

39.70

3/31/75

Memorandum 75-27

Subject: Study 39.70 - Prejudgment Attachment (Amendments)

Attached to this memorandum are two copies of a draft of the Recommendation Relating to Amendments of the Attachment Law. We need to approve this recommendation at the April meeting so that it will be possible to get the bill introduced in time for passage before the Attachment Law goes into effect on January 1, 1976. Please mark your editorial changes on one copy and give it to the staff at the April meeting.

The remainder of this memorandum briefly discusses several new changes which have been made in the draft recommendation as a result of decisions made at the March meeting and some additional matters.

Brevely Third-Party Claims Procedure

At the March meeting the Commission decided that the procedure for shifting liability for the wrongful attachment of a third person's property to the defendant should be altered to give the third person the opportunity to make a claim before levy. The First Supplement to Memorandum 75-27 will present two drafts of a procedure designed to implement the Commission's decision. However, as you will discover when you receive the First Supplement, the procedure is rather complex, requiring either many amendments to the Attachment Law or the addition of many new sections and involves several problems which up to this point we have reserved for consideration when the Commission considers third-party claims after execution (Sections 689, 689b). The staff does not want to delay the introduction of the amendments which are contained in the attached recommendation; therefore, we have separated out the

question of prelevy third-party claims until the Commission has time to give this subject the consideration it requires.

§§ 481.160, 488.370. Manner of levy on nonnegotiable instruments

The attached recommendation presents two alternative amendments to deal with nonnegotiable instruments which are otherwise negotiable but which are not made payable to order or to bearer. See Sections 481.160 and 488.370. Division 3 of the Commercial Code treats such nonnegotiable instruments as negotiable instruments except that under Section 3805 there is no holder in due course. (See excerpt from Commercial Code Comment, Exhibit II.) However, such nonnegotiable instruments are still readily transferable. The question is whether a nonnegotiable instrument in the defendant's possession should be levied upon (1) by seizure, as is the case with negotiable instruments under Section 488.400, or (2) by notice to the obligor, as is provided by Section 488.370, with the option of later seizing the instrument to prevent transfer and make eventual collection easier. If nonnegotiable instruments are treated as negotiable instruments (first alternative), any payments made by the obligor on the nonnegotiable instrument made in good faith would be applied to the discharge of his obligation pursuant to Section 488.400(c). In addition, the first alternative would save the levying officer from having to decide whether an instrument which looks like a negotiable instrument might not actually be a nonnegotiable instrument which must be levied upon as a chose in action by service on the account debtor (§ 488.370). The second alternative assumes that initially giving notice to the obligor is more important than protecting any potential transferees by initially seizing the instrument. Under the proposed amendment to Section 488.370 the plaintiff would be able to direct the levying officer to seize the instrument after levy if it is in the defendant's possession.

§ 486.060. Issuance of checks by defendant subject to temporary protective order

We have redrafted Section 486.060 to make clear when the defendant can write checks for any purpose in amounts in excess of \$1,000 which would reduce the amount remaining on deposit below the amount of the plaintiff's claim. The Comment to Section 486.060 contains an extensive discussion of the section and several illustrations.

§ 488.080. Third person's inventory

Section 488.080 has been amended to make clear that even where the third person denies that he has property of the defendant in his possession or is an account debtor or the defendant he must give the levying officer a memorandum or be liable for the costs of obtaining such a memorandum.

§ 488.530. Levying officer's sale of perishables

We have amended Section 488.530 to permit the levying officer to sell perishable property where there is no time to get the court order normally required. We were informed at the last meeting that this conforms to existing practice.

§ 690.235. Homestead exemption claim

Section 690.235 (enacted in 1974) provides a homestead exemption to the same extent as is provided in Civil Code Sections 1237-1304 which the judgment debtor may claim after levy by following the procedure provided by Section 690.50. (See Exhibit I for text of Sections 690.235 and 690.50.) The staff does not think that these new provisions create any new problems under the Attachment Law.

Before the 1972 amendments to the attachment laws a plaintiff could levy on the defendant's home either before or after a homestead declaration was

filed under the Civil Code. Although the homestead declaration defeated a prior or subsequent attachment lien, the attachment is sufficient to preserve the plaintiff's right to reach the excess after judgment. (See Southern Pacific Milling Co. v. Milligan, 15 Cal.2d 729, 104 P.2d 654 (1940)). If the defendant or a purchaser wants to remove the cloud on his title caused by the (partially) defeated lien, he must so move in the action or bring an action to quiet title. After judgment a detailed procedure provided by Civil Code Sections 1245-1259 must be followed to reach the excess. The judgment creditor must levy execution on the homestead. Within 60 days after levy the creditor must apply to the court for the appointment of appraisers. The debtor must be served and the hearing held within 90 days after the application is made. At the hearing the court appoints three appraisers who report to the court within 15 days. If the land can be divided without material injury, the creditor is permitted to enforce his judgment against the land remaining after setting off the homestead and additional land equal to the amount of prior liens and encumbrances. If the land cannot be divided, it is sold unless no bid is received which would result in an excess over the amount of the homestead and prior liens and encumbrances.

The treatment of homestead exemptions under the 1972 attachment law is unclear. Section 537.3 provides that property subject to attachment is the property listed in that section which is "not exempt from execution (without regard to whether a claim of exemption shall be filed)." Until the enactment of Section 690.235, it could be assumed that the homestead exemption had to be claimed by filing a declaration under the Civil Code. Since the amendment of Section 690.50 and the enactment of Section 690.235, a homestead exemption may be claimed within 20 days after levy of a writ of attachment.

Under the Commission's Attachment Law a homestead is exempt as provided by Section 487.020(b). The exemption may be claimed at the hearing on the issuance of the writ. (Section 484.070.) If the writ is issued ex parte, the exemption may be claimed by the procedure provided by Section 690.50. (Section 485.230.) Several matters remain ambiguous:

(1) What interest should the plaintiff seek to attach? The Attachment Law refers to attachment of "an interest in real property" (Section 488.310) and simply of "real property." (See Section 487.010(c) and the Comment to Section 488.310.) Presumably the plaintiff may attach the excess value only. Where the defendant claims the homestead exemption at the noticed hearing or shows that a homestead exemption has already been declared under the Civil Code, the writ would necessarily describe only the excess. Where the defendant fails to claim a homestead exemption at the hearing or does not appear at the hearing, the plaintiff could be issued a writ of attachment describing the home, but the lien could be defeated by the subsequent filing of an exemption under the Civil Code. The lien on the excess would continue. Where the writ is issued ex parte, the plaintiff must show that the property sought to be attached is not exempt. (Sections 485.210, 485.220.) The plaintiff is liable for a wrongful attachment for the ex parte attachment of any exempt property. (Section 490.010(c).) These matters can be dealt with by Comment or by amendment.

(2) Must the court determine the amount of the excess at the noticed hearing in order to permit its attachment? The appraisal procedure provided by the Civil Code is too time-consuming to be usefully employed to determine the amount of the excess for the purpose of issuance of a writ of attachment permitting the attachment of such excess. Since the Civil Code procedure is a post-

judgment procedure, the court issuing an attachment need not follow its provisions. However, there may still not be enough time in the normal attachment hearing procedure to fairly and accurately determine the amount of excess value. The staff thinks that it would be best to permit the excess to be levied upon without requiring that the amount of the excess be specified. However, if the defendant claims that there is not likely to be any excess, then the court would have to decide the issue. If the Commission agrees with this approach, Section 484.090 should probably be amended, although it might be possible to deal with this by Comment.

(3) Where the writ is issued ex parte, Section 485.230 incorporates the procedure of Section 690.50 for claiming exemptions. Section 690.50 does not provide for a determination of the amount of the excess. If the policy suggested above for writs issued after a noticed hearing is to be applied to claims of exemption made after levy of an ex parte writ, it will be necessary to provide an ex parte claims procedure different from Section 690.50 or to amend Section 690.50. Although this problem could be left to eventual judicial interpretation of Sections 690.235 and 690.50, the tentative thinking of the staff is that the Attachment Law should be amended to provide for the continuation of the lien on the excess where the defendant claims a homestead exemption pursuant to Section 690.50 or the Civil Code, unless the defendant also claims pursuant to Section 690.50 that there will be no excess in which case the court will have to determine the question.

The staff plans to continue working on this problem. If the Commission can make a tentative decision at the April meeting, further amendments can be approved at the May meeting for addition to the amendatory bill.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

EXHIBIT I

§ 690.235. [Same: Dwelling house of debtor or family.] (a) A dwelling house in which the debtor, or the family of the debtor actually resides, to the same extent and in the same amount, except as otherwise provided in this section, as the debtor or the spouse of the debtor would be entitled to select as a homestead pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code; provided that neither such debtor nor the spouse of such debtor has an existing declared homestead on any property in this state.

(b) The exemption provided in subdivision (a) shall not apply to a judgment or an abstract thereof which has been recorded prior to the acquisition of the property by the debtor or the spouse of the debtor or the commencement of residence, whichever last occurs.

(c) Property which would otherwise be exempt under subdivision (a) is subject to execution or forced sale in satisfaction of judgments obtained:

(1) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises.

(2) On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant.

(3) On debts secured by encumbrances on the premises, executed and recorded prior to or in connection with the acquisition of the property by the debtor or the spouse of the debtor.

(d) In the event of an execution sale, the proceeds of the sale shall be applied in the following order or priority: first, to the discharge of all liens and encumbrances, if any, on the property; second, to the debtor in the amount of the exemption provided by this section; third, to the satisfaction of the execution; and fourth, to the debtor.

(e) That portion of the proceeds from any sale of property which is exempt under this section, which portion represents the amount of such exemption, shall be exempt for a period of six months from the date of receipt of such proceeds. [1974 ch 1251 § 2.5.]

§ 690.50. [Same: Affidavit and claim of exemption: Notice of claim: Creditor's counteraffidavit: Hearing: Perishable goods: Burden of proof: Judgment: Appeal: Release.] (a) If the property mentioned in Sections 690.1 to 690.29, inclusive, shall be levied upon under writ of attachment or execution, the defendant or judgment debtor (herein referred to as "the debtor"), in order to avail himself of his exemption rights as to such property, shall within 20 days, in the case of real property described in Section 690.235, and 10 days, in the case of all other property, from the date such property was levied upon deliver to the levying officer an affidavit of himself or his agent, together with a copy thereof, alleging that the property levied upon, identifying it, is exempt, specifying the section or sections of this code on which he relies for his claim to exemption, and all facts necessary to support his claim, and also stating therein his address within this state for the purpose of permitting service by mail upon him of the counteraffidavit and any notice of the motion herein provided. For purposes of this section, if the property levied upon consists of the earnings of a judgment debtor, each date that earnings are withheld from the judgment debtor shall be deemed to be the date earnings were levied upon. A judgment debtor shall have the right to file a separate claim of exemption each time that a withholding of earnings occurs, provided, that if a prior claim of exemption has been adjudicated under the same levy, that each separate claim of exemption thereafter be supported by a statement under oath alleging the changed circumstances which support the new claim of exemption. If a claim of exemption be allowed, the judgment creditor shall have the right, at any time during the effective period of the claim of exemption, to move the court for consideration of the claim previously granted on the grounds of a material change of circumstances affecting the debtor's exemption rights. If the judgment creditor does make such a motion, he must support his motion by a statement under oath alleging the changed circumstances which support his motion for consideration.

(b) Forthwith upon receiving the affidavit of exemption, the levying officer shall serve upon the plaintiff or the person in whose favor the writ runs (herein referred to as "the creditor"), either personally or by mail, a copy of the affidavit of exemption, together with a writing, signed by the levying officer, stating that the claim to exemption has been received and that the officer will release the property unless he receives from the creditor a counteraffidavit within 10 days after service of such writing, in the case of real property described in Section 690.235, and within five days after service of such writing, in all other cases.

(c) If the creditor desires to contest the claim to exemption, he shall, within such period of 10 days, in the case of real property described in Section 690.235, and five days, in all other cases, file with the levying officer a counteraffidavit alleging that the property is not exempt within the meaning of the section or sections of this code relied upon, or if the claim to exemption be based on Sections 690.2, 690.3, 690.4, 690.6, alleging that the value of the property claimed to be exempt is in excess of the value stated in the applicable section or sections, together with proof of service of a copy of such counteraffidavit upon the debtor.

(d) If no such counteraffidavit, with such proof of service, is so filed with the levying officer within the time allowed, the officer shall forthwith release the property.

(e) If such counteraffidavit, with such proof of service, is so filed, either the creditor or the debtor 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 claim to exemption, the priority or division of payment between one or more creditors from nonexempt earnings under the provisions of Section 690.6 or the value of the property claimed to be exempt. Such hearing shall be granted by the court upon motion of either party made within five days after the counteraffidavit is filed with the levying officer, and such hearing must be had within 15 days from the date of the making of such motion unless continued by the court for good cause. The party making the motion for hearing shall give not less than five days' notice in writing of such hearing to the levying officer and to the other party, and specify therein that the hearing is for the purpose of determining the claim to exemption. The notice may be of motion or of hearing and upon the filing of the notice with the clerk of court, the motion is deemed made.

(f) If neither party makes such motion within the time allowed, or if the levying officer shall not have been served with a copy of the notice of hearing within 10 days after the filing of the counteraffidavit, the levying officer shall forthwith release the property to the debtor.

(g) At any time while the proceedings are pending, upon motion of either party or upon its own motion, the court may (1) order the sale of any perishable property held by such officer and direct disposition of the proceeds of such sale, and (2) make such other orders as may be proper under the particular circumstances of the case. Any orders so made may be modified or vacated by the court or judge granting the same, or by the court in which the proceedings are pending, at any time during the pendency of the proceedings, upon such terms as may be just.

(h) The levying officer in all cases shall retain physical possession of the property levied upon if it is capable of physical possession, or in the case of property not capable of physical possession, the levy shall remain in full force and effect, pending the final determination of the claim to exemption. However, no sale under execution shall be had prior to such final determination unless an order of the court hearing the claim for exemption shall so provide.

(i) At such hearing, the party claiming the exemption shall have the burden of proof. The affidavits and counteraffidavits shall be filed by the levying officer with the court and shall constitute the pleadings, subject to the power of the court to permit an amendment in the interests of justice. The affidavit of exemption shall be deemed controverted by the counteraffidavit and both shall be received in evidence. Nothing herein shall be construed to deprive anyone of the right to a jury trial in any case where, by the Constitution, such right is given, but a jury trial may be waived in any such case in like manner as in the trial of an action. No findings shall be required in a proceeding under this section. When the hearing is before the court sitting without a jury, and no evidence other than the affidavit and counteraffidavit is offered, the court, if satisfied that sufficient facts are shown thereby, may make its determination thereon. Otherwise, it shall order the hearing continued for the production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits. At the conclusion of the hearing, the court shall give judgment determining whether the claim to exemption shall be allowed or not, in whole or in part, and may give judgment determining the priority or division of payment between one or more creditors from nonexempt earnings under the provisions of Section 690.6, which judgment shall be determinative as to the right of the creditor to have the property taken and held by the officer or to subject the property to payment or other satisfaction of his judgment. In such judgment the court shall make all proper orders for the disposition of such property or the proceeds thereof.

(j) A copy of any judgment entered in the trial court shall be forthwith transmitted by the clerk to the levying officer in order to permit such officer to either release the property attached or to continue to hold it to sell it, in accordance with the provisions of the writ previously delivered to him. Such officer, unless an appeal from the judgment is waived, or the judgment has otherwise become final, shall continue to hold such property under attachment or execution, continuing the sale of any property held under execution until such judgment becomes final. However, if a claim to exemption under Section 690.6 is allowed by such judgment, the debtor shall be entitled to a release of the earnings so exempted at the expiration of three days, unless otherwise ordered by the court, or unless the levying officer shall have been served with a copy of a notice of appeal from the judgment.

(k) When any documents required hereunder are served by mail, the provisions of this code relating to service by mail shall be applicable thereto.

(l) Whenever the time allowed for an act to be done hereunder is extended by the court, written notice thereof shall be given promptly to the opposing party, unless such notice be waived, and to the levying officer.

(m) An appeal lies from any judgment under this section. Such appeal to be taken in the manner provided for appeals in the court in which the proceeding is had. [1970 ch 1523 § 56; 1972 ch 649 § 2, effective August 9, 1972; former § 690.50 amended and renumbered as § 690.52, 1970 ch 1523 § 55; 1974 ch 1251 § 3.] *Cal Jur 2d Exemp § 28; Cal Practice § 57:22; Witkin Procedure 2d pp 3407, 3409, 3441, 3455, 3456, 3457, 3458, 3459, 3485, 4319, 4332.*

EXHIBIT II

Civil Code § 955

§ 955. Nonnegotiable instruments; transfer; notice

A transfer other than one intended to create a security interest (Section 9102(1) (a) of the Uniform Commercial Code) of a nonnegotiable instrument which is otherwise negotiable within Division 3 of the Uniform Commercial Code but which is not payable to order or to bearer and a sale of accounts, contract rights or chattel paper as part of a sale of the business out of which they arose (Section 9104(f) of the Uniform Commercial Code) shall be deemed perfected against third persons when such property rights have been endorsed or assigned in writing and in the case of such instruments or chattel paper delivered to the transferee, whether or not notice of such transfer or sale has been given to the obligor; but such endorsement, assignment or delivery shall not be, of itself, notice to the obligor so as to invalidate any payments made by him to the transferor.

Commercial Code § 3805

§ 3805. Instruments Not Payable to Order or to Bearer. This division applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this division but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument. (Stats.1963, c. 819, § 3805.)

California Code Comment

By John A. Bohn and Charles J. Williams

Prior California Law

1. This section is new and has no statutory counterpart in the NIL. Except for those sections of Division 3 which are peculiar to the holder in due course, this section makes Division 3 applicable to an instrument which is negotiable in form except for the fact that it is not payable to order or to bearer.

The following comment is made with regard to nonnegotiable instruments under the Commercial Code:

"By virtue of section 13805, [3805] Chapter [Division] 3 would apply to an instrument not payable to order or to bearer, but otherwise in negotiable form. However, there could be no holder in due course of such an instru-

ment. Since there is no comparable N.I.L. provision, there are now no clearly defined rules governing instruments which appear to be notes or drafts except that they lack words of negotiability. The Code drafters intended the rules relating to negotiable instruments, with the exception of those governing holders in due course, could be applied to such nonnegotiable instruments and that this would clarify the law." California State Bar Committee on the Commercial Code, A Special Report, The Uniform Commercial Code, 37 Calif. State Bar J. (March-April, 1962) pp 162-163.

2. Professors Marsh and Warren describe the effect of this section on prior California law:

" . . . This Section creates new law; there is no comparable provision in the N.I.L. CC § 3266d states 'In any case not provided for in this title the rules of the law merchant shall govern.' (N.I.L. § 196) Since the N.I.L. is generally thought not to apply to non-negotiable instruments, the law merchant or common law of commerce must, under N.I.L. § 196, cover them. However, as the Official Comment to the Code points out, the N.I.L. is generally regarded as a codification or restatement of the law merchant and has been applied to non-negotiable instruments by analogy. This Section would bring non-negotiable instruments within Chapter (Division) 3 for all purposes except that there can be no holder in due course of such an instrument. This Section does not refer to simple contracts; these are entirely outside the scope of this chapter. It refers to instruments

which meet all the requirements of negotiability except that they lack words of negotiability—'order' or 'bearer.' Under this Section, the holder of a non-negotiable instrument establishes his case by production of the instrument and proof of the signature; the burden of proving want of consideration or other defenses is on the maker or drawer. The indorser is entitled to presentment and notice of dishonor. The rules as to material alteration, filling in of blanks, accommodation parties and discharge are the same for non-negotiable instruments as for negotiable ones.

"It is not easy to state with accuracy what changes this Section will bring about in California law, for it is difficult to say what the California law of non-negotiable instruments is. In certain instances this Section would compel results in cases concerning non-negotiable instruments similar to those obtaining under the Civil Code. Under CC § 1459, a non-negotiable instrument may be transferred by indorsement, the transferee thereof taking subject to all equities and defenses. Under CC § 1614, a non-negotiable instrument would presumptively be issued for consideration. Under CC § 1615, the burden of showing want of consideration is on the maker or drawer.

"It might be contended that this Section imposes too onerous a burden on the indorser of a non-negotiable note. Decisions on the liability of the indorser of non-negotiable notes are conflicting. The majority view seems to be that the indorser of a non-negotiable instrument incurs only the liabilities

of an assignee; other jurisdictions hold him as a surety or a guarantor. California has gone as far as any state in imposing upon such an indorser liabilities similar to those of the indorser of a negotiable instrument. In *First Nat'l Bank v. Falkenthan*, 21 Cal. 131, 29 Pac. 806 (1892), it was held that the indorsement of a non-negotiable note will, as to the immediate indorsee, create the same liability as the indorsement of a negotiable note. A payee who indorsed 'Pay to order' a non-negotiable note was held liable to a remote holder on the conditional guaranty of an indorser in *Nuetzel v. Macaie*, 80 Cal.App. 768, 253 Pac. 166 (1927). At the least, a California indorser of a non-negotiable note guarantees payment to his immediate taker, hence this Section does not change California law in this respect as much as it does that of other states.

"The New York and Texas commentaries on the Code concede that the law of non-negotiable instruments in their jurisdictions, as in California, is obscure and uncertain. The great convenience of having the law of non-negotiable instruments codified is apparent. Except for the holder in due course issue, no convincing reasons have been advanced why this codification should not be identical to that applying to negotiable instruments.

"The State Bar Committee points out the objection to the use of the word 'instrument' in this Section due to the definition of that term in § 13102 (13022) to mean a negotiable instrument. For instance, it might be contended that § 13804 (13804) (lost instruments) would apply to a lost non-negotiable instrument, thereby compelling indemnity in case such an instrument was lost. Despite the definition in § 13102 (13022), it is recommended that no change be made in the wording of this Section. The kind of writing spoken of in this Section will continue to be popularly referred to as a 'non-negotiable instrument,' and it seems preferable to retain the word 'instrument' in this Section rather than to replace it by a different term that is not commonly used. An instrument is by its terms either negotiable or not, and no one is likely to be confused by the fact that the term 'instrument' is used to denote non-negotiable paper in this Section as well as negotiable paper throughout Chapter [Division] 3." Sixth Progress Report to the Legislature by Senate Fact Finding Committee on Judiciary (1959-1961) Part I, The Uniform Commercial Code, pp. 469-471.

(Changes from U.C.C. (1962 Official Text))

3. This is section 3-805 of the Official Text without change.

Uniform Commercial Code Comment

Prior Uniform Statutory Provision:
None.

Purposes:

This section covers the "non-negotiable instrument." As it has been

used by most courts, this term has been a technical one of art. It does not refer to a writing, such as a note containing an express condition, which is not negotiable and is entirely outside of the scope of this

Article and to be treated as a simple contract. It refers to a particular type of instrument which meets all requirements as to form of a negotiable instrument except that it is not payable to order or to bearer. The typical example is the check reading merely "Pay John Doe."

Such a check is not a negotiable instrument under this Article. At the same time it is still a check, a mercantile specialty which differs in many respects from a simple contract. Commercial and banking practice treats it as a check, and a long line of decisions before and after the original Act have made it clear that it is subject to the law merchant as distinguished from ordinary contract law. Although the Negotiable Instruments Law has been held by its terms not to apply to such "non-negotiable instruments" it has been recognized as a codification and restatement of the law merchant, and has in fact been applied to them by analogy.

Thus the holder of the check reading "Pay A" establishes his case by production of the instrument and proof of signatures; and the burden of proving want of consideration or any other defense is upon the obligor. Such a check passes by indorsement and delivery without words of assignment, and the indorser undertakes greater liabilities than those of an assignor. This section re-

solves a conflict in the decisions as to the extent of that undertaking by providing in effect that the indorser of such an instrument is not distinguished from any indorser of a negotiable instrument. The indorser is entitled to presentment, notice of dishonor and protest, and the procedure and liabilities in bank collection are the same. The rules as to alteration, the filling of blanks, accommodation parties, the liability of signing agents, discharge, and the like are those applied to negotiable instruments.

In short, the "non-negotiable instrument" is treated as a negotiable instrument, so far as its form permits. Since it lacks words of negotiability there can be no holder in due course of such an instrument, and any provision of any section of this Article peculiar to a holder in due course cannot apply to it. With this exception, such instruments are covered by all sections of this Article.

Cross Reference:

Section 3--104.

Definitional Cross References:

"Bearer". Section 1--201.

"Holder in due course". Section 3--302.

"Instrument". Section 3--102.

"Term". Section 1--201.

RECOMMENDATION

relating to

AMENDMENTS TO THE ATTACHMENT LAW

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

Cases in Which an Attachment May Be Issued

As enacted, Section 483.010 of the Attachment Law permits the issuance of attachment against a "defendant engaged in a trade, business, or profession"⁴ provided that the subject of the contract upon which the claim is based was not used "primarily for personal, family, or household purposes." Section 483.010 failed to specify the time when the defendant must be engaged in a trade, business, or profession. Accordingly, the Commission recommends that Section 483.010 be amended to provide that the defendant must be so engaged either when the contract was made upon which the claim is based or when the claim against him arose. The effect of this amendment would be to make clear that the property of an individual may be subject to attachment regardless of whether the individual has retired or gone out of business after the contract was made or the claim arose but before the attachment is sought.

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1. Cal. Stats. 1974, Ch. 1516 (Assembly Bill No. 2948).
 2. See also Report of Senate Committee on Judiciary on Assembly Bill 2948, Senate J. 13010 (August 21, 1974).
 3. Cal. Stats. 1974, Ch. 1516, § 49.
 4. For an interpretation of the meaning of "trade or business" under existing Section 537.2, see *Advance Transformer Co. v. Superior Court*, 44 Cal. App.3d 127, ___ Cal. Rptr. ___ (1974).

Insufficient Undertaking and Wrongful Attachment

Under the Attachment Law as enacted, it is unclear whether it is a wrongful attachment under Section 490.010 where the plaintiff fails to increase an undertaking when ordered to do so pursuant to Section 489.220 (undertaking to obtain a writ of attachment or protective order) or Section 489.410 (undertaking on appeal). The Commission recommends that it be made clear that the plaintiff's failure to increase the amount of the undertaking is not itself a wrongful attachment. The defendant is adequately protected in the event of a wrongful attachment under Section 490.010 because the original undertaking remains in effect,⁵ thereby providing a fund for recovery of damages for a wrongful attachment, and because the rights obtained by filing the now insufficient undertaking immediately cease,⁶ thereby minimizing any injury to the defendant's interests.

Court Commissioners

In its 1973 recommendation, the Commission recommended enactment of a provision stating that the judicial duties to be performed under the Attachment Law are "subordinate judicial duties" within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.⁷ This provision was deleted from the Commission's recommended legislation because it proved to be extremely controversial and jeopardized the passage of the legislation. Nevertheless, such duties are appropriate duties to be performed by court commissioners and are now performed by them in some counties. Since delegation of such duties to commissioners under the Attachment Law is necessary for efficiency and economy, the Commission again recommends that such delegation be expressly authorized by statute.⁸

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5. See Section 489.090(d). As provided in subdivision (a) of Section 489.220, the amount of the undertaking is \$2,500 in municipal court and \$7,500 in superior court.
 6. See Sections 489.090(c) and 489.410(a).
 7. Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 739, 760 (1973).
 8. Assembly Bill 919, introduced in the 1975 session of the Legislature, proposes the enactment of a section designating the duties under the Attachment Law as subordinate judicial duties.

Description of Property Subject to Temporary Protective Order

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

Effect of Temporary Protective Order on Deposit Accounts

Section 486.060, which permits the defendant who is subject to a temporary protective order to write checks for certain purposes despite the order, is unclear. The Commission recommends that this section be amended to make clear that the defendant may write checks for any purpose he pleases so long as there remain sufficient funds in his accounts to secure the plaintiff's claim and to meet payroll, legal, and other expenses specified in the section.

Wrongful Attachment Liability for Levy on Property of Third Person

The Attachment Law makes the plaintiff liable for damages, costs, and attorney's fees to a third person whose property is attached except where the plaintiff has relied in good faith on registered or recorded ownership.⁹ This exception to the plaintiff's wrongful attachment

9. See Code Civ. Proc. §§ 490.010 and 490.020.

liability is too narrowly drawn. A plaintiff, who has acted reasonably and in good faith where there is no recorded or registered ownership but has nevertheless attached property of a third person, should not be liable for a wrongful attachment. Accordingly, the Commission recommends that the limited exception to liability for attachment of a third person's property provided by Section 490.010 be expanded to protect any plaintiff who makes the levy in good faith and if he reasonably believes that the property belongs to the defendant.

Minor Amendments

The Commission also recommends several minor amendments and amendments of a technical nature which are explained in the Comments following the affected sections of the bill, infra.

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

An act to amend Sections [481.160,] 482.080, 483.010, 484.050, 484.340, 486.050, 486.060, 486.090, 487.010, 487.020, 488.010, 488.080, 488.310, 488.350, 488.360, [488.370,] 488.430, 488.530, 488.560, 489.230, 489.310, 490.010, and 491.010 of, and to add Sections 482.060 and 489.130 to, the Code of Civil Procedure, relating to attachment.

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

SECTION 1. Section 481.160 of the Code of Civil Procedure is amended to read: [This amendment is an alternative to the amendment of Section 488.370.]

481.160. "Negotiable instrument" means a "negotiable instrument" as defined by Section 3104 of the Commercial Code and any instrument described in Section 3805 of the Commercial Code .

Comment. The amendment of Section 481.160 makes clear that "nonnegotiable instruments" are treated as negotiable instruments in this title. See Com. Code § 3805 (relating to any instrument whose terms do not preclude transfer and which is otherwise negotiable within the Commercial Paper division of the Commercial Code but which is not payable to order or to bearer). The effect of this amendment is that such "nonnegotiable instruments" are levied upon by serving the person in possession of the instrument and, if such person is the defendant, by seizure of the instrument. See Section 488.400. Prior to this amendment, levy in this situation was by notice to the person obligated on the instrument as provided by Section 488.370. Compare Civil Code § 955 (perfecting transfer of "nonnegotiable instruments").

SEC. 2. Section 482.060 is added to the Code of Civil Procedure,
to read:

§ 482.060. Judicial duties are "subordinate judicial
duties"

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

Comment. Section 482.060 authorizes the use of court
commissioners to perform any of the judicial duties required by
this title. See CAL. CONST., Art. VI, § 22; compare CODE CIV.
PROC. § 259.

SEC. 3. Section 482.080 of the Code of Civil Procedure is
amended to read:

§ 482.080. Issuance of order directing transfer

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

Comment. The amendment to Section 482.080 deletes the words "or
arrest" from the end of the last sentence. This amendment makes clear
that the defendant is not subject to arrest independent of contempt
proceedings. See Code Civ. Proc. § 501 (civil arrest abolished). A
person may still be arrested in the course of contempt proceedings.
See Code Civ. Proc. §§ 1212, 1214.

SEC. 4. Section 483.010 of the Code of Civil Procedure is amended
to read:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action ~~against a defendant engaged in a trade, business, or profession~~ where:

¶ (1) The action is

on
a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. ~~Each claim shall be based upon a contract, express or implied, and each of which~~
claim is based upon a contract, express or implied; and

(2) The action is against a defendant engaged in a trade, business, or profession either when the contract was made or when the claim arose.

(b) An attachment may not be issued if the claim is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

(c) An attachment may not be issued where the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.

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

Comment. Section 403.010 is amended to provide that the property of a defendant is subject to attachment if the defendant was engaged in a trade, business, or profession at the time the contract was made or the claim against him arose. The amended section makes clear that an individual is subject to attachment despite the fact that, after the contract was made or the claim arose, he retired or ceased to engage in a trade, business, or profession. Where attachment is not precluded by the standard of subdivision (c), the question whether an attachment will properly issue depends upon a determination that the individual is "engaged in a trade, business, or profession." The application of this standard is necessarily left to the courts, but in the case of individuals it is not intended to limit attachment to sole proprietors and independent contractors. Whether a guarantor is subject to attachment depends upon whether he was engaged in a trade or business at the time the contract was made or the claim arose. See Advance Transformer Co. v. Superior Court, 44 Cal. App.3d 127, ___ Cal. Rptr. ___ (1974).

SEC. 5. Section 484.050 of the Code of Civil Procedure is amended to read:

484.050. The notice of application and hearing shall inform the defendant of all of the following:

(a) A hearing will be held 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 court 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 decisions 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 described in the plaintiff's application unless the court determines that such property is exempt from attachment. However, the order will not be limited to the property described 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.

and serve on
the plaintiff

(e) If the defendant claims that the property described 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.

and served

and serve

(f) The defendant may obtain a determination at the hearing whether property not described in the application is exempt from attachment, but the failure to claim that property not so described 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 is amended to conform to the provisions of Sections 484.060 and 484.070.

SEC. 6. Section 484.340 of the Code of Civil Procedure is amended to read:

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 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 described in the plaintiff's application unless the court determines that such property is exempt from attachment.

(d) If the defendant claims that the property described 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 not later than five days prior to the date set for hearing. 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."

and serve on
the plaintiff

Comment. Section 484.340 is amended to conform to the provisions of Section 484.350.

SEC. 7. Section 486.050 of the Code of Civil Procedure is amended to read:

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

(b) If Notwithstanding subdivision (a), if the property is farm products held for sale or is inventory, the temporary protective order

may not prohibit the defendant from transferring the property in the ordinary course of business, but the temporary protective order may impose appropriate restrictions on the disposition of the proceeds from such transfer.

Comment. Subdivision (a) of Section 486.050 is amended to provide for the manner of description of property which is subject to the temporary protective order. The description in a temporary protective order restraining the transfer of property of an individual defendant or a portion of the property of a corporation or a partnership should be sufficiently specific to permit accurate identification. For example, where all equipment of the defendant is subject to the temporary protective order, the statement "all equipment as defined in Code of Civil Procedure Section 481.100" would satisfy the standard of subdivision (a) if the order also contains the text of the section referred to and other relevant sections. Where less than all of a type of property is to be restrained by the temporary protective order, a more specific description is needed. Where all attachable corporate (or partnership) property is subject to the temporary protective order, the statement "all corporate (or partnership) property which is subject to attachment pursuant to subdivision (a) of Code of Civil Procedure Section 487.010" satisfies the requirement of subdivision (a) if the order also contains the text of the section referred to and other relevant sections. Compare Section 484.020(e).

The temporary protective order should restrain the transfer only of an amount of the defendant's property which is reasonably necessary to protect the plaintiff's interest until a writ of attachment can be issued. Where an excessive amount of property is subject to the temporary protective order,

the plaintiff may be liable for abuse of process. Cf. White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968). See Section 486.040 requiring the temporary protective order to contain provisions which the court determines would be in the interest of justice and equity to both parties.

The amendments to the introductory portion of subdivision (a) and to subdivision (b) are technical and make no substantive change.

SEC. 8. Section 486.060 of the Code of Civil Procedure is amended to read:

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

any terms of

may

against his
deposit accounts
in this state :

In any amount
for the follow-
ing purposes:

(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.~~

(1) Payment

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

worker's

(2) Payment

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

(3) Payment

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

(4) 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.

(c) In any amount for any purpose so long as the aggregate amount remaining in the defendant's deposit accounts in this state is not less than the amount of the plaintiff's claim plus any additional amounts permitted to be paid pursuant to subdivisions (a) and (b).

Comment. Section 486.060, as enacted, and its predecessor, former Section 538.3, failed to clearly state the rules permitting a defendant who is subject to a temporary protective order to write checks. Section 486.060, as amended, makes clear that, if funds are available, the defendant may write checks regardless of the plaintiff's claim, for a total of \$1,000 for any purpose and for any amount for the purposes listed in subdivision (b). Section 486.060 does not require the defendant to write checks for the purposes described in subdivisions (a) and (b) nor does it establish a preference of one of these purposes over any other. However, the defendant may not write checks under subdivision (c) unless the defendant (1) has either written checks for the purposes described in subdivisions (a) and (b) or reserved sufficient funds in his deposit accounts to cover checks permitted to be written by subdivisions (a) and (b) and (2) has reserved sufficient funds to pay the plaintiff's claim. Subdivision (c) is intended to prevent a temporary protective order issued on a small claim from tying up large accounts. Where the defendant has sufficient funds, the amounts allowed to be written by subdivisions (a) and (b) must not be allowed to reduce the funds available to secure the plaintiff's claim. However, where the defendant's accounts are insufficient to allow payment of the full amount permitted by subdivisions (a) and (b) and to reserve a fund to secure the full amount of the plaintiff's claim, Section 486.060 makes clear that checks written under subdivisions (a) and (b) have preference over the plaintiff's interest in reserving a fund to secure his claim.

In the following examples illustrating the application of Section 486.060, assume that the defendant has deposit accounts totaling \$10,000 in this state and the plaintiff has a \$5,000 claim:

(1) If expenses under subdivision (b) total \$2,000, the defendant may write checks totaling \$1,000 under subdivision (a) and \$2,000 under subdivision (b). The defendant may then write additional checks totaling \$2,000 under subdivision (c), reserving \$5,000 to cover the plaintiff's claim.

(2) If, in the first ~~example~~, the defendant had decided for some reason to defer payment of the \$2,000 payable under subdivision (b), he could still write an additional check for \$2,000 since subdivision (c) allows checks to be written in amounts in addition to the total of amounts permitted to be paid under subdivisions (a) and (b) and the amount of the plaintiff's claim.

(3) If expenses under subdivision (b) total \$8,000, the defendant may still write checks for no more than \$1,000 for any purpose under subdivision (a). No checks could be written under subdivision (c) since only \$1,000 remains in the account and the plaintiff's claim is \$5,000.

(4) If the defendant has no expenses under subdivision (b), he may write checks totaling \$5,000 for any purpose--\$1,000 under subdivision (a) and \$4,000 under subdivision (c).

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

SEC. 9. Section 486.090 of the Code of Civil Procedure is amended to read:

486.090. Except as otherwise provided in Sections ~~484.080, 486.110,-~~ and 489.320, the The temporary protective order shall expire at the earliest of the following times:

(a) Forty days after the issuance of the order or, if an earlier date is prescribed by the court in the order, on such earlier date , or if the effective period of the order is extended by the court pursuant to Section 484.080, the end of such period .

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

Comment. Subdivision (b) of Section 486.090 is amended to make clear that the temporary protective order does not restrain the transfer of property after it has been determined to be exempt. The amendments to the introductory proviso of the section and to subdivision (a) are technical and make no substantive change. It should be noted that the court may modify or vacate a temporary protective order pursuant to Section 486.100 (on application of defendant), or terminate the order pursuant to Section 489.320 (undertaking to secure termination).

SEC. 10. Section 487.010 of the Code of Civil Procedure is amended to read:

487.010. The following property of the defendant is 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.

(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.

(c) Where the defendant is an individual engaged in a trade, business, or profession, all ~~of his~~ real property and all of the following property:

(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; but, if the defendant has more than one deposit account, the court, 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 on the premises where the trade, business, or profession is conducted.

(8) Negotiable documents.

(9) Negotiable instruments.

(10) Securities.

(d) Where the defendant is an individual who is a partner and is sued for his individual liability as a partner of a partnership which is engaged in a

trade, business, or profession, all of the defendant's real property and all of his property which is of a type described in subdivision (c) and which is used or held for use in the partnership's trade, business, or profession.

Comment. The amendment of the opening clause of Section 487.010 makes clear that only the defendant's property is subject to attachment. All other property is exempt from attachment in the action as provided by subdivision (d) of Section 487.020.

SEC. 11. Section 487.020 of the Code of Civil Procedure is amended to read:

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

(a) All property exempt from execution.

(b) Property which is necessary for the support of an individual defendant and members of his household, or the defendant's family supported in whole or in part by the defendant .

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

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

Comment. The amendments to Section 487.020 are technical. The introductory phrase, reading "Notwithstanding Section 487.010," has been deleted since it was confusing when read with subdivision (d); this amendment makes no substantive change. The language of subdivision (b) is amended to make clear that an individual defendant is entitled to the exemption as well as a defendant with a family; this language is based on Section 690.6 (hardship exemption for earnings).

SEC. 12. Section 488.010 of the Code of Civil Procedure is amended to read:

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

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

Comment. Subdivision (b) of Section 488.010 is amended to provide that, where crops growing or timber standing on real property are sought to be attached, the writ must identify any person, other than the defendant, in whose name the defendant's real property stands upon the records of the county. See Section 488.360(c). Subdivision (b) is applicable, for example, where there has been a fraudulent transfer, where defendant's interest in the real property is unrecorded, or where there is a resulting trust in favor of the defendant. This provision is applicable only in the situation where the defendant's interest in property, or part thereof, is recorded in the name of another person, and is not applicable in the normal situation where title is legitimately held jointly. The other amendments are technical and make no substantive change. The addition of the phrase "upon the records of the county" restores language of former Section 542.

SEC. 13. Section 488.080 of the Code of Civil Procedure is amended to read:

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

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

Comment. Subdivision (b) of Section 488.080 is amended to state more directly the duty to give a memorandum on request of the levying officer. In addition, the amendment makes clear that the person served has a duty to give the officer a memorandum even where he denies that he has the defendant's property or owes a debt to the defendant. See Section 488.550(c).

SEC. 14. Section 488.310 of the Code of Civil Procedure is amended to read:

488.310. (a) To attach an interest in real property, the levying officer shall record with the office of the county recorder of the county where the

property is located a copy of the writ and the notice of attachment.

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

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

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

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

Comment. The amendments of subdivisions (b) and (c) of Section 488.310 are largely technical. See the Comment to Section 488.010 as amended. The last sentence of subdivision (c) is amended to eliminate the provision for mailing the defendant's copy of the writ and notice at his address as it appears on the tax assessor's records; the copies are mailed to the defendant at his address for service in the action.

SEC. 15. Section 488.350 of the Code of Civil Procedure is amended to read:

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 which shall contain all of the following:

(1) The name and mailing address, if known, of both the plaintiff and the defendant in the described action.

(2) A description of the vehicle or vessel attached.

(3) A statement that the plaintiff in the action has acquired an attachment lien in such vehicle or vessel.

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

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

(by certified mail, return receipt requested).

(d) The lien of attachment acquired pursuant to levy under this section does not affect the rights of a person who is a bona fide purchaser of the vehicle or vessel and obtains possession of both the vehicle or vessel and its certificate of ownership.

(e) A failure to serve the defendant pursuant to subdivision (b) or the legal owner pursuant to subdivision (c) shall not affect the lien created pursuant to subdivision (a).

(f) The fee for filing and indexing each notice of attachment, notice of extension, or notice of release with the Department of Motor Vehicles is three dollars (\$3). Upon the request of any person, the Department of Motor Vehicles shall issue its 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 department is two dollars (\$2). Upon request, the department 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. Subdivision (c) of Section 486.350 is amended to provide the manner of service of the writ and notice.

SEC. 16. Section 488.360 of the Code of Civil Procedure is amended

to read:

488.360. (a) To attach farm products or inventory of a going business, if the defendant consents, the levying officer shall place a keeper in charge of such property for a period not to exceed 10 days. During such period, the defendant may continue to operate his farm or business at his own expense provided all sales are final and are for cash or the equivalent of cash. For the purposes of this subdivision, payment by check ~~or by credit card issued by a person other than the defendant~~ shall be deemed the equivalent of a cash payment. The levying officer shall incur no liability for accepting payment in the form of a cash equivalent. The proceeds from all sales shall be given to the keeper for the purposes of the levy unless otherwise authorized by the plaintiff. If the defendant does not consent or, in any event, after the end of such 10-day period, the levying officer shall take such property into his exclusive custody unless other disposition is made by the parties to the action. At the time of levy or promptly thereafter, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

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

exempt pursuant
to subdivision (b)
of Section 487.020

exempt

further order as the court deems appropriate to protect the plaintiff against frustration of the collection of his claim. Such order may permit the plaintiff to levy by filing pursuant to subdivision (c) and may provide reasonable restrictions on the disposition of the property previously levied upon.

(c) Notwithstanding the provisions of subdivision (a), upon the election and the instructions of the plaintiff, the levying officer shall attach farm products or inventory of a going business by filing a notice in the form prescribed by the Secretary of State which indicates that the plaintiff has acquired an attachment lien on the farm products or inventory of the defendant. When the property is crops or timber to be cut, the notice shall be recorded in the office of the county recorder in the county where the land on which the crops are growing or on which the timber is standing is located. Where, on the date of recording, the land on which the crops are growing or on which the timber is standing stands in the name of a ~~third person, either alone or together with the defendant,~~

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

of attachment to the defendant and, in the case of crops growing or

of attachment to the defendant and, in the case of crops growing or

timber standing on real property, to any other person identified in the writ in whose name the real property stands upon the records of the county at the address of such other person as shown by the records of the office of the tax assessor of the county where the property is located .

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

Comment. The provision in subdivision (a) of Section 488.360 permitting payment by credit card where a farm or business is allowed to continue operation under the authority of a keeper is deleted because of the lack of general provisions enabling the levying officer to collect charged amounts from the issuer of the credit card.

Subdivision (b) is amended to conform to the general exemption provisions. See Section 487.020 and Comment.

Subdivision (c) is amended to conform to changes made in subdivision (b) of Section 488.010 and in Section 488.310. In addition, the last sentence of subdivision (c) now provides that a copy of the writ and notice of attachment must be sent both to the defendant and to any other person in whose name the defendant's real property (on which crops are growing or timber is standing) stands upon the records of the county. This provision was omitted from the Attachment Law as enacted. Compare subdivision 2a of former Section 542. Subdivision (d) is amended to conform to subdivision (c).

SEC. 16.5. Section 488.370 of the Code of Civil Procedure is amended to read: [This amendment is an alternative to the amendment of Section 481.160.]

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 in writing by the account debtor or insurer as an obligee with a copy of the writ and the notice of attachment. The levying officer shall incur no liability for serving any person identified by the account debtor or insurer as an obligee. A failure to serve the defendant or other obligees pursuant to this subdivision shall not affect the lien created pursuant to subdivision (a).

(c) Upon the written direction of the plaintiff in the instructions given to the levying officer pursuant to Section 488.030, where the property levied upon is a nonnegotiable instrument which is otherwise negotiable within Division 3 (commencing with Section 3101) of the Commercial Code but which is not payable to order or to bearer, promptly after service pursuant to subdivision (a), the levying officer shall take custody of such nonnegotiable instrument if it is in the defendant's possession. A failure to take custody of the nonnegotiable instrument pursuant to this subdivision shall not affect the lien created pursuant to subdivision (a).

Comment. Section 488.370 is amended to provide for seizure of a "nonnegotiable" instrument which, at the time of levy or thereafter, is in the defendant's possession. Such seizure is not a condition of a valid levy. See Civil Code § 955 (transfer of "nonnegotiable instruments"); Com. Code § 3805 (commercial paper provisions generally applicable to "nonnegotiable instruments").

SEC. 17. Section 488.430 of the Code of Civil Procedure is amended to read:

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

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

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

in which the
estate is being
administered

(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. Subdivision (c) of Section 488.430 is amended to make clear that the personal representative is required to report the attachment to the probate court. This amendment makes no substantive change.

SEC. 18. Section 488.530 of the Code of Civil Procedure is amended to read:

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 parties, and upon a showing that the property is perishable or will greatly deteriorate or depreciate in value or for some

by certified mail,
return receipt
requested, at
their last known
addresses,

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) Notwithstanding subdivision (a), if the levying officer determines that perishable property will greatly deteriorate or depreciate in value before a court order for the sale of the property could be obtained, the levying officer may take any action necessary to preserve the value of the property or sell the property. The levying officer is not liable for a determination made as provided in this subdivision.

(c) ~~(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.

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

(e) ~~(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 Title 7 govern the appointment, qualifications, powers, rights, and duties of a receiver appointed under this section.

Comment. Subdivision (a) of Section 488.530 is amended to provide for the manner of service of notice. New subdivision (b) provides for the situation where the property is so perishable that there is not ample time to obtain the court order normally required by subdivision (a).

SEC. 19. Section 488.560 of the Code of Civil Procedure is amended to read:

488.560. (a) The levying officer shall release an attachment whenever he receives a written direction to that effect 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.

by certified mail,
return receipt
requested, sent to
such person's last
known address,

(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. Subdivision (b) of Section 488.560 is amended to provide the manner of service of the notice. The last known address of a person from whom property was taken but who can no longer be found within the county will often be the address of the place where the property was taken.

SEC. 20. Section 489.130 is added to the Code of Civil Procedure, to read:

§ 489.130. Insufficient undertaking not wrongful attachment

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

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

SEC. 21. Section 489.230 of the Code of Civil Procedure is amended to read:

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 undertaking on the grounds provided in Section 489.070.

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

Comment. Section 489.230 is amended to make clear that the statement required by subdivision (a) is to be included in the notice of attachment provided by Section 488.020. The amendment of subdivision (b) is technical.

SEC. 22. Section 489.310 of the Code of Civil Procedure is amended to read:

489.310. ~~(a) Upon reasonable notice to the plaintiff, a defendant whose property has been or is subject to being attached and who has appeared in the action may apply 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 substitute an undertaking in lieu of any property which has been or is subject to being attached.~~

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

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

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

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

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

SEC. 23. Section 490.010 of the Code of Civil Procedure is amended to read:

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, except that it is not a wrongful attachment if both of the following are established:

(1) The levy was not authorized solely because of the prohibition of subdivision (c) of Section 483.010.

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

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

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

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

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

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

plaintiff shows that he reasonably believed that the property attached was the property of the defendant and that he made the levy in good faith .

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

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

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

Subdivision (c). Subdivision (c) provides that wrongful attachment occurs when the plaintiff levies an ex parte writ of attachment on property which is exempt from attachment except where the writ was obtained under Chapter 12 (nonresident attachment) of this title or where the plaintiff reasonably believed that the property was not exempt from attachment. See Section 487.020 (property exempt from attachment). The determination that the property was not exempt made pursuant to Sections 484.520, 485.220, or 485.540 does not preclude a finding that the plaintiff acted unreasonably. For example, the determination may have been based on false affidavits or inadequate investigation by the plaintiff. Attachment of exempt property was classified as a form of abuse of process. See *White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 349, 438 P.2d 345, 353, 66 Cal. Rptr. 697, 705 (1968); *McNabb v. Byrnes*, 92 Cal. App. 337, 268 P. 428 (1928).

Subdivision (d). Subdivision (d) provides that wrongful attachment occurs when a writ of attachment is levied against property of a person other than the person against whom the writ is issued. This will generally be a nonparty but may include a codefendant.

Subdivision (d) is amended to broaden the exception to the plaintiff's statutory liability for attachment of a third person's property. The amendment makes clear that a plaintiff who acts reasonably and in good faith is not liable under this chapter to a third person whose property is attached. Under this subdivision as enacted a plaintiff would have been excused from liability only in the limited situation where he relied in good faith on ownership registered or recorded in the defendant's name.

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Under former law, the remedy of a third person was to file a complaint in intervention (see *Beshara v. Goldberg*, 221 Cal. App.2d 392, 34 Cal. Rptr. 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 *McPheters v. Baleman*, 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. 914, 209 P. 55 (1922)). See generally 5 B. WITKIN, CALIFORNIA PROCEDURE: Enforcement of Judgment §§ 103-115 at 3468-3481 (2d ed. 1971). Subdivision (d) does not preclude such actions (see Section 494.003) but provides a statutory alternative.

SEC. 24. Section 491.010 of the Code of Civil Procedure is

amended to read:

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

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

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

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

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