

#39.70

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Memorandum 75-42

Subject: Study 39.70 - Prejudgment Attachment (Amendments)

Attached to this memorandum are two copies of a staff draft of the Recommendation Relating to Amendments of the Attachment Law which incorporates decisions made at the May meeting. We hope to be able to approve this recommendation for printing and distribution for comment. Please make your editorial changes on one copy and give it to the staff at the June meeting.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Prejudgment Attachment

June 1975

CALIFORNIA LAW REVISION COMMISSION
School of Law
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Stanford, California 94305

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APPENDIX (green)

RECOMMENDATION
relating to
PREJUDGMENT ATTACHMENT

Introduction

In 1971, the California Supreme Court in Randone v. Appellate Department¹ declared unconstitutional California's prejudgment attachment on the grounds that the procedure violated the due process requirements of both the California and the United States constitutions.² An interim attachment statute--which was originally scheduled to expire on December 31, 1975--was enacted in 1972 to remedy the constitutional defects in the scheme invalidated by Randone.³ At the same time, the 1972 Legislature directed the Law Revision Commission to continue its study of attachment law;⁴ and, upon recommendation of the Commission,⁵ Code of Civil Procedure Sections 481.010 to 492.090 (hereinafter referred to as the "Attachment Law") were enacted in 1974.⁶

The Commission has received comments from various persons and organizations concerning the Attachment Law and has concluded that a number of revisions are needed. The Commission has recommended legislation to defer the operative date of the Attachment Law until January 1, 1977,⁷ so that the Legislature will have an opportunity to enact the

1. 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

2. For further discussion, see Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 721 (1973).

3. Cal. Stats. 1972, Ch. 550.

4. Cal. Stats. 1972, Res. Ch. 27.

5. Recommendation Relating to Prejudgment Attachment, *supra*, note 2. See also Report of Senate Committee on Judiciary on Assembly Bill 2948, Senate J. 13010 (August 21, 1974).

6. Cal. Stats. 1974, Ch. 1516 (Assembly Bill 2948).

7. Assembly Bill 919 (1975-76 Reg. Sess.). The Attachment Law originally would have become operative on January 1, 1976. Cal. Stats. 1974, Ch. 1516, § 49.

needed revisions before the Attachment Law becomes operative. This legislation would also extend the expiration date of the 1972 interim attachment statute until December 31, 1976.

Cases in Which an Attachment May Be Issued

The Attachment Law permits the issuance of an attachment in an action against a "defendant engaged in a trade, business, or profession" on an express or implied contract where the amount claimed is not less than \$500, exclusive of costs, interest, and attorney's fees, provided that the subject of the contract upon which the claim is based was not used "primarily for personal, family, or household purposes."⁸ The Commission recommends that this provision be revised as follows:

(1) Where the defendant is a corporation or a partnership or other unincorporated association, the writ of attachment should be issuable without requiring the plaintiff to show that the defendant is engaged in a trade, business, or profession or that the subject of the contract upon which the claim is based was not used primarily for personal, family, or household purposes. The interim statute permits attachment against all business corporations and partnerships without such additional showing.⁹ The recommended change would permit the issuance of an attachment against a corporation or a partnership or other unincorporated association regardless of whether it is organized for profit or is engaged in an activity for profit. The availability of attachment to secure the claim of a person who furnishes goods or services or loans money to a corporation should not depend upon the fortuity of whether the defendant corporation was organized under the General Corporation Law or the General Nonprofit Corporation Law.

(2) Where the defendant is an individual, a writ of attachment should be issuable only where the plaintiff shows that the contract claim arises out of the conduct by the individual of a trade, business, or profession and that the subject of the contract was not used primarily for personal, family, or household purposes. Under the Attachment Law, it is possible for an attachment to be issued against an individual who

8. Code Civ. Proc. § 483.010.

9. Code Civ. Proc. § 537.2.

is engaged in a business on a contract claim unrelated to the business.¹⁰
The proposed change would correct this anomaly.¹¹

Property Subject to Attachment Where Defendant is an Individual

Where the defendant is an individual sued for his individual liability as a partner, the Attachment Law limits his personal property¹² subject to attachment to that property "used or held for use in the partnership's trade, business, or profession."¹³ However, where the defendant is an individual who is liable other than as a partner, the Attachment Law does not limit the individual's personal property subject to attachment to that which is used in the defendant's trade, business, or profession.¹⁴

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10. Code Civ. Proc. § 483.010. But see Advance Transformer Co. v. Superior Court, infra note 11.
 11. The interim statute permits attachment against "[i]ndividuals engaged in a trade or business." Code Civ. Proc. § 537.2(c). It is interesting to note that, in Advance Transformer Co. v. Superior Court, 44 Cal. App.3d 127, 142, 118 Cal. Rptr. 350, 360 (1974), the court construed the interim statute "as limiting the attachment to situations in which the claim arises out of the defendant's conduct of his business."
 12. The following types of personal property are subject to attachment where the defendant is an individual: (1) accounts receivable, chattel paper, and choses in action of at least \$150, (2) deposit accounts over \$1,000, (3) equipment, (4) farm products, (5) inventory, (6) judgments arising out of the individual's conduct of a trade, business, or profession, (7) money on the premises where the individual conducts a trade, business, or profession, (8) negotiable documents, (9) negotiable instruments, (10) securities. Code Civ. Proc. § 487.010(c), (d).
 13. Code Civ. Proc. § 487.010(d).
 14. See Code Civ. Proc. § 487.010(c). In the Commission's original recommendation, subdivision (c) of Section 487.010 limited property of an individual subject to attachment to that "used or held for use in the defendant's trade, business, or profession." See Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports, 701, 793 (1973). This language was amended out before final passage of the Attachment Law; however, the parallel language in subdivision (d) remained. See Assembly Bill 2948 (1974 Reg. Sess.), as amended in the Senate, August 22, 1974.

The Commission recommends that the provision limiting an individual partner's personal property subject to attachment to that "used or held for use in the partnership's trade, business, or profession" be eliminated because it results in a different standard for determining which property of an individual is subject to attachment depending on whether the trade, business, or profession conducted by that individual is a partnership. If an individual defendant is personally liable in an action against a partnership, his property should not be afforded any greater protection than that of an individual who conducts his business, for example, as an independent contractor or sole proprietor.

Leasehold Estates With Unexpired Term of Less Than One Year

The Attachment Law provides that, where the defendant is an individual, all of the individual's real property is subject to attachment.¹⁵ The Commission recommends that this provision be amended to make clear that in the case of an individual the property subject to attachment includes any interest in real property other than a leasehold estate with an unexpired term of less than one year. Exclusion of leasehold estates with an unexpired term of less than one year will prevent the attachment of most residential leases. The interim statute contains a similar provision.¹⁶

Postlevy Claims of Exemption

The Attachment Law incorporates the exemption procedure applicable after levy of a writ of execution¹⁷ for claiming exemptions after levy of an ex parte writ of attachment.¹⁸ The execution exemption procedure requires that claims of exemption be filed within 10 days after levy of the writ, except for homestead claims¹⁹ which must be filed within 20 days after levy. Under the Attachment Law, however, in many instances

15. Code Civ. Proc. § 487.010(c).

16. Code Civ. Proc. § 537.3(b)(6).

17. Code Civ. Proc. § 690.50.

18. Code Civ. Proc. §§ 484.530 and 485.230.

19. See Code Civ. Proc. § 690.235.

the defendant will not be aware of the levy of the writ of attachment on his property until after the 10-day or 20-day period has expired.²⁰ In addition, except for hardship exemption claims (discussed infra), there is no urgent need for such an expeditious determination of exemption claims before judgment because the attached property may not be sold or collected to satisfy the plaintiff's claim until after judgment. Accordingly, the Commission recommends that the Attachment Law be amended to provide that the defendant may claim exemptions not later than 30 days after the levying officer mails or personally delivers the notice of attachment to the defendant.

The Attachment Law also provides that, if the defendant does not claim an exemption for property described in the plaintiff's application for the writ at the hearing on issuance of the writ or if the defendant claims an exemption for such property or any property not described in the writ but fails to prove the exemption, the defendant may not later claim the exemption unless he shows that the right to the exemption is a result of changed circumstances occurring after that time.²¹ However, the Attachment Law does not specify the procedure for showing changed circumstances. The Commission recommends that the procedure applicable after levy of a writ of execution be incorporated for the purpose of claiming exemptions based upon a showing of changed circumstances.

Where the plaintiff has chosen to levy on farm products or inventory of a going business by placing a keeper in charge of the property, the Attachment Law permits the defendant to apply for an order removing the keeper on the grounds that the property is essential for the support of the defendant and the defendant's family.²² The application for the order is made by a notice of motion. The hearing is held not later than five days after the motion is filed, and the plaintiff is to be given not less than three days' notice. The Commission recommends that such a

20. For provisions concerning the notice of attachment, see Chapter 8 (commencing with Section 488.010) of the Attachment Law.

21. Code Civ. Proc. §§ 484.050, 484.070, 484.340, and 484.350.

22. Code Civ. Proc. § 488.360(b).

procedure be provided for all claims of exemption based upon a showing that the property is necessary for the support of the defendant and the defendant's family. In such situations, an expeditious procedure for claiming an exemption is needed. The execution exemption procedure--which contemplates filing a claim of exemption with the levying officer and waiting for the plaintiff to file a counteraffidavit before a hearing may be held--is not designed for the speedy determination of hardship exemption claims.

Turnover Order for Documentary Evidence of Title to Property Levied Upon

The Attachment Law provides that the court may issue an order directing the defendant to cooperate in transferring possession of the property sought to be attached to the levying officer.²³ A similar turnover order directing the defendant to transfer to the levying officer possession of any documentary evidence of title should be available where (1) the property sought to be attached is levied upon by service on a third person of a copy of the writ and notice of attachment or (2) the property in the defendant's possession is seized but the defendant holds documentary evidence of title thereto. Such an order, enforceable only after the property is levied upon, would be useful, for example, where a motor vehicle is attached and the defendant holds the certificate of ownership or where the right to payment on a nonnegotiable instrument²⁴ is attached and the defendant holds the nonnegotiable instrument. Possession by the levying officer of the documentary evidence of title to attached property facilitates the eventual collection of the debt or sale of the attached property and prevents any transfer by the defendant.

23. Code Civ. Proc. § 482.080.

24. A "nonnegotiable instrument" is an instrument which is otherwise negotiable within Division 3 of the Commercial Code but which is not payable to order or to bearer. See Civil Code § 955; Commercial Code § 3805. The right to payment on a nonnegotiable instrument is a chose in action and is attached by service on the account debtor. See Code Civ. Proc. §§ 481.020, 481.050, 488.370.

Insufficient Undertaking and Wrongful Attachment

Under the Attachment Law, it may be argued that the failure of the attaching creditor to increase an undertaking when ordered to do so²⁵ is a wrongful attachment.²⁶ The Commission recommends that it be made clear that such failure is not in itself a wrongful attachment. The defendant is protected by the original undertaking for the period between the date of the levy and the date on which the increase is ordered²⁷ and the rights obtained by filing the insufficient undertaking cease upon the plaintiff's failure to comply with the order,²⁸ thereby minimizing any injury to the defendant's interests.

Description of Property Subject to Temporary Protective Order

The Attachment Law does not prescribe the manner of description of property whose transfer is restrained by a temporary protective order.²⁹ A defendant against whom such an order is issued is subject to being held in contempt if he violates the order. Consequently, the Attachment Law should be amended to require the order to describe the property in a manner adequate to permit the defendant to identify the property subject to it.

Effect of Temporary Protective Order on Deposit Accounts

The provision in the Attachment Law which permits the defendant who is subject to a temporary protective order to write checks for certain purposes despite the order is unclear.³⁰ The Commission recommends that

25. The plaintiff may be ordered to increase an undertaking pursuant to Section 489.220 (undertaking to obtain a writ of attachment or protective order) or Section 489.410 (undertaking on appeal).

26. See Code Civ. Proc. § 490.010.

27. The original undertaking remains in effect notwithstanding the order for an increase. Code Civ. Proc. § 489.090(d). The amount of the original undertaking is \$2,500 in municipal court and \$7,500 in superior court. Code Civ. Proc. § 489.220(a).

28. Code Civ. Proc. §§ 489.090(c) and 489.410(a).

29. See Code Civ. Proc. §§ 486.010-486.110.

30. Code Civ. Proc. § 486.060.

this provision be amended to make clear that the defendant may write checks against any of his bank accounts for any purpose so long as there remain on deposit sufficient funds 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.³¹ This exception to the plaintiff's wrongful attachment 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 the statutory liability for attachment of a third person's property be expanded to protect any plaintiff who acts reasonably and in good faith in causing the levy to be made.

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.

Revision of Official Comments

Before its final passage, the Attachment Law was amended several times by the Legislature. The Senate Judiciary Committee adopted a report revising the official Comments to the amended sections.³² However, the Comments to two sections of the Attachment Law were not revised at that time. These Comments, revised to reflect the Senate Judiciary Committee amendments, are set out as an appendix to this recommendation.

31. Code Civ. Proc. §§ 490.010 and 490.020.

32. Report of Senate Committee on Judiciary on Assembly Bill 2948, Senate J. 13010 (August 21, 1974).

PROPOSED LEGISLATION

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

An act to amend Sections 481.050, 482.080, 483.010, 484.050, 484.070, 484.340, 484.350, 484.530, 485.230, 486.050, 486.060, 486.070, 486.090, 487.010, 487.020, 488.010, 488.030, 488.080, 488.310, 488.350, 488.360, 488.430, 488.500, 488.530, 488.560, 489.230, 489.310, 489.320, 490.010, 491.010, and 690.50 of, and to add Sections 482.100 and 489.130 to, the Code of Civil Procedure, relating to attachment.

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

§ 481.050 (amended). Chose in action

SECTION 1. Section 481.050 of the Code of Civil Procedure is amended to read:

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

Comment. The amendment of the last sentence of Section 481.050 makes clear that a right to payment on a "nonnegotiable instrument" is a chose in action. 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).

§ 482.080 (amended). Issuance of order directing transfer

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

482.080. (a) 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 - :

(1) Possession of the property to be attached where such property is sought to be attached by taking it into custody.

(2) Possession of any documentary evidence of title to any property of or any debt owed to the defendant which is sought to be attached. An order for the transfer of possession of documentary evidence of title issued pursuant to this paragraph may be enforced by the levying officer when the property or debt is levied upon or at any time thereafter.

(b) Such The order shall contain a notice to the defendant that failure to turn over possession of such property to the levying officer comply with the order may subject the defendant to being held in contempt of court or arrest .

Comment. Section 482.080 is amended to make clear that an order may be issued under subdivision (a)(1) only where the property is sought to be attached by taking it into custody. See, e.g., Sections 488.320 (tangible personal property in possession of defendant), 488.380(a)(2) (chattel paper in possession of defendant). The enforcement of such an order is not appropriate where the property sought to be attached is in the possession of a third person or is levied upon by notice. See, e.g., Sections 488.330 (tangible personal property in possession of third person), 488.380(a)(1) (chattel paper in possession of third person).

Subdivision (a)(2) is added to Section 482.080 to provide for issuance of a "turnover" order directing the defendant to transfer to the levying officer the muniments of title to property or a debt which is attached. The order may be enforced only where the writ of attachment has been levied. Issuance of an order under subdivision (a)(2) is appropriate, for example, where a motor vehicle has been or is to be attached and the certificate of ownership is sought or where the right to payment on a nonnegotiable instrument has been or is to be attached (by service on the account debtor as provided by Section 488.370) and the nonnegotiable instrument itself is sought. Possession of such muniments of title is useful to facilitate eventual collection (such as in the case of a nonnegotiable instrument) or sale (such as in the case of the certificate of ownership of a motor vehicle) and to prevent a transfer.

An order may be issued pursuant to this section when the writ of attachment is issued or thereafter.

Subdivision (b) of Section 482.080 is amended to delete the words "or arrest" from 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.

§ 482.100 (added). Postlevy exemption claims based on change in circumstances

SEC. 3. Section 482.100 is added to the Code of Civil Procedure, to read:

482.100. (a) The defendant may claim an exemption provided in Section 487.020 for property levied upon pursuant to a writ issued under this title if the right to the exemption is the result of a change in circumstances occurring after (1) the denial of a claim of exemption for the property earlier in the action or (2) the expiration of the time for claiming the exemption earlier in the action.

(b) A claim of exemption under this section shall follow the procedure provided in Section 690.50 except that, subject to subdivision (a), the defendant may claim the exemption at any time. References in Section 690.50 to "the debtor" shall be deemed references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed references to the plaintiff.

(c) The exemption provided by subdivision (b) of Section 487.020 may be claimed at the defendant's option either pursuant to subdivision (b) of this section or by following the procedure provided in this subdivision. The claim 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 the hearing. The hearing shall be held not more than five days after the filing of the notice of motion unless, for good cause shown, 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 proving that the property is exempt pursuant to subdivision (b) of Section 487.020. Upon such showing and the showing required by subdivision (a), the court shall order the release of such property.

Comment. Section 482.100 provides the procedure for making postlevy claims of exemption under this title where the right to the exemption is based upon a change in circumstances occurring after the exemption was previously denied or the defendant failed previously to make a timely claim. Compare Sections 484.070 and 484.350 (claiming exemptions at a noticed hearing on issuance of a writ), Sections 484.530 and 485.230 (claiming exemptions immediately after levy of an ex parte writ).

The requirement that the defendant show a change in circumstances giving rise to the exemption in any case where the exemption has previously been claimed but denied or where the exemption was required to be claimed within a specified time but the defendant failed to do so is applicable, for example, where the defendant failed to claim an exemption for property described in the plaintiff's application for a writ issuable at a noticed hearing (Section 484.070(a)), where the defendant made a claim of exemption as to property not described in the plaintiff's application for a writ issuable after a noticed hearing but failed to prove the exemption (Section 484.070(b)), or where the defendant failed to claim the exemption within the time for making a claim of exemption after levy of an ex parte writ of attachment or additional writ (Section 484.530 or 485.230).

Subdivision (b) incorporates the procedure provided by Section 690.50 for claiming exemptions after levy of any writ issued under Chapter 4 or 5. See Sections 484.090 (writ issued at noticed hearing), 484.370 (additional writ issued at noticed hearing), 484.520 (ex parte additional writ), 485.220 (ex parte writ), and 485.540 (ex parte additional writ).

The provisions for claiming exemptions after levy apply as well in the case of a nonresident defendant whose property has been levied upon pursuant to a writ issued under Chapter 12, except that the nonresident defendant must first have filed a general appearance. See Sections 492.040 and 492.050. Under Chapter 12, the initial determination of exemptions is made when the defendant makes a general appearance. See Sections 492.040 and 492.050. The procedures of Section 482.100 are applicable where the right to the exemption is the result of a change in circumstances occurring after that time.

A claim of exemption made pursuant to subdivision (b) may be made at any time after levy so long as the defendant can show, pursuant to subdivision (a), that the right to claim the exemption is the result of a change in circumstances occurring after the claim was previously denied or the time for previously making the claim had expired.

A more expeditious procedure is provided by subdivision (c) for claiming a hardship exemption. See Section 487.020(b)(exemption of property necessary for the support of an individual defendant or the

defendant's family supported in whole or in part by the defendant). This procedure is substantially the same as the exemption procedure formerly provided for removing a keeper in charge of farm products or inventory of a going business. See Section 488.360(b). Subdivision (b) of former Section 537.3 permitted the defendant to claim a hardship exemption at any time after levy upon five days' notice to the plaintiff. It should be noted that an exemption for necessities may also be claimed, at the defendant's option, pursuant to the procedures provided by subdivision (b). The defendant may elect to use the subdivision (b) procedure, for example, where there is no need for the more expeditious procedure provided by subdivision (c).

After levy, the defendant may claim an exemption only for property which has been levied upon. Contrast Section 484.070 which permits the defendant to claim an exemption for property which is not described in the plaintiff's application.

§ 483.010 (amended). Actions in which attachment authorized

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 on a claim or claims for money in which each of which is based upon a contract, express or implied, where the total sum claimed amount of such claim or claims 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.

(b) An attachment may not be issued ~~if the~~ on a claim which 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) If the action is against an individual, an attachment may be issued only on a claim which arises out of the conduct by the individual of a trade, business, or profession. An attachment may not be issued where the on a claim against an individual which is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the individual primarily for personal, family, or household purposes.

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

Comment. Section 483.010 is amended to permit attachment in an action against a defendant that is not an individual without a showing that the defendant was engaged in a trade, business, or profession or that the goods, services, or money furnished were used primarily for the defendant's personal, family, or household purposes. Consequently, an attachment may be issued against a business corporation or a partnership, or other unincorporated association on a contract claim or claims where the total amount claimed is \$500 or more, exclusive of costs, interest, and attorney's fees. In addition, unlike former Section 537.2, Section 483.010, as amended, permits attachment on such claims against corporations and partnerships and other unincorporated associations which are

not organized for profit or engaged in an activity for profit. Under Section 483.010 as amended the court is not faced with the potentially difficult and complex problem of determining whether a corporation, partnership, or association is engaged in a trade, business, or profession. However, subdivision (c) provides that, if the defendant is an individual, an attachment may be issued only if the contract claim "arises out of the conduct by the individual of a trade, business, or profession" and only if the goods, services, or money furnished were not used primarily for the defendant's personal, family, or household purposes.

See Western Board of Adjusters, Inc. v. Covina Publishing, Inc., 9 Cal. App.3d 659, 88 Cal. Rptr. 293 (1970), and 2 B. Witkin, California Procedure, Provisional Remedies § 138 at 1561-1562 (2d ed. 1970), concerning when security has without any act of the plaintiff become valueless.

§ 484.050 (amended). Contents of notice of application and hearing

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 and serve on the plaintiff a notice of opposition and supporting affidavit as required by Section 484.060 not later than five days prior to the date set for hearing.

(e) If the defendant claims that the property described in the application, or a portion thereof, is exempt from attachment, he shall include such claim in the notice of opposition filed and served pursuant to Section 484.060 or file and serve 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 expiration of the time for claiming exemptions .

(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. Subdivisions (d) and (e) of Section 484.050 are amended to conform to the provisions of Sections 484.060 and 484.070. See Section 482.100 (procedure for claiming exemptions based upon a showing of changed circumstances).

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

SEC. 6. Section 484.070 of the Code of Civil Procedure is amended to read:

484.070. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so the defendant fails to make such claim or makes such claim but fails to prove that the property is exempt , he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time except as provided in Section 482.100 .

(b) If the defendant desires to claim at the hearing that property not described in the plaintiff's application is exempt from attachment, in whole or in part, the defendant shall claim such exemption as provided in this section. Failure to make such claim does not preclude the defendant from later claiming the exemption. If the claim is made as provided in this section but the defendant fails to prove that the property is exempt from attachment, he may not later claim that the property, or a portion thereof, is exempt unless he shows that the right to the exemption is the result of a change in circumstances occurring after the hearing except as provided in Section 482.100 .

(c) The claim of exemption shall:

(1) Describe the property claimed to be exempt.

(2) Specify the statute section supporting the claim.

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

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

(f) If the plaintiff desires to oppose the claim of exemption, he shall file and serve on the defendant, not less than two days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the plaintiff does not file and serve a notice of opposition as provided in this subdivision, no writ of attachment shall be issued as to the property claimed to be exempt. If all of the property described in the plaintiff's application is claimed to be exempt and the plaintiff does not file and serve a notice of opposition as provided in this subdivision, no hearing shall be held and no right to attach order or writ of attachment shall be issued and any temporary protective order issued pursuant to Chapter 6 (commencing with Section 486.010) expires .

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

Comment. Subdivisions (a) and (b) of Section 484.070 are amended to reflect the enactment of Section 482.100. Subdivision (f) is amended

to provide for automatic expiration of a temporary protective order upon the plaintiff's failure to oppose a claim of exemption as to all the defendant's property described in the plaintiff's application. This amendment eliminates any necessity in such cases for proceeding under Section 486.100 for early vacation of the order. See Section 486.090 and Comment thereto.

§ 484.340 (amended). Contents of notice of application and hearing

SEC. 7. 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 and serve on the plaintiff 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 expiration of the time for claiming exemptions .

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

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

Comment. Section 484.340 is amended to conform to the provisions of Section 484.350. See Section 482.100 (procedure for claiming exemptions based upon a showing of changed circumstances).

§ 484.350 (amended). Claim of exemption and supporting affidavit

SEC. 8. Section 484.350 of the Code of Civil Procedure is amended to read:

484.350. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so the defendant fails to make such claim or makes such claim but fails to prove that the property is exempt, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time except as provided in Section 482.100.

(b) The claim of exemption shall:

(1) Describe the property claimed to be exempt.

(2) Specify the statute section supporting the claim.

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

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

Comment. Subdivision (a) of Section 484.350 is amended to reflect the enactment of Section 482.100.

§ 484.530 (amended). Defendant's right to claim exemption

SEC. 9. Section 484.530 of the Code of Civil Procedure is amended to read:

484.530. (a) ~~If a writ of attachment is issued under this article,~~
~~the~~ The defendant may claim an exemption as to the property levied upon pursuant to a writ issued under this article by following the procedure set forth in Section 690.50 except that the defendant shall claim the exemption not later than 30 days after the levying officer serves the defendant with the notice of attachment describing such property . For this purpose, references in Section 690.50 to "the debtor" shall be deemed references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed references to the plaintiff.

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

Comment. Subdivision (a) of Section 484.530 is amended to provide that the defendant may claim an exemption for property that has been levied upon not later than 30 days after the levying officer serves the defendant with a notice of attachment describing the property. See Section 488.020 (notice of attachment). The 10-day and 20-day periods running from the time of levy as provided in Section 690.50 are not applicable to attachment. The manner of service is provided by Section

482.070. Subdivision (b) applies where the defendant has made a claim of exemption pursuant to Section 484.070 for property not described in the plaintiff's application but failed to prove his right to the exemption. See also Section 482.100 (postlevy claims of exemption on grounds of changed circumstances).

§ 485.230 (amended). Defendant's right to claim exemption

SEC. 10. Section 485.230 of the Code of Civil Procedure is amended to read:

485.230. ~~If a writ of attachment is issued under this chapter,~~
~~the~~ The defendant may claim the exemptions provided by ~~Section 487.020~~
an exemption as to property levied upon pursuant to a writ issued under
this article by following the procedure set forth in Section 690.50
except that the defendant shall claim the exemption not later than 30
days after the levying officer serves the defendant with the notice of
attachment describing such property . For this purpose, references in
Section 690.50 to "the debtor" shall be deemed references to the defend-
ant, and references in Section 690.50 to "the creditor" shall be deemed
references to the plaintiff.

Comment. Section 485.230 is amended in the same manner as subdivision
(a) of Section 484.530. See Comment to Section 484.530. In addition,
this section is amended to limit the property for which an exemption may
be claimed to the property that has been levied upon. The defendant may
not claim an additional exemption for property that has not been levied
upon under the procedure provided by this section.

§ 486.050 (amended). Effect on transfers in the ordinary course
of business

SEC. 11. 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~~ Section 486.040 and 486.060 , 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 that 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.

The temporary protective order should restrain the transfer only of an amount of the defendant's property that 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).

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

§ 486.060 (amended). Effect on checking accounts

SEC. 12. Section 486.060 of the Code of Civil Procedure is amended to read:

486.060. (a) Notwithstanding Section 486.050, any terms of the temporary protective order issued under this chapter shall permit the defendant to may issue any number of checks against any of his bank accounts in this state to the extent permitted by this section + .

~~(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. The defendant may issue any number of checks in any amount for the following purposes:~~

~~(c) In any amount in payment (1) Payment of any payroll expense (including fringe benefits and taxes and premiums for workmen's worker's compensation and unemployment insurance) falling due in the ordinary course of business prior to the levy of a writ of attachment.~~

~~(d) In any amount in payment (2) Payment for goods thereafter delivered to the defendant C.O.D. for use in his trade, business, or profession.~~

~~(e) In any amount in payment (3) Payment of taxes if penalties will accrue for any delay in payment.~~

~~(f) In any amount in payment (4) Payment of reasonable legal fees and reasonable costs and expenses required for the representation of the defendant in the action.~~

(c) In addition to the checks permitted to be issued by subdivision (b), the defendant may issue any number of checks for any purpose so

long as the total amount of such checks does not exceed whichever of the following is the greater amount:

(1) The amount by which the total amount on deposit exceeds the sum of the amount of the plaintiff's claim and the amounts permitted to be paid pursuant to subdivision (b).

(2) One thousand dollars (\$1,000).

Comment. Section 486.060, as enacted, and its predecessor, former Section 539.3, failed to state clearly 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 subdivision (b) nor does it establish a preference of one of these purposes over any other. Subdivision (c)(1) provides that the defendant may write checks for purposes other than those described in subdivision (b), in excess of \$1,000 only if the defendant reserves sufficient funds to cover checks permitted to be written by subdivision (a) and to pay the plaintiff's claim. Subdivision (c)(1) is intended to prevent a temporary protective order issued on a small claim from tying up large accounts. The defendant may always write checks in the total amount of \$1,000 as provided in subdivision (c)(2) even though the amount remaining on deposit is insufficient to secure the plaintiff's 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 to pay them and then write additional checks totaling \$3,000 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 \$3,000 since subdivision (c)

allows checks to be written in amounts in addition to the total of amounts permitted to be paid under subdivision (b) and the amount of the plaintiff's claim.

(3) If expenses under subdivision (b) total \$8,000, the defendant may write checks for any purpose in an aggregate amount of not more than \$1,000 under subdivision (c). No checks could be written under subdivision (c) in excess of \$1,000 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 under subdivision (c).

(5) In the fourth example, if the defendant writes checks for \$5,000 under subdivision (c) and later discovers that he has expenses of a type described in subdivision (b) and so writes checks for such purposes, the defendant has violated the temporary protective order.

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).

§ 486.070 (amended). Persons bound by temporary protective order

SEC. 13. Section 486.070 of the Code of Civil Procedure is amended to read:

486.070. Except as otherwise provided by Section 486.110, a temporary protective order issued under this chapter binds only the defendant , whether or not any other person knows of or is served with a copy of the temporary protective order .

Comment. The amendment of Section 486.070 makes clear that a person other than the defendant is not bound by the temporary protective order even where such person knows of the order or is served with a copy of the order. This provision is based on a similar provision in the last sentence of former Section 538.1. Section 486.070 does not affect any other provisions of law such as the law relating to fraudulent conveyances. See Civil Code §§ 3439-3440.1.

§ 486.090 (amended). Expiration of order

SEC. 14. 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~~ in this title, 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.

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

Comment. The amendment to Section 486.090 is technical and makes no substantive change. The effective date of the temporary protective order may be extended pursuant to Section 484.080 in the case of a continuance. 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). It should also be noted that, where the defendant claims an exemption for all the property described in the plaintiff's application for a writ and the plaintiff does not oppose the claim of exemption, the temporary protective order expires without a hearing or further court action. Section 484.070(f). In cases where the court determines at a hearing that property is exempt, or that a writ of attachment may not issue for any other reason, the defendant may move the court to vacate or modify the protective order pursuant to Section 486.100.

§ 487.010 (amended). Property subject to attachment

SEC. 15. 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 or other unincorporated association, all partnership or association 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) Interests in real property except leasehold estates with unexpired terms of less than one year.

~~(1)~~ (2) 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 by the defendant of the a trade, business, or profession.

(7) Money on the premises where the a trade, business, or profession is conducted by the defendant and, except for the first one

thousand dollars (\$1,000), money located elsewhere and deposit accounts; but, if the defendant has more than one deposit account or has at least one deposit account and money located other than on the premises where a trade, business, or profession is conducted by the defendant, the court, upon application of the plaintiff, may order that the writ of attachment be levied so that an aggregate amount of one thousand dollars (\$1,000) in the form of such money and in such accounts remains free of levy.

(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 (e) and which is used or held for use in the partnership's trade, business, or profession.

Comment. The amendment of the introductory 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.

Subdivision (b) is amended to make clear that, where the defendant is an unincorporated association, all the property of the association for which a method of levy is provided is subject to attachment.

Subdivision (c) is amended to make clear that leasehold estates with an unexpired term of less than one year are not subject to attachment where the defendant is an individual. This amendment continues former law. See former Section 537.3(b)(6).

The provision concerning deposit accounts--formerly appearing in paragraph (2) of subdivision (c)--has been combined with the provision

concerning money in paragraph (7). The effect of this amendment is that all of an individual defendant's money on the premises where he conducts a trade, business, or profession is subject to attachment. In addition, all but \$1,000 of the individual's deposit accounts and money not located on the premises where he conducts a trade, business, or profession is subject to attachment. However, where the individual defendant either has more than one deposit account or has one or more deposit accounts and money not on the premises, the plaintiff must apply to the court in order to levy on such money or on the deposit accounts so that the total remaining free from attachment is \$1,000. The plaintiff may apply for such order at the time of the hearing on issuance of the writ or thereafter.

Subdivision (d) is deleted. Where an individual is sued for his individual liability as a partner or a member of an association, subdivision (c) provides the property of the individual which may be reached by the attachment. Consequently, as a result of the deletion of subdivision (d), all individuals against whom attachment may properly be issued pursuant to Section 483.010 are treated the same regardless of whether their personal liability arises out of their conduct of a trade, business, or profession as a sole proprietor, an independent contractor, a partner, or a member of an association.

§ 487.020 (amended). Property exempt from attachment

SEC. 16. 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 introductory phrase of Section 487.020, reading "Notwithstanding Section 487.010," is 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).

§ 488.010 (amended). Writ of attachment; plaintiff's instructions

SEC. 17. 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 and the name and address of any person who is to be served with a copy of the writ and notice of attachment . The court may direct the order of levy of the writ of attachment upon the property described therein if the court finds at the hearing on issuance of the writ that the aggregate value of such property clearly exceeds the amount to be secured by the attachment.

(b) ~~Where the property sought to be attached is real property standing in the name of a third person, whether alone or together with the defendant,~~ Where the defendant's interest in real property is sought to be attached, the writ of attachment shall identify such

third any person , other than the defendant, in whose name the real property or interest therein stands upon the records of the county and shall describe the real property in which the defendant has an interest .

(c) Where the defendant's crops or timber to be cut are sought to be attached, the writ of attachment shall identify any person, other than the defendant, in whose name the real property on which the crops are growing or on which the timber is standing stands upon the records of the county.

Comment. The second sentence of subdivision (a) of Section 488.010 is amended to provide that the plaintiff must give the levying officer the name and address of any person who is to be served with a writ and notice. For example, under subdivision (c) of Section 488.310 the plaintiff is responsible for determining the address of the third person as shown by the records of the tax assessor. The last sentence is added to subdivision (a) to restore a provision of former law. See the last sentence of former Section 538.4.

Subdivision (b) is amended to state more clearly the requirement that the writ identify a third person in whose name the real property in which the defendant has an interest stands upon the records of the county. This amendment makes clear that the requirement of subdivision (b) is applicable where a leasehold interest is sought to be attached. See Comment to the amendment of subdivision (c) of Section 487.010. Subdivision (b) is also amended to require the writ to describe the real property in which the defendant has an interest. The addition of the phrase "upon the records of the county" restores language of former Section 542. Subdivision (b) is applicable, for example, where there has been a fraudulent transfer, where the defendant's interest in the real property is unrecorded, or where there is a resulting trust in favor of the defendant. Subdivision (b) is applicable only in the situation where the defendant's interest in real property is recorded in the name of another person and is not applicable in the normal situation where title is held jointly. The requirement of subdivision (b) applies where, for example, the defendant has an unrecorded leasehold interest

in real property that is recorded in the name of a third person. In this situation, the defendant's interest stands upon the records of the county as part of the fee interest of the third person.

Subdivision (c) is added to make clear that, where the defendant's crops are growing or timber is standing on real property which stands upon the records of the county in the name of a third person, the writ shall identify the third person. See Section 488.360(c).

§ 488.030 (amended). Levying officer to execute writ

SEC. 18. Section 488.030 of the Code of Civil Procedure is amended to read:

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

(b) Upon the receipt of written instructions from the plaintiff, or his attorney of record, the levying officer to whom the writ is directed and delivered shall execute the same without delay in the manner provided in this chapter on the property described in the writ or so much thereof as is clearly sufficient to satisfy the amount to be secured by the attachment . The levying officer is not liable for a determination made in good faith under this subdivision.

(c) Where a copy of the summons and complaint has not previously been served on the defendant, the plaintiff or his attorney of record shall instruct the levying officer to make such service at the same time he serves the defendant with a copy of the writ of attachment.

Comment. Subdivision (b) of Section 488.030 is amended to provide explicitly for the duty of the levying officer to levy upon no more property than is clearly sufficient to secure the plaintiff's claim.

See Section 484.090 (writ of attachment states amount to be secured thereby). This amendment is based on part of the first sentence of former Section 540.

§ 488.080 (amended). Inventory of property

SEC. 19. 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 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 to give the levying officer a memorandum, describing the any property of the defendant in the person's possession or any debt owed to the defendant which is levied upon and stating its value or the amount owing ; . Upon the request of the levying officer, the person shall give such memorandum 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).

§ 488.310 (amended). Interest in real property

SEC. 20. 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 real property is located a copy of the writ and the notice of attachment.

(b) Where ~~;~~ on the date of recording, the property stands in the name of a third person, either alone or together with the defendant, the writ identifies a person, other than the defendant, in whose name the real property in which the defendant has an interest stands upon the records of the county, 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 real property in which the defendant has an interest 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 real 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 other 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 (a), (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. The phrase "interest in real property" used in this section includes leasehold estates. See Section 487.010(c)(1) (leasehold estates with an unexpired term of less than one year not subject to attachment in action against an individual defendant). It should also be noted that the excess value of a homestead may be attached under this section. See Civil Code §§ 1237-1304; Code Civ. Proc. § 690.235 (homestead exemption). Cf. Southern Pac. Milling Co. v. Milligan, 15 Cal.2d 729, 104

P.2d 654 (1940); Marelli v. Keating, 208 Cal. 528, 282 P. 793 (1929).

§ 488.350 (amended). Motor vehicles and vessels

SEC. 21. 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 in the form prescribed by the Department of Motor Vehicles 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 (a) of Section 488.350 is amended to provide the Department of Motor Vehicles with authority to issue the form of notice to be filed. Subdivision (c) is amended to provide the manner of service of the writ and notice.

§ 488.360 (amended). Farm products and inventory of a going business

SEC. 22. Section 488.360 of the Code of Civil Procedure is amended to read:

488.360. (a) To attach farm products or inventory of a going business, if the defendant consents, the levying officer shall place a

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

(b) Where property is levied upon pursuant to subdivision (a), the defendant may apply for an order pursuant to this subdivision for the release of property essential for the support of the defendant and his family exempt pursuant to subdivision (b) of Section 487.020 in the manner provided in subdivision (c) of Section 482.100 . 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, If the court determines that the property is exempt pursuant to subdivision (b) of Section 487.020, the court shall order the removal of the keeper and return the defendant to possession of such exempt property as is essential for the support of himself and his family and may make such further order as the court deems appropriate to protect the plaintiff against frustration of the collection of his claim. Such order may permit the plaintiff to levy on farm products or inventory of a going business and on proceeds or after-acquired property, or both, 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 and, where permitted by the writ of attachment or court order, on proceeds or after-acquired property, or both . The notice shall state the name and mailing address, if known, of both the plaintiff and the defendant and shall describe the property attached and state whether proceeds or after-acquired property, or both, are attached. 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~~ real property on which the crops are growing or on which the timber is standing is located. Where, on the date of recording, the ~~land~~ real property on which the crops are growing or on which the timber

is standing ~~stands~~ upon the records of the county in the name of a ~~third person ; either alone or together with other than~~ the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such ~~third~~ other person identified in the writ . 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 by filing or recording a notice pursuant to this subdivision ~~shall provide~~ provides the plaintiff with 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 as would be obtained by a secured party who perfects a security interest (other than a purchase money security interest) in such property by filing a financing statement at such time and place . 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 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 reflect the enactment of Section 482.100 and to conform to the general exemption provisions. See Sections 482.100, 487.020, and the Comments to those sections.

Subdivision (c) is amended to provide specifically that the lien obtained by filing the notice pursuant to this subdivision may apply to after-acquired property and proceeds from the sale or exchange of attached inventory or farm products. The second sentence, providing for the contents of the notice, is added to make clear that the plaintiff who desires to attach proceeds or after-acquired property, or both, must so state in the notice filed with the Secretary of State or county recorder. Compare Com. Code §§ 9203(3), 9204. The next-to-last sentence of subdivision (c) is amended to make clear that a plaintiff who attaches property by filing a notice pursuant to subdivision (c) describing farm products or inventory, including proceeds or after-acquired property, or both, has the same rights and priorities as he would have if he had perfected a security interest (other than a purchase money security interest) in such property by filing a financing statement at

the time and place he filed the notice under subdivision (c). See Com. Code § 9312(5), (6)(priority where special rules applicable to purchase money security interests do not apply).

Subdivision (c) is also amended to conform to changes made in Sections 488.010 and 488.310. In addition, subdivision (c) is amended to require that a copy of the writ and notice of attachment be sent both to the defendant and to any other person in whose name the real property (on which the defendant's crops are growing or the defendant's 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).

§ 488.430 (amended). Interest in personal property of estate of decedent

SEC. 23. 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 in which the estate is being administered when any petition for distribution is filed.

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

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

Comment. 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.

§ 488.500 (amended). Lien of attachment; effective date

SEC. 24. Section 488.500 of the Code of Civil Procedure is amended to read:

488.500. (a) The Except as provided in subdivision (c) of Section 488.360, levy of a writ of attachment creates a lien on the property levied upon which is valid against all subsequent transferees of the property.

(b) The lien of attachment on real property levied upon pursuant to Section 488.310 becomes effective on the date of recording pursuant to that section.

(c) The lien of attachment on property levied upon pursuant to Section 488.320 (tangible personalty in possession of defendant), 488.360(a) (inventory and farm products, alternate method), 488.380(a)(2)(chattel paper in possession of defendant), 488.400(a)(2)(negotiable instruments, documents, or money in possession of defendant), or 488.410(a) (securities in possession of defendant) becomes effective on the date the levying officer takes custody of the property pursuant to such provision.

(d) The lien of attachment on property levied upon pursuant to Section 488.340 (equipment, other than motor vehicles, of a going business), 488.350 (motor vehicles and vessels which are equipment of a going business), or 488.360(c)(farm products and inventory, alternate method) becomes effective on the date of filing pursuant to such provision.

(e) The lien of attachment on property levied upon pursuant to Section 488.330 (tangible personalty in possession of third person), 488.380(a)(1)(chattel paper in possession of third person), 488.390 (deposit accounts), 488.400(a)(1)(negotiable instruments, documents, or money in possession of third person), or 488.410(b)(securities in possession of certain third persons) becomes effective on the date of service on the person in possession of such property.

(f) The lien of attachment on property levied upon pursuant to Section 488.370 (accounts receivable, choses in action) becomes effective on the date of service on the account debtor or insurer.

(g) The lien of attachment on a judgment levied upon pursuant to Section 488.420 becomes effective on the date of service on the judgment debtor.

(h) The lien of attachment on property levied upon pursuant to Section 488.430 becomes effective on the date of filing pursuant to that section.

(i) Notwithstanding subdivisions (b) through (h), inclusive, and except as otherwise provided by Section 486.110, where a temporary protective order has been issued pursuant to Chapter 6 (commencing with Section 486.010), the lien of attachment on property described in such order and subsequently attached is effective from the date of service of such order.

Comment: Subdivision (a) of Section 488.500 is amended to provide an exception to the validity of the attachment lien against subsequent transferees where inventory or farm products are levied upon by filing the notice provided by subdivision (c) of Section 488.360 with the Secretary of State or county recorder. In this situation, the attaching plaintiff is afforded the rights and priorities of a secured party with a perfected security interest and, under Commercial Code Section 9307, a buyer in the ordinary course of business takes free of a security interest even though he knows of it.

§ 488.530 (amended). Sale of or receiver for attached property

SEC. 25. 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~~ the plaintiff, the defendant, or any third person whose interest has been determined pursuant to Section 689, ~~after reasonable notice to the other parties and upon may apply by~~ noticed motion for the order provided in this subdivision. Upon a showing that the property is perishable or will greatly deteriorate or greatly depreciate in value or that for some other reason ~~that~~ the interests of the parties will be best served thereby, the court may order that such property be sold or may appoint a receiver or direct the levying officer to take charge of, cultivate, care for, preserve, collect, harvest, pack, or sell such property.

(b) Notwithstanding subdivision (a), if the levying officer determines that property is extremely perishable or will greatly deteriorate or greatly 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 in good faith under this subdivision.

~~(b)~~ (c) 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.

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

~~(d)~~ (e) 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 a procedure for application for the order provided by this section. New subdivision (b) provides for the situation where the property is so perishable that there is not sufficient time to obtain the court order normally required by subdivision (a).

§ 488.560 (amended). Release of attachment

SEC. 26. 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 other-

wise 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 by certified mail, return receipt requested, sent to such person's last known address, as to where he may secure its possession. If, after 30 days from the giving of such notice, such person has not claimed the property, the levying officer shall sell such property in the same manner that property is sold on execution and deposit the proceeds, after first deducting his costs and expenses, in the court to abide the judgment in the action.

(c) Where the property to be released has not been taken into custody, the levying officer shall release the attachment by issuing a written release addressed to the person served with the copy of the writ and notice and, where the writ and notice were recorded or filed, by recording or filing such written release in the same office. Where the attached property is an interest in 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 into custody. Subdivision (c) is amended to conform to the amendments of subdivision (c) of Section 487.010 and Section 488.310.

§ 489.130 (added). Failure to increase undertaking

SEC. 27. Section 489.130 is added to the Code of Civil Procedure, to read:

489.130. Where the court orders the amount of the undertaking increased pursuant to Section 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 which the plaintiff obtained by filing the insufficient undertaking cease as provided in subdivision (c) of Section 489.090 and subdivision (a) of Section 489.410.

§ 489.230 (amended). Notice to defendant

SEC. 28. 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.

(b) A the form for the temporary 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.

§ 489.310 (amended). Undertaking for release of attachment

SEC. 29. 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. Whenever a writ is issued, a defendant who has appeared in the action may apply by 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 by 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 ~~such~~ the 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 by noticed motion rather than "upon reasonable notice to the plaintiff."

§ 489.320 (amended). Undertaking to secure termination of temporary protective order

SEC. 30. Section 489.320 of the Code of Civil Procedure is amended to read:

489.320. (a) ~~Upon reasonable notice to the plaintiff,~~ a A defendant who has been served with a temporary protective order and who has appeared in the action may apply by noticed motion to the court in which the action is pending for an order terminating the temporary protective order.

(b) Before making an order terminating the temporary protective order, the court shall require the defendant to file an undertaking to pay the plaintiff the amount of any judgment recovered by the plaintiff in the action against such defendant. The amount of the undertaking filed pursuant to this section shall be equal to the amount of the plaintiff's claim. The court shall issue the order terminating the temporary protective order upon being satisfied that a sufficient undertaking has been filed.

(c) 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 489.320 is amended to provide that an application for an order under this section is made by noticed motion.

§ 490.010 (amended). Acts constituting wrongful attachment

SEC. 31. 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 temporary 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 where the plaintiff acted reasonably and in good faith in causing the levy to be made. ~~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.

Comment. Subdivision (d) of Section 490.010 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. This is an objective standard that depends upon the circumstances of the case such as, for example, that the third person's property was located on the defendant's premises or that the plaintiff relied on registered or recorded ownership or the lack thereof.

§ 491.010 (amended). Examination of third person indebted to or having property of defendant

SEC. 32. 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 three days' notice of an examination ordered pursuant to this chapter.

~~(b)~~ (c) 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.

~~(e)~~ (d) 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.

§ 690.50 (technical amendment)

SEC. 33. Section 690.50 of the Code of Civil Procedure is amended to read:

690.50. (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 also, 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 of 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 such 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 writ-

ing, 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 the 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.

Comment. Subdivisions (a) and (b) of Section 690.50 are amended to delete the references to attachment. Exemptions from attachment are governed by Title 6.5 (commencing with Section 481.010), but that title incorporates Section 690.50 by reference with some modifications. See Sections 482.100, 484.530, 485.230.

APPENDIX

The Comment to Section 489.110 should read as follows:

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

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

The Comment to Section 490.010 should read as follows:

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

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

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

Subdivision (c). Subdivision (c) provides that wrongful attachment occurs when the plaintiff levies an ex parte writ of attachment on property which is exempt from attachment except where the writ was obtained under Chapter 12 (nonresident attachment) of this title or where the plaintiff reasonably believed that the property was not exempt from attachment. See Section 487.020 (property exempt from attachment). The determination that the property was not exempt made pursuant to Sections 484.530, 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. Barnes*, 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. An exception is provided comparable to that provided in Section 689. Under former law, the remedy of a third person was to file a complaint in intervention (see *Beshara v. Goldberg*, 221 Cal. App.2d 392, 34 Cal. Rptr. 301 (1963)), a third-party claim under Code of Civil Procedure Section 689, or a separate action for damages for conversion, trespass, or some other tort (see *McPheeters v. Bateman*, 11 Cal. App.2d 106, 53 P.2d 195 (1936); *Edwards v. Sonoma Valley Bank*, 59 Cal. 136 (1881)), or for specific recovery (see *Taylor v. Bernheim*, 58 Cal. App. 404, 209 P. 55 (1922)). See generally 5 B. WITKIN, CALIFORNIA PROCEDURE *Enforcement of Judgment* §§ 103-115 at 3468-3481 (2d ed. 1971). Subdivision (d) does not preclude such actions (see Section 490.060) but provides a statutory alternative.