#39.240 9/11/75

Memorandum 75-69

Subject: Study 39.240 - Enforcement of Judgments (Third-Party Claims)

This memorandum discusses the existing third-party claims procedure and the possible features of a new procedure to protect the rights of third parties. Exhibit I (green pages attached hereto) is a staff draft of a third-party claims statute based on existing law, incorporating several important changes suggested at earlier meetings. Exhibit II (yellow pages) is the existing third-party claims statute (Sections 689-689d). Exhibit III (white pages) contains an excerpt from Witkin's California Procedure. Exhibit IV (buff pages) is the existing provisions concerning third-party undertakings to release (Sections 710b through 713-1/2). Also attached hereto is a copy of the First Supplement to Memorandum 75-27 which briefly discusses prelevy third-party claims in attachment and presents two alternative statutory procedures; this memorandum was distributed last spring, but never considered in detail.

EXISTING LAW

Code of Civil Procedure Section 689 provides for the situation where the third person claims title or right to possession of the property levied upon. Section 689b provides for the situation where the third person claims a security interest in the property levied upon. These procedures are generally parallel, but there are some significant differences.

Under both procedures, the third person files his claim with the levying officer who then serves by certified or registered mail a copy of the claim on the judgment creditor. If the creditor does nothing within five days after receipt of the claim, the property is released.

(Section 689 may be interpreted to provide that the five-day period runs from the date of mailing, with an additional five days as provided by Section 1013.) Under Section 689, the creditor may maintain the levy simply by posting an undertaking with the levying officer that indemnifies the third person for any loss caused by the levy. If the creditor posts the undertaking, the third person may still obtain the release of the property by himself posting an undertaking pursuant to Sections 710b through 713-1/2. Procedures are also provided for objecting to the sufficiency of the amount of the undertaking and for the justification of sureties. Whether or not any undertaking is posted, either the creditor or the third person may petition for a hearing to determine "title to the property in question" within 15 days after the filing of the third-party claim with the levying officer. The court may order the sale of perishables and may stay the sale, transfer, or other disposition of the property involved pending the determination at the hearing. The hearing is to be held within 20 days from the filing of the petition for the hearing unless continued. Ten day's notice is given the levying officer, the creditor, and the third person (but not the debtor). The third party has the burden of proof at the hearing. At the conclusion of the hearing, the court makes whatever orders it deems appropriate. It seems to be assumed under Section 689 that the property belongs either to the debtor or to the third person; if the property belongs to the third person it is released from levy and if it belongs to the debtor the levy is continued or the writ is relevied.

Section 689b differs somewhat. Under this procedure, the third person claims a security interest in the property levied upon and the demand is for payment of all sums due or to accrue to him under the security agreement, plus interest to date of tender. The judgment creditor must either deposit the amount demanded or post an undertaking and file a statement contesting the existence of the third person's interest. If he does neither within five days after receipt, the prop-

erty is released from levy. Where the existence of the security interest is placed in dispute, objections to the creditor's undertaking may be made and the determination of the validity of the security interest is made at a hearing in the same manner as under Section 689. Whichever course is taken, the secured party's interest is accelerated and paid off (if there is an interest); the property is sold free and clear of the third person's interest, and the creditor is subrogated to the third party's interest in the proceeds from the sale. See Section 689c. The creditor can initiate this procedure by demading that a claim be made; if the secured party makes no claim within 30 days after being served with this demand, the property is sold free of the security interest.

DRAFT STATUTE--POLICY QUESTIONS

At the March 1974 meeting, the Commission directed the staff to redraft these procedures so that the judgment creditor would have an option whether or not to pay off a secured party. This procedure would not affect any right that the secured party has pursuant to his agreement with the debtor to accelerate payment of the obligation. However, in the absence of such acceleration or full payment by the judgment creditor, the secured party would not be paid off and the property levied upon (the collateral) would be sold subject to the security interest. The draft statute attached as Exhibit I implements this decision and also reorganizes and combines the substance of existing law.

However, there still remain certain policy questions, before we get to the issue of third-party rights to notice and hearing before levy. Assuming no change in the policy outlined in the previous paragraph, what amount must the judgment creditor pay the secured party if he elects to pay off the entire security interest? That is, must the judgment creditor pay the same amount the debtor would be required to pay to cancel the agreement (including, for example, prepayment penalties), or may he pay some lesser amount (for example, the outstanding balance of the principal)?

We suspect that in the overwhelming majority of cases the security agreement will contain an acceleration clause. However, where acceleration is not provided or not permitted, the Commission has decided to provide for sale subject to the security interest. This raises certain problems between the purchaser and the secured party. Should the secured party be required to file a notice before sale so that prospective purchasers will know that the property is to be sold subject to a security interest? Or should it be the purchaser's responsibility to find out the state of the title to the property where the secured party's interest is already a matter of public record? Should a secured party who has not filed (either where he could have done so independent of any proceedings between the debtor and the creditor or where, supposing we provide that the secured party must file with the levying officer before sale in order to preserve his rights in the collateral as against the purchaser, the secured party has failed to file notice before the sale) have an action against the judgment creditor and/or the judgment debtor if he loses his rights in his collateral?

So far as concerns third persons generally, under Section 689, if a third-party claim is not made, the purchaser at the sale acquires no more than the debtor's interest in the property. If the debtor has no interest, the third person can bring a separate action for conversion or replevin. It would be possible to put a greater obligation on third persons to come forward and reveal their interests. For example, the third-party claim procedure could be made exclusive and the purchaser's rights superior to those of the third person, leaving the third person to an action against the creditor or debtor. Would this be desirable? (It may run afoul of the due process clause; see the discussion infra.)

Existing law does not deal with joint ownership. Section 689 speaks in all or nothing terms. Perhaps when a single item such as a car is jointly owned by the judgment debtor and some third person, the purchaser at the execution sale becomes a joint owner with the third person. If this joint ownership cannot be worked out privately, presumably the owners would have to resort to partition by sale.

Sections 689 and 689b deal only with personal property. Where real property is involved, the third person must either move to enjoin the sale or bring an action to quiet title after sale. The lack of a more summary procedure has been criticized in correspondence to the Commission staff on the grounds that the third person's property is tied up for potentially lengthy periods. Do you wish to bring real property within the scope of the summary third-party claims procedure? On the other hand, the summary procedures for determining title to personal property have been criticized for being too informal. (See Curtis, A Legal Headache, 9 S.B.J. 167 (1934).)

DUE PROCESS AND THIRD-PARTY RIGHTS

At Past Commission meetings, the question has been raised whether a third person has a right to notice and a hearing before property in which he has an interest is levied upon. A determination of this question is necessary before a third-party claims procedure can be finally recommended. The following pages contain an analysis of the problems involved. Throughout this discussion it should be remembered that there are three interrelated questions at play: (1) Whether existing California procedures are unconstitutional under the Sniadach and Randone line of decisions; (2) whether exisiting procedures are fair and reasonable, if they are contitutional; and (3) who is liable and under what conditions for a levy on a third person's property.

Common Law

Under the common law, the levying officer was liable to the third person for conversion or replevin and was not protected by the fact that he was operating on the authority of a writ in the favor of the creditor and against the debtor. If the officer released the property to the third person, he would be liable to the creditor if it turned out that he was in error. In California, Section 689 was enacted originally to protect the levying officer's from these conflicting liabilities.

Solving the levying officer's liability problems obviously does not guarantee the fairness or constitutionality of the procedure as it has developed through the years, particularly in view of the courts' greater sensitivity to due process claims in creditor's remedies after Sniadach and Randone. A review of these decision will aid in determining their applicability to the third party situation.

U.S. Supreme Court Decisions

In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the United States Supreme Court held unconstitutional the prejudgment garnishment of wages without notice and an opportunity for a hearing prior to the taking. The unconstitutional taking in Sniadach was the deprivation of the "enjoyment of the earned wages" which the court referred to as a specialized form of property." Justice Harlan's concurring opinion spoke of the need for notice and hearing "which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use."

In Fuentes v. Shevin, 407 U.S. 67 (1972), the court held Florida's and Pennsylvania's ex parte prejudgment replevin procedures unconstitutional. The court made clear that the force of Sniadach was not to be restricted to wages, despite the contrary indications in Sniadach itself. The property interest found to be entitled to the protection of the Fourteenth Amendment was the possession and use of the household goods even though the debtors lacked full title to the goods and their claim to continued possession was in dispute. The court stated that "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." The court also held that the opportunity for a later hearing and damage award could not "undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." In its statement of the holding, the court said that the procedures were unconstitutional because they "work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." (Emphasis added.)

Suspicions about the force of Fuentes (decided by a 4-3 vote, with Justices Powell and Rehnquist not participating) seemed to be confirmed in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), which upheld the Louisiana sequestration (replevin) procedure permitting prejudgment seizure of the property on the ex parte application of the seller. The court emphasized the fact that both the buyer and the seller had an interest in the property and that the property interests of both parties should be considered when deciding on the validity of the challenged procedure. The court found that the seller would be most likely to protect the value of the property. It also noted that a judicial officer determined whether the ex parte writ should issue and that the debtor had an immediate opportunity to seek the dissolution of the writ whereupon the creditor would have to prove the grounds for issuance. The debtor could also file a bond to release the property. The court rejected the notion that the debtor was entitled to the use and possession of the property until all issues in the case were judicially resolved at a full adversary hearing. Furthermore, the court noted that the creditor had to file a bond to cover any damage or cost incurred by the debtor because of the taking. The court found that the nature of the issues at stake and the probability of being able to use documentary evidence minimized the risk of abuse. Finally, the court said that it was unconvinced that the impact on the debtor of the deprivation overrode the interest of the creditor in protecting the value of the property and that even assuming a "real impact" the basic source of the debtor's income remained unimpaired. Mitchell said that Sniadach and Fuentes "merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'" (Quoting from Phillips v. Commissioner, 283 U.S. 589 (1931).)

The court seemed to retreat from Mitchell and take several steps back toward Sniadach and Fuentes in North Georgia Finishing, Inc. v. Di-Chem, Inc., ___ U.S. ___ (1975), which declared unconstitutional the prejudgment garnishment (attachment) of a corporation's bank account based on the affidavit of the creditor. This Georgia procedure, like the procedure in Mitchell, required the filing of a bond to protect the debtor from loss or damage and permitted the debtor to obtain the release of the property by filing a bond. However, the court disapproved the procedure because the writ was issuable by a court clerk (not a judge) on conclusory allegations of the plaintiff without the opportunity for an "early hearing." The court did not say that a hearing had to be held before the writ was issued; it merely noted that a major defect was the lack of the opportunity for an early hearing. However, the court did make clear that, for the purposes of the Due Process Clause, it was not going to distinguish between types of property--in particular the wages in Sniadach, household goods in Fuentes, and a corporation bank account in North Georgia Finishing--since the "probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error." (Emphasis added.) (See also Justice Powell's concurring opinion, stating that the "most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing.")

California Decisions

The California decisions also exhibit interesting variations on this same theme. In Randone v. Appellate Department, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), the California Supreme Court declared unconstitutional the basic prejudgment attachment procedure since it did not provide for notice and an opportunity for a hearing before property is attached, did not strictly limit summary procedures to extraordinary circumstances, and did not adequately exempt necessities from attach-

ment. Decided between Sniadach and Fuentes, the California decision seems to set a stricter due process standard than Mitchell and North Georgia Finishing. Randone and Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), decided a month earlier, anticipated Fuentes by reading Sniadach broadly to apply to the loss of use of the debtor's property. In the normal case, absent extraordinary circumstances, the creditor's interest in preserving a fund for the eventual collection of his judgment was found not to be sufficient to uphold the ex parte procedure. However, in footnote 20 the court indicated some willingness to balance the interests of the parties on a case by case basis: "We recognize, of course, that bank deposits, by their very nature, are highly mobile and thus that a general risk may arise that such assets will be removed to avoid future execution. We do not believe, however, that the mere potential mobility of an asset suffices, in itself, to justify depriving all owners of the use of such property on a general basis. Instead, in balancing the competing interests of all parties, we believe a more particularized showing of an actual danger of absconding or concealing in the individual case must be required." This, of course, would still require an ex parte hearing before levy. It is not clear what Randone means by a "significant interest" since it focuses on the potential duration of the prejudgment taking (three years); the decision does not discuss the constitutional effect of the defendant's opportunity to quash the writ in this connection as does the U.S. Supreme Court in Mitchell and North Georgia Finishing. The California court did invalidate the postattachment exemption procedure which placed the burden on the debtor to seek exemption of "necessities" (even though the Randone's bank account would not have been exempt).

In Adams v. Department of Motor Vehicles, 11 Cal.3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), the court invalidated the sale provisions of the garageman's lien law, but upheld the possessory lien itself on the grounds that the garageman had added his labor or materials to the car and therefore had an interest in it. "To strike down the garageman's possessory lien would be to alter the status quo in favor of

an opposing claimant; the garageman would be deprived of his possessory interest precisely as were the debtors in Shevin [Fuentes] and Blair." In footnote 15, the court noted: "Implicit in Shevin and Blair is the policy of honoring that possessory right actually vested in possession, at least until conflicting claims of possession have been judicially resolved. That policy is consistent with the general policy of the law."

In Empfield v. Superior Court, 33 Cal. App.3d 105, 108 Cal. Rptr. 375 (1973), the court of appeal upheld the lis pendens statute (Code Civ. Proc. § 409 et seq.) against the argument that it deprived the property owner of a significant property interest without due process. In rejecting this challenge, the court stated:

> The notice of lis pendens does not deprive petitioners of "necessities of life" or any significant property interest. They may still use the property and enjoy the profits from it. [Citing Randone at 544, fn. 4.] Concededly, the marketability of the property may be impaired to some degree, but the countervailing interest of the state in an orderly recording and notice system for transactions in real property makes imperative notice to buyers of property of the pending cause of action concerning that property.

In Raigoza v. Sperl, 34 Cal. App.3d 560, 110 Cal. Rptr. 296 (1973), the court of appeal upheld the procedure for the postjudgment garnishment of wages against the claim that notice and hearing on the amount of the exemption was required before levy. The court continued:

> To characterize levies of execution as a "taking" is nonproductive. Without doubt, a levy of execution involves a "taking" in the sense that the debtor is deprived of an interest in something of value against his will. The focus, however, must be on the "process" and here the question is simple: Is it consistent with due process to require the judgment debtor to apply for and prove the right to an exemption after seizure, rather than to insist that the creditor prove in a pre-seizure hearing that arguably exempt property is subject to levy?

The court concluded that the former procedure is consistent with due process since wage exemptions are a matter of "legislative choice" rather than constitutionally protected rights such as freedom of speech

and "[i]t is eminently reasonable to place the burden of applying for and proving that wages are exempt on the debtor, who knows best what is 'necessary for the use' of his family. . . . Surely he is in a better position to prove his need for the garnished wages, than the creditor is to disprove it." It should be noted, however, that this logic would not apply to exemptions which by statute are automatically exempt; apparently the court believes that it is for the Legislature to determine which exemptions are automatic and which must claimed. The California Supreme Court denied a hearing in Raigoza (Dec. 5, 1973).

Similarly, in Phillips v. Bartholomie, 46 Cal. App.3d 346, ___ Cal. Rptr. ___ (1975), the court of appeal rejected the contention that the judgment debtor was entitled to a hearing to determine whether the debtor's checking account was exempt before it was levied upon. In this case the money was derived from Social Security, AFDC, county welfare, and veteran's benefits--all of which are not subject to execution. The court followed Raigoza by holding that it is reasonable to require the debtor to claim the exemptions.

Finally, in In re Marriage of Crookshanks, 41 Cal. App.3d 475, 116 Cal. Rptr. 10 (1974), the court of appeal answered a constitutional challenge to the issuance of a writ of execution to enforce court-ordered child support by stating broadly that the

> Sniadach-Randone rationale is inapplicable to a California writ of execution.
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> Sniadach and Randone, relying upon the proposition that no person may be deprived of a substantial property right, including the right of immediate possession, without due process of law, require notice to the debtor and a hearing as a prerequisite to the issuance of a writ of attachment or garnishment except in special circumstances. The hearing must prima facie establish an obligation and its nonpayment. In the situation of a writ of execution,

> the judgment upon which it is issued establishes the obligation of the debtor. The judgment itself was rendered in a proceeding in which the debtor had an opportunity to be heard. In the situation of a writ of execution, the debtor is afforded ample legal protection on the issue of payment since Code of Civil Procedure Section 675 gives him the right to insist upon a satisfaction of judgment being filed and recorded on the register of actions as he makes his payment. . . . No writ of execution can issue on a satisfied judgment.
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> Appellant seeks to avoid the inevitable consequences of the California statutory scheme by arguing that in some circumstances equitable considerations may prevent the enforcement of a valid unpaid judgment. The argument fails since the Sniadach-Randone rule requires only a prima facie and not conclusive showing as a prerequisite to the issuance of a writ. While equitable considerations may be pertinent in a motion to quash a writ of execution, the possibility that they may exist does not detract from the requisite prima facie case.

Due Process Rights of Third Persons

The decisions just reviewed bear only obliquely on the question whether the existing California levy procedures and third-party claim procedure are constitutional. We have found no decisions that discuss the constitutionality of such procedures in the light of Sniadach and Randone. The most obvious distinguishing feature of most of the leading cases just discussed is that they involved prejudgment remedies against a defendant--we are primarily concerned with postjudgment procedures to protect the interests of third persons. If the plaintiff in these prejudgment cases shows the probable validity of his claim against the defendant before levy, he goes a long way toward satisfying the constitutional requirements. But probable validity of the claim is of no concern after judgment and is never of concern so far as third persons are concerned. In the case of third persons, the issue is the respective interests of the debtor and third person in the property sought to be levied upon. Of course, this same issue exists prior to judgment, but none of the cases reviewed supra considered it, probably because it was eclipsed by the probable validity issue. In any event, it is elementary that the creditor cannot apply the property of the third person to the satisfaction of the debtor's obligation.

Considered in terms of some sweeping statements in Fuentes and Randone, it would appear that the levy and third-party claim procedures are unconstitutional since property is taken without prior notice and an opportunity for a hearing. However, there are broad statements in Mitchell, Laigoza, and Marriage of Crookshanks that support the present scheme contemplating postlevy determination of interests in property levied upon.

The problem becomes more complex as we attempt to apply the constitutional principles to the various factual situations that may arise where a judgment creditor seeks to enforce his money judgment by a writ of execution. Tangible personal property sought to be levied upon may be in the possession of the creditor or the levying officer, the debtor, a third person having no interest therein, or a third person claiming an interest. (Intangible personal property is by its very nature not so mobile since the statutes assign a situs for the purpose of levy). The location of the property is a useful starting point since we may rely on the hoary presumption that possession of personal property by a debtor indicates ownership. (See Killey v. Scannell, 12 Cal. 73 (1859); Adams v. Department of Motor Vehicles, supra; and the adage "possession is nine-tenths of the law" or "possession is a good title where no better title appears.") Relying on this presumption, it would be permissible to levy on property in the hands of the debtor without any prior hearing on its ownership. Where property is in the hands of the creditor, he should be in a position to know the nature of its title. Where property is in the hands of a third person, under our levy procedures, the third person does not have to relinquish possession of the property if he claims an interest in it. Intangibles levied upon by notice to the obligor present no problem where the third person owes money only to the debtor since he can protect his interests when served with notice.

This simple scheme is complicated by several things: First, ownership of property may be mixed so that property in the possession of the debtor is owned in part by someone else, property in the possession of

the third person may belong only partly to the debtor, and, worst of all, property belonging jointly to the debtor and the third person may be in the possession of a "fourth person" (e.g., a joint safe deposit box). Similar problems also arise where an obligor owes money both to the debtor and another third person (e.g., joint bank account). Second, property owned entirely by one person may be in the possession of another (e.g., goods on consignment). Third, recording systems (e.g., security interests), registration of ownership (e.g., motor vehicles), and obvious labels of ownership affixed to items of property (e.g., leased office equipment) raise the problem of actual or presumed knowledge on the part of the judgment creditor of the third person's interest. Fourth, existing law permits levy in situations where, despite possession or recorded title indicating otherwise, the debtor's interest in the property is asserted by the creditor. Similar problems occur with regard to fraudulent transfers and transfers of property subject to an attachment or judgment lien.

The creditor is interested in satisfying his judgment without further delay. Hence, he seeks to levy on property which he believes is the debtor's or in which the debtor has an interest as quickly as possible. Frequently, where a creditor has some doubt as to the nature of the title to the property, he prefers to levy first and ask questions later even though this may leave him open to an action for wrongful execution. (There is a resort to an undertaking under current law only where a bank account or safe deposit box not wholly in the name of the judgment debtor is levied upon; this differs from attachment where there is always an undertaking to which either the defendant or a third person may resort for wrongful attachment damages.) Most creditors probably prefer to let third parties raise questions of title after levy rather than determine title before levy. It is also true in this situation, as in the exemption procedure upheld in Raigoza and Phillips, that the facts are known best by the debtor and third person. Consequently, the creditor would prefer to rely on the presumption that possession indicates title where the property is in the hands of the debtor.

The third person is interested in protecting his rights in any property that the creditor might seek to apply to the satisfaction of his judgment against the debtor. Of course, if property is sold, the third person does not lose his interest, but he would still prefer to avoid the trouble of later proving his title and risking the loss or deterioration of the property. The third person would probably prefer that the creditor be forced to act more carefully in levying property in order to avoid situations where the third person has to make a claim. Hence, the third person would prefer that the creditor have the burden of showing at a prelevy hearing that the property belongs to the debtor or at least that there is a probability that the property is the debtor's. The third person's interest in a prelevy determination of title (or at least notice and a right to a prompt hearing) is more constitutionally significant where he depends upon its use by the debtor or his own use for his income and where the levy interferes with the third person's use or possession.

The debtor is interested in having the judgment satisfied with as little burden, expense, and disruption as possible and with the most efficient application of his property. The debtor will want to have an opportunity to show that property is his where it is claimed by the third person. But the debtor will also want to avoid the costs involved in a procedure requiring a prelevy hearing to determine title. Where the property is jointly owned or where the debtor's property is subject to a security interest, the debtor has an interest in seeing that his interest in the property is applied to the satisfaction of the judgment, even if this puts a burden on the joint owner or secured party.

The preceding discussion indicates three major alternatives:

1. Continue existing procedure. This alternative assumes that, all things considered, existing levy and third party claims procedures are constitutional, fair, and practical. It permits the creditor to levy on property he can find, despite indications that it belongs to a third person and in the extreme case where the creditor is claiming by his

levy that the property is the debtor's despite the fact that it is registered in the name of another person and in his possession or under his control. This alternative relies on the assumption that most creditors will avoid levying on property where there is substantial doubt that it is the debtor's or that the debtor has some interest in it. Reliance is placed on liablility for wrongful execution to inhibit improper levies and on the summary procedure available to third parties to prove their interest in property levied upon. This approach finds support in Mitchell, North Georgia Finishing, Raigoza, Phillips, and Empfield. The restraint of the creditor's liablility for a wrongful levy could be increased by requiring an undertaking in every case as a condition to issuance of a writ to cover liability to any person whose property is wrongfully levied upon. If the creditor has doubts about the property and cannot get a satisfactory answer from the debtor or the third person, he may proceed by way of an examination of the third person and the debtor or, where the third person claims an interest adverse to the debtor, by a creditor's suit. Where property is jointly owned, it is assumed that the debtor's interest in seeing that his property goes toward the satisfaction of the judgment and the creditor's interest in collecting the debtor's property interest outweigh the third person's interest in avoiding the inconvenience of a levy on the property or of having to make a claim. Neither the levy or the sale deprives the third person of his interest. In most cases levy does not deprive the third person of use since if the property is in the debtor's possession the third person is not using it, if it is in the third person's possession he can retain possession, and if it is a bank account or safe deposit box or other property in the possession or under control of some "fourth person" the creditor gives an undertaking to compensate the third person for damages caused by the taking. In any event the third person has an early opportunity to seek a hearing or to release the property from levy by giving a bond.

2. Prelevy hearing in every case. This alternative assumes that any levy is a taking within the purview of the due process clause and that the constitution requires a prelevy hearing to make at least a preliminary determination of title. A hearing held on notice in every case would be burdensome and impractical; an ex parte hearing should suffice in most cases. This alternative is supported by some general statements in Fuentes and Randone. Of course, if only an ex parte hearing is held, the third person's property could still be levied upon where the creditor does not have sufficient information or is unscrupulous. Nor is a noticed hearing a complete protection because the notice may not reach the third person, the persons notified may not appear, and the persons who may have an interest in property may not be known to the creditor. A more flexible approach would be to give the court authority to decide whether the writ may be issued after an ex parte hearing or only after a noticed hearing. This alternative could also be supplemented by the requirement that the creditor give an undertaking in every case to cover damages for any wrongful levy that may occur.

3. Prelevy hearing only where reason to believe third person has interest or where interest is registered or recorded in third person's name. This alternative recognizes the impracticality of having a prelevy hearing in every case but also anticipates that there may be a due process objection to a procedure permitting the creditor to use the force of the state to levy on property where there is reason to believe that a third person has an interest in the property. Thus, this alternative preserves the traditional presumption that property in the possession of the debtor is his but makes clear that the presumption is easily rebutted by a reason to believe otherwise or registered or recorded ownership in another. It would also have the effect of putting the initial burden on the creditor to show the extent of the debtor's interest in the property. For example, in the case of a joint bank account, the creditor would have to show at an ex parte or noticed hearing the

extent of the debtor's interest. It may be objected that the creditor will not be able to show at an ex parte hearing the interest of the debtor in the account or the property in the safe deposit box, leading to the necessity of a noticed hearing with notice sent to the joint account holder. This in turn would permit the debtor the third person to transfer the funds before the hearing. The court could be given authority to grant a restraining order to protect the property from transfer or dissipation in appropriate circu stances, but it should be noted that this would require an additional ex parte hearing before the noticed hearing. An automatic restraining order would, in certain cases, defeat the purpose of the hearing procedure since the third person would be prevented from using his property (e.g., a bank account) just as if it had been levied upon in the first place. The staff believes that this alternative becomes needlessly complex if a hearing on notice is required in every case where there is reason to believe a third person has an interest. Like the other alternatives, this could be combined with a provision requiring the creditor to give an undertaking indemnifying third persons.

Conclusion

The staff generally favors the existing procedure with a few modifications, if the Commisssion thinks they are necessary, along the lines of those suggested in the third alternative just discussed. (In addition, related changes should be made, such as refining the procedure for levy on deposit accounts so that only a certain amount less than the entire account could be levied upon.) This procedure would have the following features:

(1) An ex parte hearing before the court and notice of levy to the third person (or, if the court so orders, a hearing on notice) would be required in the following special cases:

(a) Where the creditor seeks to levy upon property [including real property?] that is recorded or registered in the name of a third person but is claimed by the creditor to be property of the debtor to some extent.

(b) Where the creditor seeks to levy upon property that is no longer owned by the debtor, but was subject to an attachment lien [or judgment lien?] prior to being transferred.

(c) Where the creditor seeks to levy upon property that the creditor believes or has reason to believe is jointly owned by the debtor and some third person but is in the possession or under the control of some other third person (e.g., bank account, safe deposit box).

(2) Where the creditor seeks to levy upon property in the debtor's possession or under his control that the creditor believes or has reason to believe is jointly owned by the debtor and some third person or is subject to a lien or security interest, the creditor must give notice of the levy to the third person promptly after levy. This affords the third person the opportunity for an "early" hearing, but no hearing is required because the third person's possession or use of the property is probably not being disturbed.

(3) In any other situation where the property is in the debtor's possession or under his control, the creditor would be able to levy on such property without any prior hearing. This principle is based on the presumption that property in the debtor's possession is his and that if it is not, the taking is de minimus insofar as the third person is concerned.

(4) In any other situation where the property is in the possession or under the control of a third person, the creditor would be able to levy on such property without any prior hearing. This is based on the assumption that the third person can look out for his own interests in such cases. (This fourth principle could be made paramount over exceptions (a) and (b) under the first principle.)

The creditor could be required by statute or by the court to give an undertaking indemnifying third persons in every case or in any case where an application to the court is required.

The foregoing discussion is already fairly complex. Hence, we only note the possibility of redrafting the already complex and detailed levy statutes to specifically prescribe the proper procedure to be followed for obtaining a writ to levy on a given type of property depending on the nature of its title and by whom it is possessed or controlled.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

Memorandum 75-69

EXHIBIT I

[Draft of §§ 706.010-706.440
Third-Party Claims Procedures]

CHAPTER 6. THIRD-PARTY CLAIMS; UNDERTAKINGS

Aticle 1. General Provisions

§ 706.010. Application of definitions; definitions

706.010. (a) Unless the provision or context otherwise requires, the definitions provided in this section govern the construction of this chapter.

(b) "Secured party" means a person holding a perfected nonpossessory security interest under Division 9 (commencing with Section 9101) of the Commercial Code.

(c) "Third person" includes both an unsecured third person and a secured party.

Comment. Section 706.010 defines certain terms as they are used in this chapter. The definition of "secured party" as one holding a perfected security interest reflects the substitution of secured transactions for the former security devices of conditional sales and chattel mortgages referred to in former Section 689b. See Com. Code §§ 1201(37), 9101 et seq.

The general term "third person" reflects the use in this article of the same procedures by both secured and unsecured third persons. Formerly, unsecured third persons made their claims under one section (former Section 689) and secured parties made their claims under another (former Section 689b).

405591

§ 706.020. Liability of levying officer

706.020. The levying officer is not liable for damages to the judgment creditor or to any third person for any action taken in accordance with the provisions of this chapter.

Comment. Section 706.020 is based on the second sentence of the sixth paragraph of former Section 689 and the third sentence of subdivision (9) of former Section 689b.

Note. We have preserved this section here in this form as a temporary measure. We have some doubt whether the provision is necessary and, if it is, we may suggest that it be generalized so that it applies throughout this title.

405592

§ 706.030. General provisions relating to undertaking

706.030. The provisions of Article 1 (commencing with Section 489.010) of Chapter 9 of Title 6.5 apply to any undertaking given or sought to be given under this chapter.

Comment. Section 706.030 incorporates by reference the general provisions relating to undertakings in attachment proceedings.

404978

§ 706.040. Third-party claims

706.040. Where a warrant is issued by the State of California, or a department or agency thereof, pursuant to Section 1785 of the Unemployment Insurance Code or Section 6776, 7831, 9001, 10111, 18906, 26191, 30341, or 32365 of the Revenue and Taxation Code, for the collection of

a tax liability owed to the state, a department or agency thereof, the procedures provided by this chapter are applicable to third-party claims, and the proceedings provided may be held by the superior court of the county, or city and county, in which the property levied upon is located.

Comment. Section 706.040 continues the substance of former Section 689d.

405593

Article 2. Third-Party Claims

§ 706.110. Manner of making third-party claims

706.110. A third person may claim an interest in any personal property levied upon under a writ of execution by serving upon the levying officer a verified written claim, together with a copy thereof, which contains all of the following:

(a) A description of the interest claimed including a statement of the facts upon which the interest is based.

(b) A statement of the reasonable value of the interest claimed or, in the case of a security interest, a statement of the total amount due to the secured party under the security agreement with interest to date of tender.

(c) The address of the third person in this state to which notice may be mailed.

Comment. Section 706.110 is based on part of the first paragraph of former Section 689 and the first sentence of subdivision (2) of former Section 689b. Section 706.110 permits any person claiming an interest in the personal property levied upon to use the procedure provided by this chapter. Under former Section 689 the claimant had to show title and right to possession. See Palmquist v. Palmquist, 228 Cal. App.2d 789, 39 Cal. Rptr. 871 (1964)(attaching creditor could not use third party claim procedure).

Section 706.110 uses the terminology relating to secured transactions which has replaced terms such as chattel mortgage and conditional sale. Hence, "seller or mortgagee' in former Section 689b(2) is now "secured party." See Section 706.010; Com. Code §§ 1201(37), 9101 et seq. Subdivision (b) requires the secured party to state in his claim the total amount due whereas subdivision (2) of former Section 689b called for a statement of amounts due or to accrue under the contract or mortgage. This change reflects the policy that the secured party should be able to claim only what is due, not what is to accrue. However, if the security agreement contains an acceleration clause which comes into effect when levy occurs, the entire amount will be due under this section. See also Section 706.150(b) and Comment.

Note. Under existing law and this redraft the creditor has the option of either giving an undertaking or a cash deposit to maintain the levy. It has been suggested that the cash deposit is unfair to the third person since in effect it forces him to sell his interest. For now we have continued this relationship between the parties since the third person does not have to accept the deposit if he never makes a claim under this procedure (unless he receives a demand for a claim under Article 4) and in any event the third person may release the property from levy by giving an undertaking under Article 5. It could be provided that the third person may state in his claim that he will not accept a cash deposit under Section 706.140--this would force the creditor to permit release of the property or to give an undertaking but would not permit the forced sale of the third person's interest under Section 706.140.

405594

§ 706.120. Demand to judgment creditor for undertaking or deposit

706.120. (a) Not later than five days after service upon him of the claim provided in Section 706.110, the levying officer mail to the judgment creditor both of the following:

(1) A copy of the third-party claim.

(2) A demand for either the amount of the value of the interest claimed plus interest due to the date of tender or an undertaking as provided in Section 706.170.

(b) The officer may send the demand notwithstanding any defect, informality, or insufficiency of such claim.

Comment. Subdivision (a) of Section 706.120 continues portions of the first paragraph of former Section 689 and subdivision (3) of former Section 689b. See also Comment to Section 706.110. The alternative of giving an undertaking or making a deposit found in subdivision (3) of former Section 689b is continued and expanded to apply to all third-party claims. The creditor may, of course, deposit money in lieu of an undertaking pursuant to Section 1054a.

Subdivision (b) continues the substance of the first sentence of the sixth paragraph of former Section 689 and the second sentence of subdivision (2) of former Section 689b.

405595

§ 706.130. Judgment creditor's undertaking or deposit; release of levy

706.130. (a) Not later than 10 days after a demand is sent pursuant to Section 706.120, the judgment creditor shall deposit the amount demanded or file an undertaking pursuant to Section 706.170.

(b) If the judgment creditor has not complied with subdivision (a) within 10 days after the levying officer sends the demand under Section 706.120, the levying officer shall release the property unless otherwise ordered by the court pursuant to Section 706.240.

Comment. Section 706.130 continues the substance of a portion of the first paragraph of former Section 689 and subdivision (4) of former Section 689b. However, Section 706.130 increases the time within which the judgment creditor must either give an undertaking or make a deposit from five to 10 days.

405596

§ 706.140. Payment to third person

706.140. (a) Within five days after the levying officer receives any deposit under Section 706.130, he shall tender or pay it to the third person. If the deposit is made by check, the levying officer shall be allowed a reasonable time for the check to clear.

(b) If the tender is accepted, the entire interest of the third person in the property levied upon for which payment is made shall pass to the judgment creditor making the payment.

(c) If the tender is refused, the amount thereof shall be deposited with the county treasurer, payable to the order of the third person.

Comment. Section 706.140 is based on subdivisions (5)-(7) of former Section 689b; however, this section now permits the judgment creditor to acquire the interest of both an unsecured third person as well as a secured party. If the third person does not want to sell his interest in the property to the judgment creditor, he may give an undertaking to release the property pursuant to Article 5 (commencing with Section 706.410). See Section 706.150.

§ 706.150. Delay of sale until deposit or undertaking; interest of third person in property sold

706.150. (a) If a third-party claim is made pursuant to Section 706.110 prior to sale under execution, the property described in the claim shall not be sold without the written consent of the third person until a payment or deposit covering the third-party claim is made pursuant to subdivision (b) or (c) of Section 706.140 or the undertaking provided by Section 706.170 is given. After such payment or deposit is made or undertaking is given, the officer shall execute the writ in the manner provided by law unless the third person gives an undertaking to release the property as provided in Article 5 (commencing with Section 706.410). Property shall be sold free of all liens or claims of the third person for which a payment or deposit is made or undertaking is given.

(b) If no third-party claim is made pursuant to Section 706.110 prior to sale under execution, the property sold remains subject to the interest of any third person except as otherwise provided by Article 4 (commencing with Section 706.310).

Comment. Subdivision (a) of Section 706.150 is based on the seventh paragraph of former Section 689 and parts of subdivisions (8) and (9) of former Section 689b. But see Section 706.240. The last sentence of subdivision (a) makes clear that property is sold free of all liens or claims for which a payment or deposit is made or undertaking is given. However, where the interest of a secured party has not fully

accrued--e.g., where there is no acceleration clause in the security agreement and, hence, the interest is not paid off completely--his interest in the collateral will continue. Moreover, a third person need not generally press his claim immediately if he does not choose to. Subdivision (b) makes clear that, if no claim is presented before sale, the property is sold subject to the third person's interest unless the judgment creditor has resorted to the Article 4 procedure. See Section 706.310 et seq.

405598

§ 706.160. Disposition of released property when judgment debtor cannot be found

706.160. When property is released either because the judgment creditor fails to make a deposit or furnish and maintain a sufficient undertaking or because the third person provides a sufficient undertaking pursuant to Article 5 (commencing with Section 706.410) and the levying officer is unable to find the judgment debtor to deliver the property to him, the levying officer shall notify the judgment debtor in writing at his last known address. If the judgment debtor fails to demand the property from the levying officer within 10 days thereafter, the levying officer shall deliver the property to the third person.

Comment. Section 706.160 continues the substance of former Section 689.5.

405599

§ 706.170. Judgment creditor's undertaking; reliance on registered ownership

706.170. (a) Where the judgment creditor provides an undertaking in response to the demand made pursuant to Section 706.120, the under-

taking shall be made in favor of the third person in an amount equal to double the value of the interest claimed by such third person unless the third person agrees in writing to a lesser amount and shall indemnify the third person against any loss, liability, damages, costs, and attorney's fees by reason of such levy or its enforcement.

(b) When the property levied upon is required by law to be registered or recorded in the name of the owner and it appears that at the time of the levy the judgment debtor was the registered or record owner of such property and the judgment creditor caused the levy to be made and maintained in good faith and in reliance upon such registered or recorded ownership, there shall be no liability on the undertaking to the third person by the judgment creditor, his sureties, or the levying officer for the levy itself.

Comment. Section 706.170 continues and combines the provisions regarding undertakings by the creditor under the first and second paragraphs of former Section 689 and subdivision (9) of former Section 689b. It should be noted that, where levy has been made upon a good faith reliance upon the registered or recorded ownership, there is no liability for the levy; but, after the third person makes a proper claim, his interest must be recognized and a failure to deal properly with such interest may result in liability to him. For provisions relating to undertakings generally, see Section 706.030. The judgment creditor is not required by this section as he was under former Section 689b (9) to claim that the "sales contract or mortgage is void or invalid" as a condition of giving the undertaking.

405600

Article 3. Hearing on Third-Party Claims

§ 706.210. Application for hearing; jurisdiction; stay

706.210. (a) Not later than 15 days after the delivery of the third-party claim to the levying officer, whether or not an undertaking is given or a deposit is made pursuant to Section 706.130, either the judgment creditor or the third person may request a hearing in the court from which the writ issued to determine the proper disposition of the property that is the subject of the claim.

(b) The court from which the writ issued has original jurisdiction and shall set the matter for hearing within 20 days from the filing of the request. The court may continue the matter for good cause shown.

Comment. Subdivision (a) of Section 706.210 continues the substance of the first two sentences of the eighth paragraph of former Section 689 and the first two sentences of subdivision (10) of former Section 689b. Subdivision (b) continues the substance of the third and fifth sentences of the eighth paragraph of former Section 689 and the second and fourth sentences of subdivision (10) of former Section 689b.

405601

§ 706.220. Notice of hearing

706.220. Not less than 10 days before the day set for the hearing, the court clerk shall mail notice of the time and place of the hearing to the judgment creditor, the levying officer, the judgment debtor, and the third person. The notice shall state that the purpose of the hearing is to determine the proper disposition of the property which is the subject of the third-party claim.

Comment. Section 706.220 is based on the substance of the fourth sentence of the eighth paragraph of Section 689. See also the second sentence of subdivision (10) of former Section 689b. Section 706.220, however, provides for notice by mail. See Section 702.150 (manner of service). By requiring notice to be sent to the judgment debtor, this section avoids the problem of misapplication of funds that could occur under former law. See Rubin v. Barasch, 275 Cal. App.2d 835, 80 Cal. Rptr. 337 (1969).

405602

§ 706.230. Pleadings; burden of proof; dismissal

706.230. (a) The levying officer shall file the third-party claim delivered to him under Section 706.110 with the court. The third-party claim constitutes the pleading of the third person, subject to the power of the court to permit an amendment in the interest of justice. The claim shall be deemed controverted by the judgment creditor.

(b) Whenever the request for the hearing is made by the third person, neither the request nor the proceedings pursuant thereto may be dismissed without the consent of the judgment creditor.

(c) At the hearing, the third person has the burden of proof as to the nature and extent of his interest.

Comment. Subdivision (a) continues the substance of the eleventh sentence of the eighth paragraph of former Section 689. Subdivision (b) continues the substance of the sixth sentence of that paragraph. Subdivision (c) continues the substance of the tenth sentence of that paragraph. See also the second sentence of subdivision (10) of former Section 689b.

405603

§ 706.240. Sale of perishable property; stay of execution

706.240. (a) Notwithstanding Section 706.150, the court for good cause shown by the judgment creditor, the judgment debtor, or the third person on ex parte application or if the court so orders, on application by noticed motion:

(1) May order the sale of any perishable property held by the levying officer. The proceeds of such sale shall be deposited with the court until the proceedings under this article are concluded.

(2) May stay the release of the property or stay any sale under execution or restrain any transfer or other disposition of the property involved until these or other proceedings are concluded.

(b) The orders made pursuant to subdivision (a) may be modified or vacated by the court at any time prior to the termination of such proceedings upon such terms as may be just.

Comment. Section 706.240 continues the substance of the seventh, eighth, and ninth sentences of the eighth paragraph of former Section 689. See also the second sentence of subdivision (10) of former Section 689b.

405604

§ 706.250. Jury trial

706.250. [Nothing in this article shall be construed to deprive any person of the right to a jury trial in any case where, by the Constitution, such right is given, but a jury trial shall be waived in any such case in a like manner as in the trial of an action.]

Comment. Section 706.250 is substantively identical to the twelfth sentence of the eighth paragraph of former Section 689. See also the second sentence of subdivision (10) of former Section 689b.

Note. The staff thinks this section is unnecessary.

405605

§ 706.260. Disposition of property after hearing

706.260. At the conclusion of the hearing, the court shall determine the interests of the parties and shall order such disposition of the property, and the proceeds of any property, as it deems proper. The order is conclusive between the parties to the proceeding.

Comment. Section 706.260 continues the substance of the fourteenth and fifteenth sentences of the eighth paragraph of former Section 689 and the third sentence of subdivision (10) of former Section 689b. Of course, the proper disposition depends on the interests determined at the hearing. For example, if the third person is found to be the sole owner he would be entitled to possession; if the third person has a lien, he would normally be entitled to a share of the proceeds of sale.

405412

§ 706.270. Findings

706.270. No findings are required in any proceedings under this article.

Comment. Section 706.270 continues the rule under the thirteenth sentence of the eighth paragraph of former Section 689. See also the second sentence of subdivision (10) of former Section 689.

405413

§ 706.280. Appeal

706.280. An appeal may be taken from any judgment determining the interests of the parties under Section 706.260 in the manner provided for appeals from the court in which the proceeding is had.

Comment. Section 706.280 continues the rule under the seventeenth sentence of the eighth paragraph of former Section 689.

405414

§ 706.290. Relevy; additional writs

706.290. If property has been released pursuant to Section 706.130 and the final judgment is in favor of the judgment creditor, the levying officer upon receipt of instructions from the judgment creditor shall levy again upon the property if the writ under which the original levy was made is still in his hands; or, if the writ has been returned, another writ may be issued on which the levying officer may levy upon the property.

Comment. Section 706.290 continues the substance of the sixteenth sentence of the eighth paragraph of former Section 689 and the fifth sentence of subdivision (10) of former Section 689b.

405415

Article 4. Judgment Creditor's Demand for Third-Party Claim

§ 706.310. Judgment creditor's demand for third-party claim

706.310. (a) Upon receipt of the judgment creditor's written request, the levying officer shall serve on any third person a written demand that the third person make a claim as provided in Section 706.110.

(b) If the third person does not serve a third-party claim within 30 days after the service of the demand, the third person shall be deemed to have waived any interest he may have in the property levied upon.

Comment. Section 706.310 is based on a procedure provided under subdivision (8) of former Section 689b by which a judgment creditor may demand that a third person file his claim or waive any interest in the property levied upon. It should be noted that this is a complete waiver of any interest. The third person must claim his interest in the property even though it is contingent or, in the case of a security interest, there are no amounts currently due. Subdivision (a) clarifies prior law by providing that the levying officer serves the demand for a third-party claim pursuant to the judgment creditor's request; under former law, it was unclear how the procedure was instigated.

405416

§ 706.320. Service of demand for claim

706.320. The demand for a third-party claim shall be personally served in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5. [The demand may be served by the levying officer or for him by any other levying officer whose office is closer to the place of service. The fees and mileage of the latter shall be paid out of the prepaid fees in the possession of the levying officer.]

Comment. Section 706.320 makes clear that the demand for a third-party claim must be served in the same manner as a summons and complaint. [The second and third sentences of this section continue the substance of the second sentence of subdivision (8) of former Section 689b.]

405417

Article 5. Third-Party Undertaking

to Release Property

§ 706.410. Third-party undertaking to obtain release of property

706.410. Where personal property has been levied upon under a writ issued on a judgment for the payment of money, any third person may give an undertaking, as provided in Section 706.420, to obtain the release of the personal property described in the undertaking from the lien and levy of execution.

Comment. Section 706.410 continues the substance of former Section 710b. Although Section 706.410 does not specifically require that the third person be a claimant to the property, such is the practical result since, if it is determined that the judgment debtor has any interest in the property levied upon, the third person and his sureties will be liable to the judgment creditor for the value of such interest. See Section 706.420.

405418

§ 706.420. Contents of undertaking

706.420. (a) The undertaking given pursuant to Section 706.410 shall be in an amount equal to the lesser of the following:

(1) Double the value of the property levied upon.

(2) Double the amount for which the execution was levied.

(3) The amount agreed to in writing by the judgment creditor.

(b) The undertaking shall provide that, if the judgment debtor is finally adjudged to have had an interest in the property levied upon, the third person shall pay in satisfaction of the judgment on which execution was issued a sum equal to the value of the judgment debtor's interest.

Comment. Section 706.420 is based on former Section 710c.

405419

§ 706.430. Filing of undertaking

706.430. The third person shall file the undertaking given pursuant to Section 706.410 in the action and with the court from which the writ under which levy was made was issued. The third person shall serve notice of the filing of the undertaking on the judgment creditor and the levying officer.

Comment. Section 706.430 continues the substance of former Section 711.

Note. Should the judgment debtor receive notice of the undertaking?

405422

§ 706.440. Release by levying officer

706.440. Unless otherwise ordered by the court in which the undertaking given pursuant to Section 706.410 is filed, 10 days after receipt of the notice of the filing of the undertaking the levying officer shall release the personal property described in the undertaking from the lien and levy of execution in the manner provided by Section 488.560.

Comment. Section 706.440 is based on a portion of the seventh paragraph of former Section 689.

Memorandum 75-69

EXHIBIT II

(Code Civ. Proc. §§ 689-689d)

§ 689. [Third party claim: Undertaking: Exception to sureties: Hearing: Court orders: Procedure: Appeal.] If tangible or intangible personal property levied on, whether or not it be in the actual possession of the levying officer, is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out the reasonable value thereof, his title and right to the possession thereof and delivered, together with a copy thereof, to the officer making the levy, such officer must release the property and the levy unless the plaintiff, or the person in whose favor the writ runs, within five days after written demand by such officer, made by registered or certified mail within five days after being served with such verified claim, gives such officer an undertaking executed by at least two good and sufficient sureties, in a sum equal to double the value of the property levied upon.

Such undertaking shall be made in favor of and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such levy or such seizing, taking, collecting, withholding, or sale of such property by such officer; provided, however, that where the property levied upon is required by law to be registered or recorded in the name of the owner and it appears that at the time of the levy the defendant or judgment debtor was the registered or record owner of such property and the plaintiff, or the person in whose favor the writ runs, caused the levy to be made and maintained in good faith, and in reliance upon such registered or record ownership, there shall be no liability thereunder to the third person by the plaintiff, or the person in whose favor the writ runs, or his sureties, or the levying officer.

Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment. If they, or others in their place, fail to justify at the time and place appointed, such officer must release the property and the levy; provided, however, that if no exception is taken within five days after notice of receipt of the undertaking, the third person shall be deemed to have waived any and all objections to the sufficiency of the sureties.

If objection be made to such undertaking, by such third person, on the ground that the amount thereof is not sufficient, or if for any reason it becomes necessary to ascertain the value of the property involved, the property involved may be appraised by one or more disinterested persons, appointed for that purpose by the court in which the action is pending or from which the writ issued, or by a judge thereof, or the court or judge may direct a hearing to determine the value of such property.

If, upon such appraisal or hearing, the court or judge finds that the undertaking given is not sufficient an order shall be made fixing the amount of such undertaking, and within five days thereafter an undertaking in the amount so fixed may be given in the same form and manner and with the same effect as the original.

The officer making the levy may demand and exact the undertaking herein provided for notwithstanding any defect, informality or insufficiency of the verified claim delivered to him. Such officer shall not be liable for damages to any such third person for the levy upon, or the collection, taking, keeping or sale of such property if no claim is delivered as herein provided, nor, in any event, shall such officer be liable for the levy upon, or the holding, release or other disposition of such property in accordance with the provisions of this section.

If such undertaking be given, the levy shall continue and such officer shall retain any property in his possession for the purposes of the levy under the writ; provided, however, that if an undertaking be given under the provisions of Section 710b of this code, such property and the levy shall be released.

Whenever a verified third party claim is delivered to the officer as herein provided, upon levy of execution or attachment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining title to the property in question. Such hearing must be granted by the said court upon petition therefor, which must be filed within 15 days after the delivery of the third party claim to the officer. Such hearing must be had within 20 days from the filing of such petition, unless continued as herein provided. Ten days' notice of such hearing must be given to the officer, to the plaintiff or the person in whose favor the writ runs, and to the third party claimant, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question; provided, that no such notice need to be given to the party filing the

petition. The court may continue the hearing beyond the said 20-day period, but good cause must be shown for any such continuance. Whenever the petition for such hearing is filed by the third party claimant, or by any one or more joint third party claimants, neither such petition nor proceedings pursuant thereto may be dismissed without consent of the plaintiff or the person in whose favor the writ runs. The court may order the sale of any perishable property held by such officer and direct the disposition of the proceeds of such sale. The court may, by order, stay execution sale or forbid the transfer or other disposition of the property involved, until the proceedings for the determination of such title can be commenced and prosecuted to termination, and may require, as a condition of such order, such bond as the court may deem necessary. Such orders may be modified or vacated by the judge granting the same, or by the court in which the proceeding is pending, at any time prior to the termination of such proceedings, upon such terms as may be just. At the hearing had for the purpose of determining title, the third party claimant shall have the burden of the proof. The third party claim delivered to the officer shall be filed by him with the court and shall constitute the pleading of such third party claimant, subject to the power of the court to permit an amendment in the interest of justice, and it shall be deemed controverted by the plaintiff or other person in whose favor the writ runs. Nothing herein contained shall be construed to deprive anybody of the right to a jury trial in any case where, by the Constitution, such right is given, but a jury trial shall be waived in any such case in like manner as in the trial of an action. No findings shall be required in any proceedings under this section. At the conclusion of the hearing the court shall give judgment determining the title to the property in question, which shall be conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have said property levied upon, taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment. In such judgment the court may make all proper orders for the disposition of such property or the proceeds thereof. If the property or levy shall have been released by the officer for want of an undertaking, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake or levy upon the property on such writ if the writ is still in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take or otherwise levy upon such property. An appeal lies from any judgment determining title under this section, such appeal to be taken in the manner provided for appeals from the court in which such proceeding is had. [1872; 1891 ch 32 § 1; 1907 ch 360 § 4; 1925 ch 466 § 1; 1929 ch 341 § 1; 1933 ch 744 § 135; 1935 ch 722 § 15; 1937 ch 577 § 1; 1951 ch 1737 § 107; 1957 ch 422 § 1; 1961 ch 322 § 1.] *Cal Jur 2d Attach § 74, Bonds § 9, Cl & D §§ 13, 20, 23, 43, Cost § 36, Decl R §§ 23, 35, Exec §§ 157, 161; Cal Practice §§ 18:270, 44:25, 51:67, 56:60, 56:301 et seq., 56:310 et seq., 56:320 et seq., 229:1, 302:29; Witkin Procedure 2d pp 441, 450, 1487, 1597, 1614, 1615, 1867, 3252, 3399, 3468, 3469, 3470, 3471, 3472, 3473, 3475, 3476, 3477, 3478, 3479, 3480, 3481, 3482, 3601.*

§ 689.5. [Same: When property delivered to claimant.] Whenever, under Section 689 or 689b of this code a claim has been filed as to property levied on and the plaintiff has failed to furnish or maintain a sufficient undertaking to authorize the levying officer to continue to hold the property and such officer is unable to find the defendant to deliver the property, the levying officers shall notify the defendant in writing at his last known address, and if within ten (10) days thereafter the levying officer is unable to locate the defendant he must return the property to the party filing the third party claim. [1941 ch 1111 § 1; 1947 ch 721 § 1; 1953 ch 1796 § 1.] *Cal Jur 2d Exec § 133; Cal Practice § 56:307; Witkin Procedure 2d pp 3472, 3477.*

§ 689a. [Levy on personal property under contract for purchase or subject to mortgage.] Personal property in possession of the buyer under an executory agreement of sale and property on which there is a chattel mortgage may be taken under attachment or execution issued at the suit of a creditor of the buyer or mortgagor, notwithstanding any provision in the agreement or mortgage for default or forfeiture in case of levy or change of possession. [1921 ch 292 § 1; 1945 ch 1311 § 1; 1953 ch 1796 § 2.] *8 Cal Jur 3d Automobiles § 525; Cal Jur 2d Chat Mtg § 51, Exec §§ 65, 77, Sec Tran § 75; Cal Practice §§ 56:56, 56:60; Witkin Procedure p 1614; Summary p 684.*

§ 689h. [Levy on vehicle or vessel under contract for purchase or subject to mortgage: Procedure.] (1) Where the property levied upon is a vehicle or a vessel required to be registered with the Department of Motor Vehicles, the officer shall forthwith determine from such department the name and address of the legal owner of the vehicle or vessel and shall notify any such legal owner who is not also the registered owner of such vehicle or vessel of the levy by registered mail or certified mail or personal service.

(2) A seller or mortgagee may file with the officer levying on personal property a verified written claim, together with a copy thereof, containing a detailed statement of the sales contract or mortgage and the total amount of sums due or to accrue to him under the contract or mortgage, above setoffs, with interest to date of tender, and also stating therein his address within this state for the purpose of permitting service by mail upon him of any notice in connection with said claim. The officer making the levy may demand and exact the payment or undertaking herein provided for, notwithstanding any defect, informality or insufficiency of the verified claim delivered to him.

(3) Within five days after being served with such verified claim the officer levying on such property must make demand by registered mail or certified mail on the plaintiff or his attorney for the amount of the claimed debt and interest due to date of tender or the delivery to the officer of an undertaking and statement as hereinafter provided, which demand shall include the copy of such claim.

(4) Within five days after receipt by the plaintiff or his attorney of such officer's demand the plaintiff shall deposit with the officer the amount of such debt and interest or deliver the undertaking and statement hereinafter provided, or the levying officer must release the property.

(5) Within five days after receipt by him of such deposit the officer must pay or tender same to the seller or mortgagee; provided, that should such deposit be made by check the officer shall be allowed a reasonable time for check to clear.

(6) If the tender is accepted, all right, title, and interest of the seller or mortgagee in the property levied upon shall pass to the party to the action making the payment.

(7) If the tender is refused, the amount thereof shall be deposited with the county treasurer, payable to the order of the seller or mortgagee.

(8) Until such payment or deposit covering such claim is made, or the undertaking and statement herein provided delivered to the officer, the property cannot be sold under the levy; but when made (and also in case the seller or mortgagee fails to render his claim within 30 days after the personal service upon him of a written demand therefor, which service must be attested by the certificate of the serving officer, filed before the sale with the papers of the action wherein the attachment or execution was issued), then the officer must retain the property, and, in the case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee. Such written demand of the levying officer may be served by him, or for him by any sheriff, marshal, or constable whose office is closer to the place of service, and whose fees and mileage shall be paid out of the prepaid fees in the possession of the levying officer.

(9) When an attachment or execution creditor presents to the officer, within the time allowed from the officer's demand, a verified statement that the sales contract or mortgage is void or invalid for the reasons specified therein, and delivers to the officer a good and sufficient undertaking in double the amount of the indebtedness claimed by the seller or mortgagee or double the value of the personal property as the officer may determine and require, the officer shall retain the property and in case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee.

The undertaking shall be made to the seller or mortgagee and shall indemnify him for the taking of the property against loss, liability, damages, costs and counsel fees. Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment.

If such undertaking be given, such officer shall not be liable for damages to any such claimant for the taking, keeping, or sale of such property in accordance with the provisions of this code.

(10) Whenever a verified claim herein is delivered to the officer as herein provided, upon levy of execution or attachment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the claimant, or any one or more such joint claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the validity of such sales contract or chattel mortgage. Such hearing may be had and taken, and stay of execution or other order made in the same manner as on third party claims under Section 689 of this

code. At the conclusion of the hearing the court shall give judgment determining the validity of the claim under the sales contract or chattel mortgage which shall be conclusive between the claimant and the plaintiff, or other person in whose favor the writ runs. The court in which the action is pending, or which issued such writ, shall have original jurisdiction in all proceedings under this section.

If the property shall have been released by the officer for want of an undertaking or payment, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake the property on such writ, if the writ shall still be in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take such property. [1921 ch 292 § 2; 1925 ch 64 § 1; 1945 ch 1311 § 2; 1947 ch 720 § 1; 1949 ch 373 § 1; 1951 ch 1073 § 1; 1953 ch 1796 § 3; 1955 ch 1401 § 3; 1959 chs 1147 § 1, 1460 § 1; 1961 ch 1194 § 1; 1963 ch 1120 § 1; 1st Ex Sess 1966 ch 61 § 1; 1970 ch 1428 § 1.] *8 Cal Jur 3d Automobiles § 525; Cal Jur 2d Appeal § 36, Auto § 444, Chat Mtg §§ 39, 51, 58, Exec §§ 65, 77, 94, Sec Trans § 52, Sher § 105; Cal Practice §§ 18:127, 56:60, 56:301; Witkin Procedure 2d pp 1614, 3476, 3477, 3478, 3479, 3480; Summary p 684.*

§ 689c. [Application of proceeds of sale.] When the property thus taken is sold under process the officer must apply the proceeds of the sale as follows:

1. To the repayment of the sum paid to the seller or the mortgagee, or deposited to his order, with interest from the date of such payment or deposit.

2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases. [1921 ch 292 § 3; 1949 ch 368 § 1.] *Cal Jur 2d Chat Mtg § 69, Exec §§ 77, 105, 174; Cal Practice §§ 56:60, 56:102; Witkin Procedure 2d p 1614, 3479.*

§ 689d. [Hearing to determine title to property where warrant issued for collection of tax liability.] In cases in which a warrant or notice of levy is issued by the State of California, or a department or agency thereof, pursuant to Section 1755 or 1785 of the Unemployment Insurance Code, or Section 6776, 7881, 9001, 10111, 18906, 26191, 30341 or 32365 of the Revenue and Taxation Code, for the collection of tax liability owed to said State, a department or agency thereof, a hearing, for the purpose of determining title to the property in question as provided in Section 689 of this code, may be held by the superior court of the county, or city and county, in which the property levied upon is located. [1953 ch 1796 § 5; 1959 ch 594 § 5; 1961 ch 72 § 3, ch 1029 § 1; 1971 ch 873 § 1.] *Cal Jur 2d Exec § 130; Cal Practice § 56:303; Witkin Procedure 2d p 3469.*

Memorandum 75-69

EXHIBIT III

[5 B. Witkin, California Procedure, Enforcement of Judgment §§ 104-115 (2d ed. 1971).]

(2) Third Party Claim.

(1) [§104] Nature and Scope of Proceeding.

C.C.P. 689 provides for a *special proceeding, summary* in character, *incidental* to the main action, to determine *title or right to possession of personal property* held by an officer under *attachment* (C.C.P. 549; see *Provisional Remedies*, §215), *execution* (C.C.P. 689; see supra, §71), *claim and delivery* proceedings (C.C.P. 519; see *Provisional Remedies*, §35), or a *warrant for tax liability* owed to the state or a state agency (C.C.P. 689d; see supra, §2).

The proceeding came originally from the Practice Act, but continuous revision has completely changed its character. The numerous amendments make it necessary to scrutinize the older cases with great care to avoid serious misconceptions. (See generally, on the history and nature of the proceeding, *First Nat. Bank v. Kinslow* (1937) 8 C.2d 339, 65 P.2d 796; *Duncan v. Superior Court* (1930) 104 C.A. 218, 285 P. 732; *Arena v. Bank of Italy* (1924) 194 C. 195, 228 P. 441; *Cory v. Cooper* (1931) 117 C.A. 495, 4 P.2d 581; *Peterson v. Groesbeck* (1937) 20 C.A.2d Supp. 753, 64 P.2d 495 [court may determine title against third party claimant who is debtor's trustee in bankruptcy]; *McCoy v. Justice's Court* (1936) 23 C.A.2d 99, 71 P.2d 1115 [remedy available though debtor has transferred property to another]; *Retailers Credit Assn. v. Superior Court* (1937) 19 C.A.2d 457, 65 P.2d 937 [if main action transferred by order changing venue, incidental proceeding on third party claim likewise transferable]; *Nat. Auto. Ins. Co. v. Fraties* (1941) 46 C.A.2d 431, 115 P.2d 997; *Rubin v. Barasch* (1969) 275 C.A.2d 835, 836, 80 C.R. 337, infra, §107 [purpose is to give quick remedy where levy by mistake, and to protect officer]; 9 So. Cal. L. Rev. 348; 11 So. Cal. L. Rev. 16; C.E.B., Rem. Unsec. Cred., p. 263 et seq.; C.E.B., Debt Collection Practice, p. 529 et seq.; 7 Cal Practice 577 et seq.; 9 Am.Jur. P.P. Forms (Rev. ed.) 893 et seq.)

This *summary proceeding* permits a *stranger* to the litigation to have his claim of title determined. It is thus distinguishable from

C.C.P. 720, under which the *judgment creditor* may maintain an *action against a third person* who claims an interest in the debtor's property. (*Retailers' Credit Assn. v. Superior Court*, supra; see infra, §143.) It is also entirely different from the remedy of *release* of the property on bond, under C.C.P. 710b, without determination of title. (See infra, §114.) There are two important limitations on the scope of the proceeding under C.C.P. 689:

(1) By its nature and by express provision it is limited to *personal property*. In *First Nat. Bank v. Kinslow*, supra, 8 C.2d 345, the court pointed out that the remedy of a claimant where real property is sold under execution for another's debt is an action to *quiet title* against the purchaser. The claimant loses nothing by the execution sale itself, for the purchaser only acquires the interest of the judgment debtor, and possession does not change until the period of redemption ends. (See also *Yokohama Specie Bank v. Kitasaki* (1941) 47 C.A.2d 98, 117 P.2d 398.)

(2) The claimant must have title and right to possession; a mere attaching creditor cannot make the claim. (*Palmquist v. Palmquist* (1964) 228 C.A.2d 789, 793, 39 C.R. 871.)

It was formerly held that the remedy was limited to claims of personal property capable of manual delivery, and was unavailable where the levy of attachment or execution was on intangibles by the *garnishment* process. (*Bank of America v. Riggs* (1940) 39 C.A.2d 679, 684, 104 P.2d 125; *Ballagh v. Williams* (1942) 50 C.A.2d 303, 122 P.2d 919 [corporate stock]; *Sunset Realty Co. v. Dadmun* (1939) 34 C.A.2d Supp. 733, 88 P.2d 947.) This rule was abrogated by a 1957 amendment to C.C.P. 689, which makes the procedure available where the levy is on "tangible or intangible personal property . . . whether or not it be in the actual possession of the levying officer."

(2) Procedure.

(aa) [§105] Verified Claim.

The third party makes a *written* claim to the property, *verified* by himself or his agent, setting out its reasonable value and his title and right to possession. (C.C.P. 689; see C.E.B., Rem. Unsec. Cred., p. 264; C.E.B., Debt Collection Practice, p. 530; 7 Cal Practice 580; 9 Am.Jur. P.P. Forms (Rev. ed.) 894 et seq.) The original claim and a copy are *delivered* to the levying officer. (C.C.P. 689.)

No technical form is required, and a claim in the form of an affidavit will be sufficient. (*McCaffey Canning Co. v. Bank of America*

(1930) 109 C.A. 415, 420, 295 P. 43 ["Such a claim, however, is not a pleading, and may frequently have to be drawn by persons unfamiliar with legal jargon . . . in such matters technical niceties should not overshadow the rights of a claimant to legal possession"]; *Duncan v. Standard Acc. Ins. Co.* (1934) 1 C.2d 385, 388, 35 P.2d 523.)

Service on the levying officer may apparently be made at any time before he has sold the property or has otherwise placed himself in a position where it is impossible to deliver the property to the claimant or obtain an indemnity bond from the creditor. (*National Bank v. Finn* (1927) 81 C.A. 317, 337, 253 P. 757.)

(bb) [§106] Bond To Prevent Release.

On delivery of the verified claim to the levying officer (supra, §105) he must release the property and the levy unless the attaching or execution creditor, on demand, furnishes an undertaking to prevent release. (C.C.P. 689; see C.E.B., Rem. Unsec. Cred., p. 266; C.E.B., Debt Collection Practice, p. 532; 7 Cal Practice 582 et seq.; 9 Am.Jur. P.P. Forms (Rev. ed.) 907.) The procedure is as follows:

(1) The officer, within 5 days after being served with the verified claim, makes a written demand by registered or certified mail on such creditor (i.e., "the plaintiff, or the person in whose favor the writ runs"). (For form of demand, see C.E.B., Rem. Unsec. Cred., p. 266; 7 Cal Practice 584; 9 Am.Jur. P.P. Forms (Rev. ed.) 907.)

This provision is strictly construed to require a "written demand" in the ordinary meaning of "a command or authoritative request in written form"; a simple notification of a third party claim is insufficient. Thus, in *Johnston v. Cunningham* (1970) 12 C.A.3d 123, 127, 90 C.R. 487, the constable mailed a copy of the claim to an attaching creditor's attorney, with a covering letter informing the attorney that she was "hereby served" with the claim. Later the constable telephoned the attorney and asked if her client was going to furnish an undertaking, and she replied that none would be furnished because no written demand had been made. The trial judge made a finding of substantial compliance with C.C.P. 689 and ordered release of the attachment. *Held,* reversed; the theory of substantial compliance would abrogate an express statutory provision and give a ministerial officer discretion to deviate from its requirements.

The officer may demand the undertaking (and therefore release the property if it is not given) "notwithstanding *any defect, informal-*

ity or insufficiency of the verified claim delivered to him." (C.C.P. 689.) This last provision, enacted in 1925 and revised in 1929, changed the former law which made the officer's right to demand a bond dependent upon a substantial compliance with the formal requirements of the statute. (See *Areno v. Bank of Italy* (1924) 194 C. 195, 228 P. 441; *Cory v. Cooper* (1931) 117 C.A. 495, 502, 4 P.2d 581.)

(2) The creditor, within 5 days after such demand, gives the undertaking. It is in double the value of the property, with two sureties, and runs in favor of the *third party claimant*, indemnifying him against loss, liability, damages, costs and counsel fees by reason of acts of the levying officer. (For form of undertaking, see C.E.B., Rem. Unsec. Cred., p. 267; C.E.B., Debt Collection Practice, p. 533; 7 Cal Practice 586; 9 Am.Jur. P.P. Forms (Rev. ed.) 909; on deposit in lieu of bond, see *Provisional Remedies*, §4.) However, there is no liability on the undertaking where the property "is required by law to be registered or recorded in the name of the owner and it appears that at the time of the levy the defendant or judgment debtor was the registered or record owner," and the levy was made in good faith in reliance on such registered or record ownership.

Sureties may be compelled to justify as in an undertaking on attachment; but if no exception is taken within 5 days after notice of receipt of the undertaking, objections to them are waived. If objection is raised to the *amount*, or the value of the property is disputed, the court may appoint appraisers or hold a hearing, and, if it finds the amount insufficient, a new undertaking may be given in 5 days.

(3) When an undertaking is given, the officer must hold the property under the levy, unless it is released by undertaking under C.C.P. 710b (infra, §114). If he nevertheless releases the property, he is liable to the creditor. (*Cowsert v. Stewart* (1925) 72 C.A. 255, 236 P. 940.)

(4) If the undertaking is not given, the officer must release "the property and the levy" (i.e., must give up possession of tangible property and release a garnishment of intangible property), and deliver tangible property to the defendant. But if the officer is unable to find the defendant after 10 days' written notice to his last known address, he must return the property to the *third party claimant*. (C.C.P. 689.5.)

(cc) [§107] Hearing.

Delivery of the third party claim to the officer (supra, §105) entitles any of the following parties to a hearing to determine title to the property: "the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants." The right exists regardless of whether or not an undertaking to obtain release (supra, §106) has been given. (C.C.P. 689; see C.E.B., Rem. Unsec. Cred., p. 269; C.E.B., Debt Collection Practice, p. 534; 7 Cal Practice 586 et seq.)

The procedure is set forth in C.C.P. 689 as follows:

(1) A petition must be filed by one of such parties in the court in which the action is pending or from which the writ issued, within 15 days after delivery of the claim to the officer. (See ***Ballagh v. Williams*** (1942) 50 C.A.2d 303, 122 P.2d 919 [time held jurisdictional]; for form of petition, see C.E.B., Rem. Unsec. Cred., p. 270; C.E.B., Debt Collection Practice, p. 535; 7 Cal Practice 589; 9 Am.Jur. P.P. Forms (Rev. ed.) 902.)

(2) The hearing must be had within 20 days from filing of the petition, unless continued by the court for good cause. Notice of hearing (10 days) must be given to the officer, creditor, and third party claimant, or their attorneys (except to the party filing the petition). The notice must specify that the hearing is to determine title. (See ***Rubin v. Barasch*** (1969) 275 C.A.2d 835, 837, 80 C.R. 337 [no notice to debtor required].)

Prior to 1961 there was some reason to believe that a third party claimant, by dismissing his petition on the eleventh day, could defeat the plaintiff's right to a hearing (hearing must be had within 20 days, and on 10 days' notice). A 1961 amendment protected the plaintiff by the following added provision: "Whenever the petition for such hearing is filed by the third party claimant, or by any one or more joint third party claimants, neither such petition nor proceedings pursuant thereto *may be dismissed without consent of the plaintiff* or the person in whose favor the writ runs."

(3) The claim is filed with the court and constitutes the pleading of the third party claimant, subject to the court's power to permit amendment. It is deemed controverted by the creditor.

(4) "Nothing herein contained shall be construed to deprive anybody of the right to a *jury trial* in any case where, by the Constitution,

such right is given, but a jury trial shall be waived in any such case in like manner as in the trial of an action." (See 9 So. Cal. L. Rev. 349.)

(5) The claimant has the burden of proof. (See *Beverly Hills T. & L. v. Western P. etc. Co.* (1951) 330 C.A.2d 298, 302, 12 C.R. 107; 14 Hastings L.J. 69.)

These provisions require ample notice and hearing and fully comply with the constitutional requirement of procedural due process. (*McCoy v. Justice's Court* (1937) 23 C.A.2d 99, 101, 71 P.2d 1115.) But a summary decision without allowing the third party claimant an opportunity to present his case is a probable denial of due process and clearly reversible error. (*Nat. Auto. Ins. Co. v. Fraties* (1941) 46 C.A.2d 431, 115 P.2d 997 [trial judge, outraged at what he thought was a fraudulent transfer, denied claim after listening only to creditor and debtor]; *Johnston v. Cunningham* (1970) 12 C.A.3d 123, 128, 90 C.R. 487 [after levying officer had wrongfully released attachment (supra, §106), judge entered order "allowing" third party claim without taking or considering evidence of title].)

As pointed out above, the judgment debtor is neither a party to the proceedings nor entitled to notice. (*Rubin v. Barasch*, supra.) But he may have a sufficient interest to support *intervention*. Thus, in *Rubin v. Barasch*, supra, Rubin sued Mr. B for $50,000 due on his promissory note, joining Mrs. B and others on a theory of conspiracy to conceal Mr. B's assets. Rubin attached 5 bank accounts in the names of Mr. and Mrs. B. He then dismissed Mrs. B and obtained summary judgment against Mr. B. Before the Rubin action, however, Mr. B sued for divorce and Mrs. B cross-complained; and before summary judgment Mrs. B filed a third party claim for half the attached funds as her separate property. The judge found in her favor, and the third party judgment directed that half be distributed to her and that Rubin's attachment or any future writ of execution would be valid only as to one half. Mr. B, having received no notice of the third party claim or hearing, moved for a new trial or modification, on the ground that the funds were community property and title was in issue in the divorce action. On denial of his motion he appealed. *Held*, order reversed. (a) Since the debtor is not entitled to notice the judgment is not res judicata as between him and the creditor or third party claimant. (b) Nevertheless, Mr. B had a right to intervene in proceedings in which a judgment purported to run against him. (275 C.A.2d 838.) Hence his motion for new trial should have

been granted and the judgment modified to eliminate any reference to the adjudication of claims between Mr. and Mrs. B.

(dd) [§108] Judgment and Incidental Orders.

C.C.P. 689 provides for judgment following the hearing, and for various kinds of orders pending the hearing or in the judgment.

(1) *No findings* are required; the court, at the conclusion of the hearing, renders a "judgment *determining the title* to the property in question, which shall be *conclusive* as to the right of the *plaintiff*, or *other person in whose favor the writ runs*, to have said property levied upon, taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment." (C.C.P. 689; see C.E.B., Civ. Proc. During Trial, p. 581; C.E.B., Civ. Proc. Forms, p. 389; C.E.B., Debt Collection Practice, p. 537; 7 Cal Practice 597; 9 Am.Jur. P.P. Forms (Rev. ed.) 904.)

(2) The successful party, claimant or creditor, is entitled to costs. (See *Exchange Nat. Bank v. Ransom* (1942) 52 C.A.2d 544, 126 P.2d 620 [claimant]; *Maguire v. Corbett* (1953) 119 C.A.2d 244, 252, 259 P.2d 507 [creditor; "Turn about is fair play"].)

(3) During the proceedings the court may make an order staying the execution sale or forbidding transfer or other disposition of the property, and may require a bond as a condition of the order. (See *O'Brien v. Thomas* (1937) 21 C.A.2d Supp. 765, 65 P.2d 1370; 7 Cal Practice 590.) And it may also order the sale of perishable property and direct disposition of the proceeds. (See 9 Am.Jur. P.P. Forms (Rev. ed.) 906.) Such orders may be modified or vacated "upon such terms as may be just" at any time prior to termination of the proceedings. (C.C.P. 689.)

(4) In the judgment the court "may make all proper orders for the disposition of such property or the proceeds thereof." (C.C.P. 689.)

Under the former law, if no undertaking was filed, a hearing was considered futile and could not be compelled. (See *Duncan v. Superior Court* (1930) 104 C.A. 218, 221, 285 P. 732; cf. *Citrus Pack. Co. v. Municipal Court* (1934) 137 C.A. 337, 30 P.2d 534.) Now the hearing may be had although no undertaking was filed (see supra, §107). And, if the creditor is successful but the property was previously released for failure to furnish an undertaking, the officer must *retake* the

property, either on the original writ, or, if it was returned, on an alias writ. (C.C.P. 689.)

(ee) [§109] Review.

It has been held that the statutory scheme ordinarily precludes a motion for new trial. (See *Wilson v. Dunbar* (1939) 36 C.A.2d 144, 97 P.2d 262; *Attack on Judgment in Trial Court*, §22; cf. *Rubin v. Barasch* (1969) 276 C.A.2d 835, 80 C.R. 337, supra, §107 [judgment debtor, not a party to proceeding, may seek intervention by motion for new trial].)

The appropriate method of review is an appeal from the judgment determining title. (C.C.P. 689.) (As to stay pending appeal, see *Fulton v. Webb* (1937) 9 C.2d 726, 72 P.2d 744; *Jensen v. Hugh Evans & Co.* (1939) 13 C.2d 401, 90 P.2d 72; *O'Brien v. Thomas* (1937) 21 C.A.2d Supp. 765, 65 P.2d 1370; *Appeal*, §178.)

(c) Claim of Conditional Seller or Chattel Mortgagee.

(1) [§110] Nature and Scope of Proceeding.

(a) *In General.* Personal property in the possession of the debtor, though subject to a chattel mortgage or the reserved title of a conditional seller, may nevertheless be reached by execution. (U.C.C. 9311; C.C.P. 689a ["notwithstanding any provision in the agreement or mortgage for default or forfeiture in case of levy or change of possession"].) If no *demand for claim* is served on the conditional seller or mortgagee (infra, §111), his rights are not affected when the property is sold on execution; the purchaser at the sale acquires only the debtor's interest in the property (see infra, §116).

However, C.C.P. 689b establishes a special third party claim procedure (infra, §111 et seq.) which allows the conditional seller or mortgagee to assert his claim prior to the sale. The statute, like that governing ordinary third party claims (supra, §104 et seq.), has been continuously revised, and the older cases must be read with caution. (See, dealing with statute prior to 1953, *Casady v. Fry* (1931) 115 C.A. Supp. 777, 6 P.2d 1019; *Kuehn v. Don Carlos* (1936) 5 C.A.2d 25, 41 P.2d 585; *Missouri State Life Ins. Co. v. Gillette* (1932) 215 C. 709, 718, 12 P.2d 955; *Mercantile Acc. Corp. v. Pioneer Credit Ind. Co.* (1932) 124 C.A. 593, 596, 12 P.2d 988; *Security Nat. Bank v. Sartori* (1939) 34 C.A.2d 408, 411, 93 P.2d 863; 21 Cal. L. Rev. 51.)

(b) *Registered Vehicle or Vessel: Notice of Levy.* Ordinarily no notice of levy need be given a mortgagee or conditional seller. But if the property is a "vehicle or vessel required to be registered with the Department of Motor Vehicles," the *levying officer* must "forthwith determine" from the department the name and address of the *legal owner*, and notify any such legal owner (who is not also the registered owner) of the levy by registered or certified mail or personal service. (C.C.P. 689b(1); as to meaning of "legal owner," see Veh.C. 370; 1 *Summary, Sales*, §59; 1 *Summary, Security Transactions in Personal Property*, §50; on registration of vessels with Department of Motor Vehicles, see Veh.C. 9850 et seq.)

(2) Procedure.

(aa) [§111] Verified Claim by Seller or Mortgagee.

(1) *Form and Contents.* The seller or mortgagee may file a verified claim and copy with the levying officer. This must contain "a detailed statement of the sales contract or mortgage and the total amount of sums due or to accrue to him under the contract or mortgage, above set-offs, with interest to date of tender." It must also give the seller's or mortgagee's address for mailed service of notice. (C.C.P. 689b(2); see C.E.B., Rem. Unsec. Cred., p. 276; C.E.B., Debt Collection Practice, p. 540; 7 Cal Practice 357; on officer's right to demand and exact payment or undertaking despite defect in claim, see infra, §112; on third party claim under C.C.P. 689, see supra, §105.)

(2) *Creditor's Demand for Claim.* Although the mortgagee or conditional seller is not required to file a claim (see supra, §110), the judgment creditor can compel him to do so or forgo his interest in the property. Under C.C.P. 689b(8), the creditor may instruct the levying officer to *personally serve* the seller or mortgagee with a *written demand for* a claim. If the seller or mortgagee fails to file his claim within 30 days thereafter, the property may be sold on execution "free of all liens or claims of the seller or mortgagee." (See C.E.B., Rem. Unsec. Cred., pp. 276, 278; C.E.B., Debt Collection Practice, pp. 541, 543; 7 Cal Practice 356; on fees for service of demand and mileage, see Govt.C. 26721, 26746.)

(5b) [§112] Payment or Undertaking by Plaintiff.

The plaintiff creditor may resist the third party claim either by challenging the validity of the sale contract or mortgage and bonding against it or by admitting its validity and paying the amount of the claimed debt and interest. (C.C.P. 689b; see C.E.B., Rem. Unsec. Cred., p. 278 et seq.; C.E.B., Debt Collection Practice, p. 543 et seq.)

(1) *Demand on Officer.* The levying officer, within 5 days after receipt of the claim, must make a *demand* (with copy of the claim) on the *plaintiff* or his attorney, by registered mail, for either *payment* of the amount due, or an *undertaking* to indemnify the seller or mortgagee for the taking of the property. (C.C.P. 689b(3); see C.E.B., Rem. Unsec. Cred., p. 278.) The officer may make the demand and exact the payment (or undertaking) "notwithstanding any defect, informality or insufficiency of the verified claim delivered to him." (C.C.P. 689b(2); on similar provision in C.C.P. 689, see supra, §106.)

(2) *Payment by Plaintiff.* (a) Within 5 days after receipt of the demand the plaintiff must deposit with the officer the amount of the debt and interest, or deliver the undertaking. (C.C.P. 689b(4).) (b) Within 5 days after receipt of the deposit (with reasonable additional time for check to clear) the officer must pay or tender it to the seller or mortgagee. (C.C.P. 689b(5).) (c) If the tender is accepted the interest of the seller or mortgagee passes to the plaintiff. (C.C.P. 689b(6).) (d) If the tender is refused the money is deposited with the county treasurer for the seller or mortgagee. (C.C.P. 689b(7).)

(3) *Statement and Undertaking by Plaintiff.* Instead of paying, the plaintiff creditor may present to the officer, within the 5-day period allowed for payment, a *verified statement* that the sale contract or mortgage "is void or invalid for the reasons specified therein." (C.C.P. 689b(9); see C.E.B., Debt Collection Practice, p. 544; 7 Cal Practice 355.) He must also deliver an *undertaking* in double the amount of the indebtedness claimed by the seller or mortgagee or double the value of the property (as the officer may determine and require). The undertaking is made to the seller or mortgagee, to indemnify him for the taking against loss, liability, damages, costs and counsel fees. Exceptions to the sureties are taken in the same manner as on an attachment bond. (C.C.P. 689b(9); see *Provisional Remedies*, §3.)

If the undertaking is given, the officer may take, retain or sell the property in accordance with the statute, without liability in damages to the third party claimant. (C.C.P. 689b(9).)

(4) *Release of Property Where No Payment or Undertaking.* If the plaintiff fails to pay or give the undertaking within 5 days after receipt of the officer's demand, the officer must release the property. (C.C.P. 689b(4); *Stoehr v. Superior Court* (1948) 87 C.A.2d 850, 197 P.2d 779; see C.C.P. 689.5 [if defendant cannot be found property may be returned to seller or mortgagee].)

(5) *Sale of Property.* After the plaintiff makes or gives the required payment, deposit or undertaking, or if no claim is filed within 30 days after a *demand for a claim* has been served on the seller or mortgagee (see supra, §111), the property is sold on execution in the usual manner, "free of all liens or claims of the seller or mortgagee." (C.C.P. 689b(8).)

(6) *Allocation of Proceeds of Sale.* When the property is sold the officer must apply the proceeds of the sale as follows: (1) repayment, with interest, of the sum paid to or deposited for the seller or mortgagee; (2) distribution of the balance, if any, in manner of proceeds of an ordinary execution sale. (C.C.P. 689c.)

(cc) [§113] Hearing, Judgment and Review.

Delivery of the claim by the seller or mortgagee entitles the claimant or the plaintiff to a *hearing* to determine the validity of the sales contract or chattel mortgage, regardless of whether an undertaking is given. The hearing may be had in the court in which the action is pending or the court which issued the writ. The hearing, judgment, and power to make incidental orders follow the procedure under C.C.P. 689 (supra, §§107, 108). (C.C.P. 689b(10).) And if the plaintiff is successful but the property was previously released for lack of an undertaking or payment, the officer must retake the property on the original or an alias writ. (C.C.P. 689b(10); cf. C.C.P. 689, supra, §108.)

The judgment is appealable either as an order after final judgment or as a final judgment in a special proceeding. (See *Appeal*, §55.) The statement in C.C.P. 689b that the judgment "shall be conclusive between the claimant and the plaintiff" means only that it will be res judicata in any new proceeding. (*Embree Uranium Co. v. Liebel* (1959) 169 C.A.2d 256, 337 P.2d 159.)

The failure of the parties to seek a hearing to determine title does not affect the liability of sureties on the plaintiff's undertaking. This point of first impression was decided in *Commercial Credit Plan v.*

Gomez (1968) 276 C.A.2d Supp. 831, 80 C.R. 554. A sued H and attached his automobile. C Credit, legal owner by virtue of its loan, filed a third party claim. A gave the undertaking under C.C.P. 689b(9), but failed to accompany it with the required verified statement (supra, §112). Neither party asked for a hearing, so the sheriff sold the car. On H's bankruptcy C Credit brought this action against the sureties on A's undertaking. Defendant sureties contended that the third party claimant's failure to seek a hearing to determine the issue of title discharged the sureties. *Held*, the sureties were not discharged. The court pointed out that the creditor (A) could himself have sought a hearing.

(d) [§114] Undertaking To Release Property.

C.C.P. 710b et seq. establish the following procedure by which a third party who claims ownership of personal property levied upon under *execution* may give an undertaking to secure its release:

(1) File an undertaking (serving a copy on the judgment creditor) in the court in which the execution issued, in double the value of the property (but not more than double the amount for which execution was levied). The condition is that, if the property is finally adjudged to belong to the debtor, the third party will pay the judgment creditor. (C.C.P. 710c, 711; see C.E.B., Rem. Unsec. Cred., p. 273, C.E.B., Debt Collection Practice, p. 538; 7 Cal Practice 585; 9 Am.Jur. P.P. Forms (Rev. ed.) 911.)

(2) The judgment creditor may object to the undertaking, and there may be a hearing to justify sureties (C.C.P. 711½, 712, 713) or to determine the value of the property (C.C.P. 712½). If the undertaking is disapproved, a new one may be given. (C.C.P. 712.)

(3) The undertaking becomes effective 10 days after service of the copy on the judgment creditor, or, if objected to, when a sufficient undertaking is given. (C.C.P. 713½.)

Although this proceeding and the third party claim statute (supra, §104) serve different purposes, they may in some instances operate together. Under C.C.P. 689 the third party may prevent a sale merely by filing his claim, unless the creditor gives an undertaking. If the creditor gives the undertaking under C.C.P. 689 in favor of the *third party claimant*, the officer will hold the property. To obtain its release the third party must give an undertaking under C.C.P. 710b et seq., in favor of the *creditor*, which provides for ultimate payment of his judgment.

(e) [§115] Actions by Third Party.

In addition to the special proceedings of third party claim and undertaking to protect his interest in personal property (supra, §§104, 110, 114), the third party may protect his interests or recover damages for invasion thereof, in several types of actions:

(1) *Action To Quiet Title.* Since the third party claim statute does not apply to real property (see supra, §104), the ordinary remedy where real property is wrongfully sold is an action to quiet title against the purchaser at the execution sale. (*First Nat. Bank v. Kinslow* (1937) 8 C.2d 339, 345, 65 P.2d 796; see *Pleading*, §522 et seq.)

(2) *Action To Enjoin Sale.* If the sale of real property would cast a cloud on the owner's title he is not limited to suit against the purchaser, but may enjoin the sale. This is the case, e.g., where the third party is the *grantee* of the judgment debtor. Since their titles are derived from a common source, sale on execution against his grantor clouds his title. (*Einstein v. Bank of California* (1902) 137 C. 47, 69 P. 616; *Austin v. Union Paving etc. Co.* (1906) 4 C.A. 610, 88 P. 731.)

(3) *Action for Specific Recovery of Personal Property.* The summary remedy under the third party claim statute does not preclude the conventional action for specific recovery (replevin) against the creditor and levying officer. (See *Taylor v. Bernheim* (1922) 58 C.A. 404, 408, 209 P. 55; *Pleading*, §554 et seq.)

(4) *Action for Damages for Conversion.* A levying officer and the sureties on his official bond may be liable in damages to the third party for wrongfully selling the property. (See, for earlier law, *Missouri State Life Ins. Co. v. Gillette* (1932) 215 C. 709, 713, 12 P.2d 955; *Carpenter v. Devitt* (1942) 49 C.A.2d 473, 122 P.2d 79; cf. *McCaffey Canning Co. v. Bank of America* (1930) 109 C.A. 415, 420, 294 P. 45.) However, the officer's situation has been greatly improved by the revised third party claim statutes:

(a) If no third party claim is filed, "Such officer shall not be liable for damages to any such third person for the taking, keeping or sale of such property. . . ." (C.C.P. 689.)

(b) If a claim is filed and an undertaking is given by the plaintiff, that undertaking in favor of the third party is a complete protection, given in lieu of any right of action against the officer for conversion. The third party's remedy is solely against the creditor and the sureties on the undertaking. (*Cory v. Cooper* (1931) 117 C.A. 495, 4 P.2d 581;

C.C.P. 689 ["nor, in any event, shall such officer be liable for the holding, release or other disposition of such property in accordance with the provisions of this section"].)

Memorandum 75-69

EXHIBIT IV

(§§ 710b-713-1/2)

§ 710b. [Undertaking by third party claimant.] Where personal property levied upon under execution to satisfy a judgment for the payment of money is claimed, in whole or in part, by a person, corporation, partnership or association, other than the judgment debtor, such claimant may give an undertaking as herein provided, which undertaking shall release the personal property in the undertaking described from the lien and levy of such execution. [1903 ch 92 § 1 as § 710; amended and renumbered § 710b 1933 ch 744 § 137; 1965 ch 1974 § 1.] *Cal Jur 2d Exec § 134; Cal Practice §§ 56:310, 56:311; Witkin Procedure 2d pp 3469, 3470, 3472.*

§ 710c. [Undertaking: Form and contents.] Such undertaking, with two sureties, shall be executed by the person, corporation, partnership or association, claiming in whole or in part, the property upon which execution is levied in double the estimated value of the property claimed by the person, corporation, partnership or association; provided, in no case need such undertaking be for a greater sum than double the amount for which the execution is levied; and where the estimated value of the property so claimed by the person, corporation, partnership or association is less than the sum for which such execution is levied, such estimated value shall be stated in the undertaking. Said undertaking shall be conditioned that if the property claimed by the person, corporation, partnership or association is finally adjudged to be the property of the judgment debtor, said person, corporation, partnership or association will pay of said judgment upon which execution has issued a sum equal to the value, as estimated in said undertaking, of said property claimed by said person, corporation, partnership or association, and said property claimed shall be described in said undertaking. [1903 ch 92 § 2 as § 710½; amended and renumbered 1933 ch 744 § 138.] *Cal Jur 2d Exec § 134; Cal Practice §§ 56:307, 56:310, 56:311; Witkin Procedure 2d pp 3480, 3501.*

§ 711. [Undertaking: Filing and service.] Said undertaking shall be filed in the action in the court in which said execution issued, and a copy thereof served upon the judgment creditor or his attorney in said action. [1903 ch 92 § 3; 1965 ch 1923 § 1.] *Cal Jur 2d Exec § 134; Cal Practice § 56:310; Witkin Procedure 2d p 3480.*

§ 711½. [Objections to undertaking: Time for, and how made.] Within ten days after the service of the copy of undertaking, the judgment creditor may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of property therein is less than the market value of the property claimed. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market value of the property claimed. Such objection shall specify the judgment creditor's estimate of the market value of the property claimed. Such written objection shall be served upon the person, partnership, corporation or association giving such undertaking and claiming the property therein described. [1903 ch 92 § 4.] *Cal Jur 2d Exec § 134; Cal Practice § 56:310; Witkin Procedure 2d p 3480.*

§ 712. **[Justification of sureties.]** When the sureties, or either of them, are objected to, the surety or sureties so objected to shall justify before the court out of which such execution issued, upon ten days' notice of the time when they will so justify being given to the judgment creditor or his attorney. Upon the hearing and examination into the sufficiency of a surety, witnesses may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases. Upon such hearing and examination, the court shall make its order, in writing, approving or disapproving the sufficiency of the surety or sureties on such undertaking. In case the court disapproves of the surety or sureties on any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this section the same objection to the sureties may be made, and the same proceedings had as in case of the first undertaking filed and served. [1903 ch 92 § 5; 1933 ch 744 § 138a.] *Cal Jur 2d Exec § 134; Cal Practice § 56:310; Witkin Procedure 2d p 3480.*

§ 712½. **[Objection to estimated value of property claimed: Proceedings for estimation of value: New undertaking.]** When objection is made to the undertaking upon the ground that the estimated value of the property claimed, as stated in the undertaking, is less than the market value of the property claimed, the person, corporation, partnership or association may accept the estimated value stated by the judgment creditor in said objection, and a new undertaking may be at once filed with the judgment creditor's estimate stated therein as the estimated value, and no objection shall thereafter be made upon that ground; if the judgment creditor's estimate of the market value is not accepted, the person, corporation, partnership or association giving the undertaking shall move the court in which the execution issued, upon ten days' notice to the judgment creditor, to estimate the market value of the property claimed and described in the undertaking, and upon the hearing of such motion witnesses may be required to attend and testify, and evidence be produced in the same manner as in the trial of civil actions. Upon the hearing of such motion, the court shall estimate the market value of the property described in the undertaking, and if the estimated value made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served, with the market value determined by the court stated therein as the estimated value. [1903 ch 92 § 6.] *Cal Practice § 56:310; Witkin Procedure 2d p 3480.*

§ 713. **[Justification of sureties.]** The sureties shall justify on the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure. [1903 ch 92 § 7.] *Cal Jur 2d Exec § 134; Cal Practice § 56:310; Witkin Procedure 2d p 3480.*

§ 713½. **[Time undertaking takes effect.]** The undertaking shall become effective for the purpose herein specified ten days after service of copy thereof on the judgment creditor, unless objection to such undertaking is made as herein provided, and in case objection is made to the undertaking filed and served, then the undertaking shall become effective for such purposes when an undertaking is given as herein provided. [1903 ch 92 § 8; 1933 ch 744 § 139.] *Cal Jur 2d Exec § 134; Cal Practice § 56:310; Witkin Procedure 2d p 3480.*