

Memorandum 80-5

Subject: Study D-300 - Enforcement of Judgments (Interrogatories and Examinations)

Attached is a staff redraft of the provisions of the proposed enforcement of judgments recommendation relating to orders of examination and interrogatories to the judgment debtor after judgment. Except for the definitional section (Section 680.165), these provisions will go in Articles 1 (interrogatories) and 2 (examination proceedings) of Chapter 6 (miscellaneous creditors' remedies). The sections have been renumbered since the draft of March 1979. The principal changes from the March 1979 draft are as follows:

§ 680.165. Registered process server

This section is new and is to simplify drafting where the term is used in the statute.

§ 708.020. Written interrogatories to judgment debtor

Language is added to make clear that the interrogatories are for the purpose of "requesting information designed to aid in the enforcement of the judgment," a kind of relevancy test comparable to the civil discovery provisions.

The 120-day limitation is revised to apply when the interrogatories have been answered by the judgment debtor within the preceding 120 days, and not when the interrogatories have merely been served within that period. (This section was Section 705.110 in the March 1979 draft.)

§ 708.110. Examination of judgment debtor

The language requiring the judgment debtor to appear and "answer concerning the judgment debtor's property" has been revised to require the judgment debtor to "furnish information designed to aid in enforcement of the judgment." As the Comment to this section notes, this might include, for example, information concerning future employment prospects of the judgment debtor.

The language permitting examination if the judgment debtor (1) has not been examined within the preceding 120 days or (2) if the judgment debtor has nonexempt property which the judgment debtor "refuses to apply toward the satisfaction of the judgment" is revised to permit an

ex parte order of examination if the judgment debtor has not been examined within the preceding 120 days, and to permit the court to order a more frequent examination if the judgment creditor shows by affidavit or otherwise good cause for the examination.

The requirement in the March 1979 draft that the order be served on the judgment debtor not less than 10 days prior to the examination is shortened to three days, consistent with existing practice. See E. Jackson, California Debt Collection Practice § 18.10, at 424 (Cal. Cont. Ed. Bar 1968).

The notice to the judgment debtor to be contained in the order is made somewhat more detailed and explicit, and the judgment debtor is to be advised of the possibility of the imposition of attorneys' fees for nonappearance. See discussion under Section 708.170 infra. (Section 708.110 was Section 705.120 in the March 1979 draft.)

§ 708.120. Examination of third person

New provisions are added in subdivision (d) to require the judgment debtor to make at the examination hearing any claim that the property in the hands of the third person or the debt owed by the third person is exempt if the property or debt is described in the order and the judgment debtor receives at least 10 days' notice of the examination proceeding. If the judgment debtor fails to make the exemption claim at the examination proceeding, the claim is deemed waived. Although existing law does not contain such a provision, that is the practical effect when the court makes a turnover order.

The provisions in the March 1979 draft (Section 705.130) imposing a lien on the property or debt if the property or debt is "ordered to be applied to the satisfaction of the judgment" is revised to make the lien contingent on the judgment creditor's describing the property or debt in the affidavit or application for an order. The lien is not made contingent on the court making a turnover order, so that if ownership of the property or the existence of the debt is in dispute and an independent creditor's suit is required, the lien will nonetheless attach and protect the judgment creditor pending commencement of the creditor's suit. A maximum duration of one year is prescribed for the lien, which will give the judgment creditor ample time to commence suit.

§ 708.130. Witnesses; privilege of spouse of judgment debtor

Under existing law, the marital privilege under Sections 970 and 971 of the Evidence Code for a spouse not to testify against his or her spouse in any proceeding, and not to be called as a witness by an adverse party when the spouse is a party to a proceeding, is expressly applied in proceedings to examine a debtor of the judgment debtor. Code Civ. Proc. § 717. Thus a spouse of the judgment debtor could presumably refuse to be examined as a debtor of the judgment debtor and collude with the judgment debtor-spouse to conceal assets. Section 705.150 of the March 1979 draft continued this provision and expanded it to apply to situations where the spouse is called as a witness in an examination of the judgment debtor.

The marital privilege has received criticism from courts and commentators as obstructing the ascertainment of truth. See, e.g., 1 Cal. L. Revision Comm'n Reports at F-15 (1957). Exceptions to the privilege are set forth in Evidence Code Section 972. The privilege does not apply, for example, in a proceeding brought by one spouse against the other, in a proceeding to commit a spouse or to determine the spouse's competence, or in a criminal proceeding involving certain family crimes. Because of the possibility of collusion to conceal assets in proceedings to enforce a judgment, the staff recommends that the marital privilege not apply in examination proceedings. (This recommendation does not affect the privilege for confidential marital communications set forth in Evidence Code Section 980.)

§ 708.140. Powers and qualifications of referee

The staff has added to this section a provision that only the court, and not a referee, may make an award of attorneys' fees for the failure of a person to appear for an examination. (This section was Section 705.200 in the March 1979 draft.)

§ 708.150. Appearance at examination by representatives of organizations

The staff has added to this section a provision permitting an order of examination to require the appearance of a specific individual on behalf of an organization, and a provision requiring the order to advise the organization of its statutory duty to designate the individual to

appear for it if the order does not so designate and if the organization is being examined as a debtor of the judgment debtor. (This section was Section 705.190 in the March 1979 draft.)

§ 708.170. Failure to appear for examination; penalty for unjustified arrest

The provision for an award of reasonable attorneys' fees against a judgment debtor who fails to appear in response to an order of examination is qualified to require that the nonappearance be "without good cause," and that in such a case the court "shall" make the award. The provision is also expanded to apply to a nonappearing debtor of a judgment debtor. (This section was Section 705.180 in the March 1979 draft.)

§ 708.180. Determination of third person's adverse claim

This section is new. Under existing law and under the March 1979 draft (Section 705.170), if a third person alleged to have property of the judgment debtor or to owe a debt to the judgment debtor claims an interest in the property or denies the debt, the court is precluded from resolving the dispute and the judgment creditor must bring a creditors' suit. As revised, this section permits the court to resolve the dispute (1) if venue would be proper for a civil action, (2) if a civil action concerning the matter is not in fact pending, and (3) the court does not determine that the matter ought properly to be determined in an independent civil action. This provision is comparable to provisions giving the probate court the authority to resolve certain disputed property claims in the course of estate administration (Prob. Code §§ 851.5-853) and provisions giving the court in guardianship or conservatorship proceedings similar authority (Prob. Code §§ 2520-2528, operative January 1, 1981).

§ 708.190. Intervention by third party

This section is new and authorizes the court to permit a third party claiming an interest in the property or debt sought to be applied toward satisfaction of the judgment to intervene and obtain a determination of rights.

§ 708.200. Protective order

This section is new and is comparable to the court's authority to make protective orders in civil discovery proceedings. See Code Civ. Proc. §§ 2019(b)(1), 2030(c).

§ 708.205. Order applying property to satisfaction of judgment

The staff has added to this section a provision that a court order applying property toward the satisfaction of the judgment creates a lien on the property. (This section was Section 705.120 in the March 1979 draft.)

Respectfully submitted,

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Miscellaneous Creditors' Remedies

Introduction

Levy under a writ of execution is not a complete remedy for enforcement of a money judgment. It may be ineffective where the judgment debtor conceals or disposes of assets which are subject to execution or where a third person refuses to cooperate with the levy. In addition, there are types of property which for historical or practical reasons cannot be reached by execution. Other procedures have been developed to deal with these special situations, first by the courts of equity, and later by statute.

The Commission recommends that the various special procedures be revised and expanded to provide a greater variety of remedies to the judgment creditor consistent with fair treatment of the interests of the judgment debtor.

Examination Proceedings

Examination proceedings¹⁷³--frequently called proceedings in aid of execution or supplementary proceedings--permit the judgment creditor to examine the judgment debtor or a third person who has property of, or is indebted to, the judgment debtor in order to discover property and apply it toward the satisfaction of the judgment. Examination proceedings are initiated by application for an order that the judgment debtor or third person appear and answer concerning the judgment debtor's property.

A judgment debtor may be examined once every four months¹⁷⁴ or more frequently where a writ of execution has been issued and the judgment creditor shows that there is property which the judgment debtor "unjustly refuses" to apply toward the satisfaction of the judgment.¹⁷⁵ The four-month limitation should be retained since it is designed to prevent harassment of the judgment debtor.¹⁷⁶ However, the requirement

173. See Sections 714-723.

174. Section 714.

175. Section 715.

176. For the sake of precision, it is recommended that the four-month period be changed to 120 days.

that, in order to obtain a more frequent examination, the judgment creditor must obtain issuance of a writ of execution should be eliminated.^{176a} The requirement that the judgment creditor show that the judgment debtor's refusal to apply property has been "unjust" should be replaced with a requirement that the judgment creditor show good cause for a more frequent examination.¹⁷⁷ The proposed law adds an express

176a. Originally, California adopted the system provided in the Field draft of a Code of Civil Procedure for New York under which issuance of a writ and its return unsatisfied were required before the judgment debtor could be examined, but only issuance was required where the proceedings were aimed at the application of particular property which the judgment debtor unjustly refused to apply. See 1851 Cal. Stats. ch. 5, §§ 238, 239; S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 283-84 (2d ed. 1975). It was not until 1957 that the four-month limitation was added to the California provision for judgment debtor examinations where no special showing is made. See 1957 Cal. Stats. ch. 1194, § 1. An amendment of Section 714 in 1955 eliminated the requirement that a writ be issued and returned unsatisfied, and substituted therefor the requirement that a writ be "issuable"--in effect, a test of whether the judgment is currently enforceable. See 1955 Cal. Stats. ch. 1191, § 1. This amendment recognized that the former requirement was an outgrowth of the time when the courts of equity and law were separate and when equity would not act unless the legal remedies had been exhausted, and that the return of a writ unsatisfied creates no presumption that the legal remedy is inadequate since the levying officer may not have been instructed to levy under the writ. See S. Riesenfeld, supra at 283.

177. The requirement that the judgment debtor's refusal to apply property under Section 715 be alleged to be unjust serves no apparent purpose. If it means that the judgment debtor has nonexempt property, as opposed to exempt property or property of third persons which may properly not be applied to the judgment, then the language is unneeded because the proposed law elsewhere makes clear which property may be applied toward the satisfaction of a judgment. If it is designed to make sure the judgment creditor first attempts to reach property by levy under a writ of execution, it should be eliminated, consistent with the 1955 amendment of Section 714 and the policy of the proposed law to expunge the exhaustion of legal remedies doctrine and permit the judgment creditor to pursue whichever remedy is thought to be most effective in given circumstances.

provision, drawn from local court rule in a number of jurisdictions,^{177a} that the judgment debtor shall be served with the order of examination not less than three days prior to the date set for the examination.

Examinations of third persons are more circumscribed. The order to appear may be issued only if a writ of execution has been issued or returned and the judgment creditor must show that the third person has property of the judgment debtor or is indebted in an amount exceeding \$50. The prerequisite of the issuance or return of a writ of execution should be eliminated as an outmoded historical relic.¹⁷⁸ The judgment creditor should be free to select the most appropriate means of reaching the property held or controlled by the third person. The \$50 requirement, dating from 1851,¹⁷⁹ should be increased to \$250 to compensate for the change in the value of the dollar. The proposed law would require that notice of the examination of the third person be given the judgment debtor since the judgment debtor is an interested party. If the judgment creditor describes in the application for the order the property of the judgment debtor in the hands of the third person or the debt owed to the judgment debtor by the third person and the judgment debtor receives at least 10 days' notice of the examination, the judgment debtor must make any applicable exemption claim at the hearing or the exemption will be deemed waived. Notice of this requirement is to be included in the order which is served on the judgment debtor.

As an added incentive to the person served with an order of examination to appear as directed in the order, the proposed law provides for an award of reasonable attorneys' fees in favor of the judgment creditor if the person served fails to appear for the examination and the failure is without good cause. The order will contain a notice to

177a. See E. Jackson, California Debt Collection Practice § 18.10, at 424 (Cal. Cont. Ed. Bar 1968).

178. See note 176a supra.

179. 1851 Cal. Stats. ch. 5, § 241.

the person served that, in addition to the contempt sanction for non-appearance, attorneys' fees may be awarded.

Under existing law, if the third person being examined claims an interest in the property or denies the debt, the court may not adjudicate the dispute and may not order the property to be applied toward the satisfaction of the judgment.¹⁸⁰ The judgment creditor must resort instead to a creditor's suit in which the interest of the third person may be determined.¹⁸¹ The proposed law relaxes this restrictive rule so that the court in which the examination proceeding is pending may adjudicate a dispute between the judgment debtor and the third person concerning ownership of the property or the existence of the debt unless any one of the following conditions exist: (1) if the court in which the examination proceeding is pending would not be a proper court for the trial of an independent civil action to resolve the dispute and the third person objects to the dispute being resolved in the examination proceeding; (2) if there is a civil action pending concerning the dispute at the time the order of examination is served on the third person; or (3) if the court in its discretion determines that the dispute should be determined in an independent civil action.^{181a} The provision of existing law which authorizes the court to forbid the third person from transferring or otherwise disposing of the property pending resolution of the dispute¹⁸² is limited to authorizing the court to forbid a transfer to the judgment debtor.

180. See Section 719. The third person is entitled to a determination of the respective interests in the property or debt in an independent action. *Takahashi v. Kunishima*, 34 Cal. App.2d 367, 373, 93 P.2d 645, 648 (1939).

181. See Section 720 and the discussion under "Creditors' Suits" infra.

181a. The provision in the proposed law for summary adjudication in examination proceedings of disputed ownership of property or a disputed debt is comparable to provisions in the Probate Code for determination of some kinds of claims in the course of estate administration or in guardianship or conservatorship proceedings. See Prob. Code §§ 851.5-853, 2520-2828.

182. See Section 720 and the discussion under "Creditors' Suits" infra.

The proposed law codifies the case law concerning the lien created by service of an order of examination.¹⁸³ Service on the judgment debtor creates a lien on the judgment debtor's personal property which is subject to the enforcement of a money judgment. Service on a third person creates a lien on the property in the third person's possession in which the judgment debtor has an interest and on any debt owing to the judgment debtor if the property or debt is described in the judgment creditor's affidavit or application for the order.¹⁸⁴

The proposed law would make several other changes in the existing examination procedure. The provision of existing law permitting the arrest of the judgment debtor on ex parte application of the judgment creditor where it appears that there is a danger that the judgment debtor will abscond and providing for the imprisonment of the judgment debtor unless an undertaking is given¹⁸⁵ should be repealed since they are in conflict with the policies supporting the repeal of the civil arrest provisions.¹⁸⁶ The provision of existing law which grants a privilege to the spouse of the judgment debtor to refuse to be examined as a debtor of the judgment debtor¹⁸⁷ is not continued, and the proposed law expressly provides that the marital privilege^{187a} is not applicable in examination proceedings. This is to prevent the privilege from being

183. See *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 28-30, 87 P.2d 830, 844 (1939); *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242, 245 (1909).

184. See the discussion under "Effect of Liens" supra.

185. Section 715.

186. See Recommendation and Study Relating to Civil Arrest, 11 Cal. L. Revision Comm'n Reports 1 (1973).

187. Section 717.

187a. Evid. Code §§ 970-971. The proposed law does not affect the privilege which protects confidential marital communications. See Evid. Code § 980.

used as a collusive device for the spouse to conceal assets of the judgment debtor. Mileage fees for third persons attending examination proceedings should be the same as for witnesses generally.¹⁸⁸ The proposed law would also stiffen sanctions for nonappearance at examination proceedings by permitting the judgment creditor to recover reasonable attorneys' fees incurred in the proceeding where the judgment debtor or a third person has been served with an order to appear at an examination by a person authorized to serve the order¹⁸⁹ but fails to appear. The proposed law authorizes the court to permit a nonparty who claims an interest in the property or debt sought by the judgment creditor to intervene in the proceeding and to determine the person's rights in the property or debt. The proposed law adds express authority for the court to make such protective order as justice may require, comparable to the court's authority in civil discovery proceedings.¹⁹¹ Existing law provides that a referee appointed to conduct examinations in a county with a population of one million or more must have been licensed to practice law for five years.^{191a} The proposed law would require only that a referee be a member of the State Bar of California.

188. Section 717.1 provides mileage fees for third persons to be examined in the amount of \$0.15 per mile one way. Government Code Section 68093 was amended in 1970 to raise the fee for witnesses to \$0.20 per mile one way. 1970 Cal. Stats. ch. 1061, § 2.

189. Sections 714 and 717 provide that service be made by a sheriff, constable, marshal, some person specially appointed by the court, or a registered process server as a condition to bringing the judgment debtor before the court.

190. [Omitted.]

191. See Sections 2019(b)(1), 2030(g)(1).

191a. Section 723.

Interrogatories to the Judgment Debtor

Existing law permits a judgment creditor to serve interrogatories upon the judgment debtor if the debtor is represented by counsel.²⁰⁷ The form of, answer to, and enforcement of the interrogatories is the same as that provided for interrogatories in a civil action.²⁰⁸ The proposed law would continue this procedure but would permit the use of interrogatories whether or not the debtor is represented by counsel. This will make the use of post-judgment interrogatories consistent with interrogatories used in civil discovery.^{208a} The proposed law would also make clear that, in order to prevent harassment, interrogatories may not be served if, within the preceding 120 days, the judgment debtor has responded to post-judgment interrogatories or an examination has been conducted.²⁰⁹ Under this provision, judgment creditors would be able to use the order obtainable in an examination proceeding to apply property that is described in the answer to the interrogatories toward the satisfaction of the judgment. Service of interrogatories would not have the effect of creating a lien on property of the judgment debtor, as does service of an order of examination.²¹⁰

207. Section 714.5.

208. See Sections 714.5, 2030.

208a. See Section 2030.

209. Section 714.5 provides that interrogatories may be used "cumulative to" and "in conjunction with" examination proceedings under Section 714 and also that the judgment debtor may not be required to respond to interrogatories more frequently than once in any four-month period or within any four-month period during which an examination has been conducted pursuant to Section 714. The effect on the right to examine the judgment debtor of using interrogatories is not specified in Section 714.5, nor is the relation between interrogatories and an examination under Section 715 indicated.

210. See the discussion under "Examination Proceedings" supra.

§ 680.165. Registered process server

680.165. "Registered process server" means a person registered pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code and the employees of such person.

Comment. Section 680.165 is drawn from subdivision (b) of former Section 687 and makes clear that the term "registered process server" includes employees of the registrant. See also Section 680.150 ("person" includes an individual, a corporation, a partnership, or other unincorporated association).

CHAPTER 6. MISCELLANEOUS CREDITORS' REMEDIES

Article 1. Written Interrogatories to Judgment Debtor§ 708.010. Application of article

708.010. (a) Except as provided in this section and in subdivision (b) of Section 708.020, the provisions of this article may be used at any time the judgment is enforceable.

(b) Whenever enforcement of the judgment is stayed, all proceedings under this article are stayed.

Comment. Subdivision (a) of Section 708.010 is consistent with former Section 714.5 which provided that interrogatories may be served "any time after execution . . . may properly be issued." See also Section 683.010 (period for enforcement of judgment).

Subdivision (b) makes clear that when a statute or court order provides for a stay of the "enforcement of the judgment," the stay applies to the use of written interrogatories under this article. See, e.g., Section 681.040 (stay of enforcement without bond).

§ 708.020. Written interrogatories to judgment debtor

708.020. (a) The judgment creditor may propound written interrogatories to the judgment debtor in the manner provided in Section 2030 requesting information designed to aid in enforcement of the judgment. The judgment debtor shall answer the interrogatories in the manner and within the time provided by Section 2030.

(b) The judgment creditor may not serve interrogatories pursuant to this section and the judgment debtor is not required to respond to any

interrogatories served within 120 days after the judgment debtor has responded to interrogatories previously served pursuant to this section, or within 120 days after the judgment debtor has been examined pursuant to Article 2 (commencing with Section 708.110).

(c) Interrogatories served pursuant to this section may be enforced, to the extent practicable, in the same manner as interrogatories in a civil action.

Comment. Subdivision (a) of Section 708.020 is the same in substance as the first sentence of former Section 714.5, except that the limitation of former Section 714.5 that interrogatories could be propounded only to a judgment debtor represented by counsel is not continued. This change is consistent with Section 2030 (interrogatories in civil actions generally). The provision that the interrogatories request information designed to aid in enforcement of the judgment is new, and is consistent with Section 2016 (examination regarding matter relevant to subject matter of the action). The provision of former Section 714.5 that written interrogatories to the judgment debtor are cumulative and in addition to the examination procedure is omitted as unnecessary. Section 708.010 makes clear that written interrogatories may be used at any time the judgment is enforceable if there has been no stay and the judgment debtor has not responded to interrogatories within the preceding 120 days.

Subdivision (b) is the same in substance as the last sentence of former Section 714.5.

Subdivision (c) continues the substance of the third sentence of former Section 714.5. Under subdivision (c), if the judgment debtor fails to answer interrogatories without substantial justification, sanctions may include an award of attorney's fees. Section 2034(a). If the court orders the judgment debtor to answer and the judgment debtor refuses to do so, the refusal is punishable as a contempt. Section 2034(b); *MacDonald v. Superior Court*, 75 Cal. App.3d 692, 696, 141 Cal. Rptr. 667, ___ (1977). The court is also authorized to make such protective orders for the benefit of the judgment debtor as justice may require. Section 2030(g)(1).

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Article 2. Examination Proceedings

§ 708.110. Examination of judgment debtor

708.110. (a) The judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information designed to aid in enforcement of the judgment.

(b) If the judgment creditor has not caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order upon ex parte application of the judgment creditor.

(c) If the judgment creditor has caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order if the judgment creditor by affidavit or otherwise shows good cause for the order. The application shall be ex parte or upon such notice as the court requires.

(d) The judgment creditor shall cause a copy of the order to be personally served on the judgment debtor not less than three days prior to the date set for the examination. Service of the order creates a lien on the personal property of the judgment debtor.

(e) The order shall contain the following statement in boldface type: "NOTICE TO JUDGMENT DEBTOR. If you fail to appear at the time and place specified in this order, you may be punished for contempt of court and you may be required to pay the reasonable attorneys' fees incurred by the judgment creditor in this examination proceeding."

Comment. Subdivision (a) of Section 708.110 supersedes the first sentences of former Sections 714 and 715. The former language requiring the judgment debtor to answer concerning his property has been revised to require the judgment debtor to furnish information designed to aid in enforcement of the judgment. This might include, for example, information concerning future employment prospects. The proper court for an examination under this section is prescribed in Section 708.160. The judgment debtor may not be ordered to appear when the judgment is no longer enforceable. See Sections 683.010, 683.020.

Under subdivision (b), the judgment creditor may obtain an order of examination if the judgment creditor has not caused the judgment debtor to be examined within the preceding 120 days. This is the case even though the judgment debtor may have been required to respond to written interrogatories under Section 708.020 within the 120-day period. The provision in subdivision (b) that the order of examination is made upon ex parte application codifies case law. See *Lewis v. Neblett*, 188 Cal. App.2d 290, 297, 10 Cal. Rptr. 441, ___ (1961).

The good cause requirement of subdivision (c) for examination more frequently than every 120 days supersedes the requirement of former Section 715 that the judgment debtor have property that the judgment debtor "unjustly refuses" to apply toward the satisfaction of the judgment.

The first sentence of subdivision (d) is based on what appears to have been a local court rule in a number of jurisdictions. See E. Jackson, *California Debt Collection Practice* § 18.10, at 424 (Cal. Cont. Ed. Bar 1968). The second sentence of subdivision (d) codifies the rule

in *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 28-30, 87 P.2d 830, 844 (1939), and *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242, 245 (1909). No duration is specified for the lien. However, it may not be enforced beyond the time for enforcement of the judgment under Sections 683.010 and 683.020. See also Sections 697.020 (relation back of liens), 697.030 (effect of liens).

Subdivision (e) continues the substance of the third paragraph of former Section 714 and adds the requirement that the notice advise the judgment debtor that failure to appear may result in attorneys' fees being imposed. See Section 708.170.

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§ 708.120. Examination of third person

708.120. (a) Upon ex parte application and proof by the judgment creditor by affidavit or otherwise to the satisfaction of the proper court that a third person has possession or control of property in which the judgment debtor has an interest or owes a debt to the judgment debtor in an amount exceeding two hundred fifty dollars (\$250), the court shall make an order directing the third person to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to answer concerning the property or debt. The affidavit in support of the judgment creditor's application may be based on the affiant's information and belief.

(b) Not less than 10 days prior to the date set for the examination, a copy of the order shall be:

- (1) Served personally on the third person.
- (2) Served personally or by mail on the judgment debtor.

(c) If the property in the third person's possession or control in which the judgment debtor has an interest or the debt owed by the third person to the judgment debtor is described in the affidavit or application for an order under subdivision (a), service of the order on the third person creates a lien on the judgment debtor's interest in the property or on the debt for a period of one year from the date of the order unless extended or sooner terminated by the court.

(d) The judgment debtor may claim that all or any portion of the property or debt is exempt from execution by application to the court on noticed motion, filed and served not later than three days before the date set for the examination. The judgment debtor shall execute an

affidavit in support of the application that includes all of the matters set forth in subdivision (b) of Section 703.520. When a claim of exemption is made pursuant to this section, a notice of opposition to the claim of exemption is not required. The court shall determine any claim of exemption made pursuant to this section and the court's determination is as conclusive as an exemption determination made pursuant to Chapter 4 (commencing with Section 703.000). Failure of the judgment debtor to make a claim of exemption does not preclude the judgment debtor from later claiming the exemption unless the property or debt is described in the order and the judgment debtor receives notice of the examination proceeding at least 10 days before the date set for the examination.

(e) An order made pursuant to subdivision (a) shall contain the following statements in boldface type:

(1) "NOTICE TO PERSON SERVED. If you fail to appear you may be subject to arrest and punishment for contempt of court and you may be required to pay the reasonable attorneys' fees incurred by the judgment creditor in this examination."

(2) "NOTICE TO JUDGMENT DEBTOR. The person in whose favor the judgment was entered in this action claims that the person to be examined pursuant to this order has possession or control of property which is yours or owes you a debt and has described the property or debt as follows:

If you claim that all or any portion of the property or debt described above is exempt from execution, you must file your claim in writing with the court not later than three days before the date set for the examination and you must appear at the time and place set for this examination to establish your claim of exemption or your claim will be waived."

(f) An order made pursuant to subdivision (a) is not effective unless, at the time it is served on the third person, the person serving the order tenders to the third person fees for the mileage necessary to be traveled from the third person's residence to the place of examination. The fees shall be in the same amount generally provided for witnesses when legally required to attend civil proceedings in the court where the examination proceeding is to be conducted.

Comment. Subdivision (a) of Section 708.120 supersedes the first sentence of the first paragraph of former Section 717. It provides for the issuance of an order for the examination of the debtor of a judgment debtor or a person holding property of the judgment debtor. The minimum amount of indebtedness required before an examination order may issue has been raised from \$50 to \$250 to compensate for the change in the value of the dollar since this procedure was originally enacted in 1851. See 1851 Cal. Stats. ch. 123, § 241. The requirement of the first sentence of former Section 717 that a writ of execution be first issued against the property of the judgment debtor is not continued. The third person may not be ordered to appear when the judgment is no longer enforceable. See Sections 683.010, 683.020. The provision for an affidavit based on information and belief codifies the result in *Tucker v. Fontes*, 70 Cal. App.2d 768, 771, 161 P.2d 697, 699 (1945). The proper court for an examination under this section is prescribed in Section 708.160.

Subdivision (b) is new. Prior law did not prescribe the time within which the debtor of the judgment debtor was to be served and did not provide for any notice to the judgment debtor. The requirement that the judgment debtor be given notice changes the rule announced in *High v. Bank of Commerce*, 95 Cal. 386, 388, 30 P. 556, ___ (1892). See also Section 684.040 (longer period of mailed notice if judgment debtor outside California).

Subdivision (c) is comparable to subdivision (e) of Section 708.110 and the second sentence of subdivision (a) of Section 708.205. If the property or debt is described in the judgment creditor's application for an order for examination of a third person and the court ultimately orders the property or debt applied to the satisfaction of the judgment, the lien under subdivision (c) will merge with the lien under Section 708.205 and will continue to date from the service of the order on the third person. See also Section 697.030 (effect of lien).

Subdivision (d) is drawn from comparable provisions in the Attachment Law. See Sections 482.100 and 484.070. It makes explicit a principle that was implicit in a provision of former Section 719 for the application of property "not exempt from execution" toward the satisfaction of the judgment. This necessarily involves a determination of the existence of exemptions prefatory to issuing an order applying the property toward satisfaction of the judgment. See Section 703.040(a) (exemptions apply to all procedures for enforcement of money judgments).

The court may also determine in the examination proceedings that the property sought to be reached may properly be applied to the satisfaction of the judgment through an order in examination proceedings. Cf. *Pacific Bank v. Robinson*, 57 Cal. 520, 524 (1881) (supplementary proceedings appropriate to reach patent rights).

For the extent of the duty of a third person to protect the exemption rights of the debtor, see *Bowie v. Union Bank*, 11 Cal. App.3d 807, 815-16, 90 Cal. Rptr. 103, ___ (1970); *Agnew v. Cronin*, 148 Cal. App.2d 117, 126-29, 306 P.2d 527, 533-34 (1957); *Hing v. Lee*, 37 Cal. App. 313, 316-18, 174 P. 356, 358-59 (1918). If the judgment debtor fails to claim the exemption at the hearing when required to do so under subdivision (d), the exemption is waived, subject to the authority of the court to relieve the judgment debtor from the failure pursuant to Section 473. See Section 703.030 and Comment thereto (manner of claiming exemptions).

Paragraph (1) of subdivision (e) continues the substance of the third paragraph of former Section 717 and adds the requirement that the notice advise the third person that failure to appear may result in attorneys' fees being imposed. See Section 708.170. Paragraph (2) is new and is necessitated by the requirement in subdivision (d) that when the property in the hands of the third person or the debt is described in the application for an order of examination, a judgment debtor with at least 10 days' notice of the examination proceeding shall claim any exemption at the hearing. See also Section 703.030 (waiver by failure to claim exemption).

Subdivision (f) continues the second sentence of former Section 717.1, except that the former provision for mileage fees of fifteen cents per mile has been revised to incorporate the mileage fees for witnesses in civil proceedings in the court where the examination proceeding is pending. See Gov't Code § 68093 (twenty cents per mile one way). Mileage fees are recoverable costs under Sections [1032.6 and 1033.7].

Where a corporation is indebted to or holds property of a judgment debtor, the manner of appearance of the corporation is prescribed in Section 708.150. Where the debtor of the judgment debtor is a public entity, the judgment creditor must follow the procedures set forth in Article 8 (commencing with Section 708.610).

31789

§ 708.130. Witnesses; privilege of spouse of judgment debtor

708.130. (a) Witnesses may be required to appear and testify before the court or referee in an examination proceeding under this article in the same manner as upon the trial of an issue.

(b) The privilege prescribed by Article 4 (commencing with Section 970) of Chapter 4 of Division 8 of the Evidence Code does not apply in an examination proceeding under this article.

Comment. Subdivision (a) of Section 708.130 continues former Section 718. Subdivision (b) is new and changes the rule set forth in the second sentence of former Section 717 (marital privilege applicable in proceedings to examine debtor of judgment debtor in the absence of a waiver).

32110

§ 708.140. Powers and qualifications of referee

708.140. (a) The examination proceedings authorized by this article may be conducted by a referee appointed by the court. The referee may issue, modify, or vacate an order authorized by Section 708.205, may

make a protective order authorized by Section 708.200, and may issue a warrant authorized by Section 708.170, and has the same power as the court to grant adjournments, to preserve order, and to subpoena witnesses to attend the examination, but only the court that ordered the reference has power to do the following:

- (1) Punish for contempt for disobeying an order of the referee.
- (2) Make an award of attorneys' fees pursuant to Section 708.170.

(b) Only a member of the State Bar of California is eligible for appointment as a referee pursuant to this article.

Comment. Subdivision (a) of Section 708.140 continues the authority of a referee appointed by the court provided in former Sections 714-715, 717-721, and 723. The authority to modify and vacate orders is generalized from former Section 720. The authority to compel the appearance of a person at the examination and to control the proceeding generalizes the authority of a referee appointed by a superior court formerly provided by Section 723. The limitation on the power to punish for contempt provided in paragraph (1) of subdivision (a) continues the substance of former Section 721. Paragraph (2) of subdivision (a) is new.

Subdivision (b) supersedes the portion of former Section 723 that required referees to have been members of the State Bar for at least five years. Former Section 723 was applicable to referees appointed by a superior court in a county or city and county having a population of one million or more.

31799

§ 708.150. Appearance at examination by representatives of organizations

708.150. (a) If a corporation, partnership, association, trust, or other organization is served with an order to appear for an examination, it shall designate to appear and be examined one or more officers, directors, managing agents, or other persons who are familiar with its property and debts.

(b) If the order to appear for an examination requires the appearance of a specified individual, the specified individual shall appear for the examination and may be accompanied by one or more officers, directors, managing agents, or other persons familiar with the property and debts of the corporation, partnership, association, trust, or other organization.

(c) If the examination is to be conducted pursuant to Section 708.120 and the order to appear for the examination does not require the appearance of a specified individual, the order shall advise the corporation, partnership, association, trust, or other organization of its duty to make a designation under subdivision (a).

Comment. Subdivision (a) of Section 708.150 is derived from Rule 30(b)(6) of the Federal Rules of Civil Procedure and from Section 2019(a)(6). Former Section 717 provided for the appearance of a "corporation, or any officer or member thereof." Subdivision (b) permits the order to specify that a designated person appear for the examination. Subdivision (c) is comparable to the third sentence of Section 2019(a)(6).

If an organization described in subdivision (a) is served with an order to appear for an examination and no specified individual is required to appear by the order, the organization itself may nonetheless be held in contempt of court for its failure to appear. See Section 1209 (disobedience of lawful order is a contempt); 14 Cal. Jur.3d Contempt § 30 (1974) (corporations and other organizations may be held in contempt). If a specified individual is designated to appear in the order under subdivision (b), the designated individual is subject to the contempt sanction. See also Section 708.170 (reasonable attorneys' fees may be awarded for failure to appear).

31793

§ 708.160. Place of examination; examination outside county where judgment entered

708.160. (a) Except as otherwise provided in this section, the proper court for examination of a person under this article is the court in which the judgment is entered.

(b) A person may not be required to attend an examination before a court located outside the county in which the person resides or has a place of business unless the distance from the person's place of residence or place of business to the place of examination is less than 150 miles.

(c) If a person sought to be examined does not reside or have a place of business in the county where the judgment is entered, a court of similar jurisdiction in the county where the person resides or has a place of business is a proper court for examination of the person. If there is no court of similar jurisdiction in the county, a court of higher jurisdiction is a proper court.

(d) If the judgment creditor seeks an examination of a person before a court other than the court in which the judgment is entered, the judgment creditor shall do all of the following:

(1) File with the court from which the order is sought an abstract of judgment in the form prescribed by Section 674.

(2) Present to the court an affidavit in support of the application for the order stating the place of residence or place of business of the person sought to be examined. A copy of the abstract of judgment shall be attached to the affidavit.

(3) Make any necessary affidavit or showing for the examination as required by Section 708.110 or 708.120.

Comment. Subdivision (a) of Section 708.160 is new and makes clear what was implicit under former law. Subdivision (b) continues the substance of the first sentence of former Section 717.1. Subdivisions (c) and (d) continue the substance of the first sentence of former Section 722. Paragraph (2) of subdivision (d) sets forth the required contents of the affidavit in greater detail than did former Section 722. The requirement that a copy of the abstract of judgment be attached to the affidavit is new.

31798

§ 708.170. Failure to appear for examination; penalty for unjustified arrest

708.170. (a) If an order requiring a person to appear for an examination was served by a sheriff, marshal, constable, a person specially appointed by the court in the order, or a registered process server, and the person fails to appear:

(1) The court may, pursuant to a warrant, have the person brought before the court to answer for the failure to appear.

(2) If the person's failure to appear is without good cause, the judgment creditor shall be awarded reasonable attorneys' fees incurred in the examination proceeding. Attorneys' fees awarded against the judgment debtor shall be added to and become part of the judgment.

(b) A person who willfully makes an improper service of an order for an examination which subsequently results in the arrest pursuant to subdivision (a) of the person who fails to appear is guilty of a misdemeanor.

Comment. Subdivision (a)(1) of Section 708.170 continues the substance of the second paragraph of former Section 714 and the second paragraph of former Section 717. See also Section 680.165 ("registered process server" defined). Subdivision (a)(2) is new. Subdivision (a)(2) does not affect any right to attorneys' fees the parties may have under a contract or statute.

Subdivision (b) continues the substance of the last paragraphs of former Sections 714 and 717, respectively. The authority provided by former Section 715 for arresting the judgment debtor where there is a danger of the debtor absconding and for imprisoning the judgment debtor for failure to give an undertaking when ordered to do so is not continued, consistent with the recent repeal of the civil arrest provisions. See 1973 Cal. Stats. ch. 20. Section 708.170 does not limit the contempt power of the court under Sections 1209-1222.

31794

§ 708.180. Determination of third person's adverse claim

708.180. (a) Except as provided in subdivision (b), if a third person examined pursuant to Section 708.120 claims an interest in the property adverse to the judgment debtor or denies the debt, the court may determine the ownership of the property or the existence of the debt. Such a determination is conclusive as to the parties to the proceeding and the third person. The court may grant a continuance for a reasonable time for discovery proceedings, the production of evidence, or other preparation for the hearing.

(b) The court may not make the determination provided in subdivision (a) in any of the following cases:

(1) If the court would not be a proper court for the trial of an independent civil action for the determination of the ownership of the property or the existence of the debt, and the third person objects to the determination of the matter pursuant to subdivision (a).

(2) If at the time an order for examination pursuant to Section 708.120 is served on the third person a civil action is pending with respect to the ownership of the property or the existence of the debt.

(3) If the court determines that the ownership of the property or the existence of the debt should be determined in an independent civil action.

(c) Upon application of the judgment creditor made ex parte or, if the court so orders, upon noticed motion, the court may make an order forbidding transfer of the property to the judgment debtor or payment of the debt to the judgment debtor until the ownership of the property or the existence of the debt are determined pursuant to subdivision (a) or in an independent civil action.

Comment. Section 708.180 is drawn from provisions in the Probate Code relating to the determination of certain claims in the course of estate administration or in guardianship or conservatorship proceedings. See Prob. Code §§ 851.5-853, 2520-2528. Under former Section 719, the court lacked the power to determine the ownership of property in the hands of a third person or whether the third person was indebted to the judgment debtor when the third person claimed an interest in the property adverse to the judgment debtor or denied the debt.

Subdivision (c) is analogous to Section 708.240 (order forbidding transfer or payment to judgment debtor before commencement of creditor's suit).

31797

§ 708.190. Intervention by third party

708.190. The court may permit a person claiming an interest in the property or debt sought to be applied in an examination proceeding to intervene in the proceeding and may determine the person's rights in the property or debt pursuant to Section 708.180.

Comment. Section 708.190 is new. In a proper case, this section permits the early resolution of a third-party claim to property that is the subject of an examination proceeding. For the procedure applicable to third-party claims after levy, see Chapter 5 (commencing with Section 706.010).

32675

§ 708.200. Protective order

708.200. In any proceeding under this article, the court may, on motion of the person to be examined or on its own motion, make such protective orders as justice may require.

Comment. Section 708.200 is new and is comparable to the court's authority under Section 708.020 (which incorporates Section 2030) to make a protective order with respect to written interrogatories to the judgment debtor. Under Section 708.200, the court is authorized to make the order on its own motion as well as on motion of the person to be examined.

31795

§ 708.205. Order applying property to satisfaction of judgment

708.205. (a) Except as provided in subdivision (b), at the conclusion of a proceeding pursuant to this article, the court may order property of the judgment debtor in the possession or under the control of the judgment debtor or the third person or a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of

the judgment, if the property is not exempt from enforcement of a money judgment. Such an order creates a lien on the property or debt.

(b) If a third person examined pursuant to Section 708.120 claims an interest in the property adverse to the judgment debtor or denies the debt and the court does not determine the matter as provided in Section 708.180, the court may not order the property or debt to be applied toward the satisfaction of the judgment, but may make an order pursuant to Section 708.180 or 708.240 forbidding transfer or payment to the judgment debtor.

Comment. Subdivision (a) of Section 708.205 continues the broad authority provided by former Section 719 for the court to order any non-exempt property or debt to be applied toward the satisfaction of the judgment. See also the last portion of the first sentence of former Section 715. Under subdivision (a), the person examined--whether the judgment debtor or a third person--may be ordered to deliver property or funds to the levying officer. See *Lewis v. Neblett*, 188 Cal. App.2d 290, 295, 10 Cal. Rptr. 441, 444 (1961) (funds in hands of administrator of estate). The person examined may also be ordered to pay the judgment creditor directly. See *Hustead v. Superior Court*, 2 Cal. App.3d 780, 783-87, 83 Cal. Rptr. 26, 27-30 (1969) (sublessee of judgment debtor ordered to pay rent to judgment creditor, order held invalid on other grounds). A receiver may be appointed with the powers ordered by the court, and the judgment debtor may be ordered to make any necessary assignments or deliveries to the receiver for the purpose of sale or collection. See *Habenicht v. Lissak*, 78 Cal. 351, 357-58, 20 P. 874, 877 (1889) (seat on stock exchange); *Pacific Bank v. Robinson*, 57 Cal. 520, 524 (1881) (patent rights); *Hathaway v. Brady*, 26 Cal. 581, 593-94 (1864) (note); *Tucker v. Fontes*, 70 Cal. App.2d 768, 771-72, 161 P.2d 697, 701 (1945) (business assets). The court may order execution to be issued to collect the amount due. See *William Deering & Co. v. Richardson-Kimball Co.*, 109 Cal. 73, 41 P. 801-02 (1895) (funds in bank). If property is to be sold pursuant to the court's order under subdivision (a), it will be sold either by a levying officer, in which case there must be a valid writ of execution outstanding, or by a receiver appointed by the court. Orders made in examination proceedings are enforceable by contempt.

Subdivision (b) supersedes the portion of former Section 719 that precludes a court order applying property in every case where the third person claimed an adverse interest in the property or denied the debt. Under subdivision (b), this rule applies only if the interest of the third person has not been determined pursuant to Section 708.180. The judgment creditor may then proceed by way of a creditor's suit pursuant to Article 3 (commencing with Section 708.210) or an independent civil action.