

3/30/77

Memorandum 77-26

Subject: Study 39.250 - Enforcement of Judgments (Homestead Exemption)

This memorandum discusses various problems with the homestead exemption--both the declared homestead exemption provided in the Civil Code and the claimed homestead exemption provided in the Code of Civil Procedure. One problem concerning the relation between the judgment lien on real property and the claimed homestead exemption requires immediate action. The remainder of this memorandum presents basic policy questions for Commission consideration as a starting point in the complete revision of the homestead exemption provisions. Attached hereto are the following exhibits:

1. Comment, California's New Homestead Law, 64 Cal. L. Rev. 180 (1976).
2. Excerpt from Karol, Effective Insolvency Planning For the Consumer Bankrupt in California, 52 L.A.B.J. 376 (1977).
3. Declared homestead exemption provisions: Civil Code §§ 1237-1304.
4. Claimed homestead exemption provisions: Code Civ. Proc. § 690.235 (operative until July 1, 1977).
5. Claimed homestead exemption provisions: Code Civ. Proc. § 690.31 (operative July 1, 1977).
6. Judgment lien provisions: Code Civ. Proc § 674 (as amended, operative July 1, 1977).

BACKGROUND

Until July 1, 1975, the homestead exemption could be claimed only by filing a declaration of homestead in the office of the county recorder for the county where the real property was located pursuant to Civil Code Sections 1237-1304 (see Exhibit 3). However, the declared homestead is not good against a judgment lien created before the declaration is recorded. Civil Code § 1241.

In order to make this valuable exemption more readily available, Chapter 1251 of the Statutes of 1974 enacted Code of Civil Procedure Section 690.235 (operative from July 1, 1975, until July 1, 1977), which permits the judgment debtor to claim a homestead exemption in the same

manner as other exemptions are claimed under Section 690.50 except that 20 days rather than 10 days is afforded for making the exemption claim. (Section 690.235 is attached as Exhibit 4.) The law review comment attached as Exhibit 1 analyzes the effect of Section 690.235 in detail.

Chapter 1000 of the Statutes of 1976 (operative July 1, 1977) repeals Section 690.235 and enacts Section 690.31 (see Exhibit 5). Section 690.31 permits the assertion of a homestead exemption after judgment but differs from Section 690.235 in several important respects. Section 690.31 requires the judgment creditor to apply to the court in the county where the real property is located for an order to show cause why a writ of execution should not issue. A copy of the order is served on the judgment debtor and a hearing is held to determine whether the dwelling house is exempt or whether its value exceeds the total of the exemption (if it is exempt) and all prior liens and encumbrances. Other aspects of the new provisions will be discussed infra.

PRIOR COMMISSION DECISIONS

At the February meeting, the Commission decided to consider revising the homestead exemption laws as a separate study. Tentatively, it was decided, if feasible, to propose the repeal of the claimed homestead exemption. At the March meeting, Professor Riesenfeld noted a problem with the judgment lien on real property exempt under Section 690.31 which requires resolution before the new legislation becomes operative on July 1.

URGENCY BILL TO AMEND SECTION 674

Chapter 1000 of the Statutes of 1976 amended Code of Civil Procedure Section 674, pertaining to judgment liens (see Exhibit 6), by the addition of subdivision (c) which reads as follows:

(c) With respect to real property containing a dwelling house judicially determined to be exempt from levy of execution pursuant to the provisions of Section 690.31, as distinguished from property subject to a declared homestead created pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code, a judgment lien created pursuant to subdivision (a) of this section shall attach to such real property notwithstanding the exemption provided by Section 690.31. [Emphasis added.]

There are at least two possible interpretations of the effect of this language. At first blush, it appears that, if the property is sold at an execution sale, the proceeds of the sale will have to be applied to the satisfaction of the judgment lien before the judgment debtor receives the amount of the exemption. This follows from the priority scheme of Section 690.31(j) which provides for payment first of "all liens and encumbrances." This first priority provision is unfortunately taken verbatim from Civil Code Section 1256 which applies where there is a sale of property subject to a declared homestead. However, where there is a declared homestead, a judgment lien may not be created on the property (Boggs v. Dunn, 160 Cal. 283, 116 P. 743 (1911)), so the reference to all liens does not create a problem. In this case, Section 674(c) specifically provides for a judgment lien on the property despite Section 690.31. If Section 674(c) is taken to completely override the effect of the claimed homestead exemption under Section 690.31, in any case where the judgment creditor has recorded the judgment in the county of the judgment debtor's residence, the second and third priorities in Section 690.31(j) for distribution of the proceeds of the execution sale--i.e., "to the debtor, or the debtor's spouse if such person is the exemption claimant, in the amount of the exemption provided by this section" and then "to the satisfaction of the execution"--will have no meaning because the execution will have been paid off as a judgment lien under the first priority.

The second and more plausible interpretation of Section 674(c) is that the judgment lien of the executing judgment creditor is not paid off under Section 690.31(j) and the judgment debtor gets the amount of the exemption before the judgment creditor is paid, but the judgment lien continues on the property for the full amount of the judgment remaining unsatisfied. Accordingly, a purchaser at the execution sale will deduct the amount of the lien from his bid because the value of the property is reduced by the liability represented by the judgment lien. Hence, the third priority--the judgment creditor--is in effect elevated to the first priority. The only protection under the statute, if this second interpretation were to be followed, is for the court to count in

the amount of the judgment lien when determining under Section 690.31(c)(2) whether there is an excess value. This application of Section 690.31(c)(2) is clearly against its original intent. The excess value referred to is any amount which could go to the judgment creditor in the third priority position. In order to straighten out this priority problem and make the claimed homestead exemption effective against a prior judgment lien, subdivision (c) of Section 674 should be amended as follows:

(c) With respect to real property containing a dwelling house judicially determined to be exempt from levy of execution pursuant to the provisions of Section 690.31, as distinguished from property subject to a declared homestead created pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code, a judgment lien created pursuant to subdivision (a) of this section ~~shall attach~~ attaches to such real property notwithstanding the exemption provided by Section ~~690.31~~ 690.31 until an exemption is determined under Section 690.31, in which case the lien terminates, unless the court has determined that there is an excess pursuant to subdivision (f) of Section 690.31, in which case the judgment lien continues on the excess.

Several things should be noted about this proposed amendment. Under existing law, the excess value over a declared homestead exemption is reached by a lien of attachment or execution, not by a judgment lien. Southern Pacific Milling Co. v. Milligan, 15 Cal.2d 729, 104 P.2d 654 (1940); Lean v. Givens, 146 Cal. 739, 81 P. 128 (1905). The proposed amendment would permit the judgment lien to continue on the excess where there is determined to be an excess under Section 690.31(f). This is consistent with what the staff assumes to be the intent of Section 674(c) which is to protect the priority of the judgment creditor at a time when he does not know whether the judgment debtor will claim an exemption, the merits of any claim to be made, the amount of the exemption, or the value of the property. However, once these issues are determined, there is no reason to continue the judgment lien if there is nothing to be reached by it. If there is an excess, there is no reason to extinguish the already extant judgment lien and force the judgment creditor to rely on the priority obtained by levy of execution. Of course, the judgment creditor will still have to resort to the writ of execution to apply the excess to the satisfaction of the judgment.

Subdivisions (c)(2) and (j) of Section 690.31 should also be amended to make clear that the phrase "all liens and encumbrances" does not include the judgment lien of the judgment under which execution is sought. Subdivision (c)(2) should be amended as follows:

(2) The current value of the dwelling house, over and above all liens and encumbrances ~~thereon~~, thereon which are superior to the judgment lien or execution lien under which the sale, if any, would be made, exceeds the amount of the allowable exemption.

Subdivision (j) should be amended as follows:

(j) In the event of an execution sale, the proceeds of the sale shall be applied in the following order and priority: first, to the discharge of all liens and encumbrances, if any, on the ~~property~~; property which are superior to the lien under which the sale is made; second, to the debtor, or the debtor's spouse if such person is the exemption claimant, in the amount of the exemption provided by this section; third, to the satisfaction of the execution; and fourth, to the debtor, or the debtor's spouse if such person is the exemption claimant.

Both Civil Code Section 1265 and Code of Civil Procedure Section 690.35(e) protect the proceeds of a sale of the property for six months. Section 690.31(k), however, limits this protection to the proceeds of a "sale of real property pursuant to an order of the court directing the issuance of a writ of execution." Presumably, the judgment debtor who changes dwellings will be able to claim an exemption for the new dwelling in the proceedings for issuance of a writ of execution under Section 690.31. The problem is that the proceeds themselves are not protected where the property is not sold at an execution sale and the exemption of the second dwelling is not deemed to relate back to the earlier exemption as provided in Section 690.31(k). The staff suggests that the limitation to execution sales in Section 690.31(k) be deleted.

RELATION OF SECTION 690.31 TO ATTACHMENT LAW

Section 690.31 by its terms is an exemption from execution and provides special procedures for issuing a writ of execution. However, Section 487.020 in the Attachment Law provides that property exempt from execution is exempt from attachment. The potential problem is how the procedures of the Attachment Law are to be reconciled with the procedures set forth in Section 690.31.

Notice and a hearing are generally required before a writ of attachment may issue. The defendant is given notice of the property sought to be attached (Section 484.050) and an opportunity to claim exemptions (Section 484.070) which would include the dwelling exemption provided by Section 690.31. Where a writ is issued ex parte, the plaintiff is required to show that the property sought to be attached is not exempt (Section 485.210) and the defendant is allowed to claim exemptions in the manner provided in Section 690.50 for 30 days after receiving notice of attachment (485.610).

Clearly, the defendant has ample opportunities to claim a dwelling exemption under the Attachment Law. The only drawback is that, if the exemption is not claimed within the time allowed, it is waived for purposes of both attachment and execution (see the Comments to Sections 484.070 and 485.610) except where the defendant shows changed circumstances under Section 482.100. Furthermore, under existing law, the defendant may declare a homestead under the Civil Code even though the time for claiming the exemption under the Attachment Law has passed.

There are several troublesome aspects of the interrelation between the Attachment Law and Section 690.31. If a claimed exemption is waived in attachment proceedings and no homestead declaration is filed before the judgment becomes a lien on the property, the debtor would be precluded from claiming the exemption under Section 690.31. The creditor is still faced with the hurdle of obtaining a court order before the writ of execution will issue under Section 690.31.

Where a plaintiff seeks to attach a dwelling, he may do so under the Attachment Law without giving the detailed notice provided in Section 690.31(d).

Where an ex parte writ of attachment is issued, there is obviously no noticed hearing. Section 690.31 contemplates an opportunity for a noticed hearing in every case where a creditor seeks a writ of execution to levy upon a dwelling house.

Attachment proceedings take place in the court where the action is pending. Under Section 690.31, the determination of whether to issue a writ of execution and of the existence of the dwelling exemption or excess value is made by a court in the county where the dwelling is located.

Despite these various technical problems, the staff believes that there is no urgent need to amend either the Attachment Law to conform to Section 690.31 or to amend Section 690.31 to override any conflicting provisions in the Attachment Law. The defendant is adequately protected by the attachment procedures and in any event may resort to declaring a homestead under the Civil Code should the need arise. Another factor to be considered is that Section 690.31 provides a novel procedure in California, and it will surely be amended several times in the next few years (see, e.g., A.B. 423 in the current legislative session). Special revision of the Attachment Law at this time would be premature especially in light of the possibility that the Commission itself will eventually seek to revise this area of the law.

BASIC POLICY QUESTIONS

Before the staff begins drafting a revised homestead exemption law, we need some guidance from the Commission on several general policies. We do not intend to reexamine, at this stage at least, the amount of the homestead exemption, the type of property in which it may be claimed, the type of persons who may benefit from the exemption, or the type of debts against which the exemption is not good.

Procedure for Asserting Homestead Exemption

The staff believes the dual procedure whereby homesteads may be declared or claimed is unsatisfactory. There is no persuasive reason for permanently relying on both declared and claimed homestead procedures. What we have now is not one good system, but two defective systems which are inconsistent and in some ways in conflict with one another.

From the standpoint of the central policy behind homestead exemptions--to protect an adequate home for the debtor and his or her family from general creditors--the declared homestead exemption provisions in the Civil Code (see Exhibit 3) are inadequate. The main failing is that the declared homestead is not good against a prior judgment lien. This problem is made all the more serious because the defendant does not receive any notice in the course of the proceedings leading up to judgment that a homestead declaration should be filed before judgment is rendered.

if he wishes to protect his house. These major defects in the existing exemption scheme could be avoided by making homestead declarations good against prior judgment and execution liens and providing for some sort of notice so the debtor may take advantage of a limited grace period by filing the homestead declaration. (Adams, in the law review comment attached hereto as Exhibit 1, suggests much the same thing on page 183, n.15.) The complicated claimed homestead exemption provisions could then be repealed. This solution disrupts the existing law as little as possible.

Placing reliance on a claimed homestead exemption procedure recognizes that there is almost no need for a homestead exemption before a judgment creditor attempts to levy upon and sell one's home. If adequate notice procedures are provided (as under the current claimed homestead exemption) or if the judgment creditor is required to obtain a court order before a home may be levied upon (as under Section 690.31), the central purpose of homestead exemption laws should be adequately served.

Before a decision is made to eliminate the declared homestead exemption scheme in favor of a claimed homestead, two collateral effects of declaring a homestead under existing law should be considered. First, Civil Code Section 1242 provides that generally a married person's homestead cannot be conveyed or encumbered unless the spouse executes and acknowledges the instrument or a separate instrument. This feature is not unique to the declared homestead provisions; Civil Code Section 5127, in the community property laws, similarly provides that both spouses must join in executing an instrument leasing, selling, conveying, or encumbering community real property. Accordingly, it does not appear that the declared homestead provisions should be retained to provide for restrictions on conveyances of real property. Second, Civil Code Section 1265 provides that, if the homestead was selected from community property, quasi-community property, or separate property of the other spouse who joined in the declaration, the "land so selected" vests in the surviving spouse. Adams (see Exhibit 1, p.191, n.59) suggests that this may result in certain tax advantages by combining the survivorship feature of joint tenancy with the tax advantage of community

property. It also resembles the tenancy by the entirety, abolished in California by the enactment of Civil Code Sections 682 and 683 in 1872. Hannon v. Southern Pacific Railway Co., 12 Cal. App. 350, 107 P. 335 (1909). The staff does not believe that the possible tax advantages of the survivorship provided in Section 1265 alone justify retention of the declared homestead scheme if the Commission is otherwise inclined to recommend its repeal. In any event, it is highly doubtful that a significant number of persons declaring homesteads have any idea that these other consequences will follow.

If a claimed homestead procedure is to be recommended over a declared homestead procedure, consideration should be given to the procedures for making the claim. As discussed above, since 1975, California has had a procedure where the judgment debtor is afforded 20 days after levy within which to file an exemption claim with the levying officer. Code Civ. Proc. § 690.50(a). Beginning July 1, the exemption will be determined at a hearing to show cause why a writ of execution should not issue.

Persons Who May Claim Exemption

Inasmuch as the purpose of the homestead exemption is to protect a home for the debtor and the debtor's family, the debtor's spouse should be permitted to claim the exemption. The declared homestead exemption may be asserted by the spouse of a debtor so as to defeat an attachment lien. Civil Code § 1263; Johnson v. Brauner, 131 Cal. App.2d 713, 281 P.2d 50 (1955). Similarly, under Code of Civil Procedure Section 690.31, the spouse of the debtor may assert the exemption at the show cause hearing on issuance of a writ of execution.

This issue will also arise concerning exemptions generally. Existing law does not contemplate the making of claims by persons other than the judgment debtor. See Code Civ. Proc. §§ 690, 690.50; Grant v. Segawa, 44 Cal. App.2d Supp. 945 (1941). Section 16 of the Uniform Exemptions Act provides for assertion of exemption rights by a spouse or dependent of the debtor or by any other authorized person, such as an agent, guardian, or person holding a power of attorney.

Effect of Attachment, Execution, and Recording Judgment

The existing rules governing the relationship between attachment, execution, and judgment liens on the one hand and the declared and claimed homestead exemptions on the other seem rather arbitrary. A declared homestead defeats a prior attachment lien but is defeated by a prior judgment or (presumably) execution lien. However, the excess value of a homestead is reached by attachment or execution and not by the judgment lien. The claimed homestead exemption will prevent attachment, if properly asserted in a hearing on issuance of a writ of attachment, or will remove an attachment, if properly claimed after levy of an ex parte writ of attachment. However, if there is an excess value, the attachment lien should remain on the excess. Under the law to become operative on July 1, the judgment lien is good against the property despite the claimed homestead exemption--a problem we proposed at the outset to seek to remedy.

In devising a sensible scheme concerning these liens as they relate to the homestead exemption, it should be recognized that the purpose of the liens is to establish a priority. Of course, from the debtor's point of view, a lien is a cloud on his title.

A scheme that would maximize the priority of the first general creditor to assert an attachment, execution, or judgment lien would provide for the continuation of such liens on the homestead property in order to catch any eventually accruing excess value. This would result in more clouds on titles than under existing law.

A variant of this scheme would require the creditor to show that there is an excess value as a condition to obtaining or retaining a lien on property which has been declared or shown to be exempt. This would eliminate the possibility of there being liens on nonexistent excess values. This scheme has a precedent in the appraisal provisions in Civil Code Sections 1245-1256 (see Exhibit 3).

Retroactivity

The staff believes that changes in exemption laws should be made retroactive and that there are several feasible approaches to accomplishing this result to a greater or lesser extent despite doctrines pertaining to impairment of contracts and vested rights. We plan to prepare a memorandum on the law relating to retroactive application of changes in the amounts and types of exemptions for consideration by the Commission when the draft of the exemption chapter of the enforcement of judgments law is discussed. So far as the subject of homestead exemptions is concerned, it should be noted that the increases in the homestead exemption enacted in 1970 and 1976 provided that existing homestead declarations were deemed amended to the greater amount "to the extent that such increase does not impair or defeat the right of any creditor to execute upon the property which existed prior to such date." Civil Code § 1260 (emphasis added). This provision changes the rule in Strangman v. Duke, 140 Cal. App.2d 185, 187 n.1, 295 P.2d 12 (1956), that the amount of the homestead exemption is governed by the law in effect at the time the debt is created, citing In re Rauer's Collection Co., 87 Cal. App.2d 248, 196 P.2d 803 (1948). See also the discussion in the article attached as Exhibit 2.

The problem here is much simpler because the Commission has tentatively decided not to increase the amount of the homestead exemption. Karol, in Exhibit 2 (p.381), suggests that the procedures made available by Code of Civil Procedure Section 690.235 for claiming a homestead exemption should probably not be available to a debtor to whom credit was extended before the effective date of Section 690.235. The staff disagrees with this position. Section 690.235 did not create an exemption nor did it enlarge an existing exemption. By arguing that the time of contracting the debt is the determining factor, Karol would give less retroactive effect to the procedural changes made by Section 690.235 than Civil Code Section 1260 affords to the increase in the amount of the homestead exemption from \$20,000 to \$30,000 since the application of that increase is tied to the right to execute on a debt, not the date the debt was incurred.

The staff disagrees with this position for the reason that procedural changes may, without offending the contracts clause, be given

retroactive application (that is, may be applied to current proceedings on debts previously incurred) unless to do so would impair vested rights. At a minimum, the procedural changes should be made available to debtors unless the judgment creditor has obtained a lien on the property prior to the effective date of the new procedure. This is the approach reflected in the act enacting Code of Civil Procedure Section 690.31. Section 5 of the chaptered bill (see page 4 of Exhibit 5), provides that the act does not "alter, change, or modify the rights of any lienholder or encumbrancer vested prior to July 1, 1977, or [July 1, 1975]."

The staff would go farther and provide that these procedural changes apply to all proceedings initiated or pending on the operative date of the new law. This approach comports with the constitutional requirements. Estate of Patterson, 155 Cal. 626, 102 P. 941 (1909), involved a statute enlarging the class of destroyed wills that could be probated. The will of the testatrix had been destroyed in the 1906 San Francisco fire but at the time of her death only fraudulently destroyed wills could be proven as destroyed wills. The court applied the later amended statute which permitted the probate of wills destroyed by public calamity. In McBarron v. Kimball, 210 Cal. App.2d 218, 26 Cal. Rptr. 379 (1962), the trial court rendered judgment for the defendant in an action to recover money under a construction contract because the plaintiff-assignee of the contract and the assignor lacked a license to act as joint venturers and so were barred by statute from maintaining the action. While an appeal was pending, the Legislature amended the applicable statute to remove the bar to suit where the joint venturers were individually licensed contractors, even though not licensed as joint venturers. The court of appeal applied the amended statute to permit the plaintiff to maintain the action on the ground that the statute related to procedure and did not impair the obligation of a contract or interfere with vested rights.

The staff is of the opinion that extending the time for claiming the homestead exemption is similarly a procedural matter that may be applied to pending proceedings.

Respectfully submitted,

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EXHIBIT 1

California's New Homestead Law

Chuck Adams†

This Comment deals with California's new residential exemption law. Like the homestead law, the new law protects a debtor's residence from the claims of unsecured creditors; but the residential exemption law does not require a declaration of homestead before a judgment against the debtor is recorded. The author finds that although the new law adds significantly to the protection of debtors, it presents a number of technical difficulties.

I

INTRODUCTION

Section 690.235 of the California Code of Civil Procedure provides for the exemption from execution sale of a debtor's residence to the same extent and in the same amount as the debtor would be entitled to select as a homestead.¹ In effect, this new law affords much of the protection of the homestead law without requiring the recording of a homestead declaration.² As a result, the residential exemption law ex-

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1. The law of declared homesteads is codified in CAL. CIV. CODE §§ 1237-1304 (West 1954, Supp. 1975). A declaration of homestead protects a debtor's residence from execution sale in satisfaction of judgments of unsecured creditors which are recorded after the declaration of homestead. CAL. CIV. CODE §§ 1240, 1241 (West 1954). The homestead exemption is substantial; a head of a family or a person over 65 years of age is allowed a homestead exemption of \$20,000 over and above all liens and encumbrances on his residence. CAL. CIV. CODE § 1260 (West, Supp. 1975).

For an excellent survey of California's homestead law, see 5 H. WITKIN, CALIFORNIA PROCEDURE 3409-28 (2d ed. 1971). Other useful references include: 25 CAL. JUR. 2d *Homesteads* (1955); Comment, *Creation of the Homestead and Its Requirements*, 26 CALIF. L. REV. 241 (1938); Comment, *The Nature of the Homestead Right and Its Termination*, 26 CALIF. L. REV. 466 (1938). In addition, CAL. PROBATE CODE §§ 660-68 (West 1954, Supp. 1975) provide for a probate homestead, which should not be confused with the declared homestead. The probate homestead protects the surviving family's residence from the claims of a decedent's creditors. For a recent discussion of the probate homestead, see Comment, *The Probate Homestead in California*, 53 CALIF. L. REV. 655 (1965).

2. A residence does not become exempt under the homestead law until the homestead declaration is recorded. CAL. CIV. CODE §§ 1265, 1240 (West 1954). The recording requirement of the homestead law facilitates chain of title searches. A title insurer can determine whether property has been exempted under the homestead law by examining the county records to see if a homestead declaration has been recorded.

tends many of the benefits of the California homestead law to the presumably large number of debtors in California who are unaware of the homestead law and are consequently not protected by it. Prior to enactment of the new law, California's homestead law was criticized because it helped the sophisticated debtor, but was often of no benefit to those most in need of the law's protection.³ The residential exemption law brings California law closer to the homestead laws of many other states, where no act except occupancy is required of homestead claimants.⁴ In these other states a debtor may claim his homestead after levy of execution.⁵

The new residential exemption law should be construed in accordance with the apparent legislative intent to extend the protection of homesteads to all residences. Like other homestead legislation, the residential exemption law should be interpreted liberally by the courts so that its humane purpose—providing the debtor and his family limited protection from the claims of creditors—can be achieved.⁶

In addition to adopting the residential exemption law, the legislature retained the homestead law⁷ so that homeowners may continue to declare homesteads on their residences. A declared homestead may be desirable because attorneys and judges are familiar with the law of declared homesteads.⁸ The residential exemption, on the other hand, is new and has not yet been interpreted by the courts. Moreover, the procedure for declaring a homestead is relatively simple and inexpen-

The residential exemption law contains no recording requirement, however. Therefore, in order to determine whether the property is exempt, a title insurer will have to go beyond the county records to discover if the judgment debtor has resided on the property and has claimed the exemption. This may be difficult for title insurers to do; thus the residential exemption law may create some chain of title problems.

3. Rifkind, *Archate Exemption Laws*, 39 CALIF. ST. B.J. 370, 371 (1964).

4. For an excellent discussion of homestead laws in the United States, see S. RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTION* 302-22 (2d ed. 1975); Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289 (1950).

5. *E.g.*, NEB. REV. STAT. § 40-105 (1974); UTAH CODE ANN. § 28-1-10 (1953); WIS. STAT. ANN. § 272.21(1), (1958); S. RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTION*, 304 n.16, 305 n.18 (2d ed. 1975).

6. See *Estate of McIntyre*, 189 Cal. App. 2d 498, 11 Cal. Rptr. 733 (1st Dist. 1961):

The object of all homestead legislation is to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the impertunity of their creditors.

Id. at 502, 11 Cal. Rptr. at 736, quoting *Estate of Fath*, 132 Cal. 609, 613, 64 P. 995, 997 (1901).

7. CAL. CIV. CODE §§ 1237-1304 (West 1954, Supp. 1975).

8. California has had a homestead law since 1851. 25 CAL. JUR. 2d *Homesteads* § 8 (1955).

sive,⁹ and a homestead offers collateral benefits which are not available under the residential exemption law.¹⁰

Despite its advantages, the homestead declaration has certain limitations that may circumscribe its usefulness in some situations. For example, a homestead declaration may adversely affect a person's credit rating.¹¹ In addition, a homestead declaration is not effective against personal judgments which have become liens on the debtor's residence before the homestead declaration is recorded.¹² The residential exemption, on the other hand, protects the residence against judgments of unsecured creditors which are obtained after the debtor acquires the residence and begins residing there.¹³ If a debtor has not declared a homestead before the recording of a judgment against him, his residence may still be protected by the residential exemption.¹⁴ Thus, the residential exemption law provides an important protection for California homeowners, particularly those who are unaware of the potential protection of the homestead law.

This Comment discusses some of the details, ramifications and potential problems created by the new residential exemption law. Analysis is made of debtors' and creditors' rights under the new law, with particular emphasis upon possible ambiguities found in the law. As will be shown, the law presents a number of technical legal difficulties.¹⁵

9. Forms for homestead declarations can be found in the following references: 8 CALIFORNIA FORMS OF PLEADING AND PRACTICE *Homesteads* 382-40 (1963), 41-43 (Supp. 1973); 7 CAL. PRACTICE EXEMPTIONS § 37-44-31 (1968, Supp. 1973); DENSON'S CALIFORNIA CODE ANNOTATED, CIV. §§ 1237-1242, at 77-79 (1971); R. WARREN, C. SHERMAN & T. IJIMA, *PRACTICE YOUR HOME* (1973); WEST'S CALIFORNIA CODE FORMS, CIV. §§ 1237-41 (1968, Supp. 1973). The declaration of a homestead involves the execution, acknowledgment and recording of a document which must contain: (1) a statement that the person making the declaration is the head of a family, and if married, the name of the spouse; or, where the declaration is made by the wife, a statement that her husband has not made such a declaration and that she makes it for their joint benefit; (2) a statement that the person making the declaration is residing on the premises, and claims them as a homestead; and (3) a description of the premises. CAL. CIV. CODE § 1243 (West Supp. 1973). The only costs involved in the declaration of a homestead are recording fees, which are set forth in CAL. GOV'T CODE § 27361 (West Supp. 1973).

10. Provisions of the homestead law that do not apply to the residential exemption include: (1) the spouse's right of survivorship for the homestead, CAL. CIV. CODE § 1243 (West Supp. 1973); (2) restrictions on the conveyancing of homesteads, CAL. CIV. CODE § 1242 (West Supp. 1973). See text accompanying notes 57-59 *infra*.

11. See also R. WARREN, C. SHERMAN & T. IJIMA, *PRACTICE YOUR HOME* 21-22 (1973).

12. CAL. CIV. CODE § 1241(1) (West Supp. 1973); *Young v. Healer*, 72 Cal. App. 2d 67, 164 P.2d 63 (2d Dist. 1945).

13. CAL. CODE CIV. PROC. § 690.233(b) (West Supp. 1973). For a discussion of when a residence becomes exempt under the residential exemption law see text accompanying notes 60-64 *infra*.

14. See text accompanying notes 34-36 *infra*.

15. These difficulties come from having to mesh the residential exemption with the

which can only be resolved by farsighted judicial interpretation. Before reaching these more sophisticated issues, however, it is important to understand the exemption itself and the procedural requirements involved in claiming it.

II

CLAIMING THE EXEMPTION

The exemption authorized by section 690.235 of the California Code of Civil Procedure is one of many exemptions provided by law to protect various types of debtor-owned property from execution.¹⁶ Like many of these exemptions, the residential exemption must be claimed according to the procedure set forth in section 690.50.¹⁷ Section 690.50 requires a debtor to deliver an affidavit to the levying officer¹⁸ within 20 days after levy of attachment or execution in order to avail himself of his exemption rights. The affidavit must identify the property, allege that it is exempt under section 690.235, and state all facts necessary to support the debtor's claim to exemption. In order to claim the residential exemption, the debtor or his family must actually reside on the property involved, and neither the debtor nor his spouse can have an existing declared homestead.¹⁹ These facts must be stated in the affidavit.²⁰

existing exemption laws and could have been avoided by amending the homestead law so that it would allow homestead declarations after judgments have been recorded, instead of drafting an entirely new exemption law. In a number of other states homesteads may be declared after judgments against the debtor have been recorded. E.g., N.M. REV. STAT. § 40-105 (1974); UTAH CODE ANN. § 28-1-10 (1953); WIS. STAT. ANN. § 772.21(1), (1958).

Since the affidavit required of debtors under the residential exemption law must contain much the same information as must be included in a homestead declaration, it is not necessarily easier for a debtor to file the affidavit than to declare a homestead. Compare CAL. CODE CIV. PRO. § 690.50 (West Supp. 1975), with CAL. CIV. CODE § 1263 (West Supp. 1975). Judgment creditors and purchasers of residences from judgment debtors could receive as much protection under a homestead law that allowed homestead declarations after recording of judgments as they receive from the residential exemption law. Such a homestead law would be simpler for the courts to apply and would avoid many of the problems present in the residential exemption law.

16. CAL. CODE CIV. PRO. §§ 690.1-690.29 (West 1954, Supp. 1975).

17. CAL. CODE CIV. PRO. § 690(a) (West Supp. 1975). The procedure for claiming exemptions in section 690.50 does not apply to homesteads since the homestead law is codified in the Civil Code rather than in section 690 of the Code of Civil Procedure. A claim of exemption under CAL. CODE CIV. PRO. § 690.50 (West Supp. 1975) is also not required for the exemptions listed in CAL. CODE CIV. PRO. §§ 690.6(a), 690.8a, 690.15, 690.16, 690.175, 690.18(b), 690.19, 690.21, and 690.25 (West Supp. 1975).

18. CAL. CODE CIV. PRO. §§ 540, 687 (West 1954, Supp. 1975) contain provisions detailing who can be a levying officer.

19. CAL. CODE CIV. PRO. § 690.235(a) (West Supp. 1975).

20. These facts ought to be sufficient to support a debtor's claim for exemption. A creditor may be able to show that the debtor's exemption will not apply to the creditor's

Although section 690.50(a) does not explicitly permit the debtor's spouse to claim the exemption, the exemption should be subject to exercise by the debtor's spouse. First, since the purpose of the residential exemption law is to protect both the debtor's family and the debtor from the claims of creditors,²¹ the debtor's spouse should also be allowed to claim the exemption. Furthermore, since a debtor's spouse is entitled to declare a homestead,²² and since the residential exemption protects the residence "to the same extent" as a homestead, the spouse should be allowed to claim the residential exemption.

Section 682b of the California Code of Civil Procedure provides that there must be notice accompanying the writ of execution which indicates that the debtor has 20 days in which to claim the residential exemption by complying with section 690.50. There is no provision for such notice in the homestead law.²³

The levying officer is required to deliver the debtor's affidavit to the creditor and notify him that he may contest the debtor's claim to the exemption by filing a counteraffidavit alleging that the property is not exempt under section 690.235.²⁴ The counteraffidavit must be filed with the levying officer within 10 days after receipt of the debtor's affidavit. Within 5 days after the counteraffidavit is filed, either the debtor or creditor may move to have a hearing for the purpose of determining the claim to the exemption. The hearing must be held within 15 days from the time the motion is made.²⁵ The party making the motion must

judgment because the judgment was in satisfaction of one of the debts listed in section 690.235(c) or that it was recorded before the debtor acquired the residence. But the creditor ought to have the burden of stating such facts in his counteraffidavit; the debtor should not be required to deny them in order to establish his claim of exemption.

21. See note 6 *supra*. Consider also the court's statement in *Yager v. Yager*, 7 Cal. 2d 213, 219, 60 P.2d 422, 425 (1936): "The homestead is not only for the benefit of the judgment debtor, but to protect each and every member of his family." The purpose of the residential exemption law is the same.

22. *Squibb v. Squibb*, 190 Cal. App. 2d 766, 12 Cal. Rptr. 346 (2d Dist. 1961) (dictum); *Strangman v. Duke*, 140 Cal. App. 2d 185, 295 P.2d 12 (2d Dist. 1956) (dictum); *Johnson v. Brauser*, 131 Cal. App. 2d 713, 281 P.2d 50 (2d Dist. 1955).

23. The notice in section 682b may also enable a debtor to protect his residence by declaring a homestead if the judgment creditor has not yet obtained a judgment lien on the residence. If the debtor has an equitable rather than a legal interest in his residence, or the creditor has not recorded the judgment in the county where the residence is located, or the judgment lien has expired after the lapse of 10 years, the creditor's judgment will not constitute a lien on the residence and the debtor may protect the residence by declaring a homestead. *Homeland Bldg. Co. v. Reynolds*, 49 Cal. App. 2d 176, 121 P.2d 59 (4th Dist. 1942); CAL. CODE CIV. PROC. § 674 (West Supp. 1975).

24. CAL. CODE CIV. PROC. § 690.50(b) (West Supp. 1975). Presently section 690.50(c) provides that the creditor may also allege that the value of the property exceeds the exemption if the claim to exemption is based on sections 690.2, 690.3, 690.4, or 690.6. But there is no mention in section 690.50 of a procedure by which a creditor may reach an excess over the residential exemption of section 690.235.

25. CAL. CODE CIV. PROC. § 690.50(e) (West Supp. 1975).

give 5 days' notice to both the other party and the levying officer. If the creditor fails to file a counteraffidavit, or neither party moves for a hearing, or the levying officer does not receive notice of the hearing within the times specified in section 690.50, the levying officer must release the property to the debtor.²⁶ If there is a hearing, the party claiming the exemption has the burden of proof. At the conclusion of the hearing, the court determines the validity of the exemption.

Section 690.50 applies to levies of attachment as well as to levies of execution. Because it has generally been held in California that a homestead declaration dissolves a preexisting attachment lien,²⁷ a claim

26. CAL. CODE CIV. PRO. § 690.50(f) (West Supp. 1975).

27. *Yager v. Yager*, 7 Cal. 2d 213, 60 P.2d 422 (1936); *Johnson v. Brauner*, 131 Cal. App. 2d 713, 281 P.2d 50 (2d Dist. 1955). In *Becker v. Lindsay*, 49 Cal. App. 3d 433, 122 Cal. Rptr. 691 (3d Dist. 1975), hearing granted, California Supreme Court no. 75-135 (September 4, 1975), the court held that a declaration of homestead did not dissolve a preexisting attachment lien. Although *Yager* and *Johnson* had both held that a declaration of homestead defeated an existing attachment lien, the court noted that a significant section of the homestead law had been amended since those cases were decided. Prior to 1951 CAL. CIV. CODE § 1241 had read in part: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained . . . [o]n debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." Ch. 71, § 1, [1887] Cal. Stat. 81, as amended ch. 1109, § 1, [1951] Cal. Stat. 2865. In 1951 this section was amended by the substitution of "encumbrances" for "mortgages." The court interpreted this amendment to include levies of attachment, in addition to mortgages, in the exception to the homestead exemption. The court noted that CAL. CIV. CODE § 1114 (West 1954) defines "incumbrance" to include all liens upon real property and that an attachment creates a lien upon real property. The court reasoned that therefore the homestead was subject to attachment liens created before the declaration was recorded. It stated: "This logic is inescapable, despite the obvious hardship it causes defendant." 49 Cal. App. 3d at 439, 122 Cal. Rptr. at 694. Furthermore, the court held that the decision in *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), where California's attachment law was declared unconstitutional, had no bearing on the case, because *Randone* was decided several months after the attachment had been converted to a judgment lien. The court refused to give *Randone* retroactive effect.

The court failed to note that an attaching creditor obtains only a potential right or contingent lien which lapses at the end of 1 year unless it is followed by an execution or judgment lien. *Puissegur v. Yarbrough*, 29 Cal. 2d 409, 175 P.2d 830 (1946); *Arcturus Mfg. Corp. v. Superior Court*, 223 Cal. App. 2d 187, 35 Cal. Rptr. 502 (2d Dist. 1963); CAL. CODE CIV. PRO. § 542c (West Supp. 1975). The United States Supreme Court has aptly characterized an attachment lien in California as "merely a *lis pendens* notice that a right to perfect a lien exists." *United States v. Security Trust & Sav. Bank*, 340 U.S. 47, 50 (1950). The creditor's attachment lien in *Becker* should not have interfered with the debtor's right to declare a homestead. And once the homestead had been declared, the creditor's judgment should not have become a lien on the homestead.

Also the court's reasoning ignored the purposes of the attachment and homestead laws. The basic purpose of attachment is to aid in the collection of a money demand by seizing property in advance of trial, as security for eventual satisfaction of the judgment. *Lehnhardt v. Jennings*, 119 Cal. 192, 195, 51 P. 195, 196 (1897); *Natl. Gen. Corp. v. Dutch Inns of America, Inc.*, 15 Cal. App. 3d 490, 495, 93 Cal. Rptr. 343, 346-47 (2d Dist. 1971). It is not the purpose of attachment to cut off the debtor's right to protect his residence from his creditor's claim by declaring a homestead. The obvious purpose of

of a residential exemption should also do so.²⁸ Therefore, a debtor should be able to protect his residence from attachment liens by claiming his exemption within 20 days after levy of execution instead of being compelled to claim the exemption within 20 days after the levy of attachment. This is particularly important in view of the fact that although the debtor receives notice of the possibility of claiming a residential exemption when a writ of execution is levied, he does not receive notice when there is a levy of a writ of attachment.²⁹

The procedure for claiming a residential exemption after a levy of attachment is governed by the attachment law as well as by section 690.50. The present attachment law³⁰ protects exempt property from attachment "without regard to whether a claim of exemption shall be filed."³¹ Thus, a residence is protected—to the extent of the residential exemption³²—from attachment regardless of whether the exemption is claimed in the manner specified in section 690.50. Attachment against resident individuals is limited by the present attachment law to those engaged in a trade or business,³³ and the action giving rise to the attachment must be based upon an unsecured claim for a liquidated sum of money. The total amount claimed, exclusive of interest, attorney's fees and costs, must be \$500 or more.³⁴

The present attachment law will be replaced by a new attachment law³⁵ on January 1, 1977.³⁶ Under the new law a debtor's claim to an exemption will be barred if it is not made at the attachment hearing.³⁷ The new attachment law will restrict attachment against resident individuals to those engaged in a trade, business, or profession and to unsecured contract claims for a fixed or readily ascertainable amount of not less than \$500. Also under the new law an attachment may not be is-

the homestead law is to allow a debtor to hinder and defeat the claims of his creditors. *Viotli v. Glond*, 290 Cal. App. 2d 730, 737, 41 Cal. Rptr. 345, 349 (1st Dist. 1964). The homestead law is to be interpreted liberally so that its humane purpose is furthered; the attachment law, on the other hand, is construed narrowly so that the rights of debtors do not suffer.

28. This follows since the residential exemption protects a residence "to the same extent" as a homestead.

29. CAL. CODE CIV. PRO. § 882b (West Supp. 1975).

30. CAL. CODE CIV. PRO. §§ 337-61 (West Supp. 1975). The operation of this law was recently extended through December 31, 1976. Ch. 200, [1975] Cal. Stat. —.

31. CAL. CODE CIV. PRO. § 537.3 (West Supp. 1975).

32. The amount of the residential exemption is the same as the homestead exemption: \$20,000 for a head of a family or a person over 65 and \$10,000 for other persons. For a discussion of the procedure a judgment creditor may use to reach an excess over the residential exemption see the text accompanying notes 44-49 *infra*.

33. CAL. CODE CIV. PRO. § 537.2(c) (West Supp. 1975).

34. CAL. CODE CIV. PRO. § 337.1 (West Supp. 1975).

35. CAL. CODE CIV. PRO. §§ 481.010-492.090 (West Supp. 1975).

36. Ch. 200, [1975] Cal. Stat. —.

37. CAL. CODE CIV. PRO. § 484.070(a) (West Supp. 1975).

sued on claims based on the furnishing of services or on loans where the money loaned was used primarily for personal, family, or household purposes.³⁸

With the above description of the way in which the exemption operates in mind, it is time to turn to the complexities of the law of debtors' and creditors' rights. Adoption of the new law, and its interaction with the homestead law, may add an additional layer of confusion to an already complicated area of the law.

III

DEBTORS' AND CREDITORS' RIGHTS UNDER THE RESIDENTIAL EXEMPTION LAW

A. *A Residence is Protected "To the Same Extent" as a Homestead*

Much of the law of declared homesteads is incorporated into the residential exemption law by section 690.235(a) of the California Code of Civil Procedure. This section provides for the following exemption:

A dwelling house in which the debtor, or the family of the debtor actually resides, to the same extent and in the same amount, except as otherwise provided in this section, as the debtor or the spouse of the debtor would be entitled to select as a homestead pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code; provided that neither such debtor nor the spouse of such debtor has an existing declared homestead on any property in this state.

As the section indicates, the nature and extent of property protected by the residential exemption law is determined largely by reference to the homestead law.

A declared homestead protects from execution both the dwelling (including outbuildings) in which the homestead declarant resides and the land on which the dwelling is situated.³⁹ To qualify as a homestead, the property must be used as the declarant's home, although some business use of the property is permitted.⁴⁰ A homestead may be declared in a condominium, planned development, stock cooperative, community apartment project, or on real property held under a long-term

38. CAL. CODE CIV. PRO. § 483.010 (West Supp. 1975).

39. CAL. CIV. CODE §§ 1237, 1240 (West 1954, Supp. 1975).

40. Homestead exemptions were allowed in the following cases: *Bodden v. Community Nat'l Bank*, 271 Cal. App. 2d 432, 76 Cal. Rptr. 278 (5th Dist. 1969) (homestead consisted of two houses on one lot; the declarant lived in one and rented the other); *Phelps v. Loop*, 64 Cal. App. 2d 332, 148 P.2d 674 (2d Dist. 1944) (18-unit apartment building was protected where declarant lived in one unit); *Harlan v. Schulze*, 7 Cal. App. 287, 94 P. 379 (3d Dist. 1908) (incidental use of homestead by declarant's wife for purposes of prostitution).

(30 years or more) lease.⁴¹ Since the residential exemption protects a debtor's residence to the same extent as a homestead, the above types of property can be protected by the residential exemption as well as by a homestead. In addition, the residential exemption—like a homestead exemption—covers any freehold title, interest, or estate that gives the debtor an immediate, though not necessarily exclusive, right to possession in his or his family's residence.⁴² Thus, the residential exemption applies to equitable as well as legal interests. Furthermore, the residential exemption covers the residence of the debtor or his family, whether it is owned as community property, as quasi-community property, or as separate property held by the spouses as tenants in common, in joint tenancy, or in severalty.⁴³

The amount of the homestead exemption is \$20,000 for a head of a family or a person over 65 and \$10,000 for other persons.⁴⁴ The homestead exemption is therefore limited in amount, and a judgment creditor may reach the excess over the exemption by means of the procedure set forth in Civil Code sections 1245 through 1259.⁴⁵ In effect, these sections provide that if the value of the residence exceeds the amount of the homestead exemption plus the value of all liens and encumbrances which have attached prior to the levy of execution, and the property is not divisible, the entire property may be sold so that the judgment creditor may satisfy his judgment out of the excess. A declared

41. CAL. CIV. CODE § 1237 (West Supp. 1973).

42. CAL. CIV. CODE § 1238 (West Supp. 1973); Comment, *Creation of the Homestead and Its Requirements*, 26 CALIF. L. REV. 241, 242-43 (1938).

43. CAL. CIV. CODE § 1238 (West Supp. 1973); CAL. CIV. CODE § 1239 (West 1954) prohibits the selection of a homestead from the separate property of the wife without her consent. But the residential exemption extends to property that either the debtor or the debtor's spouse could claim as a homestead. CAL. CODE CIV. PROC. § 690.235(a) (West Supp. 1973).

44. CAL. CIV. CODE § 1260 (West Supp. 1973).

45. To reach the excess a creditor must first create a lien on it by levying a writ of execution on the homestead. Then, within 60 days after levy of execution, the creditor is required to apply to the court for the appointment of appraisers of the homestead. If the creditor fails to make the application for the appraisers within the 60 day period, his lien is dissolved and he cannot enforce his judgment by levy of another execution on the homestead. CAL. CIV. CODE § 1245 (West 1954). *Arighi v. Rubé & Sons, Inc.*, 43 Cal. App. 2d 832, 107 P.2d 976 (3d Dist. 1940). Next, within 90 days of the filing of the application, the creditor must give the debtor notice of a hearing at which three persons will be appointed to appraise the homestead. CAL. CIV. CODE §§ 1248, 1249 (West 1954). Within 15 days after their appointment, the appraisers are required to report to the court on: (1) the property's appraised value; (2) the amount of liens and encumbrances on it; and (3) whether the property can be divided without material injury. CAL. CIV. CODE §§ 1251, 1252 (West 1954). If the court determines that there is an excess and the homesteaded property can be divided without material injury, it will then direct a division of the property. CAL. CIV. CODE § 1253 (West 1954). But if the property cannot be so divided and there is an excess, the court will order an execution sale. CAL. CIV. CODE § 1254 (West 1954). The proceeds from the sale are distributed according to CAL. CIV. CODE § 1256 (West 1954).

homestead is entirely exempt from judgment liens that have been recorded after the homestead declaration. Therefore, the recording of a judgment does not create a judgment lien on any excess over the homestead exemption.⁴⁶ But a lien on the excess may be created by the levy of a writ of attachment or execution.⁴⁷

The amount of the residential exemption is the same as the amount of the homestead exemption. The procedure found in California Civil Code sections 1245 through 1259 for levy on the excess over the homestead exemption should be incorporated into the residential exemption law. Although neither section 690.235 nor section 690.50⁴⁸ contains a procedure by which a creditor may levy on the excess over the residential exemption, the existence of such a procedure can be inferred from section 690.235(d), which deals with the proceeds of an execution sale of residential property. The procedure for levy on the excess given in sections 1245 through 1259 is part of the homestead's protection. Since a residence is protected "to the same extent" as a homestead, this procedure should be included in the residential exemption law.⁴⁹ Moreover, property covered by the residential exemption should be wholly protected from judgment liens; but attachment or execution liens should be allowed to attach to the excess over the exemption.

The phrase "to the same extent" should also cause the rule of *Schoenfeld v. Norberg*⁵⁰ to be incorporated into the residential exemption law. *Schoenfeld* held that in order for homesteaded property to be sold at an execution sale, the value of the debtor's share in joint tenancy property must exceed the sum of the homestead exemption allowed under Civil Code section 1260 and the total of the joint encumbrances on the property; thus the homestead exemption is not apportioned among the joint tenants. But the rule for community property is that the total value of the property—not the debtor's share of the value of the property—must exceed the sum of the homestead exemption and the amount of the encumbrances before the property may be sold.⁵¹ The

46. *Boggs v. Dunn*, 160 Cal. 283, 116 P. 743 (1911); *Viotti v. Glomi*, 230 Cal. App. 2d 730, 41 Cal. Rptr. 345 (1st Dist. 1964); *Thomas v. Speck*, 47 Cal. App. 2d 512, 118 P.2d 365 (2d Dist. 1941). This rule is criticized in Rifkind, *Archaic Exemption Laws*, 39 CALIF. ST. B.J. 370, 372-74 (1964).

47. *S. Pac. Milling Co. v. Milligan*, 15 Cal. 2d 729, 104 P.2d 654 (1940) (attachment lien); *Marelli v. Keating*, 208 Cal. 528, 282 P. 793 (1929) (attachment lien); *Lean v. Givens*, 146 Cal. 739, 81 P. 128 (1905) (execution lien).

48. See note 24 *supra*.

49. Under the procedure in Cal. Civ. Code § 1245 (West 1954), the creditor has only 60 days after levy of execution to apply for the appointment of appraisers. But the creditor must receive notice of the debtor's claim to the exemption within 30 days of his levy of execution. Therefore, the creditor should have sufficient time to apply for the appointment of appraisers.

50. 11 Cal. App. 3d 755, 90 Cal. Rptr. 47 (1st Dist. 1970).

51. *Id.* at 760, 90 Cal. Rptr. at 49. The court in *Schoenfeld* reversed an order of

protection afforded to joint tenancy property is, therefore, greater than that given to community property under the homestead and residential exemption laws.

Section 690.235(a) provides that the exemption applies to a dwelling in which the debtor, or the family of the debtor actually resides. The debtor and the debtor's spouse are entitled to only one exemption.⁵² Moreover, the section permits the exemption only if neither the debtor nor the debtor's spouse has an existing declared homestead on any property in California.⁵³ As a result, they cannot declare a homestead on one residence and claim a residential exemption on another; nor can they add a residential exemption to a homestead exemption to obtain a total exemption of \$40,000.

In some situations, the protection afforded by the residential exemption may be greater than that afforded by a homestead. Consider, for example, the situation in which a judgment against the debtor has been recorded after the debtor has acquired the property and taken up residence, but before his homestead declaration has been recorded. The recorded judgment will create a lien which will have priority over the homestead.⁵⁴ But if a residential exemption is effective from the time the debtor commences residence, notwithstand-

also because the trial court had not determined whether the homestead was community property or property held in joint tenancy. The amount of liens and encumbrances on the homestead prior to the execution lien totalled \$9,099. The amount of the homestead exemption at the time was \$12,500 and the total value of the residence was \$35,000. If the property had been held in joint tenancy, Mr. Schoenfeld's share of the property would have been worth \$17,500. Since this amount would not have exceeded the total value of the liens and encumbrances—\$9,099—plus the total value of the homestead exemption—\$12,500—Mr. Schoenfeld's property could not have been sold; there would have been no excess which the judgment creditor could have reached. If, however, the property had been community property, the total value of the property, \$35,000, would have exceeded the amount of the liens and the encumbrances, plus the homestead exemption—\$21,598—and the property could have been sold.

52. CAL. CODE CIV. PRO. § 690.235(a) (West Supp. 1975). This is analogous to the requirement that the debtor and spouse may not declare more than one homestead. CAL. CIV. CODE § 1263(4) (West Supp. 1975); *In re Towers*, 146 F. Supp. 882 (N.D. Cal. 1956), *aff'd sub nom. Towers v. Curry*, 247 F.2d 738 (9th Cir. 1957); *Strangman v. Duke*, 140 Cal. App. 2d 185, 295 P.2d 12 (2d Dist. 1956) (dictum). *But see* CAL. CIV. CODE § 1300 (West Supp. 1975), which allows separated spouses to each claim homesteads on their separate property.

53. CAL. CODE CIV. PRO. § 690.235(a) (West Supp. 1975). State Senator Beilenson introduced Senate Bill 1121 on April 22, 1975 to amend the residential exemption law. This bill passed the State Senate on June 9, 1975, but lost in the Assembly. Senate Bill 1121, as amended, would have added the phrase "other than as provided in Section 1300 of the Civil Code" to the end of section 690.235(a). The purpose of this change was to allow a debtor who is separated from his spouse to claim a residential exemption, even though his spouse has already declared a homestead on separate property; section 1300 presently allows separated spouses to each file declared homesteads. CAL. CIV. CODE § 1300 (West Supp. 1975).

54. CAL. CIV. CODE § 1241(1) (West Supp. 1975).

ing the time when it is claimed,⁵⁵ the judgment will not be effective against the residential exemption. In this situation the residential exemption will give greater protection than the declaration of homestead. However, if the debtor has already declared a homestead, he or she will be prevented from claiming the residential exemption. To solve this problem the debtor may abandon the homestead⁵⁶ and claim the residential exemption to avoid the judgment lien.

It must be noted, however, that the phrase "to the same extent" refers only to the exemption from execution. Thus, the features of the homestead law which are not related to exemption from execution are not incorporated into the residential exemption law. Such features include the spouse's right of survivorship⁵⁷ for the homestead and the restrictions on conveyancing of homesteads.⁵⁸ Persons who desire these features should not rely on the residential exemption law, but instead should file a homestead declaration.⁵⁹ Once it has been established that a residential exemption is desired, however, inquiry must be made into when the exemption applies.

B. When Does the Property Become Exempt?

Section 690.235(b) of the new law states:

The exemption provided in subdivision (a) shall not apply to a

55. The problem of when the exemption becomes effective is discussed in the text accompanying notes 60-64 *infra*.

56. CAL. CIV. CODE §§ 1243, 1244 (West Supp. 1975).

57. CAL. CIV. CODE § 1265 (West Supp. 1975).

58. CAL. CIV. CODE § 1242 (West Supp. 1975).

59. The right of survivorship feature of the homestead law may be important in some situations. Holding property in joint tenancy also affords a right of survivorship to a spouse. However, community property may have federal income tax advantages over joint tenancy property. The entire basis of community property is stepped up to fair market value on the death of one of the spouses. Treas. Reg. § 1.1014-2(a)(5) (1960). But only that part of joint tenancy property includable in the decedent's gross estate is stepped up. *Murphy v. Comm'r.* 342 F.2d 356 (9th Cir. 1965); Treas. Reg. § 1.1014-2(b)(2) (1973); 3A MERTINS, LAW OF FEDERAL INCOME TAXATION §§ 21.81, 21.84 (1968). A homestead therefore may provide a means to combine the survivorship feature of joint tenancy with the tax advantage of community property.

Also a spouse may desire the restriction on conveyancing feature of the homestead law to protect against conveyancing or encumbering of the homestead without his consent. For example, under CAL. CIV. CODE § 1242 (West Supp. 1975), the separate property of the husband, if homesteaded, cannot be conveyed or encumbered without the wife's consent. There is no such restriction stated in the residential exemption law and it is unlikely to be brought over by the phrase "to the same extent." Therefore, a husband could execute an encumbrance on his separate property without his wife's consent. Although CAL. CODE CIV. PART. § 690.235(c)(2) requires an encumbrance on residential property to be executed and acknowledged by both husband and wife in order for the property to be subject to execution or forced sale to satisfy the encumbrance, an encumbrance executed by the husband alone would create a lien which would be valid against a subsequent purchaser of the property.

judgment or an abstract thereof which has been recorded prior to the acquisition of the property by the debtor or the spouse of the debtor or the commencement of residence, whichever last occurs.

This section makes it clear that the residential exemption does not protect a residence from judgments recorded before the debtor acquired it and took up residence. But the section does not expressly provide that the residential exemption will protect the residence from judgments recorded after the debtor acquired it and began living there. Until the courts decide the issue, the failure to establish the time when a residence becomes exempt may cause confusion in the application of the residential exemption law. The time of exemption is important, because a judgment lien may attach to the residence if the residence is not exempt at the time the judgment is recorded;⁶⁰ but if the residence is exempt when the judgment is recorded, the lien will not attach.⁶¹

Code of Civil Procedure section 690(a) provides: "[T]he property mentioned in Sections 690.1 to 690.29, inclusive, is exempt from execution when claim for exemption is made to the same by the judgment debtor or defendant as hereinafter in section 690.50 provided." The interpretation of this section in conjunction with section 690.235 should be done in such a way as to fulfill the purpose of the residential exemption law, which was to expand the protection from execution given to a debtor's residence. Therefore, a construction of section 690(a) under which the residence is not exempt until a claim for exemption is made should be disfavored.⁶² If the residence is not exempt until a claim for exemption is made, a judgment lien could attach to the residence before the debtor receives notice⁶³ that he can claim the exemption. At the least a claim of exemption should extinguish a judgment lien that has attached since the debtor acquired and commenced residing on the property—provided that the claim is made within 20 days of levy of execution. But even this construction could create difficulties where the debtor conveys the property before claiming the exemption; the judgment lien would attach before the debtor waives his right to the residential exemption.

It is probably best to interpret section 690(a) as providing that the

60. CAL. CODE CIV. PRO. § 674 (West Supp. 1975); *Crenshaw v. Smith*, 74 Cal. App. 2d 255, 267, 168 P.2d 752, 760 (3d Dist. 1946).

61. *Clauseneus v. Anderson*, 216 Cal. App. 2d 171, 30 Cal. Rptr. 772 (2d Dist. 1963).

62. *But see Agnew v. Cronin*, 148 Cal. App. 2d 117, 124, 306 P.2d 527, 531 (2d Dist. 1957); *Frenette, Exemptions of Debtors*, in CALIFORNIA REMEDIES FOR UNSECURED CREDITORS 229 (1957); *JACKSON, CALIFORNIA DEBT COLLECTION PRACTICE* § 19.1 (1968, Supp. 1974).

63. CAL. CODE CIV. PRO. § 682b (West Supp. 1975) states that notice to the debtor of his right to claim the residential exemption must accompany the levy of the writ of execution.

procedure for claiming the exemption is set forth in section 690.50, but that the property is exempt from the time the debtor acquires it and begins residing there. Judgment liens and execution liens could, however, attach to the property after the debtor waives his exemption by failing to claim the exemption within 20 days after levy of execution, as is required by section 690.50. In addition with this interpretation, a conveyance of the residence could not be set aside as a fraudulent conveyance under California law unless such a waiver had been made.⁶⁴

C. Exceptions to the Exemption

Section 690.235(c) provides for numerous exceptions to the residential exemption.⁶⁵ This section states:

Property which would otherwise be exempt under subdivision (a) is subject to execution or forced sale in satisfaction of judgments obtained:

(1) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises.

(2) On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant.

(3) On debts secured by encumbrances on the premises, executed and recorded prior to or in connection with the acquisition of the property by the debtor or the spouse of the debtor.

Even if the residence is subject to the liens and encumbrances enumerated in section 690.235(c), a debtor still has certain protections. Among them is the one action rule.⁶⁶ The California Code of Civil Procedure provides that: "There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter . . ."⁶⁷ This limits the number of judicial procedures which

64. In California the law of fraudulent conveyances does not apply to the transfer of exempt property. *Montgomery v. Bullock*, 11 Cal. 2d 58, 77 P.2d 846 (1938); *Oppenheim v. Goodley*, 141 Cal. App. 2d 325, 306 P.2d 944 (2d Dist. 1957). A judgment creditor may, however, reach an excess over the residential exemption in the hands of the transferee. *Id.* (dictum).

65. The residential exemption law also contains a retroactivity clause, which states that the law will not affect the rights of any lienholder or encumbrancer that have vested prior to July 1, 1975, the law's operative date. Ch. 1251, § 6, [1974] Cal. Stat. —. This portion of the law is not codified. Senate Bill 1121, *supra* note 53, would have placed the statement that the residential exemption law does not affect liens that came into effect prior to July 1, 1975, in section 690.235(b) of the California Code of Civil Procedure.

66. For a full discussion of the one action rule, see J. HETLAND, SECURED REAL ESTATE TRANSACTIONS § 9.4-9.1B (1974); J. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS § 6.3.6 (2) (1970).

67. CAL. CODE CIV. PRO. § 726 (West Supp. 1975).

the creditor can use to enforce his obligation where the obligation is secured by a mortgage.⁶⁸

Generally there are two consequences of the one action rule. First, where there is a suit on the underlying claim, the debtor may plead the rule as an affirmative defense, and require the plaintiff to exhaust the security before he may obtain a money judgment against the debtor for any deficiency.⁶⁹ Second, even if the rule is not pleaded as an affirmative defense by the debtor, he may still invoke it as a sanction. That is, a creditor who sues on the claim rather than foreclosing on the security interest will be deemed to have made an election of remedies and to have waived the security interest.⁷⁰ Therefore, if a creditor fails to foreclose on a debtor's residence, he will lose his rights to lien priority and he may be prevented from enforcing a personal judgment against the debtor by the residential exemption law.⁷¹

D. *The Proceeds of an Execution Sale*

Section 690.235(d) provides as follows for the allocation of proceeds from an execution sale:

68. The one action rule applies to deeds of trust and other economically similar consensual security devices as well as mortgages. But it does not yet apply to installment land contracts. J. HETLAND, SECURED REAL ESTATE TRANSACTIONS § 9.5 (1974).

69. *Walker v. Community Bank*, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974); J. HETLAND, SECURED REAL ESTATE TRANSACTIONS § 9.4 (1974). "Code of Civil Procedure § 726 is waived as an affirmative defense to an action seeking relief other than foreclosure if the debtor does not raise it; it cannot be waived by the creditor." J. HETLAND, SECURED REAL ESTATE TRANSACTIONS § 9.13 (1974); *Salter v. Ulrich*, 22 Cal. 2d 263, 138 P.2d 7 (1943); *Spector v. Nat'l Pictures Corp.*, 201 Cal. App. 2d 217, 20 Cal. Rptr. 307 (2d Dist. 1962).

70. *Walker v. Community Bank*, 10 Cal. 3d 729, 740-41, 518 P.2d 329, 337, 111 Cal. Rptr. 897, 905 (1974); *Hall v. Arnott*, 80 Cal. 348, 354, 22 P. 200, 202 (1889); J. HETLAND, SECURED REAL ESTATE TRANSACTIONS § 9.16 (1974).

71. In *James v. P.C.S. Offing Co.*, 276 Cal. App. 2d 19, 80 Cal. Rptr. 457 (5th Dist. 1969), a creditor acquired an equitable mortgage on the debtor's residence before the debtor filed a declaration of homestead. When the debtor got behind on his payments, the creditor obtained a personal money judgment against the debtor instead of foreclosing on the property. The court applied the one action rule and held that the creditor waived all rights to a lien priority by choosing to obtain a money judgment in order to recover on the debt. The creditor pointed to a specific exception in the homestead law for encumbrances recorded before the declaration of homestead. But the court found that the creditor had forfeited the lien priority by failing to foreclose on the property. As a consequence, the creditor could no longer enforce his equitable mortgage by foreclosure, and the debtor's homestead declaration protected the property from execution on the money judgment.

This result was approved by the California Supreme Court in a recent case. *Walker v. Community Bank*, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974). Courts should have little trouble reaching a similar result in cases involving a residential exemption, where a creditor obtains a money judgment instead of foreclosing on a residence to enforce his lien. Thus, any lien or encumbrance—otherwise superior to the residential exemption—should be deemed to be waived if the creditor sues on the obligation, seeking a personal money judgment, rather than foreclosing on the security.

In the event of an execution sale, the proceeds of the sale shall be applied in the following order or priority: first, to the discharge of all liens and encumbrances, if any, on the property; second, to the debtor in the amount of the exemption provided by this section; third, to the satisfaction of the execution; and fourth, to the debtor.

It is likely that this provision will be interpreted in the same way as section 1256, a similar provision in the homestead law.⁷² Thus a levying judgment creditor will receive nothing from an execution until liens and encumbrances that are prior to the creditor's execution lien and not subject to the residential exemption have been satisfied and the debtor has received the amount of the residential exemption.⁷³ Also a bid at an execution sale in satisfaction of a money judgment should not be allowed unless it exceeds the total value of liens and encumbrances that are prior to the execution lien⁷⁴ and not subject to the residential exemption, plus the amount of the residential exemption.⁷⁵

72. A too-literal interpretation of this section could cause a scrambling of the usual order of priority when a creditor brings an execution sale to reach the excess over the residential exemption. This section provides that all liens and encumbrances are to be discharged before the execution is satisfied. This could be interpreted to include liens and encumbrances that are created after a judgment creditor levies execution on the debtor's residence. Such an interpretation should be disfavored, however, because it would enable a debtor to avoid paying a creditor by creating liens on his residence after levy of execution until the excess available to the creditor is reduced to zero. This problem also arises under the homestead law, and the courts have interpreted the homestead law so as to give the judgment creditor's execution lien priority over subsequent liens, encumbrances and conveyances. See CAL. CIV. CODE § 1236 (West 1954); *Markill v. Keating*, 208 Cal. 528, 282 P. 793 (1929) (dictum); *Leah v. Oiveta*, 146 Cal. 739, 81 P. 128 (1905). Courts will probably interpret CAL. CODE CIV. PRO. § 690.235(d) in a similar manner.

73. Under section 690.235(c) all liens and encumbrances have to be discharged, and the debtor must receive proceeds equal to the amount of the residential exemption, before the judgment creditor can receive anything in satisfaction of the execution. But liens and encumbrances created after the judgment creditor has established an execution lien on the excess should not have priority over the execution lien. See note 72 *supra*.

For example, if the debtor grants a consensual lien, M, on his residence after an execution lien on the excess has been created (so that the consensual lien is junior to the execution lien), he may thereby subordinate his rights in the property to those of the lienholder in the event of an execution sale. When there is such a sale, the proceeds would be used first to satisfy liens and encumbrances that are prior to the execution lien and not subject to the residential exemption, next to the debtor in the amount of the residential exemption (which funds would be paid over to the holder of lien M), and then to satisfy the execution. Any excess would be paid over to the debtor for the benefit of the holder of lien M to the extent necessary to satisfy the lien.

74. A lien or encumbrance which is junior to the execution lien should not be included in the required minimum bid. See notes 72 and 73 *supra*. However, the lien should have priority over the debtor's interest in the property. CAL. CODE CIV. PRO. § 725a (West 1954).

75. CAL. CIV. CODE § 1255 (West 1954); *Van Bogaert v. Avery*, 271 Cal. App. 2d 492, 76 Cal. Rptr. 608 (2d Dist. 1969). CAL. CODE CIV. PRO. § 690.235 provides for the protection of a debtor's residence "to the same extent" as a homestead. Part of the protection of a homestead is that it cannot be sold at an execution sale unless the price

The order of priority stated in section 690.235(d) should also apply where an unsecured creditor seeks to levy on the proceeds of a foreclosure sale of the residence.⁷⁶ That is, if a lienholder forecloses on his security interest in the residence and the proceeds exceed the amount of the lien, a judgment creditor may seek to satisfy his judgment out of the excess. If that is the case, the debtor should receive the amount of the residential exemption before the proceeds are used to satisfy the judgment. For example, the proceeds of a mortgage foreclosure sale should be distributed as follows: (1) payment in satisfaction of the mortgage; (2) payment of the amount of the homestead exemption; (3) payment in satisfaction of any execution or attachment liens on the excess; (4) payment of the remainder to the debtor.

Once the order in which proceeds of an execution sale will be disposed of has been established, other factors must be considered. The exemption of the proceeds after a sale of residential property, for example, is of primary importance.

E. Exemption of Proceeds After Sale

Section 690.235(e) provides for the exemption of proceeds from any sale of residential property for 6 months after the debtor receives the proceeds. It states:

That portion of the proceeds from any sale of property which is exempt under this section, which portion represents the amount of such exemption, shall be exempt for a period of six months from the date of receipt of such proceeds.

Similar provisions, which apply to the proceeds from a sale of a homestead, are found in Civil Code sections 1257 and 1265.

In addition to exempting the proceeds of a sale of a homestead for 6 months, the homestead law also allows a debtor who purchases a new residence with the proceeds of the sale of a previous homestead within 6 months of the sale and who declares a homestead on the new residence within the same period, to have his declaration of homestead treated as dating from the time his prior declaration was recorded.⁷⁷ This means that a debtor may move to another residence without losing the protection of the homestead law. Although a judgment may be recorded

exceeds the amount of liens and encumbrances and the value of the homestead exemption. If a residence could be sold at a price below the amount of liens and encumbrances and the value of the residential exemption, the debtor would lose the benefit of the residential exemption.

76. *Cf. Chase v. Bank of America*, 227 Cal. App. 2d 259, 38 Cal. Rptr. 367 (1st Dist. 1964). Since the residential exemption protects the debtor's residence "to the same extent" as a homestead exemption, the *Chase* result should apply under the residential exemption law.

77. CAL. CIV. CODE § 1265a (West 1954).

against a debtor before a homestead is declared on his new residence, the new residence will be protected provided that the new residence is purchased with the proceeds of the sale of an old residence that was homesteaded before the date of the judgment.⁷⁸

While the residential exemption law contains no explicit provision enabling a debtor to retain the exemption while substituting one residence for another,⁷⁹ it is hoped that courts will imply such a provision. The residential exemption law will be seriously undermined unless a debtor can carry his exemption from one house to the next. Once a debtor has moved, a creditor who was previously unable to enforce his judgment because of the residential exemption would only have to wait 6 months before he could satisfy his judgment on the debtor's new residence,⁸⁰ unless the exemption dates back to the debtor's acquisition of his earlier residence.

The retroactive effect of the residential exemption should be implied from the statement that a residence is protected "to the same extent" as a homestead. In addition, since the provision for a 6 month exemption for the proceeds from the sale of exempt property must have been included in order to allow the debtor to purchase a new residence with the proceeds of the sale,⁸¹ it follows that the legislature intended the new residence to be exempt from the same judgments from which the earlier residence was exempted. Thus, the residential exemption should be given retroactive effect from the time the debtor acquired his earlier residence—but only if the debtor invests the proceeds of the sale of the earlier residence toward the purchase of his new residence.

The preceding discussions have focused upon how the rights and remedies of debtors and creditors will be affected by the new residential

78. *Id.*; *Thorsby v. Babcock*, 36 Cal. 2d 202, 222 P.2d 863 (1950).

79. Senate Bill 1121, *supra* note 53, provided explicitly for the retroactive effect of a residential exemption. However, it required a prior claim of exemption for the earlier residence to have been filed in order for the residential exemption to have retroactive effect. The residential exemption ought to be given retroactive effect regardless of whether an earlier claim for exemption has been filed.

80. Since a judgment must be recorded in the county where the debtor's property is located in order to become a lien on it, a debtor can avoid the lien by acquiring a residence in a county where the judgment is not recorded. See CAL. CIV. PRO. § 674 (West Supp. 1973).

81. See the court's comments on the homestead law in *Thorsby v. Babcock*, 36 Cal. 2d 202, 222 P.2d 863 (1950).

Although, in granting an exemption to the proceeds of a voluntary sale of the homestead for a period of six months (Civ. Code, § 1265), the Legislature has imposed no requirement of reinvestment, obviously the true purpose of giving the owner that time is to permit him to move his family to another home with the retention of protection from forced sale. Statutes not granting such exemption tend to immobilize the debtor to the detriment of his entire family, for whom the homestead provisions were intended to be a benefit.

Id., at 205, 222 P.2d at 866.

exemption law and its relationship to the law of homesteads. One area of importance to debtors and creditors remains to be investigated: the application of the residential exemption to bankruptcy law.

F. *The Residential Exemption in Bankruptcy*

Sections 6 and 70a⁸² of the Bankruptcy Act allow bankrupts those exemption rights prescribed by federal or state law.⁸³ Under section 70c(3)⁸⁴ of the Bankruptcy Act the trustee of the bankrupt's estate is given the status of a creditor who has obtained a lien on the debtor's property at the date of bankruptcy. In order for a bankrupt's claim of exemption to be allowed, therefore, his right to the exemption must have been established under state law at the date of bankruptcy.⁸⁵

When establishing the bankrupt's right to a residential exemption under California law, the probable results of the application of the California homestead law should not be controlling. In California, a debtor must record a homestead declaration before he is entitled to a homestead exemption.⁸⁶ Thus, in California a debtor may not claim a homestead exemption in bankruptcy if he has not recorded a homestead declaration before the filing of the petition in bankruptcy.⁸⁷ However, in some other states, where a debtor may claim a homestead after levy of execution, a bankrupt is entitled to a homestead exemption in bankruptcy even though a homestead declaration has not been recorded prior to the filing of the petition in bankruptcy.⁸⁸ It is argued that this policy—allowing a debtor to claim a homestead after levy of execution—leads to better protection of the bankrupt debtor and should, therefore, be followed when applying the California residential exemption law. A debtor in California should be allowed to claim the residential exemption in bankruptcy without having previously filed a claim to exemption under section 690.50. Since the section 690.50 claim of exemption can be made only after there has been a levy of execution or attachment on

82. 11 U.S.C. §§ 24, 110(a) (1970).

83. Because there is great variation in the amounts and kinds of exemptions allowed under state laws, the Commission on the Bankruptcy Laws of the United States has recommended the adoption of a uniform set of exemptions which would supersede other state and federal exemptions in bankruptcy proceedings. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess., Part I at 170-73; Part II at 125-31 (1973).

84. 11 U.S.C. § 110(c)(3) (1970).

85. *White v. Stump*, 266 U.S. 310 (1924). 1A J. MOORE, COLLIER ON BANKRUPTCY 825 (14th ed. 1975).

86. CAL. CIV. CODE § 1265 (West Supp. 1975).

87. *Sampell v. Straub*, 194 F.2d 228 (9th Cir. 1951), cert. denied, 343 U.S. 927 (1952).

88. *Myers v. Matley*, 318 U.S. 622 (1943); *Schultz v. Mastrangelo*, 333 F.2d 278 (9th Cir. 1964).

the property,⁸⁹ it would be unfair to prevent the debtor from claiming the residential exemption in bankruptcy just because he has not claimed the exemption under California law. Furthermore, claims of exemption for other section 690 exempt assets have been allowed in bankruptcy cases in which the bankrupt has not filed a claim of exemption under section 690.50.⁹⁰

Moreover, although bankruptcy courts follow the applicable state law in determining the nature and extent of the state exemptions, the manner of claiming the exemptions is determined by the federal courts as a matter of procedure in the course of bankruptcy administration.⁹¹ The federal bankruptcy courts are not bound or limited as to the time or manner of claiming exemptions by state law.⁹² A bankrupt who wishes to claim an exemption allowed under state law must do so by stating the claim of exemption in the schedule of property, which is filed in the bankruptcy proceeding.⁹³

In addition to the above considerations, practitioners should treat the residential exemption in the same manner as other exemptions under the bankruptcy law. Section 6 of the Bankruptcy Act provides that a bankrupt will not be allowed to claim an exemption on property which the trustee has recovered for the benefit of the estate after the bankrupt transferred or concealed it (except where the voided transfer was made by way of security only). A transfer of residential property, however, cannot be set aside as a fraudulent conveyance.⁹⁴ In addition, since a preferential transfer prior to bankruptcy must deplete assets of the estate available to creditors, a transfer of residential property could not be a voidable preference.⁹⁵ But if the trustee is able to recover the property, the bankrupt will then be barred from claiming the residential exemption.⁹⁶

89. CAL. CODE CIV. PRO. § 690.50(a) (West Supp. 1975).

90. See *In re Jackson*, 472 F.2d 389 (9th Cir. 1973); *In re Sanderson*, 134 F. Supp. 484 (N.D. Cal. 1955).

91. *Gardner v. Johnson*, 195 F.2d 717 (9th Cir. 1952); *In re Garber*, 186 F. 693 (9th Cir. 1911); *In re Groves*, 6 Am. Bankr. R. 728 (N.D. Ohio 1901). 1A J. MOORE, COLLIER ON BANKRUPTCY 902 (14th ed. 1975).

92. *In re Kane*, 127 F. 552 (7th Cir. 1904).

93. BANKR. R. 403.

94. See note 64 *supra*.

95. *Rutledge v. Johansen*, 270 F.2d 881 (10th Cir. 1959); *In re Hausman*, 209 F. Supp. 219 (M.D. Ga. 1962). The Commission on the Bankruptcy Laws of the United States has recommended a change in this rule so that a transfer of exempt property to an unsecured creditor shortly before bankruptcy could be a voidable preference. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess., Part II at 170 (1973).

96. Cf. *Gardner v. Johnson*, 195 F.2d 717 (9th Cir. 1952), where the grantee of a homestead did not claim it as exempt when the trustee brought suit to recover it. The bankrupt was not allowed to claim the homestead after the trustee had recovered the property.

CONCLUSION

The residential exemption law goes far toward correcting an inequity that has persisted in California law for over a century: the denial of homestead protection to those debtors who are not aware of the existence of the homestead law. While the residential exemption law has expanded the protection given to debtors in California, it has created a number of technical legal problems. It is hoped that the courts and lawyers will deal with these problems effectively so that the protection that the new law gives to debtors will not be lost.

EXHIBIT 2

EFFECTIVE INSOLVENCY PLANNING FOR THE CONSUMER BANKRUPT IN CALIFORNIA



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Section 70a of the Bankruptcy Act¹ vests a trustee in bankruptcy with the title of the bankrupt to all property of the bankrupt which is not held to be exempt. Section 6 of the Act² preserves the right of a bankrupt to claim all exemptions provided by the law of his domiciliary state.

California exemption statutes are among the most liberal in the nation. Decisions of California state courts and of the Ninth Circuit Court of Appeals have enunciated a liberal interpretation of these statutes.³ The Ninth Circuit has also interpreted the fraudulent conveyance provisions of the Act to permit the conversion of non-exempt assets into exempt assets on the eve of bank-

ruptcy.⁴ There is thus a unique opportunity in California to maximize a debtor's exemptions in bankruptcy proceedings.

A bankrupt's right to an exemption is determined as of the date the petition in bankruptcy is filed.⁵ Therefore, a bankrupt who has been improperly or incompletely advised prior to bankruptcy may stand to suffer irreparable harm.

It is the purpose of this article to examine three particular assets in which the opportunity and the danger are equally great: the homestead, the motor vehicle and cash. Recent amendments to the California exemption

¹11 U.S.C. § 710(a). Hereinafter "the Act" refers to the Bankruptcy Act, 11 U.S.C. §§ 1 et seq.

²11 U.S.C. § 24.

³See, e.g., *Dean v. Shephard*, 26 F.2d 460 (9th Cir. 1928); *In re Fox*, 16 F. Supp. 329 (S.D. Cal. 1936); *Independence Bank v. Heller*, 275 Cal.App.2d 84 (1969), and cases cited in n. 6 *infra*. Cf. *Security First Nat'l*

Bank of Los Angeles v. Pierson, 2 Cal.2d 63 (1934); *Quigley v. Gorham*, 5 Cal. 418 (1855); *Crown Laundry and Cleaning Co. v. Cameron*, 19 Cal.App. 617 (1919).

⁴See text accompanying n. 23-29 *infra*.

⁵*Myers v. Matley*, 318 U.S. 622 (1943); *White v. Stump*, 266 U.S. 310 (1924); *Georgiouse v. Gillon*, 24 F.2d 297 (9th Cir. 1928).

statutes will be noted. The problems they will either cause or alleviate in bankruptcy proceedings will be discussed.

The Homestead

California case law is replete with preachments concerning the sanctity of a debtor's home and with the zeal of the courts to preserve it through the most liberal statutory interpretation possible.⁶ None of the cases will help, however, if a homestead exemption is not properly perfected prior to the filing of a bankruptcy petition.

The bankruptcy trustee is given, by Section 70c of the Act,⁷ all the rights and powers of every creditor who could have recorded a judgment or obtained an execution returned unsatisfied on the date of bankruptcy. Unless, therefore, a properly prepared and executed Declaration of Homestead is recorded before the bankruptcy petition is filed, the hypothetical judgment lien of the trustee is not affected by the subsequent homestead since, pursuant to

California law, a creditor who records an abstract of judgment prior to the recordation of a homestead by the judgment debtor prevails.⁸

As of January 1, 1977, the maximum homestead exemption has been increased to \$30,000 for heads of family and those of age sixty-five and older and to \$15,000 for all other persons.⁹ From January 1, 1971 through December 31, 1976, the maximum exemptions were \$20,000 and \$10,000 respectively. From January 1, 1964 through December 31, 1970, they were \$15,000 and \$7,500.¹⁰

A creditor is bound only by an exemption effective at the time of the extension of credit.¹¹ Increases in the amounts of the homestead exemption have, therefore, no retroactive application.¹² A trustee in bankruptcy succeeds to the rights of the creditors of a bankrupt as of the time at which the bankrupt's creditors extended credit.¹³ The amount of a homestead exemption will thus not be the same for every bankrupt.

⁶See, e.g., *Thomsby v. Babcock*, 36 Cal.2d 202 (1950); *Bullis v. Stanford*, 178 Cal. 40 (1918); *In re Fath Estate*, 132 Cal. 609 (1901); *Keyes v. Cyrus*, 100 Cal. 322 (1891); *Chase v. Bank of America*, 227 Cal. App.2d 239 (1964); *California Bank v. Schlesinger*, 159 Cal.App.2d Supp. 854 (1958).

⁷11 U.S.C. § 110(c).

⁸*Sampsel v. Straub*, 294 F.2d 228 (9th Cir. 1951), cert. denied, 343 U.S. 927 (1952).

⁹Rev. Code § 1260.

¹⁰Originally enacted in 1872, the amount of the exemption was \$5,000 for a head of family and \$1,000 for any other person. The amount of the exemption was increased by amendments enacted in 1945, 1947, 1949, 1953, 1970 and 1976.

¹¹*W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934); *Sturges v. Crowninshield*, 17 U.S. 122 (1819); *In re Fox*, 16 F.Supp. 329 (S.D.Cal. 1936).

¹²*In re Bauer's Collection Co.*, 87 Cal. App.2d 284 (1948).

¹³*England v. Sanderson*, 236 F.2d 641 (9th Cir. 1956).

Accordingly, a bankrupt whose petition is filed subsequent to January 1, 1977 will not have the benefit of the increased exemption if any debt was incurred prior to that date. In that connection, a bankrupt head of family with no unsatisfied obligations incurred prior to January 1, 1971 would be entitled to a \$20,000 homestead exemption in bankruptcy. A bankrupt head of family with one unpaid debt incurred prior to January 1, 1971, but subsequent to December 31, 1963, would be entitled only to a \$15,000 homestead exemption in bankruptcy.

How is a bankrupt head of family with a \$30,000 equity in his residence to be counselled prior to bankruptcy if a creditor exists who extended credit prior to January 1, 1977? The poten-

tial bankrupt should not be advised to omit pre-1977 creditors from Schedule A, the list of obligations. While a bankrupt is free to reaffirm any discharged debt he so desires,¹⁵ he is not free to choose which creditors he will schedule and which he will not.¹⁵ Such a course of action could constitute perjury.¹⁶ It could also constitute grounds for denial¹⁷ or revocation¹⁸ of discharge.

The potential bankrupt could, however, refinance the real property or further encumber it. The source of the funds borrowed is immaterial, so long as the granting of the security interest was for fair consideration¹⁹ and was not on account of an antecedent debt.²⁰ The homestead could then be recorded after the junior trust deed is recorded

¹⁴See *Shephard v. McDonald*, 157 F.2d 467 (9th Cir. 1946); *Forman v. Scott*, 231 Cal.App.2d 340 (1964); 1A Collier, Bankruptcy § 17.33 (14th ed. 1975).

¹⁵See Section 7a(8) of the Act, 11 U.S.C. § 25(a)(8); Rule of Bankruptcy Procedure 108(a).

¹⁶Rule of Bankruptcy Procedure 109 provides that the schedules be verified.

¹⁷Failure to list the creditor would, in effect, conceal an asset from the bankruptcy trustee. Pursuant to Section 14c(4) of the Act, 11 U.S.C. § 32(c)(4), a discharge will not be granted to a bankrupt who, within the twelve months preceding bankruptcy, conceals or permits to be concealed any of his property with the intent to hinder, delay or defraud creditors. Pursuant to Section 14c(1) of the Act, 11 U.S.C. § 32(c)(1), a discharge will not be granted to a bankrupt who has committed an offense punishable by imprisonment under 18 U.S.C. § 152. 18 U.S.C. § 152 makes it a crime punishable by

fine or imprisonment to knowingly and fraudulently conceal an asset from a bankruptcy trustee.

¹⁸Section 15(1) of the Act, 11 U.S.C. § 33(1), provides for the revocation of a discharge obtained through fraud by the bankrupt.

¹⁹See Section 67d of the Act, 11 U.S.C. § 107(d); Section 70d of the Act, 11 U.S.C. § 110(d).

²⁰See Section 60a(1) of the Act, 11 U.S.C. § 96(a)(1). The creation of a lien on the eve of bankruptcy to secure antecedent debt will not endanger the discharge nor will it necessarily make the transfer fraudulent. Such a preferential transfer if successfully voided by the trustee, however, may be preserved for the benefit of the bankruptcy estate pursuant to Section 60b of the Act, 11 U.S.C. § 96(b). If the lien which thus becomes that of the trustee pre-dates the revocation of the homestead, the entire exemption would be lost.

and the bankruptcy then filed. The equity would thus be reduced to an amount which qualifies for exemption and the proceeds of the loan either deposited in exempt accounts²¹ or used to purchase exempt assets.²²

This result is possible in California due to a string of Ninth Circuit cases which, when read together, make it clear that transfers of non-exempt property into exempt property on the eve of bankruptcy are not fraudulent if made for fair, contemporaneous consideration. Therefore, such a transfer will neither be voidable by the trustee, nor will it endanger the bankrupt's right to a discharge.

In *In re Wilson*,²³ after an involuntary bankruptcy petition was filed against a debtor, but before adjudication, the debtor executed and recorded a Declaration of Homestead. The Ninth Circuit ruled that the creation of the homestead immediately preceding adjudication did not constitute a fraudulent conveyance and that the trustee, therefore, was required to report the homestead as exempt. In arriving at this conclusion, the court relied upon two California Supreme Court decisions, *Randall v. Buffington*,²⁴ and *Fitzell v. Leaky*.²⁵ *Randall*

held that the use of funds by an insolvent debtor to retire a mortgage on his residence was not prohibited by California law. *Fitzell* held that, since the very purpose of the creation of a homestead is the protection of a debtor's residence from existing debt, it could not constitute a conveyance made to hinder, delay or defraud creditors.

*In re Dudley*²⁶ overturned a referee's order which sustained a trustee's refusal to set aside as exempt shares of stock in a building and loan association valued at \$1,000. The exemption had been denied on the grounds that the stock was purchased with non-exempt funds one week before bankruptcy when the bankrupt was "heavily in debt and clearly insolvent." Examining the *Wilson* decision, the court focused not on the *Wilson* court's analysis of California homestead law, but rather on the prohibition against interference with state-created exemptions contained in Section 6 of the Act. The court noted that the California exemption statute did not indicate when the shares must be acquired in order to be exempt nor did it require the solvency of the debtor at the time of purchase. Thus, comparing the result in *Wilson* with that in the subsequent case of *In re Gerber*,²⁷ in which the

²¹See text accompanying n. 43-44 *infra*.

²²See text accompanying n. 51-53 *infra*. The debtor's budget should be able to absorb the monthly payments on the new or refinanced loan since monthly payments on discharged unsecured obligations will be eliminated. Alternatively, the loan could be retired or its balance reduced after bankruptcy with funds from deposits in exempt accounts.

²³123 F. 20 (9th Cir. 1903).

²⁴10 Cal. 391 (1858).

²⁵22 Cal. 477 (1887).

²⁶22 F. Supp. 943 (S.D. Cal. 1947), *aff'd sub nom.*, *Goggin v. Dudley*, 166 F.2d 1023 (9th Cir. 1948).

²⁷196 F. 693 (9th Cir. 1911).

intent of the bankrupt to engage in a "clearly fraudulent scheme" was shown, the court stated the rule to be that a conversion of non-exempt assets to exempt property on the eve of bankruptcy will not defeat the exemption claimed absent a showing of actual fraud.

In *Love v. Menick*,²⁸ the bankrupt, within a week preceding the filing of his bankruptcy petition, surrendered his life insurance policy for its cash value and deposited the sums received therefrom into an exempt savings and loan association account. The trustee refused to report the deposit as exempt, asserting that fraud had been perpetrated against the bankruptcy estate in that, had the policy not been surrendered, only a portion of its cash surrender value could have been entitled to exemption. The court ruled against the trustee, holding that "clear and convincing" evidence of fraud had not been presented.

*Michelman v. Roon and Wudrick v. Clements*²⁹ were decided concurrently by the Ninth Circuit. In *Michelman*, the bankrupts, on the eve of bankruptcy, refinanced their non-exempt automobile, paid in full the original automobile loan and deposited the balance of the proceeds of the new loan in a savings and loan association account. In *Wudrick*, the bankrupt owned two non-exempt vehicles. Three weeks prior to

filing his bankruptcy petition, he used them as collateral for a loan and purchased, with some of the money borrowed, exempt shares in a credit union.

The court rejected the argument of the trustee in each case that conversion of non-exempt assets to exempt property on the eve of bankruptcy by virtue of the creation of secured debt was fraudulent *per se*. The court could find no difference between "conversion by sale" and "conversion by pledge."

A new homestead exemption statute, Code Civ. Proc. § 690.235, the so-called "automatic homestead", became effective July 1, 1975. Its amended version, Code Civ. Proc. § 690.31, will become effective July 1, 1977. These statutes treat homestead exemptions as any other in that no affirmative action is required on the part of the debtor until execution proceedings are commenced by a judgment creditor. Code Civ. Proc. § 690.235 does,³⁰ and Code Civ. Proc. § 690.31 will,³¹ provide that the dwelling house in which a debtor or a debtor's family resides "will be exempt in the same amount and to the same extent as a homestead selected pursuant to the provisions of the Civil Code, provided that neither the debtor nor the debtor's spouse has an existing declared homestead in the state."

The effect of the automatic homestead in bankruptcy proceedings is still

²⁸341 F.2d 680 (9th Cir. 1965).

²⁹451 F.2d 988 (9th Cir. 1971).

³⁰Code Civ. Proc. § 690.235(a).

³¹Code Civ. Proc. §§ 690.31(a) and 690.31(b)(1).

unclear. If the new statutes are held to effect merely a procedural change, then it would no longer be necessary to record a Declaration of Homestead prior to bankruptcy. If, however, they are considered to effect a substantive change in the law, that is, the creation of an exemption which did not exist prior to the enactment of Code Civ. Proc. § 690.235, the automatic homestead would not be available to bankrupts with unpaid obligations which pre-date July 1, 1975.

Much can be said for this latter position. Prior to July 1, 1975, if a creditor recorded a judgment before a debtor recorded a Declaration of Homestead, it was simply too late for the debtor to preserve his homestead. As of July 1, 1975, however, a debtor is given twenty days after a judgment is recorded to file a claim of exemption with the County Sheriff. Any creditor, then, who extended credit prior to the effective date of the statute, should not be bound by it³² and, therefore, neither could a bankruptcy trustee who succeeds to his rights and powers.³³

It is also unclear whether a debtor who elects to record a Declaration of Homestead pursuant to the provisions of the Civil Code waives the right to

claim an exemption pursuant to Section 690.235 or Section 690.31 of the Code of Civil Procedure. This uncertainty arises from the following language of these statutes: "provided that neither such debtor nor the spouse of such debtor has an *existing declared homestead* on any property in this state."³⁴ The statute does not specify an existing *effective* declared homestead. Thus, if a bankrupt records a Declaration of Homestead and it is found for any reason to be defective in the bankruptcy proceedings, Sections 690.235 and 690.31 may be of no avail.

Motor Vehicles

Motor vehicles may qualify for exemption under three separate statutes in California, Code Civ. Proc. §§ 690.2, 690.3 and 690.4. Two of these statutes, Sections 690.2 and 690.3, have been amended to expand the scope of the exemption provided as of January 1, 1977.

Section 690.2 now provides an exemption for \$500 in equity in a motor vehicle regardless of the value of the vehicle.³⁵ Previously, only vehicles with a value of \$1,000 or less qualified for the exemption. If a vehicle

³²See text accompanying n. 11-12 *supra*.

³³See text accompanying n. 7 and n. 13 *supra*.

³⁴(Emphasis added).

³⁵Code Civ. Proc. § 690.2 now reads in pertinent part:

"One motor vehicle with a value not exceeding five hundred dollars (\$500), over and above all liens and encumbrances on such motor vehicles. . . . If the value, over and above all liens and encumbrances, exceeds five hundred dollars, the vehicle shall be subject to execution only to the extent its value exceeds five hundred dollars.

EXHIBIT 3

Declared Homestead Exemption

CIVIL CODE §§ 1237-1304

TITLE 5. HOMESTEADS

CHAPTER 1. GENERAL PROVISIONS

§ 1237. Property constituting homestead

The homestead consists of the dwelling house in which the claimant resides, together with outbuildings, and the land on which the same are situated, selected as in this title provided.

The dwelling house may be in a condominium, as defined in Section 783 of the Civil Code, a planned development, as defined in Section 11003 of the Business and Professions Code, a stock cooperative, as defined in Section 11003.2 of the Business and Professions Code, or a community apartment project, as defined in Section 11004 of the Business and Professions Code, or may be situated on real property held under long-term lease rather than a freehold. In such cases, an agreement, covenant, or restriction between or binding upon the owners of a title, interest, or estate in a condominium, planned development, stock cooperative, or community apartment project, or a lien arising under such agreement, covenant, or restriction, or an underlying lease or sublease, indebtedness, security, or other interest or obligation may be enforced in the same manner as if no homestead were declared, and the homestead shall include the interest in and right to use common areas and other appurtenances subject to the terms and conditions applicable thereto. For the purposes of this section "long-term lease" is a lease of 30 years or more.

(Amended by Stats.1970, c. 687, p. 1316, § 1; Stats.1973, c. 281, p. 677, § 1.)

§ 1237.5 Quasi-community property and separate property defined

As used in this title:

(a) "Quasi-community property" means real property situated in this state heretofore or hereafter acquired in any of the following ways:

(1) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(2) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

(b) "Separate property" does not include quasi-community property.

(Amended by Stats.1970, c. 312, p. 707, § 1.)

§ 1238. Property from which selected; property defined

If the claimant be married, the homestead may be selected:

(a) From the community property; or

(b) From the quasi-community property; or

(c) From the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the husband or the wife.

When the claimant is not married, but is the head of a family, within the meaning of Section 1261, the homestead may be selected from any of his or her property. If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Property within the meaning of this title, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive, and includes land held under long-term lease, as specified in Section 1237, and ownership rights in a condominium, planned development, stock cooperative, or community apartment project even though the title, interest, or estate of the condominium, planned development, stock cooperative, or community apartment project is in a leasehold or subleasehold.

(Amended by Stats.1970, c. 687, p. 1316, § 2; Stats.1976, c. 463, p. —, § 1.)

§ 1240. Exemption from execution or forced sale

EXEMPT FROM FORCED SALE. The homestead is exempt from execution or forced sale, except as in this Title provided.

(Enacted 1872.)

§ 1241. Execution or forced sale; when subject to

The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead is recorded, and which, at the time of such recordation, constitute liens upon the premises.

2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises.

3. On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant.

4. On debts secured by encumbrances on the premises, executed and recorded before the declaration of homestead was filed for record.

(Enacted 1872. Amended by Code Am.1873-74, c. 612, p. 229, § 146; Code Am.1880, c. 41, p. 7, § 17; Stats.1887, c. 71, p. 81, § 1; Stats. 1951, c. 1109, p. 2865, § 1; Stats.1957, c. 1317, p. 2639, § 1; Stats. 1959, c. 1805, p. 4290, § 2.)

§ 1242. Conveyance of homestead; restrictions

Except as provided in Chapter 2a (commencing with Section 1435.1) of Division 4 of the Probate Code where one or more spouses is incompetent, and except in the case of a married person's separate homestead, the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife or unless each spouse executes and acknowledges a separate instrument so

conveying or encumbering the homestead in favor of the same party or his successor in interest; provided, however, that a conveyance of the homestead between husband and wife need be executed and acknowledged only by the spouse conveying, and unless the one conveying expressly reserves his homestead rights, the spouse to whom the conveyance is made may convey or encumber the homestead property in the same manner and to the same extent as though no homestead had been declared.

(Enacted 1872. Amended by Stats.1951, c. 438, p. 1421, § 1; Stats. 1957, c. 1619, p. 2966, § 1; Stats.1959, c. 125, p. 2016, § 24; Stats. 1959, c. 1805, p. 4291, § 3.)

§ 1243. Abandonment; declaration or conveyance

Except as provided in Chapter 2A (commencing with Section 1435.1) of Division 4 of the Probate Code where one or both spouses are incompetent, a homestead can be abandoned only by:

1. A declaration of abandonment executed and acknowledged by the husband and wife, jointly or by separate instruments, if the claimant is married.

2. A declaration of abandonment or a conveyance by the claimant if unmarried.

3. A declaration of abandonment or a conveyance by the grantee named in a conveyance by which one spouse conveys the homestead to the other spouse without expressly reserving his homestead rights.

4. A conveyance or conveyances by both spouses as provided in Section 1242.

5. A declaration of abandonment or a conveyance by the claimant alone in the case of a married person's separate homestead.

(Enacted 1872. Amended by Stats.1949, c. 772, p. 1500, § 1; Stats. 1951, c. 438, p. 1422, § 2; Stats.1959, c. 125, p. 2016, § 25; Stats.1959, c. 1805, p. 4291, § 4; Stats.1959, c. 1960, p. 4564, § 1.)

§ 1244. Declaration of abandonment; effectual from recording

A declaration of abandonment is effectual only from the time it is recorded in the office in which the homestead was recorded.

(Enacted 1872. Amended by Stats.1967, c. 79, p. 981, § 4.)

§ 1245. Execution against homestead; time for application for appointment of appraisers; expiration of liens; subsequent levies prohibited

When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section one thousand two hundred and forty-one is levied upon the homestead, the judgment creditor may at any time within sixty days thereafter apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof, and if such application shall not be made within sixty days after the levy of such

execution the lien of the execution shall cease at the expiration of said period, and no execution based upon the same judgment shall thereafter be levied upon the homestead.

(Enacted 1872. Amended by Code Am.1880, c. 41, p. 7, § 18; Stats. 1911, c. 436, p. 888, § 1.)

§ 1246. Execution against homestead; petition; contents

The application must be made upon a verified petition of the judgment creditor showing:

1. The fact that an execution has been levied upon the homestead within 60 days prior to the filing of said petition.
2. A description of the homestead and the name of the claimant.
3. That the value of the homestead, over and above all liens and encumbrances thereon, exceeds the amount of the homestead exemption.
4. That no previous execution arising out of the same judgment has been levied upon said homestead.

(Enacted 1872. Amended by Stats.1911, c. 436, p. 888, § 2; Stats. 1945, c. 789, p. 1476, § 2.)

§ 1247. Execution against homestead; petition; filing

The petition must be filed with the clerk of the superior court.
(Enacted 1872. Amended by Code Am.1880, c. 41, p. 8, § 19.)

§ 1248. Execution against homestead; service of petition and notice of hearing; failure to serve; termination of execution lien

Within ninety days from the date of filing the petition, a copy thereof, with the notice of the time and place of hearing, must be served upon the claimant or his attorneys at least two days before the hearing; and if such notice shall not be so served, the lien of the execution shall cease at the expiration of said period of ninety days, and no execution based upon the same judgment shall thereafter be levied upon the homestead.

(Enacted 1872. Amended by Stats.1911, c. 436, p. 889, § 3.)

§ 1249. Execution against homestead; appointment of appraisers

At the hearing the Judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents of the county to appraise the value of the homestead.

(Enacted 1872.)

§ 1250. Execution against homestead; oath of appraisers

The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same. (Enacted 1872.)

§ 1251. Execution against homestead; appraisal; determination of divisibility of land

They must view the premises and appraise the value thereof, and if the appraised value, less the aggregate of all liens and encumbrances thereon, exceeds the homestead exemption they must determine whether the land claimed can be divided without material injury.

(Enacted 1872. Amended by Stats.1945, c. 789, p. 1476, § 3.)

§ 1252. Execution against homestead; report of appraisers

Within 15 days after their appointment they must make to the judge a report in writing, which report must show the appraised value, the amount of all liens and encumbrances, and their determination upon the matter of a division of the land claimed.

(Enacted 1872. Amended by Stats.1945, c. 789, p. 1476, § 4.)

§ 1253. Execution against homestead; order setting off homestead; enforcement against remainder

If, from the report, it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence and outbuildings, as will amount in value to the homestead exemption over and above all liens and encumbrances, and the execution may be enforced against the remainder of the land.

(Enacted 1872. Amended by Stats.1945, c. 789, p. 1476, § 5.)

§ 1254. Execution against homestead; order directing sale

If, from the report, it appears to the judge that the land claimed exceeds in value, over and above all liens and encumbrances thereon, the amount of the homestead exemption, and that it can not be divided, he must make an order directing its sale under the execution.

(Enacted 1872. Amended by Stats.1945, c. 789, p. 1477, § 6.)

§ 1255. Execution against homestead; minimum bids

At such sale no bid shall be received, unless it exceeds the amount of the homestead exemption plus the aggregate amount of all liens and encumbrances on the property.

(Enacted 1872. Amended by Stats.1945, c. 789, p. 1477, § 7.)

§ 1256. Execution against homestead; sale; distribution of proceeds

If the sale is made, the proceeds thereof must be applied in the following order of priority, first, to the discharge of all liens and encumbrances, if any, on the property, second, to the homestead claimant to the amount of the homestead exemption, third, to the satisfaction of the execution, and fourth, the balance, if any, to the homestead claimant.

(Enacted 1872. Amended by Stats.1945, c. 789, p. 1477, § 8.)

§ 1257. Execution against homestead; protection of money paid claimant

The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband or wife, which the law gives to the homestead.

(Amended by Stats.1976, c. 463, p. —, § 8.)

§ 1258. Persons who may select homesteads; valuation; automatic increase in value

Homesteads may be selected and claimed:

1. By any head of a family, of not exceeding thirty thousand dollars (\$30,000) in actual cash value, over and above all liens and encumbrances on the property at the time of any levy of execution thereon.

2. By any person 65 years of age or older, of not exceeding thirty thousand dollars (\$30,000) in actual cash value, over and above all liens and encumbrances on the property at the time of any levy of execution thereon.

3. By any other person, of not exceeding fifteen thousand dollars (\$15,000) in actual cash value, over and above all liens and encumbrances.

Any declaration of homestead which has been filed prior to January 1, 1977 shall be deemed to be amended on such date by increasing the value of any property selected and claimed to the value permitted by this section on such date to the extent that such increase does not impair or defeat the right of any creditor to execute upon the property which existed prior to such date.

(Amended by Stats.1970, c. 319, p. 714, § 1, operative Jan. 1, 1971; Stats. 1976, c. 182, p. —, § 1.)

§ 1261. Head of family defined

The phrase "head of a family," as used in this title, includes within its meaning:

1. The husband or wife, when the claimant is a married person.
2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either:
 - (a) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband;
 - (b) A minor brother or sister, or the minor child of a deceased brother or sister;
 - (c) A father, mother, grandfather, or grandmother;
 - (d) The father, mother, grandfather, or grandmother of a deceased husband or wife;

(e) An unmarried sister or brother, or any other of the relatives mentioned in this section, who have attained the age of majority, and are unable to take care of or support themselves.

(Amended by Stats.1976, c. 463, p. —, § 4.)

CHAPTER 2. HOMESTEAD OF THE HEAD OF A FAMILY

§ 1262. Declaration of homestead; execution and acknowledgment; recording

In order to select a homestead, either spouse or head of a family must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

(Amended by Stats.1976, c. 463, p. —, § 5.)

§ 1263. Declaration of homestead; contents; evidence

The declaration of homestead must contain:

1. A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, when the declaration is made by a married person without the joinder of his or her spouse in the execution and acknowledgment of the declaration, showing that the other spouse has not made such declaration and that he or she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. Such declaration of homestead may further contain a statement of the character of the property sought to be homesteaded, showing the improvement or improvements which have been affixed thereto, with sufficient detail to show that it is a proper subject of homestead, and that no former declaration has been made, or, if made, that it has been abandoned and if it contains such further statement and the declaration is supported by the affidavit of the declarant, annexed thereto, that the matters therein stated are true of his or her own knowledge, such declaration, when properly recorded, shall be prima facie evidence of the facts therein stated, and conclusive evidence thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

The declaration of a homestead shall not affect the property rights of spouses as between themselves other than as provided by this title.

(Amended by Stats.1970, c. 80, p. 93, § 1; Stats.1976, c. 463, p. —, § 6.)

§ 1264. Declaration of homestead; place of recording

DECLARATION MUST BE RECORDED. The declaration must be recorded in the office of the Recorder of the county in which the land is situated.

(Enacted 1872.)

§ 1265. Establishment of homestead; descent on death of claimant; exemption

From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, or from the quasi-community property, or from the separate property of the spouse making the selection or joining therein, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the Civil Code, the land so selected, on the death of either of the spouses, vests in the survivor, except in the case of a married person's separate homestead, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to the heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it, or the products, rents, issues or profits thereof be held liable for the debts of the owner, except as provided in this title; and should the homestead be sold by the owner, the proceeds arising from such sale to the extent of the value allowed for a homestead exemption as provided in this title shall be exempt to the owner of the homestead for a period of six months next following such sale.

(Enacted 1872. Amended by Code Am.1873-74, c. 612, p. 231, § 158; Code Am.1880, c. 41, p. 8, § 20; Stats.1909, c. 637, p. 972, § 1; Stats.1911, c. 45, p. 61, § 1; Stats.1951, c. 438, p. 1422, § 3; Stats. 1959, c. 1805, p. 4291, § 5; Stats.1961, c. 636, p. 1842, § 13.)

§ 1265a. Reinvestment of proceeds of sale; effect of new declaration

If the proceeds arising from the sale of property selected as a homestead are used for the purchase of real property within the period of six months following such sale, the property purchased may be selected as a homestead in the manner provided in this title within the period of six months following such sale, and such selection, when the declaration has been filed for record, shall have the same effect as if it had been created at the time the prior declaration of homestead was filed for record.

(Added by Stats.1939, c. 515, p. 1902, § 1.)

Chapter 3

HOMESTEAD OF OTHER PERSONS

§ 1266. Declaration of homestead; execution and acknowledgment

MODE OF SELECTION. Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a "Declaration of Homestead."

(Enacted 1872.)

§ 1267. Declaration of homestead; contents; evidence

The declaration shall contain everything required by the second and third subdivisions of Section 1263, and in addition thereto may contain the statement and affidavit provided for by subdivision 4 of such section, with like effect as therein provided. If the homestead is selected and claimed pursuant to subdivision 2 of Section 1260, the declaration shall also contain a statement that the person making it is 65 years of age or older.

(Enacted 1872. Amended by Stats.1927, c. 491, p. 829, § 1; Stats. 1969, c. 564, p. 1190, § 2; Stats.1969, c. 1099, p. 2098, § 3.)

§ 1268. Declaration of homestead; place of recording

DECLARATION MUST BE RECORDED. The declaration must be recorded in the office of the County Recorder of the county in which the land is situated.

(Enacted 1872.)

§ 1269. Establishment of homestead

EFFECT OF FILING FOR RECORD THE DECLARATION OF HOMESTEAD. From and after the time the declaration is filed for record, the land described therein is a homestead.

(Enacted 1872.)

CHAPTER 5. MARRIED PERSON'S SEPARATE HOMESTEAD

§ 1300. Declaration following decree of legal separation or dissolution of marriage; execution and acknowledgment

Following the entry of a judgment decreeing legal separation of the parties or an interlocutory judgment of dissolution of a marriage, each spouse may execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of a married person's separate homestead from the separate property of the spouse so declaring same, or from any property awarded to such spouse by said judgment.

(Amended by Stats.1971, c. 1210, p. 2325, § 2.)

§ 1301. Contents of declaration

The declaration must contain:

(1) A statement that the declarant is a married person, and that there is in existence a judgment decreeing legal separation of the parties or an interlocutory judgment of dissolution of the marriage between declarant and his or her spouse.

(2) A statement showing that declarant is the head of a family, as defined in this chapter, if such is the case.

(3) The matters required by the second and third subdivisions of Section 1263, and in addition thereto may contain the statement and affidavit provided for by subdivision 4 of said section, with like effect as therein provided.

(Amended by Stats.1971, c. 1210, p. 2325, § 3.)

§ 1302. Head of a family; definition

For the purpose of this chapter, the phrase "head of a family" includes every person who has residing on the premises with him or her and under his or her care and maintenance one or more of the persons enumerated in paragraphs (a), (b), (c), (d) and (e) of subdivision 2 of Section 1261, and such person shall receive the exemption allowed the head of a family by Section 1260. Any married person declaring a homestead under this chapter who is not the head of a family, as defined in this section, shall receive the exemption allowed other persons by Section 1260.

(Added by Stats.1959, c. 1805, p. 4290, § 1.)

§ 1303. Recordation of declaration; establishment of homestead

From and after the time the declaration is recorded in the office of the recorder of the county in which the land is situated, the land described therein is a homestead.

(Added by Stats.1959, c. 1805, p. 4290, § 1.)

§ 1304. Subsequent reconciliation of parties; dismissal of dissolution action; joint protection homestead; reduction of exemption

When a homestead has been declared under this chapter by a married person following the entry of an interlocutory judgment of dissolution of a marriage upon property awarded to such person by such judgment, a subsequent reconciliation of the parties when evidenced by a dismissal of such dissolution action executed by both parties or their attorneys of record shall transform such homestead into a joint protection homestead, which shall thereafter have the force and effect of a homestead selected under Chapter 2 of this title. If each such married person has selected a homestead under this chapter, and such a dismissal has been filed after reconciliation, one of the homesteads must be abandoned or the exemption under each shall be reduced by one-half.

(Amended by Stats 1971, c. 1210, p. 2326, § 4.)

EXHIBIT 4

Claimed Homestead Exemption

Code of Civil Procedure § 690.235 (operative until July 1, 1977)

690.235. (a) A dwelling house in which the debtor, or the family of the debtor actually resides, to the same extent and in the same amount, except as otherwise provided in this section, as the debtor or the spouse of the debtor would be entitled to select as a homestead pursuant to Title 3 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code; provided that neither such debtor nor the spouse of such debtor has an existing declared homestead on any property in this state.

(b) The exemption provided in subdivision (a) shall not apply to a judgment or an abstract thereof which has been recorded prior to the acquisition of the property by the debtor or the spouse of the debtor or the commencement of residence, whichever last occurs.

(c) Property which would otherwise be exempt under subdivision (a) is subject to execution or forced sale in satisfaction of judgments obtained.

(1) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises.

(2) On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant.

(3) On debts secured by encumbrances on the premises, executed and recorded prior to or in connection with the acquisition of the property by the debtor or the spouse of the debtor.

(d) In the event of an execution sale, the proceeds of the sale shall be applied in the following order or priority: first, to the discharge of all liens and encumbrances, if any, on the property; second, to the debtor in the amount of the exemption provided by this section; third, to the satisfaction of the execution; and fourth, to the debtor.

(e) That portion of the proceeds from any sale of property which is exempt under this section, which portion represents the amount of such exemption, shall be exempt for a period of six months from the date of receipt of such proceeds.

EXHIBIT 5

Claimed Homestead Exemptions

Code of Civil Procedure § 690.31 (operative July 1, 1977)

690.31. (a) A dwelling house in which the debtor or the family of the debtor actually resides shall be exempt from execution, to the same extent and in the same amount, except as otherwise provided in this section, as the debtor or the spouse of the debtor would be entitled to select as a homestead pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code. For the purpose of this section, "dwelling house" means the dwelling house together with the outbuildings and the land on which the same are situated.

(b) The exemption provided in subdivision (a) does not apply.

(1) Whenever the debtor or the spouse of the debtor has an existing declared homestead on any property in this state other than property which is the subject of a proceeding under subdivision (c) of this section. The existence of a homestead declared by the debtor or the debtor's spouse under Section 1306 of the Civil Code shall not affect the right of the other spouse to an exemption under this section.

(2) Whenever a judgment or abstract thereof or any other obligation which by statute is given the force and effect of a judgment lien has been recorded prior to either:

(i) The acquisition of the property by the debtor or the spouse of the debtor; or

(ii) The commencement of residence by the debtor or the spouse of the debtor, whichever last occurs.

(3) Whenever the execution or forced sale is in satisfaction of judgments obtained:

(i) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, or materialmen's or vendors' liens upon the premises;

(ii) On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant; or

(iii) On debts secured by encumbrances on the premises, executed and recorded prior to or in connection with the acquisition of the property by the debtor or the spouse of the debtor.

(c) Whenever a judgment creditor seeks to enforce a judgment against a dwelling house, the judgment creditor shall apply to the court in the county in which the dwelling house is located for the issuance of a writ of execution. The application shall be verified and describe the dwelling house and state that either or both of the following facts exist:

(1) The dwelling house is not exempt, the reasons therefor, and (i) that a reasonable search of the records of the office of the county recorder has not resulted in the finding of a declared homestead of the debtor or the spouse of the debtor on the subject dwelling house, and further, that a reasonable search of the records of the county tax assessor indicates that there is no current homeowner's exemption claimed by either the debtor or the spouse of the debtor on the subject dwelling house, or (ii) that the records of the county tax assessor indicate that there is a current homeowner's exemption claimed by either the debtor or the spouse of the debtor on the subject dwelling house but the judgment creditor believes for reasons which shall be stated in the application that the debtor or the spouse of the debtor is not entitled to the exemption provided in this section.

(2) The current value of the dwelling house, over and above all liens and encumbrances thereon, exceeds the amount of the allowable exemption.

If an application alleges facts solely pursuant to paragraph (2) or the court determines that a writ may issue only under the circumstances described in paragraph (2), and the court in which the proceeding is pending is a municipal or justice court, the court shall transfer further proceedings to the superior court. There shall be no filing fee imposed in the superior court upon such a transfer.

(d) Upon receipt of a complete application of a judgment creditor, the court shall set a time and place for hearing and order the debtor to show cause why a writ of execution should not issue. Prior to the hearing, a copy of the order to show cause, a copy of the application filed by the judgment creditor and a copy of the following notice, in at least 10-point bold type, shall be served as prescribed for the giving of notice of sale of real property in Section 692:

"IMPORTANT NOTICE TO HOMEOWNER AND RESIDENT

1. Your house is in danger of being sold to satisfy a judgment obtained in court. You may be able to protect the house and real property described in the accompanying application from execution and forced sale if you or your family now actually reside on the property and presently do not have a declared homestead on any other property in the State of California. **YOU OR YOUR SPOUSE MUST COME TO THE HEARING TO SHOW THESE FACTS.**

2. If you or your spouse want to contest the forced sale of this property, you or your spouse must appear at

_____ on _____ (date and time) _____ (location set forth in OSC) _____ and be prepared to answer questions

concerning the statements made in the attached application. **THE ONLY PURPOSE OF THE HEARING WILL BE TO DETERMINE WHETHER THE PROPERTY CAN BE SOLD, NOT WHETHER YOU OWE THE MONEY.**

3. **FOR YOUR OWN PROTECTION, YOU SHOULD PROMPTLY SEEK THE ADVICE OF AN ATTORNEY IN THIS MATTER."**

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(e) The burden of proof at the hearing shall be determined in the following manner:

(1) Where the application of the judgment creditor states a claim of nonexempt status, the debtor or the spouse of the debtor shall have the burden of proving his or her entitlement to the exemption; and

(2) Where the application of the judgment creditor asserts that the current value of the dwelling, over and above all liens and encumbrances thereon, exceeds the amount of the allowable exemption, the judgment creditor shall have the burden of proof on that issue.

(f) Upon a determination by the court that the dwelling house is not exempt or that, although exempt, the judgment creditor is entitled to levy against any excess, it shall make an order directing the issuance of a writ of execution. The order shall state whether or not the dwelling house is exempt and, if not exempt, state that the judgment creditor is entitled only to execution against the excess over the exempt amount. It shall also specify the amount of the exemption.

(g) Any such writ of execution issued upon a hearing at which the debtor, the spouse of the debtor, or his or her attorney did not appear shall be served in the manner prescribed for the giving of notice of sale of real property in Section 692 and be accompanied by the following notice in at least 10-point bold type:

"IMPORTANT NOTICE TO HOMEOWNER AND RESIDENT

1. You were recently served with a court order requiring your presence at a hearing to determine why the court should not issue a writ of execution for the forced sale of your home. YOU AND YOUR SPOUSE FAILED TO APPEAR AT THE HEARING AND THE COURT HAS ORDERED THAT YOUR HOME BE SOLD TO SATISFY A JUDGMENT AGAINST YOU."

2. Your absence at the hearing has contributed to the issuance of the accompanying writ of execution. If the absence of you or your attorney at the hearing was legally excusable and you believe in good faith that your home may be entitled to an exemption from execution, you should complete the form below and date, sign, and return the form below no later than _____ (Insert date no later than five days prior to date of sale.)

3. FOR YOUR OWN PROTECTION, YOU SHOULD IMMEDIATELY SEEK THE ADVICE OF AN ATTORNEY.

..... (Cut Out and Return This Form to)

..... (Name and Title of Levying Officer)

..... (Street Address and City)

..... (Area Code and Telephone Number
of Levying Officer)

I declare that my absence from the previous hearing on whether or not this property should be sold was legally excusable. I, or my spouse, currently reside in this property and I wish a further hearing so that I may assert my exemption rights under Code of Civil Procedure Section 690.31 and contest the sale of my home. I understand that the clerk of the court will notify me of the date and place for this hearing if I return this form immediately and that I must attend this hearing.

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

Executed on _____ at _____, California

Signature of Debtor or Debtor's Spouse

(h) If the debtor or spouse of the debtor declares that his or her absence or the absence of his or her attorney at the hearing was due to mistake, inadvertence, surprise or excusable neglect and declares that the subject dwelling house may be entitled to an exempt status, the levying officer shall, upon receipt of the declarations of the debtor five days prior to the scheduled sale date, cancel the sale pending further orders of the court and transmit the notice forthwith to the court. Upon receipt of the notice, the clerk shall set a hearing to determine whether the writ of execution should be recalled, and shall give at least 10 days notice to the parties.

(i) Subsequent applications by a judgment creditor within 12 months of a denial of a writ of execution shall be supported by a statement under oath alleging that there is a material change of circumstances affecting the exemption, and setting forth facts supporting such claimed material change of circumstances.

(j) In the event of an execution sale, the proceeds of the sale shall be applied in the following order and priority: first, to the discharge of all liens and encumbrances, if any, on the property; second, to the debtor, or the debtor's spouse if such person is the exemption claimant, in the amount of the exemption provided by this section; third, to the satisfaction of the execution; and fourth, to the debtor, or the debtor's spouse if such person is the exemption claimant.

(k) That portion of the proceeds from the sale of real property pursuant to an order of the court directing the issuance of a writ of execution pursuant to subdivision (g) of this section, which portion represents the amount of the exemption, shall be exempt for a period of six months from the date of receipt of the proceeds. Where such exempt proceeds are used for the purchase of a dwelling house, in which the debtor or the family of the debtor actually reside, within a period of six months following receipt, the subsequently acquired dwelling shall be exempt from execution and for the purposes of subparagraphs (i) and (ii) of paragraph (2) of subdivision (b). The exemption for the subsequently acquired real property shall have the same effect as if allowed on the date of the acquisition of or the commencement of residence by the debtor or the spouse of the debtor, whichever last occurred, in the property previously determined to be exempt, except with respect to a judgment or other obligation which by statute is given the force and effect of a judgment lien against the subsequently acquired property prior to its acquisition.

SEC. 5. Nothing in this act shall be construed to alter, change, or modify the rights of any lienholder or encumbrancer vested prior to July 1, 1977, or the operative date of Chapter 1251 of the Statutes of 1974.

EXHIBIT 6

Judgment Lien

Code of Civil Procedure § 674 (operative July, 1977)

674. (a) An abstract of the judgment or decree of any court of this state, including a judgment entered pursuant to Chapter 1 (commencing with Section 1710.10) of Title 11 of Part 3, or a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal or pursuant to Section 1710.50, certified by the clerk, judge or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward and before the lien expires, acquire. Such lien continues for 10 years from the date of the entry of the judgment or decree unless the enforcement of the judgment or decree is stayed on appeal or pursuant to Section 1710.50 by the execution of a sufficient undertaking or the deposit in court of the requisite amount of money as provided in this code, or by the statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action, unless otherwise by statutes of the United States provided, ceases, or upon an undertaking on release of attachment, or unless the judgment or decree is previously satisfied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: title of the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree, and where entered in judgment book, where entry in a judgment book is required, minutes or docket in the justice court.

(b) An order made pursuant to subdivision (b) of Section 908 of the Welfare and Institutions Code shall be considered a judgment for the purposes of subdivision (a) of this section.

(c) With respect to real property containing a dwelling house judicially determined to be exempt from levy of execution pursuant to the provisions of Section 690.31, as distinguished from property subject to a declared homestead created pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code, a judgment lien created pursuant to subdivision (a) of this section shall attach to such real property notwithstanding the exemption provided by Section 690.31.