

Memorandum 73-5

Subject: Study 39.70 - Prejudgment Attachment

Attached to this memorandum is a revised version of the tentative recommendation relating to prejudgment attachment. Except for the omission of any treatment of nonresidents (see Memorandum 73-4), the staff believes that this recommendation is finally complete, if not perfected.

Also attached to this memorandum (Exhibit I, pink) are comments of the Ad Hoc Committee of the State Bar (AHC). These comments were made on the basis of the earlier version of the recommendation and the Minutes of the November 1972 Commission meeting. They are therefore generally applicable to this recommendation, although, in some instances, revisions have been made which either satisfy or make inapplicable a particular comment. We discuss below, first, the provisions of the attachment title and, then, the conforming changes. We hope that, at the January meeting, final policy decisions can be made regarding this tentative recommendation so that it can be revised and approved for printing at either the February or March meetings.

THE ATTACHMENT TITLE

Section 481.050. At the November meeting, the staff was directed to re-draft this section to insure that net profits interests will be attachable. We have done this by eliminating the limitation that the right to payment be in "a fixed or reasonably ascertainable amount." This broadens the scope of this section and raises the potential Meacham problem of sale of an intangible at a deflated price to the substantial prejudice of the defendant's interests. The staff has concluded that to permit levy is reasonable and that the defendant can be protected adequately in this regard by the plaintiff's undertaking and liability for wrongful attachment (e.g., excessive attachment). However,

in connection with our review of the execution provisions, we should be careful to provide adequate safeguards for the realization of the fair value of this asset if the plaintiff finally prevails in the action. In general, we suspect that this will require that such rights be sold upon execution only under careful judicial supervision.

Section 481.130. The AHC suggests that only a judge--not any judicial officer--be authorized to perform the duties required by this chapter. This suggestion was rejected in November by the Commission, but the staff notes that the AHC insists that they feel "particularly strongly" about this issue.

Section 481.190. A Comment has been added to this section which accomplishes the AHC suggestion.

Section 482.040. The AHC suggested that the substance of the following be added to the Comment to this section (and we have done so):

Where matters are shown to the best of an affiant's knowledge, information, and belief, the facts stated in the affidavit will be the facts on which his belief is based and may include the nature of his information and the reliability of his informant.

Section 483.010. The AHC believes that attachment should be permitted in some noncommercial situations, i.e., where the amount of recovery on any contractual claim exceeds \$10,000. See Exhibit I, page 2. Note that they would also eliminate the restriction to unsecured claims in this situation. The staff is reluctant to start permitting exceptions to the general rule because we fear that exceptions of this nature are likely to be expanded in the course of the legislative process. However, you will note that certain exceptions are retained below. See, e.g., Labor Code § 3707 (employee permitted to attach property of employer to secure recovery for injuries where employer fails to secure the payment of compensation); Rev. & Tax. Code § 6713 (attachment issuable in action to recover tax delinquencies).

Section 484.040. The AHC suggests that twenty days until hearing is too long. This time period was selected because it appeared that any shorter period would not be long enough to permit the preparation and service of the various claims, notices, and affidavits required. The staff believes that, if the period is reduced to 10 days, we would have to eliminate the requirement that the defendant file prehearing notices and affidavits. This approach may eventually be taken; however, if the procedural innovations which we have included in this recommendation are removed now, we are certain that they will not be restored later and it seems to us that it would be desirable at least to have them given broader exposure in the printed tentative recommendation.

Section 484.050(d). The "Notice of Application and Hearing" now simply informs the defendant that he must "file a notice of opposition and supporting affidavit as required by Section 484.060." The AHC suggests that the actual time limit be set forth. The staff has no objection, and we have made the change suggested in subdivision (d). However, the change does make the notice somewhat longer and seems unnecessary to us since we cannot imagine that any defendant who seeks to resist will not contact an attorney fairly promptly.

Section 484.080. The AHC suggests that either party be permitted a continuance for good cause but, if the plaintiff be granted a continuance, the court should also have authority to assess attorney's fees against the plaintiff (presumably the amount incurred by the defendant because of the delay). The staff has no objection to the granting of continuances to the plaintiff; however, the Commission has been reluctant in the past to use the awarding of attorney's fees as a crutch, and the staff suggests that it is inconsistent to grant a continuance for good cause and then penalize the party who successfully seeks relief. What is your desire?

Section 484.090. The AHC again urges that the court be given broad discretion to consider factors other than probable validity in determining whether a writ should issue--they

urge insertion of a balancing of equities and justice test in this section. This Committee considers that extremely important, and feels that an excellent opportunity to bring fairness and rationality to the whole ancillary remedy area will be lost if this suggestion is not adopted.

The proposal has been rejected before for various reasons. The factors which the AHC seems to have in mind are not capable of ready definition or delineation, would not permit easy or even-handed administration, and would increase the number of contested cases. Also, the broadened sanctions for wrongful attachment should discourage abuse of the attachment procedure and provide an adequate remedy, if and when, an abuse occurs. The staff believes that the Commission's previous decision was correct, but you may wish to reconsider this issue.

Section 484.340. This section, Section 484.050, and Section 512.040 of the Claim and Delivery Statute have been conformed as the AHC suggests.

Section 484.310 et seq. and Section 484.510 et seq. The AHC questions whether two procedures for the issuance of additional writs are necessary. They do not suggest which procedure they would eliminate. We have two (one, a noticed motion procedure; the other, an ex parte procedure) because we believe that each will be used in certain circumstances and we see no reason to change.

Section 485.210(c). The AHC suggests that, under paragraph (1), the "plaintiff should be required to submit affidavits showing the 'probable validity' of his claim, which is different from showing that he is entitled to judgment." The requirement here is the same as that under Section 484.030. The staff believes that the plaintiff should be required to show that (in the absence of

any opposition) he is entitled to judgment. The court subsequently finds "probable validity" because a valid defense may be raised later, not because the plaintiff has failed to establish that he would be entitled to judgment on the basis of the facts presented. Perhaps Section 484.030 and this section need to be clarified in some way. E.g., perhaps there should be a showing that "the plaintiff on the facts presented would be entitled to a judgment on the claim. . . ." What is the Commission's desire?

The AHC also suggests that the requirement in paragraph (3) be eliminated and that the plaintiff simply be required to state that he is informed and believes that the property sought to be attached is subject to attachment. (Their suggestion could be adopted by simply deleting paragraph (3). Subdivision (b) already requires the plaintiff to make such a statement by incorporating the requirements of Section 484.020.) The staff concedes that it will be difficult for a plaintiff to negate the possibility of an exemption and a plaintiff who levies on exempt property will be subject to liability in any event. See Section 490.010(d). Nevertheless, it has been our hope here that the plaintiff will be required to make a showing greater than a simple information and belief statement that the property is nonexempt property. Perhaps this is not possible, and we should rely on the good faith of the plaintiff and the sanction for wrongful attachment.

Section 485.220. The AHC suggests that the following language be added at the end of subdivision (c): "with the same affidavits and supporting papers." See Exhibit I, p. 5 (for the reasons for this addition). The staff recommends that this change be adopted; we do not believe it changes the policy that was intended here. Note that the defendant at this point has not been inconvenienced because he is not yet aware of the application.

Chapter 6 (commencing with Section 486.010). At the November meeting, the staff was directed to reconsider whether provisions for injunctive relief ("equitable attachment") should be included in this title. The June 1972 Minutes state that the Commission determined that it would be undesirable to provide generally for a prejudgment protective order. It was thought at that time that the methods of levy provided would generally strike a proper balance between the needs of the respective parties, and that a preliminary injunction could be obtained by a plaintiff in a proper case under Sections 525-535 (Chapter 3 - Injunction). The staff believes that the Commission's earlier decision was and is correct. We do, however, suggest that the statute specifically provide that injunctive relief may be granted pursuant to Chapter 3 notwithstanding the availability pursuant to this title of an alternative or supplementary remedy. If this suggestion is adopted, we further suggest that Sections 482.020 and 482.030 be combined into one section, and that Section 482.020, as set forth in Exhibit II (Yellow), be added to Chapter 2.

The AHC comments that the Chapter 6 procedure may be harsher than the ultimate attachment remedy. See Exhibit I, pp. 5-6. The staff does not agree. We note that Section 486.040 gives the court very broad powers to limit the protective order, and Section 486.100 permits the defendant to apply immediately for ex parte modification of the order after it is issued. Contrary to the AHC's comment at the top of page 6, Section 486.050 does permit a restraint on transfer of only those things which are subject to attachment. The comment on payrolls is a good one. Section 486.060(c) is intended to permit the payment of any payroll expense until levy of attachment. (Note also that, after levy, Code of Civil Procedure Section 1206 provides a priority for wage claims of employees.) The staff believes that the phrase "after the service of the temporary protective order" could be deleted without changing the substance

of the provision and this, we think, would eliminate the AHC's concern. The present language is simply a copy of the comparable provision in the Marsh bill.

Section 486.090. In connection with this section, the staff was directed to consider whether a provision is needed for extending the effective date of a protective order until levy can be accomplished. The AHC noted the same problem. Section 486.090 formerly provided in part that the temporary protective order shall expire either thirty days after issuance or when levy is made, whichever occurs first. The staff has revised subdivision (a) to provide as follows:

486.090. . . . (a) Thirty days after the issuance of the order, or such other date as prescribed by the judicial officer in the order.

Section 486.110. The AHC asks whether involuntary bankruptcy was intentionally excluded from subdivision (c). The answer is "no"; this subdivision merely copies a provision from the Marsh bill. Whether his omission was intentional, we do not know; however, we see no difference between voluntary and involuntary bankruptcy insofar as the effect of this subdivision is concerned. The staff suggests that "by the defendant" be deleted from the first line of subdivision (c).

Section 487.010. The AHC suggests that "partner or" be deleted from subdivision (b). The deletion would preclude attachment when a partner is sued on a debt arising out of nonpartnership business activities. We believe the same result would be achieved under the Uniform Partnership Act (Corp. Code § 15025(c)) anyway but suggest that the clarifying change be adopted.

The AHC also suggests that "a partnership with three or less partners be treated as an individual." This basic approach was rejected earlier by the Commission. Actually, the scheme considered earlier was somewhat more sophisticated inasmuch as it included limitations on not only the number of partners, but also the number of employees of the partnership and the average annual net earnings. (First Supplement to Memorandum 72-35.) A similar problem

and approach was considered with respect to closely-held corporations. The staff thought that the idea had some merit (see also our comment below with respect to Section 487.020); however, we do not believe that the AHC has presented anything new and we merely note their concern.

Section 487.020. Subdivision (b) of this section provides a claimed exemption for necessities. However, only an individual defendant is permitted to make such a claim. An individual partner or person doing business in a corporate form will not get the benefit of this subdivision. This limitation causes the staff some concern. We have no solution to the problem, but raise it for your consideration.

Section 488.070. We believe that we have answered the AHC's comment on this section--the change from 30 to 60 days was necessitated by the possibility that substituted service would be required.

Chapter 8, Article 2 (commencing with Section 488.310). The AHC suggests that service by mail be permissible throughout all of this article. The matter of the manner of service, not only under this article but throughout the title, has somehow not been provided for.

The staff suggests that the following provision be added to Chapter 2--
General Provisions.

482.000. If the person to be served has not appeared in the action, service under this title shall be accomplished in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part. If the person to be served has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of this part [service of notices by mail].

A substantively similar provision was included in the claim and delivery recommendation. Section 514.020(b). The staff believes that these provisions will work a little better than across the board service by mail.

The AHC also suggests that the plaintiff be permitted to file, record, and serve under this article. This matter has been discussed previously and the idea rejected. The staff simply notes that, in the examples given (Sections 488.380(c) and 488.400(c)) where the plaintiff is given permission to serve, the property is attached by service by the levying officer, only the liability of a third person is unaffected until he is served by the plaintiff.

Section 488.310. At the November 1972 meeting, the staff was directed to consider giving notice under this section to all persons with an interest in the attached property. In this regard, the AHC suggests that "service on the occupant or posting of the property should not be eliminated. Indeed, it might be the very best method of getting the information to the third party or even to the owner." Short of actually listing the types of persons who should get notice under Section 488.310 (e.g., beneficiary under deed of trustee), we do not know what to do with this section. Inasmuch as we are not aware of any problems under the former law, our inclination is to restore the substance of former Section 542(1) and (2) and distribute the tentative recommendation in this form for comment to see if any problems are raised. What is the Commission's desire?

Section 488.360. Subdivision (b) has been amended to provide a solvency test for the defendant seeking a special business necessities exemption. The staff was unable to find authority which would permit incorporation by reference of the solvency test provided in the federal bankruptcy statute. The latter provision reads as follows (11 U.S.C. § 1(19)(1970)):

A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts

We have set forth a "balance sheet" test in subdivision (b) which, we believe, is substantially the same in effect as the federal test. Is this satisfactory?

The AHC expresses a concern that the staff also had, and has, with regard to this section. That is, "necessities" are "necessities" and Randone would seem to require the exemption from attachment of such property whether or not the defendant is solvent. However, this thought was rejected earlier, and we merely note the AHC's comment.

Section 488.550. The staff has drafted a new Section 488.550 to deal with the problem of establishing the defendant's interest in property held by a third person when the third person upon being served with a copy of the writ of attachment and notice of attachment either denies the defendant's interest in the property sought to be attached, or admits the interest but retains possession or refuses to pay the debt when called upon to do so.

At the November meeting Professor Riesenfeld suggested that the staff look at the Clyne case (Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 83 P. 36 (1905)). Section 544 of the Code of Civil Procedure currently provides for third-party liability to the plaintiff for the value of the defendant's interest or the amount of the debt existing at the time writ and notice are served. Clyne held that Section 544 is applicable only where the third person admits the defendant's interest or the debt. If, after such admission, he refuses to pay the debt or give custody of the property, he remains liable to the plaintiff. Under the new Section 488.550, subdivision (b) states the basic liability of the third person to the plaintiff (as in Section 544), and subdivision (d) allows the plaintiff to bring suit to enforce this liability at any time thereafter.

If the third person does not admit his liability, under Clyne, the statute of limitations between the defendant and the third person continues to run, and when it has run, will bar any action by the plaintiff or the defendant against the third person. Recognizing that this might harm the plaintiff's interest in preserving the defendant's interest in the property or the debt, the court in Clyne stated that the plaintiff should be able to sue the third person to protect the plaintiff's contingent interest in the property or the debt. Hence, in subdivision (e) of the new Section 488.550, the plaintiff is given the right to sue to establish his contingent interest if the defendant could have sued at the time the action is commenced. Subdivision (f) requires the defendant to be joined as a party as suggested in Clyne.

Subdivision (c) tolls the statute of limitations from time of service to the time the third person answers pursuant to Section 488.080. This was not suggested in Clyne but is added here to avoid the problem of the statute of limitations expiring between the time of garnishment and the time the garnishee answers. If he does not answer, the statute of limitations remains suspended.

Other alternatives exist. The object of preserving the property until after judgment when the plaintiff's interest would no longer be contingent could perhaps be achieved by allowing the plaintiff to get a temporary restraining order. Or the service of the writ could automatically toll the statute of limitations for a longer period of time, e.g., until after final judgment in the action in which the attachment is issued. Or the third person could be examined as under current Section 545 and new Section 491.010 and (with joinder of the defendant) a determination made at that time regarding the defendant's interest. This approach would be contrary to current case law under Sections 544 and 545. Clyne, Bunnell v. Wynns, and Takahashi v. Kunishima hold that the court cannot summarily adjudicate disputed claims under Section 545. See Comment to Section 488.550. However, if a full hearing

is provided, the objections to summary proceedings could perhaps be avoided.

Section 489.040. The AHC suggests that this section explicitly state that a single corporate surety can supply the bond. This is the effect of Section 1056 as noted in the Comment; however, we have no objection to the proposal.

Section 489.310(c). We have corrected the error noted by the AHC by changing "such judgment" to "any judgment recovered by the plaintiff in the action. . . ." The AHC also suggests that a bond in a lesser amount might be authorized here. The AHC does not appear very insistent upon this point, and the staff would prefer to leave the subdivision as is, but we have no strong opinions either way.

Section 490.010(e). This section has not been previously approved by the Commission. We have accordingly gone ahead and included the substance of the changes suggested by the AHC in Exhibit I, pp. 9-10. Is this satisfactory?

CONFORMING CHANGES

Discussed below are a number of changes which the staff believes are necessary or desirable to be made in other codes or other parts of the Code of Civil Procedure. These changes are discussed in the order (alphabetical by code) in which they would appear in the final recommendation and the sections themselves are included in this tentative recommendation in the form in which we suggest they be adopted. For your convenience, the sections are printed in pink and are set forth on pages 28 through 37 and 229 through 274 of the tentative recommendation attached to this memorandum.

Agricultural Code Section 281. This section is revised simply to include the appropriate cross-reference to attachment provisions and remove the unnecessary provision regarding an undertaking. See Comment to Section 281.

Business and Professions Code Section 6947. This section is revised simply to correct the cross-reference to the attachment provisions.

Civil Code

Section 1812. This section requires a statement of proper venue to be included in the application for a writ of attachment where the action is one arising out of a retail sale transaction. However, under Code of Civil Procedure Section 483.010, the attachment remedy would not be available to the seller in such a transaction, and the staff believes that it would be rare for the buyer to be the plaintiff in an action where the recovery sought is \$500 or more. In any event, we do not see the need for the special venue statement nor for the attorney's fees sanction. We have accordingly repealed Section 1812. Alternatively, we could simply correct the cross-reference in Section 1812 and note in the Comment that the section will rarely be applicable because of the limitations on attachment provided in Code of Civil Procedure Section 483.010, or we could generalize the requirement by adding it to the statements required in any application for a writ of attachment. See, e.g., Code Civ. Proc. § 484.020.

Section 3065a. This section permits attachment in either a special lien foreclosure action or in an ordinary action for money damages by a logger or lumberman. We have made no intentional substantive change in the section, but we have deleted certain provisions in an attempt to make clear that the plaintiff must follow the procedural steps provided by the attachment title of the Code of Civil Procedure. It might be noted that we interpret this section as an additional authorization for the use of the attachment remedy. Hence, a plaintiff who can bring himself under this section is not subject to the \$500 or unsecured debt limitations of Section 483.010. See Comment to Section 3065a.

Section 3152. This section relating to mechanics' liens contains a provision similar to that in the last paragraph of Section 3065a, and we have amended it in the same way as Section 3065a. It seems to us to be better practice to refer to the special exceptions created by these sections rather than to fail to state that the plaintiff's demand is secured by a lien.

Section 4380. This section authorizes the court to enforce any judgment, order, or decree made under the Family Law Act by "attachment." The staff has suggested that the word "attachment" be deleted to make clear that this section does not provide a separate authorization for issuance of an attachment against property. See Comment to Section 4380. Actually, we believe that the term refers to "body attachment" which is still permitted in appropriate circumstances. See Code Civ. Proc. § 1290 et seq. Hence, another approach would be to amend Section 4380 to refer to "body attachment" instead of just "attachment." What is the Commission's desire?

Code of Civil Procedure

Following are certain conforming changes in the execution chapter of the Code of Civil Procedure. We do not feel that we should load this recommendation with any revisions to the execution provisions except those which would be made necessary by enactment of the attachment provisions. Accordingly, for example, we have not included any revisions in the claim of exemption (Section 690.50) or third-party claim (Sections 689-689c) procedures, even though the Commission has previously given some consideration to these sections and certainly they will be revised to some extent in the future. Similarly, we have not attempted to revise Section 691 which now directs the levying officer to execute the writ of execution by "collecting or selling the things in action, and selling the other property, and paying to the plaintiff . . . the proceeds . . ." Professor Riesenfeld has strongly urged the Commission to

permit sale of a chose in action, if at all, only upon application to the court. The staff agrees that this is a change that is needed, but we would prefer to reserve it for a future recommendation. Is this satisfactory?

Section 682a. This section is revised simply to eliminate the obsolete cross-reference to Section 539 of the attachment provisions which will be repealed. See Comment to Section 682a.

Section 684.2. This section simply relocates two sections formerly included in the attachment chapter. The staff believes that they are more appropriately included in the execution chapter inasmuch as they deal with post-judgment satisfaction out of attached property and with sale under execution of attached property.

Section 688. This section incorporates for execution the method of levy procedures provided for attachment. For the most part, this seems satisfactory. However, where tangible personal property is in the possession of a judgment debtor, the staff believes that the judgment creditor will be adequately protected only if the property is seized. I.e., levy by filing with the Secretary of State or DMV will no longer work satisfactorily. We have, accordingly, revised Section 688 to incorporate the Section 488.320 seizure procedure where the property levied upon is tangible personal property in the possession of the defendant.

Section 690. No real substantive change is made in this section. The deletion of the reference to attachment in subdivision (a) simply avoids the potential conflict between the Section 690.50 claim of exemption procedures and the special procedures provided in the attachment title.

Section 690.6. This section has been amended in accordance with the directions of the Commission at the November 1972 meeting.

Section 690.21. See the Comment to this section.

Section 690.24. See the Comment to this section.

Education Code

Sections 13524 and 21112. Both of these sections have been revised to eliminate the reference to attachment of wages and salary of an employee. Such property is no longer subject to attachment. See Section 487.010 of the Code of Civil Procedure.

Financial Code

Section 1650. See the Comment to this section.

Section 3144. This section authorizes the Superintendent of Banks to bring an action against stockholders to collect an assessment following a bank liquidation. We have revised the section to include an appropriate cross-reference to the attachment provisions, but we have made no intentional substantive change in the section. See Comment to Section 3144.

Section 11208. This section specifies the method of levy on a federal savings and loan association. The section is the same in purpose and effect as Section 488.040 and, accordingly, we believe that it should be repealed. Sections 11208 and 488.040 are, however, phrased slightly differently, and you may wish to examine them to see if there are any changes you wish to make in Section 488.040 in the light of Section 11208.

Health and Safety Code

Section 11680.5. Subdivision (b) of former Section 537 of the Code of Civil Procedure authorized attachment "in an action by the State . . . for the recovery of funds pursuant to Section 11680.5 of the Health and Safety Code. In such cases, funds on the defendant's person at the time of his arrest which are retained in official custody shall also be subject to

attachment." The Marsh bill, perhaps inadvertently, repealed this provision. The staff would also prefer to leave the provision out. It seems to us that public funds paid over in the course of a narcotics investigation can and will be seized as evidence (see Penal Code § 1524(4)) and can subsequently be obtained pursuant to Penal Code Section 1418 or even under the claim and delivery statute. If the former law was intended to permit attachment generally of any property of the defendant, including but not limited to the public funds paid over, we are reluctant to continue such a sweeping exception to our scheme of attachment of business property. However, we have revised Section 11680.5 to provide the substance of the former law (as narrowly construed) in the event that the Commission or others desire to retain this provision or some variation thereof. (The issue should be discussed, and it is easier to delete the section later than it would be to add it.)

Labor Code

Section 300. Section 300 is revised to delete the reference to attachment of the wages and salary of an employee. Such property is no longer subject to attachment. See Section 487.010 of the attachment provisions. Section 300 is also amended but in a much more substantial way in the wage garnishment recommendation. If that recommendation is adopted, there will be no need to include Section 300 in the attachment recommendation. If the wage garnishment recommendation is not adopted, you may wish to consider revising Section 300 more in conformity with the way it is revised in that recommendation. For the time being, however, we did not want to complicate unnecessarily the attachment recommendation.

Section 404. Section 404 relates to money which is put up by an employee as a bond where he is entrusted by his employer with valuable property. See Labor Code § 402. The money is supposed to be deposited in a bank savings

account to be withdrawn only upon the joint signatures of the employer and the employee. Labor Code § 403. The staff agrees with the policy presently expressed in Section 404, i.e., such money should be exempt from levy by third persons. We have accordingly revised Section 404 in a manner which continues such policy but eliminates the reference to garnishment and attachment. We could leave the section alone, but we wanted to avoid the implication that the section authorized attachment in circumstances not covered under Section 483.010. See Comment to Section 404.

Section 3707. Generally speaking, every employer in this state is required to secure the payment of workmen's compensation by being insured by a qualified insurer or by obtaining a consent to self-insure. See Labor Code § 3700. If an employer fails to secure the payment of compensation, an injured employee may proceed against such employer by filing an application for compensation with the appeals board or by bringing a separate civil action for damages against such employer. See Labor Code § 3706. Where the second course is followed, Section 3707 authorizes the employee to attach the property of the employer to secure the payment of any judgment which is ultimately obtained and states that "the provisions of the Code of Civil Procedure, not inconsistent with this division, shall govern the issuance of, and proceedings upon such attachment." The staff does not suggest that we make any change in Section 3707; however, we did want to note this separate authorization for attachment.

Sections 5600-5603. Where the employee files with the appeals board, Section 5600 authorizes the appeals board, upon the filing of an application by the injured employee, to direct the county clerk to issue writs of attachment. Quite apart from the issues which concern us here, Section 5600 should be amended to eliminate the obsolete reference to Section 412 of the Code of Civil Procedure (see subdivision (a)) and to change "employee" to "employer" in subdivision (b).

Section 412 was repealed in 1969 when the jurisdiction and service of process provisions were amended. This former section provided for service by publication where the person on whom service was to be made was a nonresident or could not be found within the state or was a corporation having no officer or other person within the state who could be served. See Cal. Stats. 1968, Ch. 132, p. 346, § 3. Section 415.50 of the Code of Civil Procedure, which now authorizes service by publication, is applicable in a much narrower set of circumstances than was former Section 412. That is, Section 415.50 applies only where service cannot be made in another manner and service can probably generally be made on nonresidents by mail or by personal service. See Section 415.50. Subject to the decisions made with respect to nonresident attachment **generally**, the staff suggests that, for the time being, we incorporate only the cross-reference to Section 415.50 but, if nonresident attachment is permitted **generally**, that we incorporate that rule in an appropriate manner.

The change from "employee" to "employer" in subdivision (b) simply corrects an error. Obviously, it is the employer who must secure compensation under Article 1 (commencing with Section 3700) of Chapter 4 of Part 1 of Division 4. The term "employer" was used in one of the earlier versions of this section but, in the course of revision, the typesetting error was made and never apparently discovered.

As to whether the appeals board should be permitted to direct the clerk to issue writs of attachment, the staff has no opinion. We suspect it is very rare that an attachment is issued under this section simply because most employers are insured and those that self-insure, we believe, tend to be the larger, stable, solvent employers. We have, in any event, left this section and Sections 5601-5603 substantively the same as we found them; however, we note them for your consideration.

Penal Code

Section 1208. Section 1208 is revised to delete the reference to attachment of the earnings of a work-furloughed prisoner. Such property is rarely, if ever, subject to attachment. See Section 487.010. The exceptional case would be if the prisoner is self-employed and has earnings in his business. We could accordingly leave the section as is, but we have presented it in this form for your consideration.

Revenue and Taxation Code

A variety of provisions in the Revenue and Taxation Code authorize the Attorney General or the counsel for the Franchise Tax Board to prosecute actions for the collection of tax delinquencies. In connection with such authority, the following provision is also included--see Sections 6713 (sales and use tax), 7864 (vehicle fuel licence tax), 8972 (use fuel tax, i.e., gasoline tax collected from vendor), 10074 (motor transportation tax, i.e., tax on commercial carriers), 11472 (private railroad car tax), 12680 (insurance tax, i.e., tax on insurers); 18833 (personal income tax), 26251 (bank and corporation tax), 30302 (cigarette tax), 32352 (alcoholic beverage tax):

In the action a writ of attachment may [issue][be issued], and no bond or affidavit previous to the issuing of attachment is required.

We do not know to what extent these provisions are actually used. If they are not needed, they could be repealed. However, our experience with tax orders under the Earnings Protection Law recommendation suggests that this is an alternative which is unlikely to be achieved. If the authority to attach is retained in some form, we should acknowledge this in Section 483.010 by adding an introductory clause--"Except as otherwise provided by statute"--and list in the Comment the statutory exceptions. In addition, the staff believes that we should require the state to file an affidavit in support of its

application for a writ, but the ability to obtain a writ without a bond does not concern us and, indeed, seems to merely duplicate the rule provided by Section 1058 of the Code of Civil Procedure. Finally, we suspect that the Franchise Tax Board will request, if not insist, that it always be able to obtain relief ex parte. All these matters could be covered by changing the provision above to read (see sections set out in recommendation):

In the action a writ of attachment may be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Water Code

Section 71685.5. The district referred to in this section is any municipal water district. Code of Civil Procedure Section 1058 excuses any "district" from filing a bond or undertaking to secure any relief under that code. The staff has accordingly deleted the last sentence of Section 71685.5. This amendment also has the effect of eliminating any implied authorization to attach in circumstances other than those described in the general attachment provisions. Is this satisfactory?

Welfare and Institutions Code

Section 1834. Insofar as we are concerned, this section is identical in purpose and effect to Penal Code Section 1208 except that it refers to the earnings of a work-furloughed ward of the Youth Authority. We have made the same revision here as we made to Section 1208, and we think the two sections should be treated similarly.

Section 17409. The staff is not sure what to do with this section. Section 17403 authorizes an action to secure reimbursement where county aid has been furnished. As far as we can tell, no special authorization for attachment exists; hence, attachment would no longer be authorized. See Code Civ.

Proc. § 483.010. Moreover, as we interpret subdivision (f) of Section 17409, because all the property of the recipient is exempt where the claim is for reimbursement for aid received after May 21, 1963, it seems unlikely that, in the future, there will be any actions for reimbursement. We have in any event merely deleted the reference to attachment which would seem to take care of our immediate problem, but the remaining provisions still puzzle us.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

EXHIBIT I

COMMENTS REGARDING LAW REVISION COMMISSION TENTATIVE RECOMMENDATION RELATING TO PREJUDGMENT ATTACHMENT DATED OCTOBER 25, 1972, AS AMENDED NOVEMBER 9, 1972; SAID COMMENTS HAVING BEEN ADOPTED AT THE DECEMBER 2, 1972 MEETING OF THE AD HOC COMMITTEE ON ATTACHMENTS

SECTION

COMMENTS

481.130

The same comment regarding "judicial officer" as this Committee made in its comments on Claim and Delivery §511.060 apply here.

This Committee feels particularly strongly about the language "or other officer appointed by the trial court to perform the duties required by this title."

Also, the judicial function may be even more important here than it is in the area of Claim and Delivery.

481.190

The same explanatory comment as that added to §511.100 of the Claim and Delivery statute at the LRC meeting of November 9, 1972 should be added here.

482.040

The same explanatory comment as that added to §516.030 of the Claim and Delivery statute at the LRC meeting of November 9, 1972 should be added here.

483.010

This Committee believes that attachment should be permitted in some non-commercial transactions. For example, if a doctor or lawyer is purchasing property for investment purposes, that is not in his trade or business, but there is no reason to protect him from attachment. Also, while consumers should usually be protected, where very large purchases are involved such protection does not seem as necessary. Thus, the following subsection could be added: "(b) An attachment may be issued to secure the recovery on a claim for money in a fixed or reasonably ascertainable amount, based upon a contract, expressed or implied, which does not arise out of the conduct by the defendant of a trade, business or profession. The amount of recovery claimed shall be not less than \$10,000.00 exclusive of interest, costs and attorneys' fees."

We realize that other changes and shifts in this section would be required in order to make it read well and in order to incorporate this proposal.

484.040

Twenty days seems to be too long a period, and many difficulties could ensue between service and hearing, especially when the plaintiff could not prove entitlement to an ex parte writ or a temporary restraining order. It is suggested that the time period be made ten days, and that any necessary conforming changes to other sections also be made.

484.050(d) While this subsection makes reference to §484.060, the fact that the defendant has five days to respond should be explicitly stated in this subsection.

484.080 It is too harsh to require plaintiff to be ready to proceed, especially since defendant may have filed papers raising questions of exemptions, and the like, which plaintiff should have an opportunity to react to. He may well need more time for that purpose. Thus, the court should be able to grant an extension to either party for good cause shown; but it should also have authority to assess attorneys fees and costs against the plaintiff, if the continuance is requested by him.

484.090 As in this Committee's comments to §512.060 of the Claim and Delivery statute, we urge insertion of a balancing of equities and justice test in this section. This Committee considers that extremely important, and feels that an excellent opportunity to bring fairness and rationality to the whole ancillary remedy area will be lost if this suggestion is not adopted.

484.310 et.

seq.

To the extent that Article 2 duplicates Article 1 provisions, all comments made to Article 1 apply here also. There is a good deal of duplication of concepts and language throughout this proposal and

we assume that such duplication is deemed necessary or appropriate. However, we have not attempted to trace out the effect of each change on some similar section in another article or chapter.

484.340(f) This section, §484.050, and §512.040(d) of the Claim and Delivery statute should all read the same insofar as possible.

484.510 et
seq.

This Committee questions whether this procedure plus Article 2 procedure are both necessary. While we may be missing some differences, it appears that the major distinction is in the matter of sanctions for wrongful attachment. [§490.010(d).] Is that sufficient reason for two separate procedures?

485.210(c)

The Committee appreciates the need to tighten up provisions allowing ex parte writs of attachment. However, it would seem to be almost impossible for the plaintiff to meet the burden imposed by this subsection in most cases, if he is honest about it. Thus, plaintiff should be required to submit affidavits showing the "probable validity" of his claim, which is different from showing that he "is entitled to judgment." Note that §485.220(a)(2) only requires a finding of "probable validity."

More importantly, how will the plaintiff be able to sustain the burden set forth in §485.210(c)(3)? Must he negate every possible exemption, including

"necessary for support" exemptions, in order to show that the property is subject to attachment? It would seem more realistic to permit an affidavit similar to that required by §484.020(e).

485.220(c) The second sentence of this subsection seems to indicate that a plaintiff can never again seek an attachment if the ground for denial is not solely failure to comply with §485.010. Application of the maxim "inclusio unius exclusio alterius" would lead to that conclusion. We doubt that is intended, and feel that such a reading could be avoided by adding the following kind of language at the end of the sentence: "with the same affidavits and supporting papers."

486.010(a) This subsection should be amended to make it clear that the plaintiff can apply for the temporary restraining order at the time of filing or at any later time before the hearing regarding the order for attachment.

486.010 et
seq. Examination of the procedure in this chapter suggests that it may actually be harsher than the ultimate attachment itself would be. We assume that this is intended to be something less than attachment, since a temporary restraining order that was broader than the attachment could be expected to be would not seem appropriate. For example, shouldn't §486.020 require

the plaintiff to show that the things he seeks to restrain transfer of are things he could attach? Shouldn't he also be required to designate those things, just as he must designate what he seeks to attach? Shouldn't §486.060(b) relate to the amount plaintiff seeks to attach rather than the amount of his claim, where the latter is larger than the former? Also, should payment on a payroll that became due prior to the levy be precluded by a court order? [§486.060(c)] For example, if the payroll fell due on Monday, should a levy on Tuesday preclude the defendant from paying his workers? That may effectively shut him down.

As we understand it, under the proposal the court "may" permit the payment of some antecedent debts, such as payroll and rent, but perhaps further guidance in the "shall" category represented by §486.060 would be wise.

486.090(a) A flat thirty days seems unduly rigid. This should contemplate the possibility of extensions of the hearing date on proper terms and conditions. See, §484.080, which, in literal terms, conflicts somewhat with this section. See also, §486.110(b), which provides for expiration of the lien itself.

- 486.110(b) This Committee assumes that the purpose of this subsection is to allow back-dating under the provisions of §67(a) of the Bankruptcy Act, and that the Commission has determined that it will be effective for that purpose.
- 486.110(c) Was involuntary bankruptcy intentionally excluded from this provision?
- 487.010(b) Partnership property should not be subject to attachment simply because the defendant in an action happens to be a partner. Thus, the words "partner or" should be eliminated.
- 487.010(c) We recognize the difficulties presented by partnerships, especially since individuals may belong to multiple partnerships. Nevertheless, a partnership is not truly a separate person like a corporation, and giving creditors the right to drive a small partnership to the wall, while they are precluded from doing that to individuals seems rather contradictory. We do not see any perfect solution to this problem, but would suggest that for purposes of the exception a partnership with three or less partners be treated as an individual.
- 488.070 The period should be returned to thirty days, so that the levying officer will have incentive to complete the job.

488.310 Service on the occupant or posting of the property should not be eliminated. Indeed, it might be the very best method of getting the information to the third party or even to the owner.

488.310 et
seq.

A. Service by mail on defendants and third parties should be permissible throughout all of this Article.

B. Moreover, since the plaintiff is the one who stands to be hurt if the various services or recordings are not carried out promptly, when filing or recording is required the plaintiff should be the one who is to do it, just as the plaintiff is given the duty of serving the account debtor [§488.380(c)] and persons liable on negotiable instruments [§488.400(c)]. As to filing and recording, see §§488.310(a), 488.340(a), 488.350(a), 488.420(a) and 488.430(a). As to service of copies see, §§488.310(c), 488.340(c), 488.350(c) and (d), 488.370(b), 488.380(b), 488.390(b), 488.400(b), 488.410(b), 488.420(b) and 488.430(b).

C. Provisions similar to existing CCP §544 should be made regarding third parties who are holding defendant's property.

488.360(a) How does the plaintiff collect on payments made by credit card? The law should be clear on this aspect of plaintiff's security.

- 488.360(b) This section as written seems to violate Randone in that a defendant must not only show that the property is "essential for the support of himself and his family" but must also demonstrate his "solvency." We do not believe that solvency is the criteria for attachment, where essential support items are involved. It would seem that such items are necessities.
- 489.040 This section should explicitly state that a single corporate surety can supply the bond, simply for purpose of clarity.
- 489.310(c) A. The words "such judgment" do not have an apparent referent.
- B. Perhaps the court should be given authority to make the bond lower than the amount provided in the second sentence of this subsection. [This should at least be considered if the equitable balancing concept suggested in our comments to §484.090 is not adopted.]
- 490.010(e) A. The language of this subsection should read:
"The levy of a writ of attachment on property of a person other than the person against whom the writ is issued." The fact that an individual is a party to the action should not make his property subject to levy of a writ granted against another party.

B. On the other hand, we believe that the following language, which is similar to that in existing CCP §689, should be added: "Provided, however, where property 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 such registered or record owner, and plaintiff made and maintained the levy in good faith and in reliance on registered or recorded ownership, there shall be no liability to the third person by the plaintiff, or his sureties.

Dated: December 6, 1972.

AD HOC COMMITTEE ON ATTACHMENTS

Nathan Frankel
Edward N. Jackson
Andrea S. Ordin
Ronald N. Paul
Arnold M. Quittner
William W. Vaughn

Ferdinand F. Fernandez, Chairman

EXHIBIT II

§ 482.020. Injunctive relief not precluded

482.020. Nothing in this title shall preclude the granting of relief pursuant to Chapter 3 (commencing with Section 525) of Title 7 of this part.

Comment. Section 482.020 deals with certain problems of integration of this title with Chapter 3 of Title 7 of this part. The remedies provided by this title are not intended to be exclusive. In some circumstances, the relief provided, while theoretically available, may be impractical or ineffectual. In other cases, relief hereunder may be denied due to a close factual question of liability. In these situations, an injunction may provide a more satisfactory remedy and the ruling on an application for injunctive relief pursuant to the other provisions of this code should not be prejudiced by reason of the theoretical availability of a remedy at law.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE
RECOMMENDATION

relating to

PREJUDGMENT ATTACHMENT

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

This tentative recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

PREJUDGMENT ATTACHMENT

INTRODUCTION

In 1969, the United States Supreme Court in Sniadach v. Family Finance Corporation,¹ held unconstitutional a Wisconsin procedure for the prejudgment garnishment of wages. In the wake of this decision, in 1971, the California Supreme Court in Randone v. Appellate Department² declared unconstitutional California's basic prejudgment attachment procedure on the grounds that it violated the due process requirements of both the California and United States constitutions.³ The court indicated that a more narrowly drawn statute would be necessary to meet the constitutional requirements of the Sniadach

1. 395 U.S. 337 (1969).
2. 5 Cal.3d 535, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
3. Actually, the court in Randone held unconstitutional only subdivision (1) of Section 537 of the Code of Civil Procedure; that subdivision authorized attachment in an action on a debt, including liability for support, against a resident defendant. Randone did, however, cast doubt on other subdivisions of Section 537. Subsequently, subdivision (4), authorizing attachment in an action in unlawful detainer for unpaid rent, was held unconstitutional in Damazo v. MacIntyre, 26 Cal. App.3d 18, Cal. Rptr. (1972). Subdivision (5), insofar as it authorized attachment for the collection by the state of an obligation or penalty imposed by law, was declared unconstitutional in People v. Allstate Leasing Corp., 24 Cal. App.3d 973, 101 Cal. Rptr. 470, as modified, 25 Cal. App.3d 602a (1972).

On the other hand, subdivisions (2) and (3), authorizing attachment in actions against nonresidents, were held constitutional in National General Corp. v. Dutch Inns of America, Inc., 15 Cal. App.3d 490, 93 Cal. Rptr. 343 (1971); Property Research Financial Corp. v. Superior Court, 23 Cal. App.3d 413, 100 Cal. Rptr. 233 (1972); and Damazo v. MacIntyre, supra. Finally, subdivision (6), which authorized attachment to recover funds expended in narcotics investigations, was also held constitutional in Damazo v. MacIntyre, supra.

case and that a "wholesale redrafting" of the basic attachment provisions would be required.⁴

In order to provide immediate interim attachment remedies for creditors and to remedy the constitutional defects in the scheme invalidated by Randone, the 1972 Legislature enacted Senate Bill 1048.⁵ However, at the same time, the Law Revision Commission was directed to continue its study of the area of attachment with a view towards proposing a comprehensive revision of these procedures.⁶ On the basis of this study, the Commission makes the following recommendations.

CASES IN WHICH ATTACHMENT IS AUTHORIZED

A dominant theme of the California and federal court decisions in the area of prejudgment remedies is that assets of an individual which are "necessities of life" are constitutionally entitled to special consideration because of the extreme hardship to the individual which results when he is deprived of their use.⁷ In its discussion of "necessities," the court in Randone referred in part to such consumer goods as "television sets, refrigerators, stoves, sewing machines and furniture of all kinds."⁸ Certainly, a partially effective, if indirect, way of preventing attachment of such

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4. 5 Cal.3d at 547, 563, 488 P.2d at , , 96 Cal. Rptr. at , .
 5. Cal. Stats, 1972, Ch. 550. This act is effective only until December 31, 1975.
 6. Cal. Stats. 1972, Res. Ch. 27.
 7. See, e.g., Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Randone v. Appellate Dep't, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
 8. 5 Cal.3d at 560, 488 P.2d at , 96 Cal. Rptr. at , quoting from Blair v. Pitchess, 5 Cal.3d 258, 279, 486 P.2d 1242, , 96 Cal. Rptr. 42, (1971).

consumer necessities is to deny the use of the remedy in actions based on obligations generally and to authorize attachment only in actions to recover debts arising out of the conduct by the defendant of a trade, business, or profession. The 1972 legislation took just such an approach. The statute enacted provides for attachment where the action is for an unsecured liquidated sum of money based on money loaned, a negotiable instrument, the sale, lease, or licensed use of real or personal property, or services rendered and is against any corporation, partnership, or individual engaged in a trade or business. In essence, then, the 1972 act tends to restrict the availability of attachment to commercial situations by generally permitting attachment only against persons or organizations engaged in commercial activities. Unfortunately, the 1972 act does not specifically tie the types of alleged debts which may form the basis for attachment to the business activities of the defendant. Hence, for example, the 1972 act would not permit the attachment of

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9. Code Civ. Proc. §§ 537.1(a), 537.2(a), (b), (c). In contrast, at the time Randone was decided, the California law provided for attachment against any person where the action was based upon an unsecured contractual obligation, liability for support, or nonpayment of rent (in an unlawful detainer action). Cal. Stats. 1970, Ch. 1523, § 2, at 3058 (former Code Civ. Proc. § 537(1), (4)).

The pre-1972 law also authorized attachment where the defendant was a nonresident (or had departed from the state), could not be found, or had concealed himself to avoid service, and the grounds were expanded to include an action based upon any contract or any action for damages whether based on "negligence, fraud, or other wrongful act." Id. (former Code Civ. Proc. § 537(2), (3)). This aspect of the law was continued in part by the 1972 legislation which authorizes attachment in an action for the recovery of money where the defendant is a nonresident (including any foreign corporation or partnership which has not designated an agent for service of process within this state) or cannot be found or has concealed himself to avoid service of summons. Code Civ. Proc. §§ 537.1(b), 537.2(d). In such case, however, the defendant need merely make a general appearance to obtain a discharge of the attachment. Code Civ. Proc. § 538.5(d).

Note. The Commission has deferred consideration of whether and to what extent nonresident defendants will be treated uniquely and whether attachment will be permitted to secure jurisdiction. The answers to these questions will, however, be determined before a final recommendation in this area is submitted to the Legislature.

the property of an ordinary wage earner in an action based on the furnishing of medical services or the sale of a consumer good to such individual. The act would, however, permit the attachment of the property of an individual doing business as a grocer or self-employed plumber on the same type of debt. This inconsistency should be eliminated. The Commission recommends that the policy implicit in the 1972 act be continued by authorizing attachment only in those cases where the claim is based on an unsecured contract, whether express or implied, and arises out of the conduct by the defendant of a trade, business, or profession.

Prior to 1972, attachment was authorized only if the amount of recovery claimed, exclusive of interest and attorney's fees, was at least 200 dollars.¹⁰ In 1972, this limitation was increased to 500 dollars.¹¹ This limitation also tends to eliminate those cases where consumer necessities might be attached. Moreover, the elimination of these relatively small cases helps to save court time and resources which are inefficiently employed to collect such debts under the attachment procedure. It should be noted, however, that the 500 dollar limit corresponds to the jurisdictional limit of the small claims court, hence for lesser amounts a creditor will generally have an expeditious legal remedy available to him.¹² On the other hand, if the minimum amount for attachment was increased to more than 500 dollars, the limitation would seem to create an unreasonable preference between creditors seeking greater and lesser recoveries.

10. Cal. Stats. 1970, Ch. 1523, § 2.7, at 3070 (former Code Civ. Proc. § 538). See also former Code Civ. Proc. § 537(1).

11. Code Civ. Proc. § 537.1.

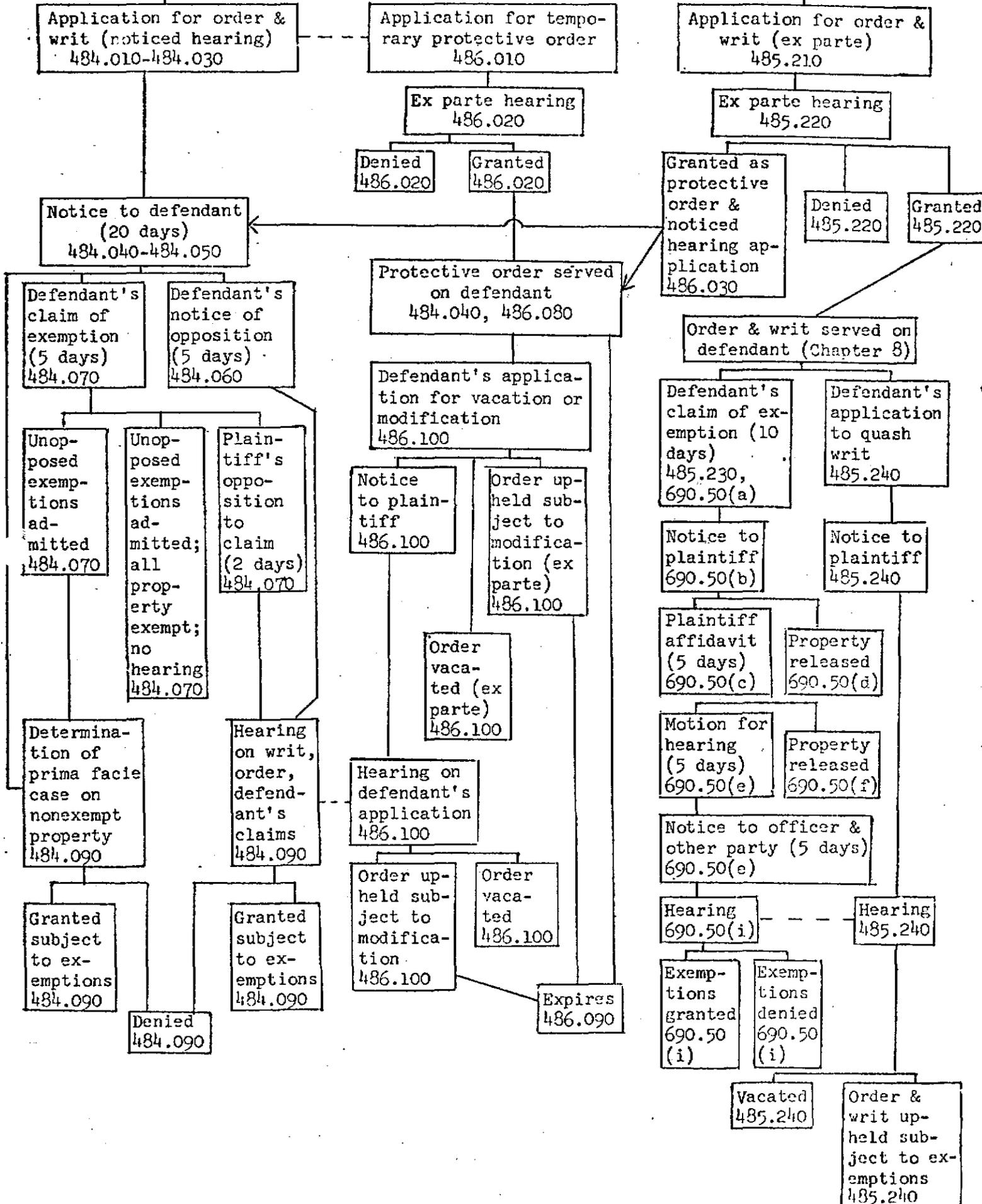
12. See Code Civ. Proc. §§ 116-117r.

PROCEDURES FOR ISSUANCE OF WRIT; CLAIMS OF EXEMPTION

Three major prerequisites established by the California Supreme Court's decision in Randone must be satisfied by any attachment procedure. First, in all but "extraordinary circumstances," a notice and the opportunity for a hearing must be provided before the defendant's property is attached. Second, the "extraordinary circumstances" which permit the use of ex parte, summary procedures for the issuance of writs of attachment must be strictly limited. Finally, the statute must provide for the exemption of necessities from attachment. These prerequisites and the manner in which they are satisfied by this recommendation are discussed below.¹³

13. The statutory procedures provided by this recommendation for the issuance of a writ of attachment (and temporary protective order) are outlined in the following diagram. See also Comment to Chapter 4 (commencing with Section 484.010), infra on pages ____ to ____.

Complaint filed



Requirement of Notice and Opportunity for Hearing

Perhaps the primary failing of the California attachment procedure prior to the enactment of the 1972 amendments was the failure to provide for notice to the debtor of the threatened attachment of his property and an opportunity to be heard before the attachment--the essence of due process.¹⁴ Under the 1972 amendments, if the judicial officer finds on the plaintiff's ex parte application that the plaintiff has established a prima facie case for attachment, he is required to issue a notice of hearing on the application for the writ.¹⁵ The hearing on the application is held seven business days after service of the notice on the defendant, or on the first regular date that law and motion matters are heard thereafter, whichever occurs later.¹⁶ Each party is required to serve upon the other any affidavits intended to be introduced at the hearing at least 24 hours before the hearing. If the defendant does not appear in person or by counsel, the statute requires the court to direct the issuance of a writ without further review. If the defendant does appear, the plaintiff must establish the probable validity of his

14. 5 Cal.3d at , 488 P.2d at , 96 Cal. Rptr. at .

15. Code Civ. Proc. § 538.1.

16. Code Civ. Proc. § 538.2.

claim and, if the court so finds, a writ is issued.¹⁷

This procedure appears to satisfy the Randone requirement that adequate notice and opportunity for a hearing be given before a writ of attachment may issue. The Commission, however, recommends a number of changes. First, it is recommended that 20 days' written notice of the hearing be given the defendant. This allows enough time for the defendant to prepare and serve the plaintiff with notice of his opposition to the application. Second, the defendant should be required to serve written notice of his opposition and any claim of exemption on the plaintiff at least five days before the hearing. If such service is not made, the defendant should be prohibited from appearing in opposition to the application. The plaintiff, in turn, should give notice that he will contest the claims of exemption at least two days before the hearing. These procedures should achieve an early framing of the issues, eliminate surprise, and obviate any need for continuances and extended hearings. If no notice of opposition is served by the defendant, the plaintiff must still establish a prima facie case as under existing law.

Under the 1972 amendments, if the plaintiff has established a prima facie case for attachment, the court is required to issue not only a notice of hearing but also a temporary restraining order.¹⁸ The temporary restraining order prohibits any transfer by the defendant of his property in the state which is "subject to the levy of a writ of attachment" except in the ordinary course of business. The order also prohibits the opening of new bank accounts and the issuance of any checks in excess of an aggregate of 1,000 dollars from funds subject to levy if the remaining funds would be reduced to less than the amount of the plaintiff's claim. Notwithstanding this

17. Code Civ. Proc. § 538.4.

18. Code Civ. Proc. § 538.1.

prohibition, the defendant may issue checks to cover payrolls, to pay for goods delivered C.O.D. for his business, to pay taxes where penalties would otherwise accrue, and to pay legal fees in the action.¹⁹ The Commission believes that the ex parte issuance and sweeping nature of the temporary restraining order may contravene the holding in Randone that, except in exceptional circumstances, a defendant cannot be deprived of the use of his property without notice and an opportunity for a hearing.

The Commission recommends that the plaintiff be permitted to obtain a temporary protective order only if he can show ex parte that he will probably suffer great or irreparable injury if no order is issued. If a temporary protective order is issued, the defendant should be permitted to apply for its vacation or modification. This procedure should adequately protect the plaintiff in situations of need. On the other hand, it should prevent unnecessary infringement of the defendant's rights where such protection is not needed. By basing the issuance of the temporary protective order on an affirmative showing of need by the plaintiff, rather than issuing a temporary restraining order in every case, the recommended procedure avoids the due process objections which might exist if the defendant's use of his property could be restrained without a showing of a sufficient state or creditor interest in that restraint. The recommended temporary protective order procedure also has the additional virtue of flexibility by allowing the judicial officer to fashion the restraints of the order shown to be necessary for the protection of the plaintiff. The statute should, however, provide certain guidelines as to the ambit of the temporary protective order. The Commission's recommendation includes such guidelines; for example, the order must permit the defendant to issue checks in the same manner as under existing law.

19. Code Civ. Proc. § 538.3.

Ex Parte Attachment

The Randone decision criticized former Code of Civil Procedure Section 537(1) on the ground that it:²⁰

does not narrowly draw into focus those "extraordinary circumstances" in which summary seizure may be actually required. Instead, the provisions sweep broadly, approving attachment over the entire range of "contract actions", a classification which has no rational relation to either the public's or creditor's need for extraordinary prejudgment relief.

The court explained that the rule laid down by the United States Supreme Court in Sniadach is that:²¹

the entire domain of prejudgment remedies [is subject to the] long-standing procedural due process principle which dictates that, except in extraordinary circumstances, an individual may not be deprived of his life, liberty or property without notice and hearing.

For this basic constitutional principle to be satisfied, an ex parte attachment procedure must serve some "'state or creditor interest' . . . 'of overriding significance' . . . which requires the procedure" and the statute must restrict ex parte attachments to such extraordinary situations.²² The court listed several cases involving extraordinary situations justifying summary deprivation of property: e.g., a procedure allowing government officers to seize operational control of a bank's assets in an emergency²³ and a procedure allowing federal Food and Drug Administration officials to seize misbranded drugs which had been determined to be dangerous or misleading.²⁴ The court found that a number of factors coalesced to justify these summary procedures:²⁵

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20. 5 Cal.3d at 541, 488 P.2d at , 96 Cal. Rptr. at .
 21. 5 Cal.3d at 547, 488 P.2d at , 96 Cal. Rptr. at .
 22. 5 Cal.3d at 552, 488 P.2d at , 96 Cal. Rptr. at .
 23. Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. v. Bennett, 277 U.S. 29 (1928).
 24. Ewing v. Myfinger & Casselberry, Inc., 339 U.S. 594 (1950).
 25. 5 Cal.3d at 554, 488 P.2d at , 96 Cal. Rptr. .

First, the seizures were undertaken to benefit the general public rather than to serve the interests of a private individual or a single class of individuals. Second, the procedures could only be initiated by an authorized governmental official, charged with a public responsibility, who might reasonably be expected to proceed only to serve the general welfare and not to secure private advantage. Third, in each case the nature of the risks required immediate action, and any delay occasioned by a prior hearing could potentially have caused serious harm to the public. Fourth, the property appropriated did not vitally touch an individual's life or livelihood. Finally, the "takings" were conducted under narrowly drawn statutes that sanctioned the summary procedure only when great necessity actually arose.

The court noted that the United States Supreme Court had also cited a case²⁶ upholding the constitutionality of a statute permitting prejudgment attachment of property of a nonresident debtor by a resident creditor.²⁷ All these cases, however, the court said:²⁸

involved statutes which carefully confined the operation of their summary procedures to the "extraordinary" situation in which a governmental interest necessitated such measures.

Finally, both in Blair v. Pitchess²⁹ and in Randone³⁰ the court recognized that:

in some instances a very real danger may exist that the debtor may abscond with the property . . . [and that in] such situations a summary procedure may be consonant with constitutional principles.

However, former Section 537(1) did³¹

not require the creditor to point to special facts which demonstrate an actual and significant danger that the debtor, if notified of the suit or potential attachment, will flee from the jurisdiction with his assets or will conceal his property to prevent future execution.

This failure of former Section 537(1) to meet any of the standards set forth caused the court to hold it unconstitutional.

26. Ownbey v. Morgan, 256 U.S. 94 (1921).

27. 5 Cal.3d at 554, 488 P.2d at , 96 Cal. Rptr. at .

28. 5 Cal.3d at 554, 488 P.2d at , 96 Cal. Rptr. at .

29. 5 Cal.3d at 278, 488 P.2d at , 96 Cal. Rptr. at .

30. 5 Cal.3d at 556, 488 P.2d at , 96 Cal. Rptr. at .

31. 5 Cal.3d at 557, 488 P.2d at , 96 Cal. Rptr. at .

It follows that one problem involved in drafting a constitutional statute is to adequately define and delimit "those 'extraordinary circumstances' in which a state or creditor interest of overriding significance might justify summary procedures."³² The court suggested that "the kind of 'extraordinary situation' that may justify summary deprivation cannot be precisely defined."³³ However, the statutory draftsman must still come as close as possible to a precise definition of the situations in which extraordinary circumstances may be said to exist.

The legislation enacted in 1972 attempted to meet the requirements of Randone by providing for the immediate issuance of a writ without notice or hearing only under the following conditions: when the plaintiff shows the court that "there is a substantial danger" that the defendant will transfer, remove, or conceal the property; when the notice cannot be served with reasonable diligence after 10 days and the court finds that the defendant has departed from the state or concealed himself to avoid service; when a bulk sales notice has been recorded and published (the writ in this case to apply only to such goods); when an escrow has been opened regarding defendant's sale of a liquor license (the writ in this case to apply only to the pro rata share of proceeds of sale in escrow); or when the defendant is a nonresident.³⁴

The Commission recommends that the substance of these provisions be retained but that issuance of a right to attach order and a writ of attachment be authorized only where the plaintiff shows that great or irreparable injury would result to him if issuance of the order were delayed until the matter

32. 5 Cal.3d at 557, 488 P.2d at , 96 Cal. Rptr. at .

33. 5 Cal.3d at 553, 488 P.2d at , 96 Cal. Rptr. at .

34. Code Civ. Proc. § 538.5.

could be heard on notice.³⁵ Moreover, the Commission also recommends that the judicial officer be authorized to issue a temporary protective order, in lieu of a writ, where such order would better serve the ends of justice and equity, taking into consideration the rights and needs of both plaintiff and defendant. Such authorization should provide desirable flexibility as well as a less onerous remedy where there is any doubt as to whether the situation may constitutionally be characterized as extraordinary.

Exemption of Necessities

An additional reason cited in Randone for finding the former attachment procedure unconstitutional was that a writ of attachment was allowed to issue even in situations where the attachment deprived the defendant of his necessities of life. The procedure did allow the defendant to obtain the release of his property by establishing that it was exempt under a set of statutory exemptions.³⁶ However, the burden of seeking and proving the exemption was placed on the defendant, and necessities were subject to attachment until such time as the defendant proved his right to the exemption. The procedural steps required could delay the release of the exempt property for at least 25 days.³⁷ The court emphasized that:

the hardship imposed on a debtor by the attachment of his "necessities of life" is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and hearing on the validity of the creditor's claim. . . .³⁸

* * * * *

35. The Commission has deferred consideration of whether and to what extent nonresident defendants will be subject to ex parte attachment. The Commission has also postponed its consideration of the use of attachment to secure jurisdiction over nonresident defendants. See note 9, supra.

36. See Code Civ. Proc. §§ 690-690.29, 690.50.

37. 5 Cal.3d at 546, 488 P.2d at , 96 Cal. Rptr. at .

38. 5 Cal.3d at 448, 488 P.2d at , 96 Cal. Rptr. at .

[P]lacing the burden on the debtor to seek exemption, does not satisfy the constitutional requirements. . . . Instead, due process requires that all necessities be exempt from prejudgment attachment as an initial matter.³⁹

[A]t a minimum . . . [the defendant must] be afforded a meaningful opportunity to be heard on the merits of the plaintiff's claim . . . , the state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action, before an impartial confirmation of the actual, as opposed to probable, validity of the creditor's claim after a hearing on that issue.⁴⁰

The attachment provisions enacted in 1972 do permit the defendant to raise any claim of exemption at the noticed hearing on the plaintiff's application for a writ of attachment.⁴¹ Thus, generally, no property will be attached before the defendant has an opportunity to claim his exemptions. Moreover, the statutory exemptions have been supplemented by a provision requiring the exemption of any property found to be necessary for the support of the defendant and his family.⁴² As noted previously, an attempt has been made to restrict the availability of attachment to actions against business entities and arising out of commercial transactions.⁴³ Finally, an attempt has also been made to limit the type of property which is subject to attachment to commercial property.⁴⁴ All these features tend to remove consumer necessities from the reach of the attachment procedure and to satisfy the constitutional

39. 5 Cal.3d at 563, 488 P.2d at , 96 Cal. Rptr. at .

40. 5 Cal.3d at 562, 488 P.2d at , 96 Cal. Rptr. at , citing *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Boddie v. Connecticut*, 401 U.S. 371 (1971).

41. Code Civ. Proc. § 537.3.

42. Id.

43. See text accompanying note 9 supra.

44. Code Civ. Proc. § 537.3.

standards set by Randone. The Commission recommends that these policies be continued.

Unfortunately, the 1972 legislation also provides for the automatic issuance of a temporary restraining order pending the hearing referred to above⁴⁵ and provides for the ex parte issuance of only a writ of attachment in extraordinary circumstances.⁴⁶ The order is subject to certain limitations;⁴⁷ however, its impact may violate the Randone standards.⁴⁸ Similarly, there is no alternative to the issuance of an ex parte writ in extraordinary circumstances, and the writ may be used to attach necessities in violation of Randone. The Commission recommends that the issuance of a temporary protective order be limited to situations where the plaintiff has shown a real need for such relief and that the court be authorized to issue a temporary protective order in lieu of an ex parte writ where this action seems appropriate. Both changes will permit the court to protect potential necessities and still provide adequate relief for the plaintiff. Finally, the Commission recommends that, where the plaintiff has sought to attach or actually attached particular property, the defendant may claim as exempt not only that property but any other property which he wishes to protect in the future. Thus, he may establish an exemption in advance, thereby precluding the attachment of necessities.

The recommendations suggested above are directed towards satisfying the constitutional dictates of Randone. This was essentially all that the 1972 legislation attempted to accomplish. The Commission, on the other hand, proposes a comprehensive revision and modernization of the entire area of attachment. The discussion which follows covers the major points of change in this area.

45. Code Civ. Proc. § 538.1.

46. Code Civ. Proc. § 538.5.

47. Code Civ. Proc. § 538.3.

48. See p. 9, supra.

ADDITIONAL WRITS PROCEDURE

Existing law simply provides for the issuance of additional writs on the basis of the plaintiff's original affidavit and undertaking.⁴⁹ The Commission recommends that more specific procedures which provide adequate protection for defendants be created. Where a right to attach order and a writ of attachment have been issued after a noticed hearing, the plaintiff should have two alternatives. He may apply either ex parte or on a noticed motion for an additional writ describing additional property. In the latter case, 20 days' notice should be given to the defendant. If the defendant makes no claim of exemption as to the additional property sought to be attached and the plaintiff has filed the necessary undertaking, the additional writ should be issued. If the defendant wants to claim an exemption, such claim should be made at least five days before the hearing. The plaintiff, in turn, should be required to serve any opposition to such claims at least two days before the hearing. If no opposition is made, the claim should be granted. If the defendant files a claim and the plaintiff files notice of opposition to at least some of the claimed exemptions, a hearing should be held and the judicial officer should make the necessary determinations and orders. The defendant may not later claim any of the property described in the plaintiff's application is exempt without showing a change in circumstances.

Alternatively, the plaintiff should be permitted to utilize an ex parte procedure for obtaining an additional writ. A writ should issue if at the ex parte hearing the court finds that a right to attach order has been issued after notice and hearing, that the plaintiff's affidavit shows the property sought to be attached is not exempt, and that the plaintiff has provided an

49. Code Civ. Proc. §§ 540, 559-1/2.

undertaking. After the writ is issued, the defendant may claim exemptions under the procedure provided by present Section 690.50 of the Code of Civil Procedure.

Where, in extraordinary circumstances, the plaintiff has obtained an order and writ under the ex parte hearing procedure,⁵⁰ the plaintiff should be able to apply ex parte for additional writs if he can show that the extraordinary circumstances still exist. Claims of exemption would again be made pursuant to Section 690.50.

These procedures, together with the claim of exemption procedures, should provide the defendant with an adequate opportunity to protect his interests. Where a noticed hearing is held on the additional writ, the defendant can present his case before the writ is issued. Where the additional writ is sought ex parte but after a right to attach order and writ of attachment have been obtained at a noticed hearing, the defendant has two opportunities to claim his exemptions: at the time the original order and writ are issued⁵¹ and then later after the ex parte writ has been served. Similarly, where in extraordinary circumstances the plaintiff has obtained an initial order and writ under the ex parte procedure, the defendant again has an opportunity to claim an exemption in advance at the time the initial writ is served and, if not previously made, after the additional writ is served.

METHOD OF LEVY

California law now provides for various methods of levy depending on the type of property involved. The Commission recommends a more detailed and orderly scheme utilizing modern terminology. Most of the provisions recommended are based on present law, but certain changes are suggested.

50. See pp. 12-13, supra.

51. See p. 14, supra.

General Provisions

The Commission recommends that the writ of attachment (or a separate statement incorporated therein) be required to identify the property or interest to be levied upon. Existing law provides only that the property be described in the plaintiff's instructions to the levying officer. However, the procedures recommended for issuance of a writ would make the matter of what property is to be attached always subject to prior judicial consideration. If the writ then issued identifies the property to be levied on, this should avoid any discrepancies between what the court has determined may be attached and what is actually levied upon by the sheriff.

Contents of Notice

The Commission recommends that a notice of attachment which informs the defendant of the capacity in which he is served, the property sought to be attached, and his rights and duties under the attachment always be served on the defendant. Existing law does not specify the contents of the notice of attachment, and some statutory guidance seems desirable.

Method of Levy for Particular Types of Property

The Commission recommends that specific methods of levy for various different types of property--real property, tangible personal property in the defendant's possession, tangible personal property in possession of a third person, equipment of a going business, motor vehicles and vessels, farm products and inventory of a going business, accounts receivable and choses in action, chattel paper, negotiable instruments and money, securities, judgments owing to the defendant as a judgment debtor, and deposit accounts--be provided. Without detailing the treatment of each type of property, some differences between existing law and the recommended provisions should be noted.

[Real Property

The Commission recommends that mere occupants of real property no longer be served with a notice of attachment.⁵² Such service seems to be an indirect means at best of giving notice to the owner of the property and at worst could cause undue worry and inconvenience to a person whose possession will not be disturbed. Service should still be required on the defendant and any record owner of the property. (See Memorandum 73-5.)]

Levy by Custody--Tangible Personal Property in Hands of Defendant

The Commission recommends that the distinction between property capable of manual delivery and property incapable of manual delivery be discontinued⁵³ and that the statute speak instead in terms of tangible personal property generally or specially defined types of property. Under existing law, when property is not capable of manual delivery, levy is by notice even when it is in the possession of the defendant.⁵⁴ The necessity to determine whether property is or is not capable of manual delivery involves the risk of an incorrect choice and the resulting invalidity of the attachment. The risk is removed by eliminating the distinction. Further, by leaving the property in the hands of the defendant and attaching by notice, subsequent transferees may not be adequately protected. This problem should be avoided by requiring levy by custody where tangible personal property is in the possession of the defendant except in carefully prescribed situations.

52. Compare Code Civ. Proc. § 542(1).

53. See Code Civ. Proc. § 542(3), (5).

54. Code Civ. Proc. § 542(5). See *Raventas v. Green*, 57 Cal. 254 (1881); *Irillary v. Byers*, 84 Cal. App. 28, P. (1927).

Levy by Notice--Tangible Personal Property in Hands of Third Person

Tangible personal property, which is capable of manual delivery and in the hands of a third person, is not covered by the present statute; tangible personal property not capable of manual delivery in the hands of a third person is attached by serving notice on that person.⁵⁵ Under the recommended statute, tangible personal property not covered by some special statute would always be levied upon by service on the third person. The third person can demand that the levying officer take the property into custody. In the absence of such demand, he is liable to the plaintiff for the value of the defendant's interest in the property until the attachment is released.

Motor Vehicles and Vessels as Equipment of Going Business

Under existing law, equipment other than a vehicle or vessel is levied upon by filing with the Secretary of State and serving notice upon the defendant.⁵⁶ The Commission recommends that motor vehicles and vessels which are equipment of a going business also be levied upon by filing but that the notice be filed with the Department of Motor Vehicles.

Inventory of a Going Business and Farm Products

Under existing law, the inventory of a going business is attached, with the defendant's consent, by placing a keeper in charge of the business, thereby allowing final cash sales to continue for a short period.⁵⁷ The Commission recommends that this procedure be retained but that the defendant be able to seek an order removing the keeper and returning the property if

55. Code Civ. Proc. § 542(5).

56. Code Civ. Proc. § 542.1.

57. Code Civ. Proc. § 542(3).

the property attached is essential for the support of himself and his family and if he can show that he is solvent but for the plaintiff's claim.

The Commission also recommends that the plaintiff be permitted, as an alternative to the keeper, to obtain an attachment lien on the inventory by filing with the Secretary of State. This would give him the same type of priority as a secured party with a perfected security interest. Finally, the Commission recommends that farm products be treated in the same manner as the inventory of a business.

Negotiable Instruments and Chattel Paper

The Commission recommends that the law relating to negotiable instruments be clarified and that this type of property be attached by serving notice and taking custody in all situations--whether the instrument is in the possession of the defendant or a third person. This procedure avoids the problem arising from transfers to subsequent holders and eliminates the ambiguities in existing law.

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58. Under existing law, a promissory note belonging to the defendant but in the possession of a third person is characterized as both a "credit" and "personal property capable of manual delivery." Compare Deering v. Richardson-Kimball Co., 109 Cal. 73, P. (1895)(credit), and Gow v. Marshall, 90 Cal. 565, P. (1891)(credit), with Haulman v. Crumal, 13 Cal. App.2d 612, 57 P.2d 179 (1936)(property capable of manual delivery). Subdivision 5 of Section 542 provides in part:

[C]redits . . . shall be attached by leaving with the persons . . . having in his possession, or under his control, such credits . . . a copy of the writ . . . and . . . a notice that . . . the credits . . . in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

Levy accordingly would be by notice and the note would not be required to be taken into custody. Cf. Puissegur v. Yarbrough, 29 Cal.2d 409, 175 P. 830 (1946)(levy by notice to financial institution regardless of the character of the property). However, no procedure is specified for levy on property capable of manual delivery and in the hands of a third person. Nevertheless, it has been suggested that the proper method of levy on a negotiable instrument in the possession of a third person is by seizure. See Haulman v. Crumal, supra (dictum). A note in the possession of the defendant has been treated as personal property capable of manual delivery and attached by seizure. See Jubelt v. Sketers, 84 Cal. App.2d 653, 191 P.2d 460 (1948).

Lien of Attachment

California law currently provides three different periods for the duration of attachment liens: five years for equipment,⁵⁹ three years for real property,⁶⁰ and one year for personal property.⁶¹ Furthermore, different procedures are provided for extending these liens. The Commission recommends that the duration and the provisions for the extension of liens be standardized. All types of property should be subject to a lien which expires two years from the date of the issuance of the writ of attachment. In order to extend the lien, the plaintiff should apply upon noticed motion before the expiration of the two-year period for an order extending the lien for not more than one year. If the order is issued, it would then be served on the person holding the property and properly recorded or filed. The aggregate of such extensions should be limited to five years.

UNDERTAKINGS

The existing law of prejudgment attachment is strewn with confusing and repetitive provisions concerning undertakings. The Commission recommends that these provisions be simplified and clarified as follows. Certain general principles should be provided common to undertakings given for any purpose under the title relating to attachment. As under existing law, the undertakings should be executed by two or more sureties (or one corporate surety).⁶² If the amount of the undertaking depends on the value of property, the principal should be required to state his estimate of the market value of the

59. Code Civ. Proc. § 542.2.

60. Code Civ. Proc. § 542a.

61. Code Civ. Proc. § 542c.

62. See Code Civ. Proc. §§ 539, 539a, 540, 553, 555, 1056.

property.⁶³ If the beneficiary of the undertaking objects to the principal's valuation of the property, the court should have discretion to order an appraisal. All undertakings should be approved by a judicial officer and then filed at which time they would become effective. This generalizes the procedure now existing with regard to undertakings given to release attached property.⁶⁴ Requiring judicial approval in every case assures that the undertaking is valid on its face and that the affidavits of the sureties are technically sufficient. All undertakings should be filed either in the court where the action is pending or a court with similar jurisdiction in the county where levy is made; under present law, some undertakings are filed in court⁶⁵ and some with the levying officer.⁶⁶

As under existing law, the beneficiary should be permitted to object to the undertaking either on the ground that the sureties are insufficient or that the amount is insufficient.⁶⁷ Such objections should be made by noticed motion and, if the beneficiary's objection involves the value of the property, he should be required to state his estimate of such value in the motion. This requirement should facilitate voluntary agreement between the beneficiary and principal as to the proper market value. Under existing law, objections have to be made within five days after notice of levy or filing.⁶⁸ There seems to be no reason for this limitation, and the limitation could be detrimental to the beneficiary should the reason for an objection to the undertaking occur after five days have passed. The Commission recommends that no time limit be placed on objections to undertakings.

63. Compare Code Civ. Proc. §§ 677, 710c.

64. Compare Code Civ. Proc. § 540.

65. Code Civ. Proc. § 540.

66. Code Civ. Proc. § 539a.

67. Compare Code Civ. Proc. §§ 539, 554, 555, 678, 711-1/2.

68. Code Civ. Proc. §§ 539, 539a, 553.5, 554.

The hearing on the motion, appraisal of property, or the examination of sureties should be held within two to five days of the objection. If the judicial officer determines that the undertaking is insufficient, then the principal should be allowed five days to remedy the insufficiency. If this is not done, the rights obtained by the filing of the undertaking should cease. Until replaced, the old undertaking should remain in effect. If the undertaking is determined after the hearing to be sufficient, then the beneficiary should not be permitted to object again unless and until changed circumstances exist. As indicated above, if the beneficiary's objection is that the property's market value is higher than stated by the principal, the principal may accept the beneficiary's estimate and give an undertaking on that basis, in which case no hearing would be held on the objection and the beneficiary would be bound by his estimate. Most of these procedures are based on existing law.⁶⁹

Under existing law, the beneficiary must attempt to satisfy his judgment from the assets of the principal before trying to enforce it against the sureties. The Commission recommends that the beneficiary be allowed to pursue the sureties first if he so desires. Since the undertaking is in his favor, the law should facilitate the satisfaction of his claims. The surety would still be able to seek indemnification from the principal. In addition, the surety would be liable only for the amount of the undertaking whereas the principal would be liable for the full amount of damages caused. Motions to enforce the liability on an undertaking should be made within one year after the time for appeal from the judgment in the main action has expired or after final judgment on appeal as under existing law.⁷⁰

69. See Code Civ. Proc. §§ 678, 678-1/2, 679, 711-1/2, 712, 712-1/2, 833-835, 1030, 1057.

70. See Code Civ. Proc. § 1166a.

Also, as under existing law, undertakings should be required to be given by a plaintiff before a writ of attachment or a temporary protective order is issued. Undertakings for this purpose should be required in one-half the amount the plaintiff seeks to recover. Existing law provides that undertakings may be increased on the defendant's motion, but no guide is given as to the new amount.⁷¹ The Commission recommends that the undertaking be increased to the amount of the probable recovery for wrongful attachment.⁷²

The defendant whose property is subject to attachment should be permitted to obtain its release by appearing in court and obtaining an order allowing him to file an undertaking equal to the lesser of (1) the plaintiff's valuation of the property or (2) the amount specified in the writ to be secured by the attachment. This procedure is similar to that under existing law.⁷³

LIABILITY FOR WRONGFUL ATTACHMENT

California law currently provides a very limited statutory remedy for wrongful attachment.⁷⁴ Persons seeking to recover for damages brought about by the plaintiff's use of prejudgment attachment are generally required to proceed by way of the common law actions of malicious prosecution and abuse of process.⁷⁵ The Commission recommends that the case law in this area be supplemented by statute in order to make a remedy more readily available to persons injured by an attachment. By providing a useful remedy to such persons, overreaching by plaintiffs should be deterred.

71. See Code Civ. Proc. § 539(a).

72. See discussion under Liability for Wrongful Attachment, infra.

73. See Code Civ. Proc. §§ 540, 554, 555.

74. See Code Civ. Proc. § 539. The attachment must have been issued in a case where attachment was not authorized or the defendant must recover judgment in the action. See generally Debt Collection Tort Practice § 5.36 (Cal. Cont. Ed. Bar 1971).

75. See 2 B. Witkin, California Procedure Provisional Remedies §214 at 1612-1613 (2d ed. 1970); White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

The Commission recommends that the following acts be characterized as a wrongful attachment: levy of a writ of attachment or service of a temporary protective order where attachment is not authorized or where the plaintiff does not recover judgment, levy of a writ of attachment on property greatly in excess of the plaintiff's legitimate claim, levy of an ex parte writ of attachment on property exempt from attachment, and levy of the writ of attachment on property of a third person. In each of these cases, the plaintiff should be liable for all damages proximately caused, whether direct or consequential, and all costs and expenses including attorney's fees reasonably expended in resisting the wrongful attachment. However, the plaintiff's liability should be limited to the amount of the undertaking if the writ of attachment was issued under the noticed hearing procedure.

The defendant or third person should not be required to bring an independent action but should be permitted to proceed by motion, filed in the original action and served on plaintiff within a year after final judgment and the time for appeal has expired or the appeal is disposed of.⁷⁶ Sureties could be joined in the proceeding, but their liability should be limited by their undertaking.

Since the cause of action for wrongful attachment is intended to handle only certain readily identifiable cases, the common law remedies should not be limited by the recommended procedure.

76. This procedure would be the same as that provided under existing law for recovery on an undertaking. Compare Code Civ. Proc. § 1058a.

PROPOSED LEGISLATION

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

An act to amend Section 281 of the Agricultural Code, to amend Section 6947 of the Business and Professions Code, to amend Sections 3065a, 3152, and 4380 of, and to repeal Section 1812 of, the Civil Code, to amend Sections 682a, 688, 690, 690.6, 690.21, and 690.24 of, to add Section 684.2 to, to add Title 6.5 (commencing with Section 481.010) to Part 2 of, and to repeal Chapter 4 (commencing with Section 537) of Title 7 of Part 2 of, the Code of Civil Procedure, to amend Sections 13524 and 21112 of the Education Code, to amend Sections 1650 and 3144 of, and to repeal Section 11208 of, the Financial Code, to amend Section 11680.5 of the Health and Safety Code, to amend Sections 300, 404, 5600, and 5601 of the Labor Code, to amend Section 1208 of the Penal Code, to amend Sections 6713, 7864, 8972, 10074, 11472, 12680, 18833, 26251, 30302, and 32352 of the Revenue and Taxation Code, to amend Section 71685.5 of the Water Code, and to amend Sections 1834 and 17409 of the Welfare and Institutions Code relating to attachment.

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

Agricultural Code § 281 (technical amendment)

Sec. . Section 281 of the Agricultural Code is amended to read:

281. The director may direct suit in the name of the people of the state, as plaintiff, to be brought for the recovery of any license or other fee against any person required to take out a license or pay any fee pursuant to this code that fails, neglects, or refuses to take out such license or pay such fee, or that, without such license or payment of such fee, carries on or attempts to carry on the business or do any act for which such license or payment of such fee is required. In such case a writ of attachment may ~~issue---The-director-may-make-the-necessary-affidavit-for-it---He-need-not,-however,-file-any-written-undertaking-in-connection-with-the-issuance-of-the-writ.~~ be issued pursuant to Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure.

Comment. Section 281 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Under Title 6.5, the director or any other person having knowledge of the facts may make the necessary affidavit. See Code Civ. Proc. § 482.040 (general requirements for affidavits). Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Business & Professions Code § 6947 (technical amendment)

Sec. . Section 6947 of the Business and Professions Code is amended to read:

6947. Nothing in this chapter shall be deemed to authorize a collection agency licensee to perform any act or acts, either directly or indirectly, constituting the practice of law.

No suit may be instituted on behalf of a collection agency licensee in any court on any claim assigned to it in its own name as the real party in interest unless it appears by a duly authorized and licensed attorney at law.

A collection agency may not appear as an assignee party in any proceeding involving claim and delivery, replevin, or other possessory action, action to foreclose a chattel mortgage, mechanic's lien, materialman's lien, or any other lien. Nothing herein contained shall prohibit a licensee from making an oral or written demand for the return or surrender of personal property or from having property attached in an action at law pursuant to the provisions of ~~Chapter 4 (commencing with Section 537) of Title 7~~ Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure, or from enforcing a judgment carrying it into execution.

No licensee or employee shall:

(a) Directly or indirectly aid or abet any unlicensed person to engage in business as a collection agency or to receive compensation therefrom.

(b) Publish or post, or cause to be published or posted, any list of debtors, commonly known as "deadbeat" lists, except that this subdivision shall not be construed to prohibit the confidential distribution of trade lists containing debtor information.

(c) Collect or attempt to collect by the use of any methods contrary to the postal laws and regulations of the United States.

(d) Commingle the money of his customers with his own, except insofar as may be authorized by rules and regulations established hereunder.

(e) Have in his possession or make use of any badge, use a uniform of any law enforcement agency or any simulation thereof, or make any statements which might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency, or any other governmental agency, while engaged in collection agency business.

(f) Print, publish or otherwise prepare for distribution for the use of, or sell or offer to sell or furnish or offer to furnish to, any person any system of collection letters, demand forms or other printed matter upon his stationery, or upon stationery upon which the licensee's name appears in such manner as to indicate that a demand is being made by the licensee for the payment of any sum or sums due or asserted to be due, where such forms containing such message are to be sold or furnished to any person to be used by such person at any address different from the address of the licensee as shown on the face of the license.

(g) Distribute collection letters, demand forms, or other printed matter which are made to be similar to or resemble governmental forms or documents, or legal forms used in civil or criminal proceedings.

(h) Advertise for sale or threaten to advertise for sale any claim as a means of endeavoring to enforce payment thereof, nor agree to do so for the purpose of solicitation of claims, except where the licensee has acquired claims as an assignee for the benefit of creditors or where the licensee is acting under the order of a court of competent jurisdiction.

§ 6947

(i) Use any name while engaged in the collection of claims, other than his true name, except under conditions prescribed by rules and regulations adopted by the director.

(j) Engage in any unfair or misleading practices or resort to any illegal means or methods of collection.

(k) Use profanity, obscenity, or vulgarity, while engaged in the collection of claims.

Comment. Section 6947 has been amended to correct the cross-reference to the attachment provisions of the Code of Civil Procedure. See Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure.

Civil Code § 1812 (repealed)

Sec. . Section 1812 of the Civil Code is repealed.

~~1812.--In any action on a contract or installment account under this chapter, in addition to the statements required by Section 538 of the Code of Civil Procedure, an affidavit for a writ of attachment shall state facts showing that the action has been commenced in a county or judicial district described in Section 1812.10 as a proper place for the trial of the action.~~

~~A plaintiff shall be liable for reasonable attorney's fees proximately caused by any levy made pursuant to a writ of attachment issued upon an affidavit which does not comply with this section.~~

Comment. Section 1812 is repealed. This section was applicable only in an action arising out of a retail installment sale. See Civil Code §§ 1802-1802.7. Except in the extremely rare case where the buyer is the plaintiff in the action and the amount of recovery sought is not less than five hundred dollars, an attachment remedy is no longer available in such actions. See Code Civ. Proc. § 483.010. Accordingly, this special exception to the requirements of the affidavit supporting the application for a writ of attachment is unnecessary.

Civil Code § 3065a (technical amendment)

Sec. . Section 3065a of the Civil Code is amended to read:

3065a. The lien created by the last preceding section shall continue in force for a period of thirty days from the time the person claiming such lien shall have ceased to do or perform the work or render the service for which said lien is claimed, while such logs, lumber or other manufactured timber products are in the county in which such labor was performed or service rendered, and said lien shall cease at the expiration of the said thirty days unless the claimant thereof, or his assignee or successor in interest, brings suit to foreclose the same, in which case the lien continues in force until the said lien foreclosure suit is finally determined and closed, and in case such proceeding be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution. If any part of the property on which the lien existed is removed from the said county, the lien continues on the balance remaining in the county to the full extent of the claim.

The plaintiff in any such lien foreclosure suit, ~~at the time of issuing the summons or at any time afterwards,~~ may have the logs, lumber and other manufactured timber products upon which such lien subsists attached, as provided in this code and the Code of Civil Procedure, ~~upon delivering to the clerk an affidavit, by or on behalf of the plaintiff, showing that:--(1) the plaintiff, or his assigner or predecessor in interest, performed labor or used his live stock, machinery or appliances or both in felling, preparing or transporting the said logs or in manufacturing the said lumber or other timber products or~~

~~both; (2) that such labor or use of live stock, machinery or appliances has not been paid for; (3) that the sum for which the attachment is asked does not exceed the reasonable value of the services rendered or the reasonable value of the use of the live stock, machinery or appliances, as the case may be; and (4) that the attachment is not sought and the action is not brought to hinder, delay or defraud any creditor or creditors of any defendant.~~

Any number of persons claiming liens under this and the next preceding section may join in the same action and when separate actions are commenced, the court may consolidate them. Whenever upon the sale of the property subject to the liens provided for in this and the next preceding section, under the judgment or decree of foreclosure of such lien or liens, there is a deficiency of proceeds, the proceeds shall be divided pro rata among the lien claimants whose liens are established, regardless of the order in which the liens were created or the order in which the suits to foreclose same were commenced, and judgment for the deficiency may be docketed against the party personally liable therefor and his sureties, in like manner and with like effect as in actions for the foreclosure of mortgages.

Nothing contained in this or the next preceding section shall be construed to impair or affect the right of any person to whom any debt may be due for work done, or for the use of live stock, machinery or appliances, to maintain a personal action to recover said debt against the person liable therefor, or his sureties, either in connection with the lien suit or in a separate action, and the person bringing such personal action may take out a separate attachment therefor, notwithstanding his lien, and in his affidavit to procure an attachment

~~need not state that his demand is not secured by a lien~~ he shall
refer to this section, and the judgment, if any, obtained by the plain-
tiff in such personal action shall not be construed to impair or merge
any lien held by said plaintiff under this or the next preceding sec-
tion; provided, only, that any money collected on said judgment shall
be credited on the amount of such lien in any action brought to en-
force the same, in accordance with the provisions of this section.

Comment. Section 3065a is amended to make clear that, although an
attachment may issue pursuant to the authority granted by this section, the
procedures for issuance are those provided by Title 6.5 (commencing with
Section 481.010) of Part 2 of the Code of Civil Procedure. It should be
noted, however, that the plaintiff is not bound by the \$500 limitation,
nor the unsecured debt requirement of Section 483.010 of the Code of Civil
Procedure.

Civil Code § 3152 (technical amendment)

Sec. . Section 3152 of the Civil Code is amended to read:

3152. Nothing contained in this title shall be construed to impair or affect the right of any claimant to maintain a personal action to recover his debt against the person liable therefor either in a separate action or in the action to foreclose his lien, nor any right he may have to the issuance of a writ of attachment or execution. In his affidavit to procure an attachment he ~~need not state that his demand is not secured by a lien.~~ shall refer to this section. The judgment, if any, obtained by the plaintiff in such personal action, or personal judgment obtained in such mechanics' lien action, shall not impair or merge any lien held by the plaintiff under this chapter, but any money collected on such judgment shall be credited on the amount of such lien.

Comment. Section 3152 is amended to require the plaintiff to refer to this section in his application or affidavit for an attachment. It seems better practice to acknowledge the exception provided by this section to the unsecured debt requirement of Section 483.010 of the Code of Civil Procedure than to fail to state that a lien does exist.

Civil Code § 4380. Method of enforcement of judgments, orders, and decrees
under Family Law Act

Sec. . Section 4380 of the Civil Code is amended to read:

4380. Any judgment, order, or decree of the court made or entered pursuant to this part may be enforced by the court by execution, ~~attachment~~, the appointment of a receiver, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary.

Comment. Section 4380 is amended to delete the reference to "attachment." Insofar as the term referred to the provisional creditor's remedy of attachment, the deletion makes clear that the Family Law Act provides no special authorization for the issuance of an attachment and the requirements of Section 483.010 of the Code of Civil Procedure must be met. Insofar as the term referred to "body attachment," the authority to imprison a person who violates a court order still exists under the remaining provisions of this section. See also Code Civ. Proc. § 1209 et seq. (contempt of court).

Sec. . Title 6.5 (commencing with Section 481.010) is added
to Part 2 of the Code of Civil Procedure, to read:

Title 6.5. Attachment

CHAPTER 1. WORDS AND PHRASES DEFINED

§ 481.010. Application of definitions

481.010. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this title.

Comment. Section 481.010 is a standard provision found in the definitional portion of recently enacted California codes. See, e.g., Evid. Code § 100; Veh. Code § 100.

Additional definitions are found in the preliminary provisions of the Code of Civil Procedure. E.g., Section 17 provides "the singular number includes the plural and the plural the singular."

§ 481.020. Account debtor

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

Comment. Section 481.020 is based on the definition of "account debtor" provided by paragraph (a) of subdivision (1) of Section 9105 of the Commercial Code. Paragraph (a) of Section 9105 provides:

(a) "Account debtor" means the person who is obligated on an account, chattel paper, contract right or general intangible. . . .

Section 481.020 merely substitutes the term "account receivable" for "account" and "chose in action" for "general intangible." See Sections 481.030 ("account receivable" defined), 481.050 ("chose in action" defined). Attachment of "contract rights" (as that term is defined by the Commercial Code) is not permitted. See Comment to Section 481.050. "Chattel paper" is defined by Section 481.040.

§ 481.030. Account receivable

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

Comment. Section 481.030 is based on the definition of "account" provided by Section 9106 of the Commercial Code. Section 9106 provides in part:

9106. "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.

The term "account receivable" is used in this title because it is a more descriptive phrase than "account" and to avoid confusion with the term "deposit account." Compare Section 481.080. The term "instrument" used in Section 9106 is defined by paragraph (g) of subdivision (1) of Section 9105 as follows:

(g) "Instrument" means a negotiable instrument (defined in Section 3104), or a security (defined in Section 8102) 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 ordinary course of business transferred by delivery with any necessary indorsement or assignment;

Section 481.030 substitutes the terms "negotiable instrument" and "security" for "instrument" but retains the substance of the Commercial Code. See Sections 481.160 ("negotiable instrument" defined), 481.210 ("security" defined).

Section 481.030 makes clear that the right to payment covered by this section must have been earned by specifically including this requirement.

The method of levy on an account receivable is provided by Section 488.370.

§ 481.040. Chattel paper

481.040. "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 section, "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.

Comment. Section 481.040 is substantively the same as paragraph (b) of subdivision (1) of Section 9105 of the Commercial Code. Paragraph (b) of Section 9105 provides:

(b) "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

The term "instrument" used in subdivision (b) of Section 9105 is defined in paragraph (g) of subdivision (1) of Section 9105. Section 481.040 incorporates the same definition in its third sentence. Thus, "chattel paper" under this title has basically the same meaning as "chattel paper" under Section 9105 of the Commercial Code, and the following excerpt from the Comment to Section 9105 should help to explain the 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.

The method of levy on chattel paper is provided by Section 488.380.

§ 481.050. Chose in action

481.050. "Chose in action" means any right to payment which arises out of the conduct of any trade, business, or profession and which (a) is not conditioned upon further performance by the defendant or upon any event other than the passage of time, (b) is not an account receivable, (c) is not a deposit account, and (d) is not evidenced by a negotiable instrument, security, chattel paper, or judgment. The term includes an interest in or a claim under an insurance policy.

Comment. Section 481.050 defines "chose in action" as the term is used in this title. It should be noted that, in contrast with the term "contract right" under the Commercial Code, the right is not conditioned on the further performance of the defendant. Compare Com. Code § 9106 ("'contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper"; "'general intangibles' means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents, and instruments. Any interest or claim in or under any policy of insurance is a general intangible.").

The phrase "which arises out of the conduct of any trade, business, or profession" limits the term to business-oriented debts. See Section 487.010 and Comment thereto.

The method of levy on a chose in action is provided by Section 488.370.

§ 481.060. Complaint

481.060. "Complaint" includes a cross-complaint.

Comment. Section 481.060 continues former law. See Rose v. Pearman, 163 Cal. App.2d 480, 329 P.2d 501 (1958); Allers v. Beverly Hills Laundry, Inc., 98 Cal. App. 580, 277 P. 337 (1929).

§ 481.070. Defendant

481.070. "Defendant" includes a cross-defendant.

Comment. See Comment to Section 481.060.

§ 481.080. Deposit account

481.080. "Deposit account" means any of the following:

(a) An account in any "bank" described in Section 102 of the Financial Code.

(b) An account in any state or federal savings and loan association. As used in this paragraph, "account" includes investment certificate, share account, and withdrawable share.

(c) An account for funds received from a member of a credit union.

Comment. Section 481.080 defines "deposit account" as the term is used in this title. Industrial loan companies (as described in Financial Code Section 18003) are not included under this section because they only issue investment or thrift certificates. See Fin. Code § 18402. See also Fin. Code § 18003 (referring to certificates as "choses in action"). These companies are expressly prohibited from receiving deposits or issuing certificates of deposit. See Fin. Code § 18403.

The method of levy on deposit accounts is provided by Section 488.390.

§ 481.090. Document

481.090. "Document" means a "document of title" as defined by subdivision (15) of Section 1201 of the Commercial Code.

Comment. Section 481.090 defines document by incorporating by reference the term document of title defined by subdivision (15) of Section 1201 of the Commercial Code. Subdivision (15) provides:

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, compress receipt, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

Goods subject to a nonnegotiable document are levied upon pursuant to Section 488.330. A negotiable document is levied upon in the same manner as a negotiable instrument. See Section 488.400.

§ 481.100. Equipment

481.100. "Equipment" means tangible personal property in the possession of the defendant and used or bought for use primarily in the defendant's trade, business, or profession if it is not included in the definitions of inventory or farm products.

Comment. Section 481.100 is based on the definition of "equipment" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods

Farm products and inventory are defined by Sections 481.110 and 481.120 respectively.

The method of levy on equipment of a going business except motor vehicles and vessels is provided by Section 488.340. Motor vehicles and vessels which are equipment of a going business are levied upon pursuant to Section 488.350. See also Sections 481.150 (motor vehicle defined); 481.230 (vessel defined). Tangible personal property not in the possession of the defendant is generally levied upon pursuant to Section 488.330.

In certain situations, the question may arise whether an item of property is personalty (equipment) or realty (fixture). The draftsmen of the California Commercial Code declined to define "fixtures." See Comment to Commercial Code Section 9313?

"[W]e believe that the basic characteristic of . . . [the law of fixtures] can be stated rather simply: It is that the courts attach the label

'fixture' to an object when they have decided that the owner of an interest in the land should prevail, and they attach the label 'personalty' or 'non-fixture' to an object when they have decided that the owner of an interest in the object apart from the land should prevail; and they may attach both labels to exactly the same object in different circumstances, depending upon the positions and equities of the contesting parties. In other words, the determination that an object is a 'fixture' is not a factual classification but a statement of a legal conclusion. As Professor Horowitz says: 'When the word "personalty", . . . is used to mean that one person owns a particular chattel as against another person, or to mean that a particular chattel is not included in a particular conveyance, or to mean that a conditional seller will prevail against a bona fide purchaser, or to mean any of many other legal conclusions in various other cases, the terminology loses its utility for the statement and solution of legal problems. . . . The word "fixture" itself tends to be a barrier to clear analysis, for it is used to describe not only the status of legal relations between persons in all of the legal problems discussed in this paper, but at the same time has a factual connotation of physical attachment to land.'

* * * * *

It would probably be a great advance in the law if the law of fixtures could be codified and separated into two distinct problems: A factual classification of an object as a 'fixture', which is recognized as something different both from 'realty' and 'personalty'; and, secondly, a statement of the legal results in various circumstances which follow from such a classification. It is impossible, however, to do only half of this job without making a greater mess than there was before. . . ." Sixth Progress Report to the Legislature by Senate Fact Finding Committee on Judiciary (1959-1961) Part 1, the Uniform Commercial Code, pp. 577-578.

For the same reasons, no attempt has been made to define "fixtures" here.

Where the issue is in doubt, it is suggested that levy be accomplished pursuant to both Sections 488.310 and 488.340.

§ 481.110. Farm products

481.110. "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 defendant engaged in raising, fattening, grazing, or other farming operations. If tangible personal property is a farm product, it is neither equipment nor inventory.

Comment. Section 481.110 is based on the definition of "farm products" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple sirup, honey, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory

Equipment and inventory are defined by Sections 481.100 and 481.120 respectively.

The method of levy on farm products is provided in Section 488.360.

§ 481.120. Inventory

481.120. "Inventory" means tangible personal property in the possession of a defendant who holds it for sale or lease or to be furnished under contracts of service or if it is raw materials, work in process, or materials used or consumed in his trade, business, or profession. Inventory of a person is not to be classified as his equipment.

Comment. Section 481.120 is based on the definition of "inventory" provided by Section 9109 of the Commercial Code. Section 9109 provides in part:

9109. Goods are . . . "inventory" if they are 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.

The phrase "or if he has leased or so furnished them" has been deleted to make clear that inventory under this title is limited to property in the possession of the defendant.

The method of levy on inventory of a going business is provided by Section 488.360. Levy generally on tangible personal property in the possession of the defendant is provided by Section 488.320. Levy generally on tangible personal property not in the possession of the defendant is provided by Section 488.330.

§ 481.130. Judicial officer

481.130. "Judicial officer" means any judge or any commissioner or other officer appointed by the trial court to perform the duties required by this title.

Comment. Section 481.130 defines "judicial officer." Notwithstanding Section 259 of this code, a commissioner appointed by the trial court may perform any of the judicial duties required by this title. See Chapter 6 (commencing with Section 486.010)(prehearing protective orders).

§ 481.140. Levying officer

481.140. "Levying officer" means the sheriff, constable, or marshal who is directed to execute a writ or order issued under this title.

§ 481.150. Motor vehicle

481.150. "Motor vehicle" means a "motor vehicle" as defined by Section 415 of the Vehicle Code.

Comment. Section 481.150 defines "motor vehicle" by incorporating by reference the same term as defined by Section 415 of the Vehicle Code. Section 415 provides: "415. A 'motor vehicle' is a vehicle which is self-propelled." This definition includes not only cars, trucks, and buses but all sorts of heavy equipment and miscellaneous vehicles; e.g., golf carts, snowmobiles, forklifts, farm and cemetery equipment. It should be noted, however, that Section 487.010 provides significant limitations on the nature of property which is subject to attachment.

The method of levy on motor vehicles which are equipment of a going business is provided by Section 488.350. Levy on other vehicles which are subject to attachment is accomplished pursuant to Sections 488.320, 488.330, and 488.360.

§ 481.160. Negotiable instrument

481.160. "Negotiable instrument" means a "negotiable instrument" as defined by Section 3104 of the Commercial Code.

Comment. Section 481.160 defines "negotiable instrument" by incorporating by reference the same term as defined by Section 3104 of 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.

* * * * *

The method of levy on a negotiable instrument generally is provided by Section 488.400. But see Section 488.390 (deposit account).

§ 481.170. Person

481.170. "Person" includes an individual, a corporation, a partnership or other unincorporated association, and a public entity.

§ 481.180. Plaintiff

481.180. "Plaintiff" means a person who files a complaint or cross-complaint.

Comment. See Comment to Section 481.060.

§ 481.190. Probable validity

481.190. A claim has "probable validity" where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.

Comment. Section 481.190 requires that, at the hearing on the application for a writ, the plaintiff must at least establish a prima facie case. If the defendant makes an appearance, the judicial officer must then consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation.

§ 481.200. Public entity

481.200. "Public entity" includes the state, the Regents of the University of California, a county, a city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Comment. Section 481.200 adopts the language of the definition found in Section 811.2 of the Government Code.

§ 481.210. Security

481.210. "Security" means a "security" as defined by Section 8102 of the Commercial Code.

Comment. Section 481.210 defines "security" by incorporating by reference the same term as defined by Section 8102 of the Commercial Code. Section 8102 provides in part:

8102. (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.

(b) A writing which is a security is governed by this division and not by Uniform Commercial Code--Commercial Paper even though it also meets the requirements of that division. This division does not apply to money.

(c) A security is in "registered form" when it specifies a person entitled to the security or to the rights it evidences and when its transfer may be registered upon books maintained for that purpose by or on behalf of an issuer or the security so states.

(d) A security is in "bearer form" when it runs to bearer according to its terms and not by reason of any indorsement.

* * * * *

The method of levy on a security is provided by Section 483.410.

§ 481.220. Security agreement

481.220. "Security agreement" means a "security agreement" as defined by Section 9105 of the Commercial Code.

Comment. Section 481.220 defines "security agreement" by incorporating by reference the same term as defined by Section 9105 of the Commercial Code. Section 9105 provides: "9105. . . . (h) 'Security agreement' means an agreement which creates or provides for a security interest. . . ."

§ 481.230. Vessel

481.230. "Vessel" means a numbered vessel as that term is used in Division 3.5 (commencing with Section 9840) of the Vehicle Code.

Comment. Section 481.230 defines "vessel" by incorporating the term "numbered vessel" used in the registration of vessels provisions of the Vehicle Code. See Veh. Code §§ 9840, 9850, 9873. The method of levy on vessels which are equipment of a going business is provided by Section 488.350. Levy on other vessels which are subject to attachment is accomplished pursuant to Sections 488.320, 488.330, and 488.360.

CHAPTER 2. GENERAL PROVISIONS

§ 482.010. Short title

482.010. This title shall be known and may be cited as "The Attachment Law."

§ 482.020. Rules for practice and procedure

482.020. The Judicial Council may provide by rule for the practice and procedure in proceedings under this title.

§ 482.030. Forms

482.030. The Judicial Council shall prescribe the form of the applications, notices, orders, and other documents required by this title.

Comment. Section 482.030 requires the Judicial Council to prescribe the forms necessary for the purposes of this title. The Judicial Council has authority to adopt and revise forms as necessary but must act in a manner consistent with the provisions of this chapter.

§ 482.040. General requirements for affidavits

482.040. The facts stated in each affidavit filed pursuant to this title shall be set forth with particularity. Each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. The affiant may be any person, whether or not a party to the action, who has knowledge of the facts.

Comment. Section 482.040 provides standards for affidavits filed pursuant to this title. These standards are comparable to but not as restrictive as those provided for affidavits filed in support of or in opposition to a motion for summary judgment. Compare Section 437c. A verified complaint that satisfies the requirements of Section 482.040 may be used in lieu of or in addition to an affidavit. Where matters are shown to the best of an affiant's knowledge, information, and belief, the facts stated in the affidavit will be the facts on which his belief is based and may include the nature of his information and the reliability of his informant.

§ 482.050. Secrecy prior to return of service; exception; form of request

482.050. (a) If the plaintiff so requests in writing at the time he files his complaint, the clerk of the court with whom the complaint is filed shall not make available to the public the records and documents in such action before either (1) 30 days after the filing of the complaint or (2) the filing pursuant to this title of the return of service of the notice of hearing and any temporary restraining order, or of the writ of attachment if issued without notice, whichever event occurs first.

(b) Notwithstanding the provisions of subdivision (a) of this section, the clerk of court shall make the entire file in the action available for inspection at any time to any party named in the complaint or to his attorney.

(c) The request by plaintiff that the fact of filing of a complaint or application for relief not be made public may take the form of a notation to that effect, made by rubber stamp or other suitable means, at the top of the first page of the complaint filed with the clerk.

Comment. Section 482.050 is substantively the same as former Section

537.5. Section 537.5 provided:

537.5. In cases of attachment the clerk of the court with whom the complaint is filed, if requested by plaintiff in writing at the time of filing the complaint, shall not make public the fact of the filing of the complaint, or of the issuance of the attachment, until after the filing of the return of service of the notice and temporary restraining order or of the writ of attachment if issued without notice, except that if the return of service of the notice and temporary restraining order or of the writ of attachment is not made within 30 days after the filing of the complaint in the action, the clerk of the court with whom the complaint is filed shall make available to the public the records and documents in such action. However, the clerk of such court shall make the entire file in the action available for inspection at any time to any party named in the complaint, or to his attorney.

§ 482.050

The request by plaintiff that the fact of filing of a complaint or issuance of an attachment not be made public may take the form of a notation to that effect, made by rubber stamp or other suitable means, at the top of the first page of the complaint filed with the clerk.

CHAPTER 3. ACTIONS IN WHICH ATTACHMENT AUTHORIZED

§ 483.010. Claims arising out of conduct of trade, business, or profession

483.010. (a) An attachment may only be issued to secure the recovery on a claim for money in a fixed or reasonably ascertainable amount, based upon a contract, express or implied, and arising out of the conduct by the defendant of a trade, business, or profession. The amount of the claim shall be not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. The contract upon which the claim is based shall not be secured by a security interest upon real or personal property or, if originally so secured, such security interest shall have become valueless without act of the plaintiff.

(b) An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

Comment. Section 483.010 is based upon a portion of former Section 537.1. Section 537.1 provided in part:

537.1. An action referred to in Section 537 is an action or actions by the same plaintiff in which the total sum claimed, exclusive of interest, attorneys' fees and costs, is five hundred dollars (\$500) or more and which is one or more of the following:

(a) An action against a defendant described in subdivision (a), (b) or (c) of Section 537.2 for a liquidated sum of money based upon

(1) Money loaned; or

(2) A negotiable instrument; or

(3) The sale or lease of, or a license to use, real or personal property (including, without limiting the generality of the foregoing, goods sold and delivered on open account); or

(4) Services rendered, if the claim is not secured by any mortgage, deed of trust or security interest on real or personal property or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. The fact that interest, attorneys' fees, costs or any combination thereof are claimed by the plaintiff in addition to the principal amount of the debt shall not make the claim unliquidated within the meaning of this section.

* * * * *

Subdivision (a) of former Section 537.1 referred to actions "against a defendant described in subdivisions (a), (b), or (c) of Section 537.2" These defendants were:

537.2.

(a) All corporations organized under the General Corporation Law or under Part 4 (commencing with Section 13400) of Division 3 of Title 1 of the Corporations Code, or organized under a law of any foreign state or jurisdiction authorizing the formation of business corporations.

(b) All partnerships organized under the Uniform Partnership Act (Chapter 1 (commencing with Section 15001) of Title 2 of the Corporations Code) or the Uniform Limited Partnership Act (Chapter 2 (commencing with Section 15501) of Title 2 of the Corporations Code) or a law of any foreign state or jurisdiction authorizing the formation of general or limited partnerships.

(c) Individuals engaged in a trade or business.

* * * * *

Subdivision (a) of former Section 537.1 also listed a number of bases for the claim on which an attachment could be based. Section 483.010 accomplishes

these same ends by limiting the claims on which an attachment may be issued to those "based upon a contract, express or implied, and arising out of the conduct of a trade, business, or profession." The term "contract" used in subdivision (a) includes a lease of either real or personal property.

Subdivision (a) makes clear that claims may not be aggregated and the amount of each claim must be not less than five hundred dollars. Although this section limits the application of this title to claims of not less than five hundred dollars, generally, an expeditious remedy will be available for lesser amounts under the small claims procedure. See Chapter 5A (commencing with Section 116) of Title 1 of Part 1 of this code.

Note. Sections 537.1 and 537.2 also provided that an attachment could be issued in any action for the recovery of money against

any person not residing in this state (including any foreign corporation not qualified to do business in this state under the provisions of Chapter 3 (commencing with Section 6403) of Part 11 of Division 1 of Title 1 of the Corporations Code, and any foreign partnership which has not filed a designation pursuant to Section 15700 of the Corporations Code), or who cannot after due diligence be found within this state, or who conceals himself to avoid service of summons.

The Commission has deferred consideration of whether and to what extent nonresident defendants will be treated uniquely and whether attachment will be permitted to secure jurisdiction. When this question has been determined, any needed revisions will be made in this chapter and elsewhere.

CHAPTER 4. NOTICED HEARING PROCEDURE FOR
OBTAINING WRIT OF ATTACHMENT

Comment. Chapters 4, 5, and 6 provide the procedures for obtaining a temporary protective order, a right to attach order, and a writ of attachment. These procedures can be summarized as follows. At the time the plaintiff files his complaint, or at any time thereafter, he may apply for an order(s) and writ in the court where his action is brought. Sections 484.010, 485.210, and 486.010.

Noticed hearing procedure. In the absence of exceptional circumstances, the plaintiff must apply under a noticed hearing procedure. See Section 485.010. Notice of the hearing on the application, a copy of the summons and complaint, and a copy of the plaintiff's application must be served on the defendant at least 20 days before the hearing. Section 484.040. The defendant, if he wishes to oppose the issuance of the right to attach order, must file and serve on the plaintiff at least five days before the date of the hearing a notice of opposition. Section 484.060(a). If he also desires to make a claim of exemption from attachment, the defendant must include such claim with his notice of opposition. Section 484.060(b). If he does not wish to oppose the issuance of the right to attach order, the defendant may still claim an exemption from attachment by filing and serving on the plaintiff any such claim together with supporting affidavits at least five days before the hearing. Section 484.070(a). The defendant may claim exemptions as to property not described in the plaintiff's application but, if he fails to prove that such property is exempt, he may not again claim an exemption as to such property at a later time unless he shows that there has been

a change in circumstances. Section 484.070(b). As to property described in the plaintiff's application, the defendant must make his claim within the time provided, or the claim is barred, absent changed circumstances occurring after the hearing on the plaintiff's application. Section 484.070(a).

If the plaintiff wants to contest a claim of exemption, he must serve on the defendant a notice of opposition to such claim at least two days before the hearing. Section 484.070(f). If the plaintiff does not oppose a defendant's claim in this manner, then the property claimed to be exempt may not be attached and, if all the property sought to be attached is thus exempted, the hearing will not be held. Id.

If the defendant neither makes a claim of exemption nor serves a notice of opposition, he may not oppose the application for a right to attach order and a writ of attachment (Section 484.060(a)), but the court is still required to review the application to see if the plaintiff has made an adequate showing to entitle him to the order and writ. Section 484.090.

Temporary protective order procedure. When the plaintiff applies for a right to attach order, he may also apply for a temporary protective order. Section 486.010. An ex parte hearing is then held upon such application and, if the plaintiff shows that he would suffer great or irreparable injury (under the same requirements provided for an ex parte right to attach order), the judicial officer issues the order on such terms as are considered appropriate. Section 486.020. The statute does, however, provide certain limitations applicable to any temporary protective order. Sections 486.040-486.060. If the temporary protective order is granted, notice is served on the defendant of that fact, along with the notice of the hearing on plaintiff's application for the order and writ. Section 486.080. The temporary protective

order expires generally 30 days after service, or when a levy of attachment on the restrained property is made by the plaintiff, or when the defendant gives an undertaking to secure the payment of the plaintiff's judgment, whichever occurs first. Section 486.090. The defendant may apply for the vacation or modification of the temporary protective order, and the judge may order its vacation or modification ex parte or at his discretion after a noticed hearing. Section 486.100.

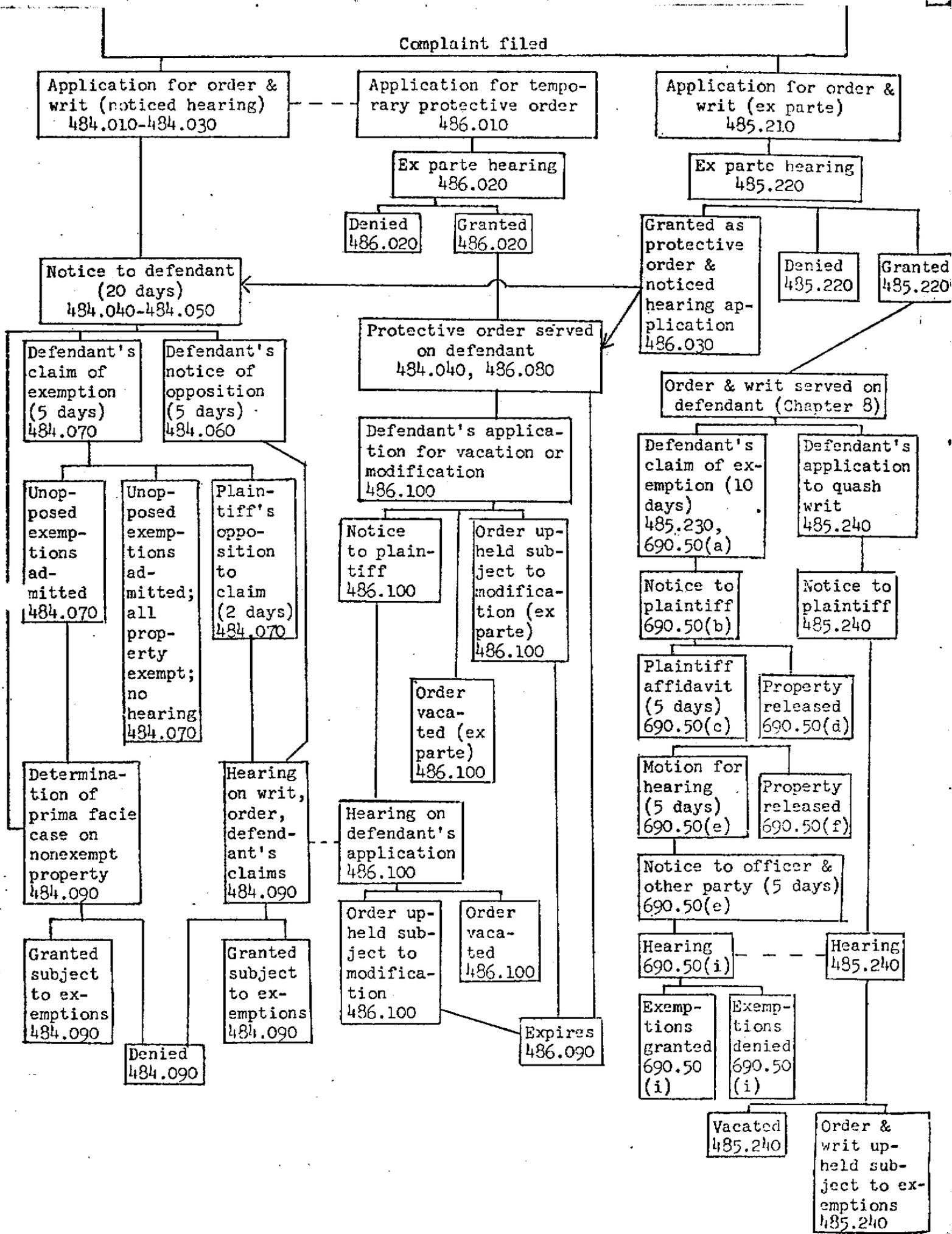
Ex parte procedure. When extraordinary circumstances are thought to exist, the plaintiff may seek an ex parte right to attach order and writ of attachment. However, the plaintiff must be able to show that he would suffer great or irreparable injury if the issuance of the order were delayed until notice and an opportunity for a hearing could be given the defendant. Section 485.010.

On application for an ex parte right to attach order and writ of attachment, the judicial officer may issue a temporary protective order in lieu of a writ and require the plaintiff to proceed for his order and writ pursuant to the noticed hearing procedure. Section 486.030. If he does this, the plaintiff's application is processed under the procedures described above requiring notice to the defendant and a hearing on the application. Id. The plaintiff is still required to show that extraordinary circumstances exist, but the order is issued in lieu of the writ where the latter form of relief seems unnecessary or unreasonable. Id.

Where the right to attach order and writ are issued ex parte, the defendant may apply for an order to set aside the right to attach order and to quash the writ and, if any property has been levied upon, to release such property. Section 485.240. This application is served on the plaintiff and, at the noticed hearing, the judicial officer determines if the plaintiff is

entitled to the right to attach order. Id. The defendant may also claim pursuant to Section 690.50 an exemption as to any property attached under the ex parte procedure. Section 485.230. Such claim may be joined with the application in opposition to the order.

These procedures are also set forth in the following diagram.



Article 1. Right to Attach Order; Issuance of Writ
of Attachment

§ 484.010. Application for order and writ

484.010. Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought.

Comment. Section 484.010 is similar in content and purpose to former Section 537 which provided in part:

537. The plaintiff, . . . at the time of issuing the summons, or at any time afterward, may have the property . . . of a defendant . . . attached in accordance with the procedure provided in this chapter

This chapter provides a noticed hearing procedure for the issuance of a writ of attachment which should be utilized in most situations. A procedure for the ex parte issuance of a writ of attachment prior to a noticed hearing on the probable validity of the plaintiff's claim is provided in Chapter 5 (commencing with Section 485.010) for use in exceptional circumstances.

Attachment is, of course, a prejudgment remedy; after final judgment, the plaintiff may, if necessary, proceed by way of execution.

§ 484.020. Contents of application

484.020. The application shall be executed under oath and shall include all of the following:

(a) A statement showing that the attachment is sought to secure the recovery on a claim upon which an attachment may be issued.

(b) A statement of the amount the plaintiff seeks to recover from the defendant (the amount of defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery) or, if an attachment is sought for only a part thereof, such partial amount.

(c) A statement that the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(d) A statement that the applicant has no information or belief that the claim has been discharged in a proceeding under the National Bankruptcy Act or that the prosecution of the action has been stayed in a proceeding under the National Bankruptcy Act.

(e) A description of the property to be attached under the writ of attachment, including plaintiff's estimate of its fair market value, and a statement that the plaintiff is informed and believes that such property is subject to attachment.

Comment. Section 484.020, together with Section 484.030, are substantively similar to former Section 538. Section 538 provided:

538. A plaintiff desiring the issuance of a writ of attachment shall file with the court an application supported by an affidavit or affidavits based upon the personal knowledge of the persons subscribing thereto and showing all of the following:

(a) That the action is one in which the issuance of a writ of attachment is proper under the provisions of Sections 537 to 537.3, inclusive.

(b) That the indebtedness claimed in the complaint is justly due and presently owing to the plaintiff by the defendant, over and above all legal setoffs or cross-complaints, or, if the action is one against a defendant described only in subdivision (d) of Section 537.2, the amount claimed by the plaintiff against the defendant and that the plaintiff believes that he has a valid cause of action for an amount of money equal to that sum.

(c) That the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any other creditor of the defendant.

(d) That the plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors, or, if any such proceeding has been terminated, that the claim of the plaintiff was not discharged in such proceeding.

§ 484.030. Affidavit in support of application

484.030. The application shall be supported by an affidavit showing that the plaintiff is entitled to a judgment on the claim upon which the attachment is based.

Comment. Section 484.030 continues the requirement of former Section 538 that the plaintiff's application for the issuance of a writ of attachment be supported by appropriate affidavits. See Comment to Section 484.020. General requirements for these affidavits are provided in Section 482.040. Of course, several affidavits may be used which together provide evidence sufficient to entitle the plaintiff to a judgment in the action. See Code Civ. Proc. § 17 (singular number includes the plural). Moreover, the application itself may contain the necessary supporting evidence and, since it is executed under oath, it may constitute a sufficient affidavit for the purposes of this section.

§ 484.040. Notice to defendant

484.040. No order or writ shall be issued under this article except after a hearing by a judicial officer. At least 20 days prior to the hearing, the defendant shall be served with all of the following:

- (a) A copy of the summons and complaint.
- (b) A Notice of Application and Hearing.
- (c) A copy of the application and of any affidavit in support of the application.

Comment. Section 484.040 is similar to former Section 538.2 which provided:

538.2. The notice of hearing issued pursuant to Section 538.1 shall provide for a hearing on the question whether a writ of attachment shall issue to be held seven business days (exclusive of Saturdays, Sundays and legal holidays) after the service of the notice upon the defendant or upon the first regular date law and motion matters are heard thereafter, whichever occurs later. The notice and temporary restraining order shall be served and return of service shall be made as provided in this code for the service of a summons and complaint. The notice shall be accompanied by a copy of the complaint and a copy of the affidavit or affidavits filed by the plaintiff under Section 538.

§ 484.050. Contents of Notice of Application and Hearing

484.050. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) A hearing will be held by a judicial officer at a place and at a time, to be specified in the notice, on plaintiff's application for a right to attach order and a writ of attachment.

(b) The order will be issued if the judicial officer finds that the plaintiff's claim is probably valid and the other requirements for issuing the order are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decision of the judicial officer at the hearing on the application for the order.

(c) If the right to attach order is issued, a writ of attachment will be issued to attach the property specified in the plaintiff's application unless the court determines that such property is exempt from attachment. The order will not be limited to the property specified in the application but may later be extended to any nonexempt property of the defendant.

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

(e) If the defendant claims that the property specified in the application, or a portion thereof, is exempt from attachment, he shall include such claim in the notice of opposition filed pursuant to

Section 484.060 or file a separate claim of exemption with respect to the property as provided in Section 484.070. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(f) The defendant may obtain a determination at the hearing whether property not specified in the application is exempt from attachment, but the failure to claim that property not so specified is exempt from attachment will not preclude him from making a claim of exemption with respect to such property at a later time.

(g) Either the defendant or his attorney or both of them may be present at the hearing.

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

Comment. Section 484.050 had no counterpart under former law. This section simply outlines the basic requirements for the "Notice of Application and Hearing." See Section 482.030 (Judicial Council to prescribe forms).

§ 484.060. Notice of opposition by defendant and supporting affidavit

484.060. (a) If the defendant desires to oppose the issuance of the right to attach order in the form sought by plaintiff, he shall file and serve upon the plaintiff no later than five days prior to the date set for the hearing a notice of opposition. The notice shall state the grounds on which the defendant opposes the issuance of the order and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the defendant fails to file a notice of opposition within the time prescribed, he shall not be permitted to submit opposition to the issuance of the order.

(b) If a defendant filing a notice of opposition desires to make any claim of exemption as provided in Section 484.070, he shall include such claim in the notice of opposition filed pursuant to this section.

Comment. Section 484.060 had no precise counterpart under former law.

Former Section 538.4 provided in part:

538.4. . . . Each party shall serve upon the other at least 24 hours before the hearing any affidavits intended to be introduced at the hearing, unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served.

Section 484.060 requires the defendant to file a notice of opposition and supporting affidavits or points and authorities in every case where he seeks to oppose issuance of a writ. In turn, the plaintiff is required to file any counteraffidavits in opposition to a claim of exemption not later than two days before the hearing date. See Section 484.070. See also former Sections 556 and 557 which provided:

556. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice

to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

557. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

§ 484.070. Claim of exemption and supporting affidavit; notice of opposition

484.070. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

(b) If the defendant desires to claim at the hearing that property not described in the plaintiff's application is exempt from attachment, in whole or in part, the defendant shall claim such exemption as provided in this section. Failure to make such claim does not preclude the defendant from later claiming the exemption. If the claim is made as provided in this section but the defendant fails to prove that the property is exempt from attachment, he may not later claim that the property, or a portion thereof, is exempt unless he shows that the right to the exemption is the result of a change in circumstances occurring after the hearing.

(c) The claim of exemption shall:

- (1) Describe the property claimed to be exempt.
- (2) Specify the statute section supporting the claim.

(d) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues so raised.

(e) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five days before the date set for the hearing.

(f) If the plaintiff desires to oppose the claim of exemption, he shall file and serve on the defendant, not less than two days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues so raised. If the plaintiff does not file and serve a notice of opposition as provided in this subdivision, (1) no writ of attachment shall be issued as to the property claimed to be exempt and (2) if all of the property described in the plaintiff's application is claimed to be exempt, no hearing shall be held and no right to attach order shall be issued.

(g) If the plaintiff files and serves a notice of opposition to the claim as provided in this section, the defendant has the burden of proving that the property is exempt from attachment.

Comment. Section 484.070 provides a preseizure procedure for claiming an exemption from attachment. Compare Section 690.50 (postseizure claim). See also former Section 537.3 (authorizing defendant's preseizure claim of exemption for property "necessary for support").

§ 484.080. Readiness for hearing; continuances

484.080. (a) At the time set for the hearing, the plaintiff shall be ready to proceed. If the plaintiff is not ready, or if he has failed to comply with Section 484.040, the judicial officer shall deny the application for the order.

(b) The court may, in its discretion and for good cause shown, grant the defendant a continuance for a reasonable period to enable him to oppose the issuance of the right to attach order. The effective period of any protective order issued pursuant to Chapter 6 (commencing with Section 486.010) may be extended by the court during the period of such continuance.

Comment. Section 484.080 had no counterpart under former law.

§ 484.090. Hearing; issuance of order and writ

484.090. (a) At the hearing, the judicial officer shall consider the showing made by the parties appearing and shall issue a right to attach order and writ of attachment if he finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(4) The defendant has failed to prove that the property sought to be attached, or the portion thereof specified in the writ, is exempt from attachment.

(5) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

(b) If the judicial officer determines that property of the defendant is exempt from attachment, in whole or in part, the order shall describe such property and exclude it from the scope of the writ.

(c) The writ of attachment shall specify the amount to be secured by the attachment and the property to be levied on.

(d) The judicial officer shall make his determinations upon the basis of the pleadings and other papers in the record provided that, upon good cause shown, he may receive and consider additional evidence and authority produced at the hearing or he may continue the hearing for the production of such additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.

Comment. Section 484.090 is similar in content and purpose to former Section 538.4. Section 538.4 provided:

538.4. The hearing shall be held before the court or a commissioner thereof on the day specified and shall take precedence over all other matters not of a similar nature pending on that day. If the defendant does not appear at the hearing, in person or by counsel, the court, without taking further evidence, shall direct the clerk to immediately issue a writ of attachment. Each party shall serve upon the other at least 24 hours before the hearing any affidavits intended to be introduced at the hearing, unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served. Either party may also introduce oral evidence at the hearing and the defendant shall make available for oral examination at the hearing himself or an officer or agent of the defendant with knowledge of the transaction on which the complaint is based, unless the court for good cause shown excuses compliance with this requirement. Upon the basis of the evidence introduced at the hearing, the court shall determine whether the case is one in which an attachment is properly issuable and whether there is any reasonable probability that the defendant can establish a successful defense to the claim asserted by the plaintiff. If the court finds on the basis of a preponderance of the evidence that grounds for the issuance of an attachment exist and that the plaintiff has established the probable validity of his claim and the absence of any reasonable probability that a successful defense can be asserted by the defendant, the court shall direct the clerk to immediately issue a writ of attachment; otherwise, the court shall dissolve the temporary restraining order. The court may direct the order in which the writ shall be levied upon different assets of the defendant, if in the aggregate they exceed in value an amount clearly adequate to secure any judgment which may be recovered by the plaintiff.

The preference for hearing provided by former Section 538.4 is not continued. The explicit direction that a writ be issued automatically if the defendant does not appear is also eliminated. However, Section 484.060 does require the defendant to file a notice of opposition if he plans to oppose the issuance of a writ; if he does not file, he may not

oppose the application. The court must still review the application but it seems that it would be rare for the plaintiff to fail to make an adequate prima facie showing.

Former Section 538.4 authorized either party to submit oral evidence. Section 484.090 provides that the court, on good cause shown, may permit the introduction of oral evidence as well as further documentary evidence and points and authorities. See subdivision (d).

The time limits for filing the required affidavits are provided in Sections 484.060 and 484.070.

Section 484.090 does not continue the requirement of former Section 538.4 that the defendant make himself or an agent or officer available for examination regarding the plaintiff's claim.

Although no special finding is required, no right to attach order will be issued if the defendant shows that such order would violate the National Bankruptcy Act. See Section 484.020(d).

Subdivision (c) of Section 484.090 requires the writ to specify the amount to be secured by the attachment and the property to be levied upon. The writ does not require that levy be made in any particular order. Contrast the last sentence of former Section 538.4. Liability for levy on an excessive amount of property is dealt with in Chapter 10 (commencing with Section 490.010).

As to multiple writs, additional writs, and alias writs, see Comment to Section 484.310.

§ 484.100. Effect of determinations of judicial officer

484.100. The determinations of the judicial officer under this chapter shall have no effect on the determination of any issues in the action other than the issues relevant to proceedings under this chapter nor shall they affect the rights of the defendant in any other action arising out of the same claim. The determinations of the judicial officer under this article shall not be given in evidence nor referred to in the trial of any such action.

Comment. Section 484.100 makes clear that the determinations of the judicial officer under this article have no effect on the determination of the validity of the plaintiff's claim in the action he has brought against the defendant nor do they affect the defendant's right to oppose an attachment or to claim that property is exempt in another action brought by the plaintiff on the same claim. However, if the judicial officer determines that the plaintiff is not entitled to an attachment because he has failed to establish the probable validity of his claim or that certain property of the defendant is exempt, such determinations are binding on the plaintiff in a subsequent action on the same claim unless the defendant is no longer entitled to the exemption because of changed circumstances. Section 484.100 does not, however, make inadmissible any affidavit filed under this chapter. The admissibility of such an affidavit is determined by rules of evidence otherwise applicable.

§ 484.110. Defendant's defense to action on claim not affected

484.110. Neither the failure of the defendant to oppose the issuance of a right to attach order under this chapter nor the defendant's failure to rebut any evidence produced by the plaintiff in connection with proceedings under this chapter shall constitute a waiver of any defense to plaintiff's claim in the action or any other action or have any effect on the right of the defendant to produce or exclude evidence at the trial of any such action.

Article 2. Noticed Hearing Procedure for
Obtaining Additional Writs

§ 484.310. Application for additional writ

484.310. At any time after a right to attach order and writ of attachment have been issued under Article 1 (commencing with Section 484.010), the plaintiff may apply for an additional writ of attachment under this article by filing an application with the court in which the action is brought.

Comment. Article 2 (commencing with Section 484.310) provides a noticed hearing procedure for the issuance of additional writs of attachment after a right to attach order has been issued. The purpose of the prior hearing is to determine whether the defendant can establish that the property sought to be levied upon is exempt. If no claim is made, the writ is issued and any claim of exemption is barred subject to a change in circumstances occurring after the hearing. See Section 484.350. An alternative ex parte procedure is provided by Article 3 (commencing with Section 484.510). Under the latter procedure, the defendant can establish that property is exempt after it is levied upon if he has not previously claimed pursuant to subdivision (b) of Section 484.070 that the property was exempt.

Both Article 2 and Article 3 serve the purpose of providing a procedure for the issuance of additional writs. This was formerly accomplished under Sections 540 and 559-1/2. The third paragraph of former Section 540 provided:

540. . . . Several writs may be issued upon the same affidavit and undertaking simultaneously or from time to time within 60 days after the filing of the affidavit and undertaking, to the sheriffs, constables, or marshals of any county or counties, whether or not any writ previously issued has been returned.

Section 559-1/2 provided:

559-1/2. After the return and filing of the writ of attachment, or upon filing by the plaintiff of a verified affidavit setting forth the loss of the writ of attachment, the clerk, upon demand of the plaintiff at any time before judgment, may issue an alias writ which shall be in the same form as the original, without requirement of a new affidavit for attachment or of a new undertaking as provided in Section 539 of the Code of Civil Procedure.

The provisions of this section do not prohibit the issuance of several writs as provided for in Section 540.

It would seem that the court has inherent power to issue multiple writs where necessary--e.g., to levy upon property located in different counties. Similarly, the Judicial Council can provide by rule for the issuance of duplicate writs where one has been lost. The procedure for obtaining additional writs in a new form is provided by Articles 2 and 3 of this chapter and Article 3 of Chapter 5.

§ 484.320. Contents of application

484.320. The application shall be executed under oath and shall include all of the following:

(a) A statement that the plaintiff has been issued a right to attach order and writ of attachment under Article 1 (commencing with Section 48 .010) in the action.

(b) A statement of the amount the plaintiff seeks to recover from the defendant (the amount of defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery) or, if an attachment is sought for only a part thereof, such partial amount.

(c) A description of the property to be attached under the writ of attachment, including plaintiff's estimate of its fair market value, and a statement that the plaintiff is informed and believes that such property is subject to attachment.

Comment. Section 484.320 is comparable to Section 484.020 except that a statement that a right to attach order has been issued is substituted for certain prerequisites to that order.

§ 484.330. Notice to defendant

484.330. No writ of attachment shall be issued under this article except after a hearing by a judicial officer. At least 20 days prior to the hearing, the defendant shall be served with both of the following:

- (a) A Notice of Application and Hearing.
- (b) A copy of the application.

Comment. Section 484.330 is comparable to Section 484.040. Service of a copy of the summons and complaint is not required here because it has presumably already been accomplished.

§ 484.340. Contents of Notice of Application and Hearing

484.340. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) The plaintiff has applied for a writ of attachment to attach the property described in the application.

(b) A hearing will be held by a judicial officer at a place and at a time, to be specified in the notice, to determine whether the plaintiff is entitled to the writ.

(c) A writ of attachment will be issued to attach the property specified in the plaintiff's application unless the court determines that such property is exempt from attachment.

(d) If the defendant claims that the property specified in the application, or a portion thereof, is exempt from attachment, he shall file with the court a claim of exemption with respect to the property as provided in Section 484.350. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(e) Either the defendant or his attorney or both of them may be present at the hearing.

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

Comment. Section 484.340 is comparable to Section 484.050. Of course, the hearing here is concerned only with the defendant's right, if any, to an exemption and the notice is accordingly so limited.

§ 484.350. Claim of exemption and supporting affidavit

484.350. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

(b) The claim of exemption shall:

(1) Describe the property claimed to be exempt.

(2) Specify the statute section supporting the claim.

(c) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues so raised.

(d) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five days before the date set for the hearing.

Comment. Section 484.350 is comparable to subdivisions (a), (c), (d), and (e) of Section 484.070.

§ 484.360. Plaintiff's notice of opposition

484.360. (a) If the defendant files and serves a claim of exemption and the plaintiff desires to oppose the claim, he shall file and serve on the defendant, not less than two days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues so raised.

(b) If the defendant files and serves a claim of exemption and supporting affidavit as provided in Section 484.350 and the plaintiff does not file and serve a notice of opposition as provided in this section, (1) no writ of attachment shall be issued as to the property claimed to be exempt and (2) if all of the property described in the plaintiff's application is claimed to be exempt, no hearing shall be held and no writ of attachment shall be issued.

(c) If the plaintiff files and serves a notice of opposition to the claim as provided in this section, the defendant has the burden of proving that the property is exempt from attachment.

Comment. Section 484.360 is comparable to subdivisions (f) and (g) of Section 484.070.

§ 484.370. Hearing; issuance of writ

484.370. The hearing shall be conducted in the manner prescribed in Section 484.090 and the judicial officer shall issue a writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) A right to attach order has been issued in the action pursuant to Article 1 (commencing with Section 484.010).

(b) The defendant has failed to prove that the property sought to be attached, or the portion thereof specified in the writ, is exempt from attachment.

(c) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 484.370 is comparable to Section 484.090.

Article 3. Ex Parte Procedure for
Obtaining Additional Writs

§ 484.510. Application for additional writ and supporting affidavit

484.510. (a) At any time after a right to attach order and writ of attachment have been issued under Article 1 (commencing with Section 484.010), the plaintiff may apply for an additional writ of attachment under this article by filing an application which meets the requirements of Section 484.320 with the court in which the action is brought.

(b) The application shall be accompanied by an affidavit showing that the property sought to be attached is subject to attachment.

Comment. Article 3 (commencing with Section 484.510) provides an ex parte procedure for the issuance of additional writs after a right to attach order has been issued following a noticed hearing. See Comment to Section 484.310. In contrast, Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of both the right to attach order and a writ. Such relief is, however, available only in exceptional circumstances. See Section 485.010 and Comment thereto.

§ 484.520. Ex parte hearing; issuance of writ

484.520. The judicial officer shall examine the application and supporting affidavit and shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) A right to attach order has been issued in the action pursuant to Article 1 (commencing with Section 484.010).

(b) The affidavit accompanying the application shows that the property sought to be attached is subject to attachment.

(c) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 484.520 is comparable to Section 484.370 except here the determinations are made ex parte and the plaintiff must show that the property sought to be attached is subject to attachment. This determination may be subsequently challenged by the defendant. See Section 484.530.

But cf. Sections 484.070(b), 484.530(b).

§ 484.530. Ex parte hearing; defendant's right to claim exemption

484.530. (a) If a writ of attachment is issued under this article, the defendant may claim an exemption as to the property levied on by following the procedure set forth in Section 690.50. For this purpose, references in Section 690.50 to "the debtor" shall be deemed references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed references to the plaintiff.

(b) Notwithstanding subdivision (a), a claim of exemption shall be denied if such claim has been denied earlier in the action and there is no substantial change in circumstances affecting such claim.

Comment. Section 484.530 authorizes the defendant to make a claim of exemption pursuant to the procedure provided by Section 690.50. Where, however, a similar claim has been previously denied, the defendant must show that a change in circumstances has now made the claim viable. See Section 484.070(b).

A "Notice of Attachment" (see Section 488.020) will be served on the defendant at or about the time his property is levied upon. The notice will advise him of his right to make a claim of exemption where the writ has been issued ex parte.

CHAPTER 5. EX PARTE HEARING PROCEDURE FOR OBTAINING

WRIT OF ATTACHMENT

Article 1. General

§ 485.010. Prerequisite of great or irreparable injury

485.010. (a) No right to attach order or writ of attachment may be issued pursuant to this chapter unless it appears from facts shown by affidavit that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice.

(b) The requirement of subdivision (a) is satisfied if any of the following are shown:

(1) An immediate danger that property sought to be attached would be transferred other than in the ordinary course of business, concealed, removed from the state, or substantially impaired in value unless the order is issued without delay.

(2) A bulk sales notice has been recorded and published by the defendant pursuant to Division 6 (commencing with Section 6101) of the Commercial Code.

(3) An escrow has been opened pursuant to the provisions of Section 24074 of the Business and Professions Code with respect to the sale by the defendant of a liquor license.

(4) Any other circumstance showing that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice.

(c) A writ issued solely on a showing under paragraph (2) of subdivision (b) shall be limited to the goods covered by the bulk sales

notice or the proceeds of such goods. A writ issued solely on a showing under paragraph (3) of subdivision (b) shall be limited to the proceeds of the sale of the license.

Comment. Section 485.010 is based on former Section 538.5. Section 538.5

provided in part:

538.5. Notwithstanding the provisions of Sections 538 to 538.4, inclusive, the court shall, upon application by the plaintiff, direct the immediate issuance of a writ of attachment without any notice of hearing (or, under subdivision (c) below, without any hearing) if any one or more of the following conditions exist:

(a) A bulk sales notice has been recorded and published with respect to property of the defendant pursuant to the provisions of Division 6 (commencing with Section 6101) of the Commercial Code, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the goods covered by the bulk sales notice; or an escrow has been opened pursuant to the provisions of Section 24074 of the Business and Professions Code with respect to the sale by the defendant of a liquor license, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the attaching creditor's pro rata share of the proceeds of the sale in escrow.

(b) The plaintiff establishes to the satisfaction of the court that there is a substantial danger that the defendant will transfer, other than in the ordinary course of business, remove or conceal the property sought to be attached, such writ to be issued upon the filing of the application provided for in Section 538.

(c) The notice and order issued pursuant to Section 538.1 cannot be served with the use of reasonable diligence upon the defendant within 10 days after its issuance and the court is satisfied that the defendant has departed from this state or conceals himself to avoid service of the notice, such writ to be issued after the expiration of such 10-day period.

(d) The defendant is one described in subdivision (d) of Section 537.2, such writ shall be issued upon the filing of the application provided for in Section 538. A writ of attachment (1) which is issued under this subdivision and levied upon property of a defendant described in subdivision (d) of Section 537.2 but who is not described in subdivision (a), (b) or (c) of Section 537.2, or (2) which is issued under this subdivision based upon a claim

which is not described in subdivision (a) of Section 537.1, shall be released and discharged by the court upon motion of the defendant if the defendant files a general appearance in the action. . . .

Subdivision (a) of former Section 538.5 has been replaced by the substantively similar provisions of paragraphs (2) and (3) of subdivision (b) and subdivision (c) of Section 485.010. Subdivision (b) of former Section 538.5 is reenacted in paragraph (1) of subdivision (b) of Section 485.010. Subdivision (c) of former Section 538.5 is not retained. Instead, paragraph (4) of subdivision (b) of Section 485.010 provides for an alternate showing of any circumstance that indicates that the plaintiff would suffer great or irreparable injury if issuance of the writ were delayed until the matter could be heard on notice.

Note. Subdivision (d) of former Section 538.5 provides for the ex parte issuance of a writ against a nonresident defendant. The Commission has deferred consideration of whether and to what extent attachment will be permitted to secure jurisdiction and whether nonresident defendants will be treated uniquely. When these issues have been resolved, any needed revisions will be made in this section and elsewhere.

Article 2. Order Determining Right
to Attach; Issuance of Writ of Attachment

§ 485.210. Application for order and writ; supporting affidavit

485.210. (a) Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought.

(b) The application shall satisfy the requirements of Section 484.020 and, in addition, shall include a statement showing that the requirement of Section 485.010 has been satisfied.

(c) The application shall be supported by an affidavit showing that:

(1) The plaintiff is entitled to a judgment on the claim upon which the attachment is based;

(2) The plaintiff would suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order were delayed until the matter could be heard on notice; and

(3) The property sought to be attached is subject to attachment.

Comment. Section 485.210 provides the procedure for applying ex parte for the issuance of a writ of attachment prior to a noticed hearing on the probable validity of the plaintiff's claim. Compare Sections 484.010-484.030 and 484.510. See also the first paragraph of former Section 538.5 set forth in the Comment to Section 485.010.

§ 485.220. Issuance of order and writ

485.220. (a) The judicial officer shall examine the application and supporting affidavit and, except as provided in Section 486.030, shall issue a right to attach order and writ of attachment if he finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(4) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof specified in the writ, is subject to attachment.

(5) The plaintiff would suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order were delayed until the matter could be heard on notice.

(6) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

(b) The writ of attachment shall specify the amount to be secured by the attachment and the property to be levied on.

(c) If the judicial officer finds that the application and supporting affidavit do not satisfy the requirements of Section 485.010, he shall so state and deny the order. If denial is solely on the ground that Section 485.010 is not satisfied, the judicial officer shall so state and such denial does not preclude the plaintiff from applying for a right to attach order and writ of attachment under Chapter 4 (commencing with Section 484.010) [with the same affidavits and supporting papers].

Comment. Section 485.220 provides the procedure for the ex parte issuance of a writ of attachment prior to a noticed hearing on the probable validity of the plaintiff's claim. Compare Sections 484.090 and 484.520.

The exception provided in subdivision (a) recognizes that the court may, in its discretion, issue a temporary protective order in lieu of a writ of attachment even where the requirements of this section are satisfied.

See Section 486.030 and Comment thereto.

§ 485.230. Right to claim exemption

485.230. If a writ of attachment is issued under this chapter, the defendant may claim the exemptions provided by Section 487.020 by following the procedure set forth in Section 690.50. For this purpose, references in Section 690.50 to "the debtor" shall be deemed references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed references to the plaintiff.

§ 485.240. Setting aside right to attach order and quashing writ

485.240. (a) Any defendant whose property has been attached pursuant to a writ issued under this chapter may apply for an order that the right to attach order be set aside, the writ of attachment quashed, and any property levied on pursuant to the writ be released. Such application shall be made by filing with the court and serving on the plaintiff a notice of motion.

(b) The notice of motion shall state the grounds on which the motion is based and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. It shall not be grounds to set aside an order that the plaintiff would not have suffered great or irreparable injury (within the meaning of Section 485.010) if issuance of the order had been delayed until the matter could have been heard on notice.

(c) At the hearing on the motion, the judicial officer shall determine whether the plaintiff is entitled to the right to attach order. If he finds that the plaintiff is not entitled to the right to attach order, he shall order the right to attach order set aside, the writ of attachment quashed, and any property levied on pursuant to the writ released. If he finds that the plaintiff is entitled to the right to attach order, thereafter the plaintiff may apply for additional writs pursuant to Article 2 (commencing with Section 484.310) or Article 3 (commencing with Section 484.510) of Chapter 4.

(d) The judicial officer shall make his determinations upon the basis of the pleadings and other papers in the record provided that, upon good cause shown, he may receive and consider additional evidence and authority produced at the hearing or he may continue the hearing for the production of such additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.

(e) The hearing provided for in this section shall take precedence over all other civil matters on the calendar of that day except older matters of the same character.

Comment. Section 485.240 is similar in content and purpose to the last two sentences of former Section 538.5. These sentences provided:

If a writ of attachment is issued under this subdivision and levied upon property of a defendant who is described in subdivision (a), (b) or (c) of Section 537.2 based upon a claim described in subdivision (a) of Section 537.1, the defendant may at any time after such levy, upon seven business days' notice to the plaintiff, request a hearing pursuant to Section 538.4. At such hearing, unless the court makes the findings required by that section for the issuance of a writ of attachment, it shall release and discharge the writ.

See also former Section 556 set forth in the Comment to Section 484.060.

Section 556 provided a procedure for setting aside a writ that had been improperly or irregularly issued. Former Section 558 provided in part:

that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.

The latter provision is not continued by statute, but the court has the inherent power to permit a plaintiff to amend his application or supplement his showing in support of the attachment at or prior to the hearing.

Article 3. Procedure for Obtaining Additional Writs

§ 485.510. Application for additional writ

485.510. At any time after a right to attach order and writ of attachment have been issued under Article 2 (commencing with Section 485.210), the plaintiff may apply for an additional writ of attachment under this article by filing an application with the court in which the action is brought.

Comment. Sections 485.510 through 485.530 are comparable to Section 484.510 only here the additional writ is obtained after an order to attach has been issued ex parte and the plaintiff must show therefore that **exceptional** circumstances continue his need for the ex parte issuance of a writ.

Nothing, of course, precludes the plaintiff ~~from~~ applying for an additional writ pursuant to Article 1 of Chapter 4. Moreover, where there has been a hearing pursuant to Section 485.240 and the plaintiff's right to attach has been upheld, the plaintiff may apply for an additional writ pursuant to the procedures provided in Articles 2 and 3 of Chapter 4.

§ 485.520. Contents of application

485.520. The application shall be executed under oath and shall include all of the following:

(a) A statement that the plaintiff has been issued a right to attach order and writ of attachment under Article 2 (commencing with Section 485.210) in the action.

(b) A statement of the amount the plaintiff seeks to recover from the defendant (amount of defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery) or, if an attachment is sought for only a part thereof, such partial amount.

(c) A description of the property to be attached under the writ of attachment, including plaintiff's estimate of its fair market value, and a statement that the plaintiff is informed and believes that such property is subject to attachment.

(d) A statement showing that the requirement of Section 485.010 has been satisfied.

Comment. See Comment to Section 485.510.

§ 485.530. Supporting affidavit

485.530. The application shall be supported by an affidavit showing that (a) the plaintiff would suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order were delayed until the matter could be heard on notice and (b) the property sought to be attached is not exempt from attachment.

Comment. See Comment to Section 485.510.

§ 485.540. Issuance of writ

485.540. The judicial officer shall examine the application and supporting affidavit and shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) A right to attach order has been issued in the action pursuant to Article 2 (commencing with Section 485.210).

(b) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof specified in the writ, is subject to attachment.

(c) The plaintiff would suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order were delayed until the matter could be heard on notice.

(d) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 485.540 is comparable to Section 484.520 except here the court must make a finding that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice. See Comment to Section 485.510.

CHAPTER 6. TEMPORARY PROTECTIVE ORDER

§ 486.010. Application for temporary protective order; supporting affidavit

486.010 (a) At the time of applying for a right to attach order under Chapter 4 (commencing with Section 484.010), the plaintiff may apply pursuant to this chapter for a temporary protective order by filing an application for the order with the court in which the action is brought.

(b) The application shall state what relief is requested and shall be supported by an affidavit showing that the plaintiff will suffer great or irreparable injury (within the meaning of Section 485.010) if the temporary protective order is not issued.

Comment. Section 486.010 replaces former Section 538.1. Section 538.1 provided in part:

538.1. The court or a commissioner thereof, if satisfied that the affidavits submitted by the plaintiff pursuant to Section 538 have established a prima facie case and that the action is one in which an attachment is properly issuable under the provisions of this chapter, shall issue without any prior notice to the defendant a . . . temporary restraining order conforming to the provisions of Section . . . 538.3 for service upon the defendant.

* * * * *

In contrast to former Section 538.1 which provided for the issuance of a temporary restraining order as a matter of right in every case, Section 486.010 requires the plaintiff to apply for relief and show that such relief is required to avoid great or irreparable injury to him.

The application required by this section will accompany that required by Section 484.020, thus permitting the court to make the determinations required by Section 486.020.

§ 486.010

Sections 486.010 and 486.020 provide for the situation where the plaintiff initially requests the relief afforded. A temporary protective order may also be issued on the court's own motion in lieu of the ex parte issuance of a writ of attachment pursuant to Section 486.030.

§ 486.020. Ex parte hearing; issuance of order

486.020. The judicial officer shall examine the application, supporting affidavit, and other papers on record and shall issue a temporary protective order if he finds all of the following:

(a) The claim upon which the application for attachment is based is one upon which an attachment may be issued.

(b) The plaintiff has shown that he is entitled to a judgment in the action on the claim upon which the application for the attachment is based.

(c) The order is not sought for a purpose other than the recovery upon the claim upon which the application for the attachment is based.

(d) The plaintiff has shown that he will suffer great or irreparable injury (within the meaning of Section 485.010) if the temporary protective order is not issued.

(e) The plaintiff has provided the undertaking required by Article 2 of Chapter 9 (commencing with Section 489.210).

Comment. Section 486.020 provides for an ex parte determination of the right to a temporary protective order. However, as under present practice, the court may require the plaintiff to give informal notice to the defendant or his attorney. See also Comment to Section 486.010.

§ 486.030. Issuance of temporary protective order in lieu of writ of attachment

486.030. (a) In any case where the plaintiff has applied for a right to attach order and writ of attachment under Chapter 5 (commencing with Section 485.010), the judicial officer may in his discretion deny the application for the order and writ and issue instead a temporary protective order under this chapter if he determines that the requirements of Section 486.220 are satisfied but that the issuance of the temporary protective order instead of the right to attach order and writ would be in the interest of justice and equity to the parties, taking into account the effect on the defendant of issuing a writ of attachment ex parte, the effect on the plaintiff of issuing the order instead of the writ, and other factors that bear on equity and justice under the circumstances of the particular case.

(b) If the judicial officer issues a temporary protective order under this section, the plaintiff's application for a right to attach order and writ shall be treated as an application for a right to attach order and writ under Chapter 4 (commencing with Section 484.010) and the plaintiff shall comply with the requirements of service provided in Section 484.040.

Comment. Section 486.030 has no counterpart under former law. See Comment to Section 486.010. Where a temporary protective order is issued in lieu of a right to attach order and writ, the plaintiff's application for the order and writ is treated as an application under Article 1 of Chapter 4. The plaintiff must serve the application, Notice of Application, and other papers required by Section 484.040 and the procedures provided thereafter are then followed.

§ 486.040. Contents of temporary protective order; general limitation

486.040. The temporary protective order issued under this chapter shall contain such provisions as the judicial officer determines are appropriate under the circumstances of the particular case.

Comment. Section 486.040 had no counterpart under the former law.

This section directs the court to consider what provisions in the temporary protective order would be fair and equitable for both parties. Included in such provisions may be a specific expiration date. See Section 486.090(a).

§ 486.050. Contents of temporary protective order; transfers in the ordinary course of business

486.050. Except as otherwise provided in Sections 486.040 and 486.060, the temporary protective order may prohibit any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business.

Comment. Section 486.050 is based on a comparable provision in former Section 538.3. Section 538.3 provided in part:

538.3. The temporary restraining order issued pursuant to Section 538.1 shall prohibit prior to the hearing any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business

Exceptions similar to those provided by Section 486.060 were also provided by Section 538.3. See Comment to Section 486.060. Section 538.3 also provided:

Without limiting the generality of the phrase "not in the ordinary course of business," the payment by the defendant of an antecedent debt shall not be considered in the ordinary course of business within the meaning of this section.

This clause has been eliminated. It seemed both confusing and unnecessary. The court should be able to frame an effective order under the guidelines provided in Sections 486.050 and 486.060.

Section 486.050 merely authorizes the issuance of an order prohibiting transfers where appropriate (see Section 486.040); former Section 538.3 seemed to always require the issuance of an order prohibiting transfers.

§ 486.060. Contents of temporary protective order; deposit accounts

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

(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 regular course[~~after~~ the service of the temporary protective order and] 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 or business.

(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 based on comparable provisions in former Section 538.3. Section 538.3 provided in part:

538.3. The temporary restraining order issued pursuant to Section 538.1 shall prohibit prior to the

nearing any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business, and the issuance by the defendant of any checks in excess of an aggregate of one thousand dollars (\$1,000) against any of his bank accounts in this state to withdraw any sums subject to such levy, which would reduce the aggregate amount remaining on deposit to less than the amount of the plaintiff's claim, and the opening of any new bank accounts by the defendant. Without limiting the generality of the phrase "not in the ordinary course of business", the payment by the defendant of an antecedent debt shall not be considered in the ordinary course of business within the meaning of this section. Notwithstanding the foregoing, checks may be issued by the defendant for any of the following purposes:

(a) To cover any payrolls (including all fringe benefits and withholding taxes) falling due in the regular course after the service of the temporary restraining order and prior to the levy of a writ of attachment, but not exceeding the amount of three hundred dollars (\$300) per week for any individual employee.

(b) In payment for goods thereafter delivered to the defendant C.O.D. for use in his trade or business.

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

(d) In payment of legal fees for the representation of the defendant in the action.

* * * * *

§ 486.070. Persons bound by temporary protective order

486.070. Except as otherwise provided by Section 486.110, a temporary protective order issued under this chapter binds only the defendant.

Comment. Section 486.070 expands the policy of a provision in former Section 538.1. Section 538.1 provided in part:

538.1. . . . Neither notice of the restraining order issued pursuant to this section nor service of a copy thereof upon any bank shall require any bank to observe the terms of the restraining order.

Section 486.070 does not, however, affect any other provisions of law such as the law relating to fraudulent conveyances. See Civil Code §§ 3439-3440.1.

§ 486.080. Service on defendant

486.080. The temporary protective order shall be served on the defendant together with the documents referred to in Section 484.040.

§ 486.090. Expiration of order

486.090. Except as otherwise provided in Section 486.110, the temporary protective order shall expire at the earliest of the following times:

(a) Thirty days after the issuance of the order, or such other date as prescribed by the judicial officer in the order.

(b) As to specific property described in the order, when a levy of attachment upon that property is made by the plaintiff.

(c) When the defendant provides an undertaking pursuant to Section 489.310 in the amount of plaintiff's claim as security for the payment of any judgment recovered by the plaintiff.

Comment. Section 486.090 is based on a comparable provision in former Section 538.3. Section 538.3 provided in part:

538.3. . . . The temporary restraining order shall expire by its terms unless a writ of attachment is issued and levied within 30 days after the service of the order or if the defendant gives an undertaking as provided in Section 555 in the amount of plaintiff's claim as security for the payment of any judgment recovered by the plaintiff. . . .

§ 486.100. Modification or vacation of order on defendant's application

486.100. Upon ex parte application of the defendant or, if the judicial officer so orders, after a noticed hearing, the judicial officer may modify or vacate the temporary protective order if he determines that such action would be in the interest of justice and equity to the parties, taking into account the effect on the defendant of the continuance of the original order, the effect on the plaintiff of modifying or vacating the order, and **any other factors.**

Comment. Section 486.100 expands a comparable provision in former Section 538.3. Section 538.3 provided in part:

538.3. . . . The restraining order shall be vacated by the court upon ex parte application by the defendant if the court is satisfied that there is no danger that sufficient property of the defendant to secure the plaintiff's claim will not be available and subject to the levy of a writ of attachment, if one is directed to be issued at the hearing provided for in Section 538.4.

§ 486.110. Lien

486.110. (a) The service upon the defendant of a temporary protective order pursuant to Section 486.080 creates a lien upon such property, or the proceeds thereof, which is described in the order and which is subject to the levy of a writ of attachment pursuant to this title and owned by him at the time of such service. The lien is not valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business.

(b) The lien terminates upon the date of expiration of the order except with respect to property upon which a writ of attachment issued upon application of the plaintiff has been levied during that period. The levy of a writ of attachment shall perfect the lien created by the service of the temporary protective order.

(c) Upon the filing [by the defendant] of a proceeding under the National Bankruptcy Act or the making by the defendant of a general assignment for the benefit of creditors, the lien terminates with respect to all property upon which a writ of attachment has not been levied prior to such event.

Comment. Section 486.110 is based on former Section 542b. Section 542b provided:

542b. The service upon the defendant of a notice and order pursuant to Section 538.2 creates a lien upon all of his personal property subject to the levy of a writ of attachment pursuant to this chapter and owned by him at the time of such service or the proceeds thereof. Such lien, however, shall not be valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business. Such lien shall terminate 30 days after the service of the notice and order upon the defendant; except with respect to property upon which a writ of attachment has been levied during that period and upon the filing by the defendant of a proceeding under the National Bankruptcy Act or the making by the defendant of a general assignment for the benefit of creditors, such lien shall terminate with respect to all property upon which a writ of attachment has not been levied prior to such event. The levy of a writ of attachment shall perfect the lien created by the service of the notice and order against a bona fide purchaser and a transferee in the ordinary course of business and the levy of a writ of attachment in those cases where it is not preceded by the service of a notice and order shall create a lien upon the property levied upon which is valid against all third persons.

The levy of a writ of attachment perfects only the lien that could be initially created by the temporary protective order; hence, levy of a writ does not affect the prior rights of bona fide purchasers or buyers in the ordinary course of business who are not bound by the temporary protective order. Of course, transfers subsequent to the levy are subject to the lien of attachment. See Section 488.500(a).

CHAPTER 7. PROPERTY SUBJECT TO ATTACHMENT

§ 487.010. Property subject to attachment

487.010. The following property shall be subject to attachment:

(a) Where the defendant is a corporation, all corporate property.

(b) Where the defendant is a [partner or] partnership, all partnership property.

(c) Where the defendant is an individual engaged in a trade, business, or profession, all of the following property used or held for use in the defendant's trade, business, or profession:

(1) Accounts receivable, chattel paper, and choses in action except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

(2) Deposit accounts except the first one thousand dollars (\$1,000) deposited in any single financial institution or branch thereof; provided, however, if the defendant has more than one deposit account, a judicial officer, upon application of the plaintiff, may direct that the writ of attachment be levied on balances of less than one thousand dollars (\$1,000) if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of levy.

(3) Equipment.

(4) Farm products.

(5) Inventory.

(6) Judgments arising out of the conduct of the trade, business, or profession.

(7) Money.

(8) Negotiable documents.

(9) Negotiable instruments.

(10) Real property.

(11) Securities.

Comment. Section 487.010 is substantially the same as former Section

537.3. Section 537.3 provided:

537.3. The property referred to in Section 537 is the following property not exempt from execution (without regard to whether a claim of exemption shall be filed):

(a) With respect to corporations and partnerships referred to in subdivisions (a) and (b) of Section 537.2, all corporate property and all partnership property.

(b) With respect to individuals referred to in subdivision (c) of Section 537.2 all of the following:

(1) Inventory.

(2) Accounts, contract rights, chattel paper, and general intangibles consisting of any right to payment of money (exclusive of those referred to in paragraph (3) of this subdivision), except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

(3) Bank accounts and other deposit accounts, except the first one thousand dollars (\$1,000) balance in any single bank or branch bank (but, if the defendant has accounts in more than one bank or branch bank, the court, upon application of the plaintiff at the hearing provided for in Section 538.4, may direct that the writ be levied on balances of less than one thousand dollars (\$1,000) in a given bank or branch bank if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of the levy).

(4) Securities.

(5) Equipment.

(6) Real estate, including any leasehold estate with an unexpired term of one year or more.

The court, however, upon application of the defendant at the hearing provided for in Section 538.4 or at any time thereafter upon five days' notice to the plaintiff, shall exclude from the effect of the levy or release from the levy, as the case may be, any of the foregoing property which the court finds is necessary for the support of the defendant and his family after taking into consideration all of his other income and assets not subject to levy or not levied upon.

The terms used in this subdivision which are defined in the Commercial Code shall have the meanings therein specified.

(c) With respect to a defendant referred to in subdivision (d) of Section 537.2, all property of the defendant.

Section 487.010 is subject to the exception that property exempt from execution as well as property necessary for the support of the defendant and his family shall not be subject to attachment. See Section 487.020. Compare the introductory paragraph of former Section 537.3 and the next to last paragraph of subdivision (b) of that section.

Subdivisions (a) and (b) are substantively the same as subdivision (a) of former Section 537.3.

Subdivision (c) is substantially the same as subdivision (b) of former Section 537.3. Some terms have been changed, but their meaning is still substantially the same, and some types of property have been added. For example, farm products and negotiable instruments and documents were apparently not always subject to levy under former Section 537.3 because none of them were listed under subdivision (b) of Section 537.3. See Com. Code §§ 9106 ("general intangibles" does not include instruments), 9109 ("inventory" does not include farm products). All have been listed under subdivision (c) of Section 487.010.

Section 487.010 merely states what property is "subject to attachment." It does not affect the rules governing priorities between creditors. See, e.g., Code Civ. Proc. § 1206 (laborer's preferred claim).

Note. Subdivision (c) of former Section 537.3 has been deleted. The Commission has deferred consideration of whether and to what extent attachment will be permitted to secure jurisdiction and nonresident defendants will be treated uniquely. When these issues have been resolved, any needed revisions will be made in this section and elsewhere.

§ 487.020. Property exempt from attachment

487.020. Notwithstanding Section 487.010, the following property is exempt from levy of attachment:

(a) Property exempt from execution.

(b) Property which is necessary for the support of an individual defendant and members of his household when a proper claim for the same is made by the defendant.

Comment. Section 487.020 is substantively the same as the first paragraph of Section 537.3 and the next to last paragraph of subdivision (b) of that section. See Comment to Section 487.010.

Subdivision (a) embraces not only the exemptions provided in the 690 series of the Code of Civil Procedure but also homesteads, spendthrift trusts, and any other special exemptions provided in other codes.

Subdivision (b) provides an additional claimed exemption available to an individual defendant upon a showing of need.

The California Supreme Court in Randone v. Appellate Department, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), held that:

the state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action, before an impartial confirmation of the actual, as opposed to the probable, validity of the creditor's claim after a hearing on that issue.

This title attempts to satisfy the foregoing requirement (1) by generally subjecting only business property to levy, (2) by providing a nonseizure form of levy in many circumstances, (3) by providing a claimed exemption for necessities which will be available prior to levy in all but exceptional circumstances, and (4) by authorizing the court to issue a temporary protective order in lieu of a writ in the exceptional circumstances where a writ may be issued ex parte.

CHAPTER 8. LEVY PROCEDURES; LIEN OF ATTACHMENT;
MANAGEMENT AND DISPOSITION OF ATTACHED PROPERTY

Article 1. General Provisions

§ 488.010. Writ of attachment

488.010. 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.

Comment. Section 488.010 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. See the first paragraph of Section 542 set forth in the Comment to Section 488.030. However, under the procedures provided here, the issue of what property may be attached is always subject to a prior review by a judicial officer. Accordingly, it is feasible and desirable to have the writ itself identify the property that that officer has determined should be attached. This should help to avoid discrepancies between what the court has determined may be attached and what the levying officer eventually attaches.

§ 488.020. Notice of attachment

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

Comment. Section 488.020 had no counterpart under former law. The form of the "Notice of Attachment" was not prescribed by statute. Section 488.020 provides general guidance to the Judicial Council as to certain matters which should be included in the notice of attachment. See Section 482.030 (Judicial Council to prescribe form of notices and other documents used under this title).

§ 488.030. Levying officer shall promptly comply with writ

488.030. (a) A writ of attachment shall be directed to a levying officer in the county in which property of the defendant described in the writ may be located.

(b) Upon the receipt of written instructions from the plaintiff, or his attorney of record, the levying officer to whom the writ is directed and delivered shall execute the same without delay in the manner provided in this chapter.

Comment. Subdivision (a) of Section 488.030 is based on the first portion of the first sentence of former Section 540. Section 540 provided in part:

540. The writ must be directed to the sheriff, or a constable, or marshal of any county in which property of such defendant may be, and must require him to attach and safely keep all of the property of such defendant within his county not exempt from attachment, or so much of the property of such defendant as may be sufficient to satisfy the plaintiff's demand against such defendant

Subdivision (b) of Section 488.030 incorporates the substance of the introductory paragraph of former Section 542. This paragraph provided as follows:

542. The sheriff, constable, or marshal, to whom the writ is directed and delivered, must, upon receipt of instructions in writing, signed by the plaintiff or his attorney of record, and containing a description of the property, and in the case of real property or growing crops the name of the record owner of the real property to be attached, or upon which the crops are growing, execute the same without delay, and if the undertaking mentioned in section 540 of this code be not given, as follows

See also former Section 543 which provided in part:

543. Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or owes any debt to the defendant, the sheriff, constable, or marshal shall serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ

§ 488.040. Person served with writ and notice of attachment.

488.040. (a) Service of a writ and a notice of attachment upon (1) a bank, (2) a savings and loan association, (3) a credit union, (4) a title insurance company or underwritten title company (as defined in Section 12402 of the Insurance Code), or (5) an industrial loan company (as defined in Section 18003 of the Financial Code) shall be made at the office or branch thereof which has actual possession of the property levied upon or at which the deposit account levied upon is carried and shall be made upon the officer, manager, or other person in charge of such office or branch at the time of service.

(b) Except as provided in subdivision (a), service of a writ and a notice of attachment shall be made upon the person upon whom summons may be served.

Comment. Section 488.040 states whom should be served with a writ and a notice of attachment. Subdivision (a) is based on the last sentence of subdivision (5) of former Section 542. This sentence read as follows:

However, debts owing to the defendant by any of the following financial institutions: (a) banks; (b) savings and loan associations; (c) title insurance companies or underwritten title companies (as defined in Section 12402 of the Insurance Code); (d) industrial loan companies (as defined in Section 18003 of the Financial Code), maintaining branch offices, or credits or other personal property whether or not the same is capable of manual delivery, belonging to the defendant and in the possession of or under the control of such financial institution shall be attached by leaving a copy of the writ and the notice, together with a copy of the complaint if required hereunder, with the manager or other officer of such financial institution at the office or branch thereof at which the account evidencing such indebtedness of the defendant is carried, or at which such financial institution has credits or other personal property belonging to the defendant in its possession or under its control; and no attachment shall be effective as to any debt owing by such financial institution if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served.

Subdivision (b) is substantially equivalent to the first sentence of subdivision (5) of former Section 542 and incorporates the provisions of Sections 416.10 through 416.90.

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

488.050. As a prerequisite to the taking of possession of property by the levying officer under this chapter, 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 such 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 of record 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 488.550.

Comment. Section 488.050 is substantively similar to the first four sentences of subdivision 4 of former Section 542. These sentences provide:

4. In cases where the sheriff, constable, or marshal is instructed to take into possession personal property capable of manual delivery, whether the same is to be placed in a warehouse or in custody of a keeper, the sheriff, constable or marshal shall require, as a prerequisite to the taking of such property, that in addition to written instructions the plaintiff or his attorney of record deposit with the sheriff, constable or marshal, 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 a further detention of said property is required, the sheriff, constable or marshal must, 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 five days each. Such demand must be served as provided in Section 1011 of this code, 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

§ 488.050

his last known office or place of residence. In the event that the money so demanded is not paid, the sheriff, constable or marshal shall release the property to the person or persons from whom the same was taken. . . .

Section 488.050, however, gives the levying officer authority to demand additional deposits for expenses (after the first 15 days) for 90 days rather than the present five days provided by subdivision 4. There was no reason to have such a short period after it had become apparent that the property would probably be held for substantial periods pending a final determination in the action.

§ 488.060. Limitations on liability of levying officer

488.060. (a) There shall be no liability upon the part of the levying officer to take or hold personal property unless the plaintiff has fully complied with the provisions of Section 488.050.

(b) 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.

Comment. Section 488.060 is substantively identical to the last two sentences of former subdivision 4 of Section 542. These sentences provided:

4. . . . There shall be no liability upon the part of the sheriff, constable or marshal to take or hold personal property unless the provisions of this section [now Section 488.050] shall have been fully complied with. There shall be no liability upon the part of the sheriff, constable or marshal, either to the plaintiff or the defendant for loss by fire, theft, injury or damage of any kind to personal property capable of manual delivery while in the possession of the sheriff, constable or marshal either in a warehouse or in the custody of a keeper or en route to or from a warehouse unless the sheriff, constable or marshal shall be negligent in his care or handling of the property.

§ 488.070. Return of writ

488.070. The levying officer shall return the writ to the clerk of the court from which the writ issued with a certificate of his proceedings endorsed thereon or attached thereto. Such return shall be made promptly in accordance with the instructions given to the officer at the time the writ is delivered to him but in no event later than 60 days after the officer receives the writ.

Comment. Section 488.070 is based on a portion of former Section 559.

Section 559 provided:

559. The sheriff, constable, or marshal must return the writ of attachment with the summons, if issued at the same time, and may return it separately from the summons if issued at a later time. The writ of attachment must be returned forthwith after levy and service in accordance with the instructions given to the officer at the time such writ or writ and summons are delivered to him, but in no event later than 30 days after its receipt, with a certificate of his proceedings endorsed thereon or attached thereto, together with the undertaking given under the provisions of Section 540 of this code to prevent or release the levy of the attachment, to the clerk of the court from which said writ of attachment was issued, except that if cash has been deposited with such levying officer in lieu of an undertaking as permitted by Section 540 of this code, such cash shall be retained in such levying officer's trust fund, and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be recorded in the offices of the county recorders in which the notices of attachment have been recorded, and be indexed in like manner.

The provisions in Section 559 relating to the defendant's undertaking in lieu of attachment have been replaced generally by Section 489.310. The maximum time limit has been increased from 30 to 60 days so that, where substituted service is required, this may be completed before the return is made. See, e.g., Section 488.310.

§ 488.080. Inventory

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 levying officer, at the time of service, shall request any person who retains property in his possession or any account debtor or judgment debtor levied upon to give him a memorandum, describing the property or debt and stating its value or the amount owing, within 10 days after such service. If the person fails to give such memorandum within the time specified, the levying officer shall state such fact at the time he makes his return pursuant to Section 488.070. A person failing to give such 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 memorandum.

Comment. Section 488.080 restates the substance of former Section 546.

Section 546 provided:

546. The officer levying the attachment must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached and other personal property not in the possession of the defendant, he must request, at the time of service, the party owing the debt or having the credit or other personal property belonging to the defendant to give him a memorandum, stating the amount and description of each, within 10 days after such service; and if such memorandum be refused, he must return the fact of such refusal with the writ. The party refusing to give the memorandum within the time specified may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debts or credits or other personal property.

§ 488.090. Third-party claims to attached property

488.090. A third person shall claim an interest in personal property attached in the manner provided for third-party claims after levy under execution.

Comment. Section 488.090 restates the substance of former Section 549. Section 549 provided:

549. In cases where a third person claims, as his property, any personal property attached, the rules and proceedings applicable in cases of third party claims after levy under execution shall apply.

Both sections incorporate the procedures provided by Section 689. Section 689 provides a third-party claim procedure for personalty only. Where a third person claims an interest in real property, he may proceed by way of a complaint in intervention (see Beshara v. Goldberg, 221 Cal. App.2d 392, 34 Cal. Rptr 501 (1963)) or by a separate action to quiet title. See First Nat. Bank v. Kinslow, 8 Cal.2d 339, 65 P.2d 796 (1937). See generally 3 B. Witkin, California Procedure Pleading § 211 at . 1883; 5 B. Witkin, California Procedure Enforcement of Judgment. § 115 at . 3481 (2d ed. 1971).

Article 2. Method of Levy on Particular

Types of Property

§ 488.310. Real property

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 property stands in the name of a third person, either alone or together with the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such third person.

(c) Promptly after recordation and in no event more than 45 days after the date of recording, the levying officer shall serve the defendant and any third person in whose name the property stands on such date with a copy of the writ and the notice.

Comment. Section 488.310 provides the method by which real property is attached. This section is based on subdivisions 1 and 2 of former Section 542. These subdivisions provided as follows:

542. . . . 1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by recording with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached,

and by 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, description and notice, or if there is no occupant then on the property, then, by posting the same in a conspicuous place on the property attached. Service upon the occupant may be made by leaving said copy of the writ, description 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 thereof 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 notice 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, one service or posting need be made as to each such continuous, unbroken tract.

* * * * *

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached in the same manner as is real property standing upon the records of the county in the name of the defendant by the provisions of subdivision 1 of this section and the notice of attachment shall state that the real property therein described, and any interest of the defendant therein held by or standing on the records of the county in the name of such other person (naming him), are attached. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if within the county. The recorder must 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.

Section 488.310 eliminates the requirement of service on an occupant or posting as an element of a proper levy. Compare former Section 542(1) and (2). See Schwartz v. Cowell, 71 Cal. 306, 12 P. 252 (1886); Clark v. Andrews, 109 Cal. App.2d 193, 240 P.2d 330 (1952); Alpha Stores, Ltd. v. You Bet Mining Co., 18 Cal. App.2d 252, P. (1937). Service on an occupant has been eliminated because at best it was an indirect means of giving notice to the owners of the property and at worst it could cause undue worry and inconvenience to a person (e.g., lessee) whose possession will not be disturbed. Service is

still required upon the defendant and upon any third person in whose name the property stands of record on the date of levy, but such service is not a condition of a valid levy. It might be noted, however, that the failure to serve pursuant to subdivision (c) may be evidence of malice sufficient to support punitive damages in an action for wrongful attachment where the failure is due to action or inaction by the plaintiff. See generally Section 490.010 (acts constituting wrongful attachment).

Subdivision (c) requires that service be done promptly, however, in some circumstances service by publication may be required, hence, the levying officer is permitted up to 45 days to accomplish such service. See also Section 488.070 (levying officer's return shall be made no later than 60 days after receipt of writ).

§ 488.320. Tangible personal property in the possession of the defendant

488.320. (a) Except as otherwise provided by this article, to attach tangible personal property in the possession of the defendant, the levying officer shall take such property into custody.

(b) At the time of levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

Comment. Section 488.320 provides the general method by which tangible personal property in the possession of the defendant is attached. This section is based on subdivision 3 of former Section 542 which provided in part: "3. Personal property, capable of manual delivery, in the possession of the defendant, must be attached by taking it into custody . . ." Former law distinguished between property capable and property not capable of manual delivery. As to the latter, subdivision 5 provided in part:

[P]ersonal property not capable of manual delivery shall be attached by leaving with the [person] . . . having in his possession, or under his control, such . . . personal property . . . , a copy of the writ, and . . . a notice that the . . . personal property in his possession, or under his control, belonging to the defendant, [is] attached in pursuance of such writ.

It was held that this provision authorized levy by notice even on the defendant where property was not reasonably capable of being moved. See Raventas v. Green, 57 Cal. 254 (1881)(growing crops prior to the enactment of a specific provision dealing with such property); Irillary v. Byers, 84 Cal. App. 28, ___ P. ___ (1927)(steam shovel). Apparently under former law, the plaintiff determined which class of property the particular asset fell into and instructed the sheriff accordingly. If his determination was wrong, the attachment

§ 488.320

presumably was invalid. The major difficulty with that scheme was that, where levy was properly made by notice alone, the protection for subsequent transferees of the property was inadequate. In place of this, Section 488.320 provides for levy by custody (whether by keeper or storage) subject to certain broad exceptions provided by other sections. See Sections 488.340 (equipment), 488.350 (motor vehicles), 488.360 (farm products and business inventory). Levy by seizure, while sometimes more expensive for the parties to the action, eliminates any ambiguity and protects innocent transferees.

§ 488.330. Tangible personal property in the possession of a third person; demand for removal; liability of third person; memorandum

488.330. (a) Except as otherwise provided in this article, to attach tangible personal property, belonging to the defendant but in the possession of another person, the levying officer shall personally serve upon such person a copy of the writ and the notice of attachment.

(b) At any time, upon the demand of such third person, the levying officer shall take such property into custody, by keeper or otherwise. In such case, the levying officer shall make demand on the plaintiff for expenses in the manner provided in Section 488.050. In the event that the money so demanded is not paid, the levying officer shall release the property to the person from whom it was taken in the manner provided in Section 488.560.

(c) 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.

(d) Notwithstanding subdivision (a), goods subject to a negotiable document shall be attached by attaching the document in the manner provided by Section 488.400.

Comment. Section 488.330 provides the general method by which tangible personal property in the possession of a person other than the defendant is attached. Such property, where capable of manual delivery, was not covered at all under the former statute. Two older cases suggested that, at least where the third person was a pledgee, such property should have been levied upon by notice to the third person. Moreover, possession

could only be obtained by court order (see Treadwell v. Davis, 34 Cal. 601 (1868)), and seizure by the levying officer without such an order could subject him to liability as a convertor of the goods. See Dubois v. Spinks, 114 Cal. 289 (1896). Personal property, not capable of manual delivery, was covered by subdivision 5 of former Section 542 which provided also for levy by notice. See Comment to Section 488.320. Section 488.330 makes clear that levy upon tangible personal property in the possession of a third person shall generally be by notice. Subdivision (d), however, states a specific exception for goods subject to a negotiable document of title. See Section 488.400.

Subdivision (b) is based on a portion of the first paragraph of former Section 544 which permitted a garnishee to deliver up the garnished property to the levying officer. The liability of the garnishee where such delivery is not made is now provided for by Section 488.550.

The duty of the person in possession to provide the levying officer with an inventory of any property which he retains in his possession is set forth in Section 488.080.

§ 488.340. Equipment of a going business

488.340. (a) Except as provided by Section 488.350 to attach equipment of a going business, the levying officer shall file with the Office of the Secretary of State a notice complying with the provisions of subdivision (b).

(b) The notice filed with the Office of the Secretary of State shall (1) contain the name and mailing address, if known, of both the plaintiff and the defendant in the described action, (2) describe the specific property attached, (3) state that the plaintiff in the action has acquired an attachment lien in the specified property of the defendant, and (4) be in the form prescribed by the Secretary of State.

(c) Promptly after filing and in no event more than 45 days after filing, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(d) 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).

(e) 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 shall be 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.

Comment. Subdivisions (a) through (c) of Section 488.340 are comparable to former Section 542.1. Section 542.1 provided:

542.1. Notwithstanding the provisions of Section 542, a writ of attachment shall be levied upon any equipment (as defined in the Commercial Code), other than a motor vehicle or boat (required to be registered, belonging to the defendant by the filing of a notice 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 term "equipment" is defined by Section 481.100. Where doubt exists whether an item of property is personalty (equipment) or realty (fixture), it is suggested that levy be made pursuant to both this section and Section 488.310. See Comment to Section 481.100. It should be noted that the operation of this section is limited to equipment of a going business. Where a business has failed or ceased, the provisions of Section 488.320 would apply.

The exceptions provided for motor vehicles and vessels under the former law are also recognized here by Section 488.350.

Subdivision (d) is substantively identical to subdivision (a) of former Section 542.2.

Subdivision (e) is substantively identical to former Section 542.3.

§ 488.350. Motor vehicles and vessels

488.350. (a) To attach a motor vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles and which is equipment of a going business, the levying officer shall file with the Department of Motor Vehicles a notice complying with the provisions of subdivision (b).

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

(c) Promptly after filing and in no event more than 45 days after filing, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(d) Promptly after filing and in no event more than 30 days after the date of filing pursuant to this section, the levying officer shall serve the legal owner, if any, of the vehicle or vessel as shown by the records of the department on such date with a copy of the writ and the notice of attachment.

(e) The lien of attachment acquired pursuant to this section shall not affect the rights of a person who without actual knowledge of the attachment purchases the vehicle or vessel and obtains possession of both the vehicle or vessel and its certificate of ownership.

Comment. Section 488.350 is new. Subdivision (a) provides an exception to the method of levy on equipment of a going business provided by Section 488.340. Where the equipment is a motor vehicle or a vessel, subdivision (a) substitutes filing with the Department of Motor Vehicles (DMV) in place of filing with the Secretary of State. The requirement of filing with the DMV is comparable to the procedure for perfection of a consensual security interest in motor vehicles and vessels. See Veh. Code §§ 6300 and 6301 (motor vehicles); 9919 and 9920 (vessels). See also Com. Code § 9302(4) ("A security interest in a vehicle or vessel required to be registered under the Vehicle Code which is not inventory may be perfected only as provided in the Vehicle Code."). Note that this section deals only with motor vehicles and vessels which are equipment of a going business. It does not deal with inventory (see Section 488.360) nor does it deal with motor vehicles or vessels generally. See Sections 488.320 (levy on tangible personal property in the possession of the defendant), 487.010-487.020 (property subject to attachment).

Section 488.350 does not require the certificate of ownership to be seized as a condition of a valid levy. Compare Veh. Code § 6300 (deposit of properly endorsed certificate of ownership a condition for perfection of a security interest). Accordingly, it is remotely possible that a vehicle which is equipment of a going business could be attached pursuant to this section and thus subsequently sold to a person who is without knowledge of the prior attachment. In such a situation, subdivision (e) permits the purchaser to acquire the vehicle free of the prior lien. In this regard, however, it should be noted that the records of the DMV should generally inform the purchaser of the prior lien and the defendant may be subject to punishment for contempt for selling the vehicle in violation of the terms of a restraining order or the writ. See Section 1209(5) (disobedience of court's process an act of contempt).

§ 488.360. Farm products and inventory of a going business

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 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 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, 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. 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 (1) that the aggregate of his property, at a fair valuation, is sufficient in amount to pay his debts, not including the plaintiff's claim, and (2) that the property attached pursuant to subdivision (a) and the proceeds therefrom are essential for the support of himself and his family. Upon such showing, the judicial officer 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 he 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.

(c) Notwithstanding the provisions of subdivision (b), 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 in the farm products or inventory of the defendant. When the property is crops or timber to be cut, the notice shall be filed 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. In all other cases, the notice shall be filed in the Office of the Secretary of State. A lien acquired pursuant to this subdivision shall provide the plaintiff the same rights and priorities in proceeds of the attached property as has a secured party with a perfected security interest in proceeds of 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.

Comment. Section 488.360 provides special methods for attaching farm products and the inventory of a going business. The terms "farm products" and "inventory" are defined by Sections 481.110 and 481.120, respectively. As to businesses, this section replaces a portion of subdivision 3 of former Section 542. That subdivision provided in part as follows:

3. . . . Whenever a levy under attachment or execution shall be made on personal property, other than money, or a vehicle required to be registered under the Vehicle Code belonging to a going concern, then the officer making the levy must, if the defendant consents, place a keeper in charge of said property levied upon, at plaintiff's expense, for at least two days, and said keeper's fees must be prepaid by the levying creditor. During said period defendant may continue to operate in the ordinary course of 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 creditor. After the expiration of said two days the sheriff, constable, or marshal shall take said property into his immediate possession unless other disposition is made by the court or the parties to the action.

Subdivision (a) preserves the basic approach of installing a keeper for a short period of time while permitting the business to continue to operate and then taking exclusive custody. However, this section is limited to farm products and inventory. Equipment is attached only by filing pursuant to Section 488.340. Subdivision (a) also makes some additional minor changes. It makes clear that the defendant must be served with a copy of the writ and notice of attachment and permits sales where payment is by check or by a credit card not issued by the defendant, e.g., BankAmericard or Master Charge. It should be noted that subdivision (a) (as does existing law) permits the parties to make an alternate disposition of the property; this may include the creation of a consensual security interest with adequate provisions for accounting for proceeds and so on. The plaintiff has substantial leverage,

however, because, if an agreement cannot be reached or the defendant cannot obtain relief under subdivision (b), the property is simply seized. Subdivision (a) also replaces the first paragraph of both subdivision 1a and subdivision 2a of former Section 542. These paragraphs provided for levy upon growing crops by recordation by the county recorder. Levy by recordation is now provided as an alternative method pursuant to subdivision (c). See discussion infra. See also Com. Code § 9401(1).

Subdivision (b) provides a procedure for certain relief where the defendant can show that, but for the plaintiff's claim, he (the defendant) is solvent and that the property attached is essential for the support of himself and his family. In these circumstances, the court must order the return of essentials to the defendant but he may also require the defendant to care for the property and may place reasonable restrictions on the disposition of such property. For example, he may direct the defendant to maintain adequate insurance, to care for and preserve the property, to account for proceeds of sale, to permit reasonable inspections of the property and his books, and to furnish the plaintiff with periodic accounts.

Subdivision (c) permits the plaintiff to elect initially an alternate method of levy comparable to the perfection by filing of a consensual security interest in inventory under the Commercial Code. Compare Com. Code § 9302. The attachment lien acquired by filing not only provides the plaintiff with a "floating lien" on inventory but also gives the plaintiff the same rights and priorities in proceeds as has a secured party who has obtained rights in proceeds of collateral under Section 9306 of the Commercial Code. Section 9306 provides in part:

9306. (1) "Proceeds" includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are "cash proceeds." All other proceeds are "noncash proceeds."

(2) Except where this division otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

* * * * *

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest

(a) In identifiable noncash proceeds and in a separate bank account containing only proceeds;

(b) In identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) In identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) In all cash and bank accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) Subject to any right of setoff; and

(ii) Limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subdivision (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under Section 9308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

Subdivision (c) creates a lien in inventory, including after-acquired property, and in "proceeds." Although subdivision (2) of Section 9306 appears to continue a security interest in the original collateral after it is sold as well as in proceeds, the appearance is deceiving because Section 9307 provides that a buyer in the ordinary course of business takes free from the security interest in inventory (except farm products) even though he knows of it. Subdivision (c) accomplishes this same result by granting the plaintiff rights and priorities only in proceeds (and, of course, in whatever property of the defendant can be classified as "inventory"). Obviously, subdivision (c) does not provide a plaintiff the same degree of security as does subdivision (a). It does, however, provide a priority over other creditors and, if the business continues to be solvent, it may offer an adequate measure of security with a minimal interference with the defendant's affairs.

§ 488.370. Accounts receivable; choses in action

488.370. (a) To attach an account receivable or a chose in action, the levying officer shall serve the account debtor or, in the case of an interest in or a claim under an insurance policy, the insurer with a copy of the writ and the notice of attachment.

(b) Promptly after service on the account debtor or insurer and in no event more than 45 days after the date of service on the account debtor or insurer, the levying officer shall serve the defendant and any other person identified by the account debtor or insurer as an obligee with a copy of the writ and the notice of attachment.

Comment. Section 488.370 provides the method by which accounts receivable and choses in action are attached. The term "account receivable" is defined by Section 481.030; "chose in action" is defined by Section 481.050. Both types of property are attached by serving the "account debtor" who is defined by Section 481.020. This procedure is comparable to that provided by subdivision 5 of former Section 542. Subdivision 5 provided in part:

5. . . . [Debts . . . shall be attached by leaving with the persons owing such debts . . . a copy of the writ and . . . a notice that the debts owing by him to the defendant . . . are attached in pursuance of such writ.

The duty of the obligor to give an account of the amount owing is set forth in Section 488.080.

§ 488.380. Chattel paper

488.380. (a) To attach chattel paper, the levying officer shall (1) serve the person in possession of such chattel paper with a copy of the writ and the notice of attachment and (2) if the chattel paper is in the possession of the defendant, take the chattel paper into custody.

(b) If the chattel paper is not in the possession of the defendant, 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.

(c) The plaintiff shall serve the account debtor obligated on the attached chattel paper with a copy of the writ and the notice of attachment. Until such service is completed, the attachment shall in no way affect the rights and duties of the account debtor. After such service is completed, the account debtor shall make any payments required under the chattel paper to the levying officer.

(d) Any payments made by the account debtor to the person in possession of the chattel paper after levy shall be delivered by such person to the levying officer to be held pursuant to the attachment.

Comment. Section 488.380 provides the method by which chattel paper is attached. The term "chattel paper" is defined by Section 481.040. Chattel paper is attached by serving the person in possession of such chattel paper with a copy of the writ and the notice of attachment and, if the chattel paper is in the possession of the defendant, taking the chattel paper into custody. This procedure will prevent further transfers of the chattel paper and provide the plaintiff priority over other attaching creditors. Former attachment law . . . did not use the term "chattel paper." However, the procedure provided by subdivision (a) is comparable to that formerly used

to attach debts or credits--terms which would seem to have embraced chattel paper. See generally Comment to Section 488.400.

Attachment pursuant to subdivision (a) does not, however, affect the rights and duties of the account debtor until he is served (by the plaintiff) with a copy of the writ and the notice of attachment. The notice of attachment will advise the account debtor of his duties under the attachment (see subdivision (d) of Section 488.020), including the duty to make any payments still required to the levying officer.

The duty of the obligee (person in possession of the chattel paper) to give an account of the amount owing is set forth in Section 488.080. However, the plaintiff (and not the levying officer) serves the account debtor under subdivision (c), hence, the account debtor is not required to give a similar memorandum. But cf. Chapter 11 (commencing with Section 491.010). The person in possession is also required to forward payments received subsequent to levy to the levying officer to be held pursuant to the attachment. Subdivision (d).

§ 488.390. Deposit accounts

488.390. (a) To attach a deposit account, the levying officer shall serve the financial institution holding such account with a copy of the writ and the notice of attachment.

(b) Promptly after the attachment of the deposit account and in no event more than 45 days after the deposit account is attached, the levying officer shall serve the defendant, and any other person in whose name the account is held, with a copy of the writ and the notice of attachment.

(c) While the attachment is in force, the financial institution shall not be liable to any person by reason of:

- (1) Its compliance with the levy;
- (2) The nonpayment of any check or other order for the payment of money drawn or presented against the account;
- (3) The refusal to pay any withdrawal in respect to the account.

Comment. Section 488.390 provides the method by which a deposit account is attached. The term "deposit account" is defined by Section 481.080. A deposit account is attached by serving the proper branch or office of the financial institution with a copy of the writ and the notice of attachment. See Section 488.040(a) (manner of service of writ and notice on financial institution). The procedure provided by Section 488.390 (together with Section 488.040) is substantively identical to that provided under former law by subdivision 5 of former Section 542.

The duty of the financial institution to give an account of the amount owing is set forth in Section 488.080.

Subdivision (e) is substantively identical to a portion of former Section 539a.

§ 488.400. Negotiable instruments; negotiable documents; money

488.400. (a) Except as provided by Section 488.390, to attach a negotiable instrument, a negotiable document, or money, the levying officer shall (1) serve the person in possession of such instrument, document, or money with a copy of the writ and the notice of attachment and (2) take the instrument, document, or money into custody.

(b) If the instrument, document, or money is not in the possession of the defendant, 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.

(c) Promptly after the negotiable instrument or document is attached and in no event more than 45 days after the negotiable instrument or document is attached, the plaintiff shall serve any person liable under the instrument or document with a copy of the writ and the notice of attachment. Until an obligor is served as required by this subdivision, payments made in good faith by him to the previous holder of the instrument shall be applied to the discharge of his obligation.

Comment. Section 488.400 provides the method by which a negotiable instrument, a negotiable document, or money is attached. The term "negotiable instrument" is defined by Section 481.160. Because the definition includes a "certificate of deposit," the introductory clause of this section makes clear that a certificate of deposit representing a deposit account in a savings and loan association shall be levied upon as a deposit account pursuant to Section 488.390.

Subdivision (a) makes clear the law relating to promissory notes. Under the former law, a promissory note belonging to the defendant but in the possession of a third person was characterized as both a "credit" and "personal

property capable of manual delivery." Compare Deering v. Richardson-Kimball Co., 109 Cal. 73, P. (1895)(credit), and Gow v. Marshall, 90 Cal. 565, P. (1891)(credit), with Haulman v. Crumal, 13 Cal. App.2d 612, 57 P.2d 179 (1936)(property capable of manual delivery). Subdivision 5 of former Section 542 provided in part:

[C]redits . . . shall be attached by leaving with the persons . . . having in his possession, or under his control, such credits . . . a copy of the writ . . . and . . . a notice that . . . the credits . . . in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

Levy accordingly would be by notice and the note would not be required to be taken into custody. Cf. Puissegur v. Yarbrough, 29 Cal.2d 409, 175 P.2d 830 (1946)(levy by notice to financial institution regardless of the character of the property). However, no procedure was specified for levy on property capable of manual delivery and in the hands of a third person. See Comment to Section 488.330. Nevertheless, it had been suggested that the proper method of levy on a negotiable instrument in the possession of a third person was by seizure. See Haulman v. Crumal, supra (dictum). A note in the possession of the defendant had been treated as personal property capable of manual delivery and attached by seizure. See Jubelt v. Sketers, 84 Cal. App.2d 653, 191 P.2d 460 (1948). In order to make the procedure clear and to preclude transfer of the types of property dealt with here, subdivision (a) provides for seizure whether or not the property is in the hands of the defendant or some third person.

Although levy is accomplished by seizure, subdivision (c) as a practical matter also requires service of any obligor liable on the instrument because,

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until service, payments made in good faith by the obligor to the prior holder of the note are applied to the discharge of the obligor's debt.

Section 488.400 also applies to goods subject to a negotiable document of title. The requirement of seizure of the negotiable document is consistent with Commercial Code Section 7602, which protects the bailee of goods until such document is surrendered to him or impounded by the court. See Com. Code § 7602 and Comment thereto.

§ 488.410. Securities

488.410. (a) Except as provided in subdivision (b), to attach a security, the levying officer shall (1) serve the person in possession of such security with a copy of the writ and the notice of attachment and (2) take the security into custody.

(b) If the security is not in the possession of the defendant, 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.

(c) 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 attach the security by serving copies of the writ and the notice as provided in subdivision (a).

Comment. Section 488.410 provides the method by which a security is attached. The term "security" is defined by Section 481.210. A security is attached pursuant to Section 488.410 by serving the person in possession of the security with a copy of the writ and notice of attachment and seizing the security. This procedure continues the substance of former law as provided by subdivision (1) of Section 8317 of the Commercial Code. Subdivision (1) provided:

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.

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Section 8317 of the Commercial Code was incorporated by reference by Section 541 of the Code of Civil Procedure which provided that securities shall be levied upon in the manner provided by Division 8 of the Commercial Code. Section 488.410 simply sets forth the procedure to be followed instead of incorporating the procedure by reference.

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

488.420. (a) To attach a judgment owing to the defendant, the levying officer shall (1) file in the action in which the judgment was entered a copy of the writ and the notice of attachment and (2) serve a copy of the writ and the notice upon the judgment debtor in such action.

(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.

Comment. Section 488.420 provides the method by which a judgment owing to the defendant is attached. Section 488.420 is based on a portion of subdivision 5 of former Section 542 which provided as follows:

5. . . . [J]udgments . . . shall be attached by leaving with the persons owing such debts . . . a copy of the writ . . . and . . . a notice that the debts owing by him to the defendant . . . are attached in pursuance of such writ. However, whenever a judgment has been attached under the provisions of this subdivision, a copy of the writ and notice shall be filed in the action from which the judgment arose and served upon the judgment creditor of such action. . . .

The duty of the judgment debtor to give an account of the amount owing is set forth in Section 488.080.

§ 488.430. Interest in personal property of estate of decedent

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 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 of attachment.

(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.

(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.

(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. Section 488.430 is substantially the same as former Section 561. Section 561 provided as follows:

561. The interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered and the personal representative shall report such attachment to the court when any petition for distribution is filed, and in the decree made upon such petition distribution shall be ordered to such heir, legatee or devisee, but delivery of such property shall be ordered to the officer making the levy subject to the claim of such heir, legatee or devisee, or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing such interest has become final.

Both sections are limited to personal property in the estate of the decedent. The interest of an heir or devisee in real property must be levied upon in the manner provided for real property generally. Estate of Troy, 1 Cal. App.2d 732, P.2d (1934). See Martinovich v. Marsicano, 150 Cal. 597, P.

(1907). See Section 487.310. If the real property during the course of administration is converted into personalty (e.g., cash), it should subsequently be levied upon as personalty. See Estate of Troy, supra. Where real property has been properly levied upon, the levy does not affect the power of the court to administer the property, and the lien attaches to whatever property is eventually distributed to the person whose interest has been levied upon. See Noble v. Beach, 21 Cal.2d 91, P.2d (1942) (rights obtained in real property under recorded abstracts of judgment may be followed into property allocated to judgment debtor after partition by probate court); Reed v. Hayward, 23 Cal.2d 336, 342, P.2d , (1943).

It should be noted that nothing in this section affects the general rules relating to interests in a partnership. See Corp. Code § 15028

(judgment creditor only may obtain charging order to reach partner's interest in partnership).

Note. "The death of a defendant destroys the lien of an attachment upon his property." Clary v. Rupert, 93 Cal. App.2d 844, 210 P.2d 44 (1949) (see cases cited therein and Prob. Code § 732; Code Civ. Proc. § 686). This rule does not seem to make sense (see Myers v. Mott, 29 Cal. 359 (1866)(dissenting opinions); Nordstrom v. Corona City Water Co., 155 Cal. 206, 213, 100 P. 242, (1909)(lien of execution not destroyed by death)), and the Commission will investigate this matter further and propose the changes believed to be desirable.

Article 3. Lien of Attachment; Management and Disposition
of Attached Property

§ 488.500. Lien of attachment; effective date

488.500. (a) The levy of a writ of attachment shall create a lien upon the property levied upon which is valid against all subsequent transferees of the property.

(b) The lien of attachment on property levied upon pursuant to Section 488.310 [real property] shall become effective upon the date of recording pursuant to that section.

(c) The lien of attachment on property levied upon pursuant to Sections 488.320(a)[tangible personalty in possession of defendant], 488.360(a)[inventory and farm products, alternate method], 488.400 [negotiable instruments and documents or money], and 488.410 [securities] shall become effective upon the date the levying officer takes custody of the property pursuant to those sections.

(d) The lien of attachment on property levied upon pursuant to Sections 488.340 [equipment, other than motor vehicles, of a going business], 488.350 [motor vehicles and vessels which are equipment of a going business], and 488.360(c)[farm products and inventory, alternate method] shall become effective upon the date of filing pursuant to those sections.

(e) The lien of attachment on property levied upon pursuant to Sections 488.330 [tangible personalty in possession of third person], 488.380 [chattel paper], and 488.390 [deposit accounts] shall become effective upon the date of service on the person in possession of such property.

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(f) The lien of attachment on property levied upon pursuant to Section 488.370 [accounts receivable, choses in action] shall become effective upon the date of service on the account debtor or insurer.

(g) The lien of attachment on a judgment levied upon pursuant to Section 488.420 shall become effective on the date of service on the judgment debtor.

(h) The lien of attachment on property levied upon pursuant to Section 488.430 shall become effective on the date of filing pursuant to that section.

(i) Notwithstanding subdivisions (b) through (h) of this section, and except as otherwise provided by Section 486.110, where a temporary protective order has been issued pursuant to Chapter 6 (commencing with Section 486.010), the lien of attachment on property described in such order and subsequently attached shall be effective from the date of service of such order.

Comment. Section 488.500 replaces the following provisions under the former law:

542.2. . . . (c) A filed notice of attachment lien is effective . . . from the date of filing.

542a. The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated; provided, however, that in the event that the sheriff, constable, or marshal does not complete the execution of said writ in the manner prescribed in Section 542 of this code within a period of 15 days next following said recording in the recorder's office then said lien shall cease at the expiration of said period of 15 days.

* * * * *

§ 488.510. Lien of attachment; duration; termination; extension

488.510. (a) Unless sooner released or discharged, any attachment shall cease to be of any force or effect, and the property levied upon shall be released from the operation of such attachment at the expiration of two years from the date of issuance of the writ of attachment under which such levy was made.

(b) Notwithstanding subdivision (a), upon motion of the plaintiff, made not less than 10 or more than 60 days before the expiration of such period of two years and upon notice of not less than five days to the defendant whose property is attached, the court in which the action is pending may, by order filed prior to the expiration of the period and for good cause, extend the time of such attachment for a period not exceeding one year from the date on which the attachment would otherwise expire.

(c) The levying officer shall serve notice of such order upon any person holding property pursuant to an attachment and shall record or file such notice in any office where the writ and notice of attachment is recorded or filed prior to the expiration of the period described in subdivision (a) or any extension thereof. Where the attached property is real property, the plaintiff or his attorney, instead of the levying officer, may record the required notice.

(d) Any attachment may be extended from time to time in the manner herein prescribed provided that the aggregate period of such extensions shall not exceed five years.

Comment. Section 488.510 replaces comparable provisions of former Sections 542.2, 542.4, 542a, and 542c. Former law had three similar but slightly

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different provisions for equipment, real property, and personal property (other than equipment). Section 488.510 replaces these provisions with a single, simple procedure for extending the effectiveness of a lien of attachment.

§ 488.520. Execution of certain commercial paper by levying officer

488.520. (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,

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.

Comment. Section 488.520 authorizes and directs the levying officer to execute certain types of commercial paper. The section is virtually identical to subdivision 6 of former Section 542. Subdivision 6 provided:

6. When checks, drafts, money orders and other orders for the withdrawal of money from a banking corporation or association, the United States, any state or public entity within any state, payable to the defendant or judgment debtor on demand, come into the possession of a levying officer under a writ of attachment or execution, the sheriff, constable, or marshal, to whom the writ is directed and delivered, shall promptly thereafter endorse the same and present, or cause the same to be presented, for payment. The sheriff, constable, or marshal shall endorse such check, draft, money order or other order for the withdrawal of money by writing the name of the defendant or judgment debtor thereon and the name and official title of the officer making the levy with the statement that such endorsement is made pursuant to levy of writ of attachment or execution and giving the title of court and cause in which such writ was issued, and such endorsement shall be sufficient endorsement and no banking corporation or association or public entity on which said check, draft, money order or other order for the withdrawal of money is drawn shall incur any liability to any person, firm or corporation by reason of paying to such officer such check, draft, money order or other order for withdrawal of money by reason of such endorsement, nor shall the officer making the levy incur any liability by reason of his endorsing and presenting for and obtaining payment of such check, draft, money order or other order for the payment of money; provided, however, that the funds or credit resulting from the payment of such check, draft, money order or other order for withdrawal of money shall be held by said officer subject to the levy of said writ of attachment or execution. If it appear from the face of such check, draft, money order or other order for the withdrawal of money that the same has been tendered to the defendant or judgment debtor in satisfaction of a claim or demand and that endorsement thereof shall be considered a release and satisfaction by defendant or judgment debtor of such claim or demand, then, in such event, the officer making the levy shall not endorse said check, draft, money order or other order for the withdrawal of money unless the defendant or judgment debtor shall first endorse the same to the officer making the levy; provided, however, that if said defendant shall not endorse said check, draft, money order or other order for withdrawal of money to the officer making the levy, said officer may thereafter hold such check, draft, money order or other order for the withdrawal of money subject to such levy and shall incur no liability to the defendant or judgment debtor or to any other person, firm or corporation for delay in presentment of the same for payment.

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

488.530. (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 upon a showing that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason 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 or direct the levying officer to take charge of, cultivate, care for, preserve, collect, harvest, pack, or sell such property.

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

(c) Where a receiver or keeper is appointed, the court shall fix the daily fee of such receiver or keeper and may order the plaintiff to pay such fee and expenses of the receiver or keeper 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.

Comment. Section 488.530 replaces comparable provisions of former Sections 542(1a), 542(2a), 547, 547a, and 548.

§ 488.540. Collection of account receivable, chattel paper, chose in action,
negotiable instrument, or judgment

488.540. Where an account receivable, chattel paper, chose in action, negotiable instrument, or judgment is attached, the account debtor or obligor may pay the amount owing on such obligation to the levying officer. The receipt of such officer is a sufficient discharge for the amount paid.

Comment. Section 488.540 replaces a portion of former Section 547 which provided:

547. . . . Debts and credits attached may be collected by him [levying officer], if the same can be done without suit. The receipt of such officer is a sufficient discharge for the amount paid.

Section 488.540 treats the matter of voluntary payment. For the collection of amounts not paid voluntarily, see Section 488.550.

§ 488.550. Liability of garnishee; enforcement by suit

488.550. (a) As used in this section, "obligor" means a person who has in his possession personal property belonging to the defendant, an account debtor of the defendant, or a person obligated to the defendant under a negotiable instrument.

(b) An obligor shall be liable to the plaintiff for the value of the defendant's interest in the property held by the obligor or for the amount owed to the defendant at the time of service of the copy of the writ and notice of attachment upon him. Such liability shall continue until the attachment is released or discharged or until the property is delivered or payment of the amount owed is made to the levying officer. [If the obligor delays delivery of the property and the property depreciates during the delay, the obligor shall remain liable to the plaintiff for the difference between the value of the property on the date of service of the copy of the writ and notice of attachment and the value of the property when it is delivered.]

(c) The period between the date of the service of the copy of the writ and the notice of attachment and the date that a garnishee answers pursuant to Section 488.080 shall not be part of the time limited for the commencement of an action.

(d) If an obligor admits the defendant's interest in the property or the amount owed to defendant, the plaintiff may bring an action to enforce the obligor's liability at any time.

(e) If a garnishee denies, in whole or in part, the defendant's interest in the property or the amount owed to the defendant, or if a garnishee makes no answer as provided in Section 488.080, the plaintiff

may bring an action against the garnishee if at the time the action is brought the defendant could have maintained such action.

(f) The defendant shall be joined in any action under subdivision (d) or (e) brought by the plaintiff against a garnishee.

Comment. Section 488.550 is based on the provisions of the first paragraph of former Section 544 and the decisions construing those provisions.

Subdivision (a) defines the term "obligor." As used in Section 488.550, "obligor" means a person who owes a debt or who holds property belonging to the defendant. The neutral term "garnishee," used in subdivisions (c), (e), and (f), refers to any third person on whom an attachment has been levied.

Subdivision (b) is similar to the first paragraph of former Section 544, which provided:

All persons having in their possession or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in this chapter, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, constable, or marshal, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment or garnishment be released or discharged or any judgment recovered by him be satisfied.

Subdivisions (c), (d), and (e) are inspired by the California Supreme Court's opinion in Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 83 P. 36 (1905), which interpreted the first paragraph of former Section 544. At the time of garnishment, a garnishee is not required to pay over or deliver any property to the levying officer. See subdivision (b)(former Section 544). However, if he does not pay over or deliver, he is required to furnish a

memorandum describing any debt owed or property held by him belonging to the defendant. See Section 488.080 (former Section 546). In Clyne, the court stated that, under former Section 544 where the obligor "admits his indebtedness to the defendant in the attachment or admits his possession or control of specific property of the defendant," he remains "liable to account to the party entitled whenever called upon." 148 Cal. at 298-299, 83 P. at . The same rule is retained by subdivision (d) which permits a plaintiff-garnisher to sue an obligor at any time to enforce the latter's liability. Actions by the plaintiff against the obligor under subdivision (d) may be brought either before or after judgment is obtained against the defendant, as long as the liability of the obligor continues under subdivision (b). See Carter v. Los Angeles Nat'l Bank, 116 Cal. 370, 48 P. 332 (1897); Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P. 242 (1909); Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 83 P. 36 (1905); and Boyle v. Hawkins, 71 Cal.2d 229, 455 P.2d 97, 78 Cal. Rptr. 161 (1969). See Sections 716-720 of the Code of Civil Procedure for proceedings after execution where no writ of attachment before judgment was obtained.

The Clyne court also stated that, where the debt is denied, "there appears to be no very weighty reason for holding that the garnisher might not commence an action against the garnishee for the protection of his contingent interest in the debt or property attached before he obtains a judgment." 148 Cal. at 300, 83 P. . The right of action of the original creditor-defendant is not suspended by the garnishment (Glugermovich v. Zicovich, 113 Cal. 64, 45 P. 174 (1896)), and the Clyne court, therefore, saw no reason for denying the garnisher the same right of action. Under

such a rule, the garnisher stands in the shoes of the original creditor-defendant (see Clecak v. Dunn, 95 Cal. App. 537, P. (1928); Carter v. Los Angeles Nat'l Bank, 116 Cal. 370, 48 P. 332 (1897); Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P. 242 (1909)), and the statute of limitations is not tolled. The same rule is provided by subdivision (e).

Subdivision (f) implements the suggestion in Clyne v. Easton, Eldridge & Co. that, in any action by the plaintiff against the obligor, the defendant would be a necessary party to afford the obligor complete protection. 148 Cal. at 300, 83 P. at . See Code Civ. Proc. § 389 for general provisions regarding joinder and indispensable persons.

Subdivision (c) provides a limited tolling period between levy and answer by the garnishee so that the statute of limitations will not run before the plaintiff is aware of the disputed nature of the obligor's debt.

In connection with this section, it should be noted that an obligor may be required to appear before a judicial officer and be examined regarding property of the defendant in his hands or obligations owed to the defendant. See Section 491.010. However, if the obligor denies that he has defendant's property or that he has any obligations to the defendant, the judicial officer may not adjudicate the dispute between the obligor on one hand and the plaintiff and defendant on the other. See Bunnell v. Wynns, 13 Cal. App.2d 114, 56 P.2d 267 (1936); Takahasi v. Kunishima, 34 Cal. App.2d 367, 93 P.2d 645 (1939). On the other hand, if the obligor admits his obligations, Section 491.010(c) authorizes the court to order the obligor to pay over or deliver the property to the levying officer. This procedure provides an alternative for the plaintiff which obviates the need for filing suit pursuant to subdivision (d) of this section.

§ 488.560. Release of attachment

488.560. (a) The levying officer shall release an attachment whenever he receives a written direction from the plaintiff, or a certified copy of an order of the court in which the action is pending, discharging or dissolving the attachment or releasing the property.

(b) Where the property to be released has been taken into custody, it shall be delivered to the person from whom it was taken unless otherwise ordered by the court. If such person cannot be found within the county where the property was levied upon, the levying officer shall retain the property but give reasonable notice to such person as to where he may secure its possession. If, after 30 days from the giving of such notice, such person has not claimed the property, the levying officer shall sell such property in the same manner that property is sold on execution and deposit the proceeds, after first deducting his costs and expenses, in the court to abide the judgment in the action.

(c) Where the property to be released has not been taken into custody, the levying officer shall release the attachment by issuing a written release addressed to the person served with the copy of the writ and notice and, where the writ and notice were recorded or filed, by recording or filing such written release in the same office. Where the attached property is real property, the plaintiff or his attorney, instead of the levying officer, may record the release.

(d) There shall be no liability for persons acting in conformity with the release of the levying officer or for such officers releasing such attachments in accordance with this section.

Comment. Section 488.560 replaces comparable provisions of former Sections 542.2, 544, and 560.

§ 488.570. Judgment for defendant; release of property and return of proceeds

488.570. If the defendant recovers judgment against the plaintiff and no timely motion for vacation of judgment or for judgment notwithstanding the verdict or for a new trial is filed and served and is pending and no appeal is perfected and undertaking executed and filed as provided in Section 921 of this code, any undertaking received from the defendant in the action, all the proceeds of sales and money collected by the levying officer, and all the property attached remaining in such officer's hands shall be delivered to the person from whom it collected or taken, unless otherwise ordered by the court; and the court shall order the discharge of any attachment made in the action and the release of any property held thereunder.

Comment. Section 488.570 is substantively similar to the first portion of former Section 553. Former Section 553 required delivery to the defendant; Section 488.550 requires delivery to the person from whom property was taken. This will usually be the defendant and, even where it is not, the defendant can apply for delivery of the property to him where this would be appropriate.

CHAPTER 9. UNDERTAKINGS

Article 1. General Provisions

§ 489.010. Application of article

489.010. Unless expressly provided by statute, the provisions of this article apply only to undertakings required in this title.

Comment. Section 489.010 limits the application of this article to undertakings in attachment proceedings. The provisions of this article supplement the general provisions that govern undertakings in Sections 1041-1059 of the Code of Civil Procedure and are in turn supplemented by specific provisions relating to particular undertakings in other articles of this chapter.

§ 489.020. Definitions

489.020. As used in this article:

- (a) "Beneficiary" means the person to be benefited by an undertaking.
- (b) "Principal" means the person who files an undertaking.

§ 489.030. Waiver of undertaking

489.030. An undertaking may be waived in writing by the beneficiary.

Comment. Section 489.030 is modeled after a portion of Section 920 (waiver of appeal bond). See also Merritt v. J. A. Stafford Co., 68 Cal.2d 619, 440 P.2d 927, 68 Cal. Rptr. 447 (1968)(parties may agree to appeal bond in less than required amount). Compare former Section 539(a)(failure to object deemed a waiver of objection).

§ 489.050. Estimate of value of property in undertaking

489.050. Where the amount of an undertaking depends upon the value of property, the undertaking shall include the principal's estimate of the market value of such property.

Comment. Section 489.050 adopts the method used under Sections 677 (action to set aside fraudulent conveyance) and 710c (third-party claims on execution), whereby the person filing the undertaking supplies the estimate of value. The provision of former Section 555 for a court-appointed appraisal of property is not continued. However, the judicial officer may order an appraisal of property upon a subsequent objection by the beneficiary. See Section 489.100(b).

§ 489.060. Filing and approval of undertaking

489.060. (a) An undertaking shall be presented to a judicial officer for approval and upon approval shall be filed with the court in which the action is pending. The undertaking becomes effective upon filing.

(b) Nothing in this chapter shall be construed to preclude approval of an undertaking in an amount larger than that required.

Comment. Section 489.060 requires approval of any undertaking under this title by a judicial officer before it may be filed. This generalizes the requirement of former Section 540 (undertaking for release of attached property). The judicial officer approves the undertaking if he determines that the undertaking on its face and the affidavits of the sureties are sufficient. Such approval has no effect on the right of the beneficiary to object to the sufficiency of the undertaking.

The undertaking is filed with the court in which the action is pending. Under prior law, the undertaking was filed with the court in some instances (former Section 540) and with the levying officer in others (former Section 539a). However, since an undertaking must now be approved by a judicial officer in all cases, all undertakings are required to be filed with the court. See also Section 1057 (clerk to enter undertaking in register of actions).

Subdivision (b) of Section 489.060 is based on a sentence found in former Section 539.

§ 489.070. Grounds for objection to undertaking

489.070. The beneficiary may object to the undertaking on either of the following grounds:

- (a) The sureties are insufficient.
- (b) The amount of the undertaking is insufficient.

Comment. Section 489.070 continues prior law. See, e.g., former Sections 539 (exceptions to sureties, increase of undertaking on motion), 554 (justification of sureties), 555 (justification of sureties). The combination of both exception to sureties and adequacy of the amount of the undertaking in a single objection to the undertaking is modeled upon Sections 678 (undertaking in action to set aside transfer of property) and 711-1/2 (undertaking by third-party claimant on execution).

The qualifications of sureties are set out in Sections 1056 and 1057. The amount of the undertaking is prescribed in Sections 489.220, 489.310, 489.410, and 489.420. See also Section 917.9.

§ 489.080. Manner of making objection

489.080. (a) An objection to the undertaking shall be made by a noticed motion. The notice of motion shall specify the precise ground for the objection.

(b) Where the objection is made on the ground that the market value of the property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the notice of motion shall state the beneficiary's estimate of the market value of the property.

Comment. Section 489.080 provides a procedure for objecting to the undertaking but places no limitation on the time within which objections must be made. Contrast former Sections 539, 539a, 553.5, 554 (five days).

Subdivision (b) is new. Its purpose is to facilitate voluntary agreement on the amount of an undertaking by the parties. See Section 489.100. Where the parties are unable to agree on property valuation, the court determines the amount of the undertaking. See Section 489.090.

§ 489.090. Hearing and determination of objection

489.090. (a) Unless the parties otherwise agree, the hearing on the objection shall be held not less than two nor more than five days after service of notice of motion.

(b) The hearing shall be conducted in such manner as the judicial officer determines is proper. He may permit witnesses to attend and evidence to be procured and introduced in the same manner as in the trial of a civil case. He may appoint one or more disinterested persons to appraise property for the purpose of ascertaining its value.

(c) If the judicial officer determines that the undertaking is insufficient, he shall specify in what respect it is insufficient and shall order that an undertaking with sufficient sureties and in a sufficient amount be filed within five days. If the order is not complied with, all rights obtained by filing the original undertaking shall immediately cease.

(d) Where the judicial officer determines an undertaking is insufficient, the undertaking shall remain in effect until an undertaking with sufficient sureties and in a sufficient amount is filed in its place.

(e) Where the judicial officer determines an undertaking is sufficient, no future objection may be made to the undertaking except upon a showing of changed circumstances.

Comment. Section 489.090 is derived from numerous provisions of the Code of Civil Procedure. See, e.g., Sections 678, 678-1/2, 679, 711-1/2, 712, 712-1/2, 833-835, 1030, and 1057.

The time for hearing on the sufficiency of an undertaking in subdivision (a) continues prior law. See former Section 539.

Subdivision (b) is intended to provide the judicial officer with a wide variety of tools. He may examine sureties under oath; he may appoint appraisers; he may order a full-dress hearing. Subdivision (b) is permissive rather than restrictive.

If a new undertaking is filed after the original undertaking is found insufficient, it must of course be approved by a judicial officer before it may take effect. Section 489.060. The new or increased undertaking is subject to objection in the same manner as the original undertaking. Section 489.070. However, a judicial officer's determination that an undertaking is sufficient is binding in any subsequent proceedings, absent changed circumstances. Subdivision (e).

Orders for a sufficient undertaking made under this section are not subject to appeal. See Murillo v. Toole, 47 Cal. App.2d 725, 118 P.2d 895 (1941). See also Section 904.1 et seq.

Subdivision (d) is new. The effect of this provision is to continue the liability of the surety on an insufficient undertaking until the surety is exonerated either by the filing of a sufficient undertaking, or the failure of the condition of the surety's liability.

§ 489.100. Hearing unnecessary where undertaking increased to amount of beneficiary's estimate of property value

489.100. Where an objection to an undertaking is made on the ground that the market value of property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the principal may accept the beneficiary's estimated value of the property and file at once an increased undertaking based upon such estimate. In such case, no hearing shall be held on the objection, and the beneficiary is bound by his estimate of the value of the property in any hearing on the sufficiency of an undertaking filed by the principal in the action.

Comment. Section 489.100 is derived from Sections 678, 679, 711-1/2, and 712-1/2. The beneficiary is bound by his estimate of the value of the property on which the amount of the undertaking depends but may object to the sufficiency of the increased undertaking on any other ground.

§ 489.110. Liability of surety

489.110. Notwithstanding Section 2845 of the Civil Code, a judgment of liability on an undertaking shall be in favor of the beneficiary and against the sureties and may be enforced by the beneficiary directly against the sureties. The liability of a surety is limited to the amount of the undertaking. Nothing in this section affects any right of subrogation of a surety against his principal.

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 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. This provision in no way interferes with the contractual relation between principal and surety.

Section 489.110 limits only the liability of a surety; the principal is generally liable to the beneficiary to the extent of the full amount of damages caused. See Section 490.020.

§ 489.120. Limitations period for recovery on undertaking

489.120. A motion to enforce liability on an undertaking shall not be filed or notice served until after entry of the final judgment in the action in which the undertaking is given and expiration of the time for appeal from such judgment or, if an appeal is filed, until such appeal is finally determined. The motion may not be filed or notice served more than one year **after** the latest of the preceding dates.

Comment. Section 489.120 is derived from Section 1166a. Compare Section 490.030.

Article 2. Undertakings to Obtain Writ of
Attachment or Protective Order

§ 489.210. Undertaking required

489.210. Before issuance of a writ of attachment or a protective order, the judicial officer shall require that the plaintiff have filed an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action.

Comment. Section 489.210 supersedes the first sentence of former Section 539.

For damages on wrongful attachment, see Chapter 10 (Section 490.010 et seq.). The recovery for a wrongful attachment includes not only damages but also attorney's fees. See Section 490.020. See also Section 490.010 (acts constituting wrongful attachment).

§ 489.220. Amount of undertaking

489.220. (a) Except as provided in subdivision (b), the amount of an undertaking filed pursuant to this article shall be one-half of the amount sought to be recovered by the plaintiff in the action in which the writ of attachment or protective order is sought.

(b) If, upon objection to the undertaking, the judicial officer determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, he shall order the amount of the undertaking increased to the amount he determines to be the probable recovery for wrongful attachment if it is ultimately determined that there was a wrongful attachment.

Comment. Section 489.220 supersedes portions of former Section 539 but provides no authorization for decrease of the amount of an undertaking.

Subdivision (a). Subdivision (a) makes no provision for attachment based on a partial amount of a plaintiff's claim. Compare the second sentence of former Section 539.

Subdivision (b). Under former law, the undertaking could be increased but no guide existed as to the proper amount. See the last sentence of former Section 539(a).

§ 489.230. Notice to defendant

489.230. (a) The notice of levy 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 sufficiency of the undertaking.

(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.

§ 489.240. Deposit account, or contents of safe deposit box, not wholly in name of defendant

489.240. (a) In addition to any other provision of law, the provisions of this section shall be complied with where the following personal property is sought to be attached:

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

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

(b) The amount of an undertaking filed to obtain a writ of attachment of property described in subdivision (a) shall be an amount not less than twice the amount sought to be recovered by the plaintiff in the action in which the writ is sought. The undertaking shall secure the payment of any recovery for wrongful attachment by any person, other than the defendant whose interest is sought to be attached, rightfully entitled to such property (which person need not be named specifically in the undertaking but may be referred to generally in the same manner as in this sentence).

(c) Objections to the undertaking may be made by any person claiming to be the rightful owner of the property sought to be levied upon.

Comment. Section 489.240 continues the substance of a portion of former Section 539a except that the provision for delivery of the undertaking to the beneficiary through the sheriff and bank is not continued. See Comment to Section 489.060.

Article 3. Undertaking to Obtain Release of
Attachment or Protective Order

§ 489.310. Application for release of attachment; proper court; undertaking;
multiple defendants

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 to the court in which the action is pending, or, if a writ of attachment is levied in another county, to a court in such county having jurisdiction in cases involving the amount specified in the writ, for an order permitting him to file an undertaking in lieu of any property 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 in the plaintiff's application for a writ 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 valid and 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. Section 489.310 is based on former Sections 540, 554, and

555. These sections provided:

540. The writ must be directed to the sheriff, . . . and require him to attach and safely keep all the property of such defendant . . .

unless such defendant give him security by the undertaking of at least two sufficient sureties, which must first be approved by a judge of the court issuing the writ, or if said writ of attachment is issued to another county then by a judge of a court, having jurisdiction in cases involving the amount specified in the writ, in the county where the levy shall have been, or is about to be, made, or deposit a sum of money with the sheriff, constable, or marshal in an amount sufficient to satisfy such demand against such defendant, in addition to those costs actually incurred to the time of giving the undertaking or the deposit of money with the sheriff, constable, or marshal, a sum not to exceed 25 percent of the amount of the plaintiff's demand, and in no event more than one thousand dollars (\$1,000), or in an amount equal to the value of the property of such defendant which has been or is about to be attached, in which case to take such undertaking or sum of money in lieu of the property which has been or is about to be attached.

In the event that the action is against more than one defendant, any defendant whose property has been or is about to be attached in the action may give the sheriff, constable, or marshal such undertaking which must first be approved by the judge as hereinabove provided, or deposit such sum of money, and the sheriff, constable, or marshal shall take the same in lieu of such property. Such undertaking, or the deposit of such sum of money, shall not subject such defendant to, or make him answerable for, any demand against any other defendant, nor shall the sheriff, constable, or marshal thereby be prevented from attaching or be obliged to release from attachment, any property of any other defendant. However, such defendant, at the time of giving such undertaking to, or depositing such sum of money with the sheriff, constable, or marshal, shall file with the sheriff, constable, or marshal a statement, duly verified by his oath, wherein such defendant shall state the character of his title to the attached property and the manner in which he acquired such title, and aver and declare that the other defendant or defendants, in the action in which said undertaking was given or such sum of money was deposited, has or have not any interest or claim of any nature whatsoever in or to said property.

* * * * *

§ 554.)

Whenever any defendant has appeared in the action, such defendant may upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment wholly, or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment, any or all of the property of such defendant attached; and all of the property so released and all of the proceeds of the sales thereof, must be delivered to such defendant upon the justification of the sureties on the undertaking, if required by the plaintiff. Such justification must take place within five days after the notice of the filing of such undertaking.

§ 555.)

Before making such order, the court or judge must require an undertaking on behalf of such defendant, by at least two sureties, residents and freeholders, or householders in the State to the effect that in case the plaintiff recovers judgment in the action against the defendant, by whom, or in whose behalf such undertaking shall be given, such defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of any judgment in such action against said defendant, or in default thereof, that such defendant and sureties will, on demand, pay to the plaintiff the full value of the property released not exceeding the amount of such judgment against such defendant. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge and the property attached cannot be released from the attachment without their justification if the same is required.

Article 4. Undertaking on Appeal

§ 489.410. Postjudgment continuance of attachment; increase in undertaking

489.410. (a) At any time after entry of judgment in favor of the defendant and before perfection of an appeal under the provisions of Section 921, upon motion of the defendant, the trial court may order an increase in the amount of the original undertaking on attachment in such amount, if any, as is justified by the detriment reasonably to be anticipated by continuing the attachment. Unless such undertaking is filed within 10 days after such order, the order of attachment shall be discharged, and the property released therefrom.

(b) If an order increasing the undertaking is made, the amount of the undertaking on appeal required by Section 921 of this code shall be the same as the amount fixed by the trial court in such order.

(c) Neither the pendency nor granting of a motion timely filed and served by the plaintiff for vacation of judgment, or for judgment notwithstanding the verdict or for new trial shall continue an attachment in force, unless an undertaking is made by the plaintiff to pay all costs and damages sustained by continuing the attachment. The undertaking may be included in the undertaking specified in Section 921. If not so included, the same procedure shall apply as in case of an undertaking pursuant to Section 921.

Comment. Section 489.410 is based on former Section 553 which provided in part:

553. [A]t any time after entry of judgment and before perfection of the appeal under the provisions of Section 921 of this code, upon motion of the defendant, the trial court may order an increase in the amount of the original undertaking on attachment in such amount, if any,

as is justified by the detriment reasonably to be anticipated by continuing the attachment. Unless such undertaking shall be executed and filed by at least two sureties within 10 days after such order, the order of attachment shall be discharged, and the property released therefrom. The sureties may be required to justify before the court within 10 days after the undertaking is filed and if they fail to do so, the order of attachment shall be discharged and the property released therefrom. If an order increasing the undertaking is made, the amount of the undertaking on appeal required by Section 921 of this code shall be the same as the amount fixed by the trial court in said order. Neither the pendency nor granting of a motion timely filed and served for vacation of judgment, or for judgment notwithstanding the verdict or for new trial shall continue force an attachment, unless an undertaking be executed and filed on the part of the moving party by at least two sureties that the moving party will pay all costs and damages sustained by continuing the attachment. The undertaking may be included in the undertaking specified in Section 921. If not so included, the same procedure shall apply as in case of an undertaking pursuant to Section 921.

§ 489.420 Release from attachment upon filing of undertaking on appeal

489.420. Where a defendant appeals and the enforcement of the judgment against him is stayed by the filing of a sufficient undertaking on appeal as provided by this code, all property of such defendant which has been attached in the action shall be released from the attachment upon the justification of the defendant's sureties, or written waiver thereof, or upon the failure of the respondent to except to said sureties within five days after written notice of the filing of the undertaking.

Comment. Section 489.420 is based on former Section 553.5 which provided:

553.5. Whenever a defendant appeals and the enforcement of the judgment against him is stayed by the filing of a sufficient undertaking on appeal as provided by this code, all property of said defendant which has been attached in said action shall be released from the attachment levy upon the justification of the defendant's sureties, or written waiver thereof, or upon the failure of the respondent to except to said sureties within five days after written notice of the filing of the undertaking. If the officer's fees for services rendered on the attachment are unpaid, such officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

Section 489.420 provides for release where the defendant appeals and the trial court in its discretion requires an undertaking and the undertaking is given. See Section 917.9. Perfection of an appeal by the defendant stays the enforcement of the judgment but does not otherwise affect the lien of attachment. See Section 916. The defendant may, of course, always obtain a release pursuant to Section 489.410. The provision for the levying officer's fees has been eliminated. These can be recovered eventually as costs, pending the final determination in the action.

CHAPTER 10. LIABILITY FOR WRONGFUL ATTACHMENT

§ 490.010. Acts constituting wrongful attachment

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

(a) The levy of a writ of attachment or the service of a protective order in an action in which attachment is not authorized.

(b) 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.

(c) The levy of a writ of attachment on property possessing a value greatly in excess of the amount of the plaintiff's legitimate claim.

(d) The levy of a writ of attachment obtained [ex parte][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.

(e) The levy of a writ of attachment on property of a person other than the person against whom the writ was issued, except where property 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 person against whom the writ was issued was such registered or record owner, and plaintiff made the levy in good faith and in reliance on the registered or recorded ownership.

Comment. Section 490.010 provides a statutory cause of action for wrongful attachment in five specific situations.

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. This is analogous to the common law tort--abuse of process. See White Lighting Co. v. Wolfson, 68 Cal.2d 336, 348-351, 433 P.2d 345, , 66 Cal. Rptr. 697, (1968). However, subdivision (a) eliminates the common law requirement that the writ of attachment be procured maliciously. Compare White Lighting Co. v. Wolfson, *supra*; Crews v. Mayo, 165 Cal. 493, 132 P. 1032 (1913); Vesper v. Crane Co., 165 Cal. 36, 130 P. 876 (1913).

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. Liability under the common law for malicious prosecution requires a showing of malice in prosecuting the action and in procuring the writ, as well as the lack of probable cause to institute the action. See Goland v. Peter Nolan & Co., 2 Cal.2d 96, 38 P.2d 783 (1934); Crews v. Mayo, *supra*; Vesper v. Crane, *supra*; King v. Montgomery, 50 Cal. 115 (1875); Merron v. Title Guar. & Trust Co., 27 Cal. App.2d 119, 80 P.2d 740 (1938). Subdivision (b) eliminates the requirements of malice and lack of probable cause.

Subdivision (c). Subdivision (c) provides that wrongful attachment occurs when a writ of attachment is levied on property of a value greatly exceeding the plaintiff's legitimate claim. Under common law, this is classified as a form of abuse of process. White Lighting Co. v. Wolfson, *supra* at 350. See Clark v. Nordholt, 121 Cal. 26, 53 P. 400 (1898); Harris v. Harter, 79 Cal. App. 190, 249 P. 39 (1926).

Subdivision (d). Subdivision (d) provides that wrongful attachment occurs when the plaintiff levies an ex parte writ of attachment on property which is exempt from attachment. Attachment of exempt property was also classified as a form of abuse of process. See White Lighting Co. v. Wolfson, *supra* at 349; McNabb v. Byrnes, 92 Cal. App. 337, 268 P. 428 (1928).

Subdivision (e). Subdivision (e) 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 non-party 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. 392, 34 Cal. Rptr. 501 (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. Subdivision (e) does not preclude such actions (see Section 490.060) but provides a statutory alternative.

§ 490.020. Liability for wrongful attachment

490.020. (a) The liability of a plaintiff for causing a wrongful attachment includes both of the following:

(1) All damages proximately caused to the defendant or any other person by the wrongful attachment, whether direct or consequential.

(2) All costs and expenses, including attorney's fees, reasonably expended in recovering for wrongful attachment.

(b) The liability of a plaintiff for wrongful attachment pursuant to Section 490.010 is limited by the amount of the undertaking where the writ of attachment was issued pursuant to Article 1 (commencing with Section 484.010) or Article 2 (commencing with Section 484.310) of Chapter 4 of this title.

Comment. Section 490.020 provides a standard that will make the defendant whole. Contrast Vesper v. Crane Co., 165 Cal. 36, 130 P. 876 (1913).

Subdivision (a). The extent of wrongful attachment liability is the actual damage caused by the attachment and includes such items as loss of credit and business losses. Contrast Gray v. American Sur. Co., 129 Cal. App.2d 471, 277 P.2d 436 (1954); Atlas Dev. Co. v. National Sur. Co., 190 Cal. 329, 212 P. 196 (1923); Elder v. Kutner, 97 Cal. 490, 32 P. 563 (1893); Bailey v. McDougal, 196 Cal. App.2d 178, 16 Cal. Rptr. 204 (1961).

Subdivision (b). Compare Section 489.120 (liability of surety limited). See Finn v. Witherbee, 126 Cal. App.2d 45, 271 P.2d 606 (1954). The limitation provided in subdivision (b) does not, however, limit liability or recovery on a claim based on a common law theory of relief. See Section 490.060.

§ 490.030. Procedure for recovery for wrongful attachment

490.030. (a) A defendant may recover damages for wrongful attachment by motion made in the trial court without necessity of an independent action.

(b) A motion under this section shall not be filed or notice served on the plaintiff until after entry of the final judgment in the action for which damages are sought and expiration of the time for appeal from such judgment or, if an appeal is filed, until such appeal is finally determined. The motion may not be filed or notice served more than one year after the latest of the preceding dates.

(c) The defendant may join in such motion the sureties on an undertaking for wrongful attachment liability, and any judgment of liability shall bind the plaintiff and sureties jointly and severally, but the liability of a surety is limited to the amount of the undertaking.

(d) The procedure for recovery of wrongful attachment damages on motion of the defendant shall be as provided in Section 1058a for recovery on an undertaking.

Comment. Section 490.030 provides a motion procedure for recovery of damages from the plaintiff for wrongful attachment. See Section 490.020. The procedure is the same as that provided by Section 1058a for recovery on an undertaking. Section 1058a was enacted by Cal. Stats. 1972, Ch. 391 (AB 605) and provides in part as follows:

1058a. . . . The liability . . . may be enforced on motion filed in the trial court without the necessity of an independent action. . . . Notice of the motion shall be served on the persons whose liability is sought to be enforced at least 30 days prior to the time set for hearing of the motion. The notice shall state the

amount of the claim and shall be supported by an affidavit or affidavits setting forth the facts on which the claim is based. Such notice and affidavit may be served in accordance with any procedure authorized by Chapter 5 (commencing with Section 1010), Title 14, Part 2. Judgment may be entered in accordance with the notice against the person or persons served therewith, unless such person or persons shall serve and file an affidavit or affidavits in opposition to the motion showing such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such showing is made, the issues to be tried shall be specified by the court and trial thereof shall be set for the earliest date convenient to the court, allowing sufficient time for discovery. . . .

Affidavits filed pursuant to this section shall conform to the standards prescribed for affidavits filed pursuant to Section 437c.

§ 490.040. Setoff of wrongful attachment recovery

490.040. The amount of any recovery for wrongful attachment shall be offset insofar as possible against any unsatisfied amounts owed to the plaintiff by the defendant on the judgment in the action for which wrongful attachment damages are awarded.

§ 490.050. Recovery by third-party claimants

490.050. A person not originally a party to an action whose property is attached is entitled to intervene in the action and to recover damages for wrongful attachment to the same extent and in the same manner as a defendant in the action. For this purpose, the person whose property is attached shall be deemed to be the beneficiary of the undertaking for the attachment of such property and shall have all rights of the beneficiary, uncluding the right to recover such damages by using the procedure provided by Section 490.030.

Comment. Section 490.050 continues the existing law authorizing a third party whose property is attached to intervene in the pending action to protect his interests. See Berghauser v. Golden State Orchards, 208 Cal. 550, 282 P. 950 (1929). See generally 3 B. Witkin, California Procedure Pleading § 211 at 1883 (2d ed. 1971). In addition, the section makes clear that the third person shall be deemed a beneficiary of the attachment bond and is entitled to recover damages against the surety on such bond by using the simple motion procedure provided by Sections 490.030 and 1058a.

§ 490.060. Common law remedies not limited

490.060. Nothing in this chapter limits the right to recover for damages caused by an attachment or protective order on any common law theory of recovery.

Comment. Section 490.060 makes clear that this chapter does not limit the common law remedies for wrongful attachment such as malicious prosecution and abuse of process. See, e.g., White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

CHAPTER 11. EXAMINATION OF THIRD PERSON INDEBTED

TO DEFENDANT; ADDITIONAL WITNESSES

§ 491.010. Third person indebted to defendant or possessing or controlling property or credits of defendant; examination

491.010. (a) 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 a judicial officer and be examined on oath regarding such property.

(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 judicial officer may, pursuant to a warrant, have such person brought before the court to answer for such failure to appear.

(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 judicial officer may order that such debt or property belonging to the defendant be attached in the manner and under the conditions provided by this chapter and that the amount owing be paid or the property held be delivered to the levying officer.

Comment. Sections 491.010 through 491.040 reenact the substance of former Sections 545 through 545.3 of the Code of Civil Procedure. Section 491.010 is based on former Section 545. Section 545 provided as follows:

545. Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court, judge, or referee may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff, constable, or marshal on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

§ 491.010

If the defendant or other person ordered to appear pursuant to this section fails to do so, and if the order requiring his appearance has been served by a sheriff, constable, marshal, or some person specially appointed by the court in the order, the judge may, pursuant to a warrant, have such defendant or other person brought before the court to answer for such failure to appear.

The apparent ability of the plaintiff under former Section 545 to examine the defendant regarding his property was limited to an examination concerning matters relating to the examination of the third person and did not include a general examination of the defendant regarding his property. In short, Section 545 did not provide the equivalent of the postjudgment creditor's examination. See Ex parte Rickleton, 51 Cal. 316, ___ P. ___ (1876). Compare Code Civ. Proc. § 714.

Subdivision (c) is based on the last sentence of the first paragraph of former Section 545. Former Section 545 (now Section 491.010) did not permit the judicial officer to adjudicate the dispute where the third person denied his obligation to the defendant. See Comment to Section 488.550. The court's apparent ability to order transfer of the property was limited to situations where the garnishee admitted his liability. This limited power is continued in subdivision (c). Where the garnishee denies any liability, the plaintiff must proceed by way of action pursuant to Section 488.550.

§ 491.020. Examination; attendance of persons outside county; 150-mile limit

491.020. No person shall be required to appear pursuant to Section 491.010 outside of the county in which he resides or in which he has a place of business unless the distance to the place of hearing is less than 150 miles from his place of residence or place of business.

Comment. Section 491.020 is substantively identical to former Section 545.1 of the Code of Civil Procedure. Section 545.1 provided as follows:

545.1. No person shall be required, pursuant to Section 545 of this code, to attend before a judge or referee outside of the county in which he resides or in which he has a place of business, unless the distance to the place of trial is less than 150 miles from his place of residence or place of business.

See Comment to Section 491.010.

§ 491.030. Order for examination of third person outside county of residence or place of business

491.030. (a) When the third person does not reside or have a place of business in the county where the action is pending, an order for his examination, authorized by Section 491.010, may be made by any judicial officer of a court of similar jurisdiction of the county where the third person resides or has a place of business or, if no court of similar jurisdiction is in the county, by a court of higher jurisdiction therein, upon filing with the clerk of the court a certified copy of the complaint in the pending action and an affidavit showing the existence of the facts required to be shown herein.

(b) The fee for filing pursuant to this section shall be four dollars (~~\$4~~) when filing is in a municipal court and five dollars (\$5) when filing is in a superior court.

Comment. Section 491.030 is substantively identical to former Section 545.2 of the Code of Civil Procedure. Section 545.2 provided as follows:

545.2. When a defendant or a garnishee does not reside or have a place of business in the county where the action is pending, an order for his examination, authorized by Section 545 of this code, may be made by any judge of a court of similar jurisdiction of the county where the defendant or garnishee resides or has a place of business, or if no court of similar jurisdiction is in the county, by a court of higher jurisdiction therein, upon filing with the clerk or the judge of the court a certified copy of the complaint in the pending action and upon presenting to the judge of the court an affidavit showing the existence of the facts required to be shown herein. At the time of filing the certified copy of the complaint, there shall be paid to the clerk or judge, as and for a filing fee, the sum of four dollars (~~\$4~~) when filed in a justice court; the sum of five dollars (\$5) when filed in a superior court.

See Comment to Section 491.010.

§ 491.040. Witnesses; compelling appearance; testimony

491.040. In any proceeding for the examination of a third person under this chapter, witnesses, including the defendant, may be required to appear and testify as to matters relating to the examination of such person in the same manner as upon the trial of an issue.

Comment. Section 491.040 is substantially the same as former Section 545.3 of the Code of Civil Procedure. Section 545.3 provided as follows:

545.3. In any proceeding for the examination of a defendant or a garnishee under this chapter, witnesses may be required to appear and testify before the judge or referee in the same manner as upon the trial of an issue.

See Comment to Section 491.010.

Sec. . Chapter 4 (commencing with Section 537) of Title 7 of Part 2 of the Code of Civil Procedure is repealed.

Note. The text of the repealed sections and their present disposition is set out in the Appendix.

Code of Civil Procedure § 682a (technical amendment)

Sec. . Section 682a of the Code of Civil Procedure is amended to read:

682a. If the debt, credit, or other personal property sought to be levied upon is (a) any bank account, or interest therein, not standing in the name of the judgment debtor or judgment debtors or standing in the name of such judgment debtor or judgment debtors and one or more other persons who are not judgment debtors, or (b) any savings and loan association share, investment certificate, or account, or interest therein, not standing in the name of the judgment debtor or judgment debtors or standing in the name of such judgment debtor or judgment debtors and in one or more other persons who are not judgment debtors, or (c) 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 or persons other than such judgment debtor or judgment debtors or rented by it to one or more such judgment debtors and to one or more other persons who are not judgment debtors, the following provisions of this section also shall be complied with; otherwise the levy shall not be effectual for any purpose and shall be disregarded. The plaintiff shall provide and concurrently with the levy the sheriff, constable, or marshal shall deliver to such bank, trust company, savings and loan association, or safe deposit corporation a bond in an amount not less than twice the amount of the judgment indemnifying the person or persons, other than the judgment debtor or judgment debtors whose interest is sought to be levied upon, rightfully entitled to such debt, credit, or other personal property (which person or persons need not be named specifically in

§ 682a

said bond but may be referred to generally in the same manner as in this sentence), against actual damage by reason of the taking of such debt, credit, or other personal property and assuring to such person or persons the return thereof to him or them upon proof of his or their right thereto. Upon delivery to it of the aforesaid bond such bank, trust company, savings and loan association, or safe deposit corporation shall immediately notify the person in whose name such account stands, other than the judgment debtor, or the person to whom such safe deposit box is rented, other than the judgment debtor, by registered mail addressed to the last address of such person known to such bank, trust company, savings and loan association or safe deposit corporation of the fact of the service of said writ and of the delivery to it of said bond. From the time of said levy and the delivery to it of said bond such bank, trust company, savings and loan association or safe deposit corporation shall not honor a check or other order for the payment of money drawn against the account or other credit so levied upon, such savings and loan association shall not permit withdrawals in respect of the share, investment certificate, or account so levied upon, and such bank, trust company, savings and loan association or safe deposit corporation shall not permit the removal of any of the contents of the safe deposit vault or box levied upon for a period of fifteen (15) days from the mailing of said notice or until the levy is soon released. After fifteen (15) days from the making of said levy and the delivery of said bond, if no proceedings excepting to the sufficiency of the sureties have been commenced, or if such proceedings have been commenced, when the sureties have justified, said bank, trust company, savings and loan

association or safe deposit corporation shall comply with the levy, unless it has been sooner released, and shall not be liable to any person by reason of such complaine or by reason of the nonpayment of any check or other order for the payment of money drawn against the account or other credit so levied upon and presented while the levy is in force or by reason, while the levy is in force, of refusal to pay any withdrawal in respect of the share, investment certificate or account so levied upon, or by reason of the removal, pursuant to the levy, of any of the contents of such safe deposit vault or box or by reason of the refusal of such bank, trust company, savings and loan association, or safe deposit corporation to permit access to such safe deposit vault or box by the renter thereof. The bond described above shall be executed by the judgment creditor or judgment creditors with two or more sufficient sureties. Exceptions to the sufficiency of the sureties may be taken by any person claiming to be the rightful owner of the debt, credit, or other personal property levied upon, in the same manner as ~~that provided in Section 539 of this code with respect to sureties executing undertakings~~ upon an undertaking on attachment and when excepted to the sureties must justify in the same manner as ~~that provided in Section 539~~ upon an undertaking on attachment . The bank, trust company, savings and loan association, or safe deposit corporation to whom any such bond is delivered shall deliver it as directed by the obligees thereof. 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.

Comment. Section 682a is amended to delete the obsolete cross-reference to Section 539. See now Sections 489.070-489.100.

Code of Civil Procedure § 684.2 (added). Satisfaction of judgment from attached property; proceeds of perishable property sold, money collected, sales under execution; notices; delivery of balance

Sec. . Section 684.2 is added to the Code of Civil Procedure, to read:

684.2. Where an attachment has previously been issued and judgment is recovered by the plaintiff, the sheriff, constable, or marshal shall satisfy the same out of any property attached by him which is still subject to such attachment:

(a) First, by paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any money collected by him, or so much as shall be necessary to satisfy the judgment;

(b) If any balance remain due and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance if enough for that purpose remain in his hands. Notices of the sales shall be given and the sales conducted as in other cases of sales on execution. If, after selling the property attached by him remaining in his hands, deducting his fees, and applying the proceeds, together with the money collected by him, to the payment of the judgment, any balance shall remain due, the sheriff, constable, or marshal shall proceed to collect such balance as upon an execution in other cases.

(c) Whenever the judgment shall have been paid, the sheriff, constable, or marshal shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment.

Comment. Section 684.2 combines the substance of former Sections 550 and 551. These sections provided:

§ 550.

If judgment be recovered by the plaintiff, the sheriff, constable, or marshal must satisfy the same out of the property attached by him which has not been delivered to the defendant, or released because of a third party claim, or subjected to a prior execution or attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

§ 551.

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff, constable, or marshal must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, constable, or marshal upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

Code of Civil Procedure § 688. Property liable; manner of levy or release; exemptions from levy and sale; gold dust; return as money collected; effective period of levy; alias executions

Sec. . Section 688 of the Code of Civil Procedure is amended to read:

688. All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, except as provided for in Section 690.6, and all property and rights of property seized and held under attachment in the action, are liable to execution. ~~Shares-and-interests-in-any-corporation-or-company,-and-debts-and-credits,-and-all-other-property,-both-real-and-personal,-or-any-interest-in-either-real-or-personal-property,-and-all-other-property-not capable-of-manual-delivery,~~ All property liable to execution may be levied upon or released from levy in like manner as like property may be attached or released from attachment, except that a-copy-of-the-complaint-in-the-action-from-which-the-writ-issued-need-not-accompany the-writ tangible personal property in the possession of the judgment debtor shall always be levied upon in the manner provided by Section 486.320 ; provided, that no cause of action nor judgment as such, nor license issued by this state to engage in any business, profession, or activity shall be subject to levy or sale on execution. Gold dust must be returned by the officer as so much money collected at its current value, without exposing the same to sale. Until a levy, the property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution, except a levy on the interests or claims of heirs, devisees, or legatees in or to assets of deceased persons remaining in the hands of executors

or administrators, thereof prior to distribution and payment. However, an alias execution may be issued on said judgment and levied on any property not exempt from execution.

Comment. Section 688 continues prior law insofar as it provided that the manner of levy of execution shall be the same as that provided for levy of attachment. However, the method of levy procedures for attachment have been revised. See Sections 488.310-488.430. For the most part, these procedures also continue prior law; however, for attachment, some nonseizure methods of levy have been utilized to avoid disturbance of a defendant's going business prior to judgment. After judgment, seizure is a more appropriate method where property is in the possession of the defendant; hence, Section 688 incorporates this method by reference to Section 488.320.

Code of Civil Procedure § 690 (technical amendment)

Sec. . Section 690 of the Code of Civil Procedure is amended to read:

690. (a) Except as otherwise specifically provided, the property mentioned in Sections 690.1 to 690.29, inclusive, is exempt from execution ~~or attachment~~ , when claim for exemption is made to the same by the judgment debtor or defendant as hereinafter in Section 690.50 provided.

(b) Whenever it is specifically provided in Sections 690.1 to 690.29, inclusive, that the filing of a claim of exemption is not required, the property so mentioned in each such section shall not be subject to levy of attachment or execution in any manner.

(c) As used in Sections 690.1 to 690.29, inclusive, "debtor" means debtor, claimant, defendant, cross-defendant, or judgment debtor.

(d) As used in Sections 690.1 to 690.29, inclusive, "creditor" means the plaintiff or the person in whose favor the writ runs.

Comment. Subdivision (a) of Section 690 is amended to delete the reference to attachment in order to avoid the implication that claims of exemption from attachment must always be made as provided in Section 690.50. In some circumstances, claims will be made pursuant to Section 690.50 (see Section 485.230) but, in other situations, special claims procedures are provided by the attachment title. See, e.g., Section 484.070. This amendment does not, however, change the rule that property exempt from execution is also exempt from attachment. See Section 487.020(a).

Code of Civil Procedure § 690.6. Exemptions; earnings for personal services; determination of priorities; hearing

Sec. . Section 690.6 of the Code of Civil Procedure is amended to read:

690.6. ~~(a)--Except as provided in Section 11489 of the Welfare and Institutions Code, all of the earnings of the debtor received for his personal services shall be exempt from levy of attachment without filing a claim for exemption as provided in Section 690.50.~~ (a) As used in this section, "earnings" means 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.

(b) One-half or such greater portion as is allowed by statute of the United States, of the earnings of the debtor received for his personal services rendered at any time within 30 days next preceding the date of a withholding by the employer under Section 682.3, shall be exempt from execution without filing a claim for exemption as provided in Section 690.50.

(c) All earnings of the debtor received for his personal services rendered at any time within 30 days next preceding the date of a withholding by the employer under Section 682.3, if necessary for the use of the debtor's family residing in this state and supported in whole or in part by the debtor, unless the debts are:

(1) Incurred by the debtor, his wife, or his family for the common necessities of life.

(2) Incurred for personal services rendered by any employee or former employee of the debtor.

§ 690.6

(d) The court shall determine the priority and division of payment among all of the creditors of a debtor who have levied an execution upon nonexempt earnings upon such basis as is just and equitable.

(e) Any creditor, upon motion, 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 priority and division of payment among all the creditors of the debtor who have levied an execution upon nonexempt earnings pursuant to this section.

Comment. Section 690.6 is amended to restrict its application to earnings arising out of an employer-employee relationship. This does not, of course, affect the federal exemptions from garnishment. See Consumer Credit Protection Act, §§ 301-307, 15 U.S.C. §§ 1671-1677. The former exemption of earnings from attachment is deleted. Earnings of an employee are no longer subject to attachment under Section 487.010. See also Section 483.010 (cases in which attachment authorized).

Code of Civil Procedure § 690.21 (technical amendment)

Sec. . Section 690.21 of the Code of Civil Procedure is amended to read:

690.21. The funds of any person confined in any prison or facility under the jurisdiction of the Department of Corrections or the Youth Authority or confined in any county or city jail, road camp, industrial farm, or other local correctional facility, held in trust for him, or to his credit, in an inmate's trust account or similar account by the state, county, or city, or any agency thereof, not to exceed the sum of forty dollars (\$40), shall be exempt from ~~attachment-or~~ execution without filing a claim for exemption as provided in Section 690.50.

Comment. Section 690.21 is amended to delete the reference to attachment. Any property exempt from execution is exempt from attachment pursuant to Section 487.020 in any event. However, the amendment also avoids the implication that funds in excess of \$40 are subject to attachment. See Section 487.010 (property subject to attachment). See also Section 483.010 (actions in which attachment is authorized).

Code of Civil Procedure § 690.24 (technical amendment)

Sec. . Section 690.24 of the Code of Civil Procedure is amended to read:

690.24. All lots of land, not exceeding one-quarter of an acre in size, owned, used, or occupied by any person, or by any person in joint tenancy or tenancy in common with any other person or persons, in any graveyard, cemetery, or other place for the sole purpose of burying the dead, together with the railing or fencing enclosing the same, and all gravestones, tombstones, monuments, and other appropriate improvements thereon erected, are exempt from levy and forced sale by virtue of any writ, order judgment, or decree, or by any legal process whatever. In cases of religious or benevolent associations or corporations, the amount of land so exempt may extend to not exceeding five acres.

Not more than one lot owned, used, or occupied by any such person or by any person in joint tenancy or tenancy in common with any other person or persons or such association or corporation in any one cemetery, graveyard or other place is exempted by this section.

This section does not apply to land held by any person or persons, association, or corporation for the purpose of sale or disposition as burial lots or otherwise.

No property dedicated as a cemetery by a cemetery authority shall be subject to execution ~~or attachment~~ because of debts due from an individual owner of an interment plot.

All money payable or to become payable as the purchase price or on account of the purchase price of unused cemetery lands, or lands

§ 690.24

from which all remains have been removed, is not subject to ~~attachment~~
~~ex~~ execution if used for the purpose enumerated in Section 7925 of the
Health and Safety Code.

Comment. Section 690.24 is amended to delete the reference to attach-
ment. Any property exempt from execution is exempt from attachment pursuant
to Section 487.020.

Education Code § 13524 (technical amendment)

Sec. . Section 13524 of the Education Code is amended to read:

13524. When the payroll form of warrant is used the name of each employee shall be listed . ~~and-in--case-of-an-attachment-of-the salary-or-wages-of-any-employee-the-attachment-shall-affect-only-the salary-or-wages-of-that-employee.~~

Comment. Section 13524 is amended to delete the obsolete reference to attachment of the salary or wages of an employee. Such property is no longer subject to attachment. See Code Civ. Proc. § 487.010. See also Code Civ. Proc. § 483.010.

Education Code § 21112 (technical amendment)

Sec. . Section 21112 of the Education Code is amended to read:

21112. Each payroll order drawn pursuant to this article (commencing at Section 21101) shall be drawn, approved, and issued in the same manner and shall contain the same minimum content as prescribed for single orders. Each payroll order shall list the names of all employees in whose favor the order is drawn and shall state the amount of money due each. ~~In-the-case-of-an-attachment-of-the-salary-or-wages-of-any-employee-listed-on-the-order,-the-attachment-shall-affect-only-the-salary-or-wages-of-the-particular-employee.~~

Comment. Section 21112 is amended to delete the obsolete reference to attachment of the salary or wages of an employee. Such property is no longer subject to attachment. See Code Civ. Proc. § 487.010. See also Code Civ. Proc. § 483.010.

Financial Code § 1650. Adverse claims to contents of safe deposit box

Sec. . Section 1650 of the Financial Code is amended to read:

1650.

Notice to a bank operating a safe deposit department or to a company conducting a safe deposit business of an adverse claim (the person making the adverse claim being hereinafter in this section called "adverse claimant") to any personal property in a safe deposit box maintained by a bank or company and rented to any person, or to any personal property held by the bank or company in safekeeping or storage for any person may be disregarded until and unless the adverse claimant does one of the following:

(a) Procures and serves upon the bank or company at the office at which such safe deposit box is maintained or such personal property is held a restraining order, injunction, or other appropriate order against the bank or company from a court of competent jurisdiction in an action in which the adverse claimant and all persons in whose name the box is rented or the property is held are parties.

(b) Executes and delivers to the bank or company at the office at which the safe-deposit box is maintained or the property is held a bond in form and with surety acceptable to the bank or company and in an amount fixed by the bank or company, but which amount in no event need be more than twice the market value of the entire property against which the adverse claim is made, indemnifying the bank or company and also all persons in whose names the box is rented or the property is held against all liability, loss, damage, costs, and expenses arising out of the refusal to permit access to the safe-deposit box or withdrawal of the property or any part thereof held in safekeeping or storage.

Unless the restraining order, injunction, or other appropriate order is obtained or a bond is given, the bank or company, notwithstanding the notice, may permit access to the box to the person to whom it is rented or may deliver the contents thereof to or on the order of the person or may deliver the property held in storage or safekeeping to or on the order of the person for whom it is held without any liability on the part of the bank or company.

If an adverse claimant delivers to the bank or company at the office at which the safe-deposit box is maintained or the property is held his affidavit stating that of his own knowledge the person in whose name the box stands or for whom the property is held is a fiduciary for the adverse claimant and that the fiduciary is about to misappropriate the contents of the box or the property and stating the facts upon which the claim of fiduciary relationship is based, the bank may refuse access to the safe-deposit box or refuse to deliver the personal property until the adverse claim is finally adjudicated or released without liability on its part and without liability for the sufficiency or truth of the facts alleged in the affidavit.

The provisions of this section shall be applicable even though the name of the person appearing on the bank's or company's books as the renter of the box or as the depositor of the property held in storage or safekeeping is modified by a qualifying or descriptive term such as "agent," "trustee," or other word or phrase indicating that the person may not be the owner in his own right of the contents of the box or of the property held in storage or safekeeping.

Before giving access to any safe deposit box, the bank or company may demand payment to it of all costs and expenses of opening the safe deposit box and all costs and expenses of repairing any damage to the safe deposit box caused by the opening thereof.

Comment. Section 1650 is amended to retain the substance of a portion of former Section 539a of the Code of Civil Procedure.

Financial Code § 3144 (technical amendment)

Sec. . Section 3144 of the Financial Code is amended to read:

3144. The superintendent may maintain actions in this State, or in any other state or country to enforce and collect any sums or amounts due and payable and remaining unpaid upon any assessments from any stockholder or stockholders failing to pay the assessment in full. In any such action the superintendent may join as defendants one or more stockholders. In any such action ~~the superintendent shall have the right of attachment as in other actions upon unsecured debts~~ a writ of attachment may be issued pursuant to Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure but the superintendent shall not be required to ~~give bond on attachment~~ post an undertaking or pay filing fees or other court costs.

Comment. Section 3144 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. As amended, however, the section is substantively identical to the former provision.

Financial Code § 11208 (repealed)

Sec. . Section 11208 of the Financial Code is repealed.

~~11208.--Where an attachment is levied upon any shares or share accounts of federal savings and loan association or upon any debts owing by any such association, the copy of writ and notice shall be left with the manager or any other officer of such association at the office or branch thereof at which such shares or share accounts were issued or such debt incurred if such office or branch is still being maintained, and otherwise at the principal office of such association.--An attachment which has not been served as provided in this section shall not be effective as to any share or share account issued by any such association or as to any debt owing by any such association if such share or account was issued or such debt incurred at an office or branch not so served.~~

Comment. Section 11208 is superseded by Section 488.040 of the Code of Civil Procedure.

Health & Safety Code § 11680.5. Action for recovery of funds expended in narcotics investigations; attachment authorized

Sec. . Section 11680.5 of the Health and Safety Code is amended to read:

11680.5. The State of California, or any political subdivision thereof, may maintain an action against any person or persons engaged in the unlawful sale of narcotics for the recovery of any public funds paid over to such person or persons in the course of any investigation of violations of Division 10 (commencing with Section 11000) of the Health and Safety Code. All proceedings under this section shall be instituted in the Superior Court of the county where the funds were paid over, where the sale was made, or where the defendant resides. In any action under this section, a writ of attachment may be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure to attach any funds paid over or any other funds on the defendant's person at the time of his arrest.

Comment. Section 11680.5 is amended to restore the ability of the state to attach any public funds paid over in the course of a narcotics investigation (and other funds on the defendant's person at the time of his arrest). See former Code Civ. Proc. § 537(b), Cal. Stats. 1961, Ch. 1164, p. 2906, § 2. The amendment also makes clear that the attachment may be issued ex parte pursuant to Code of Civil Procedure Section 485.010 et seq.

Labor Code § 300 (technical amendment)

Sec. . Section 300 of the Labor Code is amended to read:

300. No assignment of, or order for wages or salary, earned or to be earned, shall be valid unless:

(a) Such assignment is contained in a separate written instrument, signed by the person by whom the said wages or salary have been earned or are to be earned, and identifying specifically the transaction to which the assignment relates; and

(b) Where such assignment of, or order for wages or salary is made by a married person, the written consent of the husband or wife of the person making such assignment or order is attached to such assignment or order; and

(c) Where such assignment or order for wages or salary is made by a minor, the written consent of a parent or guardian of such minor is attached to such order or assignment; and

(d) Where such assignment of or order for wages or salary is made by a person who is unmarried or who is an adult or who is both unmarried and adult, a written statement by the person making such assignment or order, setting forth such facts, is attached to or included in such assignment or order;

(e) No other assignment or order exists in connection with the same transaction or series of transactions and a written statement by the person making such assignment or order to that effect, is attached thereto or included therein; and

(f) A copy of such an assignment or order and of the written statement provided for in subdivision (d) hereof, authenticated by a notary public, shall have been filed with the employer, accompanied by an itemized statement of the amount then due to the assignee; provided,

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that at such time no other assignment or order for the payment of any wages or salary is subject to payment, and no attachment-~~er~~ levy on execution against said wages or salary is in force. Any valid assignment, when filed in accordance with the provisions contained herein, shall have priority with respect to any subsequently filed assignment or order or subsequent attachment-~~er~~ levy on execution. Any power of attorney to assign or collect wages or salary shall be revocable at any time by the maker thereof.

No assignment of, or order for wages or salary shall be valid unless at the time of the making thereof, such wages or salary have been earned, except for the necessities of life and then only to the person or persons furnishing such necessities of life directly and then only for the amount needed to furnish such necessities. Under any assignment of, or order for wages or salary to be earned, a sum not to exceed 50 per centum of the assignor's wages or salary, and not to exceed 25 per centum of the assignor's wages or salary, upon the showing that such wages or salary are necessary for the support of his mother, father, spouse, children or other members of his family, residing in this State and supported in whole or in part by his labor, shall be collectible from the assignor's employer at the time of each payment of such wages or salary.

The employer shall be entitled to rely upon the statements of a fact in the written statement provided for in subdivisions (d) and (e) hereof, without the necessity of inquiring into the truth thereof, and the employer shall incur no liability whatsoever by reason of any payments made by him to an assignee under any assignment or order, in reliance upon the facts so stated.

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No assignment of or order for wages or salary earned or to be earned shall be valid under any circumstances, if the wages or salary earned or to be earned are paid under a plan for payment at a central place or places established under the provisions of Section 204a of this code.

This section shall not apply to deductions which the employer may be requested by the employee to make for the payment of life, retirement, disability or unemployment insurance premiums, for the payment of taxes owing from the employee, for contribution to funds, plans or systems providing for death, retirement, disability, unemployment, or other benefits, for the payment for goods or services furnished by the employer to the employee or his family at the request of the employee, or for charitable, educational, patriotic or similar purposes.

Comment. Section 300 is amended to delete the reference to attachment of wages or salary of an employee. Such property is no longer subject to attachment. See Code Civ. Proc. § 487.010. See also Code Civ. Proc. § 483.010.

Labor Code § 404 (technical amendment)

Sec. . Section 404 of the Labor Code is amended to read:

404. Any money put up as a bond under sections 401, 402 and 403 shall be ~~subject to garnishment, attachment or execution only by~~ :

(a) Exempt from execution except in an action between the employer, and the employee or applicant, or their successors or assigns, and shall be returned ;

(b) Returned to the employee or applicant together with accrued interest thereon, immediately upon the return of the money or property entrusted to the employee or applicant and upon the fulfillment of the agreement, subject only to the deduction necessary to balance accounts between the employer and employee or applicant.

Comment. Section 404 is amended to make clear that it provides no separate authorization to attach money put up as a bond. Such property is only subject to levy in actions in which attachment is authorized pursuant to Code of Civil Procedure Section 483.010. Compare former Section 404, Cal. Stats. 1937, Ch. 90, p. 204, § 404 with Code Civ. Proc. § 483.010 (actions in which attachment authorized). However, Section 404 continues to exempt such property from levy by third persons under any circumstances.

Labor Code § 5600. Authorization and grounds for issuance of attachment;
amount

Sec. . Section 5600 of the Labor Code is amended to read:

5600. The appeals board may, upon the filing of an application by or on behalf of an injured employee, his dependents, or any other party in interest, direct the county clerk of any county to issue writs of attachment authorizing the sheriff to attach the property of the defendant as security for the payment of any compensation which may be awarded in any case:

(a) Mentioned in Section ~~412~~ 415.50 of the Code of Civil Procedure, or

(b) Where the employee employer has failed to secure the payment of compensation as required by Article 1 of Chapter 4 of Part 1 of this division.

Such attachment shall be in an amount fixed by the appeals board, not exceeding the greatest probable award against the defendant in such matter.

Comment. Section 5600 is amended (1) to eliminate the obsolete reference in subdivision (a) to former Section 412 of the Code of Civil Procedure and (2) to correct subdivision (b) to refer to the "employer" rather than the "employee." Former Section 412, Cal. Stats. 1968, Ch. 132, p. 346, § 3, authorized service by publication; its present counterpart, Section 415.50 of the Code of Civil Procedure has been substituted here. Article 1 (commencing with Section 3700) of Chapter 4 of Part 1 of this division, requires an employer to secure compensation. The term "employer" was used in an earlier version of this section, Cal. Stats. 1923, Ch. 197, p. 438, § 1, and the change here simply corrects a later typographical error.

Labor Code § 5601 (technical amendment)

Sec. . Section 5601 of the Labor Code is amended to read:

5601. The provisions of ~~Part-2, Title-7, Chapter-4,~~ Title 6.5 (commencing with Section 480.010) of Part 2 of the Code of Civil Procedure, as far as applicable, shall govern the proceedings upon attachment, the appeals board being substituted therein for the ~~superior~~ court or judicial officer .

Comment. Section 5601 has been amended to include the appropriate cross-reference to the Code of Civil Procedure.

Note. The remaining two sections in this chapter dealing with attachment provide as follows:

5602. No writ of attachment shall be issued except upon the order of the appeals board. Such order shall not be made where it appears from the application or affidavit in support thereof that the employer was, at the time of the injury to the employee, insured against liability imposed by this division by any insurer. If, at any time after the levying of an attachment, it appears that such employer was so insured, and the requisites for dismissing the employer from the proceeding and substituting the insurer as defendant under any method prescribed by this division are established, the appeals board shall forthwith discharge the attachment.

5603. In levying attachments preference shall be given to the real property of the employer.

Penal Code § 1208 (technical amendment)

Sec. . Section 1208 of the Penal Code is amended to read:

1208. (a) The provisions of this section, insofar as they relate to employment, shall be operative in any county in which the board of supervisors by ordinance finds, on the basis of employment conditions, the state of the county jail facilities, and other pertinent circumstances, that the operation of this section, insofar as it relates to employment, in that county is feasible. The provisions of this section, insofar as they relate to education, shall be operative in any county in which the board of supervisors by ordinance finds, on the basis of education conditions, the state of the county jail facilities, and other pertinent circumstances, that the operation of this section, insofar as it relates to education, in that county is feasible. In any such ordinance the board shall prescribe whether the sheriff, the probation officer, or the superintendent of a county industrial farm or industrial road camp in the county shall perform the functions of the work furlough administrator. The board of supervisors may also terminate the operative-ness of this section, either with respect to employment or education in the county if it finds by ordinance that, because of changed circumstances, the operation of this section, either with respect to employment or education in that county is no longer feasible.

(b) When a person is convicted of a misdemeanor and sentenced to the county jail, or is imprisoned therein for nonpayment of a fine, for contempt, or as a condition of probation for any criminal offense, or committed under the terms of Section 6404 or 6406 of the Welfare and Institutions Code as a habit-forming drug addict, the work furlough administrator may, if he concludes that such person is a fit subject therefor,

direct that such person be permitted to continue in his regular employment, if that is compatible with the requirements of subdivision (d), or may authorize the person to secure employment for himself, unless the court at the time of sentencing or committing has ordered that such person not be granted work furloughs. The work furlough administrator may, if he concludes that such person is a fit subject therefor, direct that such person be permitted to continue in his regular educational program, if that is compatible with the requirements of subdivision (d), or may authorize the person to secure education for himself, unless the court at the time of sentencing has ordered that such person not be granted work furloughs.

(c) If the work furlough administrator so directs that the prisoner be permitted to continue in his regular employment or educational program, the administrator shall arrange for a continuation of such employment or education, so far as possible without interruption. If the prisoner does not have regular employment or a regular educational program, and the administrator has authorized the prisoner to secure employment or education for himself, the prisoner may do so, and the administrator may assist him in doing so. Any employment or education so secured must be suitable for the prisoner. Such employment or educational program, if such educational program includes earnings by the prisoner, must be at a wage at least as high as the prevailing wage for similar work in the area where the work is performed and in accordance with the prevailing working conditions in such area. In no event may any such employment or educational program involving earnings by the prisoner be permitted where there is a labor dispute in the establishment in which the prisoner is, or is to be, employed or educated.

(d) Whenever the prisoner is not employed or being educated and between the hours or periods of employment or education, he shall be confined in the facility designated by the board of supervisors for work furlough confinement unless the work furlough administrator directs otherwise. If the prisoner is injured during a period of employment or education, the work furlough administrator shall have the authority to release him from the facility for continued medical treatment by private physicians or at medical facilities at the expense of the employer, workman's compensation insurer, or the prisoner. Such release shall not be construed as assumption of liability by the county or work furlough administrator for medical treatment obtained.

The work furlough administrator may release any prisoner classified for the work furlough program for a period not to exceed 72 hours for medical, dental, or psychiatric care, and for family emergencies or pressing business which would result in severe hardship if the release were not granted.

(e) The earnings of the prisoner may be collected by the work furlough administrator, and it shall be the duty of the prisoner's employer to transmit such wages to the administrator at the latter's request. Earnings levied upon pursuant to a writ of ~~attachment-or~~ execution or in other lawful manner shall not be transmitted to the administrator. If the administrator has requested transmittal of earnings prior to levy, such request shall have priority. In a case in which the functions of the administrator are performed by a sheriff, and such sheriff receives a writ of ~~attachment-or~~ execution for the earnings of a prisoner subject to this section but has not yet requested transmittal of the prisoner's earnings pursuant to this section, he shall first levy on the earnings

pursuant to the writ. When an employer or educator transmits such earnings to the administrator pursuant to this subdivision he shall have no liability to the prisoner for such earnings. From such earnings the administrator shall pay the prisoner's board and personal expenses, both inside and outside the jail, and shall deduct so much of the costs of administration of this section as is allocable to such prisoner, and, in an amount determined by the administrator, shall pay the support of the prisoner's dependents, if any. If sufficient funds are available after making the foregoing payments, the administrator may, with the consent of the prisoner, pay, in whole or in part, the preexisting debts of the prisoner. Any balance shall be retained until the prisoner's discharge and thereupon shall be paid to him.

(f) The prisoner shall be eligible for time credits pursuant to Sections 4018, 4019, and 4019.2.

(g) In the event the prisoner violates the conditions laid down for his conduct, custody, education, or employment, the work furlough administrator may order the balance of the prisoner's sentence to be spent in actual confinement.

(h) Willful failure of the prisoner to return to the place of confinement not later than the expiration of any period during which he is authorized to be away from the place of confinement pursuant to this section is punishable as provided in Section 4532 of the Penal Code.

(i) As used in this section, "education" includes vocational training, and "educator" includes a person or institution providing vocational training.

§ 1208

(j) This section shall be known and may be cited as the "Cobey Work Furlough Law".

Comment. Section 1208 is amended to delete the reference to attachment of the earnings of a prisoner. Such property is no longer subject to attachment. See Code Civ. Proc. § 487.010. See also Code Civ. Proc. § 483.010.

Revenue & Taxation Code §6713 (technical amendment)

Sec. . Section 6713 of the Revenue and Taxation Code is amended to read:

6713. In the action a writ of attachment may issue, and ~~no bond or affidavit previous to the issuing of the attachment is required.~~ be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 6713 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. §.1058.

Revenue & Taxation Code § 7864 (technical amendment)

Sec. . Section 7864 of the Revenue and Taxation Code is amended to read:

7864. In the action a writ of attachment may ~~issue, and no bond or affidavit previous to the issuing of the attachment is required,~~ be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 7864 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 8972 (technical amendment)

Sec. . Section 8972 of the Revenue and Taxation Code is amended to read:

8972. In the action a writ of attachment may ~~issue, and no bond or affidavit previous to the issuing of the attachment is required,~~ be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 8972 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 10074 (technical amendment)

Sec. . Section 10074 of the Revenue and Taxation Code is amended to read:

10074. In the action a writ of attachment may ~~issue, and no bond or affidavit previous to the issuing of the attachment is required,~~ be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 10074 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 11472 (technical amendment)

Sec. . Section 11472 of the Revenue and Taxation Code is amended to read:

11472. In the action a writ of attachment may ~~issue, and no bond or affidavit previous to the issuing of the attachment is required,~~ be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 11472 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 12680 (technical amendment)

Sec. . Section 12680 of the Revenue and Taxation Code is amended to read:

12680. A writ of attachment may be issued in the action ~~and no bond or affidavit previous to the issuing of the attachment is required~~, pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 12680 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 18833 (technical amendment)

Sec. . Section 18833 of the Revenue and Taxation Code is amended to read:

18833. In the action a writ of attachment may be issued ~~and no bond or affidavit previous to the issuing of the attachment is required.~~ pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 18833 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 26251 (technical amendment)

Sec. . Section 26251 of the Revenue and Taxation Code is amended to read:

26251. At any time within six years after the determination of liability for any tax, penalties, and interest or within the period during which a lien is in force as the result of the recording of a certificate under Sections 26161 or 26161.5, the Franchise Tax Board may bring an action in the courts of this state, of any other state, or of the United States in the name of the people of the State of California to collect the amount due, together with penalties, and interest. The Attorney General or counsel for the Franchise Tax Board shall prosecute the action. In such action a writ of attachment may be issued ~~, and no bond or affidavit previous to the issuing of said attachment is required.~~ pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 26251 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 30302 (technical amendment)

Sec. . Section 30302 of the Revenue and Taxation Code is amended to read:

30302. In the action a writ of attachment may ~~issue, and no bench~~
~~er-affidavit previous to the issuing of the attachment is required,~~
be issued pursuant to Chapter 5 (commencing with Section 485.010) of
Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 30302 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Revenue & Taxation Code § 32352 (technical amendment)

Sec. . Section 32352 of the Revenue and Taxation Code is amended to read:

32352. In any suit brought to enforce the rights of the State with respect to taxes, a certificate by the board showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency of the amount of tax, interest, and penalty set forth therein, and of compliance by the board with all provisions of this part in relation to the computation and levy of the tax. In the action a writ of attachment ~~may issue, and no bond or affidavit previous to the issuing of the attachment shall be required.~~ be issued pursuant to Chapter 5 (commencing with Section 485.010) of Title 6.5 of Part 2 of the Code of Civil Procedure.

Comment. Section 32352 has been amended to include the appropriate cross-reference to the Code of Civil Procedure. Chapter 5 (commencing with Section 485.010) provides a procedure for the ex parte issuance of a writ of attachment upon proper application supported by affidavit. Because the action is on behalf of the state, no undertaking is required. Code Civ. Proc. § 1058.

Water Code § 71685.5 (technical amendment)

Sec. . Section 71685.5 of the Water Code is amended to read:

71685.5. The district may bring a suit in the court having jurisdiction against any producer of ground water from the ground water supplies within the district for the collection of any delinquent replenishment assessment, interest, or penalties. The court having jurisdiction of the suit may, in addition to any judgment, award interest and costs on any judgment as allowed by law. ~~Should the district seek an attachment against the property of any named defendant therein, the district shall not be required to furnish bond or other undertaking as provided in Part 2, Title 7, Chapter 4 (commencing with Section 537) of the Code of Civil Procedure.~~

Comment. Section 71685.5 is amended to delete the obsolete reference to the attachment provisions of the Code of Civil Procedure. See Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure. The substance of the deleted provision is contained in Code of Civil Procedure Section 1058.

Welfare & Institutions Code § 1834 (technical amendment)

Sec. . Section 1834 of the Welfare and Institutions Code is amended to read:

1834. The earnings of the ward shall be collected by the Youth Authority work furlough administrator, and it shall be the duty of the ward's employer to transmit such wages to the administrator at the latter's request. Earnings levied upon pursuant to writ of ~~attachment-or~~ execution or in other lawful manner shall not be transmitted to the administrator. If the administrator has requested transmittal of earnings prior to levy, such request shall have priority. When an employer transmits such earnings to the administrator pursuant to this section he shall have no liability to the ward for such earnings. From such earnings the administrator shall pay the ward's board and personal expenses, both inside and outside the detention facility, and shall deduct so much of the costs of administration of this article as is allocable to such ward. If sufficient funds are available after making the foregoing payments, the administrator may, with the consent of the ward, pay, in whole or in part, the pre-existing debts of the ward. Any balance shall be retained until the ward's discharge and thereupon shall be paid to him.

Comment. Section 1834 is amended to delete the reference to attachment of the earnings of a ward. Such property is no longer subject to attachment. See Code Civ. Proc. § 487.010. See also Code Civ. Proc. § 483.010.

Welfare & Institutions Code § 17409 (technical amendment)

Sec. . Section 17409 of the Welfare and Institutions Code is amended to read:

17409. There shall be exempt from the transfers and grants authorized by Section 17109 and from ~~attachment~~ and execution on claims under Section 17403 against property acquired by persons for the support of whom public moneys have been expended all of the following property:

- (a) Cash to the amount of fifty dollars (\$50).
- (b) Personal effects and household furniture to the value of five hundred dollars (\$500).
- (c) An interment space, crypt, or niche intended for the interment of the applicant or recipient of aid.
- (d) Funds placed in trust for funeral or burial expenses to the extent that such funds do not exceed the sum of five hundred dollars (\$500).
- (e) Insurance policies having an actual cash surrender value of not to exceed five hundred dollars (\$500).
- (f) Real or personal property of a recipient of public assistance, with respect to aid or county hospital care granted after May 21, 1963.

No county shall withhold emergency medical or hospital care from any person pending his giving security for reimbursement to the county for the care or hospitalization to be provided to him.

Comment. Section 17409 is amended to eliminate the reference to attachment. Property which is exempt from execution is exempt from attachment in any event. See Code Civ. Proc. § 487.020(a). Elimination of the term here avoids any implication that this section authorizes attachment of property not listed as exempt. Compare Section 483.010 (actions in which attachment authorized).

Severability Clause

Sec. . If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect any other provision or application of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Operative Date

Sec. . (a) This act becomes operative on January 1, 1975.

(b) Except as otherwise provided by rules adopted by the Judicial Council effective on or after January 1, 1975, this act shall not apply to any writ of attachment issued prior to January 1, 1975, and such writs of attachment shall continue to be governed in all respects by the provisions of Chapter 4 (commencing with Section 537) of Title 7 of Part 2 of the Code of Civil Procedure in effect on December 31, 1974.

CALIFORNIA LAW REVISION COMMISSION

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February 1, 1973

PREJUDGMENT ATTACHMENT RECOMMENDATION--NEW SECTIONS

The new sections (buff and green sheets) attached to the First Supplement to Memorandum 73-5 supersede the sections with the same number that were included in the prejudgment attachment recommendation dated 12/21/72 (originally attached to Memorandum 73-5).

To update your copy of the recommendation, remove the old sections and insert the new ones. The buff pages are to be inserted in the white portion, and the green pages are to be inserted in the pink portion, of the original recommendation.

A P P E N D I X

CODE OF CIVIL PROCEDURE SECTIONS 537-561
(disposition under draft statute indicated in the margin)

537. The plaintiff, in an action specified in Section 537.1, at the time of issuing the summons, or at any time afterward, may have the property specified in Section 537.3 of a defendant specified in Section 537.2 attached in accordance with the procedure provided for in this chapter, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as provided for in this chapter.

§ 484.010

537.1. An action referred to in Section 537 is an action or actions by the same plaintiff in which the total sum claimed, exclusive of interest, attorneys' fees and costs, is five hundred dollars (\$500) or more and which is one or more of the following:

(a) An action against a defendant described in subdivision (a), (b) or (c) of Section 537.2 for a liquidated sum of money based upon

(1) Money loaned; or

(2) A negotiable instrument; or

(3) The sale or lease of, or a license to use, real or personal property (including, without limiting the generality of the foregoing, goods sold and delivered on open account); or

(4) Services rendered,

if the claim is not secured by any mortgage, deed of trust or security interest on real or personal property or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. The fact that interest, attorneys' fees, costs or any combination thereof are claimed by the plaintiff in addition to the principal amount of the debt shall not make the claim unliquidated within the meaning of this section.

(b) An action against a defendant described in subdivision (d) of Section 537.2 for the recovery of money.

§ 483.010

Not continued. See
Note to § 483.010.

537.2. The defendants referred to in Section 537 are:

(a) All corporations organized under the General Corporation Law or under Part 4 (commencing with Section 13400) of Division 3 of Title 1 of the Corporations Code, or organized under a law of any foreign state or jurisdiction authorizing the formation of business corporations.

(b) All partnerships organized under the Uniform Partnership Act (Chapter 1 (commencing with Section 15001) of Title 2 of the Corporations Code) or the Uniform Limited Partnership Act (Chapter 2 (commencing with Section 15501) of Title 2 of the Corporations Code) or a law of any foreign state or jurisdiction authorizing the formation of general or limited partnerships.

(c) Individuals engaged in a trade or business.

(d) Any person not residing in this state (including any foreign corporation not qualified to do business in this state under the provisions of Chapter 3 (commencing with Section 6403) of Part 11 of Division 1 of Title 1 of the Corporations Code, and any foreign partnership which has not filed a designation pursuant to Section 15700 of the Corporations Code), or who cannot after due diligence be found within this state, or who conceals himself to avoid service of summons

See § 483.010.

Not continued. See Note to § 483.010.

537.3. The property referred to in Section 537 is the following property not exempt from execution (without regard to whether a claim of exemption shall be filed):

See § 487.020(a)

(a) With respect to corporations and partnerships referred to in subdivisions (a) and (b) of Section 537.2, all corporate property and all partnership property.

§ 487.010(a), (b)

(b) With respect to individuals referred to in subdivision (c) of Section 537.2 all of the following:

§ 487.010(c)

(1) Inventory.

§ 487.010(c)(5)

(2) Accounts, contract rights, chattel paper, and general intangibles consisting of any right to payment of money (exclusive of those referred to in paragraph (3) of this subdivision), except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

§ 487.010(c)(1)

§ 537.3

(3) Bank accounts and other deposit accounts, except the first one thousand dollars (\$1,000) balance in any single bank or branch bank (but, if the defendant has accounts in more than one bank or branch bank, the court, upon application of the plaintiff at the hearing provided for in Section 538.4, may direct that the writ be levied on balances of less than one thousand dollars (\$1,000) in a given bank or branch bank if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of the levy). § 487.010(c)(2)

(4) Securities. § 487.010(c)(8)

(5) Equipment. § 487.010(c)(3)

(6) Real estate, including any leasehold estate with an unexpired term of one year or more. § 487.010(c)(7)

The court, however, upon application of the defendant at the hearing provided for in Section 538.4 or at any time thereafter upon five days' notice to the plaintiff, shall exclude from the effect of the levy or release from the levy, as the case may be, any of the foregoing property which the court finds is necessary for the support of the defendant and his family after taking into consideration all of his other income and assets not subject to levy or not levied upon. §§ 484.070, 484.090(b), 487.020

The terms used in this subdivision which are defined in the Commercial Code shall have the meanings therein specified. See definitions, Ch. 1 (§§ 481.010-481.220)

(c) With respect to a defendant referred to in subdivision (d) of Section 537.2, all property of the defendant. not continued

537.5. In cases of attachment the clerk of the court with whom the complaint is filed, if requested by plaintiff in writing at the time of filing the complaint, shall not make public the fact of the filing of the complaint, or of the issuance of the attachment, until after the filing of the return of service of the notice and temporary restraining order or of the writ of attachment if issued without notice, except that if the return of service of the notice § 482.050(a)

§ 537.5

and temporary restraining order or of the writ of attachment is not made within 30 days after the filing of the complaint in the action, the clerk of the court with whom the complaint is filed shall make available to the public the records and documents in such action. However, the clerk of such court shall make the entire file in the action available for inspection at any time to any party named in the complaint, or to his attorney.

§ 482.050(a)

§ 482.050(b)

The request by plaintiff that the fact of filing of a complaint or issuance of an attachment not be made public may take the form of a notation to that effect, made by rubber stamp or other suitable means, at the top of the first page of the complaint filed with the clerk.

§ 482.050(c)

538. A plaintiff desiring the issuance of a writ of attachment shall file with the court an application supported by an affidavit or affidavits based upon the personal knowledge of the persons subscribing thereto and showing all the following:

§§ 484.020, 484.030

(a) That the action is one in which the issuance of a writ of attachment is proper under the provisions of Sections 537 to 537.3, inclusive.

§ 484.020(a)

(b) That the indebtedness claimed in the complaint is justly due and presently owing to the plaintiff by the defendant, over and above all legal setoffs or cross-complaints, or, if the action is one against a defendant described only in subdivision (d) of Section 537.2, the amount claimed by the plaintiff against the defendant and that the plaintiff believes that he has a valid cause of action for an amount of money equal to that sum.

§ 484.020(b)

(c) That the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any other creditor of the defendant.

§ 484.020(c)

(d) That the plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors, or, if any such proceeding has been terminated, that the claim of the plaintiff was not discharged in such proceeding.

§ 484.020(d)

538.1. The court or a commissioner thereof, if satisfied that the affidavits submitted by the plaintiff pursuant to Section 538 have established a prima facie case and that the action is one in which an attachment is properly issuable under the provisions of this chapter, shall issue without any prior notice to the defendant a notice of hearing and temporary restraining order conforming to the provisions of Sections 538.2 and 538.3 for service upon the defendant.

§§ 486.010-486.030

Neither notice of the restraining order issued pursuant to this section nor service of a copy thereof upon any bank shall require any bank to observe the terms of the restraining order.

See § 486.070

538.2. The notice of hearing issued pursuant to Section 538.1 shall provide for a hearing on the question whether a writ of attachment shall issue to be held seven business days (exclusive of Saturdays, Sundays and legal holidays) after the service of the notice upon the defendant or upon the first regular date law and motion matters are heard thereafter, whichever occurs later. The notice and temporary restraining order shall be served and return of service shall be made as provided in this code for the service of a summons and complaint. The notice shall be accompanied by a copy of the complaint and a copy of the affidavit or affidavits filed by the plaintiff under Section 538.

§§ 484.040, 486.080

538.3. The temporary restraining order issued pursuant to Section 538.1 shall prohibit prior to the hearing any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment, otherwise than in the ordinary course of business, and the issuance by the defendant of any checks in excess of an aggregate of one thousand dollars (\$1,000) against any of his bank accounts in this state to withdraw any sums subject to such levy, which would reduce the aggregate amount remaining on deposit to less than the amount of the plaintiff's claim, and the opening of any new bank accounts by the defendant. Without limiting the generality of the phrase "not in the ordinary course of business", the payment by the defendant of an antecedent debt shall not be considered in the ordinary course of business within the meaning of this section.

§ 486.050

§486.060

§ 486.050

§ 538.3

Notwithstanding the foregoing, checks may be issued by the defendant for any of the following purposes:

(a) To cover any payrolls (including all fringe benefits and withholding taxes) falling due in the regular course after the service of the temporary restraining order and prior to the levy of a writ of attachment, but not exceeding the amount of three hundred dollars (\$300) per week for any individual employee.

§ 486,060

(b) In payment for goods thereafter delivered to the defendant C.O.D. for use in his trade or business.

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

(d) In payment of legal fees for the representation of the defendant in the action.

The temporary restraining order shall expire by its terms unless a writ of attachment is issued and levied within 30 days after the service of the order or if the defendant gives an undertaking as provided in Section 555 in the amount of plaintiff's claim as security for the payment of any judgment recovered by the plaintiff. The restraining order shall be vacated by the court upon ex parte application by the defendant if the court is satisfied that there is no danger that sufficient property of the defendant to secure the plaintiff's claim will not be available and subject to the levy of a writ of attachment, if one is directed to be issued at the hearing provided for in Section 538.4.

§ 486.090

§ 486.100

538.4. The hearing shall be held before the court or a commissioner thereof on the day specified and shall take precedence over all other matters not of a similar nature pending on that day. If the defendant does not appear at the hearing, in person or by counsel, the court, without taking further evidence, shall direct the clerk to immediately issue a writ of attachment. Each party shall serve upon the other at least 24 hours before the hearing any affidavits intended to be introduced at the hearing, unless the court at the hearing for good cause shown permits the introduction of affidavits not previously served. Either party may also introduce oral evidence at the hearing and the defendant shall make available for oral examination at the hearing himself or an officer or agent of the defendant with knowledge of the transaction on which the complaint is based, unless the court for good cause shown excuses compliance with this requirement. Upon the basis of the evidence introduced at the hearing, the court shall determine whether the case is one in which an attachment is properly issuable and whether there is any reasonable probability that the defendant can establish a successful defense to the claim asserted by

not continued

§§ 484.060, 484.070

See generally
§ 484.090

not continued

§ 538.4

the plaintiff. If the court finds on the basis of a preponderance of the evidence that grounds for the issuance of an attachment exist and that the plaintiff has established the probable validity of his claim and the absence of any reasonable probability that a successful defense can be asserted by the defendant, the court shall direct the clerk to immediately issue a writ of attachment; otherwise, the court shall dissolve the temporary restraining order. The court may direct the order in which the writ shall be levied upon different assets of the defendant, if in the aggregate they exceed in value an amount clearly adequate to secure any judgment which may be recovered by the plaintiff.

§ 484.090(a)

§ 484.090(c)

538.5. Notwithstanding the provisions of Sections 538 to 538.4, inclusive, the court shall, upon application by the plaintiff, direct the immediate issuance of a writ of attachment without any notice of hearing (or, under subdivision (c) below, without any hearing) if any one or more of the following conditions exist:

§§ 485.010, 485.210, 485.220

(a) A bulk sales notice has been recorded and published with respect to property of the defendant pursuant to the provisions of Division 6 (commencing with Section 6101) of the Commercial Code, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the goods covered by the bulk sales notice; or an escrow has been opened pursuant to the provisions of Section 24074 of the Business and Professions Code with respect to the sale by the defendant of a liquor license, such writ to be issued upon the filing of the application provided for in Section 538 but to be limited to the attaching creditor's pro rata share of the proceeds of the sale in escrow.

§ 485.010(b)(2), (e)

§ 485.010(b)(3), (e)

(b) The plaintiff establishes to the satisfaction of the court that there is a substantial danger that the defendant will transfer, other than in the ordinary course of business, remove or conceal the property sought to be attached, such writ to be issued upon the filing of the application provided for in Section 538.

§ 485.010(b)(1)

(c) The notice and order issued pursuant to Section 538.1 cannot be served with the use of reasonable diligence upon the defendant within 10 days after its issuance and the court is satisfied that the defendant has departed from this state or conceals himself to avoid service of the notice, such writ to be issued after the expiration of such 10-day period.

See § 485.010(b)(4).

§ 538.5

(d) The defendant is one described in subdivision (d) of Section 537.2, such writ shall be issued upon the filing of the application provided for in Section 538. A writ of attachment (1) which is issued under this subdivision and levied upon property of a defendant described in subdivision (d) of Section 537.2 but who is not described in subdivision (a), (b) or (c) of Section 537.2, or (2) which is issued under this subdivision based upon a claim which is not described in subdivision (a) of Section 537.1, shall be released and discharged by the court upon motion of the defendant if the defendant files a general appearance in the action. If a writ of attachment is issued under this subdivision and levied upon property of a defendant who is described in subdivision (a), (b) or (c) of Section 537.2 based upon a claim described in subdivision (a) of Section 537.1, the defendant may at any time after such levy, upon seven business days' notice to the plaintiff, request a hearing pursuant to Section 538.4. At such hearing, unless the court makes the findings required by that section for the issuance of a writ of attachment, it shall release and discharge the writ.

Not continued. See Note to § 485.010.

§ 484.240

539. (a) Before issuing the notice and order pursuant to Section 538.1 or the writ pursuant to Section 538.5, the plaintiff must file with the clerk or judge a written undertaking with two or more sufficient sureties, to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the restraining order or the attachment, not exceeding the sum specified in the undertaking, and that if 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 the plaintiff will pay all damages which the defendant may have sustained by reason of the restraining order or the attachment, not exceeding the sum specified in the undertaking. The sum specified in the undertaking shall be one-half (1/2) of the principal amount of the total indebtedness or damages claimed, excluding attorneys' fees. Nothing herein shall be construed to preclude the acceptance of an undertaking in which a larger sum is specified, if such undertaking be offered. The court on ex parte application of the plaintiff, may by written order, direct the issuance of the restraining order or the writ on the filing of an undertaking in a lesser sum, if the court is satisfied that the defendant will be adequately protected thereby. The damages recoverable by the defendant pursuant to this section shall include all damages proximately caused by the service of the restraining order or the levy of the writ of attachment.

§ 489.210

§ 489.040

Compare § 490.020

§ 489.220

§ 489.060

Not continued. See § 489.220.

Compare § 490.020

§ 539

At any time after the issuing of the restraining order or the attachment, but not later than five days after actual notice of the levy of the writ of attachment, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When excepted to, the plaintiff's sureties, within five days from service of written notice of exception, upon notice to the defendant of not less than two nor more than five days, must justify before the judge or clerk of the court in which the action is pending, in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the writ of attachment must be vacated.

§§ 489.070, 489.080,
489.120

Compare § 489.030

§ 489.090

The court, at any time after issuance of the restraining order or the writ, on motion of the defendant, after notice to the plaintiff, or at the hearing pursuant to Section 538.4, may order the amount of the undertaking increased.

§ 489.220(b)

(b) The liability of any surety furnishing a bond pursuant to this section, if any, may be enforced on motion in the trial court without the necessity of an independent action. Notice of the motion shall be served on the persons whose liability is sought to be enforced at least 30 days prior to the time set for hearing of the motion. The notice shall state the amount of the claim and shall be supported by an affidavit or affidavits setting forth the facts on which the claim is based. Such notice and affidavit may be served in accordance with any procedure authorized by Chapter 5 (commencing with Section 1010), Title 14, Part 2. Judgment may be entered in accordance with the notice against the person or persons served therewith, unless such person or persons shall serve and file an affidavit or affidavits in opposition to the motion showing such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such showing is made, the issues to be tried shall be specified by the court and trial thereof shall be set for the earliest date convenient to the court, allowing sufficient time for discovery. The surety shall not obtain a stay of the proceedings pending the determination of any third-party claims. Affidavits filed pursuant to this section shall conform to the requirements prescribed for affidavits filed pursuant to Section 437c.

Not continued here.
See § 1058a as
added by Cal. Stats.
1972, Ch. 391
(A.B. 605).

§ 539a. Levy on bank account, savings and loan association, share or certificate, or property in safe deposit box not wholly in name of defendant

If the debt, credit, or other personal property sought to be attached is (a) any bank account, or interest therein, not standing in the name of the defendant or defendants or standing in the name of the defendant or defendants and one or more other persons who are not defendants, or (b) any savings and loan association share, investment certificate, or account, or interest therein, not standing in the name of the defendant or defendants or standing in the name of the defendant or defendants and in one or more other persons who are not defendants, or (c) 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 or persons other than a defendant or defendants or rented by it to one or more such defendants and to one or more other persons who are not defendants, the provisions of this section and of Section 539 shall be complied with; otherwise, the levy shall not be effectual for any purpose and shall be disregarded. The plaintiff shall provide and concurrently with the levy of the writ of attachment the sheriff, constable, or marshal shall deliver to such bank, trust company, savings and loan association, or safe deposit corporation a bond in an amount not less than twice the amount of the plaintiff's claim indemnifying the person or persons, other than the defendant or defendants whose interest is sought to be attached, rightfully entitled to such debt, credit, or other personal property (which person or persons need not be named specifically in said bond 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 such debt, credit, or other personal property and assuring to such person or persons the return thereof to him or them upon proof of his or their right thereto. Upon delivery to it of the aforesaid bond such bank, trust company, savings and loan association, or safe deposit corporation shall comply with the writ of attachment and shall not be liable to any person by reason of such compliance or by reason of the nonpayment of any check or other order for the payment of money drawn against the account or other credit so attached and presented while the attachment is in force or by reason of refusal to pay any withdrawal in respect of the share, investment certificate or account so attached while the attachment is in force or by reason of the removal, pursuant to the levy, of any of the contents of such safe deposit vault or box or by reason of the refusal of such bank, trust company, savings and loan association, or safe deposit corporation to permit access to such safe deposit vault or box by the renter thereof. The bond described above shall be executed by the plaintiff or plaintiffs with two or more sufficient sureties. Exceptions to the sufficiency of the sureties may be taken by any person claiming to be the rightful owner of the debt, credit, or other personal property levied upon, in the same manner as that provided in Section 539 of this code and when excepted to the sureties must justify in the same manner as that provided in said

§ 489.240(a)

Compare § 489.060

§ 489.240(b)

§ 488.390(c)

§ 489.040, 489.070,
489.080, 489.240(c)

§ 539a

Section 539. The bank, trust company, savings and loan association, or safe deposit corporation to whom any such bond is delivered shall deliver it as directed by the obligees thereof. 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.

Not continued. See
Comment to § 489.240.

relocate to Fin. Code
§ 1650

§ 540. Direction and command of writ; undertaking in lieu of property; statement of nature of defendant's title; multiple writs

The writ must be directed to the sheriff, or a constable, or marshal of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from attachment, or so much of the property of such defendant as may be sufficient to satisfy the plaintiff's demand against such defendant, the amount of which must be stated in conformity with the amount stated in plaintiff's affidavit filed pursuant to Section 538, not exceeding the amount of the complaint, unless such defendant give him security by the undertaking of at least two sufficient sureties, which must first be approved by a judge of the court issuing the writ, or if said writ of attachment is issued to another county then by a judge of a court, having jurisdiction in cases involving the amount specified in the writ, in the county where the levy shall have been, or is about to be, made, or deposit a sum of money with the sheriff, constable, or marshal in an amount sufficient to satisfy such demand against such defendant, in addition to those costs actually incurred to the time of giving the undertaking or the deposit of money with the sheriff, constable, or marshal, a sum not to exceed 25 percent of the amount of the plaintiff's demand, and in no event more than one thousand dollars (\$1,000), or in an amount equal to the value of the property of such defendant which has been or is about to be attached, in which case to take such undertaking or sum of money in lieu of the property which has been or is about to be attached.

§ 488.030

Not continued. See
§ 488.010.

§ 489.310(a)-(c)

In the event that the action is against more than one defendant, any defendant whose property has been or is about to be attached in the action may give the sheriff, constable, or marshal such undertaking which must first be approved by the judge as hereinabove provided, or deposit such sum of money, and the sheriff, constable, or marshal shall take the same in lieu of such property. Such undertaking, or the deposit of such sum of money, shall not subject such defendant to, or make him answerable for, any demand against any other defendant, nor shall the sheriff, constable, or marshal thereby be prevented from attaching or be obliged to release from attachment, any property of any other defendant. However, such defendant, at the time of giving such undertaking to, or depositing such sum of money with the sheriff, constable, or marshal, shall file with the sheriff, constable, or marshal a statement, duly verified by his oath, wherein such defendant shall state the character of his title to the attached property and the manner in which he acquired such title, and aver and declare that the other defendant or defendants, in the action in which said undertaking was given or such sum of money was deposited, has or have not any interest or claim of any nature whatsoever in or to said property.

§ 489.310(a)

§ 540

Several writs may be issued upon the same affidavit and undertaking simultaneously or from time to time within 60 days after the filing of the affidavit and undertaking, to the sheriffs, constables, or marshals of any county or counties, whether or not any writ previously issued has been returned.

See Chapter 4, Articles 2 and 3, and Chapter 5, Article 3. See also Comment to Section 484.310.

541. Securities, as defined in the Commercial Code, shall be levied upon as provided by Division 8 (commencing with Section 8101) of the Commercial Code.

§ 488.410

§ 542. Instructions; manner of execution of writ

The sheriff, constable, or marshal, to whom the writ is directed and delivered, must, upon receipt of instructions in writing, signed by the plaintiff or his attorney of record, and containing a description of the property, and in the case of real property or growing crops the name of the record owner of the real property to be attached, or upon which the crops are growing, execute the same without delay, and if the undertaking mentioned in Section 540 of this code be not given, as follows:

See §§ 488.010, 488.030.

1. Real property in name of defendant.

1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by recording with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by 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, description and notice, or if there is no occupant then on the property, then, by posting the same in a conspicuous place on the property attached. Service upon the occupant may be made by leaving said copy of the writ, description 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 thereof 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 notice 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, one service or posting need be made as to each such continuous, unbroken tract.

§ 488.310

1a. Crops growing on real property in name of defendant.

1a. Growing crops (which, until severed, shall be deemed personal property not capable of manual delivery), growing upon real property standing upon the records of the county in the name of the defendant, must be attached by recording with the recorder of the county a copy of the writ, together with a description of the growing crops to be attached, and of the real property upon which the same are growing, and a notice that such growing crops are attached in pursuance of the writ, and by 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 description and notice, or if there is no occupant then on the real property, then,

§ 488.340(a)

by posting the same in a conspicuous place on the real property. Service upon the occupant may be made by leaving said copy of the writ, description and 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. Where the real property described in the notice 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, one service or posting need be made as to each such continuous unbroken tract.

§ 488.340(c)

§ 488.340(a)

Whenever growing crops have been attached under the provisions of this subdivision, which will greatly deteriorate in value, unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the person in whose favor the writ runs, and after due notice to the owner of said property, may direct the sheriff to take possession of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold on execution and the proceeds must be retained by the sheriff to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall order said applicant to pay such expenses in advance if the court may deem it proper, or may direct that the whole or any part of such expenses be paid from the proceeds of any sale of such property.

§ 488.510

2. Real property in name of third party.

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached in the same manner as is real property standing upon the records of the county in the name of the defendant by the provisions of subdivision 1 of this section and the notice of attachment shall state that the real property therein described, and any interest of the defendant therein held by or standing on the records of the county in the name of such other person (naming him), are attached. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if within the county. The recorder must 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.

§ 488.310

2a. Crops growing on real property in name of third party.

2a. Growing crops (which, until severance, shall be deemed personal property not capable of manual delivery), or any interest therein, belonging to the defendant, and growing upon real property held by any other person or standing upon the records of the county in the name of any other person, must 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 by the provisions of subdivision 1a of this section, and the notice of attachment shall state that the crops therein described or any interest of the defendant therein, held by, or standing upon the records of the county in the name of, such other person (naming him), are attached in pursuance of the writ. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if known and within the county. The recorder must 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.

§ 488.340(a), (c)-(e)

§ 488.340(b)

Whenever growing crops have been attached under the provisions of this subdivision, which will greatly deteriorate in value unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the person in whose favor the writ runs, and with or without notice as the court directs to the owner of said property, may direct the sheriff to take possession of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold under execution and the proceeds must be retained by the sheriff to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall order said applicant to pay such expenses in advance if the court may deem it proper, or may direct that the whole or any part of such expenses be paid from the proceeds of any sale of such property.

§ 488.510

3. Deliverable personal property.

3. Personal property, capable of manual delivery, in the possession of the defendant, must be attached by taking it into custody. When the personal property is used as a dwelling, such as a housetrailer, mobilehome, or boat, the same is to be attached by placing a keeper in charge of the property, at plaintiff's expense, for at least two (2) days. At the expiration of said period the officer shall remove its occupants, and take the property into his immediate custody, unless other disposition is made by the court or the parties to the action. Whenever a levy under attachment or execution shall be made on personal property, other than money, or a vehicle required to be registered under the Vehicle Code belonging to a going concern, then the officer making the levy must, if the defendant consents, place a keeper in charge of said property levied upon, at plaintiff's expense, for at least two days, and said keeper's fees must be prepaid by the levying creditor. During said period defendant may continue to operate in the ordinary course of 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 creditor. After the expiration of said two days the sheriff, constable, or marshal shall take said property into his immediate possession unless other disposition is made by the court or the parties to the action.

§ 488.320

Not continued. See Note to § 488.320.

§§ 488.350-488.370

4. Deliverable personal property; deposit for expenses of taking and keeping.

4. In cases where the sheriff, constable, or marshal is instructed to take into possession personal property capable of manual delivery, whether the same is to be placed in a warehouse or in custody of a keeper, the sheriff, constable or marshal shall require, as a prerequisite to the taking of such property, that in addition to written instructions the plaintiff or his attorney of record deposit with the sheriff, constable or marshal, 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 a further detention of said property is required, the sheriff, constable or marshal must, 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 five days each. Such demand must be served as provided in Section 1011 of this code, 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 sheriff, constable or marshal shall release the property to the person or persons from whom

§ 488.050

the same was taken. There shall be no liability upon the part of the sheriff, constable or marshal to take or hold personal property unless the provisions of this section shall have been fully complied with. There shall be no liability upon the part of the sheriff, constable or marshal, either to the plaintiff or the defendant for loss by fire, theft, injury or damage of any kind to personal property capable of manual delivery while in the possession of the sheriff, constable or marshal either in a warehouse or in the custody of a keeper or en route to or from a warehouse unless the sheriff, constable or marshal shall be negligent in his care or handling of the property.

\$ 488.060

5. Debts, credits, judgments, and personal property not capable of manual delivery.

5. With the exception of earnings of the defendant which are exempt as provided in Section 690.6, debts, credits, judgments, and other personal property not capable of manual delivery shall be attached by leaving with the persons owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent or, in the case of a corporation, with the president of the corporation, vice president, secretary, assistant secretary, cashier, or managing agent thereof, a copy of the writ, and, if the demand as stated in the writ does not exceed three hundred dollars (\$300) exclusive of interest, attorney's fees and costs, a copy of the complaint in the action from which the writ issued, and, in every case, a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ. However, whenever a judgment has been attached under the provisions of this subdivision, a copy of the writ and notice shall be filed in the action from which the judgment arose and served upon the judgment creditor of such action. However, debts owing to the defendant by any of the following financial institutions: (a) banks; (b) savings and loan associations; (c) title insurance companies or underwritten title companies (as defined in Section 12402 of the Insurance Code); (d) industrial loan companies (as defined in Section 18003 of the Financial Code), maintaining branch offices, or credits or other personal property whether or not the same is capable of manual delivery, belonging to the defendant and in the possession of or under the control of such financial institution shall be attached by leaving a copy of the writ and the notice, together with a copy of the complaint if required hereunder, with the manager or other officer of such financial institution at the office or branch thereof at which the account evidencing such indebtedness of the defendant is carried, or at which such financial institution has credits or other personal property belonging to the defendant in its possession or under its control; and no attachment shall be effective as to any debt owing by such financial institution if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served.

\$\$ 488.320,
488.380-488.400,
488.440

See § 488.040

\$ 488.420

\$ 488.040

6. Commercial paper.

6. When checks, drafts, money orders and other orders for the withdrawal of money from a banking corporation or association, the United States, any state or public entity within any state, payable to the defendant or judgment debtor on demand, come into the possession of a levying officer under a writ of attachment or execution, the sheriff, constable, or marshal, to whom the writ is directed and delivered, shall promptly thereafter endorse the same and present, or cause the same to be presented, for payment. The sheriff, constable, or marshal shall endorse such check, draft, money

\$ 488.500

order or other order for the withdrawal of money by writing the name of the defendant or judgment debtor thereon and the name and official title of the officer making the levy with the statement that such endorsement is made pursuant to levy of writ of attachment or execution and giving the title of court and cause in which such writ was issued, and such endorsement shall be sufficient endorsement and no banking corporation or association or public entity on which said check, draft, money order or other order for the withdrawal of money is drawn shall incur any liability to any person, firm or corporation by reason of paying to such officer such check, draft, money order or other order for withdrawal of money by reason of such endorsement, nor shall the officer making the levy incur any liability by reason of his endorsing and presenting for and obtaining payment of such check, draft, money order or other order for the payment of money; provided, however, that the funds or credit resulting from the payment of such check, draft, money order or other order for withdrawal of money shall be held by said officer subject to the levy of said writ of attachment or execution. If it appear from the face of such check, draft, money order or other order for the withdrawal of money that the same has been tendered to the defendant or judgment debtor in satisfaction of a claim or demand and that endorsement thereof shall be considered a release and satisfaction by defendant or judgment debtor of such claim or demand, then, in such event, the officer making the levy shall not endorse said check, draft, money order or other order for the withdrawal of money unless the defendant or judgment debtor shall first endorse the same to the officer making the levy; provided, however, that if said defendant shall not endorse said check, draft, money order or other order for withdrawal of money to the officer making the levy, said officer may thereafter hold such check, draft, money order or other order for the withdrawal of money subject to such levy and shall incur no liability to the defendant or judgment debtor or to any other person, firm or corporation for delay in presentment of the same for payment.

§ 488.500

542.1. Notwithstanding the provisions of Section 542, a writ of attachment shall be levied upon any equipment (as defined in the Commercial Code), other than a motor vehicle or boat required to be registered, belonging to the defendant by the filing of a notice 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.

§ 488.350

542.2. (a) The fee for filing and indexing each notice of attachment lien or notice affecting a notice of attachment lien in the office of the Secretary of State is three dollars (\$3). § 488.350(a)

(b) When a notice of attachment lien has been filed and the plaintiff, for whatever reason, no longer has an attachment lien in the equipment of the defendant, the sheriff, marshal or constable shall sign a notice to that effect for filing with the Secretary of State. § 488.560

(c) A filed notice of attachment lien is effective for a period of five years from the date of filing. The effectiveness of the filed notice of attachment lien lapses on the expiration of such five-year period unless sooner terminated pursuant to subdivision (b) or unless a notice of continuation is filed pursuant to Section 542.4 prior to such lapse. § 488.500(c)
§ 488.510

542.3. 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 lien, 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-lienor. 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 lien or notice affecting a notice of attachment lien for a fee of one dollar (\$1) per page. see Note to § 488.350

542.4. When more than four years and six months has elapsed after the filing of the notice of attachment lien and there is no final judgment in the action, the plaintiff may, upon notice to the defendant, apply to the court for an order directing the sheriff, marshal or constable to sign a notice of continuation of notice of attachment lien for filing with the Secretary of State if the lien is still in effect under Section 542c.

The court shall issue the order if it finds that the lien has been extended or the court concurrently extends the lien under Section 542c for a period beyond the expiration of the five years specified in Section 542.2. Upon issuance of the order, the sheriff, marshal or constable shall sign a notice of continuation of notice of attachment lien for filing with the Secretary of State prior to the lapse of the notice of attachment lien. Upon timely filing of the notice of continuation, the effectiveness of the original notice of attachment lien is continued for five years from the time when it would otherwise have lapsed, whereupon it shall lapse thereafter in the same manner as provided in subdivision (c) of Section 542.2. § 488.510

§ 542a. Lien on real estate; time effective; duration; termination; extension

The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated; provided, however, that in the event that the sheriff, constable, or marshal does not complete the execution of said writ in the manner prescribed in Section 542 of this code within a period of 15 days next following said recording in the recorder's office then said lien shall cease at the expiration of said period of 15 days.

§ 486.500(a)

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the recording with the recorder of an abstract of the judgment in the action. At the expiration of three years the lien shall cease and any proceeding or proceedings against the property under the attachment shall be barred; provided, that upon motion of a party to the action, made not less than five nor more than 60 days before the expiration of said period of three years, the court in which the action is pending may extend the time of said lien for a period not exceeding two years from the date on which the original lien would expire, and the lien shall be extended for the period specified in the order upon the recording before the expiration of the existing lien, of a certified copy of the order with the recorder of the county in which the real property attached is situated. The lien may be extended from time to time in the manner herein prescribed.

§ 488.510

542b. The service upon the defendant of a notice and order pursuant to Section 538.2 creates a lien upon all of his personal property subject to the levy of a writ of attachment pursuant to this chapter and owned by him at the time of such service or the proceeds thereof. Such lien, however, shall not be valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business. Such lien shall terminate 30 days after the service of the notice and order upon the defendant; except with respect to property upon which a writ of attachment has been levied during that period and upon the filing by the defendant of a proceeding under the National Bankruptcy Act or the making by the defendant of a general assignment for the benefit of creditors, such lien shall terminate with respect to all property upon which a writ of attachment has not been levied prior to such event. The levy of a writ of attachment shall perfect the lien created by the service of the notice and order against a bona fide purchaser and a transferee in the ordinary course of business and the levy of a writ of attachment in those cases where it is not preceded by the service of a notice and order shall create a lien upon the property levied upon which is valid against all third persons.

§ 486.110(a)

§ 486.110(b)

§ 486.110(c)

not continued; but see
§§ 486.110(b),
488.500(i)

§ 488.500(a)

542c. An attachment of personal property shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on shall be released from the operation of the attachment at the expiration of one year from the date of the levy of the writ unless a notice of readiness for trial is filed or a judgment is entered against the defendant in the action in which the attachment was issued within that period, in which case the attachment shall continue in effect until released or vacated after judgment as provided in this chapter. However, upon motion of the plaintiff, made not less than 10 nor more than 60 days before the expiration of such period of one year, and upon notice of not less than five days to the defendant, the court in which the action is pending may, by order filed prior to the expiration of the period, extend the duration of the attachment for an additional period or periods as the court may direct, if the court is satisfied that the failure to file the notice of readiness is due to the dilatoriness of the defendant and was not caused by any action of the plaintiff. The attachment may be extended from time to time in the manner herein prescribed.

§ 488.510

§ 543. Third party indebted to defendant or possessing or controlling property or credits of defendant; exception

Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or owes any debt to the defendant, the sheriff, constable, or marshal shall serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ, except that earnings of the defendant for his personal services are exempt from attachment, as provided in Section 690.6.

see generally § 488.030

see § 487.010

§ 544. Third party indebted to defendant or possessing or controlling property or credits of defendant; liability to plaintiff; release of attachment or garnishment

All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in this chapter, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, constable, or marshal, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment or garnishment be released or discharged or any judgment recovered by him be satisfied.

§§ 488.330(b), 488.550

The levying officer shall release such attachment or garnishment in full or in part as required, by issuing a written release addressed to the person served with the copy of the writ and notice, upon (1) written direction of the plaintiff or his attorney, or (2) upon receipt by the officer of an order of the court in which the action is pending, or a certified copy thereof, discharging or dissolving the attachment or garnishment or releasing the property; provided, no appeal is perfected and undertaking executed and filed as provided in Section 946 of this code or a certificate to that effect has been issued by the clerk of the court, or (3) in all other cases provided by law. There shall be no liability for such persons acting in conformity with such releases or for such officers releasing such attachments or garnishments in accordance with the foregoing.

see § 488.560

§ 545. Third party indebted to defendant or possessing or controlling property or credits of defendant; examination

Any person owing debts to the defendant, or having in his possession, or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court, judge, or referee may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff, constable, or marshal on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

§ 491.010(a)

§ 491.040

§ 491.010(c)

If the defendant or other person ordered to appear pursuant to this section fails to do so, and if the order requiring his appearance has been served by a sheriff, constable, marshal, or some person specially appointed by the court in the order, the judge may, pursuant to a warrant, have such defendant or other person brought before the court to answer for such failure to appear.

§ 491.010(b)

§ 545.1 Examination; attendance of persons outside county; 150 mile limit

No person shall be required, pursuant to Section 545 of this code, to attend before a judge or referee outside of the county in which he resides or in which he has a place of business, unless the distance to the place of trial is less than 150 miles from his place of residence or place of business.

§ 491.020

§ 545.2 Order for examination of defendant or garnishee outside county of residence or place of business

When a defendant or a garnishee does not reside or have a place of business in the county where the action is pending, an order for his examination, authorized by Section 545 of this code, may be made by any judge of a court of similar jurisdiction of the county where the defendant or garnishee resides or has a place of business, or if no court of similar jurisdiction is in the county, by a court of higher jurisdiction therein, upon filing with the clerk or the judge of the court a certified copy of the complaint in the pending action and upon presenting to the judge of the court an affidavit showing the existence of the facts required to be shown herein. At the time of filing the certified copy of the complaint, there shall be paid to the clerk or judge, as and for a filing fee, the sum of four dollars (\$4) when filed in a justice court; the sum of five dollars (\$5) when filed in a superior court.

§ 491.030(a)

§ 491.030(b)

§ 545.3 Witnesses; compelling appearance; testimony

In any proceeding for the examination of a defendant or a garnishee under this chapter, witnesses may be required to appear and testify before the judge or referee in the same manner as upon the trial of an issue.

§ 491.040

§ 546. Inventory; memorandum; time limit

The officer levying the attachment must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached and other personal property not in the possession of the defendant, he must request, at the time of service, the party owing the debt or having the credit or other personal property belonging to the defendant to give him a memorandum, stating the amount and description of each, within 10 days after such service; and if such memorandum be refused, he must return the fact of such refusal with the writ. The party refusing to give the memorandum within the time specified may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debts or credits or other personal property.

§ 488.070(b)

§ 488.330(d)

§ 547. Perishable property; sale; custody of proceeds; collection of debts and credits attached

If any of the property attached be perishable, the officer levying the attachment must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the levy of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The receipt of such officer is a sufficient discharge for the amount paid.

§ 488.510

§ 487.520

§ 547a. Receiver for perishable property or to cultivate, care for and preserve property; sale; proceeds; fees; expenses

Whenever a writ of attachment is issued and the holder of such writ desires to attach, or has attached, property which is perishable, or which will greatly deteriorate in value unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the holder thereof, and after due notice to the owner of said property, may appoint a receiver to take charge of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold on execution and the proceeds must be retained by such receiver to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall fix the fee per day of such receiver and may order said applicant to pay such fee and expenses of said receiver in advance if the court may deem it proper, 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.

§ 488.510

§ 548. Sale; prerequisites

Whenever property has been taken by an officer under a writ of attachment and it is made to appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only (1) after notice to the adverse party or his attorney in case such party has been personally served with a summons in the action or, (2) after an order of service of summons by publication has been made.

§ 488.510

§ 549. Third party claims; personal property

In cases where a third person claims, as his property, any personal property attached, the rules and proceedings applicable in cases of third party claims after levy under execution shall apply.

§ 488.080

§ 550. Satisfaction of judgment; proceeds of perishable property sold, debts or credits collected; sales under execution; notices

If judgment be recovered by the plaintiff, the sheriff, constable, or marshal must satisfy the same out of the property attached by him which has not been delivered to the defendant, or released because of a third party claim, or subjected to a prior execution or attachment, if it be sufficient for that purpose:

§ 684.2; see Note
to § 488.570

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

§ 684.2; see Note to § 488.570

§ 551. Balance due after applying proceeds of attached property; collection; return of surplus

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff, constable, or marshal must proceed to collect such balance, as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, constable, or marshal upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

§ 684.2; see Note to § 488.570

§ 552. Actions on undertakings

WHEN SUITS MAY BE COMMENCED ON THE UNDERTAKING: If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to Section 540 or Section 555, or he may proceed, as in other cases, upon the return of an execution.

See §§ 489.120; 1058a.

§ 553. Judgment for defendant; release of property and return of proceeds; increase in and continuance of undertaking

If the defendant recovers judgment against the plaintiff, and no timely motion for vacation of judgment, or for judgment notwithstanding the verdict, or for a new trial, is filed and served, and no appeal is perfected and undertaking executed and filed as provided in Section 921 of this code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, constable, or marshal and all the property attached remaining in such officer's hands, must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom; provided, that at any time after entry of judgment and before perfection of the appeal under the provisions of Section 921 of this code, upon motion of the defendant, the trial court may order an increase in the amount of the original undertaking on attachment in such amount, if any, as is justified by the detriment reasonably to be anticipated by continuing the attachment. Unless such undertaking shall be executed and filed by at least two sureties within 10 days after such order, the order of attachment shall be discharged, and the property released therefrom. The sureties may be required to justify before the court within 10 days after the undertaking is filed and if they fail to do so, the order of attachment shall be discharged and the property released therefrom. If an order increasing the undertaking is made, the amount of the

§ 488.570

§ 489.410

undertaking on appeal required by Section 921 of this code shall be the same as the amount fixed by the trial court in said order. Neither the pendency nor granting of a motion timely filed and served for vacation of judgment, or for judgment notwithstanding the verdict or for new trial shall continue force an attachment, unless an undertaking be executed and filed on the part of the moving party by at least two sureties that the moving party will pay all costs and damages sustained by continuing the attachment. The undertaking may be included in the undertaking specified in Section 921. If not so included, the same procedure shall apply as in case of an undertaking pursuant to Section 921.

§ 489.410

§ 553.5 Release from attachment upon filing of undertaking on appeal

Whenever a defendant appeals and the enforcement of the judgment against him is stayed by the filing of a sufficient undertaking on appeal as provided by this code, all property of said defendant which has been attached in said action shall be released from the attachment levy upon the justification of the defendant's sureties, or written waiver thereof, or upon the failure of the respondent to except to said sureties within five days after written notice of the filing of the undertaking. If the officer's fees for services rendered on the attachment are unpaid, such officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

§ 489.420

§ 554. Application for discharge of attachment; undertaking; order; delivery of property; justification of sureties

Whenever any defendant has appeared in the action, such defendant may upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment wholly, or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment, any or all of the property of such defendant attached; and all of the property so released and all of the proceeds of the sales thereof, must be delivered to such defendant upon the justification of the sureties on the undertaking, if required by the plaintiff. Such justification must take place within five days after the notice of the filing of such undertaking.

§ 489.310

§ 555. Undertaking for discharge of attachment; sureties; amount; justification

Before making such order, the court or judge must require an undertaking on behalf of such defendant, by at least two sureties, residents and freeholders, or householders in the State to the effect that in case the plaintiff recovers judgment in the action against the defendant, by whom, or in whose behalf such undertaking shall be given, such defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of any judgment in such action against said defendant, or in default thereof, that such defendant and sureties will, on demand, pay to the plaintiff the full value of the property released not exceeding the amount of such judgment against such defendant. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge and the property attached cannot be released from the attachment without their justification if the same is required.

§ 489.310

§ 556. Discharge for irregularity

The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

§§ 484.060, 485.240

§ 557. Motion for discharge made on affidavit may be opposed by affidavit

WHEN MOTION MADE ON AFFIDAVIT, IT MAY BE OPPOSED BY AFFIDAVIT. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

cf. §§ 484.070,
484.090

§ 558. Discharge for irregularity; amendments

If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged; *provided* that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter.

§ 485.240(c). See also
Comment to § 485.240.

§ 559. Return of writ

The sheriff, constable, or marshal must return the writ of attachment with the summons, if issued at the same time, and may return it separately from the summons if issued at a later time. The writ of attachment must be returned forthwith after levy and service in accordance with the instructions given to the officer at the time such writ or writ and summons are delivered to him, but in no event later than 30 days after its receipt, with a certificate of his proceedings endorsed thereon or attached thereto, together with the undertaking given under the provisions of Section 540 of this code to prevent or release the levy of the attachment, to the clerk of the court from which said writ of attachment was issued, except that if cash has been deposited with such levying officer in lieu of an undertaking as permitted by Section 540 of this code, such cash shall be retained in such levying officer's trust fund, and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be recorded in the offices of the county recorders in which the notices of attachment have been recorded, and be indexed in like manner.

§ 488.070(a)

Not continued; see
§ 489.310

§ 488.560(c)

§ 559½. Alias writs; issuance

After the return and filing of the writ of attachment, or upon filing by the plaintiff of a verified affidavit setting forth the loss of the writ of attachment, the clerk, upon demand of the plaintiff at any time before judgment, may issue an alias writ which shall be in the same form as the original, without requirement of a new affidavit for attachment or of a new undertaking as provided in Section 539 of the Code of Civil Procedure.

see § 484.310 and
Comment thereto

The provisions of this section do not prohibit the issuance of several writs as provided for in Section 540.

§ 560. Real estate; release; manner

An attachment as to any real property may be released by a writing signed by the plaintiff, or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property.

§ 488.560(c)

§ 561. Interest in estate of decedent

The interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered and the personal representative shall report such attachment to the court when any petition for distribution is filed, and in the decree made upon such petition distribution shall be ordered to such heir, legatee or devisee, but delivery of such property shall be ordered to the officer making the levy subject to the claim of such heir, legatee or devisee, or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing such interest has become final.

§ 488.430