

Memorandum 83-11

Subject: Study D-301 - Creditors' Remedies

Assembly Bill No. 99 was introduced to make necessary substantive and technical revisions in the Enforcement of Judgments Law enacted by the 1982 session and in the Attachment Law as revised by the 1982 session. Attached is a copy of the Commission's recommendation relating to AB 99.

We have received a letter from Robert M. Allen (Exhibit 1) identifying various problems in connection with the Enforcement of Judgments Law. Mr. Allen obviously has made a careful study of the new law and he has noted problems that are worthy of careful consideration by the Commission. The matters he raises are discussed in this memorandum.

Joint Bank Account Levy

The Enforcement of Judgments Law continues the requirement of prior law that the judgment creditor provide an undertaking given by a corporate surety if a levy is made on a deposit account standing in the name of a third person or in the names of both the judgment debtor and a third person. The undertaking is required to be for not less than twice the amount of the judgment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. See Section 700.160 (Enforcement of Judgments Law).

Mr. Allen believes that no undertaking should be required where a levy is made on a deposit account if the account is held jointly by a husband and wife and only one spouse is the judgment debtor. This suggestion is consistent with the view the Commission has generally taken that earnings in a joint account should be presumed to be community property. Mr. Allen refers to the possibility of a delay in payment of the money in the joint account to the levying officer to allow time for the nondebtor spouse to claim an exemption. The staff does not believe such a delay would be desirable. The money in the account will be paid over to the levying officer and the nondebtor spouse can file a third-party claim or an exemption claim with the levying officer. The staff recommended provision requires that the levying officer mail or deliver a notice of levy to the nondebtor spouse. We see no benefit by a delay in payment over to the levying officer. The procedure becomes complicated if a financial institution is to hold the money in the account for a

time to determine if an exemption claim will be filed. This is because the exemption claim will be filed with the levying officer. The staff recommended provisions would be incorporated into AB 99 by the amendments to Section 700.160 and the addition of the new Section 700.165 (both set out in Exhibit 2 attached).

Mr. Allen also believes that no undertaking should be required when a levy is made on an account held in a fictitious business name and the persons doing business in that name are the judgment debtor alone or the judgment debtor and the spouse of the judgment debtor and no other third person. The substance of this suggestion would be accomplished by the amendments to Section 700.160 and the addition of new Section 700.167 as set out in Exhibit 2 attached.

Motor Vehicle Exemption (Section 704.010 of Enforcement of Judgments Law)

Mr. Allen is concerned that under the motor vehicle exemption as set out in Section 704.010 any number of motor vehicles can be claimed as exempt so long as the aggregate equity does not exceed \$1,200. This provision is a result of legislative decisions made when the proposed legislation was considered. As originally proposed by the Commission one vehicle was exempt if the equity in the motor vehicle did not exceed \$1,000 and a second vehicle was exempt if (1) the judgment debtor is married, (2) the second motor vehicle is necessary to enable both the judgment debtor and the spouse of the judgment debtor to earn a livelihood, and (3) the equity in the second motor vehicle does not exceed \$1,000. This provision was not acceptable because it created a need for a court hearing to determine whether the requirements for exemption of the second vehicle existed. The cost of a court hearing for debtors and creditors and the burden on the court caused interested persons and organizations to accept as a compromise the provision now found in Section 704.010. The staff does not believe that it would be desirable or legislatively acceptable to attempt to change this compromise decision.

Mr. Allen also is concerned that Section 704.010 may permit a husband and wife each to exempt \$1,200 equity in motor vehicles and perhaps to combine the exemptions and exempt \$2,400 in the same vehicle. This was not, of course, the intent of the provision. It was intended to provide one exemption for the marital unit. The scheme of the Enforcement of Judgments Law exemptions is to provide one exemption for a marital unit unless a particular exemption provides for a greater exemption. For example, the tools of the trade exemption provides for a

doubling of the exemption if both husband and wife are engaged in a trade, business, or profession. The deposit account for social security payments directly deposited provides a \$500 exemption where one spouse is the designated payee and \$750 where both spouses are the designated payees. The exemption for an inmate's trust account and the exemption for life insurance, endowment, and annuity policies are doubled if the judgment debtor is married. On the other hand, the combined homestead exemptions of spouses on the same judgment shall not exceed \$45,000 (the amount of the homestead exemption for a family), regardless of whether the homestead consists of community or separate property or both. The Enforcement of Judgments Law bill was amended after introduction to revise the motor vehicle exemption and the exemption for jewelry, heirlooms, and works of art. This resulted in a lack of clarity as to how those exemptions apply where the property is owned by a husband and wife. To make clear that the marital unit is entitled to one exemption under these provisions, the staff suggests that Section 703.110 be amended as provided in Exhibit 2 attached. The amendment would add additional language providing that, unless the exemption provision specifically otherwise provides, the two spouses together are entitled to one exemption limited to the specified maximum dollar amount specified in an exemption provision that creates an exemption which is limited to a maximum dollar amount. Exhibit 3 attached sets out the Comment to existing Section 703.110 and the staff suggested Comment to the section as it is proposed by the staff to be amended.

Homestead Exemption - Joint Tenancy

Mr. Allen is in favor of the establishment of a presumption that a principal dwelling owned and used by a husband and wife "as joint tenants" is community property if acquired during the marriage for the purpose of a judgment creditor's execution against the dwelling. The Commission is working on a recommendation relating to the liability of marital property for debts and a general provision consistent with Mr. Allen's suggestion is included in that recommendation. That recommendation further provides that the presumption can be rebutted only by proof tracing the source of funds used for the acquisition or improvement of the property to separate funds or by proof of an agreement providing that the property is not community property.

Mr. Allen is also concerned that the rule of the Schoenfeld case has been retained. The prior law and the new Enforcement of Judgments Law require that a dwelling may be sold only if all liens on the dwelling will be satisfied and, in addition, the exempt amount will be paid to the judgment debtor. Where property is held in joint tenancy the result is that all the liens on the entire property (not just the portion that would be allocable to the judgment debtor's interest) must be satisfied and the judgment debtor is entitled to the applicable exemption. The Commission's recommendation to the 1981-82 legislative session would have cured this problem. However, the recommendation was not acceptable to the California Association of Collectors and the proposed legislation was revised during the legislative session to retain much of the prior law with all its problems. The staff does not believe that it is desirable or legislatively feasible to attempt to change what was enacted in 1982.

Mr. Allen gives examples of how the homestead exemption will apply under various circumstances. Some of the results he gives would be corrected by the presumption that real property acquired during marriage is community property. In addition, it should be noted that the results he gives in his letter would not necessarily apply if we assume the fact situation he gives. That is because he assumes that the judgment creditor is seeking to collect child support arrearages. Section 703.070 provides in part: "if property sought to be applied to the satisfaction of a judgment for child or spousal support is shown to be exempt . . . in appropriate proceedings, the court shall, upon noticed motion of the judgment creditor, determine the extent to which the exempt property nevertheless shall be applied to the satisfaction of the judgment." Accordingly, the court under the facts of the case given by Mr. Allen could determine that the support obligor would receive less than a \$45,000 exemption or no exemption at all.

Respectfully submitted,

John H. DeMouilly,
Executive Secretary

EXHIBIT 1

LAW OFFICE OF
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ATTORNEYS AT LAW
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Assemblyman Alister McAlister
554 Valley Way
Milpitas, CA 95035

Dear Assemblyman McAlister:

I have reviewed the Enforcement of Judgment Law, Assembly Bill #707, which you sponsored. It appears to be a very well thought out piece of legislation. There are a few areas which I feel need clarification, amplification or modification, as follows:

Joint Bank Account Levy (CCP §700.160)

I am concerned about the situation where a husband and wife have a joint deposit account or a joint safe deposit box and only one spouse is the judgment debtor. I feel that there should be a presumption that the funds in a joint deposit account are community property (without a presumption of community property, CCP §700.160 will require a bond, CCP § 695.20 notwithstanding), and an expression from the legislature that the judgment creditor can execute on all (or at least one-half) of the funds in the deposit account without the necessity of the judgment creditor obtaining a bond. Possibly a provision could be inserted requiring a notice to be served on the non-debtor spouse and a ? day period after service of this notice where the non-debtor spouse could claim an exemption of his or her separate property funds, if any, and if the non-debtor spouse makes this claim of exemption, the judgment creditor could object and request a hearing.

I am also concerned about the situation where an individual or husband and wife have a sole proprietorship business account (usually a checking account) in a fictitious name. I feel that a judgment creditor should not be required to obtain a bond to execute against the account standing in the fictitious name if the judgment creditor forwards a certified copy of the fictitious name statement to the levying officer, showing the business to be a sole proprietorship of

the judgment debtor(s) and the judgment debtor(s) or the judgment debtor's spouse are the only signatories on the account. Again, a provision could be inserted requiring a notice to be served on the non-debtor spouse who was a signatory on the account and a process for a claim of exemption and hearing.

Motor Vehicle Exemption (CCP §704.010)

This appears to be a significant change from existing law. Not only is the exemption raised from \$500.00 to \$1200.00 per individual, but each individual can claim more than one vehicle exempt, so long as the aggregate equity does not exceed \$1200.00 (CCP §704.010(a)(1)). I do not believe this is proper. I believe that a judgment debtor should only be able to exempt one vehicle.

The same rule should be applied to the non-debtor spouse of the judgment debtor. He or she should be able to exempt only one additional community property vehicle so long as the equity does not exceed \$1200.00. However, the way the law is written, a husband and wife could exempt numerous (more than two) vehicles so long as the combined aggregate equity does not exceed \$2400.00. (Whether or not both spouses are judgment debtors.) Also, I think the legislature should express its intentions as to whether a husband and wife can combine their exemption toward the same vehicle so as to be able to exempt one vehicle which alone has an equity of \$2400.00.

Homestead Exemption - Joint Tenancy (CCP §704.710, et seq.)

I am concerned about the homestead exemption where a husband and wife hold title to their principal dwelling house in joint tenancy and only one spouse is a judgment debtor and the judgment creditor seeks to execute against the principal dwelling house.

Current law does not distinguish between a husband and wife holding title as joint tenants or two unrelated persons holding title as joint tenants. In each situation, each owner owns an undivided one-half separate property interest in the principal dwelling house (the CCP §5510 presumption of community property is not applicable to the husband and wife joint tenants in a creditor-debtor situation;

rather it is only applicable in a marriage dissolution proceeding between them). See Schoenfeld v. Norberg, (1970) 11 CA3d 755, 90 CalRptr 47.

I do not believe that this treatment of the husband and wife joint tenants results in a proper outcome when a judgment creditor seeks to execute against the judgment debtor's interest in the principal dwelling house of the judgment debtor and his non-debtor spouse.

This problem can best be demonstrated by an example. Assume the judgment creditor is an ex-spouse and the ex-spouse is seeking to collect \$20,000.00 in child support arrearages accumulating since January 1, 1981 (i.e., \$45,000.00 homestead exemption applicable). Assuming that the judgment debtor has remarried and he and his current spouse use only community property funds to purchase their principal dwelling, taking title "as joint tenants". Assume that the dwelling has a fair market value of \$140,000.00 and an outstanding encumbrance (first deed of trust) of \$40,000.00. Is the dwelling subject to being sold at an execution sale under current laws and/or under CCP §704.710, et seq.?

A. If the dwelling was considered to be community property (which I believe it should), both spouses share of the community property dwelling will be subject to this debt. Under current law, the entire dwelling would be sold at an execution sale and the judgment creditor spouse would be able to collect his/her entire \$20,000.00 in child support arrearages from the non-exempt proceeds.

\$140,000.00	Fair market value
<u>- 40,000.00</u>	To pay off encumbrance
\$100,000.00	Equity
<u>- 45,000.00</u>	Homestead exemption
\$ 45,000.00	Non-exempt equity

The result will be the same under CCP §704.710, et seq.

B. Under current law, the dwelling is presumed to be one-half the separate property of the debtor spouse and one-half the separate property of his non-debtor spouse. Only the debtor spouse's one-half interest is subject to his pre-marital judgment of child support. However, the sale cannot take place unless it generates enough proceeds to set aside the non-debtor spouse's 50% of the fair market

value to pay off the entire encumbrance, and to exceed the full \$45,000.00 homestead exemption. See Schoenfeld v. Norberg, supra. The result is that there is no non-exempt equity and consequently the sale cannot occur and the judgment creditor ex-spouse cannot collect any of her child support arrearage.

\$140,000.00	Fair market value
- 70,000.00	Non-debtor spouse's 50% separate property
<u>\$ 70,000.00</u>	Debtor's spouse's 50% separate property
- 40,000.00	Encumbrance
<u>\$ 30,000.00</u>	Debtor spouse's equity
- 45,000.00	Exemption
<u>\$(15,000.00)</u>	Non-exempt equity

However, if the non-debtor spouse had to contribute to paying off his/her one-half of the encumbrance, instead of it coming from the sale proceeds of the judgment debtor spouse's one-half and/or if the judgment debtor spouse only could claim one-half of the exemption, there would be non-exempt equity, the sale could take place, and some or all of the child support arrearage would be paid from the non-exempt equity.

\$140,000.00	Fair market value
- 70,000.00	Non-debtor spouse's 50% separate property
<u>\$ 70,000.00</u>	
- 20,000.00	Debtor spouse's 50% of encumbrance
<u>\$ 50,000.00</u>	Debtor spouse's equity
- 22,500.00	Debtor spouse's 50% of exemption
<u>\$ 27,500.00</u>	Non-exempt equity

C. If I correctly interpret CCP §704.710, et al., (including CCP §704.820), the result would be the same as under current law, except the judgment debtor spouse will apparently only be allowed to claim one-half of the homestead exemption (good!). In my example, the sale would be allowed but only \$7,500.00 of the \$20,000.00 arrearage would be collected.

\$140,000.00	Fair market value
- 70,000.00	Non-debtor spouse's 50% separate property
<u>\$ 70,000.00</u>	
- 40,000.00	Encumbrance
<u>\$ 30,000.00</u>	Debtor spouse's equity
22,500.00	Debtor spouse's 50% of exemption
<u>\$ 7,500.00</u>	Non-exempt equity

I am in favor of corrective clean-up legislation which would result in:

(1) A presumption that a principal dwelling owned and used by a husband and wife "as joint tenants" is community property if acquired during the marriage for the purpose of a judgment creditor's execution against the dwelling, and;

(2) If the presumption is rebutted and the property is found to be truly joint tenancy and therefore one-half the separate property of the judgment debtor and one-half the separate property of his/her non-debtor spouse, to provide that the judgment debtor spouse is only entitled to have one-half of the encumbrance(s) paid from his share.

Assuming that the entire encumbrance must be paid in full, it seems that some procedure should be enacted to join the non-debtor spouse to the proceeding to force him/her to contribute toward paying his/her one-half of the encumbrance from his/her funds or subject his/her one-half separate property interest to sale for the purpose of generating sufficient funds to do so, of course protecting his/her one-half of the homestead exemption.

The presumption of community property is indicated for the same reasons as it was found to be indicated in 1965, when enacting CC §5110, upon a dissolution of marriage. At the time, the legislature expressed its rationale as follows:

"Husbands and wives take property in joint tenancy without legal counsel but primarily because deeds prepared by real estate brokers, escrow companies and by title companies are usually presented to the parties in joint tenancy form. The result is that they don't know what joint tenancy is, that they think it is community property and then find out upon death or divorce that they didn't have what they thought they had all along and instead have something else which isn't

what they had intended." Domestic Relations Rep. p 124.

It is not fair to the judgment creditor that he/she should be prevented from executing, or collect substantially less on his/her judgment by executing, against the principal dwelling of the debtor spouse dependent on the form of title which said debtor spouse hold title with his/her non-debtor spouse. Because of the significant difference, any married couple which holds title to their community property principal dwelling "as community property" would convert title to "as joint tenants" at the time of a judgment taken against one spouse to exempt the principal dwelling from execution which would be subject to execution if title remained "as community property" and when the judgment creditor attempted to rebut the presumption of joint tenancy (i.e., intent that each spouse hold their 50% share as his/her separate property) they would simply be educated by their attorney to deny an intent to continue to hold the principal dwelling as community property. This is not fair or just to the judgment creditor, particularly where the judgment creditor is an ex-spouse seeking to collect a support arrearage.

I would appreciate your comments. I would also appreciate it if you would introduce and/or support legislation to make these clarifications, amplifications or modifications. Thank you for your consideration and anticipated cooperation.

Very truly yours,

Robert M. Allen

ROBERT M. ALLEN

RMA/cb

EXHIBIT 2

Amendment

On page 16, line 28, strike out "Section 700.160" and insert:
Sections 700.160, 700.165, and 700.167

Amendment

On page 17, between lines 22 and 23, insert:

SEC. 14.1. Section 700.140 of the Code of Civil Procedure is amended to read:

700.140. (a) To levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands. Service shall be made personally or by mail.

(c) Subject to ~~Section~~ Sections 700.160, 700.165, and 700.167, during the time the execution lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount levied upon. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

(e) When the amount levied upon pursuant to this section is paid to the levying officer, the execution lien on the deposit account levied upon terminates.

(f) For the purposes of this section and Section 700.160, neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a person designated on a P.O.D. account (as defined in Section 5110 of the Probate Code) as one to whom the account is payable on request after the death of one or more persons.

SEC. 14.3. Section 700.160 of the Code of Civil Procedure is amended to read:

700.160. (a) The Except as provided in subdivision (h), the provisions of this section apply in addition to the provisions of Sections 700.140 and 700.150 if any of the following property is levied upon:

(1) A deposit account standing in the name of a third person or in the names of both the judgment debtor and a third person.

(2) Property in a safe deposit box standing in the name of a third person or in the names of both the judgment debtor and a third person.

(b) The judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking given by a corporate surety authorized to execute the undertaking by Section 1056. The undertaking shall be for not less than twice the amount of the judgment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. The undertaking shall indemnify any third person rightfully entitled to the property against actual damage by reason of the levy on the property and shall assure to the third person the return of the property upon proof of the person's right thereto. The undertaking need not name the third person specifically but may refer to the third person generally in the same manner as in this subdivision. If the provisions of this subdivision are not satisfied, the levy is ineffective and the financial institution shall not comply with the requirements of this section or with the levy.

(c) Upon delivery of the undertaking to the financial institution, the financial institution shall immediately mail or deliver a notice of the delivery of the undertaking to the third person in whose name the deposit account or safe deposit box stands. If mailed, the notice shall be sent by registered or certified mail addressed to the person's last address known to the financial institution. The financial institution shall deliver the undertaking as directed by the third person.

(d) Notwithstanding Article 5 (commencing with Section 701.010), from the time of levy and the delivery of the undertaking to the financial institution until 15 days after the notice is mailed or delivered under subdivision (c) if no objection to the undertaking is made or, if such objection is made, until the court determines that the undertaking is sufficient, the financial institution shall not do any of the following:

(1) Honor a check or other order for the payment of money drawn against, or pay a withdrawal from, the deposit account that would reduce the deposit account to less than the amount levied upon. For the purposes of this paragraph, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(2) Permit the removal of any of the contents of the safe deposit box except pursuant to the writ.

(e) The financial institution is not liable to any person for any of the following during the period prescribed in subdivision (d):

(1) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (d).

(2) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (d).

(3) Refusal to permit access to the safe deposit box by the person in whose name it stands.

(4) Removal of any of the contents of the safe deposit box pursuant to the levy.

(f) An objection to the undertaking may be made by any person claiming to be rightfully entitled to the property levied upon. The objection shall be made in the manner provided by Chapter 7 (commencing with Section 720.710) of Division 4.

(g) Upon the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the levy and Sections 700.140 and 700.150 apply.

(h) This section does not apply in any case where the procedure provided in Section 700.165 or 700.167 is used.

SEC. 14.4. Section 700.165 is added to the Code of Civil Procedure, to read:

700.165. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands only in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person. This section applies only if the judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.

(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, a notice that the judgment creditor has elected to use the procedure provided in Section 700.165 of the Code of Civil Procedure and that the levy reaches any deposit account that stands in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person.

(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on the spouse of the judgment debtor. Service shall be made personally or by mail.

(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (a) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies.

SEC. 14.5. Section 700.167 is added to the Code of Civil Procedure, to read:

700.167. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands in a fictitious business name and the fictitious business name statement filed pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code lists as the persons doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but does not list any other person as doing business under the fictitious business name. This section applies only if the

judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.

(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, both of the following:

(1) A notice that the judgment creditor has elected to use the procedure provided in Section 700.167 of the Code of Civil Procedure.

(2) A copy of an unexpired fictitious business name statement, certified as provided in Section 17926 of the Business and Professions Code, listing as the person doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but not listing any other person as doing business under the fictitious business name.

(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy upon each of the persons listed in the fictitious business name statement. Service shall be made personally or by mail.

(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (b) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies.

SEC. 14.7. Section 703.110 of the Code of Civil Procedure is amended to read:

§ 703.110. Application of exemptions to marital property

703.110. If the judgment debtor is married:

(a) The exemptions provided by this chapter or by any other statute apply to all property that is subject to enforcement of a money judgment, including the interest of the spouse of the judgment debtor in community property. The fact that one or both spouses are judgment debtors under the judgment or that property sought to be applied to the satisfaction of the judgment is separate or community does not increase or reduce the number or amount of the exemptions. Where the property exempt under a particular exemption is limited to a specified maximum dollar amount, unless the exemption provision specifically provides otherwise, the two spouses together are entitled to one exemption limited to the specified maximum dollar amount, whether one or both of the spouses are judgment debtors under the judgment and whether the property sought to be applied to the satisfaction of the judgment is separate or community.

(b) In determining an exemption based upon the needs of the judgment debtor and the spouse and dependents of the judgment debtor, the court shall take into account all property of the judgment debtor and of the spouse and dependents, including community property and separate property of the spouse, whether or not such property is subject to enforcement of the money judgment.

(c) If an exemption is required by statute to be applied first to property not before the court and then to property before the court, the application of the exemption to property not before the court shall be made to the community property and separate property of both spouses, whether or not such property is subject to enforcement of the money judgment.

(d) If the same exemption is claimed by the judgment debtor and the spouse of the judgment debtor for different property, and the property claimed by one spouse, but not both, is exempt, the exemption shall be applied as the spouses agree. If the spouses are unable to agree, the exemption shall be applied as directed by the court in its discretion.

EXHIBIT 3

COMMENTS TO SECTION 703.110

1982 Enactment-Legislative Committee Comment

Comment. Subdivision (a) of Section 703.110 is an application of the basic rule that exemptions apply to property that is liable for the satisfaction of a judgment. If the judgment debtor is married, the property liable for the satisfaction of the judgment may include the community property and the separate property of both spouses in certain situations. See generally Civil Code § 5100 *et seq.* In such situations, both spouses may claim any applicable exemptions but the exemptions are not increased for the marital unit. The fact that one or both spouses are judgment debtors, or that community or separate property is sought to be applied to the satisfaction of the judgment, does not affect the exemptions applicable to the spouses as a marital unit.

Generally, property that is not liable for the satisfaction of a judgment does not enter into exemption determinations. Subdivision (b) creates an exception to this rule for exemptions based on the needs of the judgment debtor and the spouse and dependents of the judgment debtor. See Sections 704.020 (household furnishings), 704.050 (health aids), 704.060 (tools of the trade), 704.100(c) (life insurance benefits), 704.140 (damages for personal injury), 704.150 (damages for wrongful death). In such situations, the court must take into account both nonliable and liable property in making a determination of need. See also Sections 706.051 (earnings necessary for support), 706.052 (earnings withholding order for support).

An exemption may be required to be applied first to property not before the court. See Section 704.100(b) (life insurance policies). Subdivision (c) makes clear that in applying an exemption to property not before the court, the court should consider marital property that would not be liable for satisfaction of the judgment as well as property that would be liable for satisfaction.

Subdivision (d) recognizes that exemptions may be claimed by both the judgment debtor and the spouse of the judgment debtor. See Section 703.020 (persons entitled to claim exemptions). See also 704.720(c) (one homestead of spouses exempt).

1983 Amendment

Comment. Section 703.110 is amended to add the third sentence to subdivision (a). This new sentence makes clear how the exemption scheme works with respect to married persons. Some exemption provisions specifically provide for a separate exemption for each spouse or provide for an exemption in a greater amount for a married couple. See, e.g., Sections 704.030 (materials for repair or improvement of dwelling), 704.060 (personal property used in trade, business, or profession), 704.080 (deposit account in which social security payments are directly deposited), 704.090 (inmate's trust fund), 704.100 (life insurance, endowment, annuity policies). See also Section 704.730(b) (maximum combined homestead exemptions of married couple). Other exemption provisions provide a maximum dollar amount for an exemption applicable to the spouses as a marital unit. For example, under subdivision (a), the maximum exemption allowed under Section 704.010 for the marital unit is \$1,200 aggregate equity in motor vehicles, whether one or both spouses are judgment debtors and whether the vehicle or vehicles are community or separate property. The exemption is not doubled where each spouse owns an interest in the motor vehicle. Likewise, the maximum exemption allowed under Section 704.040 for jewelry, heirlooms, and works of art is \$2,500 for the marital unit.

APPENDIX VIII
STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Creditors' Remedies

Amount to be Secured by Attachment
Execution of Writs by Registered Process Servers
Technical Amendments

September 1982

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
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NOTE

This 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.

CALIFORNIA LAW REVISION COMMISSION

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September 27, 1982

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

A new Enforcement of Judgments Law was enacted by Chapter 1364 of the Statutes of 1982 upon recommendation of the Law Revision Commission. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980). A related recommendation relating to prejudgment attachment was enacted by Chapter 1198 of the Statutes of 1982. See *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982).

The Commission has continued to review the law relating to creditors' remedies to determine whether any substantive or technical changes are necessary. As a result of this review, the Commission recommends amendments to specify the nature of claims that may be offset against the amount of an attachment, to clarify the duties of a registered process server who serves a writ of attachment or execution, and to make some technical revisions.

This recommendation is submitted pursuant to Resolution Chapter 45 of the Statutes of 1974.

Respectfully submitted,

ROBERT J. BERTON
Chairperson

(2177)

RECOMMENDATION

relating to

CREDITORS' REMEDIES

Introduction

The 1982 session of the California Legislature enacted a new Enforcement of Judgments Law¹ and conforming changes in the Attachment Law² upon recommendation of the California Law Revision Commission.³ This recommendation proposes substantive and technical revisions in the legislation enacted in 1982. The more important substantive revisions are discussed below; recommended technical changes are explained in the Comments to the provisions in the Proposed Legislation.

Amount Secured by Attachment

Under existing law, the amount for which a writ of attachment may issue is subject to reduction in the amount of "all claims which would diminish the amount of the plaintiff's recovery."⁴ This language might be construed to allow the defendant to seek to reduce the amount of the attachment by the amount of a tort claim, even though attachment is available only on a "claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars."⁵ A tort claim of the defendant that has not been reduced to judgment should not be permitted to offset the plaintiff's attachment claim. Such a tort claim is likely to be speculative in amount and may be contrived for the purpose of delaying issuance of the writ of attachment.

¹ 1982 Cal. Stats. ch. 1364 (operative July 1, 1983). See also 1982 Cal. Stats. ch. 497 (conforming changes).

² 1982 Cal. Stats. ch. 1198 (operative July 1, 1983).

³ See *Tentative Recommendation Proposing the Enforcements of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980); *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982).

⁴ Code Civ. Proc. § 483.015 (enacted by 1982 Cal. Stats. ch. 1198). See also *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982).

⁵ Code Civ. Proc. § 483.010(a).

The Commission recommends that the Attachment Law be revised to provide that the amount of the attachment may be reduced only by (1) the amount of any money judgment in favor of the defendant and against the plaintiff and (2) the amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action, or the amount of any claim of the defendant asserted as a defense in the answer, if the defendant's claim is one upon which an attachment could be issued.⁶

Execution of Writs by Registered Process Servers

The 1982 legislation permits registered process servers to levy on certain types of property under a writ of attachment⁷ or writ of execution.⁸ The 1982 provisions require the registered process server to file the writ, relevant instructions, and an affidavit of the actions taken in executing the writ with the levying officer within five days after the registered process server levies.⁹ The levying officer is then required to perform the remaining duties under the writ and return the writ to the court.

There is a danger under this scheme that the papers will not be filed with the levying officer early enough to permit the levying officer to set up a file for the case. If the levying officer has no file, there is no practical way of handling various papers that may be filed with the levying officer, such as exemption claims,¹⁰ third-party claims,¹¹ and

⁶ The substance of this recommendation was included in Assembly Bill 2332 at the 1981-82 Regular Session but was removed from the bill before the bill was passed by the Legislature. This recommendation was withdrawn at the request of the Business Law Section of the State Bar of California so that the Section would have sufficient time to study the recommendation. The Commission believes that this proposal merits further consideration.

⁷ See Code Civ. Proc. § 488.080. See also *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701, 715-16 (1982).

⁸ See Code Civ. Proc. § 699.080. See also *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2037-58 (1980).

⁹ See Code Civ. Proc. §§ 488.080(c), 699.080(c). Code of Civil Procedure Section 715.040 permits a registered process server to serve or post a writ of possession of real property, but in this case the writ must first be delivered to the levying officer who is given three business days within which to serve or post the writ. The recommended legislation revises Section 715.040 to make clear that the writ is to be returned to the judgment creditor or registered process server if the levying officer does not serve or post it within the three days allowed.

¹⁰ See, e.g., Code Civ. Proc. §§ 482.100, 485.610, 703.520.

¹¹ See Code Civ. Proc. §§ 488.110, 720.120, 720.220.

garnishees' memorandums.¹² In addition, a garnishee may desire to pay the amount levied upon or deliver possession of property levied upon to the levying officer,¹³ and the debtor may wish to obtain the release of property levied upon by paying the amount due on the claim or judgment.¹⁴ In each of these situations, the procedure breaks down if the levying officer has no file for the case that is involved.

The Commission recommends that the provisions governing levy of attachment and execution by registered process servers be amended to require the registered process server to file a copy of the writ of attachment or writ of execution with the appropriate levying officer before attempting to levy. The levying officer's fee should also be paid at this time to cover the clerical cost of setting up a file as well as the eventual costs of performing other duties under the writ after levy.¹⁵ Requiring this initial filing with the levying officer will aid in the efficient processing of a writ of attachment or execution once levy is made by the registered process server.

Proposed Legislation

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

An act to amend Sections 483.015, 484.050, 484.060, 485.240, 488.080, 488.375, 488.385, 488.455, 488.730, 685.020, 687.040, 695.020, 699.080, 700.140, 715.040, and 726 of the Code of Civil Procedure, to amend Sections 864 and 7609.5 of the Financial Code, to amend Sections 7170, 26820.4, and 72055 of the Government Code, to amend Section 2407 of the Probate Code, and to amend Section 1342 of the Unemployment Insurance Code, relating to creditors' remedies.

Note. To save printing costs, only significant revisions are set out in this report.

¹² See Code Civ. Proc. §§ 488.610, 701.030.

¹³ See Code Civ. Proc. §§ 488.600, 701.010, 701.040-701.060; see also § 699.020 (payment by third person without levy).

¹⁴ Cf. Code Civ. Proc. §§ 695.210 (amount required to satisfy money judgment), 724.010 (satisfaction of judgment).

¹⁵ See Code Civ. Proc. §§ 488.080(c), 699.080(c).

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

Code of Civil Procedure § 483.015 (amended). Amount to be secured by attachment

SECTION 1. Section 483.015 of the Code of Civil Procedure is amended to read:

483.015. (a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following:

(1) The amount of the defendant's indebtedness claimed by the plaintiff.

(2) Any additional amount included by the court under Section 482.110.

(b) The amount described in subdivision (a) shall be reduced by all claims which would diminish the amount of the plaintiff's recovery, the sum of the following:

(1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

(2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.

(3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.

Comment. Subdivision (b) of Section 483.015 is amended to clarify the nature of claims that will reduce the amount to be secured by attachment. The amended subdivision provides a more precise rule under which, for example, it is clear that the amount to be secured by the attachment is not reduced by a tort claim that has not been reduced to judgment. The defendant may seek to have the amount secured by the attachment reduced as provided in Sections 484.060 and 485.240. Under subdivision (b), if a claim may be offset only if it is "one upon which an attachment could be issued," the claim must meet the requirements of Section 483.010 as to amount and nature of the claim.

Code of Civil Procedure § 484.050 (amended). Contents of notice of application and hearing

SEC. 2. Section 484.050 of the Code of Civil Procedure is amended to read:

484.050. The notice of application and hearing shall inform the defendant of all of the following:

(a) A hearing will be held 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 court 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 decisions at the hearing on the application for the order.

(c) The amount to be secured by the attachment is the amount of the defendant's indebtedness claimed by the plaintiff over and above all claims which would reduce the amount of the plaintiff's recovery the sum of (1) the amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable, (2) the amount of any indebtedness of the plaintiff claimed by the defendant in a cross-complaint in the action if the defendant's claim is one upon which an attachment could be issued, and (3) the amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.

(d) If the right to attach order is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such property is exempt from attachment or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment. However, additional writs of attachment may be issued to attach other

nonexempt property of the defendant on the basis of the right to attach order.

(e) If the defendant desires to oppose the issuance of the order, the defendant shall file with the court and serve on the plaintiff a notice of opposition and supporting affidavit as required by Section 484.060 not later than five days prior to the date set for hearing.

(f) If the defendant claims that the personal property described in the application, or a portion thereof, is exempt from attachment, the defendant shall include that claim in the notice of opposition filed and served pursuant to Section 484.060 or file and serve a separate claim of exemption with respect to the property as provided in Section 484.070. If the defendant 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 expiration of the time for claiming exemptions.

(g) The defendant may obtain a determination at the hearing whether real or personal property not described in the application or real property described in the application is exempt from attachment by including the claim in the notice of opposition filed and served pursuant to Section 484.060 or by filing and serving a separate claim of exemption with respect to the property as provided in Section 484.070, but the failure to so claim that the property is exempt from attachment will not preclude the defendant from making a claim of exemption with respect to the property at a later time.

(h) Either the defendant or the defendant's attorney or both of them may be present at the hearing.

(i) The notice shall contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

Comment. Subdivision (c) of Section 484.050 is amended to conform to Section 483.015 as amended.

Code of Civil Procedure § 484.060 (amended). Notice of opposition by defendant and supporting affidavit

SEC. 3. Section 484.060 of the Code of Civil Procedure is amended to read:

484.060. (a) If the defendant desires to oppose the issuance of the right to attach order sought by plaintiff; ~~he~~ *or objects to the amount sought to be secured by the attachment, the defendant* shall file and serve upon the plaintiff no later than five 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 *or objects to the amount sought to be secured by the attachment* 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~~ *the defendant* shall not be permitted to oppose 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 484.070, ~~he~~ *the defendant* may include such claim in the notice of opposition filed pursuant to this section.

Comment. Subdivision (a) of Section 484.060 is amended to make clear that the defendant may seek the reduction of the amount of the attachment by the amounts specified in subdivision (b) of Section 483.015.

Code of Civil Procedure § 485.240 (amended). Setting aside right to attach order and quashing writ

SEC. 4. Section 485.240 of the Code of Civil Procedure is amended to read:

485.240. (a) Any defendant whose property has been attached pursuant to a writ issued under this chapter may apply for an order (1) that the right to attach order be set aside, the writ of attachment quashed, and any property levied upon pursuant to the writ be released, *or (2) that the amount to be secured by the attachment be reduced as provided in Section 483.015.* 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 485.010) 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 court shall determine whether the plaintiff is entitled to the right to attach order *or whether the amount to be secured by the attachment should be reduced*. If the court finds that the plaintiff is not entitled to the right to attach order, it shall order the right to attach order set aside, the writ of attachment quashed, and any property levied on pursuant to the writ released. If the court 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 484.310) or Article 3 (commencing with Section 484.510) of Chapter 4.

(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence 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. Subdivisions (a) and (c) of Section 485.240 are amended to make clear that the defendant may seek the reduction of the amount of the attachment by the amounts specified in subdivision (b) of Section 483.015.

Code of Civil Procedure § 488.080 (amended). Levy of attachment by registered process server

SEC. 5. Section 488.080 of the Code of Civil Procedure is amended to read:

488.080. (a) A registered process server may levy under a writ of attachment on the following types of property:

- (1) Real property, pursuant to Section 488.315.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 488.325.
- (3) Personal property in the custody of a levying officer, pursuant to Section 488.355.
- (4) Equipment of a going business, pursuant to Section 488.375.
- (5) Motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business, pursuant to Section 488.385.
- (6) Farm products or inventory of a going business, pursuant to Section 488.405.
- (7) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (8) Deposit accounts, pursuant to Section 488.455 or 488.465.
- (9) Property in a safe deposit box, pursuant to Section 488.460 or 488.465.
- (10) Accounts receivable or general intangibles, pursuant to Section 488.470.
- (11) Final money judgments, pursuant to Section 488.480.
- (12) Interest of a defendant in personal property in the estate of a decedent, pursuant to Section 488.485.

(b) Before levying under the writ of attachment, the registered process server shall file a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

~~(b)~~ (c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do all of the following:

- (1) Comply with the applicable levy, posting, and service provisions of Article 2 (commencing with Section 488.300).
- (2) Deliver any undertaking required by Section 488.465.

(3) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 488.610.

~~(e)~~ (d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of attachment.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of attachment on other persons as required by Article 2 (commencing with Section 488.300).

(4) Instructions in writing, as required by the provisions of Section 488.030.

~~(d)~~ Upon receipt of (e) If the fee provided by Section 26721 of the Government Code *has been paid*, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court. The levying officer is not liable for actions taken in conformance with the provisions of this title in reliance on information provided to the levying officer under subdivision ~~(e)~~ (d) except to the extent that the levying officer has actual knowledge that the information is incorrect. Nothing in this subdivision limits any liability the plaintiff or registered process server may have if the levying officer acts on the basis of incorrect information provided under subdivision ~~(e)~~ (d).

~~(e)~~ (f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. A new subdivision (b) is added to Section 488.080 to require a registered process server to file a copy of the writ with the appropriate levying officer before attempting to levy. This requirement gives the levying officer an early opportunity to establish a file which facilitates handling exemption claims and third-party claims, garnishees' memorandums, and payments by garnishees or by the defendant. Subdivision (e) is amended for consistency with new subdivision (b).

Code of Civil Procedure § 488.375 (amended). Attachment of equipment of going business

SEC. 6. Section 488.375 of the Code of Civil Procedure is amended to read:

488.375. (a) Except as provided by Section 488.385, to attach equipment of a going business in the possession or under the control of the defendant, the levying officer shall file with the office of the Secretary of State a notice of attachment, in the form prescribed by the Secretary of State, which shall contain all of the following:

- (1) The name and mailing address of the plaintiff.
- (2) The name and last known mailing address of the defendant.
- (3) The title of the court where the action is pending and the cause and number of the action.

(4) A description of the specific property attached.

(5) A statement that the plaintiff has acquired an attachment lien on the specified property of the defendant.

(b) Upon presentation of a notice of attachment under this section for filing, and tender of the filing fee to the office of the Secretary of State, the notice of attachment shall be filed, marked, and indexed in the same manner as a financing statement. The fee for filing in the office of the Secretary of State is the same as the fee for filing a financing statement in the standard form.

(c) Upon the request of any person, the Secretary of State shall issue a certificate showing whether there is on file in that office on the date and hour stated therein any notice of attachment filed against the equipment of a particular person named in the request. If a notice of attachment is on file, the certificate shall state the date and hour of filing of each such notice and any notice affecting any such notice of attachment and the name and address of the plaintiff. The fee for the certificate issued pursuant to this subdivision is the same as the fee for a certificate issued pursuant to Section 9407 of the Commercial Code. Upon request, the Secretary of State shall furnish a copy of any notice of attachment or notice affecting a notice of

attachment for the fee for a copy prescribed by subdivision (2) of Section 9407 of the Commercial Code.

(d) The fee for filing, indexing, and furnishing filing data for a notice of extension of attachment is the same as the fee for a continuation statement under Section 9403 of the Commercial Code. The fee for filing, indexing, and furnishing filing data for a notice of release of attachment is the same as the fee for a statement of release under Section 9405 of the Commercial Code.

(e) If property subject to an attachment lien under this section becomes a fixture (as defined in Section 9313 of the Commercial Code), the attachment lien under this section is extinguished.

Comment. Subdivision (e) is added to Section 488.375 to make clear that the lien on equipment is extinguished if the equipment becomes a fixture. This subdivision is the same as Sections 488.385 (attachment lien on vehicle, vessel, mobilehome, or commercial coach that is equipment), 488.405(e) (attachment lien on inventory), and 697.530(e) (judgment lien on certain business property).

Code of Civil Procedure § 488.385 (amended). Attachment of vehicle, vessel, mobilehome, or commercial coach that is equipment of going business

SEC. 7. Section 488.385 of the Code of Civil Procedure is amended to read:

488.385. (a) To attach a vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles, or a mobilehome or commercial coach for which a certificate of title has been issued by the Department of Housing and Community Development, which is equipment of a going business in the possession or under the control of the defendant, the levying officer shall file with the appropriate department a notice of attachment, in the form prescribed by the appropriate department, which shall contain all of the following:

- (1) The name and mailing address of the plaintiff.
- (2) The name and last known mailing address of the defendant.

(3) The title of the court where the action is pending and the cause and number of the action.

(4) A description of the specific property attached.

(5) A statement that the plaintiff has acquired an attachment lien on the specific property of the defendant.

(b) Upon presentation of a notice of attachment, notice of extension, or notice of release under this section for filing and tender of the filing fee to the appropriate department, the notice shall be filed and indexed. The fee for filing and indexing the notice is three dollars (\$3).

(c) Upon the request of any person, the department shall issue its certificate showing whether there is on file in that department on the date and hour stated therein any notice of attachment filed against the property of a particular person named in the request. If a notice of attachment is on file, the certificate shall state the date and hour of filing of each such notice of attachment and any notice affecting any such notice of attachment and the name and address of the plaintiff. The fee for the certificate issued pursuant to this subdivision is three dollars (\$3). Upon request, the department shall furnish a copy of any notice of attachment or notice affecting a notice of attachment for a fee of one dollar (\$1) per page.

(d) If property subject to an attachment lien under this section becomes a fixture (as defined in Section 9313 of the Commercial Code), the attachment lien under this section is extinguished.

Comment. Subdivision (d) is added to Section 488.385 to make clear that the lien on equipment under this section is extinguished if the equipment, such as a mobilehome, becomes a fixture. This subdivision is the same as Sections 488.375(e) (attachment lien on equipment generally), 488.405(e) (attachment lien on inventory), and 697.530(e) (judgment lien on certain business property).

Code of Civil Procedure § 488.455 (technical amendment). Levy on deposit account

SEC. 8. Section 488.455 of the Code of Civil Procedure is amended to read:

488.455. (a) To attach a deposit account, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the deposit account is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the deposit account stands.

(c) Subject to Section 488.465, during the time the attachment lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount attached. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the attachment.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where the nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where the refusal is pursuant to the requirements of subdivision (c).

(e) When the amount attached pursuant to this section is paid to the levying officer, the attachment lien on the attached deposit account terminates.

(f) *For the purposes of this section and Section 488.465, neither of the following is a third person in whose name the deposit account stands:*

(1) *A person who is only a person named as the beneficiary of a Totten trust account.*

(2) *A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section*

852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivision (f) is added to Section 488.455 to make clear that no bond is required to levy on an account described in the subdivision.

Code of Civil Procedure § 488.730 (technical amendment). Release of attached property

Comment. Subdivision (b) of Section 488.730 is amended to delete erroneous language. See Section 699.060(b) (release from execution).

Code of Civil Procedure § 685.020 (amended). Commencement of interest

SEC. 10. Section 685.020 of the Code of Civil Procedure is amended to read:

685.020. (a) *Except as provided in subdivision (b), interest commences to accrue on a money judgment on the date of entry of the judgment.*

(b) Unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due.

Comment. Subdivision (a) of Section 685.020 continues the general rule as to the time postjudgment interest commences to run. See former Section 682.2, Section 1033; *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App.3d 964, 122 Cal. Rptr. 202 (1975). See also Sections 695.210 and 724.010 (amount to satisfy a judgment).

Subdivision (b) codifies the rule concerning accrual of interest on support judgments payable in installments and extends the rule to other judgments payable in installments. See, e.g., *Huellmantel v. Huellmantel*, 124 Cal. 583, 589-90, 57 P. 582 (1899); *In re Marriage of Hoffee*, 60 Cal. App.3d 337, 131 Cal. Rptr. 637 (1976). The introductory clause of subdivision (b) also recognizes that in certain circumstances the court may have the authority to order that interest accrues from the date of entry of a judgment rendered in an amount certain but payable in installments. See Section 85 (municipal or justice court may fix terms and conditions of payment of money judgment), 117 (small claims court may fix terms and conditions of payment).

Section 685.020 does not affect the rules that determine the extent to which prejudgment interest is to be included in a judgment. See Section 685.110.

**Code of Civil Procedure § 687.040 (technical amendment).
Liability of levying officer**

Comment. Section 687.040 is amended to correct a cross-reference.

**Code of Civil Procedure § 695.020 (technical amendment).
Community property**

Comment. Subdivision (b)(1) is amended to correct a typographical error.

**Code of Civil Procedure § 699.080 (amended). Levy of
execution by registered process server**

SEC. 13. Section 699.080 of the Code of Civil Procedure is amended to read:

699.080. (a) A registered process server may levy under a writ of execution on the following types of property:

- (1) Real property, pursuant to Section 700.015.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 700.020.
- (3) Personal property in the custody of a levying officer, pursuant to Section 700.050.
- (4) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (5) Deposit accounts, pursuant to Section 700.140 or 700.160.
- (6) Property in a safe deposit box, pursuant to Section 700.150 or 700.160.
- (7) Accounts receivable or general intangibles, pursuant to Section 700.170.
- (8) Final money judgments, pursuant to Section 700.190.
- (9) Interest of a judgment debtor in personal property in the estate of a decedent, pursuant to Section 700.200.

(b) *Before levying under the writ of execution, the registered process server shall file a copy of the writ with*

the levying officer and pay the fee provided by Section 26721 of the Government Code.

~~(b)~~ (c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do all of the following:

(1) Comply with the applicable levy, posting, and service provisions of Article 4 (commencing with Section 700.010).

(2) Deliver any undertaking required by Section 700.160.

(3) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 701.030.

~~(e)~~ (d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of execution.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of levy on other persons as required by Article 4 (commencing with Section 700.010).

(4) Instructions in writing, as required by the provisions of Section 687.010.

~~(d)~~ Upon receipt of ~~(e)~~ If the fee provided by Section 26721 of the Government Code *has been paid*, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court.

~~(e)~~ (f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Section 699.080 supersedes subdivisions (b) and (c) of former Section 687. This section expands and clarifies the role of the registered process server in levying on property pursuant to a writ of execution. See also Section 715.040 (service and posting of writ of possession of real property).

Subdivision (a) of Section 699.080 specifies the methods of levy that may be performed by a registered process server. This

authority is limited to cases where the levy does not involve the possibility of taking immediate possession of the property.

Subdivision (c) makes clear that the registered process server is required to perform certain duties ancillary to the levy that would normally be performed by the levying officer at the time of levy or promptly thereafter. Subdivision (d) requires that the levying officer be provided with the information necessary to perform the remaining duties under the writ and to make a return on the writ. Subdivision (e) continues the substance of former Section 687(c). Subdivision (f) makes it discretionary with the court whether a fee for a registered process server will be allowed as costs. Whether the registered process server was used as a convenience to the judgment creditor or because service would not have been made if a public employee were used is an element to be considered by the court in exercising its discretion. If the court decides to allow a fee, subdivision (f) incorporates the general standard for recovery of the costs of employing a registered process server. For a limitation on this provision, see Section 706.101(e) (earnings withholding order).

~~Subdivision (b) is a new provision requiring a registered process server to file a copy of the writ with the appropriate levying officer and pay the standard fee before attempting to levy. This requirement gives the levying officer an early opportunity to establish a file which facilitates handling exemption claims and third-party claims, garnishees' memorandums, and payments by garnishees or by the judgment debtor.~~

Code of Civil Procedure § 700.140 (technical amendment). Levy on deposit account

SEC. 14. Section 700.140 of the Code of Civil Procedure is amended to read:

700.140. (a) To levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands. Service shall be made personally or by mail.

(c) Subject to Section 700.160, during the time the execution lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount levied upon. For the purposes of this subdivision, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (c).

(3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

(e) When the amount levied upon pursuant to this section is paid to the levying officer, the execution lien on the deposit account levied upon terminates.

(f) *For the purposes of this section and Section 700.160, neither of the following is a third person in whose name the deposit account stands:*

(1) *A person who is only a person named as the beneficiary of a Totten trust account.*

(2) *A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, 7604.5, 11203.5, 14854.5, or 18318.5 of the Financial Code or other similar provision.*

Comment. Subdivision (f) is added to Section 700.140 to make clear that no bond is required to levy on an account described in the subdivision.

Code of Civil Procedure § 715.040 (amended). Execution of writ of possession by registered process server

SEC. 15. Section 715.040 of the Code of Civil Procedure is amended to read:

715.040. (a) A registered process server may execute the writ of possession of real property as provided in subdivisions (a) and (b) of Section 715.020 if a proper writ of possession is delivered to the sheriff, marshal, or constable and that officer does not execute the writ as provided in subdivisions (a) and (b) of Section 715.020 within three days (Saturday, Sunday, and legal holidays excluded) from the day the writ is delivered to that officer. *If the writ is not executed within such time, the levying officer shall upon request give the writ to the judgment creditor or to a registered process server designated by the judgment creditor.*

(b) Within five days after executing the writ under this section, all of the following shall be filed with the levying officer:

- (1) The writ of possession of real property.
- (2) An affidavit of the registered process server stating the manner in which the writ was executed.
- (3) Proof of service of the writ.
- (4) Instructions in writing, as required by the provisions of Section 687.010.

(c) *Upon receipt of the fee provided by Section 26733 of the Government Code If the writ is executed by a registered process server,* the levying officer shall perform all other duties under the writ and shall return the writ to the court.

(d) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032.8.

Comment. Subdivision (a) of Section 715.040 is amended to make clear that if the levying officer does not serve or post pursuant to the writ within the three days allowed, the writ is to be returned to the judgment creditor or registered process server so that the writ can be executed pursuant to this section.

Subdivision (c) is amended to avoid any implication that a second fee must be paid to the levying officer for the performance of remaining duties under the writ. The fee provided by Government Code Section 26733 is paid when the writ is delivered to the levying officer as required in subdivision (a).

Code of Civil Procedure § 726 (technical amendment). Foreclosure of mortgage or deed of trust

SEC. 16. Section 726 of the Code of Civil Procedure is amended to read:

726. (a) There can be but one form of action for the recovery of any debt; or the enforcement of any right secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter. In such *the* action the court may, by its judgment, direct the sale of the encumbered property (or so much thereof *of the property as may be necessary*), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the *levy and* sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for *such attorney's* fees as the court shall find reasonable, not exceeding the amount named in the mortgage.

The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an amount fixed by the court, with sufficient sureties, to be approved by the judge, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he must file such undertaking, so approved, together with his oath that he will faithfully perform the duties of his office.

(b) The decree for the foreclosure of a mortgage or deed of trust secured by real property or any interest therein shall declare the amount of the indebtedness or right so secured and, unless judgment for any deficiency there may be between the sale price and the amount due with costs is waived by the judgment creditor or a deficiency judgment is prohibited by Section 580b, shall determine the

personal liability of any defendant for the payment of the debt secured by ~~such~~ *the* mortgage or deed of trust and shall name ~~such~~ *the* defendants against whom a deficiency judgment may be ordered following the proceedings hereinafter prescribed *in this section*. In the event of ~~such~~ waiver, or if the prohibition of Section 580b is applicable, the decree shall so declare and there shall be no judgment for a deficiency. In the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for ~~such~~ *the* debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the property or the interest therein sold as of the date of sale, the court shall render a money judgment against ~~such~~ *the* defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of *levy and sale* and of action exceeds the fair value of the property or interest therein sold as of the date of sale; ~~provided, however, that in.~~ *In* no event shall the amount of ~~said~~ *the* judgment, exclusive of interest from the date of sale and of costs exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by ~~said~~ *the* mortgage or deed of trust. Notice of ~~such~~ *the* hearing ~~must shall~~ be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for ~~such~~ *the* hearing. Upon application of any party made at least 10 days before the date set for ~~such~~ *the* hearing the court shall, and upon its own motion the court at any time may, appoint one of the probate referees provided for by law to appraise the property or the interest therein sold as of the time of sale. ~~Such~~ *The* probate referee shall file ~~his~~ *the* appraisal with the clerk and the ~~same shall be appraisal~~ *is* admissible in evidence. ~~Such~~ *The* probate referee shall take and subscribe an oath to be attached to the appraisal that ~~he~~ *the referee* has truly, honestly and impartially appraised the property to the best of ~~his~~ *the referee's*

knowledge and ability. Any probate referee so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation, in an amount as determined by the court to be reasonable, but ~~such~~ *the* fees shall not exceed similar fees for similar services in the community where ~~such~~ *the* services are rendered, which may be taxed and allowed in like manner as other costs.

(c) No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action need be made a party to ~~such~~ *the* action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party ~~person~~ holding ~~such~~ *the* unrecorded conveyance or lien as if ~~he~~ *the person* had been a party to the action. *Notwithstanding Section 701.630, the sale of the encumbered property does not affect the interest of a person who holds a conveyance from or under the mortgagor of the property mortgaged, or has a lien thereon, if the conveyance or lien appears of record in the proper office at the time of the commencement of the action and the person holding the recorded conveyance or lien is not made a party to the action.*

If the court appoint a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of Chapter 1 (commencing with Section 681), Title 9, Part 2, of this code are hereby made applicable to sale made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner.

In all cases heretofore, now or hereafter pending in the courts of this state; in the event of the death, absence from the state, other disability or disqualification of the commissioner appointed to sell encumbered property under the foregoing provisions of this section; the court may, upon the happening of either the death, absence from the state, other disability or disqualification of the

commissioner appoint an elisor to perform the duties of such commissioner which are then to be performed in such action. The elisor so appointed shall give the undertaking, and take the oath hereinbefore provided to be given and taken by a commissioner, before entering upon the discharge of his duties, and shall thereafter perform all duties left unperformed by the commissioner whom he is appointed to succeed, with like effect as if such duties had been performed by the commissioner.

(d) If the land mortgaged consists of a single parcel, or two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such ~~the~~ counties by the sheriff, commissioner or elisor, as the case may be, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county.

(e) *If a deficiency judgment is waived or prohibited, the property shall be sold as provided in Section 716.020. If a deficiency judgment is not waived or prohibited, the property shall be sold subject to the right of redemption as provided in Sections 729.010 to 729.090, inclusive.*

Comment. The provisions of Section 726 relating to commissioners appointed to sell real property under a judgment of foreclosure are repealed. Pursuant to Section 712.060 a receiver may be appointed to sell the property under the direction of the court. See also Sections 567 (oath and undertaking of receiver), 568 (powers of receiver), 568.5 (sales by receiver), 708.620 (appointment of receiver). The provisions concerning the qualification and duties of receivers and commissioners were essentially the same under former law. Consequently, special commissioners have been eliminated in favor of the uniform provisions concerning receivers. The provisions of Section 726 concerning elisors are unnecessary. See, e.g., Section 262.8.

A provision for the application of proceeds to satisfy the costs of levy is added to Section 726(a) because Section 716.010 requires levy under a writ of sale if the judgment is enforced by a levying officer.

Subdivision (c) codifies the rule in *Carpentier v. Brenham*, 40 Cal. 221, 235 (1870), to the effect that the interest of a junior lienholder of record is not affected by the foreclosure of a senior lien if the junior lienholder is not joined.

Subdivision (e) specifies the manner of sale depending upon whether the property is to be sold subject to the right of redemption.

See Chapter 1 (commencing with Section 712.010) and Chapter 4 (commencing with Section 716.010) of Division 3 of Title 9 for provisions governing the enforcement of judgments for sale of real property.

Financial Code § 864 (technical amendment). Bank setoff

Comment. Subdivision (c) of Section 864 is amended to include cross-references to additional exemptions provided in the Enforcement of Judgments Law.

Financial Code § 7609.5 (technical amendment). Savings and loan association setoff

Comment. Subdivision (c) of Section 7609.5 is amended to include cross-references to additional exemptions provided in the Enforcement of Judgments Law.

Government Code § 7170 (amended). State tax liens

Comment. The second sentence is added to subdivision (a) of Section 7170 to make clear that the recording of a homestead declaration has no effect on the attachment of a state tax lien. See also Code Civ. Proc. §§ 688.030 (exemptions from enforcement of tax); 704.850 (satisfaction of liens upon execution sale of homestead).

Government Code § 26820.4 (technical amendment). Fee for filing first paper

Comment. Section 26820.4 is amended to correct a cross-reference.

Government Code § 72055 (technical amendment). Fee for filing first paper

Comment. Section 72055 is amended to correct a cross-reference.

Probate Code § 2407 (technical amendment). Application of chapter to community and homestead property

SEC 22. Section 2407 of the Probate Code is amended to read:

2407. This chapter applies to property owned by husband and wife as community property ; ~~or owned by husband and wife or either of them which is subject to a homestead,~~ only to the extent authorized by Part 6 (commencing with Section 3000).

Comment. Section 2407 is amended to reflect the elimination of the collateral effects of a homestead declaration. See Code Civ. Proc. § 704.940 and the Comment thereto.

Unemployment Insurance Code § 1342 (technical amendment). Exemption of benefits

Comment. Section 1342 is amended to delete unnecessary language. See Code Civ. Proc. §§ 487.020 (exemptions from attachment), 704.120 (exemption of unemployment benefits and contributions). See also Code Civ. Proc. § 703.070 (certain property not subject to satisfaction of judgment for child support unless otherwise provided); Welf. & Inst. Code § 11350.5 (withholding of unemployment compensation to pay child support judgment).