

368/248

#39.160

2/28/77

Memorandum 77-13

Subject: Study 39.160 - Attachment (Court Commissioners)

At the February 1977 meeting, the Commission directed the staff to draft a tentative recommendation to authorize the use of court commissioners under the Attachment Law. The draft recommendation attached to this memorandum is designed to deal with the constitutional objections raised by the 1975 Legislative Counsel's opinion. We hope to be able to approve the tentative recommendation for distribution for comment with a view toward introducing legislation in the 1978 session of the Legislature. Attached as Exhibit 1 is an outline of the judicial duties under the Attachment Law.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

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## EXHIBIT 1

## JUDICIAL DUTIES UNDER THE ATTACHMENT LAW

A. RIGHT TO ATTACH ORDERS, WRITS OF ATTACHMENT, AND DETERMINATIONOF EXEMPTIONS.1. Noticed hearing procedures and prelevy exemption claims. (Chapter

4.)

a. A right to attach order which states the amount to be secured by the attachment is issued if the court finds the following at a noticed hearing: (§ 484.090.)

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

(See § 483.010.)

(2) The plaintiff has established the probable validity of the claim. (See § 481.190 defining probable validity.)

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

b. A writ of attachment is also issued at the hearing, conditioned upon the filing of an undertaking, which describes property to be levied upon, property which is exempt, and states the amount to be secured by the attachment where: (§§ 484.090(b), 488.010(a).)

(1) The court has made the findings necessary to issue a right to attach order.

(2) The defendant has failed to prove all property sought to be attached is exempt.

c. Additional writs of attachment may be issued at a noticed hearing, conditioned upon the filing of an undertaking, if the court finds the following: (§ 484.370.)

(1) A right to attach order has been issued at a noticed hearing (§ 484.090) or the court has determined in a hearing on a motion to set aside an ex parte right to attach order that the plaintiff is entitled to the order (§§ 485.240, 492.050(d)).

(2) The defendant has failed to prove that all property sought to be attached is exempt.

**d. Continuances.**

(1) For good cause shown, the court may grant a continuance of the hearing on issuance of the order upon the defendant's or the plaintiff's application. (§ 484.080.) If the continuance is granted on the defendant's application, the effective period of any temporary protective order is extended. (§ 484.080(b) and Chapter 6.) If the continuance is granted on the plaintiff's application, the effective period of any temporary protective order may be extended. (§ 484.080(a) and Chapter 6.)

(2) The court may continue the hearing on issuance of the order and writ for the production of additional evidence upon a showing of good cause. (§ 484.090(d).)

**2. Ex parte procedures and prelevy determination of exemptions.**

(Article 3 of Chapter 4, and Chapter 5.)

a. A right to attach order and writ of attachment may be issued, conditioned upon the filing of an undertaking, if the court finds the following at an ex parte hearing: (§ 485.220.)

(1) The claim is one upon which attachment may be issued. (See § 483.010.)

(2) The plaintiff has established the probable validity of the claim. (See § 481.190.)

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

(4) The plaintiff's affidavit shows that the property sought to be attached is not exempt. (See § 487.020.)

(5) The plaintiff will suffer great or irreparable injury if the order is delayed to be heard on notice. (See § 485.010 which provides that great or irreparable injury is shown where it may be inferred that there is a danger that the property would be concealed, made unavailable to levy, or substantially impaired in value; a bulk sales notice has been recorded and published, a liquor license escrow has been opened, or any other circumstance showing that great or irreparable injury would result to the plaintiff.)

b. The court may deny the application for the ex parte right to attach order and writ of attachment in its discretion and instead issue a temporary protective order (§§ 486.010-486.110) and treat the application as an application for a right to attach order at a noticed hearing (§§ 484.010-484.110) if it finds that the requirements for issuance of an ex parte order and writ are satisfied (§ 485.220) but that it would be in the interest of justice and equity to the parties to follow the noticed hearing procedure (§ 486.030).

c. Additional writs of attachment may be issued ex parte, conditioned on the filing of an undertaking, if the court finds the following: (§ 485.540.)

- (1) An ex parte right to attach order and writ of attachment have been issued pursuant to § 485.220.
- (2) The plaintiff's affidavit shows that the property sought to be attached, or part of it, is not exempt. (See § 487.020.)
- (3) The plaintiff will suffer great or irreparable injury if the writ is delayed to be heard on notice. (See § 485.010.)

d. Additional writs of attachment may be issued ex parte, conditioned on the filing of an undertaking, if the court finds the following: (§ 484.520.)

- (1) A right to attach order has been issued after a noticed hearing (§ 484.090) or the court has determined in a hearing on a motion to set aside an ex parte right to attach order that the plaintiff is entitled to the order (§§ 485.240, 492.050(d)).
- (2) The plaintiff's affidavit shows that the property sought to be attached is not exempt. (See § 487.020.)

e. Motion to set aside ex parte right to attach order and writ of attachment may be made by the defendant and is granted if the court determines at the hearing on the motion that the plaintiff is not entitled to the order. (§ 485.240.) The hearing on the motion may be continued for production of additional evidence.

**3. Postlevy determination of exemptions.**

a. Exemptions provided by § 487.020 are claimed and determined after levy of an ex parte writ (§ 485.220), an ex parte additional writ (issued after issuance of an ex parte order and writ under § 485.540), or an ex parte additional writ (issued after issuance of a noticed hearing order and writ under § 484.520), as provided in Section 690.50. (§§ 484.530, 485.610.)

b. Farm products or inventory levied upon pursuant to Section 488.360(a) may be claimed as essential for the support of the defendant or the defendant's family. (§§ 487.020(b), 488.360(b).) Upon the required showing, the court orders removal of the keeper and return of the property essential for support and may make such further order as the court deems appropriate to protect the plaintiff.

c. Postlevy exemption claims based on change in circumstances (§ 482.100). The court orders the release of property shown to be exempt as a result of a change in circumstances occurring after (1) the denial of a claim earlier in the action or (2) the expiration of the time for claiming the exemption earlier in the action. (See §§ 488.100(c), 690.50 for procedures.)

**4. Ex parte procedures in action against nonresident defendant.**

a. A right to attach order and writ of attachment may be issued, conditioned upon the filing of an undertaking, if the court finds the following at the ex parte hearing: (§ 492.030.)

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

(See § 492.010 which permits attachment in an action for the recovery of money against nonresident individuals and foreign corporations and partnerships.)

(2) The plaintiff has established the probable validity of the claim. (See § 481.190.)

(3) The defendant is a nonresident described by § 492.010.

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

(5) The plaintiff's affidavit shows that the property is subject to attachment. (See § 492.040 which provides that all property of a nonresident is subject to attachment if a method of levy is provided by § 488.310 et seq.)

b. Additional writs of attachment may be issued ex parte, conditioned upon the filing of an undertaking, if the court finds the following: (§ 492.090.)

(1) A right to attach order has been issued against the nonresident pursuant to § 492.030.

(2) The plaintiff's affidavit shows that the property sought to be attached is subject to attachment. (See § 492.040.)

c. Exempt property (see § 487.020) is released on order of the court when the nonresident defendant files a general appearance in the action. (§ 492.040.)

d. A motion to set aside the ex parte right to attach order and writ of attachment may be made by the defendant. (§ 492.050.)

The court sets aside the right to attach order if the defendant has filed a general appearance in the action and the plaintiff fails to show that the order is authorized by some other provision. If the court finds that the plaintiff is entitled to the right to attach order, it orders the release of property exempt pursuant to § 487.020.

5. Order directing transfer. If a writ of attachment is issued, the court may also issue an order directing the defendant to transfer to the levying officer possession of the property to be taken into custody or documentary evidence of title of property to be attached. (§ 482.080.)

6. An order restricting amount of property to be levied upon or determining order of levy may be issued where the property described in the plaintiff's application clearly exceeds the amount necessary to satisfy the plaintiff's claim. (§ 482.120.)

**B. TEMPORARY PROTECTIVE ORDER. (Chapter 6.)**

- 1. Issuance of temporary protective order.** A temporary protective order may be issued ex parte, conditioned upon the filing of an undertaking, if the court finds the following: (§ 486.020.)
- a. The claim is one upon which attachment may be issued. (See § 483.010.)
  - b. The plaintiff has established the probable validity of his claim. (See § 481.190.)
  - c. The order is not sought for a purpose other than the recovery upon the claim upon which the application for the attachment is based.
  - d. The plaintiff will suffer great or irreparable injury if the order is not issued. (See § 485.010.)

**2. Contents of temporary protective order.** The temporary protective order contains such provisions as the court determines are in the interest of equity and justice (§ 486.040) and may restrain the transfer of the defendant's property in the state (§ 486.050(a)) except that the defendant may sell farm products or inventory in the ordinary course of business (§ 486.050(b)), and may write checks for certain purposes (§ 486.060).

**3. Duration of temporary protective order.**

- a. The court may prescribe a date of expiration earlier than 40 days after issuance. (§ 486.090(a).)
- b. The court may modify or vacate the temporary protective order on the defendant's ex parte application, or after a noticed hearing, if it determines that such action would be in the interest of justice and equity to the parties. (§ 486.100.)

**C. THIRD-PARTY CLAIMS.** After levy of a writ of attachment, a third person may make a third-party claim (which eventually may result in a hearing at which the court determines title to the property claimed) in the manner provided for third-party claims after levy of execution. (See §§ 488.090, 689.)

**D. EXTENSION OF LIEN OF ATTACHMENT.** Upon motion of the plaintiff, not less than 10 nor more than 60 days before the expiration of the

normal three-year period of the lien of attachment, the court may for good cause extend the duration of the lien for one year from the date the lien would otherwise expire. (§ 488.510.) The total of such extensions may not exceed five years.

**E. SALE OR CARE OF ATTACHED PROPERTY.**

1. Upon application of the plaintiff, defendant, or a third person whose interest has been determined, and reasonable notice to other parties, the court may order the sale of attached property or may appoint a receiver or direct the levying officer to take charge of, cultivate, care for, preserve, collect, harvest, pack, or sell attached property where it is shown that the property is perishable or will greatly deteriorate or depreciate in value or that such action will best serve the interests of the parties. (§ 488.530(a).)
2. The court fixes the daily fee of the receiver and may order the plaintiff to pay the receiver in advance, or may direct that all or part of the receiver's fees and expenses be paid from the proceeds of the sale. (§ 488.530(c).)

**F. RELEASE OF EXCESSIVE ATTACHMENT.** An order releasing an attachment is made where the defendant shows on noticed motion that the value of the property attached clearly exceeds the amount necessary to satisfy the plaintiff's claim. (§ 489.555.) The attachment is released to the extent that it is excessive.

**G. UNDERTAKINGS.** (Chapter 9.)

1. Approval of undertakings. All undertakings, other than those given with corporate surety, must be approved by the court before filing. (§ 489.060.)
2. Determination of objections to undertakings. The court determines objections to undertakings on noticed motion. (§ 489.080.) Objections may be made on the grounds that the sureties are insufficient or that the amount of the undertaking is insufficient. (§ 489.070.) See §§ 489.220 (increase to amount of probable recovery for wrongful attachment), 489.310 (undertaking to release attachment), 489.320 (undertaking to secure termination of protective order), 489.410 (postjudgment continuance of attachment), 489.420 (undertaking to release attachment on defendant's appeal.) The court

may permit witnesses to attend and evidence to be introduced as in a civil case. (§ 489.090(b).) The court may appoint appraisers to ascertain the value of property. (§ 489.090(b).) If the undertaking is determined to be insufficient, the court orders a sufficient undertaking to be filed. (§ 489.090(c).)

**H. RECOVERY FOR WRONGFUL ATTACHMENT.** (Chapter 10.) A motion for recovery on the plaintiff's undertaking for wrongful attachment may be made within a year after judgment by the defendant (§ 490.030) or a third person whose property is attached (§ 490.050) by the procedure provided in Section 1058a.

**I. EXAMINATION OF THIRD PERSON INDEBTED TO DEFENDANT.** (Chapter 11.)

A person owing debts to the defendant or having in his possession or under his control the defendant's personal property may be required to appear before the court and be examined regarding such property. (§ 491.010.) If the person fails to appear he may be brought before the court on a warrant. (§ 491.010(c).) If the person admits the debt or possession of the property, the court may order its attachment. (§ 491.010(d).) Witnesses may be required to appear and testify at the examination. (§ 491.040.)

Staff Draft

## TENTATIVE RECOMMENDATION

relating to

## THE ATTACHMENT LAW

Performance of Judicial Duties by Court Commissioners

## BACKGROUND

The Commission's original recommendation proposing enactment of the Attachment Law contained a provision permitting court commissioners to perform all the judicial duties under the Attachment Law.<sup>1</sup> This provision was derived in part from provisions for the issuance of writs ex parte or after a noticed hearing under the interim attachment statute.<sup>2</sup> However, the proposed provision was deleted from the bill before final passage.

Maximum use of court commissioners to perform judicial duties within the constitutional limitations is necessary for the efficient and economical administration of the Attachment Law. Without a specific statutory designation of the judicial duties which may appropriately be

1. Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 739, 760 (1973). The Attachment Law was enacted in 1974, was amended in 1976, and became operative on January 1, 1977. Cal. Stats. 1974, Ch. 1516, § 9 (original enactment); Cal. Stats. 1975, Ch. 200, § 2 (deferring operative date); Cal. Stats. 1976, Ch. 437 (amendments).
2. Former Code Civ. Proc. §§ 538.1, 538.4, as enacted by Cal. Stats. 1972, Ch. 550, §§ 9, 12, was repealed by Cal. Stats. 1974, Ch. 1516, § 12 (operative Jan. 1, 1977 pursuant to Cal. Stats. 1975, Ch. 200, § 2).

performed by court commissioners, their use will remain limited by the general statutes pertaining to the powers of court commissioners<sup>3</sup> except in certain situations where the parties stipulate otherwise.<sup>4</sup>

In preparing proposed legislation to authorize the use of court commissioners under the Attachment Law, the Commission has attempted to satisfy the constitutional objections to the original proposal which were stated in an opinion of the Legislative Counsel.<sup>5</sup> The Legislative Counsel concluded that a provision authorizing court commissioners to perform judicial duties under the Attachment Law

would be constitutional to the extent it authorized the determination of preliminary matters, even though contested, and a final determination on the merits of an issue in litigation, if uncontested. This general rule is subject to the qualification that the determination of a contested preliminary matter may, depending upon the facts of a particular case, so involve the exercise of due process rights that it would be required to be made by a judge rather than an officer such as a commissioner.

Whether a particular question involved a preliminary matter, with the exception of a recovery for wrongful attachment, which in all cases would be a determination on the merits, would depend upon the circumstances of a given case.

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3. General powers of superior court commissioners are provided in Code of Civil Procedure Section 259. Additional powers of superior court commissioners in Los Angeles County are provided by Code of Civil Procedure Section 259a which is made applicable to several other counties by Government Code Sections 70141.4-70141.12. Government Code Section 72190 authorizes municipal court commissioners to exercise the powers of superior court commissioners. Court commissioners are empowered to hear and determine certain ex parte motions for orders and writs, to approve undertakings, and in certain counties to act as judge pro tempore and hear uncontested actions and proceedings. See also 1 B. Witkin, California Procedure, Courts §§ 223-227, at 480-484 (2d ed. 1970).

4. If appointed and qualified, a commissioner may act as a temporary judge pursuant to a stipulation of the parties. Cal. Const. Art. VI, § 21; Code Civ. Proc. § 259a, subd. 4; *Rooney v. Vermont Investment Corp.*, 10 Cal.3d 351, 359-360, 515 P.2d 297, \_\_\_-\_\_\_, 110 Cal. Rptr. 353, \_\_\_-\_\_\_ (1973). Where a court commissioner is permitted by statute to hear uncontested matters, the commissioner may enter a judgment on stipulation since the stipulation makes the matter uncontested. *Id.* at 367, 515 P.2d at \_\_\_, 110 Cal. Rptr. at \_\_\_.

5. Opinion of Cal. Legislative Counsel (June 16, 1975) (unpublished).

The opinion also suggests that the determination of a contested exemption claim is the sort of situation that in some cases may involve "due process rights" so as to require the "exercise of judicial power of the highest degree." This position is buttressed by recent decisions regarding prejudgment remedies rendered by the United States and the California Supreme Courts which emphasize the importance of the defendant's right to property necessary for the support of the defendant and his or her family.<sup>6</sup>

#### RECOMMENDATION

The Commission recommends that the Attachment Law be amended to provide for the maximum use of court commissioners within appropriate constitutional limitations. Accordingly, court commissioners should be generally authorized to preside over all contested and uncontested matters arising under the Attachment Law subject to several significant exceptions. The Commission has concluded, after a review of the judicial duties specified in the Attachment Law, that court commissioners should not be permitted to hear the following matters except where the parties properly stipulate otherwise:

- (1) Contested claims of exemption.<sup>7</sup>
- (2) Contested motions for determination of liability and damages for wrongful attachment.<sup>8</sup>

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6. See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340-342 (1969); *Randone v. Appellate Department*, 5 Cal.3d 536, 558-563, 488 P.2d 13, \_\_\_-\_\_\_, 96 Cal. Rptr. 709, \_\_\_-\_\_\_ (1971); *Blair v. Pitchess*, 5 Cal.3d 258, 279, 486 P.2d 1242, \_\_\_-\_\_\_, 96 Cal. Rptr. 42, \_\_\_ (1971); *McCallop v. Carberry*, 1 Cal.3d 903, 907, 464 P.2d 122, \_\_\_ 83 Cal. Rptr. 666, \_\_\_ (1970). Cf. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605-606 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 88-90 (1972).

7. See Code Civ. Proc. §§ 482.100, 484.070, 484.350, 484.360, 484.530, 485.610, 492.040, 492.050. The proposed limitation on the power of court commissioners in situations where there is a contested exemption claim is not restricted to "necessities" claims because of the imprecision of that term and because property which may be a "necessity" may actually be claimed under the necessities exemption (Code Civ. Proc. § 487.020(b))--e.g., a savings and loan account exempt pursuant to Code Civ. Proc. § 690.7 (applicable to attachment pursuant to § 487.020(a)).

8. See Code Civ. Proc. §§ 490.030, 490.050.

(3) Contested third party claims.<sup>9</sup>

(4) Contested actions to enforce a garnishee's liability.<sup>10</sup>

Contested exemption claims are preliminary matters, but represent essential rights generally requiring judicial attention. The other matters specified here are not preliminary matters and so may be determined by a court commissioner only if uncontested, subject of course to stipulation of the parties in appropriate cases.

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9. See Code Civ. Proc. § 488.090, incorporating the procedures of Code Civ. Proc. § 689.

10. See Code Civ. Proc. § 488.550.

PROPOSED LEGISLATION

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

An act to add Section 482.060 to the Code of Civil Procedure, relating to attachment.

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

SECTION 1. Section 482.060 is added to the Code of Civil Procedure, to read:

482.060. (a) Except as otherwise provided in subdivision (b), the judicial duties to be performed under this title are subordinate judicial duties within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.

(b) Unless otherwise stipulated by the parties in writing, the judicial duties to be performed in the determination of the following matters are not subordinate judicial duties:

- (1) A contested claim of exemption.
- (2) A contested motion for determination of the liability and damages for wrongful attachment.
- (3) A contested third party claim.
- (4) A contested action to enforce a garnishee's liability.

(c) Nothing in subdivision (b) limits the power of a court to appoint a temporary judge to hear and determine a matter arising under this title pursuant to Section 21 of Article VI of the California Constitution.

Comment. Section 482.060 authorizes the use of court commissioners to perform judicial duties arising under this title, subject to the exceptions noted in subdivision (b).

Contested exemption claims, described in paragraph (1) of subdivision (b), may arise under Sections 482.100 (postlevy exemption claims based on changed circumstances), 484.070 (claim of exemption and notice of opposition in procedure for issuance of writ of attachment after a noticed hearing), 484.350-484.360 (claim of exemption and notice of opposition in procedure for issuance of additional writ after a noticed

hearing), 484.530 (claim of exemption after levy of ex parte additional writ), 485.610 (claim of exemption after levy of ex parte writ or additional writ), 492.040-492.050 (release of exempt property where non-resident defendant files general appearance).

Motions for determination of liability and damages for wrongful attachment arise under Sections 490.030 and 490.050. Third-party claims are made and determined in the manner provided by Section 689 which is incorporated by Section 488.090. Actions to enforce a garnishee's liability may be brought pursuant to Section 488.550.

The provision in subdivision (b) of this section for the stipulation of the parties recognizes that the written stipulation of the parties authorizing entry of judgment on specified terms makes the action uncontested. See Rooney v. Vermont Investment Corp., 10 Cal.3d 351, 367, 515 P.2d 297, \_\_\_, 110 Cal. Rptr. 353, \_\_\_ (1973) (applying this principle to Section 259a, subd. 6, which permits certain court commissioners to determine uncontested actions).

Subdivision (c) recognizes that a qualified commissioner or other person may be appointed as a temporary judge to determine the matter pursuant to the authority of Section 21 of Article VI of the California Constitution.