

Memorandum 83-74

Subject: Study D-302 - Creditors' Remedies

Some additional questions have arisen concerning provisions in the Attachment Law and the Enforcement of Judgments Law. If approved by the Commission, the amendments proposed by the staff and attached to this memorandum as Exhibit 1 will be included in a bill for the 1984 legislative session. (Additional amendments are proposed in Memorandums 83-53 and 83-69.)

Code Civ. Proc. § 485.610. Claim of exemption after ex parte attachment

The staff proposes to make a technical change in this section to nullify an erroneous interpretation of the Attachment Law that appears in the official form for the Notice of Attachment (AT-165). The form informs the defendant that exemptions for real property must be claimed within 10 days after notice is served (15 days if service is by mail). While Section 487.030 clearly provides that an exemption for real property may be claimed at any time before judgment, the Judicial Council finds an ambiguity in Section 485.610 and we have received a letter suggesting legislative clarification. (Letter from Pam Hulse to Stan G. Ulrich (August 15, 1983).)

Code Civ. Proc. §§ 488.080, 488.455-488.465, 699.080, 700.140-700.167.
Deposit account and safe deposit box levies

The Attachment Law and Enforcement of Judgments Law continue in modified form a provision requiring a creditor to furnish an undertaking protecting the bank as a prerequisite to levying on an account or safe deposit box where a person other than the defendant or judgment debtor is a joint account holder or box holder. While the Enforcement of Judgments Law eliminated the need to furnish this undertaking if the joint account holder is the spouse of the judgment debtor (Section 700.165) or where the account stands in a fictitious business name (Section 700.167), the cumbersome procedure still applies in other cases after judgment and all joint account cases under attachment.

The predecessor statute (Code Civ. Proc. § 682a) was enacted in 1941 to protect the banks against claims of nondebtor joint account holders. It results in an extra cost to creditors which may be passed on to debtors. It may result in delay if the bank refuses to honor the levy where the writ of attachment or execution is not accompanied by the undertaking. Uncertainty results since the bank is required to give

notice to the joint account holder who may then object to the sufficiency of the undertaking. The right to object to the undertaking means that in every case there is at least a 15-day delay from the time the bank sends notice until the bank is required to pay over. As amended by AB 99 (1983 Cal. Stats. ch. 155, operative July 1, 1983), the bank is not required to pay over to the levying officer until the levying officer gives notice to the bank. Hence, two services may be required--the initial levy and then the second notice. Levying officers are uncertain how to handle this situation and have expressed their concern. Levying officers in some counties are giving a letter to judgment creditors informing them of the need to tell the levying officer when to tell the bank to pay the levying officer so the creditor can be paid. In this situation the creditor must find out from the bank when notice was given the joint account holder and must know whether an objection to the undertaking was made within 15 days thereafter; only then can the creditor inform the levying officer to give notice to the bank.

The staff proposes to eliminate the undertaking requirement in its entirety. The financial institutions are protected from liability for complying with the levy. The nondebtor joint account holder or joint safe deposit box holder can resort to the normal third-party claim remedies like any other person who holds an interest in property levied upon to satisfy the debt of another.

Code Civ. Proc. §§ 491.410-491.460. Attachment lien in pending action

Professor Lloyd Tevis has identified a problem with the relation between the procedure for obtaining a right to attach order and for obtaining a lien in a pending action. (See Exhibit 2.) This lien procedure is new to the Attachment Law and was patterned after the procedure in the Enforcement of Judgments Law. Section 491.410 permits the plaintiff to file a notice of lien in an action of the defendant and thereby tie up any rights to money or property the defendant may gain by the action. This procedure does not provide for an "attachment lien" as such. Consequently, there is doubt concerning how the plaintiff can comply with the requirements for obtaining a right to attach order in a case where other property is not sought to be attached. See Section 484.020(e) (application for right to attach order and writ of attachment to include description of property to be attached). Since the defendant's rights in a pending action are not subject to attachment (see Section 487.010) in a strict sense, it would appear to be inappropriate to apply

for a right to attach order and writ of attachment and describe such property. And if such property is not described, the application would be incomplete, although Section 484.090 does contemplate the issuance of a right to attach order without a writ of attachment if all the property sought to be attached has been shown to be exempt. If the hearing procedure is not available for determining the propriety of obtaining a lien in a pending action, it is possible that exempt property may be subject to a lien without a prior hearing or a showing of extraordinary circumstances. For example, if the money sought by the defendant in the action subject to the lien represents earnings or is otherwise necessary for the support of the defendant and the defendant's family. This may not be a significant problem since the defendant does not have the money or property that is the subject of the action and the defendant may seek court approval of a settlement (Section 491.440). Once the action is concluded, the court may order the property to be applied to the satisfaction of the lien or held until it can be levied upon under a writ of attachment.

In view of these technical and theoretical difficulties with this aspect of attachment, the staff proposes to revise the lien procedure and make other conforming changes as necessary. A draft will be presented at the next meeting.

Code Civ. Proc. §§ 693.010-693.060. Statutory forms

The Enforcement of Judgments Law was enacted with a six-month delayed operative date. It was not known whether the Judicial Council would have the time to prepare the needed forms before the new law became operative; consequently, a set of basic forms was enacted as Sections 693.010-693.060 in order to permit operation of the statute if Judicial Council forms were not available on time. As it turned out, the statutory forms have not been needed and have been superseded by the Judicial Council forms. There is no longer any reason to preserve the statutory forms. They will only cause confusion if they continue to be reprinted in the code and will become inconsistent with the statute as it is amended. Accordingly, the forms should be repealed. If this is done, a conforming change is needed in Section 681.030.

Code Civ. Proc. § 697.390. Effect of transfer or encumbrance of interest subject to judgment lien on real property

We have received word that Section 697.390 is subject to a serious misinterpretation. Section 697.390 provides that a judgment lien on

real property continues after transfer or encumbrance of the property unless it is first satisfied. Apparently an attorney with a judgment lien subordinate to a deed of trust is claiming that his lien remains on the property after a trustee's sale of the property after default. Section 697.390 was not intended to have any such effect on the rules governing foreclosed junior lienholders. In order to avoid any confusion on this point in the future, the staff proposes to revise Section 697.390 to make clear that it applies only where the judgment lien is not satisfied or extinguished.

Code Civ. Proc. § 704.740. Application of general execution exemption procedure

The clarifying amendment of this section, like that proposed for Section 485.610, is needed to achieve a revision of an official form, in this case the Notice of Levy (EJ-150). This form is misleading in that it informs the judgment debtor that an exemption must be claimed within 10 days (15 days if notice is mailed). This requirement does not apply to homestead exemptions.

Code Civ. Proc. § 704.995. Effect of death of homestead owner

Section 704.995 would be a new provision added to the declared homestead provisions to provide some continuation of the homestead protection against creditors after the death of a homestead owner. As noted in the Comment to the draft section, this provision is needed to avoid an overbroad dictum in Estate of Grigsby, 134 Cal. App.3d 611, 184 Cal. Rptr. 886 (1982). In Grigsby the court rejected the argument that a homestead declaration restricted the wife's right to convey her interest in the home. As to the surviving spouse who is an owner, the proposed section is clarifying. As to a nonowning spouse and resident family members, the proposed section bridges the gap in protection from liens of creditors of the decedent. Otherwise the surviving children, for example, who live in the family home and take it upon the death of their parents would probably not be protected from liens that were on the home right before their parents' deaths. Cf. Prob. Code § 663(a) (probate homestead liable for claims secured by liens at the time of decedent's death but exempt to extent of homestead exemption).

Code Civ. Proc. § 706.101. Manner of service of earnings withholding order
§ 706.108. Issuance and service of earnings withholding
order by registered process server

The staff proposes the addition of Section 706.108 to permit issuance of earnings withholding orders by registered process servers. Under existing procedure the judgment creditor must have a writ of execution and then apply to the levying officer for an earnings withholding order. This involves some unnecessary delay in the enforcement process and unnecessary paperwork by levying officers. Completion of the earnings withholding order form is a clerical function and is based on information in the writ of execution and the instructions of the judgment creditor. Accordingly, it is not essential that the order be issued by the levying officer.

The proposed amendment to Section 706.101 is a conforming change.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

STAFF DRAFTRevisions of Creditors' Remedies Legislation

38202

Code of Civil Procedure § 485.610 (technical amendment). Claim of exemption

SEC. __. Section 485.610 of the Code of Civil Procedure is amended to read:

485.610. (a) The defendant may claim an exemption as to real or personal property levied upon pursuant to a writ of attachment issued under this chapter by following the procedure set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9, except that the defendant shall claim the exemption as to personal property not later than 30 days after the levying officer serves the defendant with the notice of attachment describing such property and may claim an exemption for real property within the time provided in Section 487.030. For this purpose, references in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 to the "judgment debtor" shall be deemed references to the defendant, and references to the "judgment creditor" shall be deemed references to the plaintiff.

(b) The defendant may claim the exemption provided by subdivision (b) of Section 487.020 within the time provided by subdivision (a) of this section either (1) by following the procedure set forth in Article 2 (commencing with Section 703.510) of Chapter 4 of Division 2 of Title 9 or (2) by following the procedure set forth in subdivision (c) of Section 482.100 except that the requirement of showing changed circumstances under subdivision (a) of Section 482.100 does not apply.

Comment. Subdivision (a) of Section 485.610 is amended to make completely clear that the time for filing an exemption claim provided in the general exemption procedures (Section 703.520) are supplanted by special limits applicable here. This amendment makes no substantive change.

Code of Civil Procedure § 488.080 (technical amendment). Attachment by registered process server

SEC. __. 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 488.453 ~~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 deposit a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

(c) If a registered process server levies on property pursuant to subdivision (a), the registered process server **shall do ~~all~~ both 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) (2)~~ Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 488.610.

(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.

(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 (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 (d).

(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. Subdivisions (a) and (c) of Section 488.080 are amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.455 (technical amendment). Attachment of deposit accounts

SEC. __. 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. The attachment lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

(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~~ 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. Subdivisions (c) and (f) of Section 488.455 are amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.460 (technical amendment). Attachment of safe-deposit boxes

SEC. __. Section 488.460 of the Code of Civil Procedure is amended to read:

488.460. (a) To attach property in a safe-deposit box, 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 safe-deposit box 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 safe-deposit box stands.

(c) ~~Subject to Section 488.465, during~~ During the time the attachment lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe-deposit box except pursuant to the attachment.

(d) The levying officer may first give the person in whose name the safe-deposit box stands an opportunity to open the safe-deposit box to permit the removal pursuant to the attachment of the attached property. The financial institution may refuse to permit the forcible opening of the safe-deposit box to permit the removal of the attached property unless the plaintiff pays in advance the cost of forcibly opening the safe-deposit box and of repairing any damage caused thereby.

(e) 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 guarishee under the attachment.

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

(3) Removal of any of the contents of the safe-deposit box pursuant to the attachment.

Comment. Subdivision (c) of Section 488.460 is amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.465 (repealed). Attachment of deposit accounts and safe-deposit boxes not exclusively in name of defendant

SEC. __. Section 488.465 of the Code of Civil Procedure is repealed.

~~488.465. (a) The provisions of this section apply in addition to the provisions of Sections 488.455 and 488.460 if any of the following property is attached:~~

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

~~(b) The plaintiff shall provide, and the issuing officer shall deliver to the financial institution at the time of levy, an undertaking for not less than twice the amount of the attachment 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 attachment of 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 attachment is ineffective and the financial institution shall not comply with the requirements of this section or with the attachment.~~

~~(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 4 (commencing with Section 488.600), from the time of levy and 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 attached. 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 the nonpayment is pursuant to the requirements of subdivision (d).~~

~~(2) Refusal to pay a withdrawal from the deposit account where the 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 attachment~~
~~(f) Upon the expiration of the period prescribed in subsection~~
~~(d), the financial institution shall comply with the attachment and~~
~~Sections 488.455 and 488.460 apply.~~

Comment. The requirement of providing an undertaking as a prerequisite for attachment of a deposit account or safe-deposit box not exclusively in the name of the defendant provided in Section 488.465 is repealed. See Sections 488.455(d), 488.460(c) (nonliability of financial institution for complying with levy). The nondefendant holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Section 488.110.

045/075

Code of Civil Procedure § 681.030 (technical amendment). Rules for practice and procedure; forms

SEC. __. Section 681.030 of the Code of Civil Procedure is amended to read:

681.030. (a) The Judicial Council may provide by rule for the practice and procedure in proceedings under this title.

(b) The Judicial Council may prescribe the form of the applications, notices, orders, writs, and other papers under this title. A form prescribed by the Judicial Council under this section is deemed to comply with this title ~~and supersedes any corresponding form provided in this title~~. The Judicial Council may prescribe forms in languages other than English.

(c) The Judicial Council shall prepare a form containing both of the following:

(1) A list of each of the federal and this state's exemptions from enforcement of a money judgment against a natural person.

(2) A citation to the relevant statute of the United States or this state which creates each of the exemptions.

Comment. Section 681.030 is amended to reflect the repeal of the statutory forms formerly provided in this title.

Code of Civil Procedure §§ 693.010-693.060 (repealed). Forms

SEC. __. Chapter 19 (commencing with Section 693.010) of Division 1 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

Comment. The statutory forms provided by former Sections 693.010-693.060 are repealed because the Judicial Council has issued superseding forms.

Code of Civil Procedure § 697.390 (technical amendment). Effect of transfer or encumbrance of interest subject to judgment lien

SEC. __. Section 697.390 of the Code of Civil Procedure is amended to read:

697.390. If an interest in real property that is subject to a judgment lien is transferred or encumbered without satisfying or extinguishing the judgment lien:

(a) The interest transferred or encumbered remains subject to a judgment lien created pursuant to Section 697.310 in the same amount as if the interest had not been transferred or encumbered.

(b) The interest transferred or encumbered remains subject to a judgment lien created pursuant to Section 697.320 in the amount of the lien at the time of transfer or encumbrance plus interest thereafter accruing on such amount.

Comment. Section 697.390 is amended to make clear that this section does not continue judgment liens that are otherwise extinguished. See, e.g., Section 701.630 (extinction of junior liens upon execution sale); Carpentier v. Brenham, 40 Cal. 221, 235 (1870) (affect on junior liens of foreclosure of senior lien); Hohn v. Riverside County Flood Control Dist., 228 Cal. App.2d 605, 613, 39 Cal. Rptr. 647 (1964) (purchaser at trustee's sale takes free of junior liens).

Code of Civil Procedure § 699.080 (technical amendment). Levy by registered process server

SEC. __. 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 700.030.
- (4) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.030.
- (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 deposit a copy of the writ with the levying officer and pay the fee provided by Section 28721 of the Government Code.

(c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do ~~all~~ both 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) (2)~~ Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 701.030.

(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.

(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.

(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. Subdivisions (a) and (c) of Section 699.080 are amended to reflect the repeal of Section 700.160.

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

SEC. ___. 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. The execution lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

(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 Sections 700-160, 700-165, and 700-167, during~~ 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, 11293.5, 14854.5, or 15318.5 of the Financial Code or other similar provision.

Comment. Subdivisions (c) and (f) of Section 700.140 are amended to reflect the repeal of Sections 700.160, 700.165, and 700.167.

Code of Civil Procedure § 700.150 (technical amendment). Levy on safe-deposit boxes

SEC. __. Section 700.150 of the Code of Civil Procedure is amended to read:

700.150. (a) To levy upon property in a safe deposit box, 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 safe deposit box 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 safe deposit box stands. Service shall be made personally or by mail.

(c) ~~Subject to Section 700.160, during~~ During the time the execution lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe deposit box except pursuant to the levy.

(d) The levying officer may first give the person in whose name the safe deposit box stands an opportunity to open the safe deposit box to permit the removal pursuant to the levy of the property levied upon. The financial institution may refuse to permit the forcible opening of the safe deposit box to permit the removal of the property levied upon unless the judgment creditor pays in advance the cost of forcibly opening the safe deposit box and of repairing any damage caused thereby.

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

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

Comment. Subdivision (c) of Section 700.150 is amended to reflect the repeal of Section 700.160.

Code of Civil Procedure § 700.160 (repealed). Levy on deposit accounts and safe-deposit boxes not exclusively in name of judgment debtor

SEC. __. Section 700.160 of the Code of Civil Procedure is repealed.

~~700.160. (a) 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 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.~~

~~(c) 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.~~

~~(5) Upon being notified by the levying officer of 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.~~

~~(6) This section does not apply in any case where the procedure provided in Section 700.165 or 700.167 is used.~~

Comment. Section 700.160, which required an undertaking as a prerequisite to levy on a deposit account or safe-deposit box not exclusively in the name of the defendant is repealed. See Sections 700.140(d), 700.150(e) (nonliability of financial institution for complying with levy). The nondebtor who is the holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Sections 720.110 et seq.

Code of Civil Procedure § 700.165 (repealed). Deposit account in name of judgment debtor and spouse

SEC. __. Section 700.165 of the Code of Civil Procedure is repealed.

~~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 and specifying the name of the spouse of the judgment debtor.~~

~~(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. The financial institution is not liable to any person for performing its duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).~~

Comment. Section 700.165 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.

Code of Civil Procedure § 700.167 (repealed). Deposit account in fictitious business name

SEC. __. Section 700.167 of the Code of Civil Procedure is repealed.

~~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 17000) of Part 6 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 17026 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. The financial institution is not liable to any person for performing its duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).~~

Comment. Section 700.167 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.

Code of Civil Procedure § 704.740 (amended). Court order for sale; exemption claim where court order for sale not required

SEC. __. Section 704.740 of the Code of Civil Procedure is amended to read:

704.740. (a) Except as provided in subdivision (b), a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

(b) If the dwelling is personal property or is real property in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy:

(1) A court order for sale is not required and the procedures provided in this article relating to the court order for sale do not apply.

(2) An exemption claim shall be made and determined as provided in Article 2 (commencing with Section 703.510).

Comment. Subdivision (a) of Section 704.740 is amended to make clear that this article provides the exclusive procedure for determining real property dwelling exemptions (other than leaseholds of less than two years). Accordingly, the general procedures for claiming exemptions from execution are not applicable, except as otherwise provided.

Code of Civil Procedure § 704.995. Effect of death of homestead owner

SEC. __. Section 704.995 is added to the Code of Civil Procedure, to read:

704.995. (a) The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the death of the homestead owner if, at the time of the decedent's death, the dwelling was the principal dwelling of one or more of the following persons to whom the interest of the deceased homestead owner passes:

- (1) The surviving spouse of the decedent.
- (2) A member of the family of the decedent.

(b) The protection of the homestead provided by subdivision (a) continues regardless of whether the decedent was the sole owner of the homestead or owned the homestead with the surviving spouse or a member of the decedent's family and regardless of whether the surviving spouse

or the member of the decedent's family was a homestead owner at the time of the decedent's death.

(c) The amount of the homestead is determined pursuant to Section 704.730 depending on the circumstances of the case at the time the amount is required to be determined.

Comment. Section 704.995 is added to make clear that the surviving spouse or resident family do not lose the declared homestead right by the death of a homestead owner. Hence, the protection afforded the declared homestead from creditors continues even though the person who recorded the homestead declaration or who was the sole or joint owner is dead. This section rejects a contrary dictum in Estate of Grigsby, 134 Cal. App.3d 611, 615, 184 Cal. Rptr. 886 (1982) (" . . . the declared homestead does not survive the death of one of the spouses."). See also Prob. Code § [6528] (effect of probate homestead on declared homestead). Subdivision (c) makes clear that where the right to a declared homestead continues, the amount of the homestead exemption is determined under the normal rules. For example, if the surviving spouse is not 65 years of age or older and does not have another family member living in the dwelling, the dollar amount of the declared homestead that is protected from creditors will be reduced. See Sections 704.730 (amount of homestead exemption), 704.950 (attachment of judgment lien to surplus value).

16968

Code of Civil Procedure § 706.101. Manner of service of earnings withholding order and of other notices and documents

SEC. __. Section 706.101 of the Code of Civil Procedure is amended to read:

706.101. (a) An earnings withholding order shall be served by the levying officer upon the employer by delivery of the order to any of the following:

(1) The managing agent or person in charge, at the time of service, of the branch or office where the employee works or the office from which the employee is paid. In the case of a state employee, the office from which the employee is paid does not include the Controller's office unless the employee works directly for the Controller's office.

(2) Any person to whom a copy of the summons and of the complaint may be delivered to make service on the employer under Article 4 (commencing with Section 416.10) of Chapter 4 of Title 5.

(b) Service of an earnings withholding order shall be made by personal delivery as provided in Section 415.10 or 415.20 or by delivery by registered or certified mail, postage prepaid, with return receipt requested. When service is made by mail, service is complete at the time the return receipt is executed by or on behalf of the recipient.

If the levying officer attempts service by mail under this subdivision and does not receive a return receipt within 15 days from the date of deposit in the mail of the earnings withholding order, the levying officer shall make service as provided in Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5.

(c) Except as provided in subdivision (b), service of any notice or document under this chapter may be made by first-class mail, postage prepaid. If service is made on the employer after the employer's return has been received by the levying officer, the service shall be made by first-class mail, postage prepaid, on the person designated in the employer's return to receive notices and at the address indicated in the employer's return, whether or not such address is within the county. Nothing in this subdivision precludes service by personal delivery (1) on the employer before the employer's return has been received by the levying officer or (2) on the person designated in the employer's return after its receipt.

(d) Notwithstanding subdivision (b), if the judgment creditor so requests, the levying officer shall make service of the earnings withholding order by personal delivery as provided in Section 415.10 or 415.20. If the judgment creditor requests that service be made under this subdivision, the fee provided in Section 26750 of the Government Code shall be increased by one dollar and fifty cents (\$1.50).

~~(e) An earnings withholding order also may be served by a registered process server. When an earnings withholding order is served by a registered process server pursuant to this subdivision, the levying officer shall perform all other duties required by the provisions of this chapter, except for the actual service of the order, as if the levying officer had served the order. When an earnings withholding order is served by a registered process server, the court, in allowing costs for service pursuant to Section 1032-8, shall not allow a sum in excess of one dollar and fifty cents (\$1.50).~~

Comment. Former subdivision (e) of Section 706.101 is superseded by Section 706.108 (issuance and service of earnings withholding order by registered process server).

Code of Civil Procedure § 706.108. Issuance and service of earnings withholding order by registered process server

SEC. __. Section 706.108 is added to the Code of Civil Procedure, to read:

706.108. (a) If a writ of execution has been issued to the county where the judgment debtor's employer is to be served and the time specified in subdivision (b) of Section 699.530 for levy on property under the writ has not expired, a judgment creditor may deliver an application for issuance of an earnings withholding order to a registered process server who may then issue an earnings withholding order.

(b) If the registered process server has issued the earnings withholding order, the registered process server, before serving the earnings withholding order, shall deposit with the levying officer a copy of the writ of execution, the application for issuance of an earnings withholding order, and a copy of the earnings withholding order, and shall pay the fee provided by Section 26750 of the Government Code.

(c) A registered process server may serve an earnings withholding order on an employer whether the earnings withholding order was issued by a levying officer or by a registered process server, but no earnings withholding order may be served after the time specified in subdivision (b) of Section 699.530. In performing this function, the registered process server shall serve upon the designated employer all of the following:

- (1) The original and one copy of the earnings withholding order.
- (2) The form for the employer's return.
- (3) The notice to employee of earnings withholding order.
- (4) A copy of the employer's instructions referred to in Section 706.127, except as otherwise prescribed in rules adopted by the Judicial Council.

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

- (1) The writ of execution, if it is not already in the hands of the levying officer.
- (2) Proof of service on the employer of the papers listed in subdivision (c).

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

(e) If the fee provided by Section 26750 of the Government Code has been paid, the levying officer shall perform all other duties required by the provisions of this chapter as if the levying officer had served the earnings withholding order.

(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 is governed by Section 1032.8 but may not exceed one dollar and fifty cents (\$1.50).

Comment. Section 706.108 supersedes former subdivision (e) of Section 706.101 which provided for service of an earnings withholding order by a registered process server. The authority of the registered process server to issue an earnings withholding order provided in subdivision (a) is new. This is comparable to the authority of a levying officer under Section 706.102. See also Section 706.121 (contents of application for earnings withholding order).

Subdivision (b) is comparable to subdivision (b) of Section 699.080 (levy by registered process server under writ of execution). The papers are required to be filed with the levying officer under this subdivision to give the levying officer an early opportunity to establish a file, thereby facilitating the handling of any exemption claim, the employer's return, and payments by the employer or judgment debtor. Of course, if the levying officer has issued the earnings withholding order, this step is not required since the necessary papers will already be on file before service on the employer.

Subdivision (c) is the same in substance as Section 706.103 which applies to service by a levying officer. The first sentence continues the authority provided by former subdivision (e) of Section 706.101.

Subdivision (d) is drawn from subdivision (d) of Section 699.080 (levy by registered process server under writ of execution). If the levying officer has issued the earnings withholding order, the writ of execution will already be in the hands of the levying officer, as is recognized in subdivision (d)(1). If the registered process server has issued the earnings withholding order, however, only a copy of the writ of execution is delivered to the levying officer under subdivision (b) and the writ itself is retained and filed with the levying officer only after service on the employer is complete.

Subdivision (e) continues the substance of the second sentence of former subdivision (e) of Section 706.101 and is comparable to subdivision (e) of Section 699.080 (duties of levying officer after levy by registered process server under writ of execution).

Subdivision (f) continues the limitation on the extra fee that may be allowed provided by former subdivision (e) of Section 706.101. Subdivision (f) is comparable in other respects to subdivision (f) of Section 699.080 (fee for levy under writ of execution).

**LOYOLA LAW SCHOOL**

August 2, 1983

Mr. Stan G. Ulrich, Staff Counsel
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94306

Dear Stan:

I am writing to seek assistance in understanding the operation of the new article in the Attachment Law relating to liens in pending actions or proceedings (CCP §§ 491.410 to 491.460 incl.). My questions concern the procedures involved in obtaining the right to attach order which, according to CCP §491.410(a), is the prerequisite to obtaining a lien upon a pending action or proceeding.

It would seem that we are not to consider the lien upon the pending action as an attachment lien. Under §491.460 when the pending action has gone to judgment one means of enforcing the lien is to apply for an order that the property subject to the lien be attached, thus distinguishing it from an attachment lien. I am not sure whether this application must be made in the manner of an original application for a right to attach order or whether another form of application under this section would be appropriate. However, this is a lesser uncertainty, my point here primarily is that the lien is not an attachment lien.

Nevertheless, in order to obtain a lien on a pending action, the plaintiff must first secure a right to attach order. Does this require that the plaintiff shall have described the pending action in his application for a right to attach order as "property to be attached" as required by §484.020(d)? It really isn't property that is to be attached. Furthermore, it is not property subject to attachment under §487.010. Thus I wonder if the court could issue a right to attach order as to such property.

I have another question related that raised above as to whether a court may issue a right to attach order as to property not subject to attachment. Suppose the only property of the defendant that plaintiff might reach is a pending action. If there is no property subject to attachment, how does the plaintiff get a right to attach order in order to obtain a lien on the pending action?

§491.410(a) can also be read to mean that if a plaintiff has already obtained a right to attach order on an application relating to other property, then he is qualified to obtain a lien in a pending action by filing a notice of lien and a copy of the right to attach order. I have some difficulties with such a reading of the statutory language. First, it would allow the imposition of a lien upon the defendant's property without prior notice. In addition there is no provision made for a hearing either before or after the creation of the lien.

Perhaps I am attempting to create problems where none exist. If I have a misconception about this matter, or if I have overlooked something, I would be happy to have you clear it up for me. If, on the other hand, my concerns are justified, or at least reasonable, I think that the problem could readily be solved by the insertion of some appropriate language in the sections relating to the contents of an application for a right to attach order and in §487.010.

My address for the summer is: 90 Costa Azul Drive, Los Osos, CA 93402. I look forward to hearing from you.

Sincerely,



Lloyd Tevis
Professor of Law