

#39,160

9/24/77

Memorandum 77-65

Subject: Study 39.160 - Attachment (Use of Court Commissioners)

Attached to this memorandum are two copies of the staff draft of the recommendation relating to use of court commissioners in attachment, revised in accordance with the Commission's decisions at the September meeting. This recommendation has been approved in substance; the staff has rewritten portions of the preliminary part. Please mark any editorial revisions you may have on one copy and return it to the staff at the October meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

#39.160

October 6, 1977

STAFF DRAFT

STATE OF CALIFORNIA

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

RECOMMENDATION

relating to

USE OF COURT COMMISSIONERS UNDER THE ATTACHMENT LAW

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

LETTER OF TRANSMITTAL

October 6, 1977

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was directed by Resolution Chapter 27 of the Statutes of 1972 to study the subject to creditors' remedies, including prejudgment attachment. As a result of this directive, the Attachment Law--1974 Cal. Stats., Ch. 1516--was enacted upon Commission recommendation.

The Commission has maintained a continuing study of the Attachment Law to determine whether any substantive, technical, or clarifying changes are needed. This recommendation is a product of the continuing review. It defines the subordinate judicial duties under the Attachment Law that may be performed by court commissioners.

Respectfully submitted,
JOHN N. McLAURIN
Chairman

Staff Draft

RECOMMENDATION

relating toUSE OF COURT COMMISSIONERS UNDER THE ATTACHMENT LAW

The California Constitution permits the Legislature to provide for the appointment of officers such as commissioners to perform subordinate judicial duties.¹ Until January 1, 1977, commissioners were authorized by statute to issue writs ex parte or after a noticed hearing in attachment.² The Attachment Law,³ which took effect on January 1, 1977, is silent as to the use of court commissioners.

The Law Revision Commission's original recommendation proposing enactment of the Attachment Law would have permitted court commissioners to perform all judicial duties under the law.⁴ This provision was deleted from the bill before final passage. As a result, the duties a court commissioner may perform under the Attachment Law are not clear and are limited by the general statutes pertaining to the powers of court commissioners.⁵ The parties may, however, stipulate that any

1. Cal. Conts., Art. 6, § 22.

2. Code Civ. Proc. §§ 538.1, 538.4 (Interim attachment statute), enacted by 1972 Cal. Stats., Ch. 550, §§ 9, 12, repealed by 1974 Cal. Stats., Ch. 1516, § 12 (operative Jan. 1, 1977, pursuant to 1975 Cal. Stats., Ch. 200, § 2).

3. Code Civ. Proc. §§ 481.010-492.690.

4. Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 739, 760 (1973).

5. General powers of superior court commissioners are provided in Code of Civil Procedure Section 259. Additional powers of superior court commissioners in Los Angeles County are provided by Code of Civil Procedure Section 259a which is made applicable to several other counties by Government Code Sections 70141.4-70141.12. Government Code Section 72390 authorizes municipal court commissioners to exercise the powers of superior court commissioners. Court commissioners are empowered to hear and determine certain ex parte motions for orders and writs, to approve undertakings, and in certain counties to act as judge pro tempore and hear uncontested actions and proceedings. See also I. E. Witkin, California Procedure Courts §§ 223-227, at 490-84 (2d ed. 1970).

judicial duty under the Attachment Law be performed by a court commissioner.⁶

The question has been raised whether it would be constitutionally permissible to authorize court commissioners to perform all judicial duties under the Attachment Law.⁷ The Legislative Counsel has given the opinion that a provision authorizing court commissioners to perform judicial duties under the Attachment Law⁸

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

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

The Legislative Counsel has concluded that preliminary or uncontested matters may be appropriately designated subordinate judicial duties by the Legislature on the authority of the California Supreme Court's decision in Rooney v. Vermont Investment Corporation.⁹ The Legislative Counsel has also suggested that the determination of a contested exemption claim, although a preliminary matter, is the sort of situation that in some cases may involve "due process rights" so as to require the "exercise of judicial power of the highest degree."¹⁰ This position is

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6. If appointed and qualified, a commissioner may act as a temporary judge pursuant to the stipulation of the parties. Cal. Const. Art. VI, § 21; Code Civ. Proc. § 259a, subd. 4; Rooney v. Vermont Investment Corp., 10 Cal.3d 351, 359-60, 515 P.2d 297, 302-03, 110 Cal. Rptr. 353, 358-59 (1973).
 7. An outline of the judicial duties specified in the Attachment Law is attached as an Exhibit hereto.
 8. Opinion of Cal. Legislative Counsel at p.9 (No. 8659, June 16, 1975) (unpublished).
 9. 10 Cal.3d 351, 366, 515 P.2d 297, 307, 110 Cal. Rptr. 353, 363 (1973).
 10. Opinion of Cal. Legislative Counsel, supra, at p.9.

buttressed by recent decisions regarding prejudgment remedies rendered by the United States and the California Supreme Courts that emphasize the importance of the defendant's right to property necessary for the support of the defendant and the defendant's family.¹¹

The Commission has reviewed the judicial duties specified in the Attachment Law. The Commission has determined that the following matters are not preliminary matters and so may not constitutionally be determined by a court commissioner:

- (1) Contested motions for determination of liability and damages for wrongful attachment.¹²
- (2) Contested third-party claims.¹³
- (3) Contested actions to enforce a garnishee's liability.¹⁴

In addition, contested exemption claims, although preliminary matters, in many cases involve essential rights requiring judicial attention;¹⁵ these too may not constitutionally be determined by a court commissioner. The parties may stipulate, however, that these matters may be determined by a court commissioner as a temporary judge.¹⁶

The Attachment Law should make clear the duties under it that constitutionally may be performed by a court commissioner. This will cure the existing uncertainty over the extent to which a commissioner can perform subordinate judicial duties under the Attachment Law. It

11. See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340-42 (1969); *Randone v. Appellate Dep't*, 5 Cal.3d 536, 558-63, 488 P.2d 13, 27-32, 96 Cal. Rptr. 709, 723-28 (1971); *Blair v. Pitchess*, 5 Cal.3d 258, 279, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57, (1971); *McCallop v. Carberry*, 1 Cal.3d 903, 907, 464 P.2d 122, 125, 83 Cal. Rptr. 666, 669 (1970). Cf. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605-06 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 88-90 (1972).

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

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

14. See Code Civ. Proc. § 488.550.

15. See Code Civ. Proc. §§ 482.100, 484.070, 484.350, 484.360, 484.530, 485.610, 492.040, 492.050.

16. See Cal. Const., Art. 6, § 21.

will also enable court commissioners to continue to perform the types of duties they have been successfully performing for a number of years under the prior attachment law. And it will promote the efficient, expeditious, and economical administration of the Attachment Law by enabling the fullest permissible use of court commissioners.

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

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

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

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

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

(b) The judicial duties to be performed in the determination of the following matters are not subordinate judicial duties:

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

(c) Nothing in subdivision (b) limits the power of a court to appoint a temporary judge pursuant to Section 21 of Article VI of the California Constitution.

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

Contested exemption claims, described in paragraph (1) of subdivision (b), may arise under Sections 482.100 (postlevy exemption claims

based on changed circumstances), 484.070 (claim of exemption and notice of opposition in procedure for issuance of writ of attachment after a noticed hearing), 484.350-484.360 (claim of exemption and notice of opposition in procedure for issuance of additional writ after a noticed hearing), 484.530 (claim of exemption after levy of ex parte additional writ), 485.610 (claim of exemption after levy of ex parte writ or additional writ), or 492.040-492.050 (release of exempt property where non-resident defendant files general appearance).

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

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

EXHIBIT

JUDICIAL DUTIES UNDER THE ATTACHMENT LAW

A. RIGHT TO ATTACH ORDERS, WRITS OF ATTACHMENT, AND DETERMINATION OF EXEMPTIONS.

1. Noticed hearing procedures and prelevy exemption claims. (Chapter 4.)

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

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

(See § 483.010.)

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

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

b. A writ of attachment is also issued at the hearing, conditioned upon the filing of an undertaking, which describes property to be levied upon, property which is exempt, and states the

amount to be secured by the attachment where: (§§ 484.090(b), 488.010(a):)

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

to attach order;

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

c. Additional writs of attachment may be issued at a noticed hear-

ing, conditioned upon the filing of an undertaking, if the court finds the following: (§ 484.370.)

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

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

d. Continuances.

- (1) For good cause shown, the court may grant a continuance of the hearing on issuance of the order upon the defendant's or the plaintiff's application. (§ 484.080.) If the continuance is granted on the defendant's application, the effective period of any temporary protective order is extended. (§ 484.080(b) and Chapter 6.) If the continuance is granted on the plaintiff's application, the effective period of any temporary protective order may be extended. (§ 484.080(a) and Chapter 6.)
- (2) The court may continue the hearing on issuance of the order and writ for the production of additional evidence upon a showing of good cause. (§ 484.090(d).)

2. Ex parte procedures and prelevy determination of exemptions.

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

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

- (1) The claim is one upon which attachment may be issued.
(See § 483.010.)
- (2) The plaintiff has established the probable validity of the claim. (See § 481.190.)
- (3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
- (4) The plaintiff's affidavit shows that the property sought to be attached is not exempt. (See § 487.020.)
- (5) The plaintiff will suffer great or irreparable injury if the order is delayed to be heard on notice. (See § 485.010 which provides that great or irreparable injury is shown where it may be inferred that there is a danger that the property would be concealed, made unavailable to levy, or substantially impaired in value, a bulk sales notice has been recorded and published, a liquor license escrow has

- been opened, or any other circumstance showing that great or irreparable injury would result to the plaintiff.)
- b. The court may deny the application for the ex parte right to attach order and writ of attachment in its discretion and instead issue a temporary protective order (§§ 486.010-486.110) and treat the application as an application for a right to attach order at a noticed hearing (§§ 484.010-484.110) if it finds that the requirements for issuance of an ex parte order and writ are satisfied (§ 485.220) but that it would be in the interest of justice and equity to the parties to follow the noticed hearing procedure (§ 486.030).
- c. Additional writs of attachment may be issued ex parte, conditioned on the filing of an undertaking, if the court finds the following: (§ 485.540.)
- (1) An ex parte right to attach order and writ of attachment have been issued pursuant to § 485.220.
 - (2) The plaintiff's affidavit shows that the property sought to be attached, or part of it, is not exempt. (See § 487.020.)
 - (3) The plaintiff will suffer great or irreparable injury if the writ is delayed to be heard on notice. (See § 485.010.)
- d. Additional writs of attachment may be issued ex parte, conditioned on the filing of an undertaking, if the court finds the following: (§ 484.520.)
- (1) A right to attach order has been issued after a noticed hearing (§ 484.090) or the court has determined in a hearing on a motion to set aside an ex parte right to attach order that the plaintiff is entitled to the order (§§ 485.240, 492.050(d)).
 - (2) The plaintiff's affidavit shows that the property sought to be attached is not exempt. (See § 487.020.)
- e. Motion to set aside ex parte right to attach order and writ of attachment may be made by the defendant and is granted if the court determines at the hearing on the motion that the plaintiff is not entitled to the order. (§ 485.240.) The hearing

on the motion may be continued for production of additional evidence.

3. Postlevy determination of exemptions.

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

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

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

4. Ex parte procedures in action against nonresident defendant.

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

(1) The claim is one upon which attachment may be issued. (See § 492.010 which permits attachment in an action for the recovery of money against nonresident individuals and foreign corporations and partnerships.)

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

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

- (4) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
- (5) The plaintiff's affidavit shows that the property is subject to attachment. (See § 492.040 which provides that all property of a nonresident is subject to attachment if a method of levy is provided by § 488.310 et seq.)
- b. Additional writs of attachment may be issued ex parte, conditioned upon the filing of an undertaking, if the court finds the following: (§ 492.090.)
- (1) A right to attach order has been issued against the nonresident pursuant to § 492.030.
- (2) The plaintiff's affidavit shows that the property sought to be attached is subject to attachment. (See § 492.040.)
- c. Exempt property (see § 487.020) is released on order of the court when the nonresident defendant files a general appearance in the action. (§ 492.040.)
- d. A motion to set aside the ex parte right to attach order and writ of attachment may be made by the defendant. (§ 492.050.) The court sets aside the right to attach order if the defendant has filed a general appearance in the action and the plaintiff fails to show that the order is authorized by some other provision. If the court finds that the plaintiff is entitled to the right to attach order, it orders the release of property exempt pursuant to § 487.020.
5. Order directing transfer. If a writ of attachment is issued, the court may also issue an order directing the defendant to transfer to the levying officer possession of the property to be taken into custody or documentary evidence of title of property to be attached. (§ 482.080.)
6. An order restricting amount of property to be levied upon or determining order of levy may be issued where the property described in the plaintiff's application clearly exceeds the amount necessary to satisfy the plaintiff's claim. (§ 482.120.)

B. TEMPORARY PROTECTIVE ORDER. (Chapter 6.)

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

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

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

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

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

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

E. SALE OR CARE OF ATTACHED PROPERTY.

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

F. RELEASE OF EXCESSIVE ATTACHMENT. An order releasing an attachment is made where the defendant shows on noticed motion that the value of the property attached clearly exceeds the amount necessary to satisfy the plaintiff's claim. (§ 488.555.) The attachment is released to the extent that it is excessive.

G. UNDERTAKINGS. (Chapter 9.)

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

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

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

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

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