#39.70 2/1/73

First Supplement to Memorandum 73-5

Subject: Study 39.70 - Prejudgment Attachment

Attached to this memorandum are the handful of sections of the tentative recommendation relating to prejudgment attachment which were reviewed in part at the January 1973 meeting. (The issues relating to nonresident attachment are discussed separately in Memorandum 73-20.) These sections have been revised in light of the discussion at that meeting and can be inserted in your prejudgment attachment binder in place of the sections with the same number which were distributed for January. Some problems still remain in connection with these sections. These problems are noted either below or in Memorandum 73-5.

The Attachment Title

Section 481.030. The Comment to this section has been revised primarily to refer to those cases which provide that an attachment levy is effective only as to a debt which has accrued at the time of the levy.

Section 483.010. This section has been revised to add the introductory clause--"Except as otherwise provided by statute." The last paragraph of the Comment has been added to refer to those additional statutes which authorize attachment under the present tentative recommendation.

Section 487.010. Subdivisions (a) and (b) of this section have been revised as the Commission directed by adding the phrase "subject to levy." The staff believes that greater clarity could be achieved if these subdivisions were revised again as follows:

487.010. The following property shall be subject to attachment:

(a) Where the defendant is a corporation, all corporate property for which a method of levy is provided by Article 2 (commencing with

Section 488.310) of Chapter 8 of this title.

(b) Where the defendant is a partnership, all partnership property for which a method of levy is provided by Article 2 (commencing with Section 488.310) of Chapter 8 of this title.

* * * * *

Further issues in connection with this section are discussed in Memorandum 73-5.

Section 488.400. This section and the Comment thereto have been revised in accordance with the Commission's directions to permit levy by seizure only where the defendant is the person in possession of the instrument, document, or money.

Section 488.410. This section and its Comment have also been revised in accordance with the Commission's directions at the January 1973 meeting.

Section 491.010. We have revised this section to implement the policy adopted by the Commission at the January meeting. It should be noted that property in the third person's possession may be attached (by garnishment pursuant to Section 488.330), but no turnover order is permitted unless the third person disclaims any interest in the property. The staff has no objection to the policy adopted. However, at the January meeting, we expressed the opinion that the section as now drafted continues existing law. We have done further research and have discovered no case in point as to the circumstances in which a turnover order may be issued. The cases do make clear that the court has no jurisdiction in these supplementary proceedings to determine title to the property. See, e.g., Takahashi v. Kunishima, 34 Cal. App.2d 367 (1939); Bunnell v. Wynns, 13 Cal. App.2d 114 (1936). These cases do not, however, deal with the separate and distinct problem of protective orders, including an order requiring delivery to the custody of the sheriff pending a determination of who is entitled to the property. In short, we

believe that Section 491.010 makes clear a point that was not clear under its predecessor (Section 545).

Conforming Changes

Agricultural Code Section 281. This section has been revised in an attempt to make clear that the separate authority to attach formerly provided by this section is retained, but that the issuance of the attachment shall be in the manner provided by the new attachment title. Similar revisions accomplishing the same purpose have been made to Financial Code Section 3144, Health and Safety Code Section 11680.5, and Revenue and Taxation Code Sections 6713, 7864, 8972, 10074, 11472, 12680, 18833, 26251, 30302, and 32352.

Business and Professions Code Section 6947. We have made no change in this section, but we have attempted to make clear in the Comment that this section does not provide separate authorization to attach.

Code of Civil Procedure Section 684.2. We have revised subdivision (c) to conform to changes made previously to Section 488.560 that were overlooked when this section was first drafted.

Code of Civil Procedure Section 688. This section has been revised in conformity with the Commission's directions at the January meeting and to provide a garnishment procedure for levy on intangibles not covered under the attachment title. We have not dealt with the problem of levy on causes of action and judgments. We are not making any change in the law in this regard, and we believe that this problem is one that should be deferred until work is done on the revision of the execution chapter generally.

Code of Civil Procedure Section 1174. This is another conforming change which we missed earlier. For the time being we have simply incorporated the

proper cross-reference. When we have determined what the service provisions are to be under Section 488.310, we will have to reexamine this section to determine whether those service provisions are adequate here. See Memorandum 73-5.

Respectfully submitted,

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Assistant Executive Secretary

§ 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. However, the term "account receivable" is used in this title because it is more descriptive than "acccunt" and because it avoids confusion with the term "deposit account." Compare Section 481.080 ("deposit account" defined). Section 481.030 also substitutes the terms "negotiable instrument" and "security" for the term "instrument" used in Section 9106. However, the substance of the Commercial Code is retained. Compare Sections 481.060 ("negotiable instrument" defined) and 481.210 ("security" defined) with Commercial Code Section 9105(1)(g)("instrument" defined).

Section 481.030 also makes clear that the right to payment must have been earned at the time of levy. This continues former attachment law. See, e.g., Brunskill v. Stutman, 186 Cal. App.2d 97, 8 Cal. Rptr. 910 (1960); Philbrook v. Mercantile Trust Co., 84 Cal. App. 187, 257 P. 882 (1927). See also Dawson v. Bank of America, 100 Cal. App.2d 305, 223 P.2d 280 (1950).

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

CHAPTER 3. ACTIONS IN WHICH ATTACHMENT AUTHORIZED

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

483.010. (a) Except as otherwise provided by statute, 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 subdivision (a) of former Section 537.1. Subdivision (a) of former Section 537.1 appeared to attempt to limit attachment to cases arising out of commercial transactions. Section 483.010 accomplishes this same end 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.

The introductory clause to Section 483.010 recognizes the authority to attach granted by other miscellaneous statutory provisions. See Agri. Code § 281, Civil Code §§ 3065a and 3152, Fin. Code § 3144, Health & Saf. Code § 11680.5, Labor Code § 5600, and Rev. & Tax. Code §§ 6713, 7864, 8972, 10074, 11472, 12680, 18833, 26251, 30302, and 32352.

[page 72 is omitted]

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 subject to levy.

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

(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. The introductory paragraph of former Section 537.3 provided that property exempt from execution was not subject to attachment. The next to last paragraph of subdivision (b) of Section 537.3 provided that property necessary for the support of the defendant and his family was not subject to attachment. These provisions are continued in Section 487.020.

Subdivisions (a) and (b) of Section 487.010 are substantively the same as subdivision (a) of former Section 537.3. These subdivisions have been revised to make clear that property which is not subject to levy, e.g., copyrights and patents, is not subject to attachment.

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.

[page 135 is omitted]

§ 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) if the property is in the possession of the defendant, 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, 41 P. 801 (1895)(credit), and Gow v. Marshall, 90 Cal. 565, 27 P. 422 (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). 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). Subdivision (a) clarifies prior law by providing for seizure where the property is in the possession of the defendant but providing for simple garnishment where a third person, e.g., a pledgee, is in possession.

Although levy is accomplished pursuant to subdivision (a), subdivision (c) as a practical matter also requires service of any obligor liable on the instrument because, 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 a negotiable document of title. It should be noted, however, that Commercial Code Section 7602 will continue to protect the bailee of goods until the document is impounded by the court. See Com. Code § 7602 and Comment thereto.

§ 488.410. Securities

488.410. (a) To attach a security in the possession of the defendant, the levying officer shall take the security into custody. At the time of levy, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

(b) To attach a security which (1) is held in escrow pursuant to the provisions of the Corporate Securities Law or (2) has been surrendered to the issuer, the levying officer shall serve the person in possession of such security with a copy of the writ and the notice of attachment. 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) In those cases not provided for by subdivisions (a) and (b), the plaintiff shall be entitled to relief pursuant to subdivision (2) of Section 8317 of the Commercial Code.

Comment. Section 488.410 provides the methods by which a security may be attached and makes clear that, in those cases where a security cannot be attached, the plaintiff is entitled to appropriate relief against the third party who is in possession. Subdivisions (a) and (b) provide a method of levy consistent with subdivision (1) of Section 8317 of the Commercial Code. Where the security is in the possession of the defendant, subdivision (a) requires seizure. Where a third person has possession under the limited circumstances described in subdivision (b), levy may be accomplished by garnishment. In other situations where a third person is in possession, e.g., as pledgee, subdivision (c) makes clear that the plaintiff is limited to the relief available under subdivision (2) of Section 8317 of the Commercial Code. These provisions avoid conflict with Section 8317; it should be noted, however, that they do not permit attachment of securities in all situations.

[page 172 is omitted]

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 any amount owing be paid to the levying officer. If the person admits that he holds property which belongs to the defendant and in which he claims no interest, the judicial officer may order that such property be delivered to the levying officer on such terms as may be just.

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.

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. The ability to examine the defendant regarding matters relating to the examination of the third person is continued by Section 491.040.

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.

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 in the manner provided by 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.

(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. It should be noted, however, that Section 6947 does not provide any additional authority for the issuance of a writ of attachment. An attachment may issue only in those actions described in Code of Civil Procedure Section 483.010.

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 release any attached property unapplied on the judgment in the manner provided by Section 488.560.

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~~ levied upon 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, 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~~ ; 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. 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 tangible personal property in the possession of the judgment debtor shall always be levied upon in the manner provided by Section 488.320. To levy upon any property or debt owed to the judgment debtor for which a method of levy of attachment is not provided, the levying officer shall serve upon the person in possession of such property or owing such debt, a copy of the writ of execution, and a notice that such property or debt is levied upon in pursuance of such writ. 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. The attachment title does not provide a method of levy for every type of property. Therefore, Section 688 has been amended to provide a garnishment procedure to levy upon any property not already provided for.

Code of Civil Procedure § 1174 (technical amendment)

Sec. . Section 1174 of the Code of Civil Procedure is amended to read:

1174.

If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement if the notice required by Section 1161 of the code states the election of the landlord to declare the forfeiture thereof, but if such notice does not so state such election, the lease or agreement shall not be forfeited.

The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded either damages and rent found due or punitive damages in an amount which does not exceed three times the amount of damages and rent found due. The trier of fact shall determine whether damages and rent found due or punitive damages shall be awarded, and judgment shall be entered accordingly.

When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon the judgment shall be satisfied and the tenant be restored to his estate.

But if payment as here provided be not made within five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately.

A plaintiff, having obtained a writ of restitution of the premises pursuant to an action for unlawful detainer, shall be entitled to have the premises restored to him by officers charged with the enforcement of such writs. Promptly upon payment of reasonable costs of service, the enforcing officer shall serve or post a copy of the writ in the

same manner as upon levy of writ of attachment pursuant to ~~subdivision 1 of~~ Section ~~542~~ of this code. In addition, where the copy is posted on the property, another copy of the writ shall thereafter be mailed to the defendant at his business or residence address last known to the plaintiff or his attorney or, if no such address is known, at the premises. If the tenant does not vacate the premises within five days from the date of service or, if the copy of the writ is posted, within five days from the date of mailing of the additional notice, the enforcing officer shall remove the tenant from the premises and place the plaintiff in possession thereof. It shall be the duty of the party delivering the writ to the officer for execution to furnish the information required by the officer to comply with this section.

488.310

All goods, chattels or personal property of the tenant remaining on the premises at the time of its restitution to the plaintiff shall be stored by the plaintiff in a place of safekeeping for a period of 30 days and may be redeemed by the tenant upon payment of reasonable costs incurred by the plaintiff in providing such storage and the judgment rendered in favor of plaintiff, including costs. Plaintiff may, if he so elects, store such goods, chattels or personal property of the tenant on the premises, and the costs of storage in such case shall be the fair rental value of the premises for the term of storage. An inventory shall be made of all goods, chattels or personal property left on the premises prior to its removal and storage or storage on the premises. Such inventory shall either be made by the enforcing officer or shall be verified in writing by him. The enforcing officer shall be entitled to his costs in preparing or verifying such inventory.

In the event the property so held is not removed within 30 days, such property shall be deemed abandoned and may be sold at a public sale by competitive bidding, to be held at the place where the property is stored, after notice of the time and place of such sale has been given at least five days before the date of such sale by publication once in a newspaper of general circulation published in the county in which the sale is to be held. Notice of the public sale may not be given more than five days prior to the expiration of the 30 days during which the property is to be held in storage. All money realized from the sale of such personal property shall be used to pay the costs of the plaintiff in storing and selling such property, and any balance thereof shall be applied in payment of plaintiff's judgment, including costs. Any remaining balance shall be returned to the defendant.

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 in the manner provided by 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.

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 in the manner provided by 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.

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 in the manner provided by 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 in the manner provided by 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 in the manner provided by 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 in the manner provided by 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 in the manner provided by 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,~~ in the manner provided by 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,~~ in the manner provided by 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.~~ in the manner provided by 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 bond or affidavit previous to the issuing of the attachment is required.~~ be issued in the manner provided by 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 in the manner provided by 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.

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February 20, 1973

To: Members of the California Law Revision Commission

From: Stefan A. Riesenfeld

Re: Comments on Memorandum 39.70 (Memorandum 73-23)

The recommendation relating to the adoption of the Uniform Enforcement of Judgment Acts raises important procedural problems in addition to those discussed in the staff memorandum. The Commission should recognize these problems before adopting the recommendations.

1) Read literally the Uniform Enforcement of Foreign Judgments Act (1964) permits the "conversion" of a judgment of a state court of a sister court as well as of a court of the United States into a judgment of a California state court. Hence conversion is provided for judgments rendered by

a) state courts of sister states,
b) federal courts sitting in sister states or territories,
c) federal courts sitting in California.

While there is an unquestionable need for such conversion of judgments of sister states, the advantages of extending this possibility to federal judgments are not as evident, in view of the difficulties created by such procedures. Foreign federal judgments can be converted into judgments of local federal courts by means of registration pursuant to 28 U.S.C.A. §1963. A duplication of these procedures is hardly needed.

2) The main difficulties created by registration procedures stem from the uncertain meaning of the mandate that a foreign judgment so filed "has the same effect" as a judgment of this state. Does this signify that the "filing" constitutes the "entry" of a new judgment for the purposes of California provisions relating to actions on, execution of, and liens created by money judgments (C.C.P. secs. 337.5, 361, 674, 681)? It is by now evident that the similar mandate in 28 U.S.C.A. §1963 has created a whole array of doubts, ably enumerated by (then) Judge Blackmun in Stanford v. Utley, 341 F.2d 265, at 271 (1965), quoted in the Appendix. Certainly the Commission should consider these difficulties and decide whether and what modifications of the Uniform Act are in order. Pennsylvania, e.g., added an important provision relating to judgment liens.

3) Prior to the availability of "domestication" by registration, a sister state judgment created a debt which could be sued upon in this state. If there was personal jurisdiction, the new judgment was entitled to full faith and credit in all sister states, merged the old judgment debt and had all effects of a domestic judgment. Its entry constituted the entry from which the duration of a judgment lien (C.C.P. §674), the executability as a matter of right (§681), as well as the running of the limitation period (§337.5) were reckoned. If there was only quasi-in-rem jurisdiction the new judgment was not entitled to all of these effects and could be enforced only from the assets attached at the commencement of the action. See Riesenfeld, Creditors' Remedies & Debtors' Protection, pp. 310-314.

So far as actions on foreign judgments are concerned, the applicable California statutes of limitations are C.C.P. §§337.5 and 361. In other words, the governing limitation period is 10 years from the entry of the foreign judgment unless the foreign limitation period for actions on the judgment is less than 10 years. To be sure, at least one California case has held that §361 is inapplicable, Mark v. Safren, 227 C.A.2d 151, at 154 (2d Dist., Div. 4, 1964), but this holding is in conflict with the holding in Biewind v. Biewind, 17 C.2d 106, 115 (1941) in which the shorter foreign limitation period was applied to a sister state judgment. The same result was reached in Parhm v. Parhm, 2 C.A.3d 311, 82 Cal. Rptr. 570 (1969). Of course, the new California judgment is governed by its own limitation periods, Weir v. Corbett, 229 C.A.2d 290, but the language of the cases illustrates the existing tremendous confusion. Ordinarily, a borrowing statute such as C.C.P. §361 does not violate the equal protection clause, see Watkins v. Conway, 385 U.S. 189, 87 S.Ct. 357 (1966).

4) When it comes to the effect of filing or registration under the new rules a distinction must be made between the limitation period barring filing or registration and the limitation periods applicable to judgments upon timely filing or registration thereof.

a) It seems to be recognized that the limitation periods governing timeliness of filing or registration are in California those specified in C.C.P. §337.5 and §361. This follows from §363 which apparently was overlooked by the staff memorandum. In Matanuska Valley Lines, Inc. v. Molitor, 365 F.2d 358 (9 Cir. 1966), the court held that a judgment entered in the U.S. District Court of Alaska could not be registered in Washington because it was barred by the limitation act of Washington. The court distinguished Stanford v. Utley, 341 F.2d 265 (8 Cir. 1965) which applied the limitation statute of the forum to the enforcement of a judgment which had been timely registered. The judgment was originally entered in the U.S. Court for S.D. Miss. and registered the next day in Missouri. It would have been outlawed under Mississippi law, but was not barred by the limitation statute governing Missouri judgments. Missouri had a borrowing statute, but its conditions were met. The same was true in the case of Juneau Spruce Corp. v. Intern. L & W Union, 128 F. Supp. 697 (D. Hawaii 1955) in which the court held that the borrowing statute (Rev. Laws of Hawaii 1968, §657.9) applied and permitted registration and enforcement of an Alaskan judgment which was still subject to action thereon under the law of Alaska; accord, for different reasons, Juneau Spruce Corp. v. Int. L & W Union, 128 F. Supp. 715 (N.D. Calif. 1955).

b) Timely registration thus entails subsequent applicability of the local limitation periods. Is registration therefore tantamount to entry? What happens in cases of successive registration and filing, for example, a judgment of the U.S. Court for S.D.N.Y. is first registered with a U.S. District Court in California and subsequently filed under the proposed statute? The question is significant for the application of C.C.P. §681 and especially §674.

Under the present form of §674, as amended in 1933, "an abstract of the judgment . . . of any court of record of the United States . . . may be recorded with the recorder of any county and from such recording the judgment becomes a lien upon all real property. . . . Such lien continues for 10 years from the date of the entry of the judgment . . ." Originally only judgments of U.S. courts in California created liens. In 1927 this was extended to judgments of any court of the U.S. Such liens, however, were unenforceable prior to the enactment of 28 U.S.C.A. §1963.

As a result, since 1948 even under the current form of §674, the problem arises whether in the case of a federal judgment registered in California but entered in a federal court sitting in another state, the date of the registration or the date of the original entry constitutes the date of the entry within the meaning of §674.

As a preliminary issue it must be resolved whether California is free to determine the date of the relevant entry or whether the matter is preempted by federal law, especially 28 U.S.C.A. §§1962 and 1963.

Sec. 1962 prescribes that federal judgments "rendered" within a state shall be a lien to the same extent and under the same conditions and for the same duration as local judgments. Does registration under §1963 convert the foreign federal judgment into a federal judgment rendered in the state of registration within the meaning of §1962?

At present there is no case law settling this point. It would be consistent with the legislative history of §674 as well as 28 U.S.C.A. §§1962 and 1963 if (a) §674 would be limited to the filing of abstracts of judgments of courts of record of the United States entered or registered in this state and (b) if the duration of the lien would be measured by reference to the date of such entry or registration.

5) It seems to be unnecessary and unwise to multiply the difficulties by extending the benefits of the Uniform Foreign Judgments Act to federal judgments. The reasoning of Knapp v. McFarland, 452 F.2d 935 (2 Cir. 1972) that the Uniform Act was not intended to duplicate enforcement remedies for federal judgments seems to be quite persuasive.

The staff memorandum points out that New York already had a conversion procedure (CPLR §5018b) while California has not. This, however, is not quite accurate for two reasons. CPLR §5018b applies only to federal judgments that are entered or registered in New York. Moreover, the chief purpose of CPLR §5018b is the creation of liens, a function which is performed by CCP §674. Why should federal judgments be enforced by the sheriff rather than by the marshal?

6) In my opinion it would be preferable to restrict the Uniform Act to sister-state state court judgments and to amend §674 as suggested.

If the Commission, however, accepts the staff proposal, then C.C.P. §§674 and 681 should be amended and "entry" should mean entry in this state or in the absence of such entry the first filing or registration in this state. I see no reason why a judgment lien of a federal judgment which was first entered or registered in this state should be extended by filing under the Uniform Act.

be enforced in like manner". Some courts, accordingly, have described registration as a ministerial step. See Gullet v. Gullet, supra, p. 720 of 188 F.2d. But this is only part of the statute. The very position of the words of enforcement in the statute demonstrates that they are additive and not restrictive and that the statute has some substantive aspect and not exclusively a procedural character. If it were otherwise the enforcement language is surplusage.

[3] We are aware that § 1963, by its terms, refers to registration of a judgment "which has become final by appeal or expiration of time for appeal", and that this Mississippi judgment was registered in Missouri only one day after it was entered in Mississippi. Although the defendant Utley is silent on the point, it would seems that one could argue that there was no compliance with the statute because the registration in Missouri was premature in that it was effected within and not after the 30-day appeal period prescribed by Rule 73(a), F.R.Civ.P. See Abegglen v. Burnham, 94 F.Supp. 484 (D.Utah 1950), and Gulf & Southern Transp. Co. v. Jordan, 257 F.2d 361, 363 (5 Cir. 1958). The Mississippi judgment, however, recites:

> "* * * it appearing to the court that defendants filed an answer on December 10, 1952 and that defendants' attorneys by letter dated July 23, 1955 * * * advised that the defendants did not have any objections to plaintiffs securing a judgment against defendants, which letter is a part of the court file in this cause * * *"

The situation thus appears to be one which falls within the rule that a person who has consented to the entry of a judgment, unless the matter is one of jurisdiction, has no status to appeal. Francisco v. Chicago & A.R. Co., 149 F. 354, 355 (8 Cir. 1906); Stewart v. Lincoln-Douglas Hotel Corp., 208 F.2d 379, 381 (7 Cir. 1953); Foger v. Johnson, 362 S.W.2d 763, 765 (Mo.App.1962); Hunter v. Stanford, 198 Miss. 299, 22 So.2d 166 (1945); Duvall v. Duvall, 224 Miss. 546, 80 So.2d 752, 756, 81 So.2d 695 (1955); Legg v. Legg, 168 So.2d 58, 60 (Miss. 1964). See Becker v. Anchor Realty & Inv. Co., 71 F.2d 355 (8 Cir. 1934). 4 C.J.S. Appeal and Error § 213; 4 Am. Jur.2d Appeal and Error, § 243.

[4] It follows that, with no right in the defendants to appeal, the Mississippi judgment forthwith upon its entry became final as to them by "expiration of time for appeal", within the meaning of § 1963, and that the April 26 registration of the April 25 judgment was not ineffective because of the lapse of only one day between those two dates.

We note by way of caveat that § 1963 presents much to be answered in the future. Does the statute's "same effect" language apply for all purposes and embrace no exception? Does the registration court have power, under Rule 60, F.R.Civ.P., to correct the registered judgment? See James Blackstone Memorial Ass'n v. Gulf, M. & O. R.R., supra, p. 386 of 28 F.R.D. Is a registered judgment itself subject to registration elsewhere? May a registered judgment be revived by a later reregistration? Is a registered judgment subject to every attack which could be raised in an action on that judgment, such as fraud, lack of jurisdiction, and the like? Is § 1963 the equivalent of the Uniform Enforcement of Foreign Judgments Act even though the latter is much more detailed in its provisions? Must full faith and credit be given to a registered judgment? The presence of these and undoubtedly many other questions prompts us to emphasize that the conclusion we reach here is one having application to the fact situation of this case. We do not now go so far as to say that registration effects a new judgment in the registration court for every conceivable purpose; neither do we say that it fails to do so for any particular purpose.

The conclusion we reach makes it unnecessary to pass upon the plaintiff's suggestion that the Mississippi limitation period was tolled by the defendants' absence from that state. We note in passing, however, that the record does not

Elizabeth K. KNAPP, Plaintiff-Appellee,

v.

Walter P. McFARLAND, Defendant-Appellee-Appellant,

Sheriff of the City of New York, Appellant-Appellee.

Nos. 524, 526, Dockets 71-1983, 71-2195.

United States Court of Appeals, Second Circuit.

Argued March 20, 1972.

Decided May 1, 1972.

As Modified on Denial of Rehearing June 1, 1972.

Appeal from orders of the United States District Court for the Southern District of New York, Richard H. Levet, J., denying defendant's motion to vacate notice of execution and levy of money judgment and denying poundage fees to sheriff. The Court of Appeals, Mansfield, Circuit Judge, held that action of judgment creditor under federal judgment in docketing judgment in office of county clerk of state and issuing execution to sheriff of that county under caption of state court was proper and that where bank against which execution was levied had custody of treasury bills as agent of another bank which had security interest in such bills, fact that sheriff did not take possession of bills did not deprive him of his right to poundage.

Affirmed in part and reversed in part.

MANSFIELD, Circuit Judge:

This appeal deals with one more chapter in the efforts of Elizabeth Knapp, assignee of the law firm of Tanner & Friedman, to enforce a judgment of the United States District Court for the Southern District of New York against McFarland awarding her legal fees in the sum of $154,999.54 for services rendered by Tanner & Friedman to McFarland. Upon appeal that judgment was recently affirmed in part, reversed in part and remanded for further proceedings. See Knapp v. McFarland, 457 F.2d 881 (March 28, 1972). The present controversy arises from the method Knapp chose to obtain execution on the judgment. More specifically, McFarland appeals from the district court's order denying his motion to vacate the notice of execution and the Sheriff appeals from its order denying poundage on the ground that the execution and levy never became effective. The first of these two orders is affirmed and the second is reversed.

Discussion of the issues necessitates a brief review of Knapp's efforts to enforce the federal judgment. That judgment was entered on July 14, 1971, and on July 19, 1971 costs in the sum of $2,308.52 were taxed against McFarland. On July 29, 1971 Knapp's counsel (Tanner & Friedman) filed a transcript of the judgment in the office of the Clerk of New York County and on the same day issued an execution under the heading of the Supreme Court of the State of New York, New York County, to the Sheriff of the City of New York, directing him to levy upon certain treasury bills held by the Chemical Bank in a custody account for the Security National Bank of Washington, D.C. ("Security").

At the time of the levy Security was escrow agent for the proceeds of the sale of the Arlington Towers Apartments in Arlington, Virginia, in which McFarland and one Edward P. Johnson had interests that were then the subject of litigation between them in the Virginia state courts. Security, in turn, had placed some of the proceeds of the sale in the treasury bills in a custody account held for its account by the Chemical Bank, upon which the levy was sought. On July 27 the Sheriff served the writ of execution on the Chemical Bank. However, he never collected anything from the bank toward satisfaction of the judgment. Simultaneously Tanner & Friedman also obtained a restraining notice from the United States District Court which it caused to be served on the Chemical Bank.

By memorandum opinion dated September 17, 1971 Judge Levet denied McFarland's motion to vacate the Sheriff's levy, holding that pursuant to 28 U.S.C. § 1962 and New York Civil Practice Law & Rules ("CPLR") § 5018 (b) the filing of the federal judgment with the New York County Clerk gave it the same effect as a judgment of the

New York Supreme Court, including the right to have execution issued and a levy made as provided by New York law. See CPLR § 5230(b). Since McFarland had in the meantime filed a supersedeas bond in the district court, Judge Levet on September 20 released the restraining order that had been served on the Chemical Bank.

Two days later, after the Sheriff had submitted to the jurisdiction of the district court, Judge Levet released the execution except to the extent of $11,000 (to cover the Sheriff's claim to poundage, not yet determined). In an opinion dated October 14, 1971, he decided that the Sheriff was not entitled to poundage and that his levy was ineffective because he had not collected or attempted to collect the funds in the Chemical Bank in which McFarland had an interest. On October 26 Judge Levet accordingly ordered the execution on the Chemical Bank vacated in its entirety. Although we agree with the district court that the method of execution engaged in here was proper, we disagree with its conclusion that the Sheriff's failure to collect anything under the levy bars him from recovery of poundage.

[1] Turning first to the question of whether the method of execution employed here was valid, the controlling federal statute, which in our view authorizes the method used, is 28 U.S.C. § 1962, which provides:

> "Every judgment rendered by a district court within a State shall be a lien on the property located in such State *in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State*, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State." (Emphasis supplied)

It will be noted that the statute, by speaking of "property" without limitation, encompasses both real and personal property of the judgment debtor.

[2] In exercise of the option thus created by 28 U.S.C. § 1962 the State of New York enacted what is now CPLR § 5018(b), which provides that:

> "A transcript of the judgment of a court of the United States rendered or filed within the state may be filed in the office of the clerk of any county and upon such filing the clerk shall docket the judgment *in the same manner and with the same effect* as a judgment entered in the supreme court within the county." (Emphasis supplied)

Under this statute a federal judgment, upon being docketed with a clerk of a county of the state, becomes a judgment of a Supreme Court of the State of New York for purposes of enforcement in that county. In this respect § 5018(b) gives to a federal judgment docketed in the county clerk's office an effect similar to that given by CPLR § 5018(a) to the judgment of a state court rendered in another county which is so docketed. See generally Brownell v. Parsons, 220 N.Y. 483, 487, 116 N.E. 366 (1917); Dieffenbach v. Roch, 112 N.Y. 621, 626, 20 N.E. 560 (1889); Quackenbush v. Johnston, 249 App.Div. 452, 453–454, 293 N.Y.S. 123, 125 (3d Dept. 1937).

[3, 4] Without more the docketing of a judgment, state or federal, in the office of the county clerk creates a lien upon the debtor's realty in that county. CPLR § 5203. E. g., United States v. Hodes, 355 F.2d 746, 748 (2d Cir.), cert. granted, 384 U.S. 968, 86 S.Ct. 1858, 16 L.Ed.2d 680 (1966), cert. dismissed, 386 U.S. 901, 87 S.Ct. 784, 17 L.Ed.2d 779 (1967); Hulbert v. Hulbert, 216 N.Y. 430, 438, 440, 111 N.E. 70 (1916). To enforce the judgment as a lien against the debtor's personalty, however, the judgment creditor must, after docketing of the judgment, deliver a writ of execution to the sheriff for levy, CPLR § 5202(a); 9 Carmody-Wait, Cyclopedia of N.Y. Practice § 64:140 at 480 (2d ed. 1966); e. g., Art-Camera-Pix v. Cinecom Corp., 64 Misc.2d 764, 765, 315 N.Y.S.2d 991, 992 (Sup.Ct.N.Y. County 1970).

[5, 6] In accordance with the procedure thus contemplated by 28 U.S.C. § 1962 and implemented by CPLR § 5018(b), Knapp docketed the judgment in the office of the New York County Clerk and issued an execution to the Sheriff of the City of New York under the caption of the Supreme Court of the State of New York, New York County.[1] We believe that this was the proper procedure.

[7, 8] McFarland argues that before a judgment of the United States District Court for the Southern District of New York may be enforced as a New York judgment the judgment creditor must also comply with the Uniform Enforcement of Foreign Judgments Act, CPLR Art. 54, which specifies certain additional requirements for enforcement of foreign judgments in New York. At first blush Art. 54 would appear to apply, since it defines a "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." However, our function is to give effect to the Legislature's intent, and where a literal reading leads to an illogical result, the tempering influence of reasonable construction must be applied. "There is no surer way to misread any document than to read it literally." Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (per Learned Hand, C. J.). A glance at the legislative history of the statutes under consideration makes it clear that Art. 54 was intended to apply only to money judgments rendered by sister states of the United States and not to such judgments of federal district courts, whether in New York or elsewhere. In its *Report to the 1969 Legislature in Relation to the Civil Practice Law and Rules*, the Judicial Conference of the State of New York noted that under the law as it existed at that time (prior to passage of the Uniform Act) a judgment of a federal district court for a sum of money rendered outside New York could be enforced here by filing

> "a certified copy of the judgment in a United States district court in [the federal district court in] New York under 28 U.S.C. § 1963 and thereafter fil[ing] a transcript of the judgment so registered in the office of the clerk of any county of New York State under CPLR 5018(b)." State of N. Y., Judicial Conf., 15th Ann.Rep., Appendix D. at A105 (1970).

Section 5018(b), which allows docketing in the county clerk's office of federal judgments "rendered *or filed* within the state" (emphasis supplied), provides a method for enforcement not only of judgments of federal district courts "rendered" in a district located within the state but also of judgments of federal district courts elsewhere which have been "filed" in a federal court within the state pursuant to 28 U.S.C. § 1963.[2] State of N.Y., 3d Preliminary Rep. of Advisory Comm. on Practice and Procedure 213 (1959). There was no need, therefore, for the enactment of a new statute to permit enforcement by registration of judgments rendered by federal district courts, whether located inside or outside of New York.

[9] The situation with respect to the enforcement of foreign *state* judgments, however, was different prior to the enactment of Art. 54. No provision comparable to § 5018(b) for enforcement by registration was made for judgments

1. Because the effect of docketing a federal judgment under CPLR § 5018(b) is to transform it into a judgment of the State for purposes of enforcement, it is no violation of F.R.Civ.P. 4(c) for the sheriff rather than the federal marshal to levy on the judgment debtor's personalty. Cf. 7 J. Moore, Federal Practice ¶ 69.04 [2] n. 1, at 2413 (1971); Yazoo & Mississippi Valley R. R. Co. v. Clarksdale, 257 U.S. 10, 24-25, 42 S.Ct. 27, 66 L.Ed. 104 (1921).

2. 28 U.S.C. § 1963:

"§ 1963. *Registration in other districts*

"A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

"A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien."

of sister states of the United States. This omission was noted by the Judicial Conference of the State of New York in its Report to the 1969 Legislature, *supra*, as follows (at p. A106):

> "Since a registered federal judgment may be docketed in the county clerk's office under CPLR 5018(b), New York in effect uses a registration system for federal district court judgments of other states while the benefits of a registration procedure are denied to judgments of the sister states."

The purpose of Art. 54, therefore, was not to provide for enforcement by registration of federal judgments in New York, which was already authorized by CPLR § 5018(b), but for judgments of sister states. Furthermore, even if Art. 54 were construed as providing an alternative method of enforcement of federal judgments, there is no evidence that it was intended to repeal or modify the procedures authorized by § 5018(b).[3] Accordingly, we agree with the district court that Knapp's issuance of the execution to the Sheriff for levy was valid.[4]

3. See Kulzer, The Uniform Enforcement of Foreign Judgments Act, State of N. Y., Judicial Conf., 13th Ann.Rep. 289 (1968), stating:

> "No provisions of the CPLR create a procedure inconsistent with that set up by this Act. The several alternative methods by which enforcement of foreign judgments may be had should not be affected by this Act."

4. McFarland asserts that Knapp's use of the Sheriff to enforce the judgment instead of the federal marshal amounted to an abuse of process. Since we hold that the execution was validly issued to the Sheriff, as a matter of law in the circumstances here there was no abuse of process. See Hauser v. Bartow, 273 N.Y. 370, 374, 7 N.E.2d 268 (1937); Safie v. Safie, 19 A.D.2d 900, 901, 244 N.Y.S.2d 727, 730 (2d Dept. 1963).