

#D-300

8/24/79

Second Supplement to Memorandum 79-29

Subject: Study D-300 - Enforcement of Judgments

Attached to this supplement are four more letters commenting on the Tentative Recommendation Relating to Enforcement of Judgments. These letters were received after we distributed Memorandum 79-29 to which 19 letters were attached. To facilitate reference to these letters in the memorandums you have received and will receive for this and future meetings, these additional letters have been numbered as Exhibits 20 through 23.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 23

COMMENTS ON TENTATIVE RECOMMENDATION RELATING TO
ENFORCEMENT OF JUDGMENTS.

by Stefan A. Riesenfeld

I have doubts on the wisdom of some of the recommendations of the Commission and consider some of the provisions in need of improvement of their wording.

My most extensive reservations relate to the new regime of judgment liens, especially to §705.470 and to §703.810, particularly as applicable to dwellings. I have, however, also misgivings against the content or wording of §§702.320, 703.110(3), 703.450, 703.740, 703.750, 703.810(e), 705.460, 707.120, 707.130, 707.580 and the comments to §705.490, p. 14 ftn. 50, p. 40 text to ftn. 151 and doubts on the interrelations between §703.200(b) and §§702.210 and 702.200.

A.
§705.470

§705.470 provides new rules relating to discharge of judgments liens on real property.

The section is modelled after Or. Rev. Stat. §§23.280-23.300 (1977) which relate to the discharge of judgment liens on the excess value of homestead property over and above the exempt amount. The California proposal, however, applies to judgment liens on any type of real property in case of a voluntary sale thereof.

In my opinion this extension of the Oregon rule (which applies also in other states) overshoots the mark. A judgment lien is designed to give a judgment creditor a security interest in the debtor's real property which accord the judgment creditor the benefits of a subsequent increase in the value of the property even in the hands of a successor. This was forcefully pointed out by the California Supreme Court in *Kinney v. Valentine*, 15 C.3d 475, 124 Cal.Rptr. 897, 541 P.2d 537 (1975).

I see no reason for depriving the judgment creditor of this protection and to convert any transfer into an involuntary enforcement of the judgment lien. It forces the judgment creditor to accept part payment of the judgment debt and may be futile if the judgment lien is followed by a junior voluntary encumbrance.

Moreover, it is not clear, how the section operates in the case of a judgment for installments whose aggregate amounts are uncertain. Does the lien cover only the installments due? In that case, the new regime which assures the judgment creditor of a lien for all installments under the judgment, even if falling due more than 20 years of the entry of the judgment with priority determined by the date of recordation (§§702.220, 702.330, 705.460(c)), is rendered quite illusory.

Finally the operation of the new system is left in limbo if the real property is a dwelling and the installment judgment one for ex-spousal support. §707.170 provides for "equitable division." How this provision would operate in the context of §705.470(a), (b), (c) and (d) should be clarified.

B.

Abolition of the Rule of C.C. §1255

In my opinion the abolition of the rule of C.C. §1255 deprives the debtor of an important protection. While in general execution sales as well as judicial foreclosure sales are subject to prior liens which remain on the land in the hands of the purchaser, execution sales of homesteads require bids covering the satisfaction of all prior liens. This rule was introduced in 1945. It had the purpose of protecting the judgment debtor against personal liability in the amount of the prior liens. Satisfaction of the liens constituted satisfaction of the personal liability so secured.

If the prior liens remain unsatisfied and the minimum bid needs only to cover the exempt amount, the debtor remains personally liable for the debts secured by the liens. True, "superior lienors and encumbrancers do not lose their liens when the property is sold...; they may [sic] continue to look to the real property in the hands of the execution purchaser" (Tent. Rec. p. 75). But if the superior liens (except in cases of purchase money deeds of trust) get closed out because of a down-swing in property values or a deterioration of the property involved, the judgment debtor has to make up the deficiency. While the judgment debtor may be protected to a certain degree by the one-form-of-action statute (C.C.P. §726) the anti-deficiency legislation (C.C.P. §§580a-580d), the surety-defenses (C.C. §2819, 2845) and the doctrine of subrogation (C.C. §2848) there is no protection against personal liability if a lienor fails to enforce the lien and the security, other than purchase money security, is lost wholly or partially (C.C. §2823). Moreover, the availability of some of the surety defenses is dubious if the encumbrance secures liability as a maker of a negotiable instrument. To the debtor the value of "competitive bidding" is ironical if it facilitates the loss of the debtor's home.

The only benefit of the return to the pre-1945 system is the avoidance of the harshness on creditors of the rule of *Schoenfeld v. Norberg*, see Tentative Recommendation p. 78. But this relief could be accomplished in some other fashion.

If the value of the joint tenant's share exceeds the amount of all encumbrances and the exempt amount the purchaser will acquire the debtor's share free of all liens and the other joint tenant's share will be subject to an equitable lien in the amount of 1/2 half of the prior liens. The purchaser then is entitled to partition receiving the amount allocable to his share plus the amount allocable to the equitable lien on the other share. The non-debtor spouse would be entitled to share in the exempt amount.

Hence it would be sensible to treat the enforcement of the judgment lien on the debtor spouse's share in the dwelling like a partition sale: the creditor is entitled to sell the whole property at a price covering the prior liens and the exempt amount; the proceeds over and above the discharged liens are shared by the debtor and the non-debtor spouse. The executing judgment creditor would be entitled to the debtor's share in the proceeds over and above the exempt amount to the extent of the lien. At present a lienor is not entitled to a partition sale, but it would not be inequitable to combine an execution and partition sale, if need be subject to a right of preemption granted to the non-debtor spouse.

This corresponds to the system of the Bankruptcy Reform Act.

C.
Reformulation of §§705.460(a),
703.740(a) and 704.810

1. §705.460.

This section should be redrafted. In its present form Subsections (a) and (b) are interrelated, Subsection (c) is unrelated. It is not clear that the lien referred to in (c) also covers installments due and unpaid at the time at the recordation: no relation back in such case! The contrast to §705.460(b), renders it doubtful whether §705.470 covers inchoate installments.

2. §§703.740(a) and 703.810(a).

"Required to be satisfied" is too broad. It should read "required to be satisfied by the sale."

3. §§703.810(e).

This subsection omits entitlement to the proceeds (ahead of the judgment debtor under subsection (f)) of junior lienors other than the judgment creditors mentioned in (e). Subsection (a) does not and should not cover juniors (especially if 703.810(a) is amended as suggested). This is particularly necessary since §703.750 fails to state that the liens are extinguished on the real property but transferred to the proceeds.

D.
Other matters

1. §702.320 should be rephrased to avoid subordination of judicial liens on real property to the rights of the trustee in bankruptcy since the new B.R.A. vests the trustee with the rights of a b.f.p. of real property and it is not clear whether the trustee is subject to the rules of constructive or inquiry notice. I suggest:

"A lien created pursuant to this title is effective against a subsequent transferee of the property subject to the lien except against a transferee of property who gives fair consideration for the property without knowledge of the lien in cases where such lien is not manifested by entries in public records or possession of the property in a person other than the debtor under such lien."

2. 703.110(3)

Although "cause of action" is the language of the present law, the use of the term seems to be unfortunate. The word "claim" would be preferable. The proposed act should have a definition of "debt", clarifying that it includes claims arising out of breach of contract, tort claims and claims for restitution.

3. Under §703.450 it is doubtful whether a judgment debt owed by a judgment debtor under a sister-state judgment is subject to levy even if that judgment debtor is present in California. Even if an attachment is impossible, an execution should not be.

4. §707.130 is too broad as is §707.150.

Waivers of exemption in advance should be proscribed. §707.130 should be limited to involuntary application. If the debtor wants to apply exempt property to payment of his debts the law should not prohibit such action.

5. §707.580 limits the exemption of payments under matured policies to the insured or the dependents or spouse of the insured "or decedent". The meaning of these words is not clear.

6. Is Southern Calif. Lumber Co. v. Ocean Beach Hotel (cited on p. 14) still good law? The statute was amended since that time. Provisor v. Nelson, cited on p. 40, was probably erroneously decided. The text should not rely on the case without qualification. The comment to §705.490 should be clarified.

7. Should §703.200(b), qualify §§702.330 and 702.210?

8. Can the term "rendered" be replaced by different language? §§701.200 and .210 use a term inconsistent with CCP §664.

Judgment creditor means the person who is entitled to the rights established by the judgment and judgment debtor is the person whose liability is established by the judgment.

9. §707.120(1) and (2) are overlapping. They should read:

- (1) If the debtor is a single person, all the debtor's property;
- (2) If the debtor is a married person,
 - (i) the separate property of the judgment debtor
 - (ii) the community property to the extent provided in the community property laws
 - (iii) the separate property of the spouse of the judgment debtor to the extent provided in Sections 5121 and 5132 of the Civil Code

EXHIBIT 20

July 10, 1979

MEMO TO JANE C. FENNELLY

FROM: WILLIAM H. LAKE

RE: ENFORCEMENT OF JUDGMENT (Chapters 9 & 10)

My assignment was to review and to express my opinion relative to the tentative recommendation relating to enforcement of judgments as proposed by the California Law Revision Commission. My specific assignment was to review Chapters 9 & 10 of this proposed legislation dealing with enforcement of judgments for possession of real property (Chapter 9) and enforcement of judgment for sale of property (Chapter 10).

After reviewing and analyzing these chapters, it is my recommendation that they should be adopted by the California Legislature with a few minor additions as further indicated in this memorandum.

CHAPTER 9 - ENFORCEMENT OF JUDGMENT FOR POSSESSION
OF REAL PROPERTY

Section 709.110 - This section deals with the issuance of the writ of possession of real property and provides that the writ of possession may be issued by the attorney for the judgment creditor as an officer of the court. This is a new concept and I believe is one that should be adopted with the following proviso. There should be a requirement that an affidavit should be filed by the judgment creditor's attorney setting forth the facts that he is the attorney of record and his license to practice before the particular court involved and that he is issuing the writ of possession pursuant to the particular code section involved.

Section 709.120 - This section sets forth the contents of the writ of possession of real property and gives to the judgment creditor the right to dispose of personal property on the premises. This section is a good one, however, I believe that the writ of possession itself should inform the judgment debtor that the judgment creditor does have this right. Otherwise, it can be argued by the judgment debtor that he did not have proper notice and therefore it is unconstitutional for the judgment creditor to be able to remove the personal property on the premises.

Section 709.130 - This section deals with the delivery and execution of the writ of possession of real property. It further provides that any items recoverable may be satisfied from any property of the judgment debtor subject to enforcement of a money judgment. As a result of this section, it is no longer required that costs and damages be satisfied first from personal property and only then from real property. In addition, the judgment creditor can satisfy his costs and damages by wage garnishment.

Section 709.140 - This section deals with the disposition of personal property. This is a new provision and follows the same procedures as the situation where a tenant has vacated the premises in an unlawful detainer action. This section is applicable to all cases where personal property remains on the premises

after the judgment creditor has obtained a writ of possession of real property. This is a good provision, however, there should be some notice of this right given to the judgment debtor and perhaps this notice should be contained in the writ of possession itself.

Section 709.150 - This section deals with the return of the writ of possession of real property. This is a new provision and conforms to the procedures adopted in connection with writs of execution. Basically, it provides that the life of the writ of possession is the same as that of the writ of execution. The levy of the writ of possession is good for 90 days after its issuance and the judgment creditor may have possession of the property for up to one year.

Section 709.160 - This section provides for the appointment of a receiver. This is a new concept and is not found in present law, which does not specifically authorize the appointment of a receiver to enforce a judgment for possession of real property. Further, there is no requirement of the issuance or return of the writ of possession before the receiver may be appointed.

CHAPTER 10 - ENFORCEMENT OF JUDGMENT FOR SALE OF PROPERTY

Section 710.110 - This section deals with the issuance of the writ of sale and is analogous to the procedure for the issuance of a writ of execution and writ of possession. It

permits the judgment creditor's attorney to issue such a writ as an officer of the court. The judgment for sale of real property can only be enforced by the writ of sale. This differs from present law, whereby the judgment could be enforced by the order of sale. Further, it is provided that a levy is required in every case.

Section 710.120 - This section deals with the contents of the writ of sale and is basically self explanatory.

Section 710.130 - This section deals with the delivery and execution of the writ of sale and follows essentially the same procedures as found in Chapter 10 regarding the writ of possession of real property.

Section 710.140 - This section deals with the return of the writ of sale and is procedurally the same as found with the writ of execution. This is a new provision, there having been no prior statutory authority for the return of a writ dealing with the sale of specific property.

Section 710.150 - This section deals with the order directing the transfer of property for documents by the debtor. This order may be ex parte by the judgment creditor and the judgment debtor is subject to contempt for failure to obey such an order.

Section 710.160 - This section deals with the appointment of a receiver to enforce the judgment for sale of real or personal property. This is a new provision, there having been no specifically

authorize order for the appointment of a receiver under prior law.

CONCLUSION

It is my opinion that the tentative recommendation of the California Law Revision Commission with respect to Chapters 9 and 10 dealing with enforcement of judgments, should be adopted by the California Legislature with the few additions that I have indicated in this memorandum. This legislation appears to give many advantages to judgment creditors without any real detriment to the judgment debtor as long as proper notice is given. Further, this proposed legislation has the advantage of providing uniformity in the various areas dealing with writs of execution, writs of possession and writs of sale.

WHL:amf

GEORGE BALLARD COMPANY

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July 20, 1979

California Law Revision Committee
Stanford Law School
Stanford, Calif 94305

Re: Tentative Recommendations /
Enforcement of Judgments

Gentlemen:

On May 18th, 1979 I wrote some comments on your then recent work. I fear I have left a misunderstanding as to my position with respect to the \$2000.00 proposed exemption on deposited funds.

I am sorry for the confusion caused but am writing today to explain and possibly correct statements in my 5/18 letter.

I am not in favor of increasing any exemption of deposited funds.

I am in favor of changes in the language that will avoid exemptions from various sources in (perhaps) various accounts. I believe that with the confusion that is caused now in what is and what is not exempt funds, and where those funds are placed, it is too easy to exempt more than was ever intended.

I would favor one simple statement and one simple amount, but I can see no reason to make any increase in the exemption.

To have some money with which to live is important, but so too, is paying one's debts. To increase exemptions now, when so many other creditor's rights have been reduced, can, in my mind, lead only to further costs of doing business, more cost to pass on to those who do pay their bills, and less credit being available to those that need it.

Sincerely,

A handwritten signature in cursive script that reads 'Roy Wolcott'. The signature is written in black ink and is positioned above the printed name.

Roy Wolcott

THE STATE BAR OF CALIFORNIA

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July 23, 1979

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California Law Revision Commission
Stanford Law School
Stanford, California 94305

Attention: Mr. John DeMouly, Executive Director

Gentlemen:

Reference is made to your report called Tentative Recommendation Relating to Enforcement of Judgments dated March 1979 and forwarded to us with a request for our comments.

The Committee on Administration of Justice has studied your report and has agreed upon the comments set out below.

These comments do not have the approval of the Board of Governors.

(1) §702.210 Time for enforcement of judgments.

CAJ does not favor the LRC proposal to make judgments enforceable for a flat period of 20 years instead of the 10 plus 10 under the present law. CAJ believes you need to look at the situation sooner than at the expiration of 20 years. CAJ's suggestion: a basic 10 year period with two renewal periods of 10 years each.

(2) §707.120 Property subject to enforcement of money judgment.

The summary text indicates that the recorded judgment reaches a leasehold estate with an unexpired term of two years or more, but does not reach a leasehold estate with an unexpired term of less than two years. However, the proposed statute does not make this clear and should be changed so that it is clearly stated.

(3) §705.490 Judgment liens of equal rank.

CAJ does not favor changing the present law regarding the priority between judgment liens of equal rank. LRC proposes that the proceeds from the sale of property subject to judgment liens of equal rank be prorated among the judgment lienors. CAJ believes that the LRC proposal unduly rewards lack of diligence and that the present law is more equitable.

(4) §703.640 Notice of sale of real property.

Subsection (g) requires publication of notice in a newspaper of general circulation. A provision should be added to specify where you publish in the event there is no newspaper of general circulation.

The last sentence of subsection (c)(2) does not say what "person" is being referred to.

(5) §705.470 Discharge of judgment lien on real property.

Subsection (c) should provide that the notice shall also be given to the attorney of record for the judgment creditor.

Subsection (e) should be changed so that the judgment debtor has the burden of proof on the issue of the current value of the real property.

Subsection (f) providing for a deposit by the judgment debtor of the amount of the excess value within 30 days after the order is issued should be modified by building flexibility into the procedure to permit the time to be extended to allow the financing to be consummated and the escrow to be closed.

(6) §§ 705.610 and 705.630 Assignment orders.

Section 705.610 should be modified to require that notice be given to the obligor as to the hearing and with respect to any orders resulting from the hearing.

Section 705.630 should be changed to provide that the court not only may modify or set aside the assignment order but also may compel reassignment.

(7) §703.120 Issuance of writ of execution.

CAJ is opposed to the provision authorizing the issuance of writs of execution by attorneys for judgment creditors. Among the reasons for CAJ's position are that such new procedure would increase the chances for error and abuse; many people might be hurt because they are not competently represented, as, for example, if a levy might be had on too much property; that it is desirable to have an official in the middle of the process to do such things as compare the amount of the judgment with the amount of the writ.

(8) §703.370 Tangible personal property of a going business.

This section says nothing about what happens if the judgment debtor does not consent to the procedure set forth. Either a provision or a comment should be added to §703.370 that §703.320 is applicable if the judgment debtor's consent is not obtained.

(9) §703.390 Growing crops and standing timber.

The meaning of the phrase "continuous, unbroken tracts" is not clear. This language is not usually used and needs some explanation.

(10) §703.430 Deposit accounts and safe deposit boxes.

Subsection (a) should be changed from providing for the serving of a copy of the writ of execution and a notice of levy "on the financial institution" to "on an officer of the branch of the financial institution where the account or the safe deposit box is maintained."

(11) §703.680 Manner of payment; §703.690 defaulting bidder.

This section should be amended to allow credit bidding under the terms provided only if either the judgment debtor or the judgment creditor consents to it. Also, the section should be changed to provide that the one who consented to it should bear any added costs arising out of the failure of the bidder to go through with the transaction.

(12) §707.170 Exemptions inapplicable against support judgment.

This should be changed so that the present law remains in effect. Removing the exemption of child or spousal support could destroy the ability of the judgment debtor to survive.

(13) §707.200 Adjustments of dollar amounts of exemptions.

CAJ is opposed to this provision as it would create an area of uncertainty not to have the amounts fixed. It should also be noted that the referenced index specified has been superseded by a new formula by the government.

(14) §707.810 et seq. Dwelling exemption.

The provisions on the dwelling exemption appear inconsistent and lack clarity.

(15) §707.520 Household furnishings, wearing apparel, personal effects; §707.530 jewelry heirlooms, works of art.

CAJ does not approve of these sections; however, it suggests the following provision to substitute for the language you proposed for §707.530:

"Any jewelry, heirlooms, works of art, or any similar items are exempt if the court finds that such items reasonably have such sentimental or psychological value to the debtor that it would be inequitable to subject them to enforcement of a money judgment. Proceeds from the sale of such items are not exempt."

(16) §707.560 Deposit accounts and money.

CAJ suggests that the proposed \$2000 exemption be increased to \$2500 to equal the savings and loan exemption.

Very truly yours,



Monroe Baer
Staff Attorney

MB:rt