

Memorandum 75-71

Subject: Study 39.260 - Enforcement of Judgments (Nonmoney Judgments)

Attached to this memorandum as Exhibit I (green pages) is a draft of Chapters 8 through 11 of the Enforcement of Judgments title dealing with the enforcement of judgments other than for the payment of money. Exhibit II (yellow pages) contains Code of Civil Procedure Sections 681, 682, 683, 684, 684.1, and 687. Exhibit III (white pages) is an excerpt from Witkin's California Procedure. Exhibit IV (buff pages) contains draft Sections 702.070 and 702.080 (from Chapter 2--General Provisions) reflecting previous Commission decisions on the time for enforcement of a judgment. Exhibit V (blue pages) contains Code of Civil Procedure Section 725a and 726 dealing with foreclosure.

The Commission has thus far been concerned almost exclusively with the enforcement of judgments for the payment of money. However, mixed in with the existing law concerning enforcement of money judgments (Code Civ. Proc. §§ 681-723) are a very few scattered references to enforcement of judgments for possession of personal property (see Chapter 8 in Exhibit I), for possession of real property (see Chapter 9), for the sale of real or personal property (see Chapter 10), and for the performance of any other act (see Chapter 11). Throughout the drafting of the Enforcement of Judgments title, the staff has attempted to separate general provisions applicable to more than one enforcement procedure from those applicable to only one such procedure and to separate provisions for the enforcement of one type of judgment from provisions for the enforcement of some other type. The existing statutes contain very few provisions applicable only to the enforcement of nonmoney judgments and it is generally unclear to what extent general provisions apply to nonmoney judgments.

The draft statutes in Exhibit I (attached hereto) fill in some of the detail lacking in existing law. In some cases noted in the Comments to the sections, the proposed statutory provision is derived from existing practice as indicated in court decisions or in the Marshal's Manual or Sheriff's Manual (e.g., manner of sale of property under writ of enforcement). In other cases we have supplied new provisions analogous to those applicable to a writ of execution (e.g., the content of the writ, return date) in order to make the statutes more complete and introduce a bit of order and consistency. However, so far as concerns the enforcement of nonmoney judgments, we have not attempted to approach the degree of detail that is currently provided (and is further increased in Chapters 2-7 of our draft) with regard to the enforcement of money judgments. This is because the questions concerning which property to levy upon, the manner of levy, whether levy will reach particular types of property, and exemptions are not present with regard to nonmoney judgments. For example, in judgments for the sale or possession of real or personal property, the judgment itself will state the property against which enforcement is to be directed.

Finally, it is our hope to be able to regularize the names given the various types of enforcement process. Under existing law, judgments for the possession of personal property may be enforced by a "writ of execution (possession of personal property)" or a "writ of possession"; a judgment for the possession of real property may be enforced by a "writ of execution (possession of real property)", a "writ of possession," a "writ of restitution," or a "writ of assistance"; a judgment for the sale of real or personal property may be enforced by an "order of sale" or a "writ of enforcement."

Respectfully submitted,

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EXHIBIT I

(Draft of §§ 708.010-711.010.)

CHAPTER 8. ENFORCEMENT OF JUDGMENT FOR
POSSESSION OF PERSONAL PROPERTY

§ 708.010. Application for writ of possession; several writs; successive writs

708.010. (a) After the entry of a judgment for the possession of personal property, upon application of the judgment creditor, the court clerk shall issue a writ of possession.

(b) Two or more writs may be issued to obtain enforcement of the judgment in different counties. A separate writ shall be issued for each county in which property sought to be delivered to the judgment creditor is located.

(c) Successive writs may be issued upon further application until the judgment is satisfied; however, no writ of possession may be issued to obtain enforcement of the judgment in a county until any prior writ of possession issued for that county is returned unsatisfied.

Comment. Section 708.010 is analogous to Section 703.010 relating to writs of execution and is based in part on former Sections 681 and 687. See Section 703.010 and Comment. Subdivision (c), providing for successive writs of possession, is made necessary by the provisions of Section 708.040 concerning the return of a writ of possession. See Section 708.040 and Comment.

§ 708.020. Writ of possession; contents

708.020. (a) The writ of possession shall describe the personal property to be delivered to the judgment creditor and state its value and shall require the levying officer to search for and take custody of the property in the manner prescribed by Section 514.010 and promptly thereafter deliver possession of the property described in the writ to the judgment creditor.

(b) The writ of possession may also require the levying officer to satisfy any costs, [attorney's fees,] damages, rents, or profits recovered by the judgment in the same manner as a writ of execution.

Comment. Section 708.020 prescribes the essential elements of a writ of possession issued to enforce a judgment for the possession of personal property. See Section 702.180(b)(Judicial Council to prescribe form of writs). This section is based on portions of former Sections 682(4), 684, and 684.1. Subdivision (b) continues a portion of former Section 682(4). The term "writ of possession" rather than "writ of execution" is used here to be consistent with the usage in Chapter 2 (commencing with Section 511.010) of Title 7. It should be noted that the judgment enforced hereunder is one which entitles a party to specific property, i.e., the party in whose favor the judgment runs is not obliged to accept merely the value of the property. See Griffith v. Reddick, 41 Cal. App. 458, 182 P. 984 (1919). The value of the property is substituted only where delivery of the property is impossible because it has been destroyed or cannot be found. See Section 708.030. Cf. Steele v. Marlborough Hall Corp., 100 Cal. App. 491, 280 P. 380 (1929).

The requirement of former Section 684.1 that the levying officer place a keeper in charge of personal property occupied as a dwelling for two days is continued in subdivision (b) of Section 514.010, incorporated by subdivision (a) of this section.

The requirements of former Section 682(4) that costs, damages, rents, or profits be satisfied first from personal property and only then from real property has been discontinued. See Sections 703.010 (levy procedures under writ of execution) and 703.210 et seq. (manner of levy on particular types of property).

Note. We have used the term "writ of possession" here in connection with personal property and the term "writ of restitution" in the next chapter (Section 709.010) in connection with real property. Present law refers to a writ of execution in both instances although the Judicial Council forms are then subtitled "Possession of Personal Property" and "Possession of Real Property" respectively. The staff believes that there is some benefit in separating the special provisions relating to the enforcement of judgments for the possession of real and personal property into two chapters as is done in this draft.

The language in brackets provides formal requirements similar to those deleted from the writ of execution provisions and should be deleted here too.

The staff has some doubts about the utility of using a keeper where personal property is used as a dwelling; this provision has been continued because it was continued in claim and delivery.

§ 708.030. Writ of possession unsatisfied; judgment satisfied as if money judgment

708.030. Where the property described in the writ of possession cannot be taken into custody and after the levying officer has made a demand upon the judgment debtor or the judgment debtor's agent for the property, the levying officer shall so state on the face of the writ and thereafter the judgment for the possession of the property may be satisfied in the same manner as a judgment for the payment of money. During the first 90 days after issuance, the writ of possession may be levied upon other property of the judgment debtor as if the writ of possession is a writ of execution issued pursuant to Chapter 3 (commencing with Section 703.010).

Comment. Section 708.030 continues former law and practice. See former Section 682(4); Marshal's Manual of Procedure §§ 621, 623.1 (n.d.); Civil Procedural Manual § 7.26 (Cal. State Sheriffs' Ass'n 1975 rev.). Where the property cannot be found and delivered to the judgment creditor and the demand on the judgment debtor or his agent has been made, the first sentence of Section 708.030 makes clear that the judgment for possession of personal property may be satisfied for the value of the property in the manner of a money judgment. Hence, the

judgment creditor may instruct the levying officer to levy on property as if the writ of possession were a writ of execution issued under Chapter 3 (commencing with Section 703.010), may seek to garnish the judgment debtor's wages pursuant to Chapter 4 (commencing with Section 704.010), or may employ appropriate supplementary procedures provided by Chapter 5 (commencing with Section 705.010). The judgment creditor may obtain a writ of execution where the writ of possession has expired or been returned. The 90-day limitation prescribed by the second sentence is a consequence of subdivision (d) of Section 703.170 (return of writ of execution if no levy within 90 days).

Note. An earlier staff draft which the Commission has never considered provided that the levying officer must return the writ of possession and obtain a writ of execution before any levy could take place. We have chosen the approach set out in Section 708.030 because it is simpler and avoids the extra cost of obtaining a new writ. A more rigorously consistent statute would result if we required the return of the writ of possession and the issuance of a new writ of execution, but it would not provide any additional protection to the debtor and would merely be burdensome for the creditor.

§ 708.040. Return of writ of possession

708.040. (a) The levying officer to whom the writ of possession is directed shall return the writ to the court from which it was issued at the earliest of the following times:

- (1) One year from the date the writ was issued.
 - (2) Not more than 15 days after the property described in the writ is delivered to the judgment creditor.
 - (3) When return is requested in writing by the judgment creditor.
- (b) Where the writ of possession is levied as if it is a writ of execution, as provided in Section 708.030, and insofar as the writ of possession is levied upon the judgment debtor's property as provided in subdivision (b) of Section 708.030, it is subject to the return provisions of Section 703.170.

Comment. Section 708.040 is new. Prior statutory law did not explicitly provide for a return date in the case of a writ of possession (see former Section 683) and it was held in Magnaud v. Traeger, 66 Cal. App. 526, 226 P. 990 (1924), that a writ of possession for the restitution of real property remained in force insofar as it directed the restitution of the premises although it had expired insofar as it directed the levying officer to levy on property to satisfy the part of the judgment awarding damages. Section 708.040 changes this rule by making the life of the writ of possession analogous to that of the writ of execution. Compare Sections 703.170 (return of writ of execution) and 709.030 (return of writ of restitution). Under subdivision (a) of Section 708.040, the writ of possession authorizes the levying officer to take the property into custody and deliver it to the judgment creditor as late as one year after its issuance. However, if the writ is levied for costs, attorney's fees, and the like or is treated as a writ of execution where the property cannot be found, the officer may levy on property only during the first 90 days of the life of the writ. See Sections 708.040(b) and 708.030.

§ 708.050. Issuance of order directing transfer

708.050. After entry of judgment for the possession of personal property, in addition to a writ of possession, the court may issue an order directing the judgment debtor to transfer possession of the property to the judgment creditor. The order shall contain a notice to the judgment debtor that failure to comply with the order may subject him to being held in contempt of court.

Comment. Section 708.050 is new. However, it is based on a comparable provision (Section 512.070) which is applicable before judgment. This subdivision simply makes clear that the court has power to issue a "turnover" order directing the judgment debtor to transfer possession. The order is not issued in lieu of a writ but rather in addition to or in aid of a writ, permitting the person entitled to possession to select a more informal and less expensive means of securing possession.

§ 708.060. Appointment of receiver

708.060. Upon application of the judgment creditor and after a noticed hearing, the court may order the appointment of a receiver pursuant to Article 3 (commencing with Section 705.210) of Chapter 5 where enforcement of a judgment for the possession of personal property would be aided by such appointment.

Comment. Section 708.060, together with Article 3 of Chapter 5 (receivers), supersedes the authority formerly provided by paragraphs 3 and 4 of Section 564.

CHAPTER 9. ENFORCEMENT OF JUDGMENT FOR
POSSESSION OF REAL PROPERTY

§ 709.010. Application for writ of restitution; several writs, successive writs

709.010. (a) After the entry of a judgment for the possession of real property, upon application of the judgment creditor, the court clerk shall issue a writ of restitution.

(b) Two or more writs may be issued to obtain enforcement of the judgment in different counties. A separate writ shall be issued for each county in which the property, or some part thereof, is situated.

(c) Successive writs may be issued upon further application until the judgment is satisfied; however, no writ of restitution may be issued to obtain enforcement of the judgment in a county until any prior writ of restitution issued for that county is returned unsatisfied.

Comment. Section 709.010 is analogous to Section 703.010 relating to writs of execution and is based in part on former Sections 681 and 687. See Section 703.010 and Comment. Subdivision (c) providing for successive writs is made necessary by the provisions of Section 709.030 concerning the return of a writ of restitution.

§ 709.020. Writ of restitution; contents

709.020. (a) The writ of restitution shall describe the real property and shall require the levying officer to place the judgment creditor in possession of the property described. The levying officer shall serve the notices provided by subdivision (d) of Section 1174 in the manner prescribed therein.

(b) If necessary, the levying officer shall remove the occupant of the property and place the judgment creditor in possession in the manner prescribed by subdivision (d) of Section 1174.

(c) The writ of restitution may require the levying officer to satisfy any costs, [attorney's fees,] damages, rents, or profits recovered by the judgment in the same manner as a writ of execution.

Comment. Section 709.020 prescribes the essential elements of a writ of restitution issued to enforce a judgment for the possession of real property. See Section 702.180(b)(Judicial Council to prescribe form of writs). This section is based in part on portions of former Sections 682(4) and 684; however, under former law, the manner of enforcement was not prescribed by statute. Section 709.020 incorporates by reference the provisions for delivery of possession of the premises following an action for unlawful detainer set forth in Section 1174. The term "writ of restitution" is used here to be consistent with the term used in Section 1174. The requirement of former Section 682(4) that costs, damages, rents, or profits be satisfied first from personal property and only then from real property has been discontinued.

§ 709.030. Return of writ of restitution

709.040. (a) The levying officer to whom the writ of restitution is directed shall return the writ to the court from which it was issued at the earliest of the following times:

- (1) One year from the date the writ was issued.
 - (2) Not more than 15 days after the judgment creditor is placed in possession of property described in the writ.
 - (3) When return is requested in writing by the judgment creditor.
- (b) Insofar as the writ of restitution is levied upon the judgment debtor's property as provided in subdivision (c) of Section 709.020, it is subject to the return provisions of Section 703.170.

Comment. Section 709.030 is new. Prior statutory law did not explicitly provide for the return of a writ of restitution. This section changes the former rule that a writ for the restitution of real property remained in force beyond the 60-day limitation provided by former Section 683 insofar as it directed the restitution of the premises although it had expired insofar as it directed the levying officer to levy on property to satisfy the part of the judgment awarding damages. Magnaud v. Traeger, 66 Cal. App. 526, 226 P. 990 (1924). Section 709.030 changes this rule by making the life of the writ of restitution analogous to that of the writ of execution. Compare Sections 703.170 (return of writ of execution) and 708.040 (return of writ of possession). Under subdivision (a) of Section 709.030, the writ of restitution authorizes the levying officer to place the judgment creditor in possession of the real property up to one year after its issuance. However, under subdivision (b), the writ may be levied on property for costs, attorney's fees, damages, and the like, only during the first 90 days of the life of the writ.

§ 709.040. Issuance of order directing transfer

709.040. After entry of judgment for the possession of real property, in addition to a writ of restitution, the court may issue an order directing

the judgment debtor to transfer possession of the property to the judgment creditor. The order shall contain a notice to the judgment debtor that failure to comply with the order may subject him to being held in contempt of court.

Comment. Section 709.040 is new. It is the same in substance as Section 708.050. See Section 708.050 and Comment.

§ 709.050. Appointment of receiver

709.050. Upon application of the judgment creditor and after a noticed hearing, the court may order the appointment of a receiver pursuant to Article 3 (commencing with Section 705.210) of Chapter 5 where enforcement of a judgment for the possession of real property would be aided by such appointment.

Comment. Section 709.050, together with Article 3 of Chapter 5, supersedes the authority formerly provided by paragraphs 3 and 4 of Section 564.

CHAPTER 10. ENFORCEMENT OF JUDGMENT

FOR SALE OF PROPERTY

§ 710.010. Application for writ of enforcement; several writs; successive writs

710.010. (a) After the entry of a judgment for the sale of real or personal property, upon application of the judgment creditor, the court clerk shall issue a writ of enforcement.

(b) Two or more writs may be issued to obtain enforcement of the judgment in different counties. A separate writ shall be issued for each county in which property sought to be sold is located.

(c) Successive writs may be issued upon further application until the judgment is satisfied; however, no writ of enforcement may be issued to obtain enforcement of the judgment in a county until any prior writ of enforcement issued for that county is returned unsatisfied.

Comment. Section 710.010 is analogous to Section 703.010 relating to writs of execution and is based in part on former Sections 681 and 687. See Section 703.010 and Comment. Subdivision (c) providing for successive writs of possession is made necessary by the provisions of Section 710.030 concerning the return of a writ of enforcement.

§ 710.020. Writ of enforcement; contents

710.020. The writ of enforcement shall state the material parts of the judgment for the sale of the real or personal property and shall require the proper officer to execute the judgment by taking custody of any personal property included in the judgment in the manner prescribed by Section 514.010, making the sale as provided in Article 4 (commencing with Section 703.510) of Chapter 3, and applying the proceeds in conformity with the judgment.

Comment. Section 710.020 prescribes the essential elements of a writ of enforcement issued to enforce a judgment for the sale of real or personal property. See Section 702.180(b)(Judicial Council to prescribe form of writs). This section supersedes a portion of former Section 684. The term "writ of enforcement" has been frequently used by the courts although it did not appear in prior statutes. See, e.g., Laubish v. Roberdo, 43 Cal.2d 702, 277 P.2d 9 (1954); Knapp v. Rose, 32 Cal.2d 530, 197 P.2d 7 (1948). See also Marshal's Manual of Procedure § 450.2; Civil Procedural Manual § 7.20 (Cal. State Sheriff's Ass'n 1972 rev.). Section 710.020 incorporates the provisions of Section 514.010 concerning the manner of taking custody of personal property and the provisions of Sections 703.510-703.____ concerning the manner of sale of the property. Former law was silent as to these matters, however, the practice appears to have been similar to that provided by Section 710.020. See Johnson v. Tyrell, 77 Cal. App. 179, 246 P. 140 (1926)(foreclosure sale of real property made in same manner as execution sales);

Podrat v. Oberndorff, 207 Cal. 456, 278 P. 1035 (1929)(personal property capable of manual delivery must be in the possession of the officer to make a sale); Marshal's Manual of Procedure §§ 452.1, 452.2; Civil Procedural Manual § 7.20 (Cal. State Sheriff's Ass'n 1972 rev.). It should be noted that the writ of enforcement is directed to the "proper officer." This may be a "levying officer" as defined in Section 701.____ or a commissioner or elisor as provided in Section 726. See also Govt. Code § 27469 (coroner discharges duties of sheriff where latter is a party to the proceeding).

§ 710.030. Return of writ of enforcement

710.030. The officer to whom the writ of enforcement is directed shall return the writ to the court from which it was issued at the earliest of the following times:

- (a) One year from the date the writ was issued.
- (b) Not more than 15 days after a sale is made under the writ.
- (c) When return is requested in writing by the judgment creditor.

Comment. Section 710.030 is new. Prior statutory law did not provide for the return of a writ of enforcement. The return provisions under this section are identical to the provisions of Section 703.170 concerning a writ of execution except that, since there is no "levy" as such when a judgment for the sale of specified property is enforced, the writ is not required to be returned at the end of 90 days if it is not levied within that time. See Section 703.170(d).

Note. It is always said that the officer does not levy on the property when enforcing such judgments; this makes some sense because levy is usually needed to create a lien on the property or to preserve an attachment lien. In the case of a judgment for the sale of property, the very aim of the action is to foreclose a lien--another lien would not be of much use. However, so far as personal property is concerned, the Commission may prefer to make the return date the same as that for a writ of execution anyway because the officer still has to get custody of personal property in order to sell it. In most instances, getting

custody of the sort of personal property likely to be involved in actions to foreclose a lien is indistinguishable from levy. If this alternative is preferable, we would add a subdivision (d) providing as follows:

(d) If personal property to be sold is not taken into custody within 90 days after issuance of the writ of enforcement, promptly after the expiration of 90 days.

§ 710.040. Appointment of receiver

710.040. Upon application of the judgment creditor and after a noticed hearing, the court may order the appointment of a receiver pursuant to Article 3 (commencing with Section 705.210) of Chapter 5 where enforcement of a judgment for the sale of real or personal property would be aided by such appointment.

Comment. Section 710.040, together with Article 3 of Chapter 5, supersedes the authority formerly provided by paragraphs 3 and 4 of Section 564.

CHAPTER 11. ENFORCEMENT OF JUDGMENT BY CONTEMPT

§ 711.010. Enforcement by contempt

711.010. Where a judgment requires the performance of any act not described in Sections 702.010 (payment of money), 702.020 (possession of personal property), 702.030 (possession of real property), and 702.040 (sale of real or personal property), a certified copy of the judgment may be served upon the person against whom the judgment is rendered or upon the person or officer required by the judgment or by law to obey the judgment and obedience thereto may be enforced by the power of the court to punish for contempt [obedience thereto may be enforced by the court].

Comment. Section 711.010 continues the substance of a portion of former Section 684. As to the power of the court to punish for contempt generally, see Section 1209.

Note. The bracketed phrase employs the language of present Section 684. It has been suggested that the latter would be preferable because it seems less inflexible. We think that the substance is the same and would be satisfied with either version, although the existing language is somewhat vague.

EXHIBIT 1:

[Code Civ. Proc. §§ 681, 682, 683, 684, 684.1, 687]

§ 681. [Order for writ of execution or enforcement. Computation of time.] The party in whose favor judgment is given may at any time within 10 years after the entry thereof, have a writ or order issued for the execution or enforcement of the judgment. If, after the entry of the judgment, the issuance of such writ or order is stayed or enjoined by any judgment or order of court, or by operation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the 10 years within which execution or order may issue. [1872; 1907 ch 360 § 1; 1955 ch 754 § 1.] *Cal Jur 2d Civ & S § 210, Exec §§ 5, 17, 20, 21, 23, Juags § 312, Mig § 712, Supra § 27; Cal Practice §§ 91-9, 56:13, 56:21, 56:2, 56:14, 56:4; Witkin Procedure 2d pp 348, 349, 342, 343, 353, 353 § Summary p 2664.*

§ 681a. [Stay of execution.] The court, or the judge thereof, may stay the execution of any judgment or order, provided, that no court shall have power, without the consent of the adverse party, to stay the execution of any judgment or order, the execution whereof would be stayed on appeal only, by the execution of a stay bond, for a longer period than 10 days in justice courts, nor for a longer period than 30 days in other courts. If a motion for a new trial or for judgment notwithstanding the verdict is pending, execution may be stayed until 10 days after the determination thereof. [1911 ch 220 § 1; 1929 ch 485 § 1; 1933 ch 744 § 131; 1951 ch 1737 § 103; 1961 ch 604 § 1.] *Cal Jur 2d Exec §§ 9, 41; Cal Practice §§ 55:67, 56:10, 56:235; Witkin Procedure 2d pp 3453, 4143.*

§ 682. [Issuance of writ of execution: Form and contents of writ.] The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk or judge, and be directed to the sheriff, constable, or marshal, and it must intelligibly refer to the judgment, stating the court, the county, and in municipal and justice courts, the judicial district, where the judgment is entered, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in Section 667, the execution must also state the kind of money or currency in which the judgment is payable, and must require the officer to whom it is directed to proceed substantially as follows:

1. If it be against the property of the judgment debtor, it must require such officer to satisfy the judgment, with interest, out of the personal property of such debtor, or if it is against the earnings of such debtor, such levy shall be made in accordance with Section 682.3, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the abstract of judgment was filed as provided in Section 674 of this code, or at any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require such officer to satisfy the judgment, with interest, out of such property.

3. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in Section 667, it must also require such officer to satisfy the same in the kind of money or currency in which the judgment is made payable, and such officer must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. Any such officer collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal to do so, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

4. If it be for the delivery of the possession of real or personal property, it must require such officer to deliver the possession of the same, describing it, to the party entitled thereto, and may at the same time require such officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section. [1872; 1933 ch 744 § 132; 1951 ch 1737 § 104; 1955 ch 793 § 1; 1971 ch 1684 § 1; 1973 ch 20 § 8.] *Cal Jur 2d Arr § 18, Eject § 53, Exec §§ 32, 33, 49, Mig § 714; Cal Practice §§ 56:5, 56:35, 56:42, 56:61, 56:101, 56:170, 56:172, 56:215, 57:8, 195:34, 382:25, 383:28; Witkin Procedure 2d 492, 3290, 3443, 3444, 3445, 3446, 3496, 3536, 3541.*

§ 683. [Return of execution: Redelivery of execution.] The execution may be made returnable, at any time not less than 10 nor more than 60 days after its receipt by the officer to whom it is directed, or, if the execution is upon the earnings of the judgment debtor, upon the termination of the levy of execution as provided in Section 682.3, to the court in which the judgment is entered. When the execution is returned, the clerk must attach it to the judgment roll, or the judge must make the proper entry in the docket.

If an execution is returned unseized, another may be afterward issued within the time specified in this code.

If property either personal or real be levied upon under such writ of execution but the sale thereunder be postponed beyond or not held within the return date after it is received by the officer to whom it was delivered and which has been returned to the clerk of the court in which the judgment is entered, upon request of the person in whose favor the writ runs the court may direct the clerk to redeliver said execution to the officer to whom it was directed in order to permit the officer to make an alias return of the proceedings of the sale or levy thereon as in the case of an original return of execution.

Whenever a writ of execution issued against real property containing a dwelling house has been returned, proof that notice required by Section 682b has been served shall be indicated on the writ, or separately and attached to the writ. [1872; 1931 ch 1189 § 1; 1933 ch 744 § 133; 1949 ch 371 § 1; 1951 ch 1737 § 106; 1971 ch 1684 § 3; 1974 ch 1251 § 2.] *Cal Jur 2d Attach § 88, Exec §§ 78, 112, 144, Mtg § 713, Writs § 8; Cal Practice §§ 18:251, 38:16, 56:34, 56:37, 56:95; Witkin Procedure 2d pp 3442, 3446, 3489.*

§ 684. [Money judgments and others, how enforced.] When the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution; when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith; when the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court. [1872; 1873-74 ch 383 § 92; 1973-74 ch 20 § 9.] *Cal Jur 2d Arr § 18, Exec §§ 2, 3, 4, 144, Funds & D § 8, Jud S §§ 3, 5, 11, Liens § 54, Mtg § 714; Cal Practice §§ 56:107, 56:215, 195:34, 214:40, 302:39, 383:28; Witkin Procedure 2d pp 3388, 3392, 3444, 3536, 3540, 3541.*

§ 684.1. [Enforcement of judgment for possession of personal property.] The sheriff, constable or marshal shall enforce a judgment for the possession of personal property in the manner prescribed by Section 517 or as otherwise prescribed by law; provided that when the execution requires the delivery of possession of property used as a dwelling, such as a house trailer, mobilehome, or boat, then the sheriff, constable or marshal shall, if the property be occupied, place a keeper in charge of the property, at plaintiff's expense, for at least two (2) days, and at the expiration of said period shall remove its occupants and deliver possession to the plaintiff. [1951 ch 777 § 1; 1965 ch 1972 § 1.]

§ 687. [Officer to whom execution issued.] Where the execution is against the property of the judgment debtor, it may be issued to the sheriff, or any constable, or marshal of any county in the State. Where it requires the delivery of real or personal property, it must be issued to the sheriff, or a constable, or marshal of the county where the property, or some part thereof, is situated. If the judgment directs or authorizes the issuing of any process requiring the sale, or the delivery of possession of, or otherwise affecting specific real property, which is then, or subsequently becomes, a part of a county other than that in which such judgment was entered, such process may be issued to, and executed by, the sheriff, or any constable, or marshal of such other county, as to the property situate therein. Executions may be issued to different counties. [1872; 1907 ch 360 § 2; 1933 ch 744 § 134.] *Cal Jur 2d Exec §§ 20, 36; Cal Practice §§ 56:20, 56:37; Witkin Procedure 2d p 3441.*

SYNOPSIS III

[5 B. Witkin, *California Procedure Enforcement of Judgment*, §§ 183-185 (2d ed. 1971, Supp. 1975).]

D. Writs of Enforcement, Possession and Restitution.

1. [§183] Writ of Enforcement.

Unless the judgment directly orders the payment of money, execution cannot be had. (See supra, §6.) If it merely creates a lien, the remedy is an independent action to foreclose the lien. (See supra, §10.) If, however, the judgment *orders a sale*, the process to compel it is sometimes called a *writ of enforcement*, and is provided for by C.C.P. 684: "[W]hen the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith." (See *Knapp v. Rose* (1948) 32 C.2d 530, 534, 197 P.2d 7; *Laubisch v. Roberdo* (1954) 43 C.2d 702, 708, 712, 277 P.2d 9; C.E.B., *Rem. Unsec. Cred.*, p. 145 et seq.; 9 Am.Jur. P.P. Forms (Rev. ed.) 791 et seq.)

The distinction between this procedure and execution is that execution requires a *levy* on property before it can be sold, whereas the officer selling pursuant to an order of sale acts directly under the order. As the court said in *Withington v. Shay* (1941) 47 C.A.2d 68, 73, 117 P.2d 415, supra, §21: "A decree or decretal order for the sale of certain specific property made by a court of equity, differs materially from a common-law judgment. Instead of running against the entire property of the judgment debtor, it specifies the property which the court directs to be sold for the purpose of carrying its judgment into effect; and the officer, in executing this order, *acts under the direct mandate of the court* without the power or necessity of taking any property from the possession of the defendant." (See also *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.* (1892) 94 C. 217, 222, 29 P. 627.)

2. [§184] Writ of Possession or Assistance.

If the *judgment* is for the possession of real or personal property, the code states that it may be enforced by a *writ of execution*. (C.C.P. 684; see C.C.P. 682(5) [writ must require officer to deliver described property, etc.], 686(2) [judgment for possession of real or personal property may be enforced notwithstanding death of judgment debtor].) The writ has usually been termed a "writ of possession," but the two approved optional Judicial Council forms are "Writ of Execution (Possession of Real Property)" and "Writ of Execution (Possession of Personal Property)."

A judgment for possession of personal property may be enforced by the sheriff by breaking into the building in which the property is located. (C.C.P. 531.1; see also C.C.P. 517.) When the execution requires the delivery of possession of property used as a dwelling, such as a house trailer, mobilehome, or boat, and the property is occupied, the officer places a keeper in charge, at the plaintiff's expense, for at least 2 days. Then he removes the occupants and delivers possession to the plaintiff. (C.C.P. 684.1.)

If the judgment itself does not give possession, but decrees a sale, e.g., foreclosure of a mortgage or other lien, the purchaser at the sale enforces his right by a writ of possession or assistance. (See *Rafferty v. Kirkpatrick* (1938) 29 C.A.2d 503, 505, 85 P.2d 147 ["The writ of assistance is incident to the execution of the judgment and is issued as a matter of right where a defendant, or one claiming under him, refuses to surrender possession after the execution of the deed to the purchaser at the foreclosure sale"]; 7 Cal Practice 469 et seq.; C.E.B., Rem. Unsec. Cred., p. 140 et seq.; C.E.B., Debt Collection Practice, p. 391; 6 Am.Jur.2d 413 et seq. [writ of assistance]; 30 Am.Jur.2d 723 [writ of possession]; 2 Am.Jur. P.P. Forms (Rev. ed.) 675 et seq. [writ of assistance]; 9 Am.Jur. P.P. Forms (Rev. ed.) 817, 818 [writ of possession]; see also 5 Federal Practice and Procedure (Keogh) 574 et seq.) And in proceedings to quiet title or for forcible entry or detainer, the remedy is a writ of possession, which is not subject to the statutory limitations on return of a writ of execution. (See C.C.P. 380, 1166a; 13 Cal Practice 337; 16 Am.Jur. P.P. Forms 645.)

3. [§185]. Writ of Restitution.

(a) *Nature of Writ.* In an action for unlawful detainer (see *Pleading*, §506 et seq.), the judgment in favor of the plaintiff is for "the restitution of the premises." (C.C.P. 1174; see *Judgment*, §33.) The process used to enforce the judgment is a "writ of restitution." (C.C.P. 1174; see *Gray v. Whitmore* (1971) 17 C.A.3d 1, 18, 94 C.R. 904;

(b) *Procedure: Removal of Tenant.* The successful plaintiff is entitled to have the premises restored to him, on payment of the officer's costs. The enforcing officer, under recent amendments to C.C.P. 1174, has alternative methods of removal of the tenant: (1) *Serve or post* a copy of the writ on the property in the manner of levy of a writ of attachment. (2) *Post* a copy in such manner, and *mail* another copy to the defendant at his last known business or residence address, or, if no such address is known, at the premises. If the tenant does not vacate within 5 days from date of service (or from date of mailing the additional notice), the officer must remove him and place the plaintiff in possession.

(c) *Procedure: Storage of Tenant's Personal Property.* The "goods, chattels or personal property of the tenant" on the premises at the time of restitution are protected by complicated provisions of C.C.P. 1174. (For problems arising under this part of the section, see 21 *Hastings L.J.* 491, written before the 1970 amendments.) The procedure is as follows:

(1) The plaintiff may store the property "in a place of safekeeping" for 30 days, subject to redemption by the tenant "upon payment of reasonable costs incurred by the plaintiff in providing such storage and the judgment rendered in favor of plaintiff, including costs."

(2) The plaintiff may, however, elect to store the property "on the premises." In such event the costs of storage are "the fair rental value of the premises" for the period.

(3) An *inventory* must be made by the officer, or verified by him, of all such property, prior to its removal or storage on the premises, and the officer is entitled to his costs in preparing or verifying such inventory.

(4) If the property is not removed within 30 days it is deemed abandoned and may be sold at a public sale, by competitive bidding, at the place where it is stored, after published 5 days' notice; but notice may not be given more than 3 days prior to expiration of the 30-day period.

(5) Money realized from the sale goes first to pay the plaintiff's costs of storing and selling, next to pay the plaintiff's judgment, including costs; the balance is paid to the defendant.

The above provisions on storage and redemption are silent on the tenant's exemptions (C.C.P. 690 et seq., supra, §25 et seq.) They are therefore open to the interpretation that, in order to recover his personal property, the tenant must pay not only the costs of storage but the amount of the plaintiff's judgment with costs. Another view would be that the tenant can get his exempt property back merely by paying the costs of storage. (See *Dobner v. Borrini* (1970) 4 C.A.3d Supp. 1, 4, 84 C.R. 110.)

In *Gray v. Whitmore*, supra, the court, in an elaborate opinion tracing the history of the amendments and construing the uncertain statutory language, found the provision for application of the proceeds of sale to the plaintiff's judgment in disregard of the tenant's exemptions an unconstitutional denial of due process and equal protection. (17 C.A.3d 26, 27, 28.) But, severing the invalid part, the storage provisions were upheld. (17 C.A.3d 28.)

Practice works should be consulted on the procedural steps. (See 50 Am.Jur.2d 110 et seq.; 12 Am.Jur. P.P. Forms (Rev. ed.) 219; 2 Pac. L. J. 317; 13 Cal Practice 133 et seq.)

3. [§185] Writ of Restitution.

(a) *Nature of Writ.* C.C.P. 1174 was amended and subdivided in 1974. Citations should now be to C.C.P. 1174(a) and 1174(d) respectively.

(b) *Procedure: Removal of Tenant.* C.C.P. 1174(d), as amended, also requires that the writ of restitution give notice that personal property left on the premises will be sold or disposed of pursuant to C.C.P. 1174 "unless the tenant or the owner pays the landlord the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the premises are restored to the landlord."

(c) *Procedure: Storage of Tenant's Personal Property.* C.C.P. 1174 was amended and subdivided in 1974 to bring its provisions into conformity with new C.C. 1980 et seq., enacted at the same time. (See 6 Pacific L. J. 374.)

(1) The section applies to all property left on the premises. If the landlord "reasonably believes" property left is lost, he must dispose of it pursuant to C.C. 2080 et seq. (see 3 *Summary, Personal Property*, §79 et seq.). (C.C.P. 1174(e).) Otherwise, he must "store the personal property in a place of safekeeping" and return or dispose of it as prescribed in C.C.P. 1174. (C.C.P. 1174(g).) If the police refuse to accept property believed to be lost, it is "deemed not to have been lost." (C.C.P. 1174(e).)

(2) The landlord must give notice, as prescribed by C.C. 1983, to anyone he "reasonably believes" is the owner of the property, other than the tenant (who gets notice in the writ of restitution). (C.C.P. 1174(f).)

(3) The landlord must release the property to the tenant "or, at the landlord's option, to a person reasonably believed . . . to be its owner", if storage costs (see C.C. 1990) are paid and the demand is made within the period specified in the writ (if the tenant) or notice (if not the tenant). (C.C.P. 1174(h).)

(4) If not released to the tenant or owner, the property must be sold or disposed of pursuant to C.C. 1988. (C.C.P. 1174(i).)

(5) The landlord is not liable to anyone who had notice or to any other person, unless such other person "proves that . . . the landlord believed or reasonably should have believed that such person had an interest in the property and that the landlord knew or should have known upon reasonable investigation the address of such person." (C.C.P. 1174(j)-(l).)

p. 3543:

The reasoning and decision in *Gray v. Whitmore* were followed by the Supreme Court in *Love v. Keays* (1971) 6 Cal.3d 329, 98 Cal. 811, 491 P.2d 395.

(a) The tenant-judgment-debtor is not entitled to file an exemption claim since the only writ involved is one for restitution of the premises and no property of the tenant is levied upon.

(b) The statutory direction for storage of the tenant's personal property and for reimbursement of the landlord for storage costs satisfies the requirements of due process and equal protection.

(c) However, the provisions requiring the evicted tenant to satisfy the landlord's money judgment in order to redeem the property, and allowing the landlord to apply the proceeds of a sale in payment of his judgment, are void as a denial of due process and equal protection: They allow landlord creditors to reach property exempt from the claims of non-landlord creditors, and do not further the statutory purpose of restitution of the premises. And they also place the tenant-debtor in a more precarious position than all other judgment debtors in denying him the opportunity to dispute the landlord's claim to satisfaction of the judgment out of the stored property.

See 61 Cal. L. Rev. 406.

EXHIBIT IV

[Staff Draft of §§ 702.070, 702.080 (General Provisions
Relating to Enforcement of Nonmoney Judgments).]

§ 702.070. Time for enforcement of judgment

702.070. Except as otherwise provided in Sections 702.080 and 702.090, no judgment shall be enforced and no sale, collection, or delivery pursuant to the judgment or to a writ issued pursuant to the judgment shall take place more than 10 years after the date of entry of the judgment.

Comment. Section 702.070 provides a basic 10-year period for enforcement of a judgment and supersedes former Section 681. Section 702.080 provides a simple and exclusive procedure for extending within that period the effectiveness of a judgment for another 10 years. Sections 702.070 and 702.080 apply to money judgments, judgments for the possession or sale of real or personal property, and judgments requiring the performance of some other act. For special rules applicable to money judgments payable in installments, see Section 702.090.

Two changes in former law should be noted. First, former Section 681 provided that a writ or order could be issued within 10 years, raising the implication that a writ timely issued could be enforced after the expiration of the 10-year period. However, former Section 685 suggested that enforcement after the applicable period was a matter that was subject at the least to the court's discretion. Whatever the prior rule may have been, Section 702.070 makes clear that, if the judgment is not extended, all aspects of enforcement must be completed within the basic 10-year period. At the end of the period, unless the judgment has been extended pursuant to Section 702.080, process previously issued becomes void.

Second, unlike former Section 681, Section 702.070 does not provide for tolling of the 10-year period for any reason. Ten years should provide ample time to enforce any judgment; moreover, Section 702.080 provides a simple procedure enabling a judgment creditor to extend the life of the judgment for an additional 10 years. A judgment, or portion thereof, which is not enforced within these periods is in effect discharged.

Note. At the February 1975 meeting, the Commission decided that this section and Section 702.080 should apply only to money judgments. The Comment was to summarize the law regarding the time within which nonmoney judgments could be enforced. In researching the law on this point, however, the staff has concluded that existing law treats all judgments the same for purposes of limitations on the time within which they can be enforced. Prior to 1955, Section 681 read in part as follows:

The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Despite the fact that Section 684 provided that "when the judgment is for money, or the possession of real or personal property, the same may be enforced by a writ of execution," Section 681 could have been read to apply only to execution of money judgments. However, in 1955 Section 681 was amended to read, in part, as follows:

The party in whose favor judgment is given may, at any time within 10 years after the entry thereof, have a writ or order issued for the execution or enforcement of the judgment.

The intention of the amendment is not clear on its face, but it is arguable that the addition of "order" was intended to make the section applicable to orders for possession or sale of property, and perhaps the performance of some other act by the defendant, and that the addition of the word "execution" made clear that "enforcement" applied to something other than money judgments. On the other hand, it is arguable that the 1955 amendment merely recognizes that money judgments may be enforced by supplementary proceedings.

The staff concludes that the amendment was intended to make clear that Section 681 applies generally because of the legislative history of the 1955 amendments contained in a State Bar memorandum to the Senate Interim Judiciary Committee:

This bill also changes the wording of Section 681 for the purpose of making clear that the time limitations apply to all orders and writs for enforcement of the judgment, not merely writs of execution as such. (See, e.g., orders specified in Section 684. [Actually Section 684 did not refer to "orders," but did refer to judgments for possession of real or personal property, sale of property, and performance of any other act enforceable by the court.]) Under present wording it may be argued that Section 681

is not applicable to enforcement of a decree foreclosing a mortgage. (See, generally, Dorland v. Hansen, 81 Cal. 202 [foreclosure of street assessment lien]; Laubisch v. Roberdo, 43 Cal.2d 702--foreclosure of mechanic's lien]; and Knapp v. Rose, 32 Cal.2d 530, to contrary.)

(Review of 1955 Code Legislation 101 (Cal. Cont. Ed. Bar 1955). Bracketed material added.)

Based on the assumption that the Commission wishes to continue existing law and because we believe it is the preferable rule, the staff has drafted Sections 702.070 and 702.080 to apply to all judgments covered by this title. (with the exception of direct enforcement by contempt under Chapter 11).

§ 702.080. Extension of judgment; action on judgment prohibited

702.080. (a) Except as provided in Section 702.090, within one year prior to the expiration of the 10-year period provided by Section 702.070, the judgment creditor may extend the time during which the judgment may be enforced by filing a judgment extension notice in the court which rendered the judgment.

(b) The judgment extension notice shall contain the following:

(1) The title of the court where the judgment was rendered and the cause and number of the action.

(2) The date of entry of the judgment.

(3) The names of the judgment debtor, the judgment creditor, and, if different, the original judgment creditor.

(4) The amount of the judgment or a description of the property to be sold or whose possession is to be delivered or restored and where entered in the judgment book, minutes, or docket.

(5) A statement that the enforceability of the judgment is extended until the expiration of 20 years after the date of entry of the judgment.

(c) The court clerk shall file the judgment extension notice in the file of the action and enter the extension in the same manner as is provided for entry of judgments in that court.

(d) If the judgment extension notice is timely filed by the judgment creditor, the judgment may be enforced or continued to be enforced until the expiration of 20 years after the date of entry of the judgment.

(d) No judgment that has previously been entered in this state may be extended by bringing an action upon it.

Comment. Section 702.080 is new. It provides a general procedure for extending the enforceability of judgments for a 10-year period beyond the 10-year period provided by Section 702.080 upon the filing of a judgment extension notice in the court where the judgment was rendered. For special rules applicable to the extension of a money judgment payable in installments, see Section 702.090.

Sections 702.080 and 702.090 provide the exclusive means for extending judgments entered in California courts. Subdivision (e) of this section makes clear that a judgment entered in this state may no longer be renewed by bringing an action on it. See Section 1710.60 (action on sister state judgment authorized).

Sections 702.080 and 702.090 also replace the noticed motion procedure of former Section 685. Under that section a judgment could be enforced after the expiration of 10 years in the discretion of the court upon a noticed motion accompanied by an affidavit showing the reasons for failure to enforce the judgment during the first 10 years after entry. Section 702.080 differs from the former procedure in several respects. First, Section 702.080 permits extension of the judgment by filing a judgment extension notice with the clerk of the court where the judgment was rendered. Former Section 685 required an application on noticed motion. Where the applicant is an assignee or successor in interest of the original judgment creditor, the judgment extension notice must contain both names. See Sections 702.080(a) and (b)(2) and 701.____ (judgment creditor defined). Second, Section 702.080 provides for the automatic extension

of the judgment when a judgment extension notice is properly filed whereas, under former Section 685, the court had discretion to deny the motion for failure to set forth adequate reasons for failure to enforce the judgment during the first 10 years. Third, subdivision (a) of Section 702.080 provides that the judgment extension notice must be filed within the tenth year after the judgment was entered, whereas the motion under former Section 685 could be made at any time after 10 years from the date of entry of the judgment. But see Section 337.5 (10-year statute of limitations on action on a judgment of a court of the United States or any state within the United States). Fourth, once a judgment is extended under Section 702.080, the judgment creditor has an additional 10-year period (beginning at the expiration of the first 10-year period provided by Section 702.070) during which time he may pursue whatever enforcement remedies are necessary. Former Section 685 seemed to require a separate application to the court each time the judgment creditor sought enforcement after the first 10-years had expired.

If a judgment is not extended in the manner provided, it is in effect discharged at the expiration of 10 years after its date of entry. But see Section 702.090 (money judgments payable in installments). If the judgment is extended, but is not satisfied before the end of the twentieth year after its entry, the judgment is in effect discharged and any process previously issued becomes void.

See also Section 674 (judgment lien extended for additional 10-year period upon filing of certified judgment renewal statement with recorder).

Note. This section incorporates Commission decisions made at previous meetings. We have several questions:

1. Would the Commission be more comfortable with the word "renewal" rather than "extension"?

2. Should we provide for sending notice of the extension to the judgment debtor? The staff is inclined not to provide for notice since mere extension has no effect and the judgment debtor would not be able to oppose the extension anyway.

3. The last sentence of the Comment indicates a proposed amendment of the judgment lien statute. Is this satisfactory?

EXHIBIT V

[Code Civ. Proc. §§ 725a, 726]

§ 725a. [Persons entitled to sue: Time for redemption from sale.] The beneficiary or trustee named in a deed of trust or mortgagee named in a mortgage with power of sale upon real property or any interest therein to secure a debt or other obligation, or if there be a successor or successors in interest of such beneficiary, trustee or mortgagee, then such successor or successors in interest, shall have the right to bring suit to foreclose the same in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage upon such property, except that real property, when the estate therein is more than a leasehold of two years unexpired term, sold under a decree in an action brought pursuant to this section, may be redeemed from such sale any time within three months after the sale in the manner and upon the terms provided by law for the redemption of real property sold under execution; provided, however, that in any case wherein the property shall be sold for a sum less than the judgment sum, in addition to interest thereon and costs of action and expenses of sale, the period for redemption shall be one year. [1933 ch 642 § 7; 1935 ch 650 § 9; 1939 ch 584 § 1; 1941 ch 446 § 1.] *Cal Jur 2d Elec Rem § 4, Mtg §§ 9, 89, 404, 420, 464, 489, 659; Cal Practice §§ 214:1, 214:10, 214:18, 214:50; Witkin Procedure 2d p 1817; Summary (8th ed) pp 1492, 1497, 1557, 1567, 1603, 1610.*

§ 726. [Recovery of debt or enforcement of right secured by mortgage: Proceedings in foreclosure suits.] There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct the sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable, not exceeding the amount named in the mortgage.

The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an amount fixed by the court, with sufficient sureties, to be approved by the judge, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he must file such undertaking, so approved, together with his oath that he will faithfully perform the duties of his office.

The decree for the foreclosure of a mortgage or deed of trust secured by real property or any interest therein shall declare the amount of the indebtedness or right so secured and, unless judgment for any deficiency there may be between the sale price and the amount due with costs is waived by the judgment creditor or a deficiency judgment is prohibited by Section 580b, shall determine the personal liability of any defendant for the payment of the debt secured by such mortgage or deed of trust and shall name such defendants against whom a deficiency judgment may be ordered following the proceedings hereinafter prescribed. In the event of such waiver, or if the prohibition of Section 580b is applicable the decree shall so declare and there shall be no judgment for a deficiency. In the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for such debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the property or the interest therein sold as of the date of sale, the court shall render a money judgment against such defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of sale and of action exceeds the fair value of the property or interest therein sold as of the date of sale; provided, however, that in no event shall the amount of said judgment, exclusive of interest from the date of sale and of costs exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said mortgage or deed of trust. Notice of such hearing must be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for

such hearing. Upon application of any party made at least 10 days before the date set for such hearing the court shall, and upon its own motion the court at any time may, appoint one of the inheritance tax referees provided for by law to appraise the property or the interest therein sold as of the time of sale. Such inheritance tax referee shall file his appraisal with the clerk and the same shall be admissible in evidence. Such inheritance tax referee shall take and subscribe an oath to be attached to the appraisal that he has truly, honestly and impartially appraised the property to the best of his knowledge and ability. Any inheritance tax referee so appointed may be called and examined as a witness by any party or by the court itself. The court must fix the compensation, in an amount as determined by the court to be reasonable, but such fees shall not exceed similar fees for similar services in the community where such services are rendered, which may be taxed and allowed in like manner as other costs.

No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action.

If the court appoint a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of Chapter 1 (commencing with Section 681), Title 9, Part 2, of this code are hereby made applicable to sale made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner.

In all cases heretofore, now or hereafter pending in the courts of this state, in the event of the death, absence from the state, other disability or disqualification of the commissioner appointed to sell encumbered property under the foregoing provisions of this section, the court may, upon the happening of either the death, absence from the state, other disability or disqualification of the commissioner, appoint an elisor to perform the duties of such commissioner which are then to be performed in such action. The elisor so appointed shall give the undertaking, and take the oath hereinbefore provided to be given and taken by a commissioner, before entering upon the discharge of his duties, and shall thereafter perform all duties left unperformed by the commissioner whom he is appointed to succeed, with like effect as if such duties had been performed by the commissioner.

If the land mortgaged consists of a single parcel, or two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such counties by the sheriff, commissioner or elisor, as the case may be, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county. [1872; 1893 ch 101 § 1; 1895 ch 108 § 1; 1901 ch 43 § 1; 1933 ch 793 § 1; 1937 ch 353 § 1; 1963 ch 819 § 26, 1967 ch 1003 § 1; 1968 ch 450 § 3; 1970 ch 1282 § 2.] *Cal Jur 3d Actions § 74, Conflicts of Laws § 8, 96; Cal Jur 2d Cert § 30, Chat Mtg §§ 56, 57, 77, 80, 82, 87, 89, 93, Exec §§ 76, 144, Fraud § 58, Judgm § 256, Jud S §§ 3, 8, 9, L & T § 204, Mech L § 125, Mtg §§ 9, 230, 420, 425 et seq., 440, 441, 472, 485, 495, 497, 542, 562, 636, 657, 663 et seq., 675, 677, 686, 687, 707, 713, 717 et seq., 730, 775, 802, Pldg § 84, Recds*