

Memorandum 75-16

Subject: Study 39.70 - Prejudgment Attachment (Amendments to Attachment Law)

At the January meeting, the Commission approved various amendments to the Attachment Law and directed the staff to study some subjects further. This memorandum discusses the subjects of further study, as well as additional problems raised in a new letter from Mr. David Battin, attached as Exhibit I. A staff draft of a bill to amend the Attachment Law, which implements the Commission's decisions at the January meeting and proposes solutions to additional problems, is also attached to this memorandum. The draft is analyzed section by section below.

§ 482.060. Court commissioners.

The Commission approved this amendment at the January meeting.

§ 482.080. Turnover order

The Commission approved this amendment at the January meeting.

§ 486.050. Temporary protective order effect on transfers

The Commission considered the possibility of requiring that property subject to a temporary protective order be "specified" or "identified" in the order, but was unwilling to add such a provision until the probable meaning of such terms was known. It was suggested that the staff examine the Uniform Commercial Code in this respect.

Commercial Code Section 9110 reads:

For the purposes of this division any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described. Personal property may be referred to by general kind or class if the property can be reasonably identified as falling within such kind or class or if it can be so identified when it is acquired by the debtor. The use of the word "proceeds" is sufficient without further description to cover proceeds of any character.

Section 9203 provides for a "security agreement which contains a description of the collateral" and Section 9402 similarly refers to a "description" of the collateral and of real property in the financing statement. The official Comment to Section 9110 says that "courts should refuse to follow the holdings, often found in the older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called 'serial number' test."

In California, the words "new and used automobiles" were found to sufficiently describe property covered by a security agreement. Biggins v. Southwest Bank, 322 F. Supp. 62 (D.C. 1971). Cases in other states have upheld descriptions of property which were sufficient to put the creditor on notice that he should investigate further. (New York apparently requires the description in the security agreement to be more sufficient than mere notice to investigate.) The following descriptions have been found sufficient: "inventory and accounts receivable" (Pennsylvania), "inventory" (Oregon), "1-2pc. living room suite, wine; 1-5pc. chrome dinette set, yellow; 1-3pc. panel bedroom suite, lime oak, matt. & spgs." (Kentucky), "RCA merchandise" (Missouri), and "all furniture, fixtures, and equipment now owned and hereafter acquired by the borrower" (New Hampshire). "All contents of luncheonette including equipment" is broad enough to include a cash register (Massachusetts). "All machinery and equipment now owned and acquired" by a trucker and "all equipment and parts used in connection with such property" includes nuts, bolts, gas tanks, communication radios, office furniture, typewriters, adding machines, and cash register. On the other hand, "all personal property" was found insufficient in a Kansas decision and, in New York, an omnibus clause referring to equipment was held not to include two cars where trucks were specified in the schedule.

Along with this information, the Commission should consider subdivision (e) of Section 484.020 (contents of application for order and writ) which provides for a description of property:

(e) A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that such property is subject to attachment. Where the defendant is a corporation, a reference to "all corporate property which is subject to attachment pursuant to subdivision (a) of Code of Civil Procedure Section 487.010" satisfies the requirements of this subdivision. Where the defendant is a partnership, a reference to "all partnership property which is subject to attachment pursuant to subdivision (b) of Code of Civil Procedure Section 487.010" satisfies the requirements of this subdivision. Where the defendant is an individual, the description of the property shall be reasonably adequate to permit the defendant to identify the specific property sought to be attached.

The description required where the defendant is an individual is intended primarily to allow the defendant to know which specific items of property are sought to be attached so that he may claim his exemptions. Under this standard, "equipment" or "inventory" would apparently not be adequate since the use of these terms presupposes that the property is subject to attachment. A more specific description is needed so that the defendant will be put on notice that he should claim that such property is not subject to attachment by means of the exemption procedure (see Sections 484.070, 484.090, 487.020). Section 484.090, describing the contents of the writ, provides only that the writ shall "describe the property to be levied upon" --presumably this description should meet the standards of Section 484.020.

With this background in mind, the Commission should consider the following alternatives:

1. Make no change. This was the staff recommendation at the last meeting. We felt that the provision of Section 486.040 to the effect that

the order "shall contain such provisions as the court determines would be in the interest of justice and equity to the parties, taking into account the effects on both the defendant and the plaintiff under the circumstances of the particular case" would result in adequate specification of the property subject to the order. Section 486.050 provides that the order may prohibit any transfer of any of the defendant's property--this indicates that the order may be fashioned to prohibit only certain types of transfers of certain types of property. This alternative would permit the order to cover property of an individual defendant such as "inventory" without requiring a more specific indication of the specific items of inventory covered. In this fashion, the order would apply to unknown property.

2. Provide a standard based on Section 484.020. The standard for the description of property subject to the temporary protective order could be identical to that provided in subdivision (e) of Section 484.020 (contents of application for order and writ). Under this alternative, the description of property subject to the order in the case of an individual defendant would probably have to be more specific than allowed by the Commercial Code standard. Where all the property of a corporation or partnership is subject to the order, the order would so state (subject to the issuance of checks under Section 486.060). This would avoid any confusion arising from the use of different standards in Sections 484.020 and 486.050. It would not permit restraint of unknown property of an individual defendant. The staff thinks this is the most desirable amendment alternative--it is included in the attached bill draft.

3. Commercial Code standard. The following language could be added to subdivision (a) of Section 486.050:

The temporary protective order shall describe the property subject to the order in a manner reasonably adequate to permit the defendant to identify it.

The Comment could read:

The amendment to subdivision (a) of Section 486.050 makes clear that the temporary protective order must describe the property whose transfer is prohibited in a manner such that the defendant may identify it. This standard is substantively the same as that provided by Commercial Code Section 9110.

This alternative seems to liberalize the standard for the description of property in the application for the writ in the case of an individual defendant since "specific" is left out. In the cases of corporate or partnership defendants, all of whose property is subject to the order, this standard would seem to require a more specific description than that provided in Section 484.020. The full meaning would depend on whether a description such as "all partnership property subject to attachment" is thought to be adequate to permit the defendant to identify the property. The staff thinks this sort of alternative causes too many problems.

4. Limit the temporary protective order to property described in application. At the last meeting, it was suggested that the temporary protective order might be limited to property described in the application for the order and writ. This alternative limits the scope of the temporary protective order to property described under the standards of Section 484.020. But this amendment does not provide for the manner of description of the property described in the writ which is subject to the temporary protective order. To provide for the manner of description, this alternative could be combined with the second or third alternatives to both limit the scope of the order and provide a specific standard for describing the property subject to the order. Standing alone, this amendment would have the effect of preventing restraint of unknown property of an individual defendant.

§ 486.060. Effect of temporary protective order on deposit accounts

At the January meeting, the Commission determined to amend this section to permit the defendant to issue checks as described in the section. The staff has revised this in conformance with the preceding section to provide

that the temporary protective order may not prohibit such issuance. This will assure that the form for the temporary protective order will inform the defendant of the substance of Section 486.060.

§ 487.020. Property exempt from attachment

The amendments to this section implement decisions made at the January meeting. The staff thinks the "notwithstanding" clause is unnecessary since the meaning of the section is clear without it. See also Section 488.360(b) which the staff proposes to amend to conform to Section 487.020(b) and its amendment.

§§ 488.010, 488.310, 488.360. "Standing" upon the records of the county

The Commission directed the staff to do further research on the meaning of "standing upon the records of the county" appearing in Section 542 of existing law. Treatises and decisions often speak of the record owner, apparently as a shorthand for the longer phrase "person in whose name property stands upon the records of the county." But nowhere have we found any distinction between property standing and property recorded. The staff also feels that the Attachment Law as enacted (using "standing") is adequate and would not cause confusion; however, the language "upon the records of the county" is added to Sections 488.010, 488.310, and 488.360 in the bill draft for the Commission's consideration.

In researching this question, the staff concluded that it would probably cause more confusion to substitute "recorded" for "standing." It seems plain that "standing upon the records of the county" refers to ownership which is actually written in the proper book. However, "recorded" might be taken to mean either filed in the recorder's office or entered in the proper book. Civil Code Section 1170 provides that an "instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the

recorder's office, with the proper officer, for record." Civil Code Section 1213 provides that "[e]very conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof" It has been held that, where the purpose of the recording is to give constructive notice, actual entry as opposed to mere deposit is required. See Dougery v. Bettencourt, 214 Cal. 455, 6 P.2d 499 (1931). Some CEB authors seem to disagree with this interpretation; it does not seem to bother Witkin. See Glikbarg & Andrews, California Real Estate Sales Transactions, Recording, Notice, and Priority § 1870 (Cal. Cont. Ed. Bar 1967); 3 B. Witkin, Summary of California Law, Real Property § 149 at 1890-1891 (8th ed. 1973).

§ 488.080. Third person's inventory

The staff was directed to review the Attachment Law to see whether the term "third person" or "third party" should be replaced with more descriptive language or defined. The following is a list of places where these terms and other more specific terms appear:

<u>Section</u>	<u>Text</u>	<u>Comment</u>	<u>Heading</u>	<u>Other Language</u>
488.010	(b)	X		
488.020				(c)-third-party claim
488.080				(b)-any person who retains property levied upon
488.090	X	X	X	
488.310	(b) (c)	X		
488.330	(b)	X	X	(a)-another person. Comment-person other than defendant
488.360	(c)			(a)-credit card issued by a person other than the defendant

<u>Section</u>	<u>Text</u>	<u>Comment</u>	<u>Heading</u>	<u>Other Language</u>
488.390				(b)-any other person [than the defendant]
488.400		X		
488.410		X		
488.510	(e)			
488.530	(a)			
488.550				(a)-obligor means a person who has in his possession personal property belonging to the defendant, etc.
489.240				(b)-any person other than the defendant
490.010		X		(d) and Comment - other than the person against whom the writ was issued
490.020				(a)-any other person
490.050		X	X	Text-person not originally a party
Chapter 11			X	
491.010		X	X	(a)-any person owing debts to the defendant
491.030	(a)			
491.040	X		X	

A reading of the places indicated shows that "third person" is not used in every place where it could be. Where "third person," "third party," or other terms listed above are used, the staff thinks their meaning is clear enough from the context. We would be hesitant to define "third person" because a definition seem unnecessary. If one is desired, the following might be acceptable: "Third person" or "third party" means a person other than the plaintiff who sought the writ or the defendant against whom the writ was issued.' If this definition is added, does the Commission want the sections using other terms conformed as much as possible?

The Commercial Code does not define "third party" as used therein.

Section 1201(29) provides:

"Party", as distinct from "third party", means a person who has engaged in a transaction or made an agreement within this division.

§ 488.310(b). Third person owner of real property named in the writ

Mr. Battin suggests that, to assist the recorder, subdivision (b) of Section 488.310 should be amended to specify that the third person in whose name the recorder is to index the attachment is the third person named in the writ. (See item 8 at page 4 in Exhibit I.) Subdivision (b) of Section 488.010 requires the writ to name such person but, as Mr. Battin indicates, the statute does not specifically limit the indexing requirement to such person. Perhaps this could cause a problem if some third person other than the one named in the writ was the record owner. This change is implemented in the draft bill attached.

§ 488.310(d). Service on occupant of real property

Mr. Battin asks whether each occupant of a hotel, motel, shopping center, or office building is to be served with a copy of the writ and notice of attachment. (See item 7 at page 4 of Exhibit I.) The Commission has previously discussed this matter (if memory serves us right) and concluded that, generally speaking, apartment house occupants and shopping center occupants should each get notice. Where a hotel is involved, the creditor probably should serve each occupant, but it may be acceptable for the service to be made by posting in view of the last two sentences of the Comment, which read:

Service is still required upon the occupant and copies of the writ and the notice must be mailed as well to the defendant and to any third person in whose name the property stands of record on the date of levy, but these are not conditions of a valid levy. It might be noted, however, that the failure to perform these acts may be evidence of malice sufficient to support punitive damages in an action for wrongful attachment where the failure is due to action or inaction by the plaintiff. See generally Section 490.010 (acts constituting wrongful attachment).

In the case of a family, the following provision of subdivision (d) seems to answer the question:

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.

The staff does not believe there is any need for this provision to be made any more specific.

§§ 488.370, 488.380. Levy on accounts receivable, choses in action, chattel paper

Mr. Battin asks why the account debtor is not required to pay the levying officer the amount due on an account receivable or chose in action levied upon under Section 488.370 as is required by Section 488.380 (chattel paper). (See item 2 on page 2 of Exhibit I.)

Subdivision (d) of Section 488.380, which provides that the rights and duties of the account debtor on chattel paper are not affected until he is served, and subdivision (e), which requires the person (other than the defendant) receiving payments under the chattel paper to pay such amounts to the levying officer, are necessary because of the nature of levy on chattel paper. Chattel paper is levied upon by seizure if it is in the hands of the defendant and by notice if it is in the hands of a third person. The account debtor is a "fourth person" where the chattel paper is in the hands of a third person, and he does not get notice of the levy until as much as 45 days after levy. Consequently, he may continue making payments under it. Subdivision (e) makes clear that these amounts go to the levying officer.

Under Section 488.370 (accounts receivable, choses in action), however, there is no evidence of the indebtedness to attach, so the levy is made by notice on the account debtor on the account receivable or the chose in action. There is then no gap between time of levy and the time the account debtor

learns he is not to pay any obligation to the debtor; a provision like subdivision (e) in Section 488.360 would here be superfluous.

The staff does not think any change is needed here.

(The problem raised by Mr. Battin apparently was encountered when the question of stating the rights and duties of the account debtor under the writ as required by Section 488.020 arose. Section 488.370 is consistent with the other levy provisions; it is Section 488.380 which varies from the pattern of other provisions. The rights and duties of persons served, which are required to be indicated in the form provided by Section 488.020, are stated in part so far as levy is concerned in Sections 488.540 (voluntary payment of amounts under account receivable, chattel paper, chose in action, negotiable instrument, and judgment to levying officer) and 488.550 (liability of garnishee holding personal property of the defendant, an account debtor of the defendant, or person obligated to defendant on negotiable instrument).)

§ 488.410. Securities

Mr. Battin asks why a security is not levied on by service on the issuer. (See item 4 on page 3 in Exhibit I.) The manner of attaching securities is designed to conform with Commercial Code Section 8317. We assume the Commission does not wish to change this provision. See the Comment to Section 488.410.

Mr. Battin also asks whether Section 488.550 (enforcement of liability of garnishee by suit) applies to a pledgee of stock. Section 488.550 applies only where the "obligor" (defined in subdivision (a)) is served with a copy of the writ and notice of attachment. However, as Section 488.410 makes clear, securities may be attached under its provision only where the securities are in the possession of the defendant, are in escrow pursuant to the Corporate Securities Law, or have been surrendered to the issuer. In other cases, subdivision (d) specifies that plaintiff's relief is governed by Commercial Code Section 8317(2)(injunctive relief).

§ 488.430. Levy on interest in estate of decedent

Mr. Battin suggests that subdivision (c) of Section 488.430 should be amended to make clear that the court where the decedent's personal representative reports the attachment is the probate court. (See item 6 on page 4 in Exhibit I.) From the context of the section, this subdivision seems clear enough. Does the Commission wish to amend it as shown in the draft bill?

§ 488.550. Liability of garnishee

Mr. Battin asks whether Section 488.550 applies to banks, savings and loan associations, credit unions, persons obligated on negotiable instruments or negotiable documents, and corporations which have issued securities. (See item 3 on pages 2-3 in Exhibit I.) As indicated supra in the discussion of Section 488.410, Section 488.550 applies whenever a person having in his possession the defendant's personal property, an account debtor of the defendant, or a person obligated to the defendant on a negotiable instrument is served with a copy of the writ and notice of attachment. Upon service, the person is liable to the plaintiff for the value of the defendant's interest. The staff sees no reason why this general provision would not apply to banks, savings and loan associations, credit unions, and persons obligated on negotiable instruments and documents. It would not apply to all corporations which have issued securities since the property is not generally in the possession of the corporation; if the security has been surrendered, then presumably it would apply.

§ 489.130. Insufficient undertaking for wrongful attachment

The amendment of this section was approved by the Commission at the January meeting.

§§ 489.230 and 488.020. Notice of attachment

Mr. Battin raises a problem concerning the notice of attachment. (See item 5 on page 3 of Exhibit I.) The "notice of levy of the writ of attachment"

referred to in Section 489.230 is the same as the "notice of attachment" as it is called throughout Chapter 8. To avoid confusion and the drafting of a separate form, the staff recommends conforming Section 489.230 to Section 488.020, as set out in the draft bill.

§ 489.310. Undertaking for release of attachment

The amendment of this section implements the Commission's decision at the January meeting.

§ 490.010(d). Wrongful attachment for levy on property of third persons

The amendment of this section implements the Commission's decisions at the January meeting. We have expanded the exception to liability for wrongful attachment where property of a third person is attached to protect the plaintiff who relies on recorded or registered ownership which is permitted as well as required to be registered by law. The staff is somewhat uneasy about this change since it is impossible to say what sorts of registered or recorded ownership would be covered by this provision. The language "required by law" clearly applies to motor vehicles. (See Veh. Code § 4000.) Arguably, this language would also include ownership indicated in an application for a permit (and in the permit itself) from the Board of Equalization. (Revenue and Taxation Code Sections 6066-6072 require every "seller" to apply for a permit; the application is signed by the owner.) There are most certainly other sorts of ownership required to be filed, recorded, registered, stated, or whatever.

"Permitted" by law would include interests indicated in instruments recorded with the county recorder. It may include interests filed under Division 9 of the Commercial Code; however, it should be noted that Division 9 does not utilize the concept of title. (See Com. Code § 9202.) This raises the question of what is meant by the phrase "property of a third person" used in Section 490.010(d).

§§ 491.010-491.040. Examination of third person indebted to defendant

Mr. Battin raises questions concerning the procedure for examining third persons indebted to defendants under Chapter 11 (Sections 491.010-491.040). (See item 1 on page 1 of Exhibit I.) As the Comment to Section 491.010 states, Chapter 11 reenacts the substance of Sections 545-545.3, which do not specify any procedure. The draft bill presents amendments to Section 491.010 which would make clear that the order is issued on application of the plaintiff, supported by an affidavit on information and belief, and requiring notice to be sent to the defendant. The form printed in E. Jackson, California Debt Collection Practice § 9.91 (Cal. Cont. Ed. Bar 1968), indicates that the order is presently issued on the basis of such an affidavit. Is the notice provision desirable?

In the 1974 session of the Legislature, the provisions concerning post-judgment examination of the debtor or debtor's debtor were amended to provide that a person may also be arrested for failure to appear where he is served by a registered process server (in addition to a sheriff, constable, marshal, or some person specially appointed). Should subdivision (b) of Section 491.010 be amended to add registered process servers?

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

EXHIBIT I

JUDICIAL COUNCIL ADVISORY COMMITTEE
ON LEGAL FORMS

Chairman
HON. HARRY L. HUPP
Committee Staff Attorney
DAVID HOWARD BATTIN

1230 WEST THIRD STREET
LOS ANGELES, CALIFORNIA 90017
(213) 482-8220

22 January 1975

John H. DeMouly, Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Re: Attachment Law

Dear John:

I submit for your consideration additional comments and recommendations of the Attachment Forms Subcommittee. Page numbers refer to the chaptered act.

1. CCP 491.010-491.040 at pp. 59, 60 (CLRC comment at p. 844 of the Bluebook)

The CLRC comment suggests that 491.010-491.040 in substance reenacts CCP 545. At present there are no existing court forms implementing CCP 545. The new 491 sections do not specify the procedural steps whereby the 3rd person is brought into court for his examination. Does the plaintiff file an application for order of court for attendance and examination of the 3rd person? Does the defendant receive notice of the date, time and place of the 3rd party examination, if not, why not? We considered drafting an Application For Order Requiring Attendance of Third Person For Examination and an Order on the reverse side thereof. After a very lengthy discussion we concluded that by creating the forms we would,

in effect, be drafting rules of court procedure, hence we decided for the time being, against drafting forms for the 491 series. We suggest that you compare 491.010-491.040 with CCP Sections 714-723 (inclusive), which sections specify procedural steps, which might suggest to you similar proceedings in a newly drafted Chapter 11. (See Exhibit "A" attached hereto)

It was the consensus of the subcommittee that minor technical amendments to the 491 series would make Chapter 11 a valuable creditor's aid. We agreed that the defendant must receive notice of the hearing.

2. CCP 488.370 at p. 41 (CLRC comment at p. 811, Bluebook)

Why is there no requirement that the account debtor pay to the levying officer the amount due on the account receivable or the chose in action, as is required of the account debtor (chattel paper) in 488.380? The section, 488.370, does not impose a duty on the account debtor, nor does it state any of his rights. (See: 488.020(a)(b)(c)(d) at p. 33) The failure to specify the rights and duties of the account debtor in 488.370 creates a forms drafting problem in our Notice of Attachment.

3. CCP 488.550 at pp. 49-50 (CLRC comment at pp. 824-825, Bluebook)

Does 488.550 apply to a bank, a savings and loan association, an employee's credit union? Does 488.550 apply to an

John H. DeMouilly
22 January 1975
Page 3

"obligor" pursuant to 488.400? Does 488.550 apply to a corporation which has issued a security? (See: 488.410)

4. CCP 488.410 at p. 44 (CLRC comment at p. 816, Bluebook)

Why not make a provision for levy against the entity issuing the security? And, does 488.550 apply to the possessor of a security, e.g., a pledgee?

5. CCP 488.020 at p. 33 (CLRC comment at p. 797, Bluebook) and CCP 489.230(a) at pp. 53-54 (CLRC comment at p. 834, Bluebook)

488.020 relates to the Notice of Attachment and 489.230(a) relates to the Notice of Levy. The notice of levy is buried in Article 2 at p. 53 entitled: "Undertakings to Obtain Writ of Attachment or Protective Order". It would appear that the single purpose of the notice of levy is to advise the defendant that an undertaking has been filed and that he has a right to object to its sufficiency. We rejected any statutory suggestion that this one sentence notice appear on a separate form. We urge you to delete CCP 489.230(a) and to amend 488.020 by adding a new subsection (e) reading: "An undertaking has been filed. Defendant has a right to object to the undertaking on the grounds provided in CCP 489.070", or language of similar construction. Thus, we can accomplish the intent of 489.230(a) by new subsection 488.020(e) on the form of Notice of Attachment which notice the defendant receives in all situations.

6. CCP 488.430 at p. 45 (CLRC comment at p. 818, Bluebook)

Subsection (c) reads: "The personal representative shall report such attachment to the court when any petition for distribution is filed." Which court? The probate court or the court which issued the writ of attachment? The subcommittee has construed this to mean the probate court and in our Notice of Attachment the personal representative will be required to so report. Reporting to the issuing court would be an idle act. You could avoid the ambiguity by amending 488.430(c) to read: "The personal representative shall report such attachment to the probate court when any petition for distribution is filed."

7. CCP 488.310(d) at p. 36 (CLRC comment at p. 802, Bluebook)

What if a hotel, motel, large office building, or large regional shopping center, is attached, do all hotel, motel guests and all tenants receive the writ and notice of attachment? Does each member of a family occupying a residence or apartment receive the writ and the notice?

8. CCP 488.310(b) at pp. 35-36 (CLRC comment at p. 802, Bluebook)

Subsection (b) at p. 36 should be amended to read:
"Where, on the date of recording, the property stands in the name of a third person named in the writ, either alone or together with the defendant, the recorder shall index

such attachment when recorded, in the names of both defendant and such person." The new language, "named in the writ", would assist the recorder in indexing the writ.

As of this writing we have completed 10 forms as follows:

1. Application For Right to Attach Order and Writ of Attachment Additional Writs of Attachment After Hearing Ex Parte and Temporary Protective Order (Committee #11 amends #1)

2. Notice of Application and Hearing For Right to Attach Order and Writ of Attachment (Committee #2)

3. Notice of Application and Hearing For Additional Writs of Attachment (Committee #3)

4. Notice of Application and Hearing For Right to Attach Order and Writ of Attachment Additional Writs of Attachment (Committee #4 amended by LP #4 12/31/74)

5. Order For Right to Attach After Hearing Order For Issuance of Writ of Attachment (Committee #5)

6. Ex Parte Order For Right to Attach and For Writ of Attachment Against Property of Nonresident (CCP 492.040) (Committee #6)

7. Ex Parte Order For Right to Attach and For Writ of Attachment (Committee #7)

8. Writ of Attachment After Hearing Ex Parte (Committee #8)

John H. DeMouilly
22 January 1975
Page 6

9. Temporary Protective Order [] After Hearing [] Ex Parte (Committee #s 9 and 9a)

10. Application and Notice of Application and Hearing For Order to Set Aside Right to Attach Order, To Quash Writ of Attachment Issued [] Ex Parte [] Against Nonresidents and To Release Levied Property (Committee #12)

I am enclosing for your use in considering our comments, "Resume of Chapter 8, Article 2."

Thank you for your courtesies and cooperation.

Cordially,



David Howard Battin,
Committee Staff Attorney

Judicial Council Advisory
Committee on Legal Forms

DHB:shm

cc: Hon. Harry L. Hupp
All members Attachment Subcommittee
Edward P. Hill

NAME, ADDRESS, AND TELEPHONE NUMBER
OF ATTORNEY(S)

Mr. R. C. Marley

ATTORNEY(S) FOR

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NUMBER

PLAINTIFF(S)

VS

DEFENDANT(S)

**DECLARATION AND ORDER
FOR APPEARANCE OF**

DEBTOR OF JUDGMENT DEBTOR

I am attorney for judgment creditor(s) in the above entitled action or proceeding. Judgment was entered therein on _____, 19____, for said judgment creditor(s) against

Said Judgment has not been vacated or reversed, and \$_____ thereof, exclusive of interest, is owing and unpaid. Execution has heretofore properly issued against property of said judgment debtor(s) and the above captioned person or corporation has property of such judgment debtor(s), or is indebted to him in an amount exceeding \$50.00 as is shown by the following facts:

There is no stay of execution herein. Said debtor of judgment debtor presently resides at or has a place of business at _____, which is within Los Angeles County or is less than 150 miles from the place of trial.

Said debtor of judgment debtor (has) (has not) been previously examined in proceedings supplemental to execution herein. (IF THERE HAS BEEN SUCH A PREVIOUS EXAMINATION, SET FORTH FACTS SURROUNDING SAID EXAMINATION AND DATE THEREOF.)

(over)

EXHIBIT "A" (3 FORMS)

(Use the following paragraph only if debtor of judgment debtor is a corporation and you desire the presence of a particular officer or member thereof, representing said corporation. To satisfy all jurisdictional requirements, such person must be an officer or member upon whom service of a summons could be effected in a suit against the corporation. Other witnesses may be subpoenaed if desired):

is an officer or

Name of Person

member of said debtor of judgment debtor in that he is the
thereof.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California on
19 _____

.....
Signature

ORDER

Good cause appearing from the foregoing declaration it is ordered that

debtor of judgment debtor/ as an officer or member of

debtor of judgment debtor, appear in Dept. _____, Los Angeles County Courthouse, 111 North Hill St.,

Los Angeles, California, on the _____ day of 19 _____, at _____ M. and answer concerning property of

judgment debtor _____ before _____ Referee/Judge,

**This Order is to be served by a Sheriff, Constable, Marshal or

.....
(Name of Person designated to serve)

Dated this _____ day of _____, 19 _____

.....
Judge/Commissioner
of the Superior Court

DECLARATION OF SERVICE

I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action or proceeding; I served the above DECLARATION AND ORDER FOR APPEARANCE OF DEBTOR OF JUDGMENT DEBTOR herein by personally delivering to and leaving with the following persons in the State of California at the County and on the date set opposite their respective names, a true copy thereof, to wit:

Name	At County of	Date
		19
		19

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed at _____, California, on _____, 19 _____

**See Section 717 C.C.P.

.....
Signature

NAME, ADDRESS, AND TELEPHONE NUMBER
OF ATTORNEY(S)

ATTORNEY(S) FOR

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NUMBER

PLAINTIFF(S)

VS

DECLARATION AND ORDER FOR
APPEARANCE OF JUDGMENT DEBTOR

DEPENDANT(S)

I am attorney for judgment creditor(s) in the above entitled action or proceeding. Judgment was entered therein on _____, 19____, for said judgment creditor(s) against _____ thereof, exclusive of interest is owing and unpaid. There is no stay of execution and execution may properly be issued. Said judgment debtor presently resides or has a place of business at _____ which is within Los Angeles County or is less than 150 miles from the place of trial. Said judgment debtor (has) (has not) been previously examined in proceedings supplemental to execution herein. (IF THERE HAS BEEN SUCH A PREVIOUS EXAMINATION, SET FORTH FACTS SURROUNDING SAID EXAMINATION AND DATE THEREOF.)

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, on _____, 19____.

Signature

ESTIMATED TIME FOR HEARING

[]

OVER

ORDER

Good cause appearing from the foregoing declaration, it is ordered that

judgment debtor, appear in Dept. Los Angeles County Courthouse, 111 North Hill Street, Los Angeles, California, on , 19 , at M., and answer concerning his property before Referee Judge.

** This Order is to be served by a Sheriff, Constable, Marshal or

(Name of person designated to serve.)

Dated , 19

Judge/Commissioner of the Superior Court

DECLARATION OF SERVICE

I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action of proceeding; I served the above DECLARATION AND ORDER FOR APPEARANCE OF JUDGMENT DEBTOR herein by personally delivering to and leaving with the following persons in the State of California at the County and on the date set opposite their respective names, a true copy thereof, to-wit:

Name	At County of	Date
		19
		19

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed at , California, on , 19

Signature

Address

City

** See Section 714 C.C.P.

Name, Address, and Telephone Number of Attorney(s)

Attorney(s) For

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE

CASE NUMBER

Plaintiff(s)

vs.

Defendant(s)

**ORDER FOR
APPEARANCE OF JUDGMENT DEBTOR**

Good cause appearing, IT IS ORDERED that _____
Judgment Debtor, appear in Department _____ of this Court at _____
Santa Ana, California,
on the _____ day of _____, 19 ____, at _____ M., before the Honorable
_____, Judge to answer concerning his property. If said Judgment Debtor
does not appear at the time and place above specified, upon application, a warrant will be issued for his arrest.

*This order to be served by a Sheriff, Constable, Marshal or

(Name of person designated to serve)

Dated this _____ day of _____, 19 ____

*See Section 714 CCP

Judge of the Superior Court

**DECLARATION FOR ORDER FOR APPEARANCE OF JUDGMENT DEBTOR
(C.C.P. Secs. 714, 717.1)**

I am attorney for judgment creditor(s) in the above entitled action or proceeding. Judgment was entered therein on _____, 19 ____ for said judgment creditor(s) against _____
_____. Said judgment has not been vacated or reversed, and
\$ _____ thereof, exclusive of interest, is owing and unpaid. There is no stay of execution and
execution may properly be issued. Said judgment debtor presently resides or has a place of business at _____
_____, which is within Orange County, or is less than 150 miles
from the place of trial. Said judgment debtor has not been previously examined in proceedings supplemental to
execution herein, or, if he has previously been so examined, that he has not been required to appear for exam-
ination within the four months immediately preceding the date hereof.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at _____, California, on _____, 19 ____

Signature

DECLARATION OF SERVICE

I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action or proceeding; I served the above DECLARATION AND ORDER FOR APPEARANCE OF JUDGMENT DEBTOR herein by personally delivering to and leaving with the following persons in the State of California at the County and on the date set opposite their respective names, a true copy thereof, to-wit:

Name	At County of	Date
------	--------------	------

_____ 19____

Fee for service \$ _____ Mileage \$ _____ Notary \$ _____ Total \$ _____

(To be completed in California by process server, other than a sheriff, marshal or constable*)

- Not a registered California process server (CCP 417.40).
 Registered: _____ County,
 Number: _____

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on (insert date) _____,
 at (insert place) _____, California.
 (Type or print name, address, and telephone no.)

(To be completed in California by sheriff, marshal or constable*)

I certify that the foregoing is true and correct and that this certificate was executed on (insert date) _____
 at (insert place) _____, California.
 (Type or print name, title, county and, when applicable, Municipal or Justice Court District.)

Signature: _____

Signature: _____

*This declaration or certificate of service must be executed within California (CCP 2015.5). A proof of service executed outside California must be made by affidavit.

RESUME OF CHAPTER 8. ARTICLE 2.

ARTICLE 2. Method of Levy on Particular Types of Property
(at p. 33, CCP 488.310-430)

1. 488.310: Interest in Real Property, p. 35
LO records with the county recorder the writ and notice of attachment. No duty on 3rd person.
2. 488.320: Tangible Personal Property in Possession of Defendant, p. 36
LO takes property into custody. No duty on 3rd person.
3. 488.330: Tangible Personal Property Belonging to Defendant In Possession of 3rd Person, p. 37
 - (a) LO serves 3rd person with writ and notice of attachment.
 - (b) Upon demand of 3rd person LO shall take property into custody. No duty on 3rd person.
4. 488.340: Equipment of a Going Business, p. 37
LO files with Secretary of State a notice in form prescribed by the Secretary of State. No duty on 3rd person.
5. 488.350: Motor Vehicle or Vessel, p. 38
LO files with DMV a notice in the form prescribed by 488.350(a)(1)(2)(3). No duty on 3rd person.
6. 488.360: Farm Products or Inventory of a Going Business, p. 39
 - (a) If defendant consents, LO places a keeper in charge of property for 10 days.
 - (b) If defendant does not consent LO takes property into his custody; see other alternatives. No duty on 3rd person.
7. 488.370: Account Receivable, p. 41
LO serves the account debtor with writ and notice of attachment. No duty on 3rd person.
- 8.* 488.380: Chattel Paper, p. 42
 - (a) LO serves the person in possession with writ and notice of attachment.
 - (b) If defendant in possession LO takes custody.
 - (c) After service complete account debtor shall make payments to the LO. 3rd person, the account debtor has duty to pay LO.
9. 488.390: Deposit Account, p. 43
LO serves the financial institution holding such account with writ and notice of attachment. No duty on 3rd person.

* 3rd person has duty.

10. 488.400: Negotiable Instrument, p. 43
 - (a) LO serves the person in possession with copy of writ and notice of attachment.
 - (b) If defendant is in possession LO takes custody. No duty on 3rd person.

11. 488.410: A Security, p. 44
 - (a) LO takes custody if defendant in possession.
 - (b) If security is in escrow per Corp Sec Law or has been surrendered to issuer, LO serves person in possession with writ and notice of attachment. No duty on 3rd person.

12. 488.420: Judgment Owing Defendant, p. 44
LO shall file in the action in which judgment was entered a copy of the writ and the notice of attachment (final Judgment). No duty on 3rd person.

- 13.* 488.430: Interest of Defendant In Personal Property Belonging to the Estate of A Decedent, p. 45
 - (a) LO shall 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 serve the personal representative of the decedent with a copy of the writ and the notice.
 - (b) The personal representative shall report the attachment to the court when any petition for distribution is filed. Personal representative has duty.

In all 13 situations the LO serves the defendant, in one manner or another, the writ and notice of attachment.

In situation #s 2 and 6 the defendant only is served. In situation #s 8, 10 and 11, the defendant, or a 3rd person, is served according to which one is in possession. In situation #s 3, 7 and 9 only a 3rd person is served. In the 13 situations there are 5 where the defendant might be served and 6 where a 3rd person might be served.

* 3rd person has duty.

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

to read:

§ 482.060. Judicial duties are "subordinate judicial duties"

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

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

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

§ 482.080. Issuance of order directing transfer

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

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

SEC. 3. Section 486.050 of the Code of Civil Procedure is amended to read:

486.050
The ~~(a) Except as otherwise provided in subdivision (b) and in Sections 486.040 and 486.060, the~~ temporary protective order may prohibit any transfer by the defendant of any of his property in this state subject

to the levy of a writ of attachment. The temporary protective order shall describe the property in a manner reasonably adequate to permit the defendant to identify the specific property subject to the order. Where the defendant is a corporation, a reference to "all corporate property which is subject to attachment pursuant to subdivision (a) of Code of Civil Procedure Section 487.010" satisfies the requirements of this subdivision. Where the defendant is a partnership, a reference to "all partnership property which is subject to attachment pursuant to subdivision (b) of Code of Civil Procedure Section 487.010" satisfies the requirements of this subdivision.

(b) Notwithstanding subdivision (a), if the property is farm products held for sale or is

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

Comment. The amendment of subdivision (a) of Section 486.050 makes clear that the temporary protective order must describe the property whose transfer is prohibited in a manner similar to that provided in subdivision (e) of Section 484.020.

SEC. 4. Section 486.060 of the Code of Civil Procedure is amended to read:

486.060

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

from
issuing

may not
prohibit

(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.

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

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

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

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

SEC. 5. Section 487.020 of the Code of Civil Procedure is amended to read:

487.020 -

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

The

(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.

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

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

Comment. The amendments to Section 487.020 are technical. The introductory phrase, reading "Notwithstanding Section 487.010," has been deleted since it was confusing when read with subdivision (d); this amendment makes no substantive change. The language of subdivision (b) has been amended to be consistent with the hardship exemption available to a judgment debtor whose wages are garnished. See Section [690.6]. [As proposed in Commission's "Recommendation Relating to Wage Garnishment Exemptions".]

SEC. 6. Section 488.010 of the Code of Civil Procedure is amended to read:

488.010

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

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

standing upon the records of the county

Comment. Section 488.010 is amended to restore language of former Section 542.

SEC. 7. 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 a memorandum, describing the property or debt and stating its value or the amount owing, within 10 days after such service. If the person fails to give such memorandum within the time specified, the levying officer shall state such fact at the time he makes his return pursuant to Section 488.070. A person failing to give such 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 memorandum.

estimated

third property levied upon

Comment. The amendments to Section 488.080 make no substantive change.

SEC. 8. Section 488.310 of the Code of Civil Procedure is amended to read:

488.310

(a) To attach an interest in real property, the levying officer shall record with the office of the county recorder of the county where the property is located a copy of the writ and the notice of attachment.

the writ identifies a third person in whose name

(b) Where ~~on the date of recording~~ the property ~~is~~ in the name of a third person, whether alone or together with the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such third person.

stands upon the records of the county

identified
in the
writ

upon
the
records
of the
County.

(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 to the defendant and to any third person in whose name the property stands ~~on the date of recording.~~ Such copies shall be mailed to the address of the defendant and any third person as shown by the records of the office of the tax assessor of the county where the property is located.

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

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

Comment. The amendments to Section 488.310 are technical. See Comment to Section 488.010 and Section 488.030.

SEC. 9. 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.~~ Such application shall be made by filing with the court and serving on the plaintiff a notice of motion. Service on the plaintiff shall be made not less than three days prior to the date set for hearing. The hearing shall be held not more than five days after the filing of the motion, unless for good cause, the court orders otherwise. The notice of motion shall state the relief requested and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. At the hearing on the motion, the defendant has the burden of showing that the property, or a portion thereof, attached pursuant to subdivision (a) and the proceeds therefrom are ~~essential for the support of himself and his family.~~ Upon such showing, the court shall order the removal of the keeper and return the defendant to possession of such property ~~as is essential for the support of himself and his family~~ and may make such further order as the court deems appropriate to protect the plaintiff against frustration of the collection of his claim. Such order may permit the plaintiff to levy by filing pursuant to subdivision (c) and may provide reasonable restrictions on the disposition of the property previously levied upon.

exempt
pursuant
to subdivi-
sion (b) of
Section
489.020.

exempt

(c) Notwithstanding the provisions of subdivision (a), upon the election and the instructions of the plaintiff, the levying officer shall attach farm products or inventory of a going business by filing a notice in the form prescribed by the Secretary of State which indicates that the plaintiff has acquired an attachment lien on the farm products or inventory of the defendant. When the property is crops or timber to be cut, the notice shall be recorded in the office of the county recorder in the county where the land on which the crops are growing or on which the timber is standing is located. Where, on the date of recording, the land on which the crops are growing or on which the timber is standing stands in the name of a third person, either alone or together with the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such third person. In all other cases, the notice shall be filed in the office of the Secretary of State. The fee for filing and indexing each notice of attachment, notice of extension, or notice of release in the office of the Secretary of State is three dollars (§3). Upon the request of any person, the Secretary of State shall issue his 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 number of certificates may be issued pursuant to Section 5203 of the Government Code. Upon request, the Secretary of State shall furnish a copy of any notice of attachment or notice affecting a notice of attachment for a fee of one dollar (§1) per page. A lien acquired pursuant to this subdivision shall provide the plaintiff the same rights and priorities in the attached property and proceeds of the attached property as those of a secured party with a perfected security interest in collateral where the filed financing statement covering the original collateral also covers proceeds. Promptly after filing and in no event more than 15 days after the date of filing pursuant to this subdivision, the levying officer shall serve the defendant with a copy of the writ and the notice of attachment.

upon the records of the county

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

Comment. The amendments of Section 488.360 are technical. See Sections 487.020 and 488.310.

SEC. 10. Section 488.430 of the Code of Civil Procedure is amended to read:

488.430

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

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

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

(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.

in which the estate is being administered

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.

SEC. 11. Section 489.130 is added to the Code of Civil Procedure, to read:

§ 489.130. Insufficient undertaking not wrongful attachment

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

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

SEC. 12. Section 489.230 of the Code of Civil Procedure is amended to read:

489.230.

(a) The notice of ~~writ 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 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.

SEC. 13. Section 489.310 of the Code of Civil Procedure is amended to read:

489.310

~~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.~~

ALL IN
STRIKEOUT

(a) A defendant who has appeared in the action may apply on noticed motion (1) to the court in which the action is pending for an order permitting the defendant to substitute an undertaking for any property in the state which has been or is subject to being attached or (2) to a court in another 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 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 defendant. The amount of the undertaking filed pursuant to this section shall be equal to the lesser of (1) the value of the property attached or prevented from being attached or (2) the amount specified by the writ to be secured by the attachment. The court shall issue such order upon being satisfied that a sufficient undertaking has been filed.

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

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

SEC. 14. Section 490.010 of the Code of Civil Procedure is amended to read:

490.010

A wrongful attachment consists of any of the following:

(a) The levy of a writ of attachment or the service of a protective order in an action in which attachment is not authorized, except that it is not a wrongful attachment if both of the following are established:

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

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

(b) The levy of a writ of attachment or the service of a protective order in an action in which the plaintiff does not recover judgment.

(c) The levy of a writ of attachment obtained pursuant to Article 3 (commencing with Section 484.010) of Chapter 4 or Chapter 5 (commencing with Section 486.010) on property exempt from attachment except where the plaintiff shows that he reasonably believed that the property attached was not exempt from attachment.

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

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

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

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

or permitted

Comment. Paragraph (1) of subdivision (d) of Section 490.010 is amended to provide that the levy of attachment on property of a third person is not wrongful where the plaintiff has relied on registered or recorded ownership which by law is permitted, even though not required, to be registered or recorded. As amended, subdivision (d) allows the plaintiff to rely, for example, on certain filings under Division 9 (commencing with Section 9101) of the Commercial Code.

SEC. 15. 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. Such affidavit may be based on the affiant's information and belief.

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

(c)

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

(d)

~~and~~ 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. 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.