

3/29/72

Memorandum 72-24

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

Following the March meeting, I had an opportunity to discuss with Professor Riesenfeld the existing law relating to the method of levy of a writ of attachment, its manner of operation, its defects, and certain related problems. This memorandum summarizes rather briefly my notes from that discussion, proposes draft provisions dealing with the method of levy (Exhibit I--pink), and raises certain matters which require further direction from the Commission. Credit for the substance of most of the improvements should go to Professor Riesenfeld; responsibility for the drafting is mine. At the next meeting, we expect Professor Riesenfeld to be available to give us (orally) further background, where necessary, and to examine critically the proposed revisions.

Present Law

Our discussions covered only personal property. The present law relating to the levy on real property seems to be relatively satisfactory. However, in the section-by-section analysis of the draft provisions presented below, I have raised certain problems that occur to me. Personal property is categorized generally as follows: (1) personal property, capable of manual delivery, in the possession of the defendant; (2) personal property, capable of manual delivery, in the possession of a third person; (3) personal property, not capable of manual delivery, in the possession of the defendant; and (4) personal property, not capable of manual delivery, in the possession of a third person.

Personal property, capable of manual delivery, in the possession of the defendant is covered by Section 542(3) which generally requires immediate seizure of the property. Professor Riesenfeld suggests that the impact of these provisions be greatly reduced by (1) expansion of the definition of "necessities" (this issue will be covered in a subsequent memorandum) and (2) the use of filing procedures and more flexible arrangements for a keeper or receiver. See below Sections 547.090, 547.100, and 547.210. Professor Riesenfeld also suggests that changes in the law be made where such property is subject to a perfected nonpossessory security interest. See discussion below relating to Section 689b.

Personal property, capable of manual delivery, in the possession of a third person is curiously not covered at all by the statute. Two older cases suggest that, in this situation, at least where the third person is a pledgee, levy should be by notice to the third person. Possession may only be obtained by court order (see Treadwell v. Davis, 34 Cal. 601 (1868)) and seizure by the levying officer without such an order may subject him to liability as a convertor of the goods (see Dubois v. Spinks, 114 Cal. 289 (1896)). The statutory hiatus should be filled. Professor Riesenfeld expressed concern with levy by mere notice to a third person in possession and resultant liability of that person to the plaintiff for a failure to protect the plaintiff's rights. For example, a garage might be working on a truck belonging to a defendant-business. If levy were made merely by notice to the garage, a mechanic might inadvertently release the truck to the defendant, possibly subjecting the garage to liability to the plaintiff. The staff has dealt with the specific example by providing a filing procedure for equipment. See Section 547.090. We have also added a number of provisions dealing with other specific kinds of personal property--e.g., Sections 547.120 (chattel paper);

547.130 (negotiable instruments); and 547.140 (securities). Finally, we have provided generally for seizure of personal property capable of manual delivery (see Section 547.050) but have revised Section 689 to broaden its third-party claim procedure in an attempt to cover all types of third-party interests in property levied upon.

Personal property, not capable of manual delivery, in the possession of the defendant is presently covered by Section 542(5) which provides for levy merely by notice to the defendant. See Raventas v. Green, 57 Cal. 254 (1881); Irillary v. Byers, 84 Cal. App. 28, P. (1927). The principal difficulty here is the lack of adequate protection for subsequent transferees of the property. We have accordingly provided a filing procedure in Section 547.060 which we hope will provide notice to such persons. We have also attempted to deal directly with certain intangible personal property which may formerly have been considered to be property not capable of manual delivery, e.g., Section 547.110 (accounts receivable; choses in action).

Personal property, not capable of manual delivery, in the possession of a third person is also covered by Section 542(5) which again provides for levy by notice to such third person. The major problem here is not so much the method of levy but the manner of realization, i.e., how should debts and the like be collected? This matter is covered generally by our Section 547.210. See also Section 547.200.

Analysis of Draft Provisions

Section 547.010. This section is new and defines a number of terms used in this article. These definitions are based on, if not identical to, terms used in the Commercial Code. "Account receivable" is defined substantially the same as the term "account" under Commercial Code Section 9106. We have

used the term "account receivable" because we believe that it better describes what we are dealing with and avoids confusion perhaps with bank accounts.

"Account debtor" has substantially the same meaning as "account debtor" under Commercial Code Section 9105(a) except here we refer to "choses in action" rather than "general intangibles."

"Chattel paper" has the same meaning as "chattel paper" under Commercial Code Section 9105(b) and (g). The following excerpt from the Comment to Section 9105 should help to explain this term.

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

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

"Chose in action" is something of a catchall term which we have devised to pick up certain intangibles which are not otherwise provided for.

"Equipment," "farm products," and "inventory" are based on the same terms as defined in Commercial Code Section 9109. It might be noted that "inventory" as defined in the Commercial Code includes goods not in the actual possession of the defendant; e.g., a rental car which has been rented out. This should be kept in mind when reviewing Section 547.100.

The definitions of a "negotiable instrument" and a "security" are picked up directly from the Commercial Code. Section 3104 provides:

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

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

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

(d) Be payable to order or to bearer.

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

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

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

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

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

(3) As used in other divisions of this code, and as the context may require, the terms "draft," "check," "certificate of deposit" and "note" may refer to instruments which are not negotiable within this division as well as to instruments which are so negotiable.

Section 8102 provides in part:

§ 8102. Definitions and Index of Definitions

(1) In this division unless the context otherwise requires

(a) A "security" is an instrument which

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

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

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

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

Section 547.020. Subdivision (a) requires the writ of attachment to identify the defendant and the property sought to be attached. The description of the property was formerly provided in the instructions to the sheriff. However, under the procedures presently being considered by the Commission, the issue of what property may be attached is always subject to a prior review by a judicial officer, and it therefore seems desirable that the writ issued identify the property that that officer has determined should be attached. This should eliminate the possibility of discrepancies between what the court has determined may be attached and what the plaintiff directs the sheriff to attach.

Subdivision (b) has no counterpart in existing law. The form of the "Notice of Attachment" is not prescribed by statute. The staff suggests that some general direction at least be given to the Judicial Council (which is charged with the responsibility for drafting the forms required by this chapter). Query: Should we attempt to provide any detail here as to the filing of third-party claims, disposition of the attached property, and the like?

Subdivision (c) is based on the first portion of the first sentence of present Section 540.

Subdivision (d) incorporates the substance of the introductory paragraph of present Section 542.

The purpose of subdivision (e) is to give some direction as to the person to be served. Under present law (Section 542(5)), service on certain financial institutions having branch offices may only be made by serving an officer at the proper branch office. This feature has been continued in subdivision (e). Should the idea be expanded to include other organizations? Is this an appropriate place for the provision?

Section 547.030. This section is substantially similar to subdivision 1 of Section 542. Since Section 547.020(a) provides a description of the property attached in the writ, we eliminated the additional reference to the description formerly included here and in subsequent comparable sections. The method of levy provided here should not in most situations be onerous. We do not deal here with sale of attached property, but the staff suggests that our scheme eventually make clear that attached real property may be sold and that the proceeds of the sale then continue to be subject to the prior levy. See Section 547.210.

We have added a time limit within which service must be completed under this section. The lien of attachment arises upon recordation; however, the lien lapses if service is not properly and timely made. See Section 547.240(a). It should be noted that neither this section nor present law necessarily requires service on the defendant. Presumably, he will get notice of the attachment by the recording of the writ if in no other way. Is this adequate?

Section 547.040. This section is similar to subdivision 2 of Section 542. Subdivision 2, however, requires service on the third person only if he is within the county where the real property is located. Subdivision (a) of Section 547.040 requires service in every case even though it can only be accomplished by publication. See also Comment to Section 547.030 above.

Section 547.050. Although subject to a number of important exceptions (see below), this section states the general rule that personal property capable of manual delivery shall be attached by being taken into custody-- usually this means seizure, packing, crating, and removal to a warehouse. In some circumstances, it would be less expensive to employ a keeper--e.g., for inventory of a business recently gone out of business. Section 547.180 implies that this may be done. Would it be desirable to state this explicitly? Should the manner of taking custody be left to the discretion of the levying officer? the court? the plaintiff?

It should be noted that this section applies whether the property is in the possession of the defendant or a third person. Query: Does Section 689 (third-party claims) provide adequate relief for such third persons? Would the Commission prefer to have a notice procedure for property in the possession of third persons? Would the latter procedure adequately protect the plaintiff? Or would it subject the third person to an undesirable liability to the plaintiff? We could provide that such property is taken into custody

only on demand of the third person. If the third person retains possession, he is liable to the plaintiff for the value of the property or the amount of the credit or debt. The third person would be protected by being able to demand that the property be taken into custody, but there remains the problem of the inadvertent release of property to the defendant. If the third person believes that he really is the owner of the property, he could retain possession. The plaintiff would be protected only by his right over against the third person. Whether this would be adequate protection, we simply do not know.

The problem of personal property subject to a perfected, nonpossessory security interest is dealt with below in connection with Section 689b.

Section 547.050 requires service of the writ and notice of attachment on the defendant in all cases. It seemed desirable to us that the statute require such service to insure that the defendant gets notice so that he may take any appropriate action. He may, for example, have a valid claim of exemption. Does the Commission agree that such service is necessary? desirable? What should be the consequence of failure to serve notice within the required time? Should the lien lapse? See Section 547.240(b).

Section 547.060. Because we have dealt specifically with the types of intangible personal property we thought should be subject to levy, we suggest that this section be limited to tangible personal property not capable of manual delivery. The section is already further limited by the sections dealing with growing crops (Sections 547.070, 547.080) and equipment of a going business (Section 547.090). The section continues existing law insofar as it provides for levy by notice on the person in possession; in addition, we have suggested two possible filing procedures for the protection of subsequent transferees of the property. Again we have the issues whether service

on the defendant (when he is not the person in possession) is required and, if so, what results from a failure to serve properly. See also Section 547.240(c).

Section 547.070. This section is substantially similar to the first paragraph of present subdivision 1a of Section 542. See discussion of Section 547.030 above. It might be noted that this section continues existing law insofar as it requires recording with the local recorder's office. Should this be changed to filing with the Secretary of State?

The second paragraph of the present provision relating to the care, cultivation, and sale of crops by the sheriff is dealt with in part by Section 547.210. It should be noted, however, that, in Huston v. Abbott, 30 Cal. App.2d 5, 85 P.2d 518 (1938), a sheriff who had properly levied upon crops under these provisions was held liable to the attaching creditor for permitting these crops to eventually be severed and sold by the defendant. The court suggested that the sheriff could protect himself against such liability by requiring the plaintiff to post fees for a keeper under Section 542, and the sheriff was also given a right over against the buyer of the crops who had notice of the attachment. The court's reasoning on the first point seems deficient because Section 542 does not authorize the sheriff to make a demand for fees (nor does its counterpart, Section 547.180). Subdivision 4 of Section 542, which authorizes a similar demand, relates only to "property capable of manual delivery," and growing crops by statute are deemed "not capable of manual delivery." The staff accordingly suggests that the Commission direct us to do one of two things: (1) provide that the sheriff is not liable where he has done all that this section specifically requires him to do (leaving the plaintiff to his action against third persons who are on notice of his prior right) or (2) provide authority to the sheriff to

demand fees for a keeper to take charge of the crop. The staff favors the first approach because providing a keeper where the defendant is willing and able to care for the crop seems to be a waste of resources. The plaintiff may secure additional protection at his option by securing the services of a keeper and selling the crop at the proper time. See Section 547.210.

Section 547.080. This section is similar to the first paragraph of subdivision 2a of Section 542. See also discussion of Sections 547.030, 547.040, and 547.070 above.

Section 547.090. This section is new, but Mr. Marsh had a comparable provision (Section 542.1) in the draft he furnished us 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.

The section could be limited to equipment of a going business. The issue here is whether the expense of taking custody of equipment of a concern which has gone out of business outweighs the greater protection afforded to both the plaintiff and subsequent transferees of the defendant; the staff has no strong feelings either way.

Again, we have the question of service on the defendant and the result of failure to serve properly. See also Section 547.240(c).

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 other; 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 547.240.

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 by service on the account debtor, the "person in possession," and the defendant. "Person in possession" refers to an assignee for collection, pledgee, and the like. We need your direction as to when the lien is effective: Should the lien be effective upon service

on the account debtor and then lapse if service on the others is not completed? Or should service be completed upon all before the lien becomes effective? 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, life insurance (cash surrender value), 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 person in possession. 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, but again we raise the issues of when the lien is effective, what provisions are needed for collection, and for pledged property. It might be noted that, where the negotiable instrument is a check or order, Section 547.200 requires endorsement and presentation for payment.

Section 547.140. This section is based on (and could 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. We have dealt with insurance policies separately from choses in action because we thought you might want to have the levying officer take the policy into custody. For example, this would presumably preclude an insured from using the cash surrender value of a life insurance policy as collateral after a levy of attachment. It is true that the subsequent transferee could secure notice of the levy from the insurer, but we do not know whether such notice is adequate. If the method of levy is limited to the service of the writ and notice on the respective parties, then it seems we could just as well include interests in, and claims under, policies of insurance under choses in action. The latter approach is taken

by the Commercial Code. Again, we have the problems of when the lien is effective, how to enforce or collect claims, and how to deal with pledged policies.

Section 547.160. 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:

(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 547.170. 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 547.110 (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 the two sections dealing specifically with interests in real property. (Our Sections 547.030 and 547.040.) Do these latter sections appear adequate? Again, there is the problem of when the lien becomes effective or lapses.

Section 547.180. 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 547.190. 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 547.200. 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 April meeting, we hope we can start to work out satisfactory levy procedures.

Respectfully submitted,

Jack I. Horton
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 and is not evidenced by a negotiable instrument, security, chattel paper, or judgment, or based on an interest in or a claim under an insurance policy.

(e) "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.

(f) "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.

(g) "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.

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

(i) 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 his rights and 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) Except as otherwise provided in this article, 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. Service upon (1) a bank, (2) a savings and loan association, (3) a title insurance company or underwritten title company (as defined in Section 12402 of the Insurance Code), or (4) 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 at which the account levied upon is carried.

§ 547.030. Real property in name of defendant

547.030. (a) Any interest in real property, belonging to the defendant and standing upon the records of the county in the name of the defendant, 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 property, if there is one upon the property at the time service is attempted, with a similar copy of the writ and notice, or, if there is no occupant then on the property, posting the same in a conspicuous place on the property attached. Such service or posting shall be made not more than five days after the date the writ and the notice is recorded.

(b) Service upon the occupant may be made by leaving a 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.

(c) 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 as to each such continuous, unbroken tract.

§ 547.040. Real property in name of third party

547.040. (a) Any interest in real property belonging to the defendant, but standing upon the records of the county in the name of another person, shall be attached in the same manner as is real property standing upon the records of the county in the name of the defendant, provided that a copy of the writ and the notice shall also be served by the levying officer upon such other person in the manner provided for the service of summons, not more than 45 days after the date the writ and the notice is recorded.

(b) The recorder shall index such attachment when recorded in the names both of the defendant and of the person by whom the property is held or in whose name it stands of record.

§ 547.050. Personal property capable of manual delivery

547.050. Except as otherwise provided in this article, personal property capable of manual delivery shall be attached by the levying officer (1) taking such property into custody 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. Service on the person in possession shall be contemporaneous with the taking. Service on the defendant, if he is not the person in possession, shall be made not more than five days after the date of the taking.

§ 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 which indicates that the plaintiff has acquired an attachment lien in the specified property of the defendant][the recorder of the county in which the property is located a copy of the writ and the notice of attachment] 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 county recorder].

§ 547.070. Crops growing on real property in name of defendant

547.070. (a) Growing crops, or any interest therein, belonging to the defendant and growing upon real property standing upon the records of the county in the name of the defendant, 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, if there is one upon the real property at the time service is attempted, with a similar copy of the writ and the notice or, if there is no occupant then on the real property, posting the same in a conspicuous place on such real property. Such service or posting shall be made not more than five days after the date the writ and the notice is recorded.

(b) 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 real property at the time service thereof is attempted and who is either an employee or agent of such occupant or a member of his family or household.

(c) 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 or more contiguous unbroken tracts, only one service or posting need be made as to each such contiguous unbroken tract.

§ 547.080. Crops growing on real property in name of third person

547.080. (a) Growing crops, or any interest therein, belonging to the defendant, and growing upon real property standing upon the records of the county in the name of another person, shall be attached in the same manner as growing crops growing upon real property standing upon the records of the county in the name of the defendant are attached, provided that a copy of the writ and the notice shall also be served by the levying officer upon such other person in the manner provided for the service of summons, not more than 45 days after the date the writ and the notice is recorded.

(b) The recorder shall index such attachment when recorded in the names of both the defendant and of the person by whom the real property is held or in whose name it stands on the record.

§ 547.090. Equipment

547.090. Equipment [of a going business], whether or 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 which indicates that the plaintiff has acquired an attachment lien in the specified equipment of the defendant 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.

§ 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), on motion of either party [the defendant], after notice and hearing and upon good cause shown, the court 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

§ 547.100

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. An account receivable or a chose in action shall be attached by the levying officer serving the account debtor, the person in possession of such account receivable or chose in action, and the defendant, if he is not the person in possession, with a copy of the writ and the notice of attachment.

§ 547.120. Chattel paper

547.120. Chattel paper shall be attached by the levying officer (1) taking the chattel paper into custody and (2) serving the account debtor, the person in possession of such chattel paper, and the defendant, if he is not the person in possession, with a copy of the writ and the notice of attachment.

§ 547.130. Negotiable instruments

547.130. 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 and the defendant, if he is not the person in possession, with a copy of the writ and the notice of attachment. If the instrument is a certificate of deposit, the levying officer shall serve a similar copy of the writ and the notice on the bank obligated under the certificate. If the instrument is a note, the levying officer shall serve a similar copy of the writ and the notice on the maker of the note.

§ 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. Interest in or claim under policy of insurance

547.150. Any interest or claim in a fixed or reasonably ascertainable amount under any policy of insurance shall be attached by the levying officer [(1) taking the policy of insurance into custody and (2)] serving the insurer, the person in possession of such policy, and the defendant, if he is not the person in possession, with a copy of the writ and the notice of attachment.

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

547.160. 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.

§ 547.170. Interest in estate of decedent

547.170. (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.

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

547.180. (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.

§ 547.190. Levy on bank account, savings and loan association share or certificate, 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

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

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

(2) Any savings and loan association share, investment certificate, or account, or interest therein, not standing in the name of the defendant alone; or

(3) 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 or other credit;
 - (3) The refusal to pay any withdrawal in respect of the share, investment certificate, or 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.

§ 547.200. 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,

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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, 547.040, 547.070, and 547.080, provided, however, if service is not completed within the time and in the manner required by such sections, the lien of attachment shall cease at the end of the respective periods, and the court, on the application of any person, shall order the discharge of such attachment.

(b) The lien of attachment on property levied on pursuant to Sections 547.050 and 547.100(a) becomes effective on the date the levying officer takes custody of such property [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].

(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?].

(e) The lien of attachment on chattel paper becomes effective on [the date the chattel paper is taken into custody? the date of service on the account debtor?].

(f) The lien of attachment on negotiable instruments becomes effective on [the date the instrument is taken into custody? the date of service on the obligor? the maker?].

(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 interests in or claims under policies of insurance becomes effective on [the date of notice to the insurer?].

(i) The lien of attachment on a judgment levied on pursuant to Section 547.160 becomes effective on [the date of notice to the judgment debtor?].

(j) The lien of attachment on property levied on pursuant to Section 547.170 becomes effective on [the date of service on the personal representative? of filing with the probate court?].

[(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; "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 by at least two good and sufficient sureties, 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 by filing with the court and at the time of filing sending to the plaintiff by first-class mail, postage prepaid, a notice of exception. 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 to 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-2876

§ 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.

CC-86896

(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.

CCP 5689b

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.