The Care and Feeding of Creditors' Claims under California Procedure

Elliott Leighton
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By ELLIOTT LEIGHTON*

CAPABLE counsel often find themselves wanting for a practical procedural remedy for a creditor or debtor client. Therefore, the aim of this article is to outline the most important procedural steps available to creditors in California; and, also, because it is the obverse aspect of the same subject, the most common legal steps which may be taken by debtors to avoid, or postpone, the satisfaction of claims against them.

This article pre-supposes several things, viz:
The legal status of the creditor has been established, i.e., that there exists an alleged obligation by the debtor-obligor to pay money to the creditor-obligee.

The teeter-totter upon which practical solutions to debtor-creditor conflicts are resolved is most frequently a contest of time; for the marginal commercial debtor most often defends the claim to obtain time to better his circumstances, hoping that he can improve his financial position or that the creditor will compromise his claim in favor of speedy recovery. However, the creditor's interests require the claim to be quickly adjudicated and his money judgment expeditiously realized. Although interest is implied in California, in the absence of a written agreement to the contrary, at 7% per annum1 and runs from the date from which the amount became certain, or the date of breach of the obligation to pay,2 that right to recover interest is ordinarily not sufficient solace to the creditor who is otherwise denied the use of the principal sum. It is axiomatic that the longer the debt remains unpaid, the more the creditor's risk of ultimate loss is increased, whether from liens of competing creditors, bankruptcy, undiscovered fraudulent conveyances by the debtor, or other dissipation of the debtor's assets. Also, disillusioned debtors have been known to make themselves personally unavailable for service of process and supplemental procedures by leaving the jurisdiction.

Any analysis of the creditor's remedies, rights and disabilities is

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correlative to the rights and remedies of the debtor; i.e., the interests of creditor and debtor are in juxtaposition.

**Pleadings**

Creditors' cases are almost always framed in contract. While there are frequently situations where the pleadings properly add counts for conversion, fraud, deceit or other "business torts," the measure of damages and availability of provisional remedies usually favor the contractual cause of action. California, notwithstanding its modernized and reconstituted rules of pleading, particularly with respect to the complaint, permits an exception to requirements of fact pleading, i.e.: the use of the common counts. If a complaint is properly framed in those allegations that characterize the common counts it is not subject to demurrer under the ordinary rules of Code of Civil Procedure section 430. The ordinary rules of pleading of contracts are, of course, available to the creditor.

If the complaint is founded upon a written instrument, the creditor's pleading may provide one very strong toe-hold in the uphill race of carrying his burden of proof. Where a copy of the original instrument is made a part of the complaint, "the genuineness and due execution" is conclusive unless denied by a verified answer. The debtor-defendant is provided with a similar gambit where he has a defense founded upon a written instrument; and, furthermore, may properly seek declaratory relief by cross-complaint based upon that instrument.

**Jurisdiction Over the Debtor and/or His Property**

The Code of Civil Procedure, and well settled law, set out the rules of service of process sufficient to attain *in personam* jurisdiction upon individuals, minors, incompetents, partnerships and cor-

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10 Goodwin v. Glazer, 10 Cal. 337 (1858); Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998 (1896). For an excellent basic complaint on the common counts, and accompanying discussions, see Basic California Practice Handbook, chapter 16, at 495 (Cont. Ed. Bar 1960).
13 See Cal. Code Civ. Proc. §§ 406-08. Section 410 of the Code of Civil Procedure provides that service may be made by any "person over the age of 18, not a party to the action."
Nevertheless, objections to valid service are properly raised by motion to quash service, a motion pursuant to Code of Civil Procedure section 473, writ of mandate, by appeal, and by collateral attack upon enforcement of a void judgment founded on invalid service, providing the defendant has not waived the defect by a general appearance.

Original service must be directed to the physical person of the defendant by a process server, sheriff, marshal or constable; and it will be effective even if by telegraph. Except for the original summons and complaint, subsequent service upon the defendant or his attorney may be by mail.

However, it is not necessary to obtain personal service over the debtor within the state to satisfy the claim providing there is property belonging to him in this state. Attachment of property standing in the name of the debtor is sufficient to confer quasi-in-rex jurisdiction if the narrow statutory requirements of substituted service are met. Service by publication may render in personam jurisdiction over the absentee defendant if, in addition to compliance with publication: (a) the absentee defendant is personally served outside the state, and (b) he was a resident of California at the time of commenent of the action or at the time the cause of action arose. The broadening effect of the 1957 amendment carries the same overtones of public policy that support the “doing business” concept of jurisdiction over foreign corporations and of non-resident motorist statutes. The law tends to measure the quality and nature of a defendant’s acts and their connection with the obligation sued upon, rather than his actual physical presence or activity within the state at the time of service of process.

CAL. CODE CIV. PROC. § 411 (1) and (2) ; CAL. CORP. CODE §§ 6500-04, 3305-06.

CAL. CODE CIV. PROC. §§ 416.1, 416.2.


CAL. CODE CIV. PROC. §§ 416.3, 585-86.

CAL. CODE CIV. PROC. § 1017.

CAL. CODE CIV. PROC. § 412.

See the discussion of attachment and execution in /ra.


See Empire Steel Corp. v. Superior Court, 56 Cal. 2d 823, 17 Cal. Rptr. 150, 366 P.2d 502 (1961). Jurisdiction over a totally absent Texas corporation was held valid on the grounds of doing business, where it was found that the defendant corporation used and controlled a local subsidiary to make contracts, while maintaining the subsidiary in insolvency, and that the parent corporation’s activities thereby endangered the financial safety of those dealing with the subsidiary.

CAL. CODE CIV. PROC. § 417.

Empire Steel Corp. v. Superior Court, 56 Cal. 2d 823, 17 Cal. Rptr. 150, 366 P.2d 502
Pre-Judgment Remedies: Attachment

Elements of Procedure

One of the most expedient pre-judgment remedies of the creditor is the statutory right to attach property of the debtor to secure payment of a subsequent judgment. Thus, upon the filing of the complaint, and issuance of summons or thereafter, the clerk of the court will issue the writ of attachment. Code of Civil Procedure sections 538 and 539 require an affidavit and an undertaking by the plaintiff-creditor. This undertaking runs to the defendant in an amount for at least one-half of the amount of the claim and covers the costs of the defendant if he should prevail on trial and also his damage by reason of an erroneous issuance of the writ, or wrongful levy under that writ.

The undertaking is the limit of any recovery on wrongful levy. Contrary to usual rules, attorney fees are recoverable as damages in an action based upon a wrongful attachment.

Debtor Tactics Before Judgment

Within five days of actual notice of a levy under a writ of attachment the defendant may file notice of exemption to the surety on the undertaking. This is not a general appearance as would submit the defendant to personal jurisdiction of the court. Plaintiff, however, in the event that sureties are not justified according to their affidavits of financial strength, may elect to substitute others or a corporate surety. Orders by the court, assuming proper notice and hearing, with respect to increasing the undertaking, are not appealable.

Also, the defendant may move upon a noticed motion to have any writ of attachment discharged or recalled by the court if “improperly or irregularly issued.” This right exists without regard to whether or not there has been a levy, or release of levy, or whether the motion precedes a levy under that writ. Such “irregularity” or improper issuance contemplated by the court is frequently found in the deficiency of the complaint to set forth the elements upon which a writ of attach-

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25 CAL. CODE CIV. PROC. §§ 1010-13(a).
29 CAL. CODE CIV. PROC. § 539.
33 CAL. CODE CIV. PROC. § 556.
ment may issue. Where the action sounds in the tort of fraud, the narrowly construed statutory right does not exist and the writ would be improper.\(^4\) However, some cases have found that, where fraud is the basis for rescission, the gist of the action is an implied contract to repay what has been received and that the attachment is proper.\(^5\) Additionally, it has generally been held that where the action brought carries the ring of *ex delicto* rather than *ex contractu*, attachment will not lie\(^6\) except as to non-resident defendants.\(^7\) This is also the case where the complaint is couched in terms that do not allege the breach of an obligation for the “direct payment of money.” Hence it has been held that an action for damages, based upon defendant’s failure to deliver goods partly paid for, without a further showing of rescission, was not within the statutory meaning of an obligation for the direct payment of money.\(^8\)

Where the plaintiff has security for his claim, attachment would be improper and would give rise to a motion under Code of Civil Procedure section 556. Often such security arises by operation of law, and not by affirmative action of the plaintiff. In an action to rescind a contract to which plaintiff became bound by defendant’s fraud, an appellate court stated the general rule by making the distinction on the basis of whether or not the plaintiff had received something of value. The court held that if something of value was received, an *equitable* lien existed, and by virtue of that possessory lien no attachment could lie; *contra*, if nothing of value was received, since in such case plaintiff would have only an action for money paid to the defendant.\(^9\)

Also, where the obligation sued upon is not made, or made payable in this state, attachment would be improper. It has been held that a foreign judgment, even though a contract, is not payable in California.\(^10\) Interpretation of Code of Civil Procedure section 537(1) has generally held it sufficient to support attachment situations where the debt *could* be paid in California, although payment might also be made elsewhere, *viz*: a provision in a promissory note making it pay-

\(^8\) Willett & Burr v. Alpert, 181 Cal. 652, 185 Pac. 976 (1919).
able “wherever payment may be demanded,” where demand for payment in this state was shown.\(^{41}\)

A successful motion brought under Code of Civil Procedure section 556 may furnish the foundation for an action for damages for wrongful attachment, the essence of which is interference with the property of the defendant not supported by a legally recognized right.\(^{42}\)

**Attachable Property**

A valid writ of attachment, accompanied by sheriff’s instructions and, where applicable, an additional undertaking\(^{43}\) or sheriff’s deposit for costs, will reach all property of the debtor not subject to statutory exemption\(^{44}\) regardless of whether or not it is capable of manual delivery.\(^{45}\)

For example, corporate stock can be attached.\(^{46}\) While older common law cases held that corporate shares, being intangible interests, were not subject to attachment or execution,\(^{47}\) California now holds that the manual possession of corporate shares is not necessary for attachment purposes and that service upon a proper officer of the corporation is sufficient to effectuate the levy.\(^{48}\) This should be distinguished from the situation in which certificates merely representing stock rights may be attached in the hands of third parties.\(^{49}\)

Intangible assets can be reached by garnishment under the same writ of attachment. They include debts due to the debtor, bank deposits, and contractual rights representing choses in action.\(^{50}\) A garnishee, however, may be required to be examined with respect to debts due to the defendant,\(^{51}\) subject to some limitations.\(^{52}\)

The sheriff or other officer may attach perishables, and he must sell them and hold the proceeds as if they were the property seized.\(^{53}\) Code of Civil Procedure section 548 provides that any property may

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\(^{43}\) CAL. CODE CIV. PROC. § 539(a).

\(^{44}\) CAL. CODE CIV. PROC. §§ 690-690.51.


\(^{46}\) CAL. CODE CIV. PROC. § 541.


\(^{49}\) CAL. CODE CIV. PROC. § 543.

\(^{50}\) CAL. CODE CIV. PROC. §§ 543-44.

\(^{51}\) CAL. CODE CIV. PROC. §§ 545, 545.3.

\(^{52}\) CAL. CODE CIV. PROC. §§ 545.1, 545.2.

\(^{53}\) CAL. CODE CIV. PROC. §§ 547, 547(a).
be ordered sold after attachment upon a noticed motion to adverse parties or after an order of service of summons by publication.

Real property, including any interest therein, legal or equitable, is subject to attachment and subsequent levy and sale.\(^{54}\) This includes property held for defendant in the name of another, whether upon a theory of constructive or resulting trust, or a fraudulent conveyance.\(^{55}\) The procedures necessary for effective attachment of real property and growing crops, as well as other property, are designated in extensive detail in Code of Civil Procedure section 542.

Where the attached property is capable of manual delivery, it must be taken into the custody of the attaching officer.\(^{56}\) This is the same procedure as under an execution.\(^{57}\) Where property, capable of manual delivery, is in the hands of a pledgee levy should be upon the pledgee and not the goods.\(^{58}\)

A liquor license has been held to be a proper subject of attachment, to the extent that it is transferable.\(^{59}\)

Frequently, the property attached is subject to the quasi-secret encumbrance of a conditional sales contract; but the fact of such a third party interest, or a recorded chattel mortgage does not preclude operation of the attachment procedure.\(^{60}\) Code of Civil Procedure section 689 \textit{et seq.} set out the procedures and statutory protection applicable to third party rights in the property attached.

\textbf{Claims of Exemption}

By statute, certain items constituting property of the debtor are exempt from attachment or levy.\(^{61}\) With one exception,\(^{62}\) these exemptions are waived unless claimed according to the statutory procedures spelled out in Code of Civil Procedure section 690.26. No statutory exemption may be claimed against a judgment levy for the price under Code of Civil Procedure section 690.50. This is also true of a judg-
ment of foreclosure of a mortgage "or other lien thereon," or a judgment or order for alimony or child support. 63

One-half of the debtor’s wages for thirty days preceding the levy are exempt without any act of the debtor required to establish the exemption. 64 Establishment by an affidavit of the debtor of the necessity of the remaining one-half of the subject wages for family support will enlarge the exemption up to all of such earnings 65 unless the debt was incurred for common necessaries of life, or unless it runs to an employee or former employee of the debtor for personal services, or unless the creditor files a counter-affidavit which complies with the procedural requirements of Code of Civil Procedure section 690.26. Successive testing of the debtor’s right to exemption, by levy on exempt property, could leave the plaintiff vulnerable to an action for abuse of process. 66

Wages or other money due from a public corporation which acts in a governmental capacity is not subject to attachment.67 These obligations to the debtor can be reached only by a judgment creditor and pursuant to the special provisions of Code of Civil Procedure sections 710 and 710(a). To the extent the fund existing in favor of the debtor represents wages due for the preceding thirty days, it, too, is subject to the statutory exemptions. 68

An individual debtor’s interest in partnership property is likewise not subject to attachment, but can be reached only pursuant to the "charging order" enacted in the Uniform Partnership Act section 28, which is framed in terms of “by application of any judgment creditor” [italics added]. 69 Even for a judgment creditor, this remedy is subject to equitable and inchoate rights of non-debtor partners.

Other Methods of Attachment

By virtue of Code of Civil Procedure section 540, the plaintiff may instruct the sheriff to place a “keeper” in charge of the attached property for not longer than two days, unless the defendant requests removal of the goods. This becomes an especially effective device where the property attached is the inventory, fixtures, or stock-in-trade

64 Cal. Code Civ. Proc. § 690.11.
67 Irizarry v. City of San Diego, 186 Cal. 535, 199 Pac. 1041 (1921).
69 Enacted as Cal. Corp. Code § 15028.
of a going business. The practical effect is extremely coercive as to all but the most hardened commercial debtors. The plaintiff must, however, deposit costs with the sheriff, at least $185.00. This becomes a part of recoverable costs in the ultimate judgment.

The "till tap" constitutes a hit-and-run form of attachment. Here the sheriff is instructed to take the cash contents of a cash register, or its equivalent, which may be in the possession of the defendant.

Another possibility is "intervenor." Occasionally the creditor discovers that his defendant debtor is plaintiff in another action and, if successful in that litigation, would be financially enriched. That cause of action, then, may be treated as a quasi-equitable asset of the debtor, and creditors may intervene at any time before trial, subject to leave of court and proper service upon all parties to the action.

**General Aspects of Writs of Attachment**

Writs of attachment or garnishment are not self-operative. They are effectuated by instructions to the sheriff, signed by the plaintiff or his attorney. Thus, they should be comprehensive enough to identify the property, the garnishee, and the date or time the writ should be levied. Since the writ of attachment is effective only from the time of actual levy, problems of priority between competing writs will be resolved on that basis.

In California an attachment does not enlarge the status of the creditor so as to make him a purchaser for value and thereby allow him to prevail over a subsequent bona fide purchaser for value without notice. The attachment lien catches only the presently existing interest in real property, unlike the recorded judgment lien which catches an after-acquired interest. Both the attachment and judgment liens are subject to prior equities.

The effect of the attachment on the debtor's property is that it renders the attaching creditor a secured creditor, subject to some limitations such as those found in the Bankruptcy Act, i.e., the Trustee in Bankruptcy has the power to set aside creditors' liens acquired within four months prior to the filing of the petition in bankruptcy.

Upon taking of judgment the creditor may realize upon all property then manually held under attachment by a levy of a writ of execution.

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70 CAL. CODE CIV. PROC. §§ 387, 389.5; CAL. CORP. CODE §§ 1306, 4653; CAL. LABOR CODE § 3853.
73 CAL. CODE CIV. PROC. § 674.
upon the sheriff, or other custodian of such property. The subject of execution is covered *infra.* An attachment may be released upon written authorization of plaintiff’s attorney of record, by court order, by levy of execution, or by operation of law after the statutory three-year duration of the writ, or upon the death of the defendant before trial. An attachment lien can be extended by order of the court, or upon a judgment for defendant coupled with plaintiff’s appeal. Property under attachment must be released, upon the defendant’s giving an undertaking at least equal to the amount of the plaintiff’s claim plus costs. This is to be distinguished from an order discharging an attachment, wherein the court must fix the amount of the undertaking and may require justification of surety.

**Other Remedies**

**Discovery**

Although seldom utilized in commercial practice, Code of Civil Procedure sections 2016-2035 allow the plaintiff to arm himself with information with respect not only to the merits of his case, but also in regard to the defendant debtor’s capacity to respond in damages. The plaintiff may examine any person or party by deposition without regard to the admissibility of the questions or answers.

A more practical approach is provided by Code of Civil Procedure section 2030, *viz:* the written interrogatory, responses to which are mandatory and enforced under Code of Civil Procedure section 2034. Plaintiff may properly inquire into the nature and extent of the defendant debtor’s assets, recent conveyances and transfers, and any other matter of reasonable relevance to the subject matter of the case.

“Requests for admissions” under Code of Civil Procedure section 2033 are intended to narrow the scope of triable issues by compelling,

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79 See Clymer v. Willis, 3 Cal. 364 (1853).
under penalty for refusal to answer, admissions of facts pertinent to triable issues.

**Summary Judgment**

Inasmuch as we frequently find a defense to a creditor’s claim made not on bona fide merits, but rather as a ploy to obtain time, the courts might readily be temples of injustice to the honest creditor who is precluded from obtaining payment for goods and services previously rendered. Few courts in the state afford any of the parties the speedy trial of issues and merits usually desired. Behind the mountain of untried cases in any lower court in the state, the debtor sits, secure in the knowledge that he can delay payment of a judgment by the mere passing of time, during which he can compromise his obligation or make himself “judgment-proof.”

To this situation is directed the purely statutory remedy of the summary judgment. It is sometimes referred to as trial by affidavit, since it comes before the court in the form of a law and motion matter, and is tried without testimony of parties or their witnesses. The motion includes the common law “speaking motion to dismiss.”

At any time subsequent to the filing of the complaint either party may file and serve the motion for summary judgment, supported by the required affidavits. It must be emphasized that throughout the line of cases on this subject is found the admonition of the appellate courts that a summary judgment is not a “trial on the merits,” but rather a disposition of a matter that has no triable issues.

The sole test of the summary judgment proceeding is: *is there a triable issue of fact?* This proceeding is intended only to *find* triable issues, not to determine them if they are found. If the court finds the moving party’s affidavits set forth every requisite element of the cause

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88 It must be noticed to opposing parties for at least ten days.


90 Prior to a 1957 amendment of section 437(c) of the Code of Civil Procedure, the motion for summary judgment could be made only “when an answer is filed.” The deletion of the quoted phrase suggests legislative intent to permit the motion to be made without regard to when and if an answer is filed.


of action, or facts constituting a defense to the cause of action pleaded, no material part of which is denied by the respondent’s counter-affidavits, the court may grant a summary judgment. It is discretionary. If in any respect the counter-affidavit of the opposing party puts in issue a fact essential to the opposing party’s cause, the court must deny the motion.

The preponderance of appellate cases supports a policy favoring the pleadings, and they tend to place upon the party moving for summary judgment a burden of showing the total lack of merit to the opposing party’s fact pleading. If the opposing party’s pleading contains one unassailable cause of action or defense, it would seem to be error to strike it. The California Supreme Court has pronounced its policy in the following words:

Before a court can strike a pleading for sham or dismiss a complaint under section 437(c) it must clearly appear that the allegations are false or that the action is without merit, and every reasonable doubt must be resolved in favor of the pleading.

A summary judgment is a final judgment and may be appealed from in the same manner as any other judgment on the merits. It is otherwise res judicata; however, the order denying a summary judgment is not res judicata since it is not a final judgment, and has only the effect of placing in the trial court a burden of the determination of the merits of the cause.

**Default Judgment**

A defendant who fails to answer or otherwise appear may be subject to a judgment by default. However, upon a showing of mistake, inadvertence, surprise, or excusable neglect the default may be relieved by the court under Code of Civil Procedure section 473. The outside time limit of relief under this section is six months from the entry of the default itself, not the default judgment.

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98 Ibid.
99 Read carefully the provisions of sections 585 and 586 of the Code of Civil Procedure.
Debtor Tactics After Judgment: The Fight for Time

As of the moment of judgment, subject to the technical delay of actual entry of judgment, the judgment creditor has established the unequivocal right to realize his debt out of the non-exempt property of the debtor. But as most creditors’ attorneys discover at this juncture, the debtor is still possessed of certain remedies. A money judgment does give the successful plaintiff the absolute right to the instrumentality of the writ of execution and certain other remedies. Nevertheless the effectiveness of the creditor’s judgment is subject to the ability of the judgment debtor to delay their use. In many cases the recalcitrant debtor who sought time before adjudication of the merits still continues to seek time, either because he fears the end of a facade of solvency he may still have in the form of material assets, or because he clings to the possibility of compromise or settlement for less than the original claim.

Stay of Execution

The court which rendered the judgment may stay its execution; but this is discretionary with the court. Where the judgment debtor has made a motion for a new trial the stay may run for ten days beyond the determination of that motion. In all other cases the stay may operate for only thirty days from the date of the stay (justice courts being limited to ten days), not from the date of entry of judgment. Stay may also be had by stipulation or consent of the parties.

Appeal

An appeal will not, in and of itself, stay execution of other supplemental proceedings. Such further relief for the debtor may be had only by posting an appeal bond, although such a bond is not, as such, a condition precedent to the taking of an appeal. It should be noted that where there has been no waiver of notice of entry of judgment, the time for proper notice of appeal has been held to run from the time notice of entry is served upon the debtor. This is clearly the rule as

104 Municipal Court appeals are covered by section 985 of the Code of Civil Procedure while Superior Court appeals are covered by section 942 of that Code.
105 Notice of entry of judgment may be waived, but knowledge of the entry of judgment is not in itself sufficient. Cowee v. Marsh, 50 Cal. 2d 240, 324 P.2d 553 (1958).
to time for a motion for a new trial. Where contemplated merely as a source of time, the filing of an appeal is rare, due no doubt to the substantial costs of bringing a civil appeal before either the District Court of Appeal or the Appellate Department of the Superior Court.

**Enforcing Money Judgments**

Discussion of judgments demands that preliminary distinctions be drawn. First of all, *money* judgments are enforceable in quite different modes than other types of judgments such as declaratory judgments, real property foreclosures, and judgments or decrees involving equitable relief. For the most part the enforcement available to the plaintiff who recovers a money judgment is limited to statutory remedies which have varying legal force and scope. And he may have *money* only. He has no right to performance, forebearance, or a change of legal relationships. But, as in most jurisdictions, the judgment creditor in California obtains certain rights to realization of his claim that the pre-judgment claimant does not have. Our provisional remedy of attachment merely allows a security interest in the property of the debtor, whereas after judgment the remedy of execution and levy is available to the direct benefit of the successful plaintiff. By virtue of Code of Civil Procedure section 1007, an “order” for the payment of money is equivalent to a judgment and a writ of execution will issue for its recovery.

**The Writ of Execution**

The party in whose favor judgment is given may, at any time within 10 years after the entry thereof, have a writ or order issued for the execution or enforcement of the judgment. If, after the entry of the judgment, the issuing of such writ or order is stayed or enjoined by any judgment or order of court, or by operation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the 10 years within which execution or order may issue.

While the duration of time during which the judgment obtained will sustain issuance of a writ of execution is ten years, Code of Civil Procedure section 685 *et seq.* provide that the period of time for issuance may be extended upon a motion supported by affidavits showing

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108 See the discussion of attachments *infra*.
good cause. Failure to furnish the affidavits is described by the wording of the statute as grounds sufficient to deny the relief demanded. The showing required in the affidavits has been held sufficient where the affidavit alleged that a search of county records showed no property in the name of the judgment debtor and that this fact was the reason for the creditor's failure to proceed under Code of Civil Procedure section 681. Similarly, where a judgment creditor for alimony alleged that her failure to utilize Code of Civil Procedure section 681 was due to the fact that she was out of the state and lacked funds to pursue the defendant's assets, it was held sufficient for relief under this section.

Procedure Under the Writ

With the exception of levies directed at bank accounts not standing in the name of the judgment debtor alone, an undertaking is not required as a condition precedent to levy under the writ of execution. However, the writ, when issued, is not self-executing. The sheriff or other officer to whom it must be directed will not vary from the instructions signed by the judgment creditor or his attorney describing the property to be levied upon. It has been generally held that the sheriff becomes, by virtue of his instructions, an agent for the judgment creditor, at least as to the manner of the execution.

According to an Opinion of the Attorney General, an attorney may appear in proceedings involving small claims subsequent to the small claims court's judgment.

As a purely practical matter the creditor will ordinarily first direct levy upon any property held under a prior obtained writ of attachment. The writ may be directed, accompanied by instructions and a deposit of sheriff's costs where required, toward any and all property standing in the name of the debtor. In some cases levy may be had where others hold property in trust for the debtor. Notice of entry of judgment is not a condition precedent to issuance, levy and sale under the judgment.

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113 CAL. CODE CIV. PROC. § 682(a).
115 28 CAL. OPS. ATTY GEN. 359 (1956).
117 Foster v. Young, 172 Cal. 817, 156 Pac. 476 (1916); Baum v. Roper, 1 Cal. App. 435, 82 Pac. 390 (1905).
Life of the Writ

The life of the writ of execution is no greater than sixty days. It must be made returnable in no less than ten, nor more than sixty days after receipt by the officer to whom it is directed, to the court in which judgment is entered.118 The return has no effect upon the sale of property levied upon under that writ prior to its return day.119 However, any levy upon that writ after that date amounts to a trespass or conversion.120

Judgment Liens

The judgment creditor need not rely solely upon execution to realize the debt. Pursuant to Code of Civil Procedure section 674, a certified abstract of any California judgment, or that of any federal court may be recorded with the county recorder. Eo instanti, a lien is created on all real property then or thereafter acquired in the name of the judgment debtor, and on property fraudulently conveyed121 during the ten year life of the lien, which runs from the date of entry of the judgment. Many collection attorneys abstract judgments as a matter of course and find that the practical rewards are substantial, particularly where no other property is readily available for levy and sale. The judgment lien created by recording the abstract of the judgment is independent of any attachment lien that the same creditor may have obtained prior to judgment.122 The judgment does not, in and of itself, create a lien;123 nor is personal property caught by any recordation. That must be the subject of a specific levy.124

A special device created by Code of Civil Procedure section 688.1 allows a lien, by leave of court, upon the cause of action of the debtor in another proceeding in which the judgment debtor appears as plaintiff. The wording of the statute makes clear that the granting of the remedy is a discretionary one with that court in which the debtor action exists. The lien granted under this section is to be distinguished from the device of intervenor as might be provided under Code of Civil Procedure section 389.5. In that case the creditor makes himself a party to the action by his intervention. Under section 688.1 only a lien is created. But in both situations the debtor cannot settle or other-

120 Southern Cal. Lumber Co. v. Ocean Beach Hotel Co., supra note 119.
121 McGee v. Allen, 7 Cal. 2d 468, 60 P.2d 1026 (1936).
122 It is sometimes said, however, that the prior attachment lien “merges into” the judgment lien. Balzano v. Traeger, 93 Cal. App. 640, 270 Pac. 249 (1928).
124 Ibid.
wise dispose of his cause of action without the approval of the creditor "interloper," for section 683.1 also permits intervention. In McClearen v. Superior Court, the court quoted a portion of this section and commented: 125

"[T]he court or the judge may, in his discretion, order that the judgment creditor he granted a lien . . . and . . . may permit said judgment creditor to intervene therein." The language of the section thus permits, but does not require, intervention.

Supplementary Proceedings: "Where Are the Assets?"

A judgment obtained, entered and abstracted may perfect the creditor's rights, but by such conformity to procedure the creditor's satisfaction is not necessarily provided. Frequently the only person who can pin-point assets which can be levied upon will be the debtor himself. To this end the judgment creditor may examine the debtor under oath, 126 or even the debtor's debtor or some other person who holds property for, or is indebted to the primary debtor. 127 It is not necessary that a writ of execution be returned unsatisfied as a condition precedent, as was the common law rule or the requisite under the old Creditor's Bill in equity. 128 However, the scope of the examination has generally been held to be as broad as in the old Creditor's Bill proceedings. 129

Conclusion

Early common law dealt with the rights of creditors rather drastically, from the debtor's point of view, for the latter was subject to imprisonment until such time as his debt was paid. It was not until the belated reforms of Edward III that the creditor was forced to exhaust the debtor's property before resorting to such extreme measures. The residual flavor of imprisonment for debts continues, although on a different basis, in the Civil Arrest Statutes in California; 130 but arrest or execution of the debtor is hardly considered a desirable weapon for the contemporary creditor.

It has been the purpose of this article to enumerate some less drastic, and undoubtedly more satisfactory, legal methods available for solving disputes between creditors and debtors in California today.

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127 CAL. CODE CIV. PROC. §§ 717, 545.
129 Travis Glass Co. v. Ibbetson, 186 Cal. 724, 200 Pac. 595 (1921).
130 CAL. CONST. art. I, § 15; CAL. CODE CIV. PROC. § 478 (prejudgment civil arrest and bail); see CAL. CODE CIV. PROC. §§ 667, 682(3), 684; Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179 (1903).