obtaining payment of such check, draft, money order or other order for the payment of money; provided, however, that the funds or credit resulting from the payment of such check, draft, money order or other order for withdrawal of money shall be held by said officer subject to the levy of said writ of attachment or execution. If it appear from the face of such check, draft, money order or other order for the withdrawal of money that the same has been tendered to the defendant or judgment debtor in satisfaction of a claim or demand and that endorsement thereof shall be considered a release and satisfaction by defendant or judgment debtor of such claim or demand, then, in such event, the officer making the levy shall not endorse said check, draft, money order or other order for the withdrawal of money unless the defendant or judgment debtor shall first endorse the same to the officer making the levy; provided, however, that if said defendant shall not endorse said check, draft, money order or other order for withdrawal of money to the officer making the levy, said officer may thereafter hold such check, draft, money order or other order for the withdrawal of money subject to such levy and shall incur no liability to the defendant or judgment debtor or to any other person, firm or corporation for delay in presentment of the same for payment.

§ 487.500

542.1. Notwithstanding the provisions of Section 542, a writ of attachment shall be levied upon any equipment (as defined in the Commercial Code), other than a motor vehicle or boat required to be registered, belonging to the defendant by the filing of a notice with the Secretary of State, which shall be signed by the sheriff, constable or marshal and shall contain the name of the plaintiff as lienor, the name of the defendant as debtor and shall indicate that the plaintiff has acquired an attachment lien in the equipment of the defendant. The form of such notice shall be prescribed by the Secretary of State and shall be filed and indexed by him in accordance with the provisions applicable to financing statements in Division 9 (commencing with Section 9101) of the Commercial Code.

§ 487.350

542.2. (a) The fee for filing and indexing each notice of attachment lien or notice affecting a notice of attachment lien in the office of the Secretary of State is three dollars (\$3). § 487.350(a)

(b) When a notice of attachment lien has been filed and the plaintiff, for whatever reason, no longer has an attachment lien in the equipment of the defendant, the sheriff, marshal or constable shall sign a notice to that effect for filing with the Secretary of State. § 487.550

(c) A filed notice of attachment lien is effective for a period of five years from the date of filing. The effectiveness of the filed notice of attachment lien lapses on the expiration of such five-year period unless sooner terminated pursuant to subdivision (b) or unless a notice of continuation is filed pursuant to Section 542.4 prior to such lapse. § 487.500(c)
§ 487.510

542.3. Upon the request of any person, the Secretary of State shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of attachment lien, naming a particular person, and if a notice is on file, giving the date and hour of filing of each notice and the name of the plaintiff-lienor. The fee for the certificate issued by the Secretary of State is two dollars (\$2). A combined certificate may be issued pursuant to Section 7203 of the Government Code. Upon request, the Secretary of State shall furnish a copy of any notice of attachment lien or notice affecting a notice of attachment lien for a fee of one dollar (\$1) per page. see Note to § 487.350

542.4. When more than four years and six months has elapsed after the filing of the notice of attachment lien and there is no final judgment in the action, the plaintiff may, upon notice to the defendant, apply to the court for an order directing the sheriff, marshal or constable to sign a notice of continuation of notice of attachment lien for filing with the Secretary of State if the lien is still in effect under Section 542c.

The court shall issue the order if it finds that the lien has been extended or the court concurrently extends the lien under Section 542c for a period beyond the expiration of the five years specified in Section 542.2. Upon issuance of the order, the sheriff, marshal or constable shall sign a notice of continuation of notice of attachment lien for filing with the Secretary of State prior to the lapse of the notice of attachment lien. Upon timely filing of the notice of continuation, the effectiveness of the original notice of attachment lien is continued for five years from the time when it would otherwise have lapsed, whereupon it shall lapse thereafter in the same manner as provided in subdivision (c) of Section 542.2. § 487.510

§ 542a. Lien on real estate; time effective; duration; termination; extension

The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated; provided, however, that in the event that the sheriff, constable, or marshal does not complete the execution of said writ in the manner prescribed in Section 542 of this code within a period of 15 days next following said recording in the recorder's office then said lien shall cease at the expiration of said period of 15 days.

§ 485.500(a)

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the recording with the recorder of an abstract of the judgment in the action. At the expiration of three years the lien shall cease and any proceeding or proceedings against the property under the attachment shall be barred: provided, that upon motion of a party to the action, made not less than five nor more than 60 days before the expiration of said period of three years, the court in which the action is pending may extend the time of said lien for a period not exceeding two years from the date on which the original lien would expire, and the lien shall be extended for the period specified in the order upon the recording before the expiration of the existing lien, of a certified copy of the order with the recorder of the county in which the real property attached is situated. The lien may be extended from time to time in the manner herein prescribed.

§ 487.510

542b The service upon the defendant of a notice and order pursuant to Section 538.2 creates a lien upon all of his personal property subject to the levy of a writ of attachment pursuant to this chapter and owned by him at the time of such service or the proceeds thereof. Such lien, however, shall not be valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business. Such lien shall terminate 30 days after the service of the notice and order upon the defendant; except with respect to property upon which a writ of attachment has been levied during that period and upon the filing by the defendant of a proceeding under the National Bankruptcy Act or the making by the defendant of a general assignment for the benefit of creditors, such lien shall terminate with respect to all property upon which a writ of attachment has not been levied prior to such event. The levy of a writ of attachment shall perfect the lien created by the service of the notice and order against a bona fide purchaser and a transferee in the ordinary course of business and the levy of a writ of attachment in those cases where it is not preceded by the service of a notice and order shall create a lien upon the property levied upon which is valid against all third persons.

§ 485.110(a)

§ 485.110(b)

§ 485.110(c)

not continued; but see §§ 485.110(b), 487.500(1)

§ 487.500(a)

542c. An attachment of personal property shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on shall be released from the operation of the attachment at the expiration of one year from the date of the levy of the writ unless a notice of readiness for trial is filed or a judgment is entered against the defendant in the action in which the attachment was issued within that period, in which case the attachment shall continue in effect until released or vacated after judgment as provided in this chapter. However, upon motion of the plaintiff, made not less than 10 nor more than 60 days before the expiration of such period of one year, and upon notice of not less than five days to the defendant, the court in which the action is pending may, by order filed prior to the expiration of the period, extend the duration of the attachment for an additional period or periods as the court may direct, if the court is satisfied that the failure to file the notice of readiness is due to the dilatoriness of the defendant and was not caused by any action of the plaintiff. The attachment may be extended from time to time in the manner herein prescribed.

§ 487.510

§ 543. Third party indebted to defendant or possessing or controlling property or credits of defendant; exception

Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or owes any debt to the defendant, the sheriff, constable, or marshal shall serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ, except that earnings of the defendant for his personal services are exempt from attachment, as provided in Section 690.6.

see generally
§ 487.030

see § 486.010

§ 544. Third party indebted to defendant or possessing or controlling property or credits of defendant; liability to plaintiff; release of attachment or garnishment

All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in this chapter, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, constable, or marshal, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment or garnishment be released or discharged or any judgment recovered by him be satisfied.

§ 487.330(b), (c)

The levying officer shall release such attachment or garnishment in full or in part as required, by issuing a written release addressed to the person served with the copy of the writ and notice, upon (1) written direction of the plaintiff or his attorney, or (2) upon receipt by the officer of an order of the court in which the action is pending, or a certified copy thereof, discharging or dissolving the attachment or garnishment or releasing the property; provided, no appeal is perfected and undertaking executed and filed as provided in Section 946 of this code or a certificate to that effect has been issued by the clerk of the court, or (3) in all other cases provided by law. There shall be no liability for such persons acting in conformity with such releases or for such officers releasing such attachments or garnishments in accordance with the foregoing.

see § 487.550

§ 545. Third party indebted to defendant or possessing or controlling property or credits of defendant; examination

Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court, judge, or referee may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff, constable, or marshal on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

§ 491.010(a)

§ 491.040

§ 491.010(c)

If the defendant or other person ordered to appear pursuant to this section fails to do so, and if the order requiring his appearance has been served by a sheriff, constable, marshal, or some person specially appointed by the court in the order, the judge may, pursuant to a warrant, have such defendant or other person brought before the court to answer for such failure to appear.

§ 491.010(b)

§ 545.1 Examination; attendance of persons outside county; 150 mile limit

No person shall be required, pursuant to Section 545 of this code, to attend before a judge or referee outside of the county in which he resides or in which he has a place of business, unless the distance to the place of trial is less than 150 miles from his place of residence or place of business.

§ 491.020

§ 545.2 Order for examination of defendant or garnishee outside county of residence or place of business

When a defendant or a garnishee does not reside or have a place of business in the county where the action is pending, an order for his examination, authorized by Section 545 of this code, may be made by any judge of a court of similar jurisdiction of the county where the defendant or garnishee resides or has a place of business, or if no court of similar jurisdiction is in the county, by a court of higher jurisdiction therein, upon filing with the clerk or the judge of the court a certified copy of the complaint in the pending action and upon presenting to the judge of the court an affidavit showing the existence of the facts required to be shown herein. At the time of filing the certified copy of the complaint, there shall be paid to the clerk or judge, as and for a filing fee, the sum of four dollars (\$4) when filed in a justice court; the sum of five dollars (\$5) when filed in a superior court.

§ 491.030(a)

§ 491.030(b)

§ 545.3 Witnesses; compelling appearance; testimony

In any proceeding for the examination of a defendant or a garnishee under this chapter, witnesses may be required to appear and testify before the judge or referee in the same manner as upon the trial of an issue.

§ 491.040

§ 546. Inventory; memorandum; time limit

The officer levying the attachment must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached and other personal property not in the possession of the defendant, he must request, at the time of service, the party owing the debt or having the credit or other personal property belonging to the defendant to give him a memorandum, stating the amount and description of each, within 10 days after such service; and if such memorandum be refused, he must return the fact of such refusal with the writ. The party refusing to give the memorandum within the time specified may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debts or credits or other personal property.

§ 487.070(b)

§ 487.330(a)

§ 547. Perishable property; sale; custody of proceeds; collection of debts and credits attached

If any of the property attached be perishable, the officer levying the attachment must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the levy of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The receipt of such officer is a sufficient discharge for the amount paid.

§ 487.510

§ 487.520

§ 547a. Receiver for perishable property or to cultivate, care for and preserve property; sale; proceeds; fees; expenses

Whenever a writ of attachment is issued and the holder of such writ desires to attach, or has attached, property which is perishable, or which will greatly deteriorate in value unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the holder thereof, and after due notice to the owner of said property, may appoint a receiver to take charge of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold on execution and the proceeds must be retained by such receiver to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall fix the fee per day of such receiver and may order said applicant to pay such fee and expenses of said receiver in advance if the court may deem it proper, or may direct that the whole or any part of such fee and expenses be paid from the proceeds of any sale of such property.

§ 487.510

§ 548. Sale; prerequisites

Whenever property has been taken by an officer under a writ of attachment and it is made to appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only (1) after notice to the adverse party or his attorney in case such party has been personally served with a summons in the action or, (2) after an order of service of summons by publication has been made.

§ 487.510

§ 549. Third party claims; personal property

In cases where a third person claims, as his property, any personal property attached, the rules and proceedings applicable in cases of third party claims after levy under execution shall apply.

§ 487.080

§ 550. Satisfaction of judgment; proceeds of perishable property sold, debts or credits collected; sales under execution; notices

If judgment be recovered by the plaintiff, the sheriff, constable, or marshal must satisfy the same out of the property attached by him which has not been delivered to the defendant, or released because of a third party claim, or subjected to a prior execution or attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

§ 684.2; see Note to § 487.560

§ 550

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

§ 684.2; see Note
to § 487.560

§ 551. Balance due after applying proceeds of attached property; collection; return of surplus

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff, constable, or marshal must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, constable, or marshal upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

§ 684.2; see Note
to § 487.560

§ 552. Actions on undertakings

WHEN SUITS MAY BE COMMENCED ON THE UNDERTAKING. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to Section 540 or Section 555, or he may proceed, as in other cases, upon the return of an execution.

Not continued here;
relocate in chapter
on execution?

§ 553. Judgment for defendant; release of property and return of proceeds; increase in and continuance of undertaking

If the defendant recovers judgment against the plaintiff, and no timely motion for vacation of judgment, or for judgment notwithstanding the verdict, or for a new trial, is filed and served, and no appeal is perfected and undertaking executed and filed as provided in Section 921 of this code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, constable, or marshal and all the property attached remaining in such officer's hands, must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom; provided, that at any time after entry of judgment and before perfection of the appeal under the provisions of Section 921 of this code, upon motion of the defendant, the trial court may order an increase in the amount of the original undertaking on attachment in such amount, if any, as is justified by the detriment reasonably to be anticipated by continuing the attachment. Unless such undertaking shall be executed and filed by at least two sureties within 10 days after such order, the order of attachment shall be discharged, and the property released therefrom. The sureties may be required to justify before the court within 10 days after the undertaking is filed and if they fail to do so, the order of attachment shall be discharged and the property released therefrom. If an order increasing the undertaking is made, the amount of the

§ 487.560

§ 489.410

undertaking on appeal required by Section 921 of this code shall be the same as the amount fixed by the trial court in said order. Neither the pendency nor granting of a motion timely filed and served for vacation of judgment, or for judgment notwithstanding the verdict or for new trial shall continue force an attachment, unless an undertaking be executed and filed on the part of the moving party by at least two sureties that the moving party will pay all costs and damages sustained by continuing the attachment. The undertaking may be included in the undertaking specified in Section 921. If not so included, the same procedure shall apply as in case of an undertaking pursuant to Section 921.

§ 489.410

§ 553.5 Release from attachment upon filing of undertaking on appeal

Whenever a defendant appeals and the enforcement of the judgment against him is stayed by the filing of a sufficient undertaking on appeal as provided by this code, all property of said defendant which has been attached in said action shall be released from the attachment levy upon the justification of the defendant's sureties, or written waiver thereof, or upon the failure of the respondent to except to said sureties within five days after written notice of the filing of the undertaking. If the officer's fees for services rendered on the attachment are unpaid, such officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

§ 489.420

§ 554. Application for discharge of attachment; undertaking; order; delivery of property; justification of sureties

Whenever any defendant has appeared in the action, such defendant may upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment wholly, or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment, any or all of the property of such defendant attached; and all of the property so released and all of the proceeds of the sales thereof, must be delivered to such defendant upon the justification of the sureties on the undertaking, if required by the plaintiff. Such justification must take place within five days after the notice of the filing of such undertaking.

§ 489.310

§ 555. Undertaking for discharge of attachment; sureties; amount; justification

Before making such order, the court or judge must require an undertaking on behalf of such defendant, by at least two sureties, residents and freeholders, or householders in the State to the effect that in case the plaintiff recovers judgment in the action against the defendant, by whom, or in whose behalf such undertaking shall be given, such defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of any judgment in such action against said defendant, or in default thereof, that such defendant and sureties will, on demand, pay to the plaintiff the full value of the property released not exceeding the amount of such judgment against such defendant. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge and the property attached cannot be released from the attachment without their justification if the same is required.

§ 489.310

§ 556. Discharge for irregularity

The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

§§ 483.060, 484.030

§ 557. Motion for discharge made on affidavit may be opposed by affidavit

WHEN MOTION MADE ON AFFIDAVIT, IT MAY BE OPPOSED BY AFFIDAVIT. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

cf. §§ 483.070,
483.090

§ 558. Discharge for irregularity; amendments

If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged; *provided* that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.

§ 484.030(c). See also
Comment to § 484.030

§ 559. Return of writ

The sheriff, constable, or marshal must return the writ of attachment with the summons, if issued at the same time, and may return it separately from the summons if issued at a later time. The writ of attachment must be returned forthwith after levy and service in accordance with the instructions given to the officer at the time such writ or writ and summons are delivered to him, but in no event later than 30 days after its receipt, with a certificate of his proceedings endorsed thereon or attached thereto, together with the undertaking given under the provisions of Section 540 of this code to prevent or release the levy of the attachment, to the clerk of the court from which said writ of attachment was issued, except that if cash has been deposited with such levying officer in lieu of an undertaking as permitted by Section 540 of this code, such cash shall be retained in such levying officer's trust fund, and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be recorded in the offices of the county recorders in which the notices of attachment have been recorded, and be indexed in like manner.

§ 487.070(a)

Not continued; see
§ 489.310

§ 487.550(c)

§ 559 $\frac{1}{2}$. Alias writs; issuance

After the return and filing of the writ of attachment, or upon filing by the plaintiff of a verified affidavit setting forth the loss of the writ of attachment, the clerk, upon demand of the plaintiff at any time before judgment, may issue an alias writ which shall be in the same form as the original, without requirement of a new affidavit for attachment or of a new undertaking as provided in Section 539 of the Code of Civil Procedure.

see § 483.310 and
Comment thereto

The provisions of this section do not prohibit the issuance of several writs as provided for in Section 540.

§ 560. Real estate; release; manner

An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property.

§ 487.550(c)

§ 561. Interest in estate of decedent

The interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered and the personal representative shall report such attachment to the court when any petition for distribution is filed, and in the decree made upon such petition distribution shall be ordered to such heir, legatee or devisee, but delivery of such property shall be ordered to the officer making the levy subject to the claim of such heir, legatee or devisee, or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing such interest has become final.

§ 487.430