

#39.160

12/768

2/18/77

Memorandum 77-15

Subject: Study 39.160 - Attachment (Use of Keeper on Execution)

At the February meeting, the Commission directed the staff to draft a bill with an urgency clause for introduction in this session of the Legislature to restore the former law concerning the use of a keeper to levy on a going business. A staff draft of a recommendation to accomplish this purpose is attached to this memorandum. The draft recommendation would restore the essential features of the law in existence before January 1, 1977. Hence, the use of the keeper would be mandatory (except for a levy on money or certain vehicles or if the debtor does not consent), whereas in the draft of the enforcement of judgments law it was proposed to make the keeper optional (see Section 703.330 in draft attached to Memorandum 77-3). The need for prompt action on this matter is emphasized by the letter from Captain Martin LeFevre of the Santa Clara County Sheriff's Department, attached as Exhibit 1. Note also the Legislative Counsel's opinion attached to Captain LeFevre's letter. The Commission also requested the staff to further research the effect of the reference to "a vehicle required to be registered under the Vehicle Code." Additional research confirms that the staff's conclusion that both money and certain vehicles were excepted from the keeper requirement. The background information on this matter is presented in Exhibit 2.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

California State Sheriffs' Association

CIVIL PROCEDURES COMMITTEE

Organization Founded by the Sheriffs in 1894

February 2, 1977

John H. DeMouilly, Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

RE: URGENCY REQUEST - CCP §688 REVISION

Dear Mr. DeMouilly:

Our Committee respectfully requests the Commission's early, urgent consideration of proposing an urgency amendment to CCP §688 during early 1977.

As you are no doubt aware, our Committee's primary goal is to establish a uniformity of procedures amongst the several sheriffs' civil offices throughout the state. In attempting to accomplish this goal in regard to the recently enacted CCP §688 and relevant attachment sections, particularly CCP §488.320, it quickly became apparent that even amongst our own members there were differing views of just how to proceed. We subsequently discovered differing views being taken by county counsels or district attorneys counseling sheriffs and likewise amongst constables and marshals.

We believe that the enforcement of judgments against a judgment debtor's going business is a significant step for both the debtor and the creditor, deserving of very careful consideration of the legal and moral rights of each. Particularly noteworthy in this regard is the removal of any two (2) day "grace period" afforded the debtor with the repeal of CCP §542, subd. 3.

In reviewing the new CCP §688 and Commission Comments, CCP §§488.320, 488.045, and after discussions with Commission staff members, we believe this area may not have been given sufficient consideration, to the detriment of both creditors and debtors. Clearly, the Committee members' experiences of many years indicate that almost every going business seizure under the 2 day "grace period" approach under former CCP §542, subd. 3 resulted in some form of resolution within the 2 days, which resulted in a withdrawal of the seizure levy. Although the Committee has no hard statistics, we believe it conservatively fair to suggest the number resolved exceeded 99% of such seizure levies.

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Mr. John H. DeMouilly
February 2, 1977

In our attempt to establish a uniform procedures approach to applying the new laws, we have ended up with approaches ranging from continuing to apply a 2 day "grace period" to applying a 10 day "grace period" as if under attachment, to an immediate seizure-closure with no grace period. Although most levying officers seem to favor some "grace period," even they and their counsels have some reservation about doing so since CCP §542, subd. 3 was repealed and the Commission Comments to the new CCP §688 seem to clearly limit the manner of levy to a seizure under CCP §488.320, without definitively providing for any "grace period." A similar quandry appears to exist amongst collection attorneys and agencies, with an apparent trend favoring a "grace period." The San Diego County Sheriff's Department, through their local assemblyman, requested a legislative counsel's opinion, a copy of which is included.

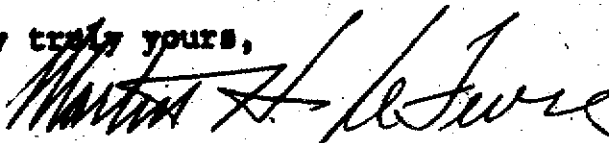
The Commission's obvious expansion of an attachment seizure levy from a 2 day "grace period" to a 10 day "grace period" implies a continuing and expanded concern for the person whose business is to be seized. We can only conclude that this same kind of concern reasonably exists for the business person who is a judgment debtor, albeit for a substantially lesser period in view of the fact that the debt has been reduced to judgment. Naturally, the interests of the creditor should be protected.

Obviously, the Commission Staff has recognized the problem outlined (#39.160, Memo 77-1, pp. 5 and #39.200, Memo 77-3, pp. 7, and the January 20, 1977 tentatively recommended new CCP §703.330, 702.270), however our Committee believes the inconsistencies in application of the present CCP §§688, 488.320 are such that corrective action should be taken now, rather than waiting for passage of the total enforcement of judgments package.

We have taken the liberty of attaching a suggested revision of the current CCP §688 for your consideration. It essentially encompasses the substance of the proposed CCP §§703.330, 702.270. We have also proposed the 2 day keeper usage on personal property used as a dwelling as contained in prior CCP §542.

Again, we believe this change is of significance and deserving of urgency consideration, and thank you for your past and continuing willingness to give consideration to our suggestions.

Very truly yours,



MARTIN H. LEFEVRE, Sheriff's Captain
County of Santa Clara
Vice-Chairman of Committee

mk - encls.

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Legislative Counsel of California

LION M. GREGORY

Sacramento, California

January 20, 1977

Honorable William A. Craven
Assembly Chamber

Execution: Duty of Levying
Officer - #17

Dear Mr. Craven:

QUESTION NO. 1

Subdivision (b) of Section 688 of the Code of Civil Procedure provides, in part, as follows:

"688.

* * *

(b) All property subject to execution may be levied upon or released from levy in like manner as like property may be levied upon or released from attachment, except that tangible personal property in the possession of the judgment debtor shall always be levied upon in the manner provided by Section 488.320.

* * * (Emphasis added.)

Do the foregoing provisions mandate that a levy, pursuant to execution, upon tangible personal property in the possession of the judgment debtor be made in the manner expressly prescribed by Section 488.320 of the Code of Civil Procedure, notwithstanding the fact that Section 488.320 itself contains provisions recognizing an exception to the manner of levy prescribed therein?

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OPINION NO. 1

The provisions of subdivision (b) of Section 688 of the Code of Civil Procedure in question require that any levy upon tangible personal property in the possession of the judgment debtor be made in accordance with the manner of levy prescribed in Section 488.320 of the Code of Civil Procedure, i.e., taking property into the custody of the levying officer, notwithstanding the fact that Section 488.320 itself contains provisions recognizing an exception to the aforementioned manner of levy.

ANALYSIS NO. 1

Section 488.320 of the Code of Civil Procedure provides, in part, as follows:

"488.320. (a) Except as otherwise provided by this article, to attach tangible personal property in the possession of the defendant, the levying officer shall take such property into custody.

* * * (Emphasis added.)

Insofar as Section 688 provides that the manner of levy upon personal property in the possession of a judgment debtor pursuant to an execution must be in the manner provided by Section 488.320, the question arises whether this incorporation of the latter section's provisions is intended to incorporate the whole of such latter section, including the clause limiting its operation, or merely the express provisions requiring levy by custody.

We are of the opinion that insofar as Section 688 limits the manner of levy upon tangible personal property in the possession of the judgment debtor to that expressly provided for in Section 488.320, it was not intended that Section 688 incorporate any alternative method of levy which would be authorized under the exception contained in Section 488.320.

In reaching this conclusion, we note that the California Law Commission, the body that authored Section 488.320 and revised Section 688 as a part of drafting a new prejudgment attachment law for California, commented that the provisions of Section 688 were to be interpreted in such manner.

While such comments are not determinative, they are nevertheless accorded substantial weight by the courts as an aid in construing statutes in the absence of persuasive evidence of a legislative intent contrary to those comments (see Keeler v. Superior Court, 2 Cal. 3d 619, 639-630).

Specifically, the comment to Section 688, authored by the California Law Revision Commission, states, in part, as follows:

"... Section 688 formerly provided that the manner of levy of execution should be the same as that provided for levy of attachment. However, the method of levy procedures for attachment have been revised. See Sections 488.310-488.430. For the most part, these procedures also continue prior law; however, for attachment, some nonseizure methods of levy have been utilized to avoid disturbance of a defendant's going business prior to judgment. After judgment, seizure is a more appropriate method where property is in the possession of the defendant; hence, subdivision (b) incorporates this method by reference to Section 488.320. ... (California Law Revision Commission, Recommendation Relating to Prejudgment Attachment (Dec. 1973), p. 857)."

Therefore, in view of the foregoing, we conclude that subdivision (b) of Section 688 requires that the levy of tangible personal property in the possession of a judgment debtor comply with the portion of Section 488.320 of the Code of Civil Procedure that expressly requires that levy be accomplished by the levying officer taking such property into his custody.

QUESTION NO. 2

In view of the conclusion reached in Opinion No. 1, does a levying officer who levies upon a going business pursuant to a writ of execution have the authority to place a keeper in charge of the inventory of the going business to be levied upon as provided in Section 488.360 of the Code of Civil Procedure, or is he required to take exclusive custody of the inventory immediately, close the business, and complete his inventory for purpose of a sale?

OPINION NO. 2

A levying officer who levies upon a going business pursuant to a writ of execution would be authorized to place a keeper on the premises of the judgment debtor's business for a 10-day period to take custody of the business's inventory and to receive the proceeds from its sale, unless the judgment creditor and the judgment debtor agree to make an alternate disposition of the property.

ANALYSIS NO. 2

As previously concluded (see Opinion No. 1 and Analysis No. 1), subdivision (b) of Section 688 of the Code of Civil Procedure requires that any levy upon tangible personal property in the possession of a judgment debtor pursuant to a writ of execution be accomplished by taking such property into custody as provided for in Section 488.320 of the Code of Civil Procedure.

While Section 488.320 does not define what constitutes custody, there is nevertheless case authority indicating that custody by a levying officer may be accomplished by the use of a keeper (see Noland v. Noland, 44 Cal. App. 2d 780, 783; Colver v. W.B. Scarborough Co., 73 Cal. App. 441, 450).

In addition, the California Law Revision Commission comment to Section 488.320 indicates that custody may take the form of storage or the use of a keeper (see California Law Revision Commission, Recommendation Relating to Prejudgment Attachment (Dec. 1973), p. 603), and, as previously indicated, such comments are accorded substantial weight by the courts as an aid in interpreting statutes (see Analysis No. 1).

Section 488.360 of the Code of Civil Procedure establishes a procedure whereby inventory of a going business may be levied upon, including the use of a keeper.

Specifically, subdivision (a) of that section requires the levying officer to place a keeper in charge of such property for a period not to exceed 10 days, during which time the proceeds from all sales of such inventory, which must be for cash or the equivalent of cash, are required to be given to the keeper, unless otherwise authorized by the attaching plaintiff. If the defendant does not consent to such an arrangement or, in any event, after the

Honorable William A. Craven - p. 5 - #17

end of the 10-day period, the levying officer is required to take such property into his exclusive custody unless some other disposition is made by the parties to the action (subd. (a), Sec. 488.360, C.C.P.).

Accordingly, to the extent that the placement of a keeper on the premises of a judgment debtor's business for a 10-day period to receive proceeds from the "cash" sale of inventory pursuant to Section 488.360 is a form of levy by custody, we conclude that a levying officer who levies upon a going business pursuant to a writ of execution would be authorized to place a keeper for a 10-day period on the premises of the judgment debtor's business to take custody of the business's inventory and to receive the proceeds from its sale, unless some other disposition of the property is made by the judgment creditor and the judgment debtor.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By *James A. Marsala*
James A. Marsala
Deputy Legislative Counsel

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CCP §688 (PROPOSED AMENDMENT)

§688

(a) All goods, chattels, moneys, or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property levied upon under attachment in the action, are subject to execution.

(b) All property subject to execution may be levied upon or released from levy in like manner as like property may be levied upon or released from attachment, except that tangible personal property in the possession of the judgment debtor shall always be levied upon in the manner provided by Section-488-320 subdivision (c). Notwithstanding the provisions of Title 6.5 (commencing with Section 481.010), service on the judgment debtor of a copy of the writ of execution shall be made either by personal delivery or by mail to the judgment debtor at the address furnished by the judgment creditor. To levy upon any property or debt owed to the judgment debtor which is subject to execution but for which a method of levy of attachment is not provided, the levying officer shall serve upon the person in possession of such property or owing such debt, or his agent (1) a copy of the writ of execution and (2) a notice that such property or debt is levied upon in pursuance of such writ.

(c) Personal property, capable of manual delivery, in the possession of the judgment debtor, must be levied upon by taking such property into custody. When the personal property is used as a dwelling, such as a housetrailer, mobilehome, or boat, the same is to be levied upon by placing a keeper in charge of the property, at the judgment creditor's expense, for at least two (2) days. At the

expiration of said period the officer shall remove its occupants, and take the property into exclusive custody, unless other disposition is agreed upon by the judgment creditor and judgment debtor. Where a writ of execution is levied upon personal property of a farm or business, other than money (or a motor vehicle required to be registered under the Vehicle Code), the levying officer shall, upon the election and the instructions of the judgment creditor and with the consent of the judgment debtor, place a keeper in charge of such property for a two-day period. During such period, the judgment debtor may continue to operate the farm or business at the judgment debtor's 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 is the equivalent of cash payment. The levying officer is not liable 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 judgment creditor. At the conclusion of the period during which the farm or business may continue to operate, the levying officer shall take the property levied upon into exclusive custody unless other disposition is agreed upon by the judgment creditor and judgment debtor.

(d) Except as otherwise provided by law: (1) As a prerequisite to the performance of a duty under this title, the judgment creditor shall deposit a sum of money with the levying officer sufficient to pay the costs of performance of the duty. (2) As a prerequisite to the taking of possession of property by the levying officer, whether by keeper or otherwise, the judgment creditor shall deposit with the levying officer a sum of money sufficient to pay the expenses of taking and keeping safely the property for a period of not to exceed

15 days. In the event the further detention of the property is required, the levying officer shall, from time to time, make written demand upon the judgment creditor or the judgment creditor's attorney of record for further deposits to cover estimated expenses for periods not to exceed 30 days. The demand shall be served as provided in Section 1011 or by depositing such notice in a post office in a sealed envelope, as first-class mail, postage prepaid, addressed to the person on whom it is served at such person's last known office or place of residence. In the event that the money so demanded is not paid within the time specified in the demand, the levying officer shall release the property in the manner provided by Section 488.560.

(e) (a) Until a levy, no property shall be affected by issuance of a writ of execution or its delivery to the levying officer.

(d) (f) No levy shall bind any property for a longer period than one year from the date of the issuance of the execution, except a levy on the interests or claim of heirs, devisees, or legatees in or to assets of deceased persons remaining in the hands of executors or administrators thereof prior to distribution and payment. However, an alias execution may be issued on said judgment and levied on any property not exempt from execution.

(e) (g) Notwithstanding subdivision (a), no cause of action nor judgment as such, nor license issued by this state to engage in any business, profession, or activity, shall be subject to levy or sale on execution.

EXHIBIT 2

Exception to Two-Day Keeper Requirement for Vehicle Required to be Registered Under the Vehicle Code Belonging to a Going Business

The fourth sentence of subdivision 3 of former Section 542, providing for a keeper levy on personal property of a going business, reads as follows:

Whenever a levy under attachment or execution shall be made on personal property, other than money, or a vehicle required to be registered under the Vehicle Code belonging to a going concern, then the officer making the levy must, if the defendant consents, place a keeper in charge of said property levied upon, at plaintiff's expense, for at least two days, and said keeper's fees must be prepaid by the levying creditor.

The effect of this provision has been to except money and vehicles "required to be registered under the Vehicle Code" from the requirement that, if the judgment debtor consents, the personal property of a going business must be levied upon by use of a keeper who permits the business to continue to operate. The legislative history of this provision supports this interpretation. Two bills were introduced into the 1965 regular session of the Legislature to provide for a keeper levy on a going business in Section 542. (Prior to 1965, keeper provisions were located in Section 540.) The first bill, A.B. 158, initially provided, in relevant part, as follows:

Whenever a levy under attachment shall be made on personal property, other than money or a vehicle required to be registered under the Vehicle Code, belonging to a going concern, or when instructed to make a levy under a writ of execution on such property by placing a keeper in charge thereof, then the officer . . .

The second bill, A.B. 1122, introduced a month later, provided as follows:

Whenever a levy under attachment or execution shall be made on personal property, other than money, belonging to a going concern . . .

This second bill was chaptered first (on May 18, 1965). The first bill, A.B. 158, was then amended (on May 20, 1965) to replace the quoted language with the language that was law until its repeal on December 31, 1976. Probably as a matter of hasty amendment made to avoid chaptering out the provisions of A.B. 1122, this amendment of May 20, 1965, erroneously placed a comma between "money" and "or a vehicle" where there was none in the first version of A.B. 158 and omits the comma immediately before "belonging to a going concern" which had appeared in both A.B. 158 and A.B. 1122.

This interpretation of the legislative history of these bills is supported by other sources. The report of the Committee on Administration of Justice of the State Bar in 1965, contains the following remarks:

A later enacted law (A.B. 157, 158; Ch. 558, 634), sponsored by the Marshals' [sic] Association, further amended Section 542, subd. (3) by excluding a "vehicle required to be registered under the Vehicle Code" from the "going business-keeper" procedure. [40 Cal. St. B. J. 561 (1965).]

The Review of Selected 1965 Code Legislation provides the following background:

Under §540, when personal property, other than money, of a going concern was attached and the attaching creditor posted no bond, a period of two days would be given defendant before the property was taken into custody. During this period a keeper was put in charge of the property, if defendant consented. 1 Witkin, PROCEDURE 910.

Not all levying officers interpreted §540 in the same way. Levying officers in some counties stopped operations of the business completely on placing a keeper in charge under §540, even though the property could not be moved to storage until two days had passed. They believed §540 required that the business not be operated once the keeper was in charge. Levying officers in other counties, including Los Angeles, permitted defendant to continue to operate for at least two days with a keeper in charge, but prohibited credit sales and seized all cash proceeds of operation.

The current amendments transfer the keeper provisions from §540 to §542, which sets forth the procedure for attaching property. See generally 1 Witkin, PROCEDURE 904-908; CALIFORNIA REMEDIES FOR UNSECURED CREDITORS chap 1 (Cal CEB 1957).

Amended §542(3) specifies that whenever a levy under attachment or execution is made on personal property, belonging to a going concern, other than money or a vehicle required to be registered under the Vehicle Code, the officer making the levy must, if the defendant consents, place a keeper in charge of the property levied on at plaintiff's expense for at least two days with the keeper's fees prepaid by the levying creditor. During this period the defendant may continue to operate in the ordinary course of business at his own expense provided all sales are for cash and the full proceeds are given to the keeper for the purposes of the levy unless the creditor authorizes another procedure. After expiration of the two-day period, the levying officer shall take the property into his immediate possession unless other disposition is made by the court or the parties to the action.

This provision gives a defendant a chance to work out a settlement or to post a bond in the case of an attachment. It also gives him an opportunity to avoid the serious damage that would result from closing down his business, and thus may also sometimes benefit the attaching creditor. The provision for defendant operating at his own expense while the keeper is in charge means that any expenditures, including employees' wages, must come from funds other than those derived from sales of merchandise during the period. [Review of Selected 1965 Code Legislation 74-75 (Cal. Cont. Ed. Bar 1965).]

Jackson in California Debt Collection Practice states that subdivision 3 of Section 542

now permits the attachment of a vehicle "required to be registered under the Vehicle Code" belonging to a going business without placing a keeper in charge. . . . It is now possible for the creditor to instruct the levying officer to levy on a vehicle and cash, as in a cash register, belonging to a going business, without use of a keeper. [E. Jackson, California Debt Collection Practice § 9.57 (Cal. Cont. Ed. Bar 1968).]

For additional authority, see 2 B. Witkin, California Procedure Provisional Remedies § 172, at 1581 (2d ed. 1970); Marshal's Manual of Procedure § 363 (J. Gillespie ed. rev. Sept. 17, 1965); Cal. State Sheriff's Ass'n, Civil Procedural Manual §§ 7.58, 7.60 (rev. 1972, 1974).

We have discussed this matter with some levying officers. They report that in practice a vehicle of a going business which, for example, is used to make deliveries, may be levied upon by a keeper, but the keeper would ride along when the vehicle leaves the business premises unless the parties agreed otherwise.

STAFF DRAFT

RECOMMENDATION

relating to

USE OF KEEPER PURSUANT TO WRIT OF EXECUTION

BACKGROUND

Under both existing and prior law, the provisions for the manner of levying on property pursuant to a writ of execution incorporate the procedures applicable to levies under a writ of attachment, subject to a few exceptions. Prior to January 1, 1977, Section 688, applicable to levies pursuant to a writ of execution, provided in relevant part as follows:

Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment

This provision incorporates the mandatory two-day keeper provisions of subdivision 3 of former Section 542 which read as follows:

3. Personal property, capable of manual delivery, in the possession of the defendant, must be attached by taking it into custody. When the personal property is used as a dwelling, such as a house trailer, mobilehome, or boat, the same is to be attached by placing a keeper in charge of the property, at plaintiff's expense, for at least two (2) days. At the expiration of said period the officer shall remove its occupants, and take the property into his immediate custody, unless other disposition is made by the court or the parties to the action. Whenever a levy under attachment or execution shall be made on personal property, other than money, or a vehicle required to be registered under the Vehicle Code belonging to a going concern, then the officer making the levy must, if the defendant consents, place a keeper in charge of said property levied upon, at plaintiff's expense, for at least two days, and said keeper's fees must be prepaid by the levying creditor. During said period defendant may continue to operate in the ordinary course of business at his own expense provided all sales are for cash and the full proceeds are given to the keeper for the purposes

of the levy unless otherwise authorized by the creditor. After the expiration of said two days the sheriff, constable, or marshal shall take said property into his immediate possession unless other disposition is made by the court or the parties to the action.

When the Attachment Law became operative on January 1, 1977, Section 688 was revised to read, in relevant part, as follows:

All property subject to execution may be levied upon or released from levy in like manner as like property may be levied upon or released from attachment, except that tangible personal property in the possession of the judgment debtor shall always be levied upon in the manner provided by Section 488.320.

The incorporation of Section 488.320 of the Attachment Law by Section 688(b) has led to confusion. Section 488.320, which provides a general rule for levying on tangible personal property in the hands of a defendant pursuant to a writ of attachment, reads in relevant part as follows:

488.320. (a) Except as otherwise provided by this article, to attach tangible personal property in the possession of the defendant, the levying officer shall take such property into custody.

The effect of the incorporation of Section 488.320 is that tangible personal property in the possession of the judgment debtor is required to be taken into custody when levied upon pursuant to a writ of execution. Section 488.045 provides for the manner of taking into custody:

488.045. Except as otherwise provided by statute, where a levying officer is directed to take property into custody, he may do so either by removing the property to a place of safekeeping or by installing a keeper.

Neither Section 488.045 nor Section 488.320 explicitly authorize the keeper to permit the operation of a going business or require the keeper to permit the occupants of personal property used as a dwelling to remain in possession for at least two days. Although subdivision (a)

of Section 488.360¹ provides for a keeper levy on inventory of a going business or on farm products pursuant to a writ of attachment, this provision is not incorporated by subdivision (b) of Section 688.

Narrowly construed, the law no longer authorizes the use of a keeper to permit the operation of a going business after judgment or to permit the occupants of personal property used as a dwelling to remain in possession for at least two days. Liberally construed, the law may be interpreted to permit use of a keeper for a two-day period (as under former law relating to levies on a going business or personal property used as a dwelling), for a 10-day period (as provided in the Attachment Law for a levy on inventory of a going business or farm products), or for some other period agreed upon by the parties.

RECOMMENDATION

Legislation is needed to achieve a resolution of the problems arising from the relation between the provisions discussed above. The variation in interpretation of the law pertaining to the use of keepers results in a lack of uniformity in the procedures followed in different counties. An interpretation that precludes the use of keepers operates to the detriment of judgment debtors by depriving them of a grace period

1. Subdivision (a) of Section 488.360 provides as follows:

(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 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.

within which to settle the debt or work out some arrangement with the judgment creditor. The elimination of a grace period is also detrimental to the interests of the judgment creditor who prefers a voluntary arrangement to the less efficient and more costly remedy of levy and sale. An interpretation that requires levy by use of a keeper for a lengthy period of time is detrimental to both judgment creditors and judgment debtors because of the considerable expense involved.

The Commission recommends that the essential features of the law in existence before January 1, 1977, pertaining to the use of keepers to levy on personal property of a going business and personal property used as a dwelling, be restored, except that the keeper should be authorized, consistent with Section 488.360(a) in the Attachment Law, to accept payment in the form of a check, as well as in cash. In order to resolve the uncertainty in this area at the earliest possible time, the proposed legislation would take effect immediately upon enactment.

PROPOSED LEGISLATION

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

An act to amend Section 688 of the Code of Civil Procedure, relating to enforcement of judgments, and declaring the urgency thereof, to take effect immediately.

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

SECTION 1. Section 688 of the Code of Civil Procedure is amended to read:

§ 688.

(a) All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property levied upon under attachment in the action, are subject to execution.

(b) All property subject to execution may be levied upon or released from levy in like manner as like property may be levied upon or released from attachment, except that tangible personal property in the possession of the judgment debtor shall always be levied upon in the manner

provided by ~~Section 484.020~~ subdivision (c). Notwithstanding the provisions of 6.5 (commencing with Section 481.010), service on the judgment debtor of a copy of the writ of execution shall be made either by personal delivery or by mail to the judgment debtor at the address furnished by the judgment creditor. To levy upon any property or debt owed to the judgment debtor which is subject to execution but for which a method of levy of attachment is not provided, the levying officer shall serve upon the person in possession of such property or owing such debt, or his agent (1) a copy of the writ of execution and (2) a notice that such property or debt is levied upon in pursuance of such writ.

(c) Tangible personal property in the possession of the judgment debtor shall be levied upon by taking such property into custody. Except as otherwise provided in this subdivision, where a levying officer is directed to take property into custody, the levying officer may do so either by removing the property to a place of safekeeping or by installing a keeper. Personal property that is used as a dwelling, such as a housetrailer, mobilehome, or vessel, shall be levied upon by placing a keeper in charge of the property, at the judgment creditor's expense, for at least two days. At the expiration of such period, the levying officer shall remove the occupants and take exclusive custody of the personal property used as a dwelling, unless other disposition is made by the court or agreed upon by the judgment creditor and the

judgment debtor. If the judgment debtor consents, personal property of a going business (other than money or a vehicle required to be registered under the Vehicle Code) shall be levied upon by placing a keeper in charge of such property, at the judgment creditor's expense, for at least two days. During such period, the judgment debtor may continue to operate in the ordinary course of business at the judgment debtor's expense provided that all sales are final and are for cash or the equivalent of cash. For the purpose of this subdivision, payment by check is the equivalent of cash payment. The levying officer is not liable 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 judgment creditor. At the conclusion of the period during which the business may continue to operate, the levying officer shall take the property into exclusive custody unless other disposition is made by the court or agreed upon by the judgment creditor and the judgment debtor.

(a) (d) Until a levy, no property shall be affected by issuance of a writ of execution or its delivery to the levying officer.

(a) (e) No levy shall bind any property for a longer period than one year from the date of the issuance of the execution, except a levy on the interests or claims of heirs, devisees, or legatees in or to assets of deceased persons remaining in the hands of executors or administrators thereof prior to distribution and payment. However, an alias execution may be issued on said judgment and levied on any property not exempt from execution.

(a) (f) Notwithstanding subdivision (a), no cause of action nor judgment as such, nor license issued by this state to engage in any business, profession, or activity, shall be subject to levy or sale on execution.

(a) (g) When a check, draft, money order, or other order for the withdrawal of money from a banking corporation or association, the United States, any state, or any public entity within any state, payable to the defendant on demand, comes into the possession of a levying officer under a writ of execution, the provisions of Section 488.520 are applicable.

Comment. The amendment of subdivision (b) of Section 688 is technical. The first sentence of new subdivision (c) continues the applicability after judgment of the general rule that tangible personal property in the possession of the judgment debtor is levied upon by taking it into custody which was formerly incorporated by the reference in subdivision (b) of Section 688 to Section 488.320. The second sentence of new subdivision (c), which provides for the levying officer's discretion in the manner of taking custody, is comparable to Section 488.045 applicable to custody under an attachment levy. The third and fourth sentences of new subdivision (c) pertaining to a levy on personal property used as a dwelling continue the second and third sentences of subdivision 3 of former Section 542 (as in effect on December 31, 1976). The fifth, sixth, ninth, and tenth sentences of new subdivision (c) of Section 688 continue the substance of the fourth, fifth, and sixth sentences of subdivision 3 of former Section 542 (as in effect on December 31, 1976). The provision in the fourth sentence of subdivision 3 of former Section 542 requiring prepayment of the keeper's fees by the judgment creditor has not been continued in new subdivision (c) of Section 688 because it was surplus in view of the general provisions for prepayment of fees. See Govt. Code §§ 6100, 24350.5. The seventh and eighth sentences of new subdivision (c) of Section 688 are comparable to a portion of subdivision (a) of Section 488.360 (attachment levy on farm products and inventory of going business) and change former Section 542 by permitting payment in the form of a check.

Subdivisions of Section 688 formerly designated (c)-(f) have been renumbered as subdivisions (d)-(g).

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

An amendment of Section 688 of the Code of Civil Procedure which became operative on January 1, 1977, has created uncertainty as to whether personal property of a going business levied on pursuant to a writ of execution must, if the judgment debtor consents, be levied upon

by placing a keeper in charge of the property levied upon for a limited period of time. Because this uncertainty is likely to lead to a lack of uniformity in the procedures followed in the various counties and may operate to the detriment of judgment debtors by depriving them of a grace period within which to work out some arrangement with the judgment creditor which will avoid seizure of the property of the business, it is necessary that this act take effect immediately.