

Memorandum 82-86

Subject: Study D-301--Creditors' Remedies

The Enforcement of Judgments Law (AB 707) and the conforming changes in the Attachment Law (AB 2332) have been passed by the Legislature. The staff believes that some of the last minute changes in these bills should be reviewed by the Commission so that any needed corrections can be included in a bill for the next session. Legislation recommended by the staff is included in the attached staff draft of a recommendation. Some technical deficiencies have also come to the attention of the staff and we have included these in the staff draft. Matters not discussed below are explained in the text or Comments in the staff draft.

Amount to be Secured by Attachment

The proposed change in the law relating to the types of claims that may be offset against the amount to be secured by an attachment, as set forth in AB 2332, were removed at the request of the Business Law Section of the State Bar. We were informed that the Section wanted more time to consider these proposed changes. In order to avoid bogging the bill down in committee, the language of existing law was restored. The staff draft attached to this memorandum again proposes the clarifying amendments earlier approved by the Commission. See page 1 of the text of the draft recommendation and Section 483.015 in the proposed legislation.

Relation of State Tax Lien and Homestead Declaration

The staff proposes to amend the state tax lien law to make clear that a state tax lien attaches to a dwelling regardless of whether the debtor records a homestead declaration on the dwelling. A representative of the Franchise Tax Board has written the Commission requesting this clarification. See Exhibit 1, attached hereto. A letter raising the same issue was also sent by the State Board of Equalization. The staff believes that the suggested amendment makes no change in the new law, but we support this amendment to avoid the need to litigate the issue if it should arise.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel



STATE OF CALIFORNIA

FRANCHISE TAX BOARD

SACRAMENTO, CALIFORNIA 95867
(916) 355-0756In reply refer to
410:IR:1kg

August 20, 1982

John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. DeMouilly:

In our telephone conversation of August 16, 1982, I indicated our concern that the amendments of June 17, 1982 to the homestead exemption, when read in connection with the amendment of August 3, 1982, adding Section 704.950(c), can give the impression that state tax liens do not attach to surplus proceeds of declared homesteads while judgment liens do. The provisions of the bill as amended on May 28, 1982, contained specific provisions as to the status of state tax liens. These provisions were deleted in the June 17, 1982 amendment.

In the absence of the provisions formerly contained in AB 707 the status of the state tax lien is not clear. Government Code Section 7170 provides, with specified exceptions, that the state tax lien attaches to all property and rights to property. The homestead exemption is not included in the exceptions. The logical conclusion is that the lien attaches to the homesteaded property whether or not there is a declared homestead and that the lien is not subject to the homestead exemption unless there is a forced sale, which is protected by the State Constitution.

This conclusion is consistent with the normal interpretation of exemption statutes in relation to tax liens. An exemption statute must specifically provide for exemption from taxes. See Greene v. Franchise Tax Board 27 C.A. 3d 38 (1972). The liberal principles governing exemption statutes are not applicable to unpaid taxes. The state acts in its sovereign capacity in collecting taxes. Laws which limit sovereignty must be strictly construed. A statute will not be construed to limit the sovereign power of the state to act in its governmental capacity unless such intent clearly appears. A statute allowing a delinquent taxpayer to exercise a claim of exemption must be strictly construed. Greene v. Franchise Tax Board, supra at 42 and 43.

John H. DeMouilly
August 20, 1982

Taxes other than those enforced by means of a state tax lien are effective against the homestead exemption. See Morrison v. Barham 184 C.A.2d 267 (1960) and Re Estate of Stewart 174 Cal. 547 (1917). Thus the state tax lien should also attach to property which is homesteaded free of the exemption except for forced sales protected by the State Constitution.

However, there is uncertainty as to whether or not the state tax lien does attach. In practice, in cases involving declared homesteads, title companies treat the lien as not attaching to the property.

The language which was formerly included in AB 707 provided that the state tax lien attached to the property and had priority over the exemption unless the state foreclosed the lien. Since that language has been deleted from the bill, the uncertainty in the law remains.

In the absence of clarifying legislation, it will be necessary to institute litigation in order to determine the status of the state tax lien with respect to property which is subject to a homestead. The law will remain uncertain until the litigation is completed, which may be several years.

The fastest and most direct way to bring certainty to the law is to include provisions regarding state tax liens, which are substantially the same as those removed from AB 707. We would appreciate your including these provisions in the trailer bill which you plan to submit to the Legislature next year.

Please contact me if you need any further information regarding this matter.

Very truly yours,



Israel Rogers
Supervising Counsel
Collections-Administration
and Exempt Organizations

STAFF DRAFT

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

RECOMMENDATION

relating to

CREDITORS' REMEDIES

Amount to be Secured by Attachment
Execution of Writs by Registered Process Servers
Technical Amendments

September 1982

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

RECOMMENDATION

relating to

CREDITORS' REMEDIES

Introduction

The 1982 session of the California Legislature enacted a new Enforcement of Judgments Law¹ and conforming changes in the Attachment Law² upon recommendation of the California Law Revision Commission.³ This recommendation proposes substantive and technical revisions in the legislation enacted in 1982. The more important substantive revisions are discussed below; recommended technical changes are explained in the Comments to the provisions in the Proposed Legislation.

Amount Secured by Attachment

Under existing law, the amount for which a writ of attachment may issue is subject to reduction in the amount of "all claims which would diminish the amount of the plaintiff's recovery."⁴ This language might be construed to allow the defendant to seek to reduce the amount of the attachment by the amount of a tort claim, even though attachment is available only on a "claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars."⁵ A tort claim of the defendant that has not been reduced to judgment should not be permitted to offset the plaintiff's attachment claim. Such a tort claim is likely to be speculative in amount and may be contrived for the purpose of delaying issuance of the writ of attachment.

1. 1982 Cal. Stats. ch. _____. See also 1982 Cal. Stats. ch. 497 (conforming changes).
2. 1982 Cal. Stats. ch. _____.
3. See Tentative Recommendation Proposing the Enforcement of Judgments Law, 15 Cal. L. Revision Comm'n Reports 2001 (1980); Recommendation Relating to Attachment, 16 Cal. L. Revision Comm'n Reports 701 (1982).
4. Code Civ. Proc. § 483.015 (enacted by 1982 Cal. Stats. ch. _____, operative July 1, 1983). See also Recommendation Relating to Attachment, 16 Cal. L. Revision Comm'n Reports 701 (1982).
5. Code Civ. Proc. § 483.010(a).

The Commission recommends that the Attachment Law be revised to provide that the amount of the attachment may be reduced only by (1) the amount of any money judgment in favor of the defendant and against the plaintiff and (2) the amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action, or the amount of any claim of the defendant asserted as a defense in the answer, if the defendant's claim is one upon which an attachment could be issued.⁶

Execution of Writs by Registered Process Servers

The 1982 legislation permits registered process servers to levy on certain types of property under a writ of attachment⁷ or writ of execution.⁸ The 1982 provisions require the registered process server to file the writ, relevant instructions, and an affidavit of the actions taken in executing the writ with the levying officer within five days after the registered process server levies.⁹ The levying officer is then required to perform the remaining duties under the writ and return the writ to the court.

6. The substance of this recommendation was included in Assembly Bill 2332 of the 1981-82 Regular Session but was removed from the bill before the bill was passed by the Legislature. This recommendation was withdrawn at the request of the Business Law Section of the State Bar of California so that the Business Law Section would have sufficient time to study the recommendation. The Commission believes that this proposal merits further consideration.
7. See Code Civ. Proc. § 488.080 [as proposed in Assembly Bill 2332, 1982 legislative session]. See also Recommendation Relating to Attachment, 16 Cal. L. Revision Comm'n Reports 701, 715-16 (1982).
8. See Code Civ. Proc. § 699.080 [as proposed in Assembly Bill 707, 1982 legislative session]. See also Tentative Recommendation Proposing the Enforcement of Judgments Law, 15 Cal. L. Revision Comm'n Reports 2001, 2057-58 (1980).
9. See Code Civ. Proc. §§ 488.080(c), 699.080(c). Code of Civil Procedure Section 715.040 permits a registered process server to serve or post a writ of possession of real property, but in this case the writ must first be delivered to the levying officer who is given three business days within which to serve or post the writ. The recommended legislation revises Section 715.040 to make clear that the writ is to be returned to the judgment creditor or registered process server if the levying officer does not serve or post it within the three days allowed.

There is a danger under this scheme that the papers will not be filed with the levying officer early enough to permit the levying officer to set up a file for the case. If the levying officer has no file, there is no practical way of handling various papers that may be filed with the levying officer, such as exemption claims,¹⁰ third-party claims,¹¹ and garnishees' memorandums.¹² In addition, a garnishee may desire to pay the amount levied upon or deliver possession of property levied upon to the levying officer,¹³ and the debtor may wish to obtain the release of property levied upon by paying the amount due on the claim or judgment.¹⁴ In each of these situations, the procedure breaks down if the levying officer has no file for the case that is involved.

The Commission recommends that the provisions governing levy of attachment and execution by registered process servers be amended to require the registered process server to file a copy of the writ of attachment or writ of execution with the appropriate levying officer before attempting to levy. The levying officer's fee should also be paid at this time to cover the clerical cost of setting up a file as well as the eventual costs of performing other duties under the writ after levy.¹⁵ Requiring this initial filing with the levying officer will aid in the efficient processing of a writ of attachment or execution once levy is made by the registered process server.

10. See, e.g., Code Civ. Proc. §§ 482.100, 485.610, 703.520.

11. See Code Civ. Proc. §§ 488.110, 720.120, 720.220.

12. See Code Civ. Proc. §§ 488.610, 701.030.

13. See Code Civ. Proc. §§ 488.600, 701.010, 701.040-701.060; see also § 699.020 (payment by third person without levy).

14. Cf. Code Civ. Proc. §§ 695.210 (amount required to satisfy money judgment), 724.010 (satisfaction of judgment).

15. See Code Civ. Proc. §§ 488.080(c), 699.080(c).

Proposed Legislation

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

An act to amend Sections 483.015, 484.050, 484.060, 485.240, 488.080, 488.375, 488.385, 488.730, 685.020, 687.040, 699.080, and 714.040 of the Code of Civil Procedure, to amend Sections 864 and 7609.5 of the Financial Code, and to amend Section 7170 of the Government Code, relating to creditors' remedies.

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

38702

Code of Civil Procedure § 483.015 (amended). Amount to be secured by attachment

SECTION 1. Section 483.015 of the Code of Civil Procedure is amended to read:

483.015. (a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following:

(1) The amount of the defendant's indebtedness claimed by the plaintiff.

(2) Any additional amount included by the court under Section 482.110.

(b) The amount described in subdivision (a) shall be reduced by ~~all claims which would diminish the amount of the plaintiff's recovery.~~ the sum of the following:

(1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

(2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.

(3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.

Comment. Subdivision (b) of Section 483.015 is amended to clarify the nature of claims that will reduce the amount to be secured by attachment. The amended subdivision provides a more precise rule under which, for example, it is clear that the amount to be secured by the attachment is not reduced by a tort claim that has not been reduced to judgment. The defendant may seek to have the amount secured by the attachment reduced as provided in Sections 484.060 and 485.240.

38703

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

SEC. 2. 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) The amount to be secured by the attachment is the amount of the defendant's indebtedness claimed by the plaintiff over and above ~~all claims which would reduce the amount of the plaintiff's recovery~~ the sum of (1) the amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable, (2) the amount of any indebtedness of the plaintiff claimed by the defendant in a cross-complaint in the action if the defendant's claim is one upon which an attachment could be issued, and (3) the amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations .

(d) 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 or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment. However, additional writs of attachment may be issued to attach other nonexempt property of the defendant on the basis of the right to attach order.

(e) If the defendant desires to oppose the issuance of the order, the defendant 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.

(f) If the defendant claims that the personal property described in the application, or a portion thereof, is exempt from attachment, the defendant shall include that 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 the defendant 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 expiration of the time for claiming exemptions.

(g) The defendant may obtain a determination at the hearing whether real or personal property not described in the application or real property described in the application is exempt from attachment by including the claim in the notice of opposition filed and served pursuant to Section 484.060 or by filing and serving a separate claim of exemption with respect to the property as provided in Section 484.070, but the failure to so claim that the property is exempt from attachment will not preclude the defendant from making a claim of exemption with respect to the property at a later time.

(h) Either the defendant or the defendant's attorney or both of them may be present at the hearing.

(i) 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. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

Comment. Subdivision (c) of Section 484.050 is amended to conform to Section 483.015 as amended.

Code of Civil Procedure § 484.060 (amended). Notice of opposition by defendant and supporting affidavit

SEC. 3. Section 484.060 of the Code of Civil Procedure is amended to read:

484.060. (a) If the defendant desires to oppose the issuance of the right to attach order sought by plaintiff ~~7~~ he or objects to the amount sought to be secured by the attachment, the defendant shall file and serve upon the plaintiff no later than five days prior to the date set for the hearing a notice of opposition. The notice shall state the grounds on which the defendant opposes the issuance of the order or objects to the amount sought to be secured by the attachment and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the defendant fails to file a notice of opposition within the time prescribed, ~~he~~ the defendant shall not be permitted to oppose the issuance of the order.

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

Comment. Subdivision (a) of Section 484.060 is amended to make clear that the defendant may seek the reduction of the amount of the attachment by the amounts specified in subdivision (b) of Section 483.015.

Code of Civil Procedure § 485.240 (amended). Setting aside right to attach order and quashing writ

SEC. 4. Section 485.240 of the Code of Civil Procedure is amended to read:

485.240. (a) Any defendant whose property has been attached pursuant to a writ issued under this chapter may apply for an order (1) that the right to attach order be set aside, the writ of attachment quashed, and any property levied upon pursuant to the writ be released , or (2) that the amount to be secured by the attachment be reduced as provided in Section 483.015 . Such application shall be made by filing with the court and serving on the plaintiff a notice of motion.

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

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

(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities.

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

Comment. Subdivisions (a) and (c) of Section 485.240 are amended to make clear that the defendant may seek the reduction of the amount of the attachment by the amounts specified in subdivision (b) of Section 483.015.

Code of Civil Procedure § 488.080 (amended). Levy of attachment
by registered process server

SEC. 5. Section 488.080 of the Code of Civil Procedure is amended to read:

488.080. (a) A registered process server may levy under a writ of attachment on the following types of property:

- (1) Real property, pursuant to Section 488.315.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 488.325.
- (3) Personal property in the custody of a levying officer, pursuant to Section 488.355.
- (4) Equipment of a going business, pursuant to Section 488.375.
- (5) Motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business, pursuant to Section 488.385.
- (6) Farm products or inventory of a going business, pursuant to Section 488.405.
- (7) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (8) Deposit accounts, pursuant to Section 488.455 or 488.465.
- (9) Property in a safe deposit box, pursuant to Section 488.460 or 488.465.
- (10) Accounts receivable or general intangibles, pursuant to Section 488.470.
- (11) Final money judgments, pursuant to Section 488.480.
- (12) Interest of a defendant in personal property in the estate of a decedent, pursuant to Section 488.485.

(b) Before levying under the writ of attachment, the registered process server shall file a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

~~(b)~~ (c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do all of the following:

- (1) Comply with the applicable levy, posting, and service provisions of Article 2 (commencing with Section 488.300).
- (2) Deliver any undertaking required by Section 488.465.
- (3) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 488.610.

~~(e)~~ (d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of attachment.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of attachment on other persons as required by Article 2 (commencing with Section 488.300).

(4) Instructions in writing, as required by the provisions of Section 488.030.

~~(d)~~ Upon receipt of (e) If the fee provided by Section 26721 of the Government Code has been paid, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court. The levying officer is not liable for actions taken in conformance with the provisions of this title in reliance on information provided to the levying officer under subdivision ~~(e)~~ (d) except to the extent that the levying officer has actual knowledge that the information is incorrect. Nothing in this subdivision limits any liability the plaintiff or registered process server may have if the levying officer acts on the basis of incorrect information provided under subdivision ~~(e)~~ (d).

~~(e)~~ (f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost. If allowed, the amount of the fee to be allowed is governed by Section 1032b.

Comment. A new subdivision (b) is added to require a registered process server to file a copy of the writ with the appropriate levying officer before attempting to levy. This requirement gives the levying officer an early opportunity to establish a file which facilitates handling exemption claims and third-party claims, garnishees' memorandums, and payments by garnishees or by the defendant. Subdivision (e) is amended for consistency with new subdivision (b).

Code of Civil Procedure § 488.375 (amended). Attachment of equipment of going business

SEC. 6. Section 488.375 of the Code of Civil Procedure is amended to read:

488.375. (a) Except as provided by Section 488.385, to attach equipment of a going business in the possession or under the control of the defendant, the levying officer shall file with the office of the Secretary of State a notice of attachment, in the form prescribed by the Secretary of State, which shall contain all of the following:

- (1) The name and mailing address of the plaintiff.
- (2) The name and last known mailing address of the defendant.
- (3) The title of the court where the action is pending and the cause and number of the action.
- (4) A description of the specific property attached.
- (5) A statement that the plaintiff has acquired an attachment lien on the specified property of the defendant.

(b) Upon presentation of a notice of attachment under this section for filing and tender of the filing fee to the office of the Secretary of State, the notice of attachment shall be filed, marked, and indexed in the same manner as a financing statement. The fee for filing in the office of the Secretary of State is the same as the fee for filing a financing statement in the standard form.

(c) Upon the request of any person, the Secretary of State shall issue a certificate showing whether there is on file in that office on the date and hour stated therein any notice of attachment filed against the equipment of a particular person named in the request. If a notice of attachment is on file, the certificate shall state the date and hour of filing of each such notice and any notice affecting any such notice of attachment and the name and address of the plaintiff. The fee for the certificate issued pursuant to this subdivision is the same as the fee for a certificate issued pursuant to Section 9407 of the Commercial Code. Upon request, the Secretary of State shall furnish a copy of any notice of attachment or notice affecting a notice of attachment for the fee for a copy prescribed by subdivision (2) of Section 9407 of the Commercial Code.

(d) The fee for filing, indexing, and furnishing filing data for a notice of extension of attachment is the same as the fee for a continuation statement under Section 9403 of the Commercial Code. The fee for filing, indexing, and furnishing filing data for a notice of release of attachment is the same as the fee for a statement of release under Section 9405 of the Commercial Code.

(e) If property subject to an attachment lien under this section becomes a fixture (as defined in Section 9313 of the Commercial Code), the attachment lien under this section is extinguished.

Comment. Subdivision (e) is added to Section 488.375 to make clear that the lien on equipment is extinguished if the equipment becomes a fixture. This subdivision is the same as Sections 488.385 (attachment lien on vehicle, vessel, mobilehome, or commercial coach that is equipment), 488.405(e) (attachment lien on inventory), and 697.530(e) (judgment lien on certain business property).

24579

Code of Civil Procedure § 488.385 (amended). Attachment of vehicle, vessel, mobilehome, or commercial coach that is equipment of going business

SEC. 7. Section 488.385 of the Code of Civil Procedure is amended to read:

488.385. (a) To attach a vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles, or a mobilehome or commercial coach for which a certificate of title has been issued by the Department of Housing and Community Development, which is equipment of a going business in the possession or under the control of the defendant, the levying officer shall file with the appropriate department a notice of attachment, in the form prescribed by the appropriate department, which shall contain all of the following:

- (1) The name and mailing address of the plaintiff.
- (2) The name and last known mailing address of the defendant.
- (3) The title of the court where the action is pending and the cause and number of the action.
- (4) A description of the specific property attached.
- (5) A statement that the plaintiff has acquired an attachment lien on the specific property of the defendant.

(b) Upon presentation of a notice of attachment, notice of extension, or notice of release under this section for filing and tender of the filing fee to the appropriate department, the notice shall be filed and

indexed. The fee for filing and indexing the notice is three dollars (\$3).

(c) Upon the request of any person, the department shall issue its certificate showing whether there is on file in that department on the date and hour stated therein any notice of attachment filed against the property of a particular person named in the request. If a notice of attachment is on file, the certificate shall state the date and hour of filing of each such notice of attachment and any notice affecting any such notice of attachment and the name and address of the plaintiff. The fee for the certificate issued pursuant to this subdivision is three dollars (\$3). 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.

(d) If property subject to an attachment lien under this section becomes a fixture (as defined in Section 9313 of the Commercial Code), the attachment lien under this section is extinguished.

Comment. Subdivision (d) is added to Section 488.385 to make clear that the lien on equipment under this section is extinguished if the equipment, such as a mobilehome, becomes a fixture. This subdivision is the same as Sections 488.375(e) (attachment lien on equipment generally), 488.405(e) (attachment lien on inventory), and 697.530(e) (judgment lien on certain business property).

24580

Code of Civil Procedure § 488.730 (technical amendment). Release of attached property

SEC. 8. Section 488.730 of the Code of Civil Procedure is amended to read:

488.730. (a) The levying officer shall release attached property when the levying officer receives a written direction to release the property from the plaintiff's attorney of record or, if the plaintiff does not have an attorney of record, from the plaintiff or when the levying officer receives a certified copy of a court order for release or when otherwise required to release the property. The release extinguishes any attachment lien in favor of the plaintiff on the property released.

(b) If the property to be released has been taken into custody under the levy, it shall be released to the person from whom it was taken unless otherwise ordered by the court. If the person does not

claim the property to be released, the levying officer shall retain custody of the property and shall serve on the person a notice of where possession of the property may be obtained. If the person does not claim the property within 30 days after the notice is served, the levying officer shall sell the property (other than cash ~~and property~~ which does not have a value exceeding its face value) in the manner provided by Article 6 (commencing with Section 701.510) of Chapter 3 of Division 2 of Title 9. The levying officer shall deposit the proceeds of sale and cash, after first deducting the levying officer's costs, with the county treasurer of the county where the property is located payable to the order of the person. If the amount deposited is not claimed by the person or the legal representative of the person within five years after the deposit is made, by making application to the treasurer or other official designated by the county, it shall be paid into the general fund of the county.

(c) If the property to be released has not been taken into custody under the levy, the levying officer shall release the attachment by issuing a written notice of release and serving it on the person who was served with a copy of the writ and a notice of attachment to create the lien.

(d) If the property to be released was levied upon by recording or filing a copy of the writ and a notice of attachment, the levying officer shall record or file a written notice of release in the same office.

(e) The levying officer is not liable for releasing an attachment in accordance with this section and no other person is liable for acting in conformity with the release.

Comment. Subdivision (b) of Section 488.730 is amended to delete erroneous language. See Section 699.060(b) (release from execution).

24581

Code of Civil Procedure § 685.020 (amended). Commencement of interest

SEC. 9. Section 685.020 of the Code of Civil Procedure is amended to read:

685.020. (a) Except as provided in subdivision (b), interest commences to accrue on a money judgment on the date of entry of the judgment.

(b) Unless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on the date the installment becomes due.

Comment. Subdivision (a) of Section 685.020 continues the general rule as to the time postjudgment interest commences to run. See former Section 682.2, Section 1033; *Dixon Mobile Homes, Inc. v. Walters*, 48 Cal. App.3d 964, 122 Cal. Rptr. 202 (1975). See also Sections 695.210 and 724.010 (amount to satisfy a judgment).

Subdivision (b) codifies the rule concerning accrual of interest on support judgments payable in installments and extends the rule to other judgments payable in installments. See, e.g., *Huellmantel v. Huellmantel*, 124 Cal. 583, 589-90, 57 P. 582 (1899); *In re Marriage of Hoffee*, 60 Cal. App.3d 337, 131 Cal. Rptr. 637 (1976). The introductory clause of subdivision (b) also recognizes that in certain circumstances the court may have the authority to order that interest accrues from the date of entry of a judgment rendered in an amount certain but payable in installments. See Section 85 (municipal or justice court may fix terms and conditions of payment of money judgment), 117 (small claims court may fix terms and conditions of payment).

Section 685.020 does not affect the rules that determine the extent to which prejudgment interest is to be included in a judgment. See Section 685.110.

32226

Code of Civil Procedure § 687.040 (technical amendment). Liability of
levying officer

SEC. 10. Section 687.040 of the Code of Civil Procedure is amended to read:

687.040 (a) The levying officer is not liable for actions taken in conformance with the provisions of this title, including actions taken in conformance with the provisions of this title in reliance on information contained in the written instructions of the judgment creditor, in reliance on information provided to the levying officer by a registered process server pursuant to subdivision ~~(e)~~ (d) of Section 699.080 or subdivision (e) of Section 706.010 or subdivision (b) of Section 715.040 or other provision, except to the extent the levying officer has actual knowledge that the information is incorrect. Nothing in this subdivision limits any liability the judgment creditor may have if the levying officer acts on the basis of incorrect information given in the written instructions. Nothing in this subdivision limits any liability the judgment creditor or registered process server may have if the levying officer acts on the basis of incorrect information provided by a registered process server.

(b) Unless the levying officer is negligent in the care or handling of the property, the levying officer is not liable to either the judgment debtor or the judgment creditor for loss by fire, theft, injury, or damage of any kind to personal property while (1) in the possession of the levying officer either in a warehouse or other storage place or in the custody of a keeper or (2) in transit to or from a warehouse or other storage place.

Comment. Section 687.040 is amended to correct a cross-reference.

38028

Code of Civil Procedure § 699.080 (amended). Levy of execution by registered process server

SEC. 11. Section 699.080 of the Code of Civil Procedure is amended to read:

699.080. (a) A registered process server may levy under a writ of execution on the following types of property:

- (1) Real property, pursuant to Section 700.015.
- (2) Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead, pursuant to Section 700.020.
- (3) Personal property in the custody of a levying officer, pursuant to Section 700.050.
- (4) Personal property used as a dwelling, pursuant to subdivision (a) of Section 700.080.
- (5) Deposit accounts, pursuant to Section 700.140 or 700.160.
- (6) Property in a safe deposit box, pursuant to Section 700.150 or 700.160.
- (7) Accounts receivable or general intangibles, pursuant to Section 700.170.
- (8) Final money judgments, pursuant to Section 700.190.
- (9) Interest of a judgment debtor in personal property in the estate of a decedent, pursuant to Section 700.200.

(b) Before levying under the writ of execution, the registered process server shall file a copy of the writ with the levying officer and pay the fee provided by Section 26721 of the Government Code.

~~(b)~~ (c) If a registered process server levies on property pursuant to subdivision (a), the registered process server shall do all of the following:

(1) Comply with the applicable levy, posting, and service provisions of Article 4 (commencing with Section 700.010).

(2) Deliver any undertaking required by Section 700.160.

(3) Request any third person served to give a garnishee's memorandum to the levying officer in compliance with Section 701.030.

~~(e)~~ (d) Within five days after levy under this section, all of the following shall be filed with the levying officer:

(1) The writ of execution.

(2) An affidavit of the registered process server stating the manner of levy performed.

(3) Proof of service of the copy of the writ and notice of levy on other persons as required by Article 4 (commencing with Section 700.010).

(4) Instructions in writing, as required by the provisions of Section 687.010.

~~(d)~~ Upon receipt of (e) If the fee provided by Section 26721 of the Government Code has been paid, the levying officer shall perform all other duties under the writ as if the levying officer had levied under the writ and shall return the writ to the court.

~~(e)~~ (f) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032b.

Comment. Section 699.080 supersedes subdivisions (b) and (c) of former Section 687. This section expands and clarifies the role of the registered process server in levying on property pursuant to a writ of execution. See also Section 715.040 (service and posting of writ of possession of real property).

Subdivision (a) of Section 699.080 specifies the methods of levy that may be performed by a registered process server. This authority is limited to cases where the levy does not involve the possibility of taking immediate possession of the property.

Subdivision (c) makes clear that the registered process server is required to perform certain duties ancillary to the levy that would normally be performed by the levying officer at the time of levy or promptly thereafter. Subdivision (d) requires that the levying officer be provided with the information necessary to perform the remaining duties under the writ and to make a return on the writ. Subdivision (e) continues the substance of former Section 687(c). Subdivision (f) makes it discretionary with the court whether a fee for a registered process server will be allowed as costs. Whether the registered process server

was used as a convenience to the judgment creditor or because service would not have been made if a public employee were used is an element to be considered by the court in exercising its discretion. If the court decides to allow a fee, subdivision (f) incorporates the general standard for recovery of the costs of employing a registered process server. For a limitation on this provision, see Section 706.101(e) (earnings withholding order).

Subdivision (b) is a new provision requiring a registered process server to file a copy of the writ with the appropriate levying officer and pay the standard fee before attempting to levy. This requirement gives the levying officer an early opportunity to establish a file which facilitates handling exemption claims and third-party claims, garnishees' memorandums, and payments by garnishees or by the judgment debtor.

30698

Code of Civil Procedure § 714.040 (amended). Execution of writ of possession by registered process server

SEC. 12. Section 715.040 of the Code of Civil Procedure is amended to read:

715.040. (a) A registered process server may execute the writ of possession of real property as provided in subdivisions (a) and (b) of Section 715.020 if a proper writ of possession is delivered to the sheriff, marshal, or constable and that officer does not execute the writ as provided in subdivisions (a) and (b) of Section 715.020 within three days (Saturday, Sunday, and legal holidays excluded) from the day the writ is delivered to that officer. If the writ is not executed within such time, the levying officer shall upon request give the writ to the judgment creditor or to a registered process server designated by the judgment creditor.

(b) Within five days after executing the writ under this section, all of the following shall be filed with the levying officer:

- (1) The writ of possession of real property.
- (2) An affidavit of the registered process server stating the manner in which the writ was executed.
- (3) Proof of the service of the writ.
- (4) Instructions in writing, as required by the provisions of Section 687.010.

(c) ~~Upon receipt of the fee provided by Section 26733 of the Government Code,~~ If the writ is executed by a registered process server, the levying officer shall perform all other duties under the writ and shall return the writ to the court.

(d) The fee for services of a registered process server under this section may, in the court's discretion, be allowed as a recoverable cost upon a motion pursuant to Section 685.080. If allowed, the amount of the fee to be allowed is governed by Section 1032b.

Comment. Subdivision (a) is amended to make clear that if the levying officer does not serve or post pursuant to the writ within the three days allowed, the writ is to be returned to the judgment creditor or registered process server so that the writ can be executed pursuant to this section. Subdivision (c) is amended to avoid any implication that a second fee must be paid to the levying officer for the performance of remaining duties under the writ. The fee provided by Government Code Section 26733 is paid when the writ is delivered to the levying officer as required in subdivision (a).

28032

Financial Code § 864 (technical amendment). Bank setoff

SEC. 13. Section 864 of the Financial Code is amended to read:

864. (a) For the purposes of this section:

(1) "Customer" means one or more natural persons.

(2) "Debt" means an interest-bearing obligation or an obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit to a natural person primarily for personal, family, or household purposes, and does not mean a charge for bank services or a debit for uncollected funds or for an overdraft of an account imposed by a bank on a deposit account.

(b) A bank is limited in exercising any setoff for a debt claimed to be owed to the bank by a customer in that a setoff shall not result in an aggregate balance of less than one thousand dollars (\$1,000) as shown on the records of the bank for all demand deposit accounts maintained by a customer with the bank or any branch thereof.

(c) Not later than the day following the exercise of any setoff with respect to a deposit account for any debt claimed to be owed to the bank by a customer, the bank shall deliver to each customer personally or send by first-class mail postage prepaid to the address of each customer as shown on the records of the bank a written notice in at least 10-point type containing the following:

(1) A statement that the bank has set off a debt or a portion thereof against the customer's deposit account, identifying the account, and giving the respective balances before and after the setoff.

(2) A statement identifying the debt set off against the account and giving the respective balances due before and after the setoff.

(3) A statement that if the customer claims that the debt has been paid or is not now owing, or that the funds in the deposit account consist of moneys expressly exempt pursuant to Chapter 4 (commencing with Section 703.010) of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure, and listed in the notice, the customer may execute and return the notice to the bank by mail at the address shown or personally to the bank branch where the customer's account is maintained not later than 20 days after the date of mailing or personal delivery.

(4) A statement that if the notice is executed and returned, the bank may file an action in court to collect the debt; that if a lawsuit is filed, the customer will be notified and have an opportunity to appear and defend; and that if the bank is successful, the customer will be liable for court costs, and attorney's fees, if the debt so provides.

(5) A response form in at least 10-point type containing substantially the following:

"The debt described in the Notice of Setoff received from the bank is _____ is not _____ my debt or the debt of another person in whose name the account is maintained.

"I claim that the debt:

_____ has been paid.
 _____ is not now owing.
 _____ is not subject to setoff because the money in the account is:
 _____ Paid earnings (CCP 704.070)
 _____ Proceeds from execution sale of or insurance for loss of
 a motor vehicle (CCP 704.010)
 _____ Proceeds from execution sale of household furnishings
 or other personal effects (CCP 704.020)
 _____ Relocation benefits (CCP 704.180)
 _____ Life insurance proceeds (CCP 704.100)
 _____ Disability and health insurance benefits (CCP 704.130)
 _____ Workers' compensation benefits (CCP 704.160)
 _____ Unemployment or strike benefits (CCP 704.120)
 _____ Retirement benefits including, but not limited to,
 social security benefits (CCP 704.080, 704.110,
 704.115)
 _____ Public assistance benefits including welfare payments
 and supplemental security income (SSI) or charitable
 aid (CCP 704.170)
 _____ Proceeds from sale of or insurance for damage or
 destruction of a dwelling (CCP 704.720 , 704.960)
 _____ Proceeds from execution sale of or insurance for loss
 of tools of a trade (CCP 704.060)
 _____ Award of damages for personal injury (CCP 704.140)
 or wrongful death (CCP 704.150)

Financial aid paid by an institution of higher
education to a student for expenses while attending
school (CCP 704.190)

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ Signed: _____ "
(Customer)

(d) If the response form described in subdivision (c) executed by the customer is received by the bank not later than 20 days after the date of mailing or personal delivery of the written notice, the amount of the setoff for any debt claimed to be owed to the bank by a customer, and any bank service charges resulting from the setoff, shall be reversed and such amount shall be credited to the deposit account not later than the end of the business day following receipt of such executed response form.

(e) The limitations provided in this section do not apply to a deposit account, other than a demand deposit account, in which the bank has a security interest expressed by a written contract as collateral for the debt owing to the bank by the customer.

(f) The limitations provided in this section do not apply when a customer previously has authorized a bank in writing to periodically debit a deposit account as the agreed method of payment of the debt.

(g) The limitations provided in this section shall apply only to the exercise by a bank a setoff with respect to debts claimed to be owing to it by customers on or after July 1, 1976.

(h) Nothing in this section shall prejudice a person's right to assert exemptions under Chapter 4 (commencing with Section 703.010) of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure, or to assert a claim or defense as to the validity of the debt, in a judicial proceeding.

Comment. Subdivision (c) of Section 864 is amended to include cross-references to additional exemptions provided in the Enforcement of Judgments Law.

Financial Code § 7609.5 (technical amendment). Savings and loan association setoff

SEC. 14. Section 7609.5 of the Financial Code is amended to read:

7609.5. (a) For the purposes of this section:

(1) "Customer" means one or more natural persons.

(2) "Debt" means an interest-bearing obligation or an obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit to a natural person primarily for personal, family, or household purposes, and does not mean a charge for savings and loan services or a debit for uncollected funds or for an overdraft account imposed by a savings and loan association on a deposit account.

(3) "Deposit account" includes investment certificate, share account and withdrawable share.

(b) A savings and loan association is limited in exercising any setoff for a debt claimed to be owed to the savings and loan association by a customer in that a setoff shall not result in an aggregate balance of less than one thousand dollars (\$1,000) as shown on the records of the savings and loan association for all demand deposit accounts maintained by a customer with the savings and loan association or any branch thereof.

(c) Not later than the day following the exercise of any setoff with respect to a deposit account for any debt claimed to be owed to the savings and loan association by a customer, the savings and loan association shall deliver to each customer personally or send by first-class mail postage prepaid to the address of each customer as shown on the records of the savings and loan association a written notice in at least 10-point type containing the following:

(1) A statement that the savings and loan association has set off a debt or a portion thereof against the customer's deposit account, identifying the account, and giving the respective balances before and after the setoff.

(2) A statement identifying the debt set off against the account and giving the respective balances due before and after the setoff.

(3) A statement that if the customer claims that the debt has been paid or is not now owing, or that the funds in the deposit account consist of moneys expressly exempt pursuant to Chapter 4 (commencing with Section 703.010) of Division 2 of Title 9 of Part 2 of the Code of

Civil Procedure, and listed in the notice, the customer may execute and return the notice to the savings and loan association by mail at the address shown or personally to the savings and loan branch where the customer's account is maintained not later than 20 days after the date of mailing or personal delivery.

(4) A statement that if the notice is executed and returned, the savings and loan association may file an action in court to collect the debt; that if a lawsuit is filed, the customer will be notified and have an opportunity to appear and defend; and that if the savings and loan association is successful, the customer will be liable for court costs, and attorney's fees, if the debt so provides.

(5) A response form in at least 10-point type containing substantially the following:

"The debt described in the Notice of Setoff received from the savings and loan association is _____ is not _____ my debt or the debt of another person in whose name the account is maintained.

"I claim that the debt:

_____ has been paid.
 _____ is not now owing.
 _____ is not subject to setoff because the money in the account is:
 _____ Paid earnings (CCP 704.070)
 _____ Proceeds from execution sale of or insurance for loss of
 a motor vehicle (CCP 704.010)
 _____ Proceeds from execution sale of household furnishings
 or other personal effects (CCP 704.020)
 _____ Relocation benefits (CCP 704.180)
 _____ Life insurance proceeds (CCP 704.100)
 _____ Disability and health insurance benefits (CCP 704.130)
 _____ Workers' compensation benefits (CCP 704.160)
 _____ Unemployment or strike benefits (CCP 704.120)
 _____ Retirement benefits including, but not limited to,
 social security benefits (CCP 704.080, 704.110,
 704.115)
 _____ Public assistance benefits including welfare payments
 and supplemental security income (SSI) or charitable
 aid (CCP 704.170)
 _____ Proceeds from sale of or insurance for damage or
 destruction of a dwelling (CCP 704.720 , 704.960)
 _____ Proceeds from execution sale of or insurance for loss
 of tools of a trade (CCP 704.060)
 _____ Award of damages for personal injury (CCP 704.140)
 or wrongful death (CCP 704.150)
 _____ Financial aid paid by an institution of higher
 education to a student for expenses while attending
 school (CCP 704.190)

"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____ Signed: _____"
(Customer)

(d) If the response form described in subdivision (c) executed by the customer is received by the savings and loan association not later than 20 days after the date of mailing or personal delivery of the written notice, the amount of the setoff for any debt claimed to be owed to the savings and loan association by a customer, and any savings and loan association service charges resulting from the setoff, shall be reversed and such amount shall be credited to the deposit account not later than the end of the business day following receipt of such executed response form.

(e) The limitations provided in this section do not apply to a deposit account in which the savings and loan association has a security interest expressed by a written contract as collateral for the debt owing to the savings and loan association by the customer.

(f) The limitations provided in this section do not apply when a customer previously has authorized a savings and loan association in writing to periodically debit a deposit account as the agreed method of payment of the debt.

(g) The limitations provided in this section shall apply only to the exercise by a savings and loan association of a setoff with respect to debts claimed to be owing to it by customers on or after July 1, 1976.

(h) Nothing in this section shall prejudice a person's right to assert exemptions under Chapter 4 (commencing with Section 703.010) of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure, or to assert a claim or defense as to the validity of the debt, in a judicial proceeding.

Comment. Subdivision (c) of Section 7609.5 is amended to include cross-references to additional exemptions provided in the Enforcement of Judgments Law.

Government Code § 7170 (amended). State tax liens

SEC. 15. Section 7170 of the Government Code is amended to read:

7170. (a) Except as provided in subdivisions (b) and (c), a state tax lien attached to all property and rights to property whether real or personal, tangible or intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in this state. A state tax lien attaches to a dwelling notwithstanding the prior recording of a homestead declaration (as defined in Section 704.910 of the Code of Civil Procedure).

(b) A state tax lien is not valid as to real property against the right, title, or interest of any of the following persons where the persons's right, title, or interest was acquired or perfected prior to recording of the notice of state tax lien in the office of the county recorder of the county in which the real property is located pursuant to Section 7171:

(1) A successor in interest of the taxpayer without knowledge of the lien.

(2) A holder of a security interest.

(3) A mechanic's lienor.

(4) A judgment lien creditor.

(c) A state tax lien is not valid as to personal property against:

(1) The holder of a security interest in the property whose interest is perfected pursuant to Section 9303 of the Commercial Code prior to the time the notice of the state tax lien is filed with the Secretary of State pursuant to Section 7171.

(2) Any person (other than the taxpayer) who acquires an interest in the property under the law of this state without knowledge of the lien or who perfects an interest in accordance with the law of this state prior to the time that the notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

(3) A buyer in ordinary course of business who, under Section 9307 of the Commercial Code, would take free of a security interest created by the seller.

(4) Any person (other than the taxpayer) who, notwithstanding the prior filing of the notice of the state tax lien:

(A) Is a holder in due course of a negotiable instrument.

(B) Is a holder to whom a negotiable document of title has been duly negotiated.

(C) Is a bona fide purchaser of a security.

(D) Is a purchaser of chattel paper or an instrument who gives new value and takes possession of the chattel paper or instrument in the ordinary course of business.

(E) Is a holder of a purchase money security interest.

(F) Is a collecting bank holding a security interest in items being collected, accompanying documents and proceeds, pursuant to Section 4208 of the Commercial Code.

(G) Acquires a security interest in a deposit account or in the beneficial interest in a trust or estate.

(H) Acquires any right or interest in letters of credit, advices of credit, or money.

(I) Acquires without actual knowledge of the state tax lien a security interest in or a claim in or under any policy of insurance including unearned premiums.

(J) Acquires any right or interest in property subject to a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate of title is required as a condition of perfection of the security interest.

(5) A judgment lien creditor whose lien was created by the filing of a notice of judgment lien on personal property with the Secretary of State prior to the time the notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

Comment. The second sentence is added to subdivision (a) of Section 7170 to make clear that the recording of a homestead declaration has no effect on the attachment of a state tax lien. See also Code Civ. Proc. §§ 688.030 (exemptions from enforcement of tax), 704.850 (satisfaction of liens upon execution sale of homestead).