

#39.70

2/19/75

Memorandum 75-19

Subject: Study 39.70 - Prejudgment Attachment (Amendments)

Attached to this memorandum is a draft recommendation containing amendments to the Attachment Law which the Commission has previously decided upon. Some new matter is included in the attached draft recommendation. See especially the amendments concerning crops and timber in Sections 488.010(b) and 488.360(c). This recommendation needs to be approved for printing at the March meeting so that it may be introduced in the Legislature in time to have a chance for passage before the Attachment Law goes into effect.

A supplementary memorandum on attachment amendments will be sent to you as soon as we receive a reply to our request to the Los Angeles County Court Commissioners for their comments on Section 483.010 (cases in which attachment may be issued) and on the alternative amendments considered at the last meeting. (See Memorandum 75-17.) The supplementary memorandum will also present two alternative drafts of a procedure for making the defendant liable for the wrongful attachment of property of third persons where the plaintiff reasonably relies on the defendant's statements at the noticed hearing specifying property in his possession which is the property of third persons. The alternatives of Section 483.010 and the wrongful attachment amendments selected by the Commission will be included in the attached recommendation-- assuming it is approved for printing.

Respectfully submitted,

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Legal Counsel

STAFF DRAFT

RECOMMENDATION

relating to

AMENDMENTS TO THE ATTACHMENT LAW

The Attachment Law (Code Civ. Proc. §§ 481.010-492.090) was enacted in 1974¹ on recommendation of the Law Revision Commission. See Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701 (1973).² The new law will go into effect on January 1, 1976.³ The Commission has reviewed the Attachment Law as enacted and comments which have been received concerning it; this recommendation proposes a number of revisions in that statute.

Cases in Which an Attachment May Be Issued

[Text depends on decision--see First Supplement to Memorandum 75-19.]

Defendant's Liability for Plaintiff's Good Faith Levy on Property of Third Person

[Text depends on decision--see First Supplement to Memorandum 75-19.]

Insufficient Undertaking and Wrongful Attachment

Under the Attachment Law as enacted, it is unclear whether it is a wrongful attachment under Section 490.010 where the plaintiff fails to increase an undertaking when ordered to do so pursuant to Section 489.220 (undertaking to obtain a writ of attachment or protective order) or Section 489.410 (undertaking on appeal). The Commission recommends that it be made

1. Cal. Stats. 1974, Ch. 1516 (Assembly Bill No. 2948).

2. See also Report of Senate Committee on Judiciary on Assembly Bill 2948, Senate Journal 13010 (August 21, 1974).

3. Cal. Stats. 1974, Ch. 1516, § 49.

clear that the plaintiff's failure to increase the amount of the undertaking is not itself a wrongful attachment. The defendant is adequately protected in the event of a wrongful attachment under Section 490.010 because the original undertaking remains in effect,⁴ thereby providing a fund for recovery of damages for a wrongful attachment, and because the rights obtained by filing the now insufficient undertaking immediately cease,⁵ thereby minimizing any injury to the defendant's interests.

Court Commissioners

In its 1973 recommendation, the Commission recommended enactment of a provision stating that the judicial duties to be performed under the Attachment Law are "subordinate judicial duties" within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.⁶ This provision was deleted from the Commission's recommended legislation because it proved to be extremely controversial and jeopardized the passage of the legislation. Nevertheless, such duties are appropriate duties to be performed by court commissioners and are now performed by them in some counties. Since delegation of such duties to commissioners under the Attachment Law is necessary for efficiency and economy, the Commission again recommends that such delegation be expressly authorized by statute.

4. See Section 489.090(d). As provided in subdivision (a) of Section 489.220, the amount of the undertaking is \$2,500 in municipal court and \$7,500 in superior court.

5. See Sections 489.090(c) and 489.410(a).

6. Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 739, 760 (1973).

Description of Property Subject to Temporary Protective Order

Chapter 6 (commencing with Section 486.010) of the Attachment Law as enacted did not provide the manner of description of property whose transfer is restrained by a temporary protective order. A defendant against whom a temporary protective order is issued is subject to being held in contempt if he should violate the order. Consequently, Section 486.050 should be amended to require the temporary protective order to "describe the property in a manner reasonably adequate to permit the defendant to identify the property subject to the temporary protective order." Under this standard, the description should be fairly specific in a temporary protective order restraining the transfer of property of an individual defendant or of a portion of the property of a corporation or partnership. For example, a description reading "all equipment as defined in Code of Civil Procedure Section 481.100" would satisfy the recommended standard. Where only a portion of a type of property such as "equipment" is sought to be restrained, a more specific description will be required. Where all corporate or partnership property subject to attachment is sought to be restrained, a reference to all such property subject to attachment pursuant to Section 487.010 would satisfy the recommended standard.

Minor Amendments

The Commission also recommends the following minor amendments:⁷

(1) The words "or arrest" should be deleted at the end of Section 482.080 which provides for an order directing transfer of property.

7. Additional technical amendments are set out in the bill infra.

(2) Section 488.010(b) which provides that, where real property is sought to be attached, the writ of attachment shall identify a person, other than the defendant, in whose name real property stands upon the records of the county, should be amended to require the writ to identify such person where the property sought to be attached is crops growing or timber standing on real property.

(3) Section 488.310(d) which provides for service of a copy of the writ and notice of attachment on "an occupant" of attached real property should be amended to require personal service only where there is one occupant and permit service by posting where there is more than one occupant.

(4) Section 488.360(c) which provides in part for levy on growing crops and standing timber should be amended to provide for notice to any person, other than the defendant, in whose name the real property where the crops are growing or the timber is standing stands on the records of the county.

(5) Section 489.310(a) should be amended to make clear that, where a writ of attachment is issued to a county other than the county where the action is pending, the defendant may apply to either the court where the action is pending or the court in the other county for an order allowing him to substitute an undertaking for property which has been or is subject to being attached and that an order issued in the other county may allow the release only of the property in that county whereas an order of the court where the action is pending may release property throughout the state.

(6) Section 490.010(d) should be amended to provide that it is not a wrongful attachment of the property of a person other than the defendant where the plaintiff reasonably relies on recorded or registered ownership which is permitted by law to be recorded or registered.

(7) Section 491.010 should be amended to provide an application procedure for an order for the examination of a person indebted to or having property of the defendant.

Revision of Official Comments

The Comments to Sections 489.110 and 490.010 were not revised to reflect amendments made by the Senate Judiciary Committee. These Comments, revised to reflect the Senate Judiciary Committee amendments, are set out as an exhibit to this recommendation.

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

An act to amend Sections 482.080, [483.010], [484.], 486.050, 486.060, [487.010], 487.020, 488.010, 488.080, 488.310, 488.360, 488.430, 489.230, 489.310, 490.010, [490.050], and 491.010 of, and to add Sections 482.060, 489.130, and [490.025] to, the Code of Civil Procedure, relating to attachment.

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

SECTION 1. Section 482.060 is added to the Code of Civil Procedure,

to read:

§ 482.060. Judicial duties are "subordinate judicial duties"

482.060. The judicial duties to be performed under this title are "subordinate judicial duties" within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.

Comment. Section 482.060 authorizes the use of court commissioners to perform any of the judicial duties required by this title. See Civ. Const. Art. VI, § 22; compare CODE CIV. PROC. § 255.

SEC. 2. Section 482.080 of the Code of Civil Procedure is amended

to read:

§ 482.080. Issuance of order directing transfer

482.080. If a writ of attachment is issued, the court may also issue an order directing the defendant to transfer possession of the property sought to be attached to the levying officer. Such order shall contain a notice to the defendant that failure to turn over possession of such property to the levying officer may subject the defendant to being held in contempt of court ~~or arrest~~.

Comment. The amendment to Section 482.080 deletes the words "or arrest" from the end of the last sentence. This amendment makes clear that the defendant is not subject to arrest independent of contempt proceedings. A person may still be arrested in the course of contempt proceedings. See Code Civ. Proc. §§ 1212, 1214.

SEC. 3. Section 486.050 of the Code of Civil Procedure is amended

to read:

486.050. (a) ~~Except as otherwise provided in subdivision (b) and in Sections 486.040 and 486.060, the~~ The temporary protective order may prohibit any transfer by the defendant of any of ~~his~~ the defendant's property in this state subject to the levy of a writ of attachment. The temporary

protective order shall describe the property in a manner reasonably adequate to permit the defendant to identify the property subject to the temporary protective order.

(b) If Notwithstanding subdivision (a), if the property is farm products held for sale or is inventory, the temporary protective order may not prohibit the defendant from transferring the property in the ordinary course of business, but the temporary protective order may impose appropriate restrictions on the disposition of the proceeds from such transfer.

Comment. The amendment of subdivision (a) of Section 486.050 provides for the manner of description of property which is subject to the temporary protective order. The description should be fairly specific in a temporary protective order restraining the transfer of property of an individual defendant or where only a portion of the property of a corporation or a partnership is subject to a temporary protective order. For example, "all equipment as defined in Code of Civil Procedure Section 481.100" would satisfy the standard of subdivision (a) if all equipment of the defendant is subject to the order. Where less than all of a type of property is to be restrained by the temporary protective order, a more specific description is needed. Where all attachable corporate (or partnership) property is subject to the temporary protective order, a reference to "all corporate (or partnership) property which is subject to attachment pursuant to subdivision (a) of Code of Civil Procedure Section 487.010" satisfies the requirement of subdivision (a) of this section. Compare Section 484.020(e). Of course, the temporary protective order should restrain the transfer only of an amount of the defendant's property which

is reasonably necessary to protect the plaintiff's interest until a writ of attachment can be issued. Where an excessive amount of property is subject to the temporary protective order, the plaintiff may be liable for abuse of process. Cf. White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968). See Section 486.040 requiring the temporary protective order to contain provisions which the court determines would be in the interest of justice and equity to both parties.

The amendments of subdivision (b) are technical.

SEC. 4. Section 486.060 of the Code of Civil Procedure is amended to read:

486.060. Notwithstanding Section 486.050, the temporary protective order issued under this chapter ~~shall permit~~ the defendant to issue any number of checks:

may not prohibit

from issuing

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

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

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

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

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

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

Comment. Section 486.060 is amended to make clear that the defendant may issue checks for the purposes and in the amounts provided regardless of the temporary protective order. The form of the temporary protective order is prescribed by the Judicial Council. See Section 482.030(b).

SEC. 5. Section 487.020 of the Code of Civil Procedure is amended to read:

487.020. ~~Notwithstanding Section 487.010, the~~ The following property is exempt from attachment:

(a) All property exempt from execution.

(b) Property which is necessary for the support of an individual defendant ~~and members of his household.~~

(c) All compensation paid or payable by an employer to an employee for personal services performed by such employee whether denominated as wages, salary, commission, bonus, or otherwise.

(d) All property not subject to attachment pursuant to Section 487.010.

or the defendant's family .

Comment. The amendments to Section 487.020 are technical. The introductory phrase, reading "Notwithstanding Section 487.010," has been deleted since it was confusing when read with subdivision (d); this amendment makes no substantive change. The language of subdivision (b) has been amended to be consistent with the hardship exemption available to a judgment debtor whose wages are garnished.

SEC. 6. Section 488.010 of the Code of Civil Procedure is amended to read:

488.010. (a) The writ of attachment shall identify the defendant whose property is to be attached. If the writ of attachment does not describe the property or interest therein in a manner adequate to permit the levying officer to execute the writ, the plaintiff shall give to the levying officer instructions in writing, signed by the plaintiff or his attorney of record, which contain a description of such property adequate to permit the levying officer to execute the writ.

(b) Where the property of the defendant sought to be attached is real property standing upon the records of the county in the name of a third person, ~~whether other than the defendant~~, either alone or together with the defendant, or is crops growing or timber standing on such real property, the writ of attachment shall identify such ~~third person~~ other than the defendant .

Comment. Subdivision (b) of Section 488.C10 is amended to provide that, where crops growing or timber standing on real property are sought to be attached, the writ must identify any person, other than the defendant, in whose name the defendant's real property stands upon the records of the county, whether alone or together with the defendant. See Section 488.360(c). The other amendments are technical and make no substantive change. The addition of the phrase "upon the records of the county" restores language of former Section 542.

SEC. 7. Section 488.080 of the Code of Civil Procedure is amended to read:

488.080. (a) The levying officer shall make a full inventory of property attached and return such inventory with the writ as provided in Section 488.070.

(b) ~~The~~ Upon the request of the levying officer, at the time of service, ~~shall request of a copy of the writ and notice of attachment,~~ any person, other than the defendant, who retains ~~property~~ in his possession property levied upon or any account debtor or judgment debtor levied upon whom a copy of the writ and notice of attachment has been served to give ~~him~~ a memorandum, describing the property or debt and stating its estimated value or the amount owing, within 10 days after ~~such~~ service. If the person fails to give ~~such~~ the memorandum within the time specified, the levying officer shall state such fact at the time ~~he makes his return~~ the writ is returned pursuant to Section 488.070. A person failing to give ~~such~~ the memorandum within the time specified may be required to pay the costs of any proceedings taken for the purpose of obtaining the information required by ~~such~~ the memorandum.

Comment. Subdivision (b) of Section 488.080 is amended to state more directly the duty to give a memorandum on request of the levying officer. In addition, several technical amendments are made.

SEC. 8. Section 488.310 of the Code of Civil Procedure is amended to read:

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

(b) Where, on the date of recording, the real property of the defendant stands upon the records of the county in the name of a ~~third~~ person, other than the defendant, 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~~ other person identified in the writ .

(c) Promptly after recording and in no event more than 15 days after the date of recording, the levying officer shall mail a copy of the writ and the notice of attachment to the defendant and to any ~~third~~ other person identified in the writ in whose name the real property stands on the date of recording upon the records of the county . ~~Such copies~~ The copy of the writ and the notice of attachment shall be mailed to the address of the defendant and ~~any third~~ such other person as shown by the records of the office of the tax assessor of the county where the property is located.

(d) Promptly after recording and in no event more than 15 days after the date of recording, the levying officer shall serve ~~an~~ ^{each} occupant of the property with a copy of the writ and the notice of attachment ~~or~~ ^{, except that,} if there is no occupant on the property at the time service is attempted, the levying officer shall post a copy of the writ and notice in a conspicuous place on the property attached. Service upon the occupant may be made by leaving the copy of the writ and notice with the occupant personally, or, in his absence, with any person, of suitable age and discretion, found upon the property at the time service is attempted and who is either an employee or agent of such occupant or a member of his family or household. Where the property described in the 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 or more continuous, unbroken tracts, only one service or posting need be made under this subdivision as to each such continuous, unbroken tract.

or if there is more than one occupant ,

(e) A failure to send the notices required by subdivision (c) or to post or serve notice pursuant to subdivision (d) shall not affect the lien created pursuant to subdivision (a).

Comment. The amendments of subdivisions (b) and (c) of Section 488.310 are technical; no substantive change is intended. See the Comment to Section 488.010 as amended. Subdivision (d) is amended to provide that, where there is more than one occupant on real property which is attached, the occupants may be served by posting rather than by personal service. The manner of service in such cases was unclear under former law and in the Attachment Law as originally enacted.

SEC. 9. Section 488.360 of the Code of Civil Procedure is amended to read:

488.360. (a) To attach farm products or inventory of a going business, if the defendant consents, the levying officer shall place a keeper in charge of such property for a period not to exceed 10 days. During such period, the defendant may continue to operate his farm or business at his own expense provided all sales are final and are for cash or the equivalent of cash. For the purposes of this

subdivision, payment by check or by a credit card issued by a person other than the defendant shall be deemed the equivalent of a cash payment. The levying officer shall incur no liability for accepting payment in the form of a cash equivalent. The proceeds from all sales shall be given to the keeper for the purposes of the levy unless otherwise authorized by the plaintiff. If the defendant does not consent or, in any event, after the end of such 10-day period, the levying officer shall take such property into his exclusive custody unless other disposition is made by the parties to the action. At the time of levy or promptly thereafter, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(b) Where property is levied upon pursuant to subdivision (a), the defendant may apply for an order pursuant to this subdivision for the release of property ~~essential for the support of the defendant and his family.~~ Such application shall be made by filing with the court and serving on the plaintiff a notice of motion. Service on the plaintiff shall be made not less than three days prior to the date set for hearing. The hearing shall be held not more than five days after the filing of the motion, unless for good cause, the court orders otherwise. The notice of motion shall state the relief requested and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. At the hearing on the motion, the defendant has the burden of showing that the property, or a portion thereof, attached pursuant to subdivision (a) and the proceeds therefrom ~~are essential for the support of himself and his family.~~ Upon such showing, the court shall order the removal of the keeper and return the defendant to possession of such property ~~as is essential for the support of himself and his family~~ and may make such further order as the court deems appropriate to protect the plaintiff against frustration of the collection of his claim. Such order may permit the plaintiff to levy by filing pursuant to subdivision (c) and may provide reasonable restrictions on the disposition of the property previously levied upon.

exempt pursuant to subdivision (b) of Section 487.020,

exempt

(c) Notwithstanding the provisions of subdivision (a), upon the election and the instructions of the plaintiff, the levying officer shall attach farm products or inventory of a going business by filing a notice in the form prescribed by the Secretary of State which indicates that the plaintiff has acquired an attachment lien on the farm products or

inventory of the defendant. When the property is crops or timber to be cut, the notice shall be recorded in the office of the county recorder in the county where the land on which the crops are growing or on which the timber is standing is located. Where, on the date of recording, the land on which the crops are growing or on which the timber is standing 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. In all other cases, the notice shall be filed in the office of the Secretary of State. The fee for filing and indexing each notice of attachment, notice of extension, or notice of release in the office of the Secretary of State is three dollars (\$3). Upon the request of any person, the Secretary of State shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of attachment, naming a particular person, and if a notice is on file, giving the date and hour of filing of each notice and the name of the plaintiff. The fee for the certificate issued by the Secretary of State is two dollars (\$2). A combined certificate may be issued pursuant to Section 7203 of the Government Code. Upon request, the Secretary of State shall furnish a copy of any notice of attachment or notice affecting a notice of attachment for a fee of one dollar (\$1) per page. A lien acquired pursuant to this subdivision shall provide the plaintiff the same rights and priorities in the attached property and proceeds of the attached property as those of a secured party with a perfected security interest in collateral where the filed financing statement covering the original collateral also covers proceeds. Promptly after filing and in no event more than 15 days after the date of filing pursuant to this subdivision, the levying officer shall ~~serve the defendant with a copy of the writ and the notice of attachment,~~

upon the records of the county

other than the defendant,

other

identified in the writ

a

or recording

or recording

mail a copy of the writ and the notice of attachment to the defendant and, in the case of crops growing or timber standing on real property, to any other person identified in the writ in whose name the real property stands upon the records of the county . The copy of the writ and the notice of attachment shall be mailed to the address of the defendant and such other person as shown by the records of the office of the tax assessor of the county where the property is located.

(d) A failure to serve the defendant or any other person pursuant to subdivision (a) or (c) shall not affect the lien created pursuant to either subdivision.

Comment. The amendment of subdivision (b) of Section 488.360 makes no substantive change. See Section 487.020 and Comment. Subdivision (c) is amended to conform to changes made in subdivision (b) of Section 488.010 and Section 488.310. In addition, the last sentence of subdivision (c) now provides that a copy of the writ and notice of attachment be sent to the defendant and to any person, other than the defendant, in whose name the defendant's real property on which crops are growing or timber is standing stands upon the records of the county. This provision was omitted in the Attachment Law as enacted. Compare subdivision 2a of former Section 542. Subdivision (d) is amended to conform to subdivision (c).

SEC. 10. Section 488.430 of the Code of Civil Procedure is amended to read:

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

(b) Promptly after levy and in no event more than 45 days after levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment. A failure to serve the defendant pursuant to this subdivision shall not affect the lien created pursuant to subdivision (a).

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

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

in which the
estate is being
administered

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

Comment: Subdivision (c) of Section 488.460 is amended to make clear that the personal representative is required to report the attachment to the probate court. This amendment makes no substantive change.

SEC. 11. Section 489.130 is added to the Code of Civil Procedure, to read:

§ 489.130. Insufficient undertaking not wrongful attachment

489.130. Where the court orders the amount of the undertaking increased pursuant to Sections 489.220 or 489.410, the plaintiff's failure to increase the amount of the undertaking is not a wrongful attachment within the meaning of Section 490.010.

Comment. Section 489.130 makes clear that the mere failure of the plaintiff to increase the amount of an undertaking when ordered to do so pursuant to Section 489.220 (undertaking to obtain a writ of attachment or protective order) or Section 489.410 (undertaking on appeal) is not a wrongful attachment under Section 490.010. The insufficient undertaking remains in effect pursuant to subdivision (d) of Section 489.090, and the plaintiff's liability for wrongful attachment pursuant to Section 490.010 is limited to the amount of the insufficient undertaking by subdivision (b) of Section 490.020. However, where an order to increase the amount of the undertaking is not complied with, the rights obtained by filing the insufficient undertaking cease as provided in subdivision (c) of Section 489.090 and subdivision (a) of Section 489.410.

SEC. 12. Section 489.230 of the Code of Civil Procedure is amended to read:

489.230. (a) The notice of ~~law~~ ~~of the writ~~ of attachment shall include a statement, in a form adopted by the Judicial Council, advising the defendant that the undertaking has been filed and informing him of his right to object to the undertaking on the grounds provided in Section 489.070.

temporary

(b) A protective order shall include a statement comparable to the one required by subdivision (a), the content of which shall be prescribed by rule adopted by the Judicial Council.

Comment. Section 489.230 is amended to make clear that the statement required by subdivision (a) is to be included in the notice of attachment provided by Section 489.020. The amendment of subdivision (b) is technical.

SEC. 13. Section 489.310 of the Code of Civil Procedure is amended to read:

489.310. ~~(a) Upon reasonable notice to the plaintiff, a~~ defendant whose property has been or is subject to being attached and who has appeared in the action may apply action against such defendant. The amount of the undertaking filed pursuant to this section shall be equal to the amount of the plaintiff's claim. The court shall issue the order terminating the temporary protective order ~~upon being satisfied that a sufficient undertaking has been filed.~~

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(a) Whenever a writ is issued, a defendant who has appeared in the action may apply on noticed motion to the court in which the action is pending for an order permitting the defendant to substitute an undertaking for any property in the state which has been or is subject to being attached. Where a writ is issued to a county other than the county where the action is pending, a defendant who has appeared in the action may apply on noticed motion to a court in such county having jurisdiction in cases involving the amount specified in the writ issued to such county for an order permitting the defendant to substitute an undertaking for any property in that county which has been or is subject to being attached.

(b) The application shall include a statement, executed under oath, describing the character of the defendant's title to the property and the manner in which he acquired such title.

(c) Before making such order, the court shall require the defendant to file with the court in which the application is made an undertaking to pay the plaintiff the value of the property released not exceeding the amount of any judgment recovered by the plaintiff in the action against such defendant. The amount of the undertaking filed pursuant to this section shall be equal to the lesser of (1) the value of the property attached or prevented from being attached or (2) the amount specified by the writ to be secured by the attachment. The court shall issue such order upon being satisfied that a sufficient undertaking has been filed.

(d) Where an action is against more than one defendant, any defendant may make such application. The filing of an undertaking by such defendant shall not subject him to any demand against any other defendant; however, the levying officer shall not be prevented thereby from attaching, or be obliged to release from attachment, any property of any other defendant. Where two or more defendants have an interest in the same property, a joint application and undertaking shall be filed to secure the release of such property.

Comment. Subdivision (a) of Section 489.310 is amended to make clear that, where a writ is issued to a county other than the county where the action is pending, the defendant may apply to either the court where the action is pending or the court in the other county for an order allowing him to substitute an undertaking for property which has been or is subject to being attached. The order of the court in the other county may allow the release only of the property in that county whereas the order of the court where the action is pending may release property throughout the state. The amendment also provides that the defendant applies on noticed motion rather than "upon reasonable notice to the plaintiff."

SEC. 14. Section 490.010 of the Code of Civil Procedure is amended to read:

490.010. A wrongful attachment consists of any of the following:

(c) The levy of a writ of attachment or the service of a protective order in an action in which attachment is not authorized, except that it is not a wrongful attachment if both of the following are established:

(1) The levy was not authorized solely because of the prohibition of Part 9 of Article 10 of Section 423.010.

(2) The person who sold or leased, or licensed for use, the property, furnished the services, or loaned the money reasonably believed that it would not be used primarily for personal, family, or household purposes.

(L) The levy of a writ of attachment or the service of a protective order in an action in which the plaintiff does not recover judgment.

(e) The levy of a writ of attachment obtained pursuant to Article 3 (commencing with Section 484.510) of Chapter 4 or Chapter 5 (commencing with Section 485.010) on property exempt from attachment except where the plaintiff shows that he reasonably believed that the property attached was not exempt from attachment.

(d) The levy of a writ of attachment on property of a person other than the person against whom the writ was issued except that it is not a wrongful attachment if all of the following exist:

(1) The property levied on is required by law to be registered or recorded in the name of the owner.

or permitted

(2) It appeared that, at the time of the levy, the person against whom the writ was issued was such registered or record owner.

(3) The plaintiff made the levy in good faith and in reliance on the registered or recorded ownership.

Comment. Paragraph (1) of subdivision (d) of Section 490.010 is amended to provide that the levy of attachment on property of a third person is not wrongful where the plaintiff has relied on registered or recorded ownership which by law is permitted, even though not required, to be registered or recorded. As amended, subdivision (d) allows the plaintiff to rely, for example, on certain filings under Division 9 (commencing with Section 9101) of the Commercial Code.

SEC. 15. Section 491.010 of the Code of Civil Procedure is

amended to read:

491.010. (a) ~~Any~~ Upon application of the plaintiff, the court may order any person owing debts to the defendant, or having in his possession or under his control any personal property belonging to the defendant, may be required to appear before the court and be examined on oath regarding such property. The plaintiff's application shall be accompanied by an affidavit showing that the person named therein owes debts to the defendant or has in his possession or under his control personal property belonging to the defendant.

(b) The plaintiff shall give the defendant at least [3] days notice of an examination ordered pursuant to this chapter.

(c) ~~(b)~~ If the person ordered to appear pursuant to this section fails to appear, and if the order requiring his appearance has been served by a sheriff or some person specially appointed by the court in the order, the court may, pursuant to a warrant, have such person brought before the court to answer for such failure to appear.

(d) ~~(c)~~ After such examination, if the person admits that he is indebted to the defendant, or that he holds property belonging to the defendant, the court may order that such debt or property belonging to the defendant be attached in the manner and under the conditions provided by this title and that any amount owing be paid to the levying officer. If the person admits that he holds property which belongs to the defendant and in which he claims no interest, the court may order that such property be delivered to the levying officer on such terms as may be just.

Comment. Subdivision (a) of Section 491.010 is amended to provide for the plaintiff's application and supporting affidavit. See Section 482.040 (general requirements for affidavits). Former Section 545 did not specify the procedure for obtaining the order for an examination. Subdivision (b) requires the plaintiff to give the defendant notice of the examination of a third person.

EXHIBIT

The Comment to Section 489.110 should read as follows:

Comment. Section 489.110 supplements Section 1058a. Under Section 1058a, a motion to enforce liability on an undertaking is directed to the sureties. Section 489.110 makes clear that the liability may be enforced directly against the sureties. In contrast with what appeared to be the former law, the beneficiary need not attempt to satisfy his judgment first from the assets of the principal. Cf. former Section 552; *Bezaire v. Fidelity & Deposit Co.*, 12 Cal. App.3d 888, 91 Cal. Rptr. 142 (1970); CIVIL CODE § 2845. It is not clear whether the enactment in 1972 of Section 1058a changed the former rule.

Section 489.110 in no way interferes with the contractual relationship between principal and surety.

The Comment to Section 490.010 should read as follows:

Comment. Section 490.010 provides a statutory cause of action for wrongful attachment in four specific situations. As Section 490.060 makes clear, the liability provided by Section 490.010 is not exclusive. The defendant may pursue his common law remedies if he chooses.

Subdivision (a). Subdivision (a) provides that wrongful attachment occurs when a writ of attachment is levied or a protective order is served in an action where attachment is not authorized. An exception is provided, however, which protects the plaintiff where levy is not authorized because the goods, services, or money furnished were used primarily for consumer purposes but the person who furnished them reasonably believed that they would not be so used. This provision is based on a portion of subdivision (a) of former Section 539 which provided for recovery where "the restraining order or the attachment is discharged on the ground that the plaintiff was not entitled thereto under Sections 537 to 537.2, inclusive."

Subdivision (b). Subdivision (b) provides that wrongful attachment occurs when a writ of attachment is levied or a protective order is served where judgment in the action is not in favor of the plaintiff. This provision is based on another portion of subdivision (a) of former Section 539 which provided for recovery where "the defendant recovers judgment."

Subdivision (c). Subdivision (c) provides that wrongful attachment occurs when the plaintiff levies an *ex parte* writ of attachment on property which is exempt from attachment except where the writ was obtained under Chapter 12 (nonresident attachment) of this title or where the plaintiff reasonably believed that the property was not exempt from attachment. See Section 487.020 (property exempt from attachment). The determination that the property was not exempt made pursuant to Sections 484.520, 485.220, or 485.540 does not preclude a finding that the plaintiff acted unreasonably. For example, the determination may have been based on false affidavits or inadequate investigation by the plaintiff. Attachment of exempt property was classified as a form of abuse of process. See *White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 340, 438 P.2d 345, 353, 66 Cal. Rptr. 697, 705 (1968); *McNabb v. Barnes*, 92 Cal. App. 337, 268 P. 425 (1928).

Subdivision (d). Subdivision (d) provides that wrongful attachment occurs when a writ of attachment is levied against property of a person other than the person against whom the writ is issued. This will generally be a nonparty but may include a codefendant. An exception is provided comparable to that provided in Section 689. Under former law, the remedy of a third person was to file a complaint in intervention (see *Beshara v. Goldberg*, 221 Cal. App.2d 392, 34 Cal. Rptr. 301 (1963)), a third-party claim under Code of Civil Procedure Section 689, or a separate action for damages for conversion, trespass, or some other tort (see *McPheeters v. Bateman*, 11 Cal. App.2d 106, 53 P.2d 195 (1936); *Edwards v. Sonoma Valley Bank*, 59 Cal. 136 (1881)), or for specific recovery (see *Taylor v. Bernheim*, 58 Cal. App. 404, 209 P. 55 (1922)). See generally 5 B. WITKIN, CALIFORNIA PROCEDURE *Enforcement of Judgment* §§ 103-115 at 3468-3481 (2d ed. 1971). Subdivision (d) does not preclude such actions (see Section 490.060) but provides a statutory alternative.