

Second Supplement to Memorandum 72-35

Subject: Study 39.70 - Attachment, Garnishment, Execution (Prejudgment Attachment--Method of Levy)

Following the April meeting, I again had an opportunity to discuss with Professor Riesenfeld some of the problems relating to the method of levy of a writ of attachment and certain related problems. Armed with his suggestions and those of the Commission from the April meeting, I have revised the attached draft provisions relating to the method of levy. (Exhibit I--pink.) At the May meeting, we hope to be able to examine critically these revisions with the assistance of Professor Riesenfeld.

Analysis of Draft Provisions

Section 547.010. This section is basically the same as that examined in April except that we have added definitions for "deposit accounts" and "motor vehicles," and we have revised "choses in action" to now include claims under an insurance policy. See also Sections 547.090, 547.110, and 547.180 below.

Section 547.020. This section is also basically the same as that examined in April except that we have added certain items to the "Notice of Attachment" (subdivision (b)) and have made clear that service must be made on certain branch offices by serving the person in charge of such office.

Section 547.030. This section has been completely redrafted. We have combined the provisions relating to the attachment of real property standing in the name of the defendant and standing in the name of a third person. Pursuant to the direction of the Commission, the attachment is accomplished now simply by the recording of the writ and notice. Service of the writ and notice is not a condition, either precedent or subsequent, of a valid attachment. Service is provided for, but the provision is directory for all practical

purposes. At the April meeting, it was suggested that a failure to serve properly should subject the plaintiff to liability for slander of title without proof of malice. However, Witkin states that now in California, "in accordance with Restatement rule, that actual malice or ill will is unnecessary. All that is required is the fictional malice or 'malice implied in law' from the unprivileged character of the act. Gudger v. Manton, 21 Cal.2d 537, 134 P.2d 217 (1943)." 2 B. Witkin, Summary of California Law Torts §§ 129-130 at 1301-1303 (1960). The Gudger case states these rules:

It is asserted that there was no evidence or finding of malice on the part of appellant. In discussing that issue it is necessary to clarify the meaning to be given to particular terms. There has been considerable confusion and lack of rationalization flowing from the use of the term malice. It arises chiefly from the failure to clearly distinguish between malice implied in law and actual malice. The former is a mere legal fiction, while the latter denotes ill will or the desire to do harm for the satisfaction of doing it or conduct which in effect amounts to the same thing. Actual malice becomes important on the question of punitive damages, or the availability of certain conditional privileges. In the instant action no punitive damages were awarded; therefore the issue of actual malice is not important in that respect. The discussion here is concerned with the right to recover compensatory damages. In the definition heretofore given of the tort, disparagement of title, it will be noted that the publication of the disparagement must be "without privilege." That phrase may be well amplified by adding thereto or "without justification." The burden of proof of that lack of privilege is upon the plaintiff in the tort here discussed as is actual malice, if that term be employed, and the existence of the circumstances necessary to create the privilege is one of fact. . . . Actual malice may under proper circumstances indicate a lack of privilege or justification and a cause of action exists if the other elements of the tort are present. . . . The rule has been concisely stated: "One who publishes matter disparaging to another's property in land, chattels or intangible things is subject to liability . . . , although he (a) did not intend to influence a third person's conduct as purchaser or lessee of the thing in question; neither knew nor believed the disparaging matter to be false; did not publish the matter from ill will toward the other or a desire to cause him loss." . . . True, it has been said or intimated that malice is an essential element in slander of title. . . . That malice may, however, be express or implied. . . . And, if there is an absence of privilege or justification, and the other elements necessary are present, an implication of malice in law is proper, if that term is used, or actual malice may in some cases show lack of privilege. [Gudger v. Manton, supra, at 543-544 (citations omitted).]

In view of these rules which essentially eliminate malice in any case, it might be desirable to ^{revise} / subdivision (c) substantially as follows:

(c) Not more than sixty (60) days after the date of recording, the levying officer shall serve any third person in whose name the property stands on such date with a copy of the writ and the notice. Where such service is not made the plaintiff shall be subject to liability to such third person for any pecuniary damage caused to such person by the attachment upon a showing that, at the time of the attachment, the defendant had no interest in the property attached.

These changes would make clear that the plaintiff is subject to absolute liability for any error if service is not made on third persons. Service on the defendant would be eliminated. However, we believe that the defendant would get adequate notice under Sections 541.070, 541.080, 543.030, and 543.040. See Exhibit I attached to Memorandum 72-35. Moreover, the sanction created for failing to serve simply does not apply to the defendant. As to the manner of service, we have eliminated the posting requirement and lengthened the period of time in which service must be made to 60 days. This should permit ample time to complete service by publication if this is required. The manner of service will be dealt with in a general section.

Sections 547.040, 547.050, and 547.060. These sections have been revised essentially in conformity with the Commission's directions at the April meeting. Section 547.040, dealing with tangible personal property capable of manual delivery in the possession of the defendant, provides for seizure. Section 547.050, dealing with the same property in the possession of a third person, provides for seizure; but a third person who claims a right to possession may retain such possession. Section 547.070, dealing with property not capable of manual delivery, provides for attachment by filing with the Secretary of State and service on the person in possession.

The staff in reexamining these sections is concerned: (1) with the distinction between property capable and incapable of manual delivery--who makes

this decision? and what follows from an erroneous decision?--and (2) with the requirement that a third person must have a "right" to possession to retain property--what constitutes a sufficient right? and what follows from retention without a sufficient right? In view of these concerns, we suggest (except as otherwise specifically provided, for example, for property such as equipment, motor vehicles, growing crops) that all property in the possession of a defendant be taken into custody initially, either by appointment of a keeper or by removing to storage, and that either the plaintiff or the defendant be permitted to apply to the court for an order authorizing appropriate modifications in the method of levy, including filing with the Secretary of State. The statute could provide that the latter method would be particularly appropriate where the property was not reasonably capable of removal and the rights of all would be protected adequately by filing. To implement this suggestion, we could include here provisions comparable to subdivision (c) of Section 547.100, or we could generalize the application of that subdivision, perhaps by incorporating it into Section 547.210.

With respect to the second concern, we suggest that, wherever property is in the possession of a third person, levy be accomplished merely by service on the third person, and he may elect to have the sheriff take the property into custody. This could be implemented as follows:

547.050. (a) Except as otherwise provided in this article, tangible personal property, belonging to the defendant but in the possession of another person, shall be attached by personally serving upon such person a copy of the writ and the notice of attachment.

(b) At any time, upon the demand of such third person, the levying officer shall take such property into custody, by keeper or otherwise. In such case, the levying officer shall make demand on the plaintiff for expenses in the manner provided in Section 547.190. In the event that the money so demanded is not paid, the levying officer shall release the property to the person from whom it was taken in the manner provided in [].

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

Treating tangible personal property held by a third person in this manner might also help in dealing with another type of property not yet dealt with--documents of title. Documents of title are made up principally of two types: bills of lading and warehouse receipts. They may be negotiable or nonnegotiable. They are used by a carrier or warehouseman when goods are shipped or stored as a receipt for the goods. While they are generally used in the mechanics of the shipment and storage of goods, they can also be purchased and sold as symbols of the goods or used as a basis of credit. Professor Riesenfeld suggests that goods subject to a nonnegotiable document of title be attached simply by notice to the bailee--this would be the procedure followed anyway under Section 547.050 above. Where a negotiable document has been issued, Professor Riesenfeld suggests that the document itself must be attached --in short, that a negotiable document of title be treated as a negotiable instrument. Is this approach satisfactory?

Section 547.070. This section has been revised in general conformity with the treatment of real property under Section 547.030. See discussion above.

Section 547.080. This section and the following sections have not been considered previously by the Commission. Section 547.080 is new, but Mr. Marsh has a comparable provision (Section 542.1) in Senate Bill 1048 which reads as follows:

542.1. . . . [A] writ of attachment shall be levied upon any equipment (as defined in the Commercial Code) belonging to the defendant by the filing of a notice by the sheriff, constable, or marshal with the Secretary of State, which shall be signed by the sheriff, constable, or

marshal and shall contain the name of the plaintiff as lienor, the name of the defendant as debtor, and shall indicate that the plaintiff has acquired an attachment lien in the equipment of the defendant. The form of such notice shall be prescribed by the Secretary of State and shall be filed and indexed by him in accordance with the provisions applicable to financing statements in Division 9 (commencing with Section 9101) of the Commercial Code.

It might be noted that Section 547.080 is limited to equipment of a going business. The staff believes that, if the concern has gone out of business, the defendant will not be burdened so greatly by having the property taken into custody and the plaintiff has a greater need for the protection that custody offers. Also as noted above, with respect to the attachment of tangible personal property generally, we suggest that both parties in any case be able to apply for an alternate method of levy. See discussion under Sections 547.040-547.060.

Section 547.080 requires service of the writ and notice on the defendant and any third person in possession of the equipment. This immediately raises the recurring issue of what consequence follows from the failure to serve. Should the lien of attachment lapse? Should the requirement of service be merely directory? What other sanctions would be appropriate?

Section 547.090. This is a new section dealing with motor vehicles. The term "motor vehicle" is defined in Section 547.010 which incorporates the following definition from the Vehicle Code: "A 'motor vehicle' is a vehicle which is self-propelled." Vehicle Code Section 415. This is obviously very broad and includes not only cars and trucks but all sorts of heavy equipment and miscellaneous vehicles. There are certain vehicles exempt from registration--e.g., golf carts, snowmobiles, forklifts, wheel chairs, vehicles not used on a highway (farm and cemetery equipment)--but even for these there may be a certificate of ownership as distinct from the vehicle registration.

We have not yet made special provision for leased vehicles. If the basic approach appears promising, we will try to learn who has possession of the certificate of ownership of a leased vehicle--we would assume it is retained by the lessor--and whether seizure can be or should be avoided.

Service of the writ and notice is not now made an element of the levy. As noted above, should service be a mandatory requirement? What other sanctions would be appropriate?

Section 547.100. This section offers special provisions for the levy on inventory of a going business and on farm products. Subdivision (a) provides for a keeper for eight days and substantial limitations on the defendant's operations. If no action is taken by the parties, at the end of the eight days, the levying officer must take exclusive custody of the property. Under subdivision (c), however, we provide either party with the opportunity to request the court to order a more flexible arrangement. We have not attempted to spell out what the court may do (it seems to us that this will depend entirely on the circumstances--the amount of the debt, the availability of other security, the nature of the defendant's operations, and so on). Although we suspect that generally it will be the defendant who is the moving party under subdivision (c), we refer to "either party" in subdivision (c) because the plaintiff may wish also to have a more flexible (and less expensive) arrangement than that provided by subdivision (a) and yet not be willing to go as far as subdivision (b) and not be able to reach a voluntary arrangement with the defendant.

Subdivision (b) provides an alternate procedure for the plaintiff to select at his option. Perhaps the court should be authorized to require the plaintiff to use this method in lieu of any others; if so, however, we think that the plaintiff's lien should date from the time a keeper was first placed in charge of the property under subdivision (a) rather than the time of filing under subdivision (b). Compare subdivisions (b) and (c) of Section 547.020.

We are not sure how to deal with farm products. We would like to avoid outright seizure; however, we are not sure that filing gives adequate protection to all concerned or that appointment of a keeper is satisfactory. Does anyone have any suggestions?

Section 547.110. This section simply provides that levy is made on accounts receivable and choses in action (which now includes claims for insurance policies) by service on the account debtor or insurer. We have also provided for service on the defendant [and other obligees] but, at the suggestion of Professor Riesenfeld, have not made this a condition of the attachment. Query: Should this provision for service be merely directory or should some sanction be provided? If so, what?

We have not dealt directly with the problem of who should be responsible for collection from the account debtor. Does Section 547.210 provide adequately for this problem? Should we provide somewhere for something comparable to the Earnings Protection Law? I.e., should a portion (percentage) of accounts receivable be exempt from levy?

There is another problem here which recurs with chattel paper, negotiable instruments, securities, and so on. That is how to deal with this property when it has been pledged. Insofar as the method of levy is concerned, we simply require service of the writ and notice on the account debtor. Presumably, he will advise the sheriff of who is the obligee and the sheriff should then serve the obligee. However, then what? Section 689 has been revised to permit the pledgee to file a third-party claim and to authorize the court to make a "proper" disposition of the property. Is this adequate direction to the court? We will return to the problem in connection with Section 689, but we raise it here so that it will not be overlooked.

Sections 547.120 and 547.130. These sections provide methods for levy on chattel paper and negotiable instruments. Both sections cause Professor Riesenfeld particular concern because he does not believe that service on anyone other than the person in possession of the chattel paper or negotiable instrument should constitute a requirement of the levy. These sections have been written to so provide, but in this form they cause the staff concern because we believe the obligor may not be adequately protected. In theory, he should not make payments except on presentation of the instrument; in practice, if he has been making payments on a note, for example, he will continue to do so until he receives notice to the contrary. He might perhaps have an action against the person to whom he made payments, but this hardly seems adequate.

These sections also raise the issues whether Sections 547.200 and 547.210 provide adequately for collection and whether pledged property should be dealt with in a manner that permits the pledgee to retain possession rather than pursue his remedy under Section 689.

Section 547.140. This section is based on (and Professor Riesenfeld suggests should supersede) Section 8317 of the Commercial Code.

Section 8317 of the Commercial Code provides:

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

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

Section 8317 does not deal adequately with the problems of who should be given notice and, as noted above, with the problem of pledged stock. Section 547.140, we believe, deals adequately with the giving of notice, but again we have the problem of when the lien is effective, what happens when service is not properly given, and what, if any, additional provisions are needed to deal with pledged stock.

Section 547.150. This section deals specially with judgments owing to the defendant. Again, there is the problem of when the lien becomes effective and how the levy should be realized, i.e., by collection or sale?

It should also be noted that this section provides only for attachment of a judgment. In contrast, it should be noted that Section 688.1 provides a judgment creditor an opportunity to apply for a lien on a claim in litigation. Section 688.1 provides:

688.1. (a) Except as provided for in subdivision (b), upon motion of a judgment creditor of any party in an action or special proceeding made in the court in which the action or proceeding is pending upon written notice to all parties, the court or judge thereof may, in his discretion, order that the judgment creditor be granted a lien upon the cause of action, and upon any judgment subsequently procured in such action or proceeding, and, during the pendency of such action may permit such judgment creditor to intervene therein. Such judgment creditor shall have a lien to the extent of his judgment upon all moneys recovered by his judgment debtor in such action or proceeding and no compromise, settlement or satisfaction shall be entered into by or on behalf of such debtor without the consent of such judgment creditor, unless his lien is sooner satisfied or discharged. The clerk or judge of the court shall endorse upon the judgment recovered in such action or proceeding a statement of the existence of the lien, the date of the entry of the order creating the lien, and the place where entered, and any abstract issued upon the judgment shall contain, in addition to the matters set forth in Section 674 of the Code of Civil Procedure, a statement of the lien in favor of such judgment creditor.

(b) Nothing in this section shall be construed to permit an assignee by operation of law of a party to a personal injury action to acquire any interest in or lien rights upon any moneys recovered by such party for general damages.

Query: Should something comparable be afforded an attaching plaintiff? If not, is a provision needed to make clear that property otherwise subject to

attachment does not become immune because it forms the basis of a claim in litigation? For example, a debt owing to the defendant is subject to levy of attachment; just because the defendant has filed an action to collect the debt, it should not thereby become immune from attachment. Does Section 688.1 presently imply such a result? Does Section 688.1 need revision as it applies to a judgment creditor? (This would seem to be beyond the scope of our present project, but Professor Riesenfeld has expressed concern with the policy expressed in Section 688.1 that a judgment creditor can intervene in a tort action and prevent settlement of the action until his rights are protected.)

Section 547.160. This section is substantially the same as present Section 561. Professor Williams suggested some drafting changes at an earlier meeting which have been incorporated into this draft. It might be noted that Section 547.160 (and Section 561) refers only to the interest of a defendant by succession. Should some provision be made for attaching the interest of a defendant where he claims to be a creditor of the estate? Or is this adequately covered by previous sections? Both this section and Section 561 deal only with personal property. Presumably, real property has been covered by Section 547.030 dealing specifically with interests in real property. Does this section appear adequate? Again, there is the problem of when the lien becomes effective or lapses.

Section 547.170. This section, dealing with deposit accounts (defined in Section 547.010), is new but attempts to implement the directions of the Commission at the April meeting.

Section 547.180. This section is substantially the same as present Section 539a. We have made some drafting changes and reorganized the section, but we have not intentionally made any significant substantive changes.

Section 547.190. This section is virtually identical to present Section 542(4). We have, however, given the levying officer authority to demand deposits for expenses for 90 days rather than the present five days. There

does not seem to be any reason to have such a short period once it has become apparent that the property will probably be held for substantial periods pending a final determination of the action.

Section 547.200. This section is virtually identical to subdivision 6 of present Section 542.

Section 547.210. This section supersedes several comparable provisions in the present law. Compare Sections 542(1a), 542(2a), 547, 547a, and 548. We do not believe that we have lost anything vital in our consolidation of these sections. We are, however, concerned that for some perishables the requirement of a court hearing after "reasonable" notice to the other parties may by its delay cause substantial losses. It is hoped that this problem would be avoided by orders shortening time and the voluntary agreement of the parties since neither side benefits if a crop is lost or a similar event occurs causing a loss or depreciation in the value of attached property. Would it be desirable to try to provide for an ex parte application in extraordinary circumstances?

We believe that Section 547.210 gives the court more flexibility than the present law to make an order that adequately protects all involved. We would expect, for example, that ordinarily the court would require collection of accounts receivable, choses in action, notes, and the like rather than sale at a discounted price. (Often the same procedure should be followed after judgment also; however, we have not tackled that problem here.) In this respect, we suggest that the second option in subdivision (b) be selected to govern sales of attached property, i.e., that such sales be made in a commercially reasonable manner. We concede that the phrase may be uncertain, and perhaps we should make clear that both the seller (receiver) and purchaser at such a sale are protected against liability; however, we suspect that an execution type sale simply does not bring a fair price in many situations.

Section 547.220. Subdivision (a) is based on present Section 559. The provisions in Section 559 relating to undertakings for the time being have

been deleted. We anticipate that these provisions will be restored and re-located in other sections of our statutory scheme.

Subdivision (b) incorporates the substance of the first sentence of present Section 546.

Section 547.230. This section is the same in substance as present Section 549; we have, however, made substantial changes in Section 689, the section incorporated by reference.

Section 547.240. We should cover this section in connection with the specific types of property referred to. Perhaps the only issue remaining is whether these provisions should be incorporated into the sections dealing with the specific types of property rather than gathered here in one section.

Sections 689 and 689b. These sections (see Exhibit II--yellow) present the basic problem of how best to protect the prior rights of third persons who have an interest in the defendant's (or judgment debtor's) property. We have redrafted Section 689, and our approach has been to permit any person with an interest of any sort in any property to file a third-party claim and to authorize the court simply to order a proper disposition of the property. We suspect that you will want us to tighten up the language of the section, but we need first some direction as to the basic approach. It is our feeling that any person should have the ability to make a third-party claim--whether the property be real or personal and whether his interest be that of a fee owner, pledgee, holder of a possessory lien (e.g., garage-keeper's lien), and so on. However, if the section is given such broad coverage, the court must be given similar broad discretion to make appropriate orders dealing with the property. For example, where the third person is in fact the owner of the entire property (i.e., the defendant has no interest at all in the property and the levy was simply a mistake), the levy

and the property should be released to the third person. On the other hand, where the third person's interest is more limited, his rights may be adequately protected even though the property and the levy is not released, particularly if we permit the third person to apply for an order protecting his rights pending further proceedings.

We also think that any third person should be able to secure the release of the levy and property upon the posting of an adequate undertaking. Section 710b now refers only to personal property. Should we change this?

We wonder whether proceedings under Section 689 are appropriate for trying title to property or whether the court should only make a finding of "probable validity" and take action accordingly, leaving title to be tried in a quiet title action or similar proceeding.

We have not tried to redraft Section 689b because Professor Riesenfeld raises a basic policy issue with respect to this section. Section 689b presently requires the levying party to pay off the security interest prior to a sale of the chattel. (Section 689b is now phrased in terms of conditional sales and chattel mortgages instead of nonpossessory security interests; this technical deficiency is one we will take care of in any event.) Professor Riesenfeld believes this is unreasonable; he suggests that, if the security interest is perfected, the secured person can be protected simply by making any sale of the property subject to the perfected interest. What is the Commission's desire on the point?

Presently, chattels subject to a possessory security interest are reached by garnishment. (We have, however, suggested that seizure may be appropriate for some types of property.) A sale is permitted only upon payment of the secured debt. Query: Should the plaintiff be permitted, or required, to fulfill a pledge and become subrogated to the rights of the pledgee?

There still remain a number of technical changes (and probably a number of substantive ones will arise) related to the method of levy and realization on the levy; however, we believe we have raised a major portion of the issues in the materials above and, with the help of Professors Riesenfeld and Warren at the May meeting, we hope we can make progress in working out satisfactory levy procedures.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT I

Article . Method of Levy; Disposition of Attached
Property Prior to Judgment; Lien of Attachment

§ 547.010. Definitions

547.010. As used in this article:

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

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

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

(d) "Chose in action" means any right to payment of a fixed or reasonably ascertainable amount which is not an account receivable and is not evidenced by a negotiable instrument, security, chattel paper, or judgment. The term includes an interest in or a claim under an insurance policy.

(e) "Deposit account" means any of the following:

- (1) An account in any "bank" described in Section 102 of the Financial Code.
- (2) An account in any state or federal savings and loan association. As used in this paragraph, "account" includes investment certificate, share account, and withdrawable share.
- (3) An account for funds received from a member of a credit union, and all the accumulation on such account.

(f) "Equipment" means goods used or bought for use primarily in business (including farming or a profession) if they are not included in the definitions of inventory or farm products.

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

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

(i) A "motor vehicle" means a "motor vehicle" as defined by Section 415 of the Vehicle Code.

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(j) A "negotiable instrument" means a "negotiable instrument" as defined by Section 3104 of the Commercial Code.

(k) A "security" means a "security" as defined by Section 8102 of the Commercial Code.

§ 547.020. Writ of attachment; notice of attachment; levying officer shall promptly comply with writ

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

(b) The "Notice of Attachment" shall inform the person who is served with the attachment of: (1) the capacity in which he has been served; (2) the specific property in his possession which is sought to be attached; (3) his rights under the attachment, including the right to make a third-party claim pursuant to Section 689; and (4) his duties under the attachment.

(c) The writ may be directed to any sheriff or constable or marshal of any county in which property of the defendant described in the writ may be and shall require him to attach and safely keep such property.

(d) The levying officer to whom the writ is directed and delivered shall execute the same without delay in the manner provided in this article.

(e) Where service of a writ and a notice of attachment is required by this article, such service shall be made upon the person upon whom summons may be served. Provided, however, that service upon (1) a bank, (2) a savings and loan association, (3) a credit union, (4) a title insurance company or underwritten title company (as defined in Section 12402 of the Insurance Code), or (5) an industrial loan company (as defined in Section 18003 of the Financial Code) shall be made at the office or branch thereof which has actual possession of the property levied upon or at which the deposit account levied upon is carried and shall be made upon the officer, a manager, or other person in charge of such office or branch.

§ 547.030. Real property

547.030. (a) Any interest in real property shall be attached by the levying officer recording with the recorder of the county in which the property is located a copy of the writ and the notice of attachment.

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

(c) Not more than sixty (60) days after the date of recording, the levying officer shall serve the defendant and any third person in whose name the property stands on such date with a copy of the writ and the notice. [Where service is not made within the prescribed time, the plaintiff shall be subject to liability for slander of title without proof of malice or lack of privilege or justification.]

§ 547.040. Deliverable personal property in the possession of the defendant

547.040. Except as otherwise provided in this article, tangible personal property capable of manual delivery, in the possession of the defendant, shall be attached by the levying officer (1) taking such property into custody and (2) serving the defendant with a copy of the writ and the notice of attachment.

§ 547.050. Deliverable personal property in the possession of a third person; demand to retain possession; liability of third person; demand for removal

547.050. (a) Except as otherwise provided in this article, tangible personal property capable of manual delivery, belonging to the defendant but in the possession of another person, shall be attached by the levying officer (1) taking such property into custody and (2) at the same time serving the person in possession of such property with a copy of the writ and the notice of attachment.

(b) At the time of levy, the levying officer shall also serve upon the person in possession, a notice advising such person that, if he has a right to the possession of such property as pledgee or [by virtue of some other interest in the property], he may retain possession by making demand upon the levying officer. Such demand shall be made in writing upon a form furnished by the levying officer and shall identify the property attached and state the basis of the person's right to possession. Where such demand is made, the levying officer shall not take custody of the property and the attachment shall be complete upon the service of the writ and notice of attachment. The person in possession of the attached property shall be liable to the plaintiff for the value of the defendant's interest in such property until the attachment is released or discharged or the property is delivered to the custody of the levying officer [pursuant to subdivision (c)].

(c) Where the person in possession has elected to retain possession, he may, at any subsequent time, upon written demand, require the levying officer to take such property into custody. In such case, the levying officer shall make demand on the plaintiff for expenses in the manner

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provided in Section 547.190. In the event that the money so demanded in not paid, the levying officer shall release the property to the person from whom it was taken in the manner provided in [_____].

§ 547.060. Personal property not capable of manual delivery

547.060. Except as otherwise provided in this article, tangible personal property not capable of manual delivery shall be attached by the levying officer (1) filing with the Office of the Secretary of State a notice in the form prescribed by the Secretary of State and (2) serving the person in possession of such property and the defendant, if he is not the person in possession, with a copy of the writ and the notice of attachment. Such service shall be made not more than five days after the date of filing with the Office of the Secretary of State. The notice filed with the Office of the Secretary of State shall (1) contain the name and mailing address, if known, of both the plaintiff and the defendant in the described action, (2) describe the specific property attached, and (3) state that the plaintiff in the action has acquired an attachment lien in the specified property of the defendant.

§ 547.070. Growing crops

547.070. (a) Growing crops, or any interest therein, shall be attached by the levying officer (1) recording with the recorder of the county a copy of the writ and the notice of attachment and (2) either serving an occupant of the real property upon which the crops are growing, if there is one upon the property at the time service is attempted, with a copy of the writ and the notice or, if there is no occupant then on the property, posting the same in a conspicuous place on such property. Such service or posting shall be made not more than five days after the date the writ and the notice is recorded.

(b) Where the real property upon which the crops are growing stands in the name of a third person, either alone or together with the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such third person.

(c) Service upon the occupant may be made by leaving the copy of the writ and the notice with the occupant personally or, in his absence, with any person of suitable age and discretion found upon the property at the time service thereof is attempted and who is either an employee or agent of such occupant or a member of his family or household.

(d) Where the real property described in the writ consists of more than one distinct lot, parcel, or governmental subdivision, and any of such lots, parcels, or governmental subdivisions lie with relation to any of the others so as to form one contiguous unbroken tract, only one service or posting need be made as to such tract.

(e) Not more than sixty (60) days after the date of recording, the levying officer shall serve upon the defendant and any third person in

§ 547.070

whose name the real property upon which the crops are growing stands on such date with a copy of the writ and the notice. [Where the service required by this subdivision is not made within the prescribed time, the plaintiff shall be subject to liability for slander of title without proof of malice or lack of privilege or justification.]

§ 547.080. Equipment

547.080. Except as provided in Section 547.090, equipment of a going business shall be attached by the levying officer (1) filing with the Office of the Secretary of State a notice in the form prescribed by the Secretary of State and (2) serving the person in possession of such equipment and the defendant, if he is not the person in possession, with a copy of the writ and the notice of attachment. Such service shall be made not more than five days after the date of filing with the Office of the Secretary of State. The notice filed with the Office of the Secretary of State shall (1) contain the name and mailing address, if known, of both the plaintiff and the defendant in the described action, (2) describe the specific property attached, and (3) state that the plaintiff in the action has acquired an attachment lien in the specified property of the defendant.

§ 547.090. Motor vehicles

547.090. (a) A motor vehicle for which a certificate of ownership has been issued by the Department of Motor Vehicles shall be attached by the levying officer (1) taking such certificate into custody and (2) filing with the department a notice complying with the provisions of subdivision (c).

(b) If, for any reason, the levying officer is unable to take the certificate of ownership into custody, he shall take the vehicle into custody until such time as the certificate is delivered to him.

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

(d) Not more than thirty (30) days after the date of filing, the levying officer shall serve the defendant and the legal owner of the vehicle as shown by the records of the department on such date with a copy of the writ and the notice of attachment.

§ 547.100. Farm products and inventory of a going business

547.100. (a) Except as provided in subdivision (b), [farm products or] inventory of a going business [conducted in premises separate from the defendant's principal place of residence?] shall be attached by the levying officer (1) serving the defendant with a copy of the writ and the notice of attachment and (2) placing a keeper in charge of such property for a period not to exceed eight days. During such period, the defendant may continue to operate his [farm or] business at his own expense provided all sales are for cash and the [full?] proceeds are given to the keeper for the purposes of the levy unless otherwise authorized by the plaintiff. After the end of such period, the levying officer shall take such property into his exclusive custody unless other disposition is made by the court or the parties to the action.

(b) Upon the instructions of the plaintiff, farm products or inventory of a going business may be attached by the levying officer (1) filing with the Office of the Secretary of State a notice in the form prescribed by the Secretary of State which indicates that the plaintiff has acquired an attachment lien in such property of the defendant and (2) serving the defendant with a copy of the writ and the notice of attachment.

(c) Where property is levied upon pursuant to subdivision (a), either party is entitled to a hearing for the purpose of determining whether an order should be issued pursuant to this subdivision. The party making the motion for hearing shall give not less than three (3) days' notice to the other party. The hearing must be held within five (5) days after the filing of the motion unless for good cause the court orders otherwise. At such hearing, upon good cause shown, the court

§547.100

may make such order as it deems appropriate to protect the plaintiff against frustration of the collection of his claim but which avoids undue interference with the defendant's operations. Such order may include the removal of the keeper or such modifications in his duties as the court in its discretion may provide and may require the plaintiff to continue his levy by filing and service pursuant to subdivision (b).

§ 547.110. Accounts receivable; choses in action

547.110. (a) An account receivable or a chose in action shall be attached by the levying officer serving the account debtor or the insurer, in the case of an interest in or a claim under an insurance policy, with a copy of the writ and the notice of attachment.

(b) No more than thirty (30) days after the date of service on the account debtor, the levying officer shall serve the defendant [and any other person identified by the account debtor as an obligee] with a copy of the writ and the notice of attachment.

§ 547.120. Chattel paper

547.120. (a) Chattel paper shall be attached by the levying officer (1) taking the chattel paper into custody and (2) serving the person in possession of such chattel paper with a copy of the writ and the notice of attachment.

(b) Not more than thirty (30) days after the chattel paper is attached, the levying officer shall serve the account debtor and the defendant, if he was not the person in possession of the chattel paper, with a copy of the writ and the notice of attachment.

§ 547.130. Negotiable instruments

547.130. (a) A negotiable instrument shall be attached by the levying officer (1) taking such instrument into custody and (2) serving the person in possession of such instrument with a copy of the writ and the notice of attachment.

(b) Not more than thirty (30) days after the negotiable instrument is attached, the levying officer shall serve the defendant, if he was not the person in possession, and any person obligated under the instrument with a copy of the writ and the notice of attachment.

§ 547.140. Securities

547.140. (a) Except as provided in subdivision (b), a security shall be attached by the levying officer (1) taking the security into custody and (2) serving the issuer, the person in possession of such security, and the defendant, if he is not the person in possession, with a copy of the writ and the notice of attachment.

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

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

547.150. Any judgment owing to the defendant shall be attached by the levying officer (1) filing in the action from which the judgment arose a copy of the writ and the notice of attachment and (2) serving a copy of the writ and the notice upon the judgment debtor in such action and the defendant to whom the judgment is owed.

§ 547.160. Interest in estate of decedent

547.160. (a) The interest of a defendant in personal property belonging to the estate of a decedent, whether by testate or intestate succession, shall be attached by the levying officer (1) serving the defendant and the personal representative of the decedent with a copy of the writ and the notice of attachment and (2) filing a similar copy of the writ and the notice in the office of the clerk of the court in which the estate is being administered.

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

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

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

§ 547.170. Deposit accounts

547.170. (a) A deposit account shall be attached by the levying officer serving the financial institution holding such account with a copy of the writ and the notice of attachment.

(b) Not more than sixty (60) days after the date the deposit account is attached, the levying officer shall serve the defendant and any other person in whose name the account is held, with a copy of the writ and the notice of attachment.

§ 547.180. Levy on deposit account or property in safe deposit box not wholly in name of defendant; nonliability of bank, trust company, savings and loan association, or safe deposit corporation

547.180. (a) The provisions of this section shall apply where the following personal property is sought to be attached:

(1) Any deposit account, or interest therein, not standing in the name of the defendant alone; or

(2) Property in a safe deposit vault or box maintained by a bank, trust company, savings and loan association, or other corporation authorized and empowered to conduct a safe deposit business and rented by it to a person other than a defendant.

(b) Prior to levy, the plaintiff shall provide an undertaking in an amount not less than twice the amount of the plaintiff's claim. Such undertaking shall indemnify any person, other than the defendant, who is rightfully entitled to the property (which person need not be named specifically in said undertaking but may be referred to generally in the same manner as in this sentence), against actual damage by reason of the taking or holding of the property and assuring to such person the return of the property to him upon proof of his right thereto.

(c) While the attachment is in force, no bank, trust company, savings and loan association, or safe deposit corporation shall be liable to any person by reason of:

- (1) Its compliance with the levy;
 - (2) The nonpayment of any check or other order for the payment of money drawn or presented against the account;
 - (3) The refusal to pay any withdrawal in respect of the account;
 - (4) The removal, pursuant to the levy, of any of the contents of the safe deposit vault or box;
 - (5) The refusal to permit access to the safe deposit vault or box by the renter thereof.
- (d) Before giving access to any safe deposit vault or box, the bank, trust company, savings and loan association, or safe deposit corporation may demand payment to it of all costs and expenses of opening the safe deposit vault or box and all costs and expenses of repairing any damage to the safe deposit vault or box caused by the opening thereof.

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

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

(b) There shall be no liability upon the part of the levying officer to take or hold personal property unless the provisions of this section shall have been fully complied with.

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

§ 547.200. Execution of commercial paper by levying officer

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

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

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

§ 547.200

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

§ 547.210. Sale of or receiver for attached property; proceeds; receiver's expenses

547.210. (a) Whenever property is or may be attached, upon application of either party [or any third person whose interest has been determined pursuant to Section 689], after reasonable notice to the other party [parties] and a showing that the interests of the parties will be best served thereby, the court may order that such property be sold or may appoint a receiver to take charge of, cultivate, care for, preserve, collect, or sell such property.

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

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

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

§ 547.220. Return of writ; inventory

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

(b) The levying officer shall make a full inventory of any property attached and return such inventory with the writ.

§ 547.230. Third party claims to attached property

547.230. In any case where a third person claims an interest in any property attached, the rules and proceedings applicable in cases of third party claims under Section 689 shall apply.

§ 547.240. Lien of attachment; effective date; exception

547.240. (a) The lien of attachment on an interest in real property and on growing crops becomes effective upon the date of recording pursuant to Sections 547.030 and 547.070.

(b) The lien of attachment on property levied on pursuant to Sections 547.040, 547.050, and 547.100(a) becomes effective on the date the levying officer takes custody of such property provided, however, if such property is not taken into custody pursuant to subdivision (b) of Section 547.050, the lien of attachment becomes effective on the date of service of the writ and the notice on the person in possession.

(c) The lien of attachment on property levied on pursuant to Sections 547.060, 547.090, and 547.100(b) becomes effective on the date of filing pursuant to those sections; [provided, however, if service is not completed within the time required by those sections, the lien of attachment shall cease, and the court, on the application of any person, shall order the discharge of such writ].

(d) The lien of attachment on property levied on pursuant to Section 547.110 becomes effective on the date of service on the account debtor or insurer.

(e) The lien of attachment on chattel paper becomes effective on the date the chattel paper is taken into custody.

(f) The lien of attachment on a negotiable instrument becomes effective on the date the instrument is taken into custody.

(g) The lien of attachment on securities becomes effective on the date the security is taken into custody? or notice is given to the issuer? or escrow holder?].

(h) The lien of attachment on a judgment levied on pursuant to Section 547.150 becomes effective on [the date of notice to the judgment debtor?].

(i) The lien of attachment on property levied on pursuant to Section 547.160 becomes effective on [the date of service on the personal representative? of filing with the probate court?].

(j) The lien of attachment on a deposit account becomes effective on the date of service on the financial institution.

[(k) Notwithstanding subdivisions (a) through (j) of this section, where a temporary restraining order has been issued pursuant to Section _____, any lien of attachment subsequently acquired on property subject to such an order shall, as to any other levy of attachment or execution, relate back to the date of service of such order.]

EXHIBIT II

§ 689 (added). Third-party claims; release; undertaking by plaintiff; justification of sureties; sufficiency of undertaking; appraisal of property; liability of officer; hearing; notices; continuance; protective orders; jury trial; appeals

689. (a) As used in this section, "plaintiff" means the person in whose favor a writ runs and "defendant" means the defendant or judgment debtor whose property is sought to be levied upon.

(b) A third person who seeks to claim an interest in any [personal] property levied upon under either a writ of attachment or a writ of execution shall serve upon the levying officer a verified written claim which describes such interest, states the reasonable value thereof and the facts upon which such claim is based, and states the address to which any notices required by this section may be mailed.

(c) The levying officer shall send to the plaintiff by first-class mail, postage prepaid, a copy of the third-party claim and a demand that the plaintiff file an undertaking in the court in which the action is pending. Such demand shall be made notwithstanding any defect, informality, or insufficiency of such claim. The undertaking shall be executed in the manner provided by [] in a sum equal to double the value of the interest of the third person, as stated in his claim or as determined in the manner prescribed herein. Such undertaking shall be made in favor of and shall indemnify the third person against any loss, liability, damages, costs and attorney's fees, by reason of the levy [or any steps taken to enforce such levy]; provided, however, that, where the property levied upon is required by law to be registered or

recorded in the name of the owner and it appears that at the time of the levy the defendant was the registered or record owner of such property and the plaintiff caused the levy to be made and maintained in good faith, and in reliance upon such registered or record ownership, there shall be no liability thereunder to the third person by the plaintiff or his sureties. If the plaintiff fails to file the undertaking within 10 days after the demand is sent, the levying officer shall release the levy [in the manner provided in Section _____].

(d) If the plaintiff files an undertaking, he shall also send to the third person by first-class mail, postage prepaid, notice of filing of the undertaking. If no exception is taken by the third person within 10 days after such notice is sent, the third person shall be deemed to have waived all objections to the sufficiency of the sureties. The third person may except to the sufficiency of the sureties

in the manner provided by [_____]. When excepted

to, the plaintiff's sureties shall justify in the manner provided by Sections 1057 and 1057a. Such justification shall be made within seven days of the filing and sending of the notice of exception and upon not less than two-days notice to the third person. Upon failure to justify, or if others in their place fail to justify, the levy shall be released.

(e) On motion of either the plaintiff or the third person, after notice and hearing, the court may order the amount of the undertaking increased or decreased as it deems necessary for the protection of the

third person; provided, however, that, in no event, shall the amount of the undertaking be less than the value of the interest of the third person. If it becomes necessary to ascertain the value of the interest involved, such interest may be appraised by one or more disinterested persons, appointed for that purpose by the court from which the writ issued, or the court may direct a hearing to make such determination. If, upon such appraisal or hearing, the court finds that the undertaking given is not sufficient, an order shall be made fixing the amount of such undertaking, and within five days thereafter an undertaking in the amount so fixed may be given in the same form and manner and with the same effect as the original.

(f) Whether or not the plaintiff gives an undertaking as required by this section, the third person may secure the release of the levy by giving an undertaking under the provisions of Section 710b.

(g) Whenever a third-party claim has been filed as provided herein, either the plaintiff or the third person may request a hearing in the court from which the writ issued for a hearing to determine the proper disposition of the property. The court shall set the matter for hearing on a date not more than 20 days after the date of filing of the written request; provided, however, that the court may continue the matter for good cause shown. Not less than 10 days before the day set for the hearing, the court clerk shall send a notice of the time and place of the hearing to the plaintiff and the third person by first-class mail, postage prepaid. [Whenever the request for a hearing is filed by a

third party, neither such request nor proceedings pursuant thereto may be dismissed without the consent of the plaintiff.] The court may order the sale of any perishable property held by the levying officer and direct the disposition of the proceeds of such sale. The court may, by order, stay execution sale, or forbid a transfer or other disposition of the property involved, until these or other proceedings can be prosecuted to termination, and may require, as a condition of such order, such bond as the court may deem necessary. Such orders may be modified or vacated by the court at any time prior to the termination of such proceedings, upon such terms as may be just. [Nothing herein contained shall be construed to deprive anybody of the right to a jury trial in any case where, by the Constitution, such right is given, but a jury trial shall be waived in any such case in like manner as in the trial of an action.] No findings shall be required in any proceedings under this section. At the conclusion of the hearing, the court shall order such disposition of the property as it deems proper.

(h) The levying officer shall not be liable for any damages to any third person or plaintiff for any actions taken in accordance with the provisions of this section.

§ 689 (repealed)

Sec. . Section 689 of the Code of Civil Procedure is repealed.

689. If tangible or intangible personal property levied on, whether or not it be in the actual possession of the levying officer, is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out the reasonable value thereof, his title and right to the possession thereof and delivered, together with a copy thereof, to the officer making the levy, such officer must release the property and the levy unless the plaintiff, or the person in whose favor the writ runs, within five days after written demand by such officer, made by registered or certified mail within five days after being served with such verified claim, gives such officer an undertaking executed by at least two good and sufficient sureties, in a sum equal to double the value of the property levied upon.

Such undertaking shall be made in favor of and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such levy or such seizing, taking, collecting, withholding, or sale of such property by such officer; provided, however, that where the property levied upon is required by law to be registered or recorded in the name of the owner and it appears that at the time of the levy the defendant or judgment debtor was the registered or record owner of such property and the plaintiff, or the person in whose favor the writ runs, caused the levy to be made and maintained in good faith, and in reliance upon such registered or record ownership, there shall be no liability thereunder to the third person by the plaintiff, or the person in whose favor the writ runs, or his sureties, or the levying officer.

Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment. If they, or others in their place, fail to justify at the time and place appointed, such officer must release the property and the levy; provided, however, that if no exception is taken within five days after notice of receipt of the undertaking, the third person shall be deemed to have waived any and all objections to the sufficiency of the sureties.

If objection be made to such undertaking, by such third person, on the ground that the amount thereof is not sufficient, or if for any reason it becomes necessary to ascertain the value of the property involved, the property involved may be appraised by one or more disinterested persons, appointed for that purpose by the court in which the action is pending or from which the writ issued, or by a judge thereof, or the court or judge may direct a hearing to determine the value of such property.

If, upon such appraisal or hearing, the court or judge finds that the undertaking given is not sufficient an order shall be made fixing the amount of such undertaking, and within five days thereafter an undertaking in the amount so fixed may be given in the same form and manner and with the same effect as the original.

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The officer making the levy may demand and exact the undertaking herein provided for notwithstanding any defect, informality or insufficiency of the verified claim delivered to him. Such officer shall not be liable for damages to any such third person for the levy upon, or the collection, taking, keeping or sale of such property if no claim is delivered as herein provided, nor, in any event, shall such officer be liable for the levy upon, or the holding, release or other disposition of such property in accordance with the provisions of this section.

If such undertaking be given, the levy shall continue and such officer shall retain any property in his possession for the purposes of the levy under the writ; provided, however, that if an undertaking be given under the provisions of Section 710b of this code, such property and the levy shall be released.

Whenever a verified third party claim is delivered to the officer as herein provided, upon levy of execution or attachment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining title to the property in question. Such hearing must be granted by the said court upon petition therefor, which must be filed within 15 days after the delivery of the third party claim to the officer. Such hearing must be had within 20 days from the filing of such petition, unless continued as herein provided. Ten days' notice of such hearing must be given to the officer, to the plaintiff or the person in whose favor the writ runs, and to the third party claimant, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question; provided, that no such notice need be given to the party filing the petition. The court may continue the hearing beyond the said 20-day period, but good cause must be shown for any such continuance. Whenever the petition for such hearing is filed by the third party claimant, or by any one or more joint third party claimants, neither such petition nor proceedings pursuant thereto may be dismissed without consent of the plaintiff or the person in whose favor the writ runs. The court may order the sale of any perishable property held by such officer and direct the disposition of the proceeds of such sale. The court may, by order, stay execution sale, or forbid a transfer or other disposition of the property involved, until the proceedings for the determination of such title can be commenced and prosecuted to termination, and may require, as a condition of such order, such bond as the court may deem necessary. Such orders may be modified or vacated by the judge granting the same, or by the court in which the proceeding is pending, at any time prior to the termination of such proceedings, upon such terms as may be just. At the hearing had for the purpose of determining title, the third party claimant shall have the burden of the proof. The third party claim delivered to the officer shall be filed by him with the court and shall constitute the pleading of such third party claimant, subject to the power of the court to permit an amendment in the interest of justice, and it shall be deemed controverted by the plaintiff or other person in whose favor the writ runs. Nothing herein contained shall be construed to deprive anybody of the right to a jury trial in any case where, by the Constitution, such right is given, but a jury trial shall be waived

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in any such case in like manner as in the trial of an action. No findings shall be required in any proceedings under this section. At the conclusion of the hearing the court shall give judgment determining the title to the property in question, which shall be conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have said property levied upon, taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment. In such judgment the court may make all proper orders for the disposition of such property or the proceeds thereof. If the property or levy shall have been released by the officer for want of an undertaking, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake or levy upon the property on such writ if the writ is still in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take or otherwise levy upon such property. An appeal lies from any judgment determining title under this section, such appeal to be taken in the manner provided for appeals from the court in which such proceeding is had.

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§ 689a (repealed)

Sec. . Section 689a of the Code of Civil

Procedure is repealed.

689a.

Personal property in possession of the buyer under an executory agreement of sale and property on which there is a chattel mortgage may be taken under attachment or execution issued at the suit of a creditor of the buyer or mortgagor, notwithstanding any provision in the agreement or mortgage for default or forfeiture in case of levy or change of possession.

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Comment. Section 689a is superseded by Section 9311 of the Commercial Code which provides as follows:

§ 9311. Alienability of Debtor's Rights: Judicial Process. The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer but a provision in the security agreement making the transfer constitute a default is valid.

CP 3492

§ 689b. Personal property under purchase contract or mortgage; motor vehicles; claim of seller or mortgagee; tender and deposit; determining validity of contract or mortgage

(1) Vehicle or vessel; notice to legal owner.

(1) Where the property levied upon is a vehicle or a vessel required to be registered with the Department of Motor Vehicles, the officer shall forthwith determine from such department the name and address of the legal owner of the vehicle or vessel and shall notify any such legal owner who is not also the registered owner of such vehicle or vessel of the levy by registered mail or certified mail or personal service.

(2) Claim of seller or mortgagee

(2) A seller or mortgagee may file with the officer levying on personal property a verified written claim, together with a copy thereof, containing a detailed statement of the sales contract or mortgage and the total amount of sums due or to accrue to him under the contract or mortgage, above setoffs, with interest to date of tender, and also stating therein his address within this state for the purpose of permitting service by mail upon him of any notice in connection with said claim. The officer making the levy may demand and exact the payment or undertaking herein provided for, notwithstanding any defect, informality or insufficiency of the verified claim delivered to him.

(3) Demand for claimed debt.

(3) Within five days after being served with such verified claim the officer levying on such property must make demand by registered mail or certified mail on the plaintiff or his attorney for the amount of the claimed debt and interest due to date of tender or the delivery to the officer of an undertaking and statement as hereinafter provided, which demand shall include the copy of such claim.

(4) Deposit or undertaking, release.

(4) Within five days after receipt by the plaintiff or his attorney of such officer's demand the plaintiff shall deposit with the officer the amount of such debt and interest or deliver the undertaking and statement hereinafter provided, or the levying officer must release the property.

(5) Payment or tender.

(5) Within five days after receipt by him of such deposit the officer must pay or tender same to the seller or mortgagee; provided, that should such deposit be made by check the officer shall be allowed a reasonable time for check to clear.

(6) Tender accepted.

(6) If the tender is accepted, all right, title, and interest of the seller or mortgagee in the property levied upon shall pass to the party to the action making the payment.

(7) Tender refused.

(7) If the tender is refused, the amount thereof shall be deposited with the county treasurer, payable to the order of the seller or mortgagee.

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(8) Sale, suspension, authorization.

(8) Until such payment or deposit covering such claim is made, or the undertaking and statement herein provided delivered to the officer, the property cannot be sold under the levy; but when made (and also in case the seller or mortgagee fails to render his claim within 30 days after the personal service upon him of a written demand therefor, which service must be attested by the certificate of the serving officer, filed before the sale with the papers of the action wherein the attachment or execution was issued), then the officer must retain the property, and, in the case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee. Such written demand of the levying officer may be served by him, or for him by any sheriff, marshal, or constable whose office is closer to the place of service, and whose fees and mileage shall be paid out of the prepaid fees in the possession of the levying officer.

(9) Statement of invalidity, undertaking, retention or sale.

(9) When an attachment or execution creditor presents to the officer, within the time allowed from the officer's demand, a verified statement that the sales contract or mortgage is void or invalid for the reasons specified therein, and delivers to the officer a good and sufficient undertaking in double the amount of the indebtedness claimed by the seller or mortgagee or double the value of the personal property as the officer may determine and require, the officer shall retain the property and in case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee.

Undertaking.

The undertaking shall be made to the seller or mortgagee and shall indemnify him for the taking of the property against loss, liability, damages, costs and counsel fees. Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment.

Liability officer.

If such undertaking be given, such officer shall not be liable for damages to any such claimant for the taking, keeping, or sale of such property in accordance with the provisions of this code.

(10) Hearing, judgment, jurisdiction.

(10) Whenever a verified claim herein is delivered to the officer as herein provided, upon levy of execution or attachment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the claimant, or any one or more such joint claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the validity of such sales contract or chattel mortgage. Such hearing may be had and taken, and stay of execution or other order made in the same manner as on third party claims under Section 689 of this code. At the conclusion of the hearing the court shall give judgment determining the validity of the claim under the sales contract or chattel mortgage which shall be conclusive between the claimant and the plaintiff, or other person in whose favor the writ runs. The court in which the action is pending, or which issued such writ, shall have original jurisdiction in all proceedings under this section.

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Retaking of released property.

If the property shall have been released by the officer for want of an undertaking or payment, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake the property on such writ, if the writ shall still be in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take such property.

Creditors' Remedies
Respecting Patents, Copyright and Trade Marks

I

Patents

The United States Patent Code, 35 U.S.C.A., § 261 provides:

"Subject to the provisions of this title, patents shall have the attributes of personal property.

Applications for patents, patents, or any interest therein shall be assignable in law by an instrument in writing An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, unless it is recorded in the Patent Office within three months from its date or prior to the date of such subsequent purchase or mortgage."

Provisions of this type also existed under prior patent statutes.

In Ager v. Murray, 105 U.S. 126, 26 L.Ed. 942 (188) it was held that patents could be reached by creditors bill. Mr. Justice Gony, writing the opinion expressly approved Gillette v. Bate, 86 N.Y. 87 (1881) and Pacific Bank v. Robinson, 57 Cal. 520 (1881) in which the Court of Appeals of New York and the Supreme Court of California held that a patent could be reached by creditors bills or supplementary proceedings. Mr. Justice Gony, however, expressed doubts whether patents are subject to a levy of execution. He cited Stevens v. Gladding, 17 Nov. 447 (1854) in which Mr. Justice Curtis questioned the possibility of reaching patent rights by levy and added: "The difficulties of which the learned Justice here speaks are of seizing and selling a patent or copyright upon an execution at law, which is ordinarily levied only upon property,

or the rents and profits of property, that has itself a visible and tangible existence within the jurisdiction of the court and the precinct of the officer; and do not attend decrees of a court of equity, which are in personam, and may be enforced in all cases where the person is within its jurisdiction."

In Inventions Corp. v. Hobbs, 244 Fed. 430 (2d Cir. 1917) Judge Learned Hand held that a receiver in supplementary proceedings could validly sell patents of the judgment debtor and that the debtor could be compelled to execute the requisite assignment to the purchaser. "It is true that patents are not subject to seizure and sale on execution. Ager v. Murray, 105 U.S. 126, 26 L.Ed. 942, and there is authority to the effect that a receiver, such as one in supplementary proceedings, does not by virtue of his appointment, acquire title to patent rights. It is, however, well settled that a court of equity may order or decree that the proper person shall execute such assignment or other instrument as may be necessary to vest the title of the patent in the person entitled thereto. Ager v. Murray, supra; Gillette v. Bates, 86 N.Y. 87."

The question arises whether this is still the law in jurisdictions in which the writs of execution and attachment have been extended to intangible personal property.

- a) In New York apparently a writ of execution cannot be levied upon patents and copyrights and the judgment creditor must resort to

proceedings under CPLR §§ 5225 and 5228, but seemingly a writ of attachment can be levied upon such rights. This incongruity results from the difference in the wording of § 5232 (relating to the levy of an execution upon personal property) and § 6214 (relating to the levy of an attachment). The levy of a writ of execution on personal property not capable of manual delivery can only be made by service of the execution upon a garnishee. A garnishee is defined as a person other than the judgment debtor. CPLR § 105(h). Conversely, a writ of attachment can be levied by serving the writ on a garnishee (as defined for that purpose in CPLR § 6202) or on the defendant. Weinstein, Korn and Miller, in their commentaries on New York Civil Practice, ¶ 6206.06, have concluded that patents, copyrights and trademarks are subject to attachment but do not deal with the question as to whether or how they are reached on execution. Certainly CPLR §§ 5201(b) and 5202 distinguish between enforcement by execution and enforcement by other proceedings.

- b) In Pennsylvania, levy and attachment were formerly distinguished and fieri facias applied only to chattels. The question of whether patents were subject to a levy of a writ of execution was the subject of a number of judicial decisions which were reviewed in McClaskey v. Harbison-Walker Refractories, 138 F2 493 (3d Cir. 1943). In that case, the court dealt with the question of whether the sheriff could make an effective assignment of a patent under an alias writ of execution

issued pursuant to Penn. 12 Purd. Stat. § 1337 dealing with executions against corporations. The court held that § 1337 amounted to a special writ of fieri facias which gave the sheriff the power to levy on a patent and sell the same and that the sheriff acted as "legal representative" authorized to assign a patent, as provided in the U.S. Patent Law (then R.S. § 4898). In executions against non-corporate debtors the debtor could invoke an act of 1889 (17 P.S. § 294) which gave the courts special powers to reach and apply rights of the judgment debtor in copy-rights and letters patent. 17 P.S. § 294 is kept in force under the New Rules by Rule 3241 (77). Conversely, 12 Purd. Stat. § 1337 is suspended by Rule 3241 (67). Hence in Pennsylvania patents and copyrights can now be reached only by proceedings under 17 P.S. § 294.

- c) In California, the rule that patents could be reached only by supplementary proceedings was settled in that sense in Peterson v. Sheriff of S. Francisco, 115 Cal. 211 (1898). Meacham v. Meacham, 262 CA 2d 248, 68 Cal.Rptr. 746 is no valid authority to the contrary. California, however, holds that a receiver appointed in supplementary proceedings needs an assignment by the judgment debtor, Finnegan v. Finnegan, 64 CA 2d 109 (1944)

II

Copyrights

Copyrights are subject to the same analysis as patents. Copyrights are different from the property in the copyrighted material, 17 U.S.C. § 27. They are subject to assignments and encumbrances, 17 U.S.C. § 28. Assignments must be recorded, 17 U.S.C. § 30. Hence they are not subject to a writ of fieri facias at common law, Dart v. Woodhouse, 40 Mich 399 (1879). They are, however, subject to the reach of creditors by means of supplementary proceedings or creditors bills. The matter was discussed in a lengthy discussion by Judge Yankwich in Security-First Nat. Bank v. Republic Pictures Corp., 97 Fed. Supp. 360 (S.D.Cal. 1951). He took the view that ordinarily copyrights are subject to bills in equity by creditors but not to levies under a writ of execution. The case was reversed on jurisdictional grounds in Republic Pictures Corp. v. Security-First Nat. Bank, 197 F.2d 767 (9. Cir. 1952). The rule that copyrights can normally be reached only by bills in equity or supplementary proceedings was enunciated at an early date in Stevens v. Gladding, 17 How. 447, 15 L.Ed. 155 (1854).

III

Trademarks

It seems to be settled that registered trademarks cannot be assigned in gross and that therefore they are not subject to the reach of creditors except where the business itself is transferred, as in bankruptcy, Milliken v. Dart, 33 N.Y. Sup. Ct. 24 (1881); Ward-Chandler Bldg. Co. v. Caldwell, 8 CA 2d 375, 47 P.2d 758 (1936).

Conclusions

There seems to be no need to validate levies of incorporeal rights by serving a notice of levy on a judgment debtor. The only currently recognized exception applies to tangible property not capable of manual delivery. Ordinarily this will be equipment, in which case a lien notice should be filed with the Secretary of State, Present California law also contains rules permitting levy on franchises. C.C.P. § 724a. The method of the levy should be clarified, see 15 Op. Att. Gen. 35 (levy on liquor by garnishment of State Board of Equalization), People v. Lavley, 17 Cal. App. 331, 119 Pac. 1089 (1911), questioning Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199 (1893).

It is recommended that the rule of Meacham v. Meacham, *supra*, (be ^(if it permits levy by notice on the judgment debtor) expressly abolished and that contract rights to repeated payments are only reached by garnishment, supplementary proceedings, or charging order.

Meacham v. Meacham:
A critique.

One of the most disturbing recent cases on the enforcement of money judgments in California is Meacham v. Meacham, 262 C.A.2d 248, 68 Cal.Reptr. 746 (1968). In that case the judgment debtor was ordered to pay to his divorced wife stated sums for alimony, child support and counsel fees. Plaintiff's counsel obtained a writ of execution and levied on the judgment debtor's interest under an agreement with another party under which this party was authorized to manufacture and market a device (known as Wizard Wedge) in consideration of the payment of a certain percentage of the annual profits from the distribution. Subsequently the interest levied upon was sold at an execution sale to the attorney for the amount of his fees and costs, totalling \$161.87. After the sale the attorney transferred the rights under the contract to the wife and the children who several years later re-transferred them to the manufacturers of the device.

The judgment debtor failed to pay the alimony and his arrears, purportedly amounting to \$16,000, accumulated. At that point in time the judgment debtor was to receive a sizeable sum from his mother's estate. The wife, as judgment creditor, obtained a second writ of execution and had the sheriff levy on her ex-husband's share in the estate. Judgment debtor thereupon filed a motion to quash the second execution, to set aside the execution sale under the first execution, and to issue an order directing an entry of satisfaction.

In support of his motion plaintiff claimed that the manufacturers had paid in excess of \$13,000 under the agreement and that this sum should be

applied to the satisfaction of the judgment. ^{1/} Judgment creditor argued that the payments were not made under the agreement but because of family relationship between the parties for the reason that Wizard Wedge was not marketable and that the manufacturers had marketed another device of their own instead. ^{2/}

The District Court of Appeal affirmed the order of the Superior Court denying the motion. It held that the decisive issue was the validity of the execution sale and held that the sale was not subject to attack since the interest involved was subject to garnishment and sale and mere inadequacy of the price obtained at the execution sale was no reason for setting the sale aside.

The decision is most perplexing. In the first place, it never discussed the method of the levy, i.e., whether it was done by serving the notice of the levy on the manufacturer (garnishment) or on the judgment debtor. The briefs likewise are totally silent on that question. Apparently the parties assumed that the levy was by means of garnishment of the third party manufacturer, followed by a sale of the interest so levied upon.

Judge Lillie addressed herself solely to the question of whether an interest such as involved in the case was subject to garnishment and never reached the question whether levy by garnishment is followed by sale or by collection.

Judge Lillie discussed only two authorities, Early v. Town of Redwood City, 57 Calif. 193 (1881) and Brunskill v. Stutzman, 186 Cal.App.2d 97 (1960). The former case held that an assignment of compensation to be paid upon completion of the work, executed after a garnishment, prevailed

over a prior garnishment since at the time of the garnishment nothing was due as the work had not been completed. Brunskill v. Stutman, supra, dealt with the question of whether compensation that had been earned but was subject to a controversy between the contracting parties was subject to garnishment. The question of whether future payments depending on future action by the debtor or garnishee, such as the success of marketing by the garnishee, was subject to garnishment was not involved. Brunskill v. Stutman contained language indicating that Early v. Town of Redwood City should not be construed to require a matured and liquidated claim, but it did not state that obligations uncertain and unascertainable as to amount were subject to garnishment.

Even more perturbing is the holding of the court in the Heacham case to the effect that garnished claims are subject to execution sales. True, in the Early case there had been such a sale of the garnished amount. But since the garnishment was inoperative the court did not have to deal with that question.

In later cases, totally ignored by Judge Lillie, this question was much debated and resulted in conflicting lines of authority. The leading case in point is Turner v. Donovan, 64 Cal.App.2d 375 (1944). In that case a judgment creditor garnished a judgment debt owed to the judgment debtor by garnishing the judgment debtor's judgment debtor. Thereafter the garnished judgment which was for \$3,544 was sold for \$250. The judgment debtor moved to vacate the sale and the appellate held that the sale should be vacated for the reason that a garnished "debt-judgment" could not be sold on execution. The court disapproved Lantin v. Biscailuz,

35 Cal.2d 422 (1939) which had reached the opposite conclusion and issued mandamus to compel an execution sale. The court referred to Dore v. Daugherty, 72 Cal. 232, 13 Pac. 621 (1887) which had held that a judgment which was levied upon by garnishment was not subject to an execution sale, but distinguished it on the ground that it did not bar a sale of the debt evidenced by the judgment. None of these cases discussed either CCP. § 691 ("collecting or selling things in action") or §§ 717-720. The latter sections were construed in Boyle v. Hawkins, 71 C.2d 229, 455 P.2d 97 (1969). The court distinguished an action under CCP § 544 from an action under CCP § 720, pointing out that a judgment creditor may collect from the judgment debtor's debtor only after initiating proceedings under § 717, Boyle v. Hawkins, 71 C.2d 229 at 238 (1969). It could well be asked whether a judgment creditor should be able to short-circuit this procedure by selling the garnished debt to himself on an execution sale.

It would seem that a levy on a "debt" by notifying the attachment defendant or judgment debtor of the levy should be invalid.

In addition, a debt levied upon by garnishment should be collected (under CCP §§ 542 or 720) rather than sold, except pursuant to specific authorization by the court.

Moreover, contracts providing for contingent future payments should not be reached by levy at all, but by supplementary proceedings, as was correctly held in Hustead v. Superior Court, 2 CA 3d 780, Cal. Rptr. 26 (1969).

The law should be clarified in that sense.

1/ This information is taken from appellant's reply brief p. 14. Judge Lillie's opinion, 262 CA 2d 248 at 251 alludes to that fact and again refers to it on p. 253 fn. 2.

2/ Respondent's brief p. 3, accepted 262 CA 2d 248, at 251.