

California's New Homestead Law

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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 B. 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, *Archaic 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 importunity 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 recordation 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* 382-90 (1963), 83-85 (Supp. 1975); 7 CAL. PRACTICE *Exemptions* § 57:45-51 (1968, Supp. 1975); DEERING'S CALIFORNIA CODES ANNOTATED, CIVIL §§ 1237-1624a, at 77-79 (1971); R. WARNER, C. SHERMAN & T. IHARA, *PROTECT YOUR HOME* (1973); WEST'S CALIFORNIA CODE FORMS, CIVIL §§ 1239-67 (1960, Supp. 1973). The declaration of a homestead involves the execution, acknowledgement and recordation 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 § 1263 (West Supp. 1975). 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. 1975).

10. Features 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 § 1265 (West Supp. 1975); (2) restrictions on the conveyancing of homesteads, CAL. CIV. CODE § 1242 (West Supp. 1975). See text accompanying notes 57-59 *infra*.

11. But see R. WARNER, C. SHERMAN & T. IHARA, *PROTECT YOUR HOME* 21-22 (1973).

12. CAL. CIV. CODE § 1241(1) (West Supp. 1975); *Young v. Hessler*, 72 Cal. App. 2d 67, 164 P.2d 65 (2d Dist. 1945).

13. CAL. CODE CIV. PRO. § 690.235(b) (West Supp. 1975). 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 54-56 *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.*, NEB. REV. STAT. § 40-105 (1974); UTAH CODE ANN. § 28-1-10 (1953); WIS. STAT. ANN. § 272.21(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 recordation 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. Brauner*, 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. PRO. § 674 (West Supp. 1975).

24. CAL. CODE CIV. PRO. § 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. PRO. § 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); *Nat'l 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. *Viotti v. Gioni*, 230 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. § 682b (West Supp. 1975).

30. CAL. CODE CIV. PRO. §§ 537-61 (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. § 537.1 (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. 1975).

42. CAL. CIV. CODE § 1238 (West Supp. 1975); Comment, *Creation of the Homestead and Its Requirements*, 26 CALIF. L. REV. 241, 242-43 (1938).

43. CAL. CIV. CODE § 1238 (West Supp. 1975). 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. PRO. § 690.235(a) (West Supp. 1975).

44. CAL. CIV. CODE § 1260 (West Supp. 1975).

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. Rule & Sons, Inc.*, 41 Cal. App. 2d 852, 107 P.2d 970 (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. Giomi*, 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-

sale 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 MERTENS, 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. PRO. § 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. *Clausseneus 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*, 148 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 §§ 9.4-9.18 (1974); J. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS §§ 6.3-6.12 (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. Ginning 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 § 1256 (West 1954); *Marelli v. Keating*, 208 Cal. 528, 282 P. 793 (1929) (dictum); *Lean v. Givens*, 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. 567 (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. CODE CIV. PRO. § 674 (West Supp. 1975).

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. *Sampsell 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 589 (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 Gerber*, 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.