

Memorandum 78-22

Subject: Study D-39.200 - Enforcement of Judgments (Comprehensive Statute--Third-Party Claims)

Attached to this memorandum is a revised draft of Chapter 6 of the Enforcement of Judgments Law pertaining to third-party claims. This chapter has been revised to reflect decisions made at the April 1978 meeting. Also attached hereto is a copy of Professor Riesenfeld's memorandum concerning an earlier draft of the third-party claims chapter (Exhibit 1), material from 5 B. Witkin, California Procedure Enforcement of Judgment, concerning the existing third-party claims statute (Exhibit 2), and some miscellaneous statutes referred to in the memorandum or the draft statute (Exhibit 3). An appendix showing the disposition of existing law is attached to the draft statute.

Scope of Section 689b

The Commission requested the staff to confirm that Section 689b applies to claims by all conditional sellers and chattel mortgagees and not just where a motor vehicle or vessel has been levied upon. This is clear from the legislative history of the section and cases under it. Former Section 2969 of the Civil Code of 1872 provided for payment of the interest of a chattel mortgagee before such property could be taken under attachment or execution. This provision was eventually superseded by Section 689b. Section 689b was enacted by 1921 Cal. Stats., Ch. 292, which, at that time, referred only to executory agreements for the sale of personal property. The chattel mortgage provision was added to Section 689b by 1945 Cal. Stats., Ch. 1311. The provision requiring notice to legal owners of motor vehicles was added at the end of the provision by 1951 Cal. Stats., Ch. 1073, § 1. The section was revised in substantially the present form by 1953 Cal. Stats., Ch. 1796, § 3. Cases noted in the annotated codes concerning former Civil Code Section 2969 and Section 689b involve, for example, a cotton crop, cattle, an airplane, furniture, billiard tables, and 585 dozen cans of string beans and 32 dozen cans of catsup.

§ 706.110. Application of chapter

The Commission has not considered this provision.

§ 706.120. Time for filing third-party claims

The Commission has not considered this provision.

§ 706.130. Third-party claims to property seized to satisfy tax liability

Section 689d makes the procedure of Section 689 applicable where property is levied upon pursuant to certain warrant and notice of levy procedures for the collection of several state taxes under the Unemployment Insurance Code and Revenue and Taxation Code. The list in Section 689d of warrant and notice of levy provisions in these codes is incomplete, as it is in Section 690.52 pertaining to exemption claims. See the discussion in Memorandum 78-23. Section 689d also applies only to claims of title, not to claims by secured parties. Revenue and Taxation Code Section 6799 (see Exhibit 3) provides a separate procedure where the agency has seized property to collect sales and use taxes.

The staff recommends that a uniform third-party claims procedure be applied to all tax collection procedures, whether the collector is a state or local agency. There does not appear to be any justification for the sketchy coverage of Section 689d. Section 706.130 has been drafted to apply the normal procedures to situations where there is a levy by a levying officer and a modified procedure where the agency itself levies upon property, which is based upon the current practice of the Department of Benefit Payments under Unemployment Insurance Code Section 1755 and Section 689d.

§ 706.140. Duty to mail notice and copy of claim

This provision has been redrafted to implement a decision made at the April meeting.

§ 706.150. Liability of levying officer

The protection against liability for levy under this chapter was deleted at the April meeting on the assumption that Chapter 6 did not provide for levy. However, it does provide for "relevy" on property which has been released for failure to make a deposit or to provide an undertaking, in a case where the creditor prevails at a hearing on the third-party claim. See Section 706.520.

Section 706.150 has been redrafted to attempt to continue the substance of existing law. However, a comparison of the liability provisions in Sections 689 and 689b reveals a definite lack of consistency. The second sentence of the sixth paragraph of Section 689 provides that the levying officer is not liable to a third person for a levy, etc., if no claim is delivered, and thus has an application outside the third-party claims procedure. It also provides a general nonliability when the levying officer complies with Section 689. On the other hand, the third paragraph of subdivision (9) of Section 689b provides only that, if an undertaking is given, the levying officer is not liable for levy, etc., in accordance with the Code of Civil Procedure.

The staff again suggests that a general provision be added to the Enforcement of Judgments Law to the effect that levying officers are not liable if they comply with the provisions of the title. This would avoid the implications that there may be liability in certain situations even where the officer followed the prescribed procedures. The nonliability provision in Section 689 is overbroad in that it seems to provide an absolute protection in the absence of a third-party claim, regardless of whether the original levy was proper. Section 536.2 of the Marshal's Manual recognizes that, at least in the case of seizure of property from a third person who claims rights thereto, the levying officer will be liable for the levy, despite language in Section 689.

§§ 706.220, 706.320. Notice of third-party claim

Existing law provides for a demand for an undertaking (Section 689, para. 1) or for an undertaking or deposit (Section 689b(3)). It also provides that the officer may "demand and exact" the undertaking where the claim is defective, informal, or insufficient. Sections 689, para. 6, 689b(2). A question arose at the April meeting concerning the significance of the word "exact." We have discovered no significance. It is clear from Sections 689 and 689b that the judgment creditor need not give an undertaking. Neither the Marshal's Manual, the Sheriff's Manual, nor any cases examined, use the word in the discussion of the procedure under these sections.

Section 706.220 and 706.320 have been drafted to provide for a notice to the judgment creditor that a third-party claim has been filed

and that, if an undertaking or, in the case of a security interest, an undertaking or deposit, is not provided, the property will be released. This is descriptive of the actual operation of existing law.

§§ 706.330, 706.370, 706.430, 706.440, 706.450. Judgment creditor's verified statement

A question arose at the April meeting concerning the function of the judgment creditor's verified statement of the invalidity of the chattel mortgage or conditional sale which is required under Section 689b(9) as a condition to giving an undertaking to maintain a levy. No decisions, treatises, or levying officers' manuals appear to deal with the question of whether the verified statement should be filed with the court if a hearing is held. The staff discussed this matter with persons familiar with procedures in Santa Clara and San Francisco counties. They recognized that existing law does not say what to do with the statement after it is filed with the levying officer, but they indicated that they generally filed it with the court anyway. They also stated that such statements are rarely received because, in most cases, the judgment creditor pays off the secured party.

The draft statute has been revised to require the levying officer to file the verified statement with the court. See Section 706.430. It also provides for the effect of the statement. See Section 706.450. Since a hearing on the third-party claim may be held even though the judgment creditor does not file the undertaking and verified statement, Section 706.440 has been added to provide for service of the verified statement on the secured party.

§ 706.620. Prohibition against release, sale, or other disposition

Existing law permits the judgment creditor to force a chattel mortgagee or conditional seller to file a third-party claim within 30 days after being served with a demand for the claim or forego the security interest in the property. See Section 689b(8). However, existing law does not provide that the property shall be held by the levying officer during the 30-day period. This would seem to be necessary since otherwise there is no point in demanding the third-party claim and, in fact, once the property is sold, a third-party claim may not be made. Section 706.620 has been drafted to deal with this problem.

§§ 706.710-706.750. Undertaking to release

Sections 710b through 713-1/2 permit the third person claiming property which has been levied upon to satisfy a money judgment to file an undertaking to release the property. We have continued the substance of existing law but suggest that the Commission consider extending this procedure to cases where the property has been levied upon to satisfy a judgment for sale or where a judgment for possession of personal property is satisfied for the value of the property because the property cannot be found.

Third-party claims where property reached by process other than levy

The draft of Chapter 6 considered at the April meeting contained an article providing a special proceeding of a summary nature to determine third-party claims where the property has been reached by a procedure other than levy under execution, such as, by a court order in an examination proceeding, a judgment in a creditor's suit, seizure by a receiver, filing a claim with a public entity owing money to the debtor, or an assignment order. See Chapter 5, attached to Memorandum 78-7. The Commission decided to delete this procedure unless it is shown that existing remedies are inadequate.

There is no shortage of remedies under existing law although they are more cumbersome than the proposed procedure. See generally E. Jackson, California Debt Collection Practice § 21.17 (Cal. Cont. Ed. Bar 1968); 5 B. Witkin, California Procedure Enforcement of Judgment § 115, at 3481-82 (2d ed. 1971). The third party may bring an action to enjoin the sale of the property or to quiet title. If the taking was wrongful, the third person may seek damages in an action for conversion. The third person may recover possession of the property through an action for specific recovery (claim and delivery). A third person may seek damages in an action for abuse of process. See Riesenfeld, Torts Involving Use of Legal Process, in Debt Collection Tort Practice § 5.18 (Cal. Cont. Ed. Bar 1971). If the third person is examined in supplementary proceedings, he may deny the debtor's interest in the property or claim an adverse interest, and the court is precluded from ordering the application of the property toward the satisfaction of the judgment.

The creditor must then resort to a creditor's suit to reach the property. See Code Civ. Proc. §§ 719, 720. A garnishee may refuse to cooperate with a levy of execution and defend his interest in any later enforcement proceedings initiated by the creditor.

The staff concludes that the proposed special proceeding would be useful, but that it is not necessary.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Memorandum 78-22
(originally distributed as Exhibit 1 to
the First Supplement to Memorandum 76-72)

EXHIBIT 1

Comment on Memorandum 76-72
(Third-Party Claims)

by

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Consultant

The Third-Party claim procedure as currently part of California Law is in need of revision because the language of the controlling provisions as well as their rules are in part obsolete in view of the adoption of the U.C.C. which consolidates all consensual security interests in personal property and specifically provides for the involuntary transferability of the debtor's rights in collateral by attachment, garnishment or other judicial process under Cal. U.C.C. 9-311, subject to default provisions in the security agreement. Under the U.C.C. purchasers at execution sales are not buyers in the ordinary course of business, Cal. U.C.C. §1-201(9) and not protected by Cal. U.C.C. §9-307.

Although the third-party claims sections, C.C.P. §§689 and 689b, relate to levies under a writ of execution, they are applicable to levies of attachments under operating or suspended new statutes. See C.C.P. §549 and suspended §§488.090, 488.020c. Because of their checkered history, §§689 and 689b are subject to curious gaps, unnecessary burdens and doubts as to their effects.

I.

Scope: Need for Expansion

At present C.C.P. §689 applies to "claims of title and right of possession" and §689b to "claims of conditional sellers and chattel mortgages."

Claimants of priority under statutory liens or liens by judicial process cannot invoke the procedures under §689, Palmquist v. Palmquist, 228 C.A.2d 789, 39 Cal. Rptr. 871 (1964). This of course does not mean

that they have not other remedies such as injunctions, declaratory judgment proceedings, trover, etc. Even C.C.P. §689 does not require resort to it by claimants protected thereby but permits reliance on other remedies, Retailers' Credit Ass'n of Sacramento v. Superior Court of Glenn County, 19 C.A.2d 457, 65 P.2d 937 (1937), Commercial Credit Plan, Inc. 276 C.A.2d Supp. 831, 80 Cal. Rptr. 534 (Super. Ct. Alameda, App. Dep.).

A) I agree with the staff that the consolidation of Sections 689 and 689b, as well as their extension to statutory and judicial liens is desirable. I am not satisfied, however, with some of the proposed language.

Third-party claim procedure should be available to a party who claims superior rights in the personal property levied upon, such superior rights including superior rights to possession or to the sale and satisfaction from the proceeds of the property. §706.110 ("any interest in the personal property levied upon" seems too broad); §706.010(c) seems to be somewhat meaningless.

I would say in §706.110:

"A person may claim a superior interest in any personal property."

I would define superior interest as "including title or other right to possession, security interest under a security agreement and liens by judicial proceedings or applicable provision of law."

B) I would recommend consideration of the question whether the availability of the third party claim procedure should be extended to supplementary proceedings. §705.160 (Memorandum 76-72) does not envisage claims by third parties other than persons indebted to or holding property of the judgment debtor. Present law does not permit third party claims under §689 or 689b in supplementary proceedings because of constitutional doubts. Since the procedure has been upheld as constitutional in case of a levy, see Rauer's Law and Collection Co. v. Higgins, 95 C.A.2d 483, 213 P.2d 45 (1950), there are no reasons why similar steps should not be permitted if a third party chooses to claim superior rights in supplementary proceedings. If the supplementary proceedings implement a post-judgment levy, §§689 and 689b are applicable by their

very terms. Why should the same procedure not be applicable if the judicial lien is obtained by supplementary proceedings? A number of jurisdictions now permit such proceedings, see Riesenfeld, *Creditors' Remedies and Debtors' Protection* (2d ed. 1975) p. 277 ftn. 9 and Note 1, p. 289 (Florida, Indiana, Maryland, Michigan, New York, Oklahoma, Washington).

II

Rights and Duties of Subordinate Creditor

If the interest claimed is ownership of the personal property levied upon or a right to possession under a lease or bailment, the creditor has no right to sell the property in defiance of such interest. If the property is leased to the third party claimant but not yet delivered, the judgment debtor's rights as lessor (which may be chattel paper if the property was inventory) should be subject to an execution sale.

If the claimed interest is a lien or security interest, the determination of the amount of the debt so secured will become material. Under the terms of C.C.P. §689b the claim must state "the sums due or to accrue, above set-offs with interest to date of tender" and upon payment of that amount (and only upon the payment of that amount) the property will be sold free of all liens and claims of the third party claimant, §689b(8). In other words, the creditor must pay the whole amount of the debt whether due or not. This goes beyond the redemption rights of lienors under CC §2904 which accrue only upon maturity of the secured debt. Moreover, it may be inconsistent with U.C.C. §9-311 and therefore repealed by implication.

The staff proposes that the levying creditor is only bound to pay what is due at the time of the making of the claim. While this may be the whole debt if the agreement contains an acceleration clause, difficulties may arise if no portion of the debt is in default and the levy does not constitute a default under the governing agreement. I agree with the proposal that the levying creditor should no longer be under a duty to pay what is not due but that still leaves two further issues:

(a) Should the creditor have a right to a determination in summary proceedings of the total outstanding indebtedness secured by the property?

(b) Should he have the right to pay it off in toto, subject to prepayment charges, if validly stipulated or discounted to the present in the absence of a governing agreement?

1) In my opinion the third party claim procedure, whether initiated by the third party (§706.110) or by the levying creditor (§706.310), should also determine the total amount secured since the execution purchaser has a legitimate interest in such determination. The reasonable value of the interest (equity) sold depends on the value of the remaining third party interest. (In my opinion §706.120(a)(2) is not properly drafted and should track with §706.110 b.)

2) I would even answer issue (b) in the affirmative.

There are other points which are bothersome. If the property secures a debt which is partly due and partly not due, what are the relative priorities after subrogation? §706.140(b) is not clear on that issue. Under former law this problem did not exist. Moreover the levying creditor should be entitled to pay off the debt and be subrogated to the portion of the debt paid and to the security if the value of the collateral exceeds the total debt. §706.140(b) is either too broad or misleading. Cf. Potter v. Solk, 161 C.A.2d 870 (Super. Ct. App. D. 1958).

III

Effect of Non-Compliance

§706.130(b), §706.160 and §706.290 deal with release and relevy.

The current statutes use varying language. §689 par. 3 speaks of "release the property and the levy," §689 par. 8 speaks of release of "the property or the levy" and provides for "retake or levy," if the creditor ultimately prevails. §689b(4) refers only to "release of the property" and 689b(10) envisages "retaking" of the property under an extant writ or a new writ. The difference in language between §689 and §689b is due to the amendment in 1957 which extended the third party claims procedure of §689 to levy on intangible property and apparently

also meant to overrule the suggestion in a prior case to the effect that the release of the property taken still left it subject to an equitable lien effective against the debtor's trustee in bankruptcy.

I recommend (a) that §706.130(a) should use the words "release the levy and the custody of the property where it is not held under another levy," (b) that §706.160 should speak of "release of the custody of the property" and (c) that §706.290 should remain restricted to re-levying instead of re-taking (as proposed). (d) I recommend, however, that a new writ should always be required, if the return day has expired, provided we keep the present system that after return day a writ is functus officio. The present system of §§689 and 689b create an unnecessary exception.

§§706.410 and 706.440 should be changed to conform to the suggestions relating to §§706.130(b) and 706.190.

EXHIBIT 2

(b) 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. Dadman* (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. 45 ["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 *Johuston 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 *Arena 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." (Sec 9 So. Cal. L. Rev. 349.)

(5) The claimant has the burden of proof. (See *Beverly Hills T. & L. v. Western D. etc. Co.* (1961) 190 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. Fratics* (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) 275 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* (1935) 5 C.A.2d 25, 41 P.2d 585; *Missouri State Life Ins. Co. v. Gillette* (1932) 215 C. 709, 713, 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*, §50; 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.)

(bb) [§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 by 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 sales 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. 534. 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.

EXHIBIT 3

CHAPTER 9. UNDERTAKINGS**Article 1. General Provisions****§ 489.010. Application of article**

489.010. Unless expressly provided by statute, the provisions of this article apply only to undertakings required in this title.

Comment. Section 489.010 limits the application of this article to undertakings in attachment proceedings. The provisions of this article supplement the general provisions that govern undertakings in Sections 1041 and 1054-1059 and are in turn supplemented by specific provisions relating to particular undertakings in other articles of this chapter.

§ 489.020. Definitions

489.020. As used in this article:

(a) "Beneficiary" means the person to be benefited by an undertaking.

(b) "Principal" means the person who files an undertaking.

§ 489.030. Waiver of undertaking

489.030. An undertaking may be waived in writing by the beneficiary.

Comment. Section 489.030 is modeled after a portion of Section 920 (waiver of appeal bond). See also *Merritt v. J. A. Stafford Co.*, 68 Cal.2d 619, 440 P.2d 927, 68 Cal. Rptr. 447 (1968) (parties may agree to appeal bond in less than required amount). Compare former Section 539(a) (failure to object deemed a waiver of objection).

§ 489.040. Number of sureties required

489.040. An undertaking shall be executed by two or more sureties.

Comment. Section 489.040 makes uniform the provision, formerly found throughout the attachment chapter, for at least two sureties. See former Sections 539, 539a, 540, 553, 555. The requirement formerly found in many of these sections that the sureties be "sufficient" is continued in Sections 1057 (affidavit of sureties), 489.060 (approval of undertaking), and 489.070 (objection to undertaking). *Cf. Tibbet v. Tom Sue*, 122 Cal. 206, 54 P. 741 (1898) (provision for attachment undertaking incorporates Section 1057).

Any undertaking required in this title may, in lieu of two or more personal sureties, be executed by a single corporate surety. See Section 1056. *Cf. Brandt v. Superior Court*, 67 Cal.2d 437, 432 P.2d 31, 62 Cal. Rptr. 429 (1967) (undertaking in libel and slander action may be made by corporate surety as well as by personal sureties).

§ 489.050. Estimate of value of property

489.050. Where the amount of an undertaking depends upon the value of property, the undertaking shall include the principal's estimate of the market value of such property.

Comment. Section 489.050 adopts the method used under Sections 677 (action to set aside fraudulent conveyance) and 710c (third-party claims on execution) whereby the person filing the undertaking supplies the estimate of value. Former Section 555 provided for a court-ordered appraisal of property. Under the procedures provided here, the court may order an appraisal of property upon a subsequent objection by the beneficiary. See Section 489.090(b).

§ 489.060. Filing and approval of undertaking

489.060. (a) Except as provided in subdivision (b), all undertakings shall be presented to a proper court for approval and upon approval shall be filed with the court in which the action is pending. An undertaking becomes effective upon filing.

(b) Where the surety on the undertaking is a corporate surety possessing a certificate of authority from the Insurance Commissioner as provided by Section 1056, the undertaking is not required to be approved by the court.

(c) Nothing in this chapter shall be construed to preclude approval of an undertaking in an amount larger than that required.

Comment to Section as Enacted

Comment. Section 489.060 requires approval of any undertaking under this title by a court before it may be filed. This makes the requirement of former Section 540 (undertaking for release of attached property) applicable to all undertakings authorized or required by this title. The court approves the undertaking if it determines that the undertaking on its face and the affidavits of the sureties are sufficient. Such approval has no effect on the right of the beneficiary to object to the sufficiency of the undertaking. It should be noted that in some instances an undertaking may be approved by a court in a county other than the county in which the action is pending. See Section 489.310. However, following approval, all undertakings must be filed with the court in which the action is pending. Under prior law, the undertaking was filed with the court in some instances (former Section 540) and with the levying officer in others (former Section 539a). See also the Comment to Section 489.240. However, all undertakings must now be judicially approved before filing. See also Section 1057 (clerk to enter undertaking in register of actions).

Subdivision (b) of Section 489.060 is based on a sentence found in former Section 539.

Note. There is no Comment to the 1976 amendment of Section 489.060.

§ 489.070. Grounds for objection to undertaking

489.070. The beneficiary may object to an undertaking on either or both of the following grounds:

- (a) The sureties are insufficient.
- (b) The amount of the undertaking is insufficient.

Comment. Section 489.070 continues prior law. See, e.g., former Sections 539 (exceptions to sureties, increase of undertaking on motion), 554 (justification of sureties), 555 (justification of sureties). The combination of both the exception to the sufficiency of the sureties and to the adequacy of the amount of the undertaking in a single objection to the undertaking is modeled upon Sections 678 (undertaking in action to set aside transfer of property) and 711½ (undertaking by third-party claimant on execution).

The qualifications of sureties are set out in Sections 1056 and 1057. The amount of the undertaking is prescribed in Sections 489.220, 489.310, 489.410, and 489.420. See also Section 917.9.

§ 489.080. Manner of making objection

489.080. (a) Any objection to an undertaking shall be made by a noticed motion. The notice of motion shall specify the precise ground for the objection.

(b) Where the objection is made on the ground that the market value of the property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the notice of motion shall state the beneficiary's estimate of the market value of the property.

Comment. Section 489.080 provides a procedure for objecting to the undertaking but places no limitation on the time within which objections must be made. Contrast former Sections 539, 539a, 553.5, 554 (five days).

Subdivision (b) is new. Its purpose is to facilitate voluntary agreement on the amount of an undertaking by the parties. See Section 489.100. Where the parties are unable to agree on the property valuation, the court determines the amount of the undertaking. See Section 489.090.

§ 489.090. Hearing and determination of objection

489.090. (a) Unless the parties otherwise agree, the hearing on an objection shall be held not less than two nor more than five days after service of notice of motion.

(b) The hearing shall be conducted in such manner as the court determines is proper. The court may permit witnesses to attend and evidence to be procured and introduced in the same manner as in the trial of a civil case. The court may appoint one or more disinterested persons to appraise property for the purpose of ascertaining its value.

(c) If the court determines that the undertaking is insufficient, it shall specify in what respect it is insufficient and shall order that an undertaking with sufficient sureties and in a sufficient amount be filed within five days. If the order is not complied with, all rights obtained by filing the original undertaking immediately cease.

(d) Where the court determines an undertaking is insufficient, the undertaking shall remain in effect until an undertaking with sufficient sureties and in a sufficient amount is filed in its place.

(e) Where the court determines an undertaking is sufficient, no future objection may be made to the undertaking except upon a showing of changed circumstances.

Comment. Section 489.090 is derived from numerous provisions of the Code of Civil Procedure. See, e.g., Sections 678, 678½, 679, 711½, 712, 712½, 833-835, 1030, and 1057.

The time for hearing on the sufficiency of an undertaking in subdivision (a) continues prior law. See former Section 539.

Subdivision (b) is intended to provide the court with a wide variety of tools. The court may examine sureties under oath; it may appoint appraisers; it may order a full-dress hearing. Subdivision (b) is permissive rather than restrictive.

If a new undertaking is filed after the original undertaking is found insufficient, it must of course be judicially approved before it may take effect. Section 489.060. The new or increased undertaking is subject to objection in the same manner as the original undertaking. Section 489.070. However, a court's determination that an undertaking is sufficient is binding in any subsequent proceedings, absent changed circumstances. Subdivision (e).

Orders for a sufficient undertaking made under this section are not subject to appeal. See *Murillo v. Toole*, 47 Cal. App.2d 725, 118 P.2d 895 (1941). See also Sections 904.1-904.3.

Subdivision (d) is new. The effect of this provision is to continue the liability of the surety on an insufficient undertaking until the surety is exonerated either by the filing of a sufficient undertaking or the failure of the condition of the surety's liability.

§ 489.100. Hearing unnecessary where undertaking increased to amount of beneficiary's estimate of property value

489.100. Where an objection to an undertaking is made on the ground that the market value of property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the principal may accept the beneficiary's estimated value of the property and file

at once an increased undertaking based upon such estimate. In such case, no hearing shall be held on the objection, and the beneficiary is bound by his estimate of the value of the property in any hearing on the sufficiency of an undertaking filed by the principal in the action.

Comment. Section 489.110 is derived from Sections 678, 679, 711½, and 712½. The beneficiary is bound by his estimate of the value of the property on which the amount of the undertaking depends but may object to the sufficiency of the increased undertaking on any other ground.

§ 489.110. Liability of surety

489.110. Notwithstanding Section 2845 of the Civil Code, a judgment of liability on an undertaking shall be in favor of the beneficiary and against the sureties and may be enforced by the beneficiary directly against the sureties. The liability of a surety is limited to the amount of the undertaking. Nothing in this section affects any right of subrogation of a surety against his principal.

Comment. Section 489.110 supplements Section 1058a. Under Section 1058a, a motion to enforce liability on an undertaking is directed to the sureties. Section 489.110 makes clear that the liability may be enforced directly against the sureties. In contrast with what appeared to be the former law, the beneficiary need not attempt to satisfy his judgment first from the assets of the principal. *CF* former Section 552; *Hezaire v. Fidelity & Deposit Co.*, 12 Cal. App 3d 888, 91 Cal. Rptr. 142 (1970); CIVIL CODE § 2845. It is not clear whether the enactment in 1972 of Section 1058a changed the former rule.

Section 489.110 in no way interferes with the contractual relationship between principal and surety.

§ 489.120. Limitations period for recovery on undertaking

489.120. A motion to enforce liability on an undertaking shall not be filed or notice served until after entry of the final judgment in the action in which the undertaking is given and the time for appeal from such judgment has expired or, if an appeal is filed, until such appeal is finally determined. The motion may not be filed or notice served more than one year after the later of the preceding dates.

Comment. Section 489.120 is derived from Section 1166a. Compare Section 490.030.

§ 6799. Excess proceeds; return; third party claims

If upon the sale the moneys received exceed the total of all amounts, including interest, penalties, and costs due the State, the board shall return the excess to the person liable for the amounts and obtain his receipt. If any person having an interest in or lien upon the property files with the board prior to the sale notice of his interest or lien, the board shall withhold any excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If for any reason the receipt of the person liable for the amount is not available, the board shall deposit the excess moneys with the State Treasurer, as trustee for the owner, subject to the order of the person liable for the amount, his heirs, successors, or assigns.

(Added by Stats.1941, c. 36, p. 552, § 1.)

STAFF DRAFT

THIRD-PARTY CLAIMS AND RELATED PROCEDURES

Existing Law

Third-Party Claims

Sections 689 and 689b¹ provide summary special proceedings permitting a person other than the judgment creditor or the judgment debtor to claim certain interests in personal property² that has been levied upon.³ Section 689 applies where the third person claims title and the right to possession of the property. Section 689b applies where the

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1. Except as otherwise noted, all statutory citations are to the Code of Civil Procedure.
 2. The usual remedy where real property is wrongfully sold on execution is an action to quiet title. See *First Nat'l Bank v. Kinslow*, 8 Cal.2d 339, 345, 65 P.2d 796, 799 (1937). The existing third-party claims procedure derives from Section 218 of the Practice Act, enacted in 1851, under which the sheriff could summon a jury of six persons in the county to determine the validity of a third-party claim. The purpose of this procedure was to aid the sheriff, although he remained liable for a wrongful levy or for improperly releasing the property despite the determination of the jury which was held not to be conclusive against the parties. See *Perkins v. Thornburgh*, 10 Cal. 189 (1858); see generally 2 A. Freeman, *Law of Executions* § 276 (3d ed. 1900); G. Gilbert, *The Law of Executions* § 1 (1763); Curtis, A Legal Headache, 9 Cal. St. B.J. 167 (1934). In 1891, the statute was amended to substitute a provision for an undertaking in favor of the sheriff for the provision for a sheriff's jury. 1891 Cal. Stats., Ch. 32, § 1. In light of this history, it has frequently been stated by the courts that a primary purpose of the procedure is to protect the levying officer from liability for taking, holding, and selling the property. See, e.g., *Sunset Realty Co. v. Dadmun*, 34 Cal. App.2d Supp. 733, 736, 88 P.2d 947, 949 (1939). Section 689 has provided since 1929 that the undertaking is in favor of the third person and, since 1933, that the levying officer is not liable if he complies therewith. 1929 Cal. Stats., Ch. 341, § 1; 1933 Cal. Stats., Ch. 744, § 135.
 3. The third-party claims procedure also applies to the determination of adverse claims in attachment (see Section 488.090) and claim and delivery (see Section 514.050). In at least one case, Section 689 was applied in an unspecified manner to a dispute between an innkeeper asserting a lien on a violin and the owner even though there was no levy and no levying officer was involved. See *Rudolph Wurlitzer Co. v. Farb*, 120 Cal. App. Supp. 773, 774, 6 P.2d 358, 358 (1932).

third person claims a security interest based on a conditional sale or chattel mortgage. In general, these procedures are parallel, but there are some significant differences.

Under both procedures, once property has been levied upon but before it has been sold or otherwise disposed of,⁴ the third person may file a claim with the levying officer who then serves a copy of the claim on the judgment creditor by certified or registered mail. If the judgment creditor does not respond within five days after receipt⁵ of the claim and the demand for an undertaking, the property is released from the levy.

If the third person claims title and right to possession under Section 689, the judgment creditor may maintain the levy by posting with the levying officer an undertaking in twice the value of the property⁶

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4. Sections 689 and 689b refer only to disposition by sale under the writ but, inasmuch as these provisions specifically apply to garnishment of intangibles and to claim and delivery proceedings (see Section 514.050), they must be read broadly to include collection and payment and to delivery of possession to the judgment creditor. Cf. National Bank v. Finn, 81 Cal. App. 317, 337, 253 P. 757, 766 (1927) (third-party claim must be made before it has become impossible for sheriff to deliver property to claimant or to obtain undertaking from creditor).
 5. Section 689 requires an undertaking "within five days after written demand . . . made by registered or certified mail," whereas Section 689b requires the undertaking or deposit "[w]ithin five days after receipt by the plaintiff or his attorney of such officer's demand." It appears that the practice is to allow five days after the date of receipt of the demand as shown by the return receipt. See Marshal's Manual of Procedure §§ 533.2, 542.2 (J. Matarazzo ed. n.d.).
 6. The procedures for objecting to the sufficiency of sureties and for the justification of sureties in attachment proceedings are incorporated by the third paragraph of Section 689 and the second paragraph of subdivision (9) of Section 689b. The fourth and fifth paragraphs of Section 689 also provide an appraisal procedure for determining an objection to the amount of an undertaking to indemnify an unsecured third-party claimant. Subdivision (9) of Section 689b gives the levying officer discretion to determine the value of the property for the purpose of setting the amount of the undertaking required to maintain the levy against a claim by a secured party.

which indemnifies the third person for any loss caused by the levy.⁷

Under Section 689b, a third person's claim under a conditional sale or chattel mortgage is required to include a demand for payment of all sums due or to accrue under the agreement, plus interest to date of tender. In order to maintain the levy, the judgment creditor must either deposit with the levying officer the amount demanded or file with the levying officer an undertaking and a verified statement contesting the validity of the third person's contract or mortgage. Whichever course is chosen, the property is sold free and clear of any claim or lien of the third person.⁸

The judgment creditor can initiate this procedure by serving a demand on the secured party that a claim be made and, if the secured party does not make a claim within 30 days after being served with the demand, the property may be sold free of any claim or lien of the third person.⁹

Within 15 days after the third-party claim is filed with the levying officer, either the judgment creditor or the third person may petition for a hearing to determine the validity of the claim.¹⁰ This may be done whether or not an undertaking is filed in response to a claim under Section 689, or an undertaking is filed or a deposit is made under Section 689b. The court may order the sale of perishable property and may stay the sale, transfer, or other disposition of the property while the proceedings are pending. The hearing is required to be held within 20 days from the filing of the petition unless a continuance is granted. Ten days' notice must be given the levying officer and the judgment creditor or third person, whichever one is not the petitioner.

7. Under the second paragraph of Section 689, there is no liability on the undertaking if the property is required by law to be registered or recorded in the name of the owner and, at the time of levy, the judgment debtor was the registered or recorded owner, so long as the judgment creditor relied in good faith on the registered or recorded ownership in making the levy.

8. Section 689b(9), 689c.

9. Section 689b(8).

10. Sections 689, para. 8, 689b(10).

The judgment debtor is not required to be given notice.¹¹ The third person has the burden of proof at the hearing. At the conclusion of the hearing, the court gives judgment determining the validity of the claim, which is conclusive between the third person and the judgment creditor.

Undertaking to Release Property

Where the property has been levied upon under a writ of execution issued to enforce a money judgment, a third person claiming ownership may obtain the release of the property by posting an undertaking in twice the value of the property (but not more than twice the amount for which execution was levied) on condition that, if the property is determined to belong to the judgment debtor, the third person will pay a sum equal to the estimated value of the property subjected to levy.¹² This procedure may be used whether or not the third person has filed a third-party claim and may accomplish the release of the property even though the judgment creditor has given an undertaking in response to a claim.¹³

Recommendations

The Commission has concluded that the third-party claims procedures have operated in a generally satisfactory manner, but that several modifications should be made to clarify the existing procedures and to promote their more efficient operation.

Nature of Interests Which May Be Claimed

Any third person who claims an interest in personal property levied upon which is superior to the judgment creditor's lien should be permitted to assert that interest through the third-party claims procedure. Existing law is limited to persons claiming title and right to possession or claiming under a conditional sales agreement or chattel mortgage.

11. See *Rubin v. Barasch*, 275 Cal. App.2d 835, 837, 80 Cal. Rptr. 337, ___ (1969).

12. See Sections 689, para. 7, 710b to 713-1/2.

13. See Sections 689, para. 7, 710b; *Mazuran v. Finn*, 53 Cal. App. 656, 657-58, 200 P. 769, 770 (1921).

Scope of Summary Procedure

A third person may resort to the procedures provided by Sections 689 and 689b when personal property is levied upon under a writ of attachment,¹⁴ a writ of execution,¹⁵ a prejudgment writ of possession issued in claim and delivery proceedings,¹⁶ or a writ issued to enforce a judgment for sale of property.¹⁷ Under the proposed law, this summary remedy would also be available where property is levied upon under a postjudgment writ of possession.

A third person claiming title to property levied upon to collect certain state taxes may take advantage of the summary procedure provided by Section 689.¹⁸ There is no apparent reason for permitting resort to summary procedures only in these limited situations. Nor is there any reason to permit the summary determination of claims of title but not of the claims of secured parties. Accordingly, the proposed law applies the third-party claim procedure uniformly to procedures for the collection of any state or local tax. Where the tax is collected by means of a levy by a levying officer, the normal procedure would be applicable except that, since public entities are not required to file undertakings,¹⁹ the proposed law requires the agency collecting the tax to file a notice with the levying officer in order to maintain the lien on the property. Where the property is reached by a notice of levy served by

14. Section 488.090.

15. Sections 689, 689b.

16. Section 514.050.

17. See *Lawler v. Solus*, 101 Cal. App.2d 816, 818, 226 P.2d 348, ____ (1951) (judgment foreclosing a chattel mortgage).

18. Section 689d applies to notices of levy and warrants and notices of levy issued pursuant to Unemployment Insurance Code Sections 1755 and 1785 and Revenue and Taxation Code Sections 6776, 7881, 9001, 10111, 18906, 26191, 30341, and 32365. Revenue and Taxation Code Section 6799 also provides for the determination of third-party claims of an interest in or lien on property seized for the purpose of sale to collect the sales and use tax, but does not incorporate Section 689 or 689b.

19. Section 1058.

agency personnel²⁰ or through seizure provisions,²¹ the agency itself will perform the duties of the levying officer.²²

Notice of Hearing Given to Judgment Debtor

The judgment debtor should be given notice of a hearing on the third-party claim since the judgment debtor is vitally interested in the disposition of the property. Participation of the judgment debtor should prevent an incorrect determination of the respective interests of the parties and a misallocation of the property or its proceeds.²³

Burden of Proof

Under existing law, the burden of proof in the hearing on the third-party claim is on the third person.²⁴ The proposed law continues this provision with regard to claims of title, right to possession, or any other interest that is not a security interest, but places the burden of proof on the judgment creditor in a case where the third person claims a security interest. This change is made in recognition of the fact that security interests are a matter of public record and that security interests are afforded a general presumption of validity.²⁵

Additional Changes

For the sake of uniformity, the general provisions pertaining to objections to undertakings and to the release of property should be incorporated by the third-party claims procedure.²⁶ Notices mailed by the levying officer should be sent by first-class rather than registered or certified mail, because first-class mail is more likely to be expeditiously received.

20. See, e.g., Unemp. Ins. Code § 1755.

21. See, e.g., Rev. & Tax. Code § 6796.

22. This is consistent with the procedure developed under Unemployment Insurance Code Section 1755.

23. See, e.g., Rubin v. Barasch, 275 Cal. App.2d 835, 80 Cal. Rptr. 337 (1969).

24. See Section 689b(10), incorporating the hearing provisions of Section 689.

25. See Com. Code § 9201.

26. See Sections 489.040-489.100, 1056 (general provisions relating to undertakings). The provision in Section 689.5 to the effect that, if the judgment debtor cannot be found, the property should be released to the third-party claimant should be retained as an exception to the general rules pertaining to release. Additional technical revisions are explained in the Comments to the proposed statute and in the Appendix, infra.

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CHAPTER 6. THIRD-PARTY CLAIMS

Article 1. General Provisions§ 706.110. Application of chapter

706.110. Pursuant to this chapter, a third person may claim an interest in personal property if the interest is superior to the judgment creditor's lien on the property, where enforcement is sought by levy under or service of any of the following:

- (a) A writ of attachment.
- (b) A writ of execution.
- (c) A prejudgment or postjudgment writ of possession.
- (d) A writ of sale.
- (e) Process issued by the state or a local public entity to enforce a tax liability.

Comment. Section 706.110 is new. Under former law, the third-party claims procedure was specifically made applicable to attachment (see Section 488.090), claim and delivery (see Section 514.050), execution (see Sections 689, 689b), and the enforcement of certain state tax liabilities by means of a notice of levy or warrant (see Section 689d). The procedure was also used to determine third-party claims to property seized to satisfy a judgment foreclosing a chattel mortgage. See Lawler v. Solus, 101 Cal. App.2d 816, 818, 226 P.2d 348, ___ (1951). Subdivision (c) of this section extends this remedy to claims regarding property levied upon to enforce a judgment for possession of personal property. Subdivision (e) extends this remedy to all cases of enforcement of a tax liability.

§ 706.120. Time for filing claim

706.120. A third person may file a third-party claim at any time after levy but before the levying officer has sold, delivered, or otherwise disposed of the property claimed.

Comment. Section 706.120 is new. Former law did not provide for the time within which a third-party claim must be filed, but in Nat'l Bank of New Zealand v. Finn, 81 Cal. App. 317, 337, 253 P. 757, 766 (1927), involving attachment of a check, it was stated that the claim must be made before the property was sold or otherwise subjected to the satisfaction of the plaintiff's demand.

§ 706.130. Third-party claims to property seized to satisfy tax liability

706.130. (a) Except as otherwise provided by statute, the provisions of this chapter apply to third-party claims regarding property sought to be applied to the satisfaction of a tax liability pursuant to the Revenue and Taxation Code or the Unemployment Insurance Code. For the purpose of this section, "judgment creditor" means the public entity which seeks to collect the tax, and "judgment debtor" means the tax debtor.

(b) Third-party claims under this section shall be heard and determined in the superior court of the county where the property claimed is located.

(c) If a levy is not made by a levying officer, the third-party claim shall be filed with the public entity.

(d) The public entity shall file a notice with the levying officer where an undertaking would otherwise be required pursuant to Article 2 (commencing with Section 706.210). The notice shall state that the public entity opposes the claim of the third person.

Comment. Section 706.130 supersedes former Section 689d, which made former Section 689 applicable to the determination of a third-party claim of title to property reached by a notice of levy or warrant issued to collect certain state taxes, and a portion of Revenue and Taxation Code Section 6799, which provided an independent procedure for determining third-party claims to property to be sold to satisfy a liability for state sales and use taxes. Section 706.130 applies the third-party claims procedure to all proceedings for the collection of state or local tax liabilities.

Subdivision (b) continues the substance of a portion of former Section 689d.

Subdivision (c) is a general provision which codifies the practice developed under former Section 689d and Unemployment Insurance Code Section 1755.

Subdivision (d) is new. It is based on the practice developed under existing law as a result of Section 1058 which provides that public entities are not required to file an undertaking. The public entity is required to file a verified statement pursuant to Article 3 (commencing with Section 706.310) as a condition to maintaining the lien on the property so the notice provided by subdivision (d) is unnecessary in such proceedings.

§ 706.140. Duty to mail notice and copy of claim

706.140. The levying officer shall mail the notice and copy of the verified third-party claim, notwithstanding any defect, informality, or insufficiency of the claim.

Comment. Section 706.140 supersedes the first sentence of the sixth paragraph of former Section 689 and the second sentence of subdivision (2) of former Section 689b. Section 706.140 requires the levying officer to mail the notice and claim whereas former law appeared to give the officer discretion.

§ 706.150. Liability of levying officer

706.150. The levying officer is not liable for damages to a third person for the levy upon, or the holding, sale, or other disposition of property, if no claim is filed pursuant to this chapter, nor is the levying officer liable for the levy upon, or the holding, release, sale, or other disposition of the property pursuant to this chapter.

Comment. Section 706.150 supersedes the second sentence of the sixth paragraph of former Section 689 and the third paragraph of subdivision (9) of former Section 689b.

§ 706.160. Objections to undertakings

706.160. (a) An undertaking given under this chapter shall satisfy the requirements of Sections 489.040, 489.050, and 1056.

(b) Objections to undertakings shall be made and determined as provided in Sections 489.070 to 489.100, inclusive.

Comment. Subdivision (a) of Section 706.160 supersedes a portion of the first paragraph of former Section 689.

Subdivision (b) supersedes the third, fourth, and fifth paragraphs of former Section 689, the second sentence of the second paragraph of subdivision (9) of former Section 689b, and former Sections 711-1/2 through 713-1/2.

Article 2. Third-Party Claim of Title, Right to Possession,
or Interest Other Than Security Interest

§ 706.210. Claim of title, right to possession, or an interest other than a security interest

706.210. (a) A third person may claim title, the right to possession, or any other interest that is not a security interest, by filing with the levying officer a verified written claim, together with a copy thereof.

(b) The claim shall contain all of the following:

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

(2) A statement of the reasonable value of the interest claimed.

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

Comment. Section 706.210 supersedes a portion of the first paragraph of former Section 689. The third person may claim any interest of the type described in subdivision (a) if it is superior to the lien of the judgment creditor. See Section 706.110. Under former Section 689, the claimant was required 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 claims procedure).

§ 706.220. Notice to judgment creditor of third-party claim

706.220. Not later than five days after the claim is filed with the levying officer, the levying officer shall mail to the judgment creditor both of the following:

(a) A copy of the claim.

(b) A notice that the property will be released unless, within 10 days after the notice was mailed, the judgment creditor files with the levying officer an undertaking that satisfies the requirements of Section 706.250.

Comment. Section 706.220 supersedes a portion of the first paragraph of former Section 689. Under this section, a notice is sent by first-class mail, whereas under former Section 689, a demand was sent by registered or certified mail. See Section 702.510 (manner of mailing notice).

§ 706.230. Release for failure to file undertaking

706.230. (a) If, within 10 days after the notice is mailed pursuant to Section 706.220, the judgment creditor does not file with the levying officer an undertaking that satisfies the requirements of Section 706.250, the levying officer shall release the property in the manner provided by Section 703.290 unless it is to be held under another lien or unless otherwise ordered by the court.

(b) Notwithstanding Section 703.290, if property which has been taken into custody is to be released to the judgment debtor and the judgment debtor has not claimed the property within 10 days after notice was mailed, the levying officer shall release the property to the third person making the claim.

Comment. Subdivision (a) of Section 706.230 supersedes a portion of the first paragraph of former Section 689. This section affords the judgment creditor 10 days after the notice is mailed within which to file the undertaking, whereas former Section 689 provided a five-day period running from the time the demand for an undertaking was made.

Subdivision (b) supersedes former Section 689.5 and provides an exception to the general rules governing release of property. See Section 703.290.

404/085

§ 706.240. Delay of sale or delivery of possession; interest conveyed

706.240. (a) If a claim is made prior to sale, payment, or delivery of possession under the writ, the property described in the claim may not be sold, paid, or delivered unless an undertaking is filed. If an undertaking is given, the levying officer shall maintain the lien on the property and apply the property toward the satisfaction of the judgment in the manner provided by law unless enforcement is stayed or the third person gives an undertaking to release the property pursuant to Article 6 (commencing with Section 706.710). Upon sale, payment, or delivery, the property is free of all liens or claims of the third person for which an undertaking is given.

(b) If no claim is made by the third person before sale, payment, or delivery under the writ, the property remains subject to the interest of the third person.

Comment. Subdivision (a) of Section 706.240 supersedes the seventh paragraph of former Section 689. Under the last sentence of subdivision

(a), the property may be sold free of all interests for which an undertaking is given. The third person may prevent a sale by obtaining a stay of enforcement pursuant to Section 706.480 or, in the case of a money judgment of a judgment for the sale of personal property, by giving an undertaking to release pursuant to Section 706.710. Moreover, a third person need not press a claim immediately since, under subdivision (b), if no claim is presented before sale, the property remains subject to the third person's interest.

Section 706.240, unlike former law, refers to delivery of possession, recognizing that the third-party claims procedure applies to claim and delivery proceedings and the enforcement of a judgment for possession of personal property. See Sections 514.050, 706.110(c).

404/128

§ 706.250. Form of undertaking

706.250. (a) An undertaking given under this article shall be made in favor of the third person in an amount equal to twice the value of the interest claimed by the third person and shall indemnify the third person against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

(b) If the property levied upon is required by law to be registered or recorded in the name of the owner and it appears at the time of the levy that the judgment debtor was the registered or record owner of the property and the judgment creditor caused the levy to be made and the lien maintained in good faith and in reliance upon such registered or recorded ownership, neither the judgment creditor, the judgment creditor's sureties, nor the levying officer is liable to the third person for the levy itself.

Comment. Section 706.250 continues the substance of a portion of the first and second paragraphs of former Section 689. Under subdivision (b), where a levy has been made based on a good faith reliance upon the registered or recorded ownership, there is no liability for the levy; but, after making a proper claim, the third person's interest must be recognized and a failure to deal properly with such interest may result in liability to the third person. For provisions relating to undertakings generally, see Section 706.160.

Article 3. Third-Party Claim of Security Interest§ 706.310. Claim of security interest

706.310. (a) A third person may claim a security interest by filing with the levying officer a verified written claim, together with a copy thereof.

(b) The claim shall contain all of the following:

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

(2) A statement of the total amount of sums due or to accrue under the security agreement, above setoffs, with interest to date of tender.

(3) The address in this state to which notice may be mailed to the secured party.

Comment. Section 706.310 supersedes the first sentence of subdivision (2) of former Section 689b. This article applies to claims by all secured parties, whereas former Section 689b governed only claims by conditional sellers and chattel mortgagees. See Division 9 (commencing with Section 9101) of the Commercial Code (secured transactions).

405/812

§ 706.320. Notice to judgment creditor of secured party claim

706.320. Not later than five days after the claim is filed with the levying officer, the levying officer shall mail to the judgment creditor both of the following:

(a) A copy of the claim.

(b) A notice that the property will be released unless, within 10 days after the notice was mailed, the judgment creditor either files with the levying officer an undertaking that satisfies the requirements of Section 706.360 and a verified statement under Section 706.370, or deposits with the levying officer the amount claimed.

Comment. Section 706.320 supersedes subdivision (3) and a portion of the first paragraph of subdivision (9) of former Section 689b. Under this section, a notice is sent by first-class mail, whereas under former Section 689, a demand was sent by registered or certified mail. See Section 702.510 (manner of mailing notice).

§ 706.330. Release for failure to make deposit or file undertaking and statement

706.330. (a) If, within 10 days after the notice is mailed pursuant to Section 706.320, the judgment creditor does not file with the levying officer an undertaking that satisfies the requirements of Section 706.360 and a verified statement under Section 706.370, or deposit with the levying officer the amount claimed, the levying officer shall release the property in the manner provided by Section 703.290, unless it is to be held under another lien or unless otherwise ordered by the court.

(b) Notwithstanding Section 703.290, if property which has been taken into custody is to be released to the judgment debtor and the judgment debtor has not claimed the property within 10 days after notice was mailed, the levying officer shall release the property to the secured party.

Comment. Subdivision (a) of Section 706.330 supersedes subdivision (4) and a portion of the first paragraph of subdivision (9) of former Section 689b. This section affords the judgment creditor 10 days after the notice is mailed within which to file the undertaking and verified statement or make a deposit whereas former Section 689b(4) provided a five-day period running from the receipt of the officer's demand.

Subdivision (b) supersedes former Section 689.5 and provides an exception to the general rules governing release of property. See Section 703.290.

§ 706.340. Delay of sale or delivery of possession; interest conveyed

706.340. (a) If a claim is made prior to sale, payment, or delivery of possession under the writ, the property described in the claim may not be sold, paid, or delivered unless an undertaking and verified statement are filed or a deposit is made. If an undertaking and verified statement are filed or a deposit is made, the levying officer shall maintain the lien on the property and apply the property toward the satisfaction of the judgment in the manner provided by law unless enforcement is stayed. Upon sale, payment, or delivery, the property is free of all liens or claims of the third person for which an undertaking is given or a deposit is made.

(b) If no claim is made by the third person before sale, payment, or delivery under the writ, the property remains subject to the interest

of the secured party except as otherwise provided by Article 5 (commencing with Section 706.610).

Comment. Subdivision (a) of Section 706.340 supersedes parts of subdivisions (8) and (9) of former Section 689b. Under the last sentence of subdivision (a), the property may be sold free of all interests for which an undertaking is given or deposit is made. The secured party may prevent a sale by obtaining a stay of enforcement pursuant to Section 706.480. Moreover, a third person need not press a claim immediately since, under subdivision (b), if no claim is presented before sale, the property remains subject to the third person's interest unless the judgment creditor has resorted to the procedure for demanding a claim by a secured party which is set forth in Sections 706.610-706.630.

Section 706.340, unlike former law, refers to delivery of possession, recognizing that the third-party claims procedure applies to claim and delivery proceedings and enforcement of a judgment for possession of personal property. See Sections 514.050, 706.110(c).

406/002

§ 706.350. Payment to secured party

706.350. (a) If the levying officer receives a deposit from the judgment creditor, the levying officer shall tender or pay it to the secured party within five days after receipt unless the deposit is made by check, in which event the levying officer is allowed a reasonable time for the check to clear.

(b) If the tender is accepted, the interest of the secured party in the property for which payment is made passes 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 secured party.

Comment. Section 706.350 continues the substance of subdivisions (5)-(7) of former Section 689b.

406/253

§ 706.360. Form of undertaking

706.360. An undertaking given under this article shall be made in favor of the secured party in an amount equal to twice the amount claimed by the secured party and shall indemnify the secured party against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

Comment. Section 706.360 supersedes portions of the first and second paragraphs of subdivision (9) of former Section 689b.

§ 706.370. Verified statement concerning security interest

706.370. At the time the undertaking is filed with the levying officer in response to a third party claim by a secured party, the judgment creditor shall file with the levying officer a verified statement that the security interest is invalid or that it is not entitled to priority over the judgment creditor's lien, for the reasons specified therein, and shall mail a copy of the verified statement to the secured party.

Comment. Section 706.370 supersedes a portion of the first paragraph of subdivision (9) of former Section 689b. This section permits the judgment creditor to resist the claim of the secured party on the grounds that the security interest is not entitled to priority, whereas former law required a statement that the chattel mortgage on conditional sale was void or invalid. See Section 706.110 (third-party claim of superior interest); Com. Code § 9301 (priority of lien creditor over unperfected security interest).

Article 4. Hearing on Third-Party Claims

§ 706.410. Application for hearing; jurisdiction; continuance

706.410. (a) Not later than 15 days after the third-party claim is filed with the levying officer, either the judgment creditor or the third person may petition the court from which the writ was issued for a hearing to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the claim.

(b) A hearing may be held whether or not an undertaking has been filed, but not if a deposit has been made pursuant to Section 706.350.

(c) The court has original jurisdiction and shall set the matter for hearing within 20 days after the filing of the petition. The court may continue the matter for good cause shown.

Comment. Subdivisions (a) and (b) of Section 706.410 continue the substance of the first two sentences of the eighth paragraph of former Section 689 and the first sentence of subdivision (10) of former Section 689(b). Subdivision (c) 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.

968/618

§ 706.420. Notice of hearing

706.420. Not less than 10 days before the date set for the hearing, the petitioner shall mail notice of the time and place of the hearing to the judgment creditor or the third person (whichever person is not the petitioner) and to the judgment debtor and the levying officer. The notice shall state that the purpose of the hearing is to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the third-party claim.

Comment. Section 706.420 supersedes the fourth sentence of the eighth paragraph of Section 689 and the second sentence of subdivision (10) of former Section 689b. See also Section 702.510 (manner of mailing notice). This section also requires notice to be sent to the judgment debtor to avoid the misapplication of funds that could occur under former law. See *Rubin v. Barash*, 275 Cal. App.2d 835, 80 Cal. Rptr. 337 (1969).

§ 706.430. Papers filed by levying officer

706.430. Promptly after receipt of the notice of the hearing on the third-party claim, the levying officer shall file the following papers with the court:

(a) The third-party claim filed with the levying officer pursuant to Section 706.210 or 706.310.

(b) The judgment creditor's verified statement, if the verified statement has been filed with the levying officer pursuant to Section 706.370.

Comment. Section 706.430 supersedes a portion of the eleventh sentence of the eighth paragraph of former Section 689. Former law did not require the levying officer to file the judgment creditor's verified statement with the court. See former Section 689b.

§ 706.440. Filing and service of verified statement

706.440. If the judgment creditor has not filed a verified statement with the levying officer pursuant to Section 706.370:

(a) In a case where the judgment creditor petitions for a hearing on the third-party claim, the judgment creditor shall file the verified statement with the court at the time the petition is filed and shall mail a copy thereof to the secured party at the time notice of the hearing is given pursuant to Section 706.420.

(b) In a case where the secured party has petitioned for a hearing on the third-party claim, the judgment creditor shall file the verified statement with the court and mail a copy thereof to the secured party not later than five days before the date set for the hearing.

Comment. Section 706.440 is new.

§ 706.450. Pleadings

706.450. (a) Subject to the power of the court to permit an amendment in the interest of justice:

(1) The third-party claim constitutes the pleading of the third person.

(2) The judgment creditor's verified statement constitutes the pleading of the judgment creditor.

(b) A third-party claim of title, right to possession, or any other interest that is not a security interest, shall be deemed controverted by the judgment creditor.

Comment. Subdivision (a)(1) of Section 706.450 continues the substance of a portion of the eleventh sentence of the eighth paragraph of former Section 689. Subdivision (a)(2) is new. Former Section 689b did not provide for the effect of the judgment creditor's verified statement.

Subdivision (b) continues the substance of a portion of the eleventh sentence of the eighth paragraph of former Section 689, but is limited to third-party claims of title, right to possession, or any other interest that is not a security interest, whereas the former provision applied to all claims under former Section 689 or 689b.

999/320

§ 706.460. Burden of proof

706.460. (a) At a hearing on a third-party claim of title, right to possession, or any other interest that is not a security interest, the third person has the burden of proof.

(b) At a hearing on a third-party claim of a security interest, the judgment creditor has the burden of proof.

Comment. Subdivision (a) a Section 706.460 continues the substance of the tenth sentence of the eighth paragraph of former Section 689. Subdivision (b) is new.

999/555

§ 706.470. Dismissal

706.470. If the third person has petitioned for a hearing, neither the petition nor the proceedings pursuant thereto may be dismissed without the consent of the judgment creditor.

Comment. Section 706.470 continues the substance of the sixth sentence of the eighth paragraph of former Section 689.

968/852

§ 706.480. Disposition of property during pendency of proceedings

706.480. (a) Notwithstanding Sections 706.240 and 706.340, upon application by the judgment creditor, the judgment debtor, or the third

person, made ex parte or, if the court so orders, upon noticed motion, the court may:

(1) Order the sale of any perishable property in the custody of the levying officer and direct the disposition of the proceeds of the sale.

(2) Stay the sale of the property under a writ, and enjoin any transfer or other disposition of the property, until proceedings under this chapter can be commenced and prosecuted to termination.

(b) As a condition for an order under paragraph (2) of subdivision (a), the court may require such bond as it considers necessary.

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

Comment. Subdivision (a) continues the substance of the seventh and a portion of the eighth sentences of the eighth paragraph of former Section 689 and clarifies the manner of application for such orders. Subdivision (b) continues the substance of a portion of the eighth sentence of the eighth paragraph of former Section 689. Subdivision (c) continues the substance of the ninth sentence of the eighth paragraph of former Section 689.

968/976

§ 706.490. Determination of claim; disposition of property

706.490. At the conclusion of the hearing, the court shall give judgment determining the validity of the third-party claim and may order the disposition of the property, and the proceeds of any property, in accordance with the respective interests of the parties. The judgment is conclusive between the parties to the proceeding.

Comment. Section 706.490 continues the substance of a portion 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.

968/977

§ 706.500. Findings

706.500. No findings are required in proceedings under this article.

Comment. Section 706.500 continues the thirteenth sentence of the eighth paragraph of former Section 689.

§ 706.510. Appeal

706.510. An appeal may be taken from a judgment given pursuant to Section 706.490 in the manner provided for appeals from the court in which the proceeding takes place.

Comment. Section 706.510 continues the seventeenth sentence of the eighth paragraph of former Section 689.

§ 706.520. Relevy; additional writs

706.520. If property has been released pursuant to Section 706.230 or 706.330 and the final judgment is in favor of the judgment creditor, the levying officer may again levy upon the property if the writ under which the original levy was made is still in the levying officer's possession. If the writ has been returned, another writ may be issued pursuant to which the levying officer may levy upon the property.

Comment. Section 706.520 continues the substance of the sixteenth sentence of the eighth paragraph of former Section 689 and the second paragraph of subdivision (10) of former Section 689b. This section provides that the levying officer may levy, rather than shall levy as under former law, which recognizes that the levying officer follows the judgment creditor's instructions in such matters. See Sections 702.610, 703.210.

Article 5. Judgment Creditor's Demand for Third-Party
Claim by Secured Party

§ 706.610. Judgment creditor's demand for claim by secured party

706.610. (a) Upon receipt of the judgment creditor's written request therefor, the levying officer shall serve upon a designated secured party a written demand that the secured party file a claim pursuant to Article 3 (commencing with Section 706.310).

(b) The demand shall describe the property which has been levied upon.

(c) If the secured party does not file a claim with the levying officer within 30 days after service of the demand, the secured party shall be deemed to have waived any superior interest the secured party may have in the property levied upon.

Comment. Section 706.610 supersedes a portion of subdivision (8) of former Section 689b. The secured party must claim the interest in the property even though there are no amounts currently due. Subdivision (a) clarifies prior law by providing that the levying officer serves the demand for the claim pursuant to the judgment creditor's request; under former law, the manner of initiating this procedure was unclear.

67707

§ 706.620. Prohibition of release, sale, or other disposition

706.620. Except as otherwise provided by this chapter or pursuant to court order, the levying officer may not release, sell, or otherwise dispose of the property described in the demand until the expiration of 30 days after the service of the demand on the secured party.

Comment. Section 706.620 is new. The introductory clause recognizes that the court may order sale of the property if it is perishable, that the property may be released pursuant to the claim of the secured party upon whom the demand was served or of some other third person, or that the property may be released pursuant to a third-party undertaking filed under Section 706.710

405/416

§ 706.630. Service of demand for claim

706.630. (a) The demand for a claim shall be 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. Service shall be

attested by the certificate of the levying officer and the certificate shall be filed in the action promptly after service.

(b) The demand may be served by the levying officer or for the levying officer by any other levying officer whose office is closer to the place of service. The fees and mileage of the other levying officer shall be paid out of the prepaid fees in the possession of the levying officer.

Comment. The first sentence of subdivision (a) of Section 706.630 is new. The second sentence continues the substance of a portion of subdivision (8) of former Section 689b. Subdivision (b) continues the substance of the second sentence of subdivision (8) of former Section 689b.

Article 6. Third-Party Undertaking
to Release Property

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

706.710. Where personal property has been levied upon under a writ of execution, a third person, who claims title, right to possession, or an interest other than a security interest, may give an undertaking, as provided in this article, to obtain the release of the property.

Comment. Section 706.710 continues the substance of former Section 710b.

405/418

§ 706.720. Contents of undertaking

706.720. (a) The property claimed shall be described in the undertaking.

(b) The amount of the undertaking given pursuant to Section 706.610 shall be the lesser of the following amounts:

(1) Twice the value of the property sought to be released.

(2) Twice the amount of the lien on the property sought to be released.

(c) The undertaking shall provide that, if the judgment debtor is finally adjudged to have an interest in the property levied upon, the third person shall pay in satisfaction of the judgment under which the writ of execution was issued a sum equal to the value of the judgment debtor's interest or the amount of the judgment remaining unsatisfied, whichever is the lesser.

Comment. Section 706.720 continues the substance of portions of former Section 710c except for subdivision (c) which recognizes that the judgment creditor is not entitled to resort to the undertaking in an amount exceeding the amount of the judgment remaining unsatisfied. See also Section 706.160 (general provisions relating to undertakings).

405/419

§ 706.730. Filing of undertaking

706.730. (a) The third person shall file the undertaking in the action with the court which issued the writ of execution under which levy was made.

(b) The third person shall serve a notice of the filing of the undertaking and a copy of the undertaking on the judgment creditor and on the levying officer. The undertaking is effective 10 days after service on the judgment creditor.

Comment. Subdivision (a) of Section 706.730 continues the substance of a portion of former Section 711. Subdivision (b) continues the substance of portions of Sections 711 and of 713-1/2 and also requires service of notice and a copy of the undertaking on the levying officer.

405/422

§ 706.740. Release of property

706.740. Unless the property is to be held under another lien or unless otherwise ordered by the court in which the undertaking is filed, the levying officer shall release the personal property described in the undertaking in the manner provided by Section 706.230 promptly after the expiration of 10 days from receipt of the notice of the filing of the undertaking.

Comment. Section 706.740 supersedes a portion of the seventh paragraph of former Section 689.

67710

§ 706.750. Objections to undertaking

706.750. An objection to an undertaking shall be made no later than 10 days after the judgment creditor is served with a copy of the undertaking.

Comment. Section 706.750 continues the substance of the first sentence of former Section 711-1/2. See also Section 706.160 (general provisions regarding undertaking).

APPENDIXDisposition of Existing Law Relating to Third-Party Claims--
Code Civ. Proc. §§ 689-689.5, 710b to 713-1/2§ 689 (repealed). Third-party claim of title and right to possession

689. 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 thirdparty 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 a 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.

Comment. The first paragraph of former Section 689 is superseded by Sections 706.110, 706.210-706.230, and 706.250(a). Under Section 706.110, the third person may claim title, right to possession, or any interest other than a security interest, and is not limited to claiming the property "as his property." Under Section 706.230(a), the property is released if the judgment creditor does not provide an undertaking or make a deposit within 10 days after the levying officer sends a notice rather than within five days after a demand is served on the judgment creditor. Section 706.220 requires the levying officer to mail the claim to the judgment creditor within five days after it is filed by the third person. Pursuant to Sections 702.510 and 706.220, the claim may be sent by first-class mail, rather than by registered or certified mail. The amount of the undertaking is specified in Section 706.250(a). The requirement of two sureties is continued by Section 706.160(a) which incorporates Section 489.040.

The substance of the second paragraph of former Section 689 is continued in Section 706.270.

The third, fourth, and fifth paragraphs, relating to exceptions to the sufficiency of sureties, are superseded by Sections 489.070-489.100, incorporated by Section 706.110. The requirement that exceptions to sureties be taken within five days after receipt of the undertaking is not continued.

The first sentence of the sixth paragraph of former Section 689 is superseded by Section 706.140 which requires the levying officer to send notice. The second sentence is superseded by Section 706.150.

The substance of the seventh paragraph is continued in Section 706.250(a); former Section 710b is superseded by Section 706.710.

The first, second, third, and fifth sentences of the eighth paragraph of former Section 689 are superseded by Section 706.410. The

substance of the fourth sentence is continued in Section 706.420. The substance of the sixth sentence is continued in Section 706.470. The substance of the seventh, eighth, and ninth sentences is continued in Section 706.480. The substance of the tenth sentence is continued in Section 706.460. The eleventh sentence is continued in Section 706.430(a). The twelfth sentence is not continued since it is superfluous; it has been decided that there is no right to a jury trial in third-party claim proceedings (see *Misrach v. Liederman*, 14 Cal. App.2d Supp. 757, 58 P.2d 746 (1936)) and, in any event, if there were a right to a jury trial, it would exist independently under the Constitution. The thirteenth sentence is continued in Section 706.500. The fourteenth and fifteenth sentences are continued in Section 706.490. The sixteenth sentence is continued in Section 706.520. The last sentence is continued in Section 706.510.

14910

§ 689a (repealed). Personal property under purchase contract or subject to chattel mortgage

689a. 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.

Comment. Former Section 689a is not continued. It is unnecessary in light of Commercial Code Section 9311.

29201

§ 689b. (repealed). Third-party claim based on conditional sale or chattel mortgage

689b. (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.

Comment. Subdivision (1) of former Section 689b is superseded by Section [703.____]. The first sentence of subdivision (2) is superseded by Sections 706.110 and 706.310 which permit any secured party to claim a superior interest in the property. The last sentence of subdivision (2) is superseded by Section 706.140 which requires the levying officer to serve the notice. Subdivision (3) is superseded by Section 706.320(a). The reference to the judgment creditor's attorney has been omitted as unnecessary. Pursuant to Sections 702.510 and 706.220, the claim may be mailed by first-class rather than registered or certified mail. Subdivision (4) is superseded by Section 706.330(a) which affords the judgment creditor 10 days from mailing the notice within which the deposit or undertaking must be given to the levying officer. Subdivisions (5), (6), and (7) are continued in Section 706.350. Subdivision (8) is superseded by Section 706.340(a) (delay of sale until deposit or undertaking) and Sections 706.610 (judgment creditor's demand for third-party claim) and 706.630 (service of demand for claim). The first paragraph of subdivision (9) is superseded by Sections 706.340(a) and 706.360 except that the levying officer does not have the discretion to require an undertaking in the amount of twice the value of the property. The first sentence of the second paragraph of subdivision (9) is continued in Section 706.360. The second sentence of the second paragraph of subdivision (9) is continued in Section 706.160. The substance of the third paragraph of subdivision (9) is continued in Section 706.150. The first sentence of the first paragraph of subdivision (10) is superseded by Section 706.410(a). The second sentence of the first paragraph of subdivision (10) is unnecessary because the third-party claims procedures formerly contained in Sections 689 and 689b are merged in Article 4 (commencing with Section 706.410) of Chapter 6 of Title 9. The substance of the third sentence of subdivision (10) of the first paragraph is continued in Section 706.490. The fourth sentence of the first paragraph of subdivision (10) is superseded by Section 706.410(c). The second paragraph of subdivision (10) is continued in Section 706.520.

14912

§ 689c (repealed). Proceeds of sale; application

689c. 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.

Comment. Former Section 689c is superseded by Sections 706.490 (disposition of property after hearing on third-party claim) and [703.750] (disposition of proceeds of sale).

28759

§ 689d (repealed). Warrant to collect tax; hearing to determine title

689d. 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.

Comment. Former Section 689d is superseded by Section 706.130. See the Comment to Section 706.130.

28760

§ 689.5 (repealed). Release; delivery of property to claimant

689.5. 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.

Comment. Former Section 689.5 is superseded by Sections 706.230(b) and 706.330(b) which incorporate the general rules pertaining to release in Section 703.290. The provision in former Section 689.5 for release to the third person where the judgment debtor cannot be found has been retained in Sections 706.230(b) and 706.330(b) as an exception to the general rules.

§ 710b (repealed). Third-party claimants; undertaking to release property

710b. 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.

Comment. The substance of former Section 710b is continued in Section 706.710. See also Section 701.____ ("person" defined).

§ 710c (repealed). Form of undertakings to release

710c. 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.

Comment. Former Section 710c is superseded by Section 706.720 and Section 706.160(a), making Section 489.050 (estimate of value stated in undertaking) applicable to undertakings under Chapter 6 (commencing with Section 706.110).

§ 711 (repealed). Filing and service of undertaking

711. 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.

Comment. The substance of former Section 711 is continued in Section 706.730 except that the reference to the judgment creditor's attorney has not been continued since it is unnecessary.

§ 711-1/2 (repealed). Objections to sureties

711-1/2. 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.

Comment. Former Section 711-1/2 is superseded by Sections 706.110(b) and 706.750 which make the provisions pertaining to objections to undertakings under attachment applicable to undertakings given pursuant to Chapter 6 (commencing with Section 706.110) of Title 9. See Article 1 (commencing with Section 489.010) of Chapter 9 of Title 6.5.

§ 712 (repealed). Justification of sureties

712. 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.

Comment. Former Section 712 is superseded by Section 706.160(b) which incorporates Sections 489.070-489.100.

67702

§ 712-1/2 (repealed). Dispute as to estimated value of property;
new undertaking

712-1/2. 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.

Comment. Former Section 712-1/2 is superseded by Section 706.160(b) which incorporates Sections 489.070-489.100.

67703

§ 713 (repealed). Justification of sureties on new undertaking

713. The sureties shall justify on the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure.

Comment. Former Section 713 is superseded by Section 706.160(b) which incorporates Sections 489.070-489.100.

67705

§ 713-1/2 (repealed). Effective date of undertaking

713-1/2. 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.

Comment. Former Section 713-1/2 is superseded by Section 706.160(b) and Section 706.730(b) which incorporate Sections 489.070-489.100.