

Memorandum 80-15

Subject: Study D-300 - Enforcement of Judgments (Enforcement Against Franchise)

One type of "property" that a creditor may seek to reach and apply to the satisfaction of a judgment is a franchise--a special privilege or right in the nature of a license granted by a governmental entity to a private person. Examples of franchises are the right granted to a public utility to place wires and pipelines in a public street, a right to operate a parking lot on publicly owned property, and a right to provide cable television or community antenna service.

At common law this sort of property right was not subject to execution. The common law rule has been abrogated by statute in California. Code of Civil Procedure Sections 724a-724e permit levy of execution on and sale of a franchise. For an analysis of these provisions, see the memorandum attached as Exhibit 2, which was prepared for the staff by a Stanford law student.

As the memorandum indicates, there are a number of problems with permitting levy and sale of franchises. Among these problems are that the franchise may not be transferable and that transfer may be subject to approval by a regulatory agency such as the Public Utilities Commission. In addition, levy on the franchise may be impractical and sale may not be the most satisfactory means of reaching the value of the franchise.

For these reasons, the staff recommends that the franchise provisions be revised to permit a franchise to be reached to satisfy a judgment only upon court order, taking into consideration factors such as the nature of the franchise and its transferability. The court order should prescribe the means by which the franchise is to be applied to satisfaction of the judgment (e.g., sale, collection of proceeds, appointment of a receiver) and should resolve any other problems that may be involved with the application of the franchise to the judgment. The statute should also make clear that any application of the franchise to the judgment is subject to all applicable statutory and administrative regulations, such as Public Utilities Commission approval of transfers.

A staff draft to accomplish such a scheme is attached as Exhibit 1.

If the Commission approves this draft, we will incorporate it in the Miscellaneous Creditors' Remedies chapter of the comprehensive statute.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

32177

Article 9. Enforcement Against Franchise§ 708.910. Franchise defined

708.910. As used in this article, "franchise" means a franchise granted by a public entity and all the rights and privileges thereof, other than the franchise of being a corporation.

Comment. Section 708.910 makes clear that this article applies only to franchises from public entities. Private franchises are governed by the general rules relating to application of property to satisfaction of a money judgment.

32178

§ 708.920. Court order for enforcement

708.920. (a) The court may, in its discretion, order a franchise applied to the satisfaction of a money judgment upon motion by the judgment creditor and notice to the judgment debtor and the public entity that granted the franchise. In exercising its discretion, the court shall determine whether application of the franchise to the satisfaction of the judgment is proper taking into account all the circumstances of the case, including but not limited to the nature of the franchise, whether the franchise is by its terms transferable, and the likelihood that application of the franchise to the satisfaction of the judgment will yield a substantial amount.

(b) If the court orders application of the franchise to the satisfaction of the judgment, application shall be by such means as appears proper to the court, including but not limited to sale of the franchise, assignment of the franchise or proceeds of the franchise, or appointment of a receiver. The court may include in its order, or make additional orders containing, provisions to effectuate the application of the franchise to the satisfaction of the judgment, including but not limited to provisions relating to the place of sale of the franchise, possession of the property of the judgment debtor necessary for the exercise of the franchise, receipt of proceeds of the franchise, recovery of penalties imposed by law and recoverable for injury to the franchise or for damages or other cause, and the judgment debtor's powers and duties and liability for penalties and forfeitures.

Comment. Subdivision (a) of Section 708.920 supersedes former Section 724a. A franchise is no longer subject to levy and sale under execution but may only be applied to the satisfaction of a judgment pursuant to court order made in the court's discretion. See Section 699.010 and Comment thereto (property subject to execution); see also Cal. Const. art. XX, § 4 (franchise may not be relieved from liability). Subdivision (b) supersedes former Sections 724b-724d.

32180

§ 708.930. Limitations on enforcement

708.930. Notwithstanding any other provision of this article, an order for application of a franchise to the satisfaction of a money judgment is subject to all applicable laws governing sale, transfer, or other actions concerning the franchise, including but not limited to any necessary approvals by the Public Utilities Commission or local public entities and compliance with statutory or administrative regulations.

Comment. Section 708.930 incorporates limitations on sale and other actions affecting franchises. See, e.g., *South Pasadena v. Pasadena Land and Water Co.*, 152 Cal. 579, 93 P. 490 (1908) (franchise not transferrable unless transferee continues exercise of franchise).

EXHIBIT 2

To: Nat Sterling

Fr: Marcia Grimm

Re: Code of Civil Procedure Sections 724a-724e: Sale of Franchises

Da: August 19, 1979

Code of Civil Procedure Section 724a authorizes the levy and sale under execution of "any franchise other than the franchise of being a corporation" and of "all the rights and privileges thereof." A franchise in this sense may be defined as a special privilege conferred upon a corporation or individual by a government legally empowered to grant it, and which is granted on the theory of some benefit accruing to the public. City of Oakland v. Hogan, 41 Cal. App.2d 333, 346-47, 106 P.2d 987 (1940). The term franchise usually refers to such services and functions as government itself is obligated to furnish to its citizens and usually concerns such matters of vital public interest as water, gas, electricity or telephone services, and the right to use the public streets and ways to bring them to the public. Copt-Air v. City of San Diego, 15 Cal. App.3d 984, 988-89, 93 Cal. Rptr. 649 (1971). As such, it may be distinguished from a license or permit, or an easement or right of way. See 34 Cal. Jur.3d, Franchises From Governmental Bodies §§ 2-3, and cases there cited. If property is held for a public use, or is useable by the public generally, with a charge, such as a toll paid for such use, it is classified as a public utility and permission, generally in the form of a franchise from governmental authority, is necessary. City of Oakland v. El Dorado Terminal Co., 41 Cal. App.2d 320, 325, 106 P. 1000 (1940) [franchise from city required to maintain and collect tolls on public wharf on privately owned submerged lands]. See, generally, 34 Cal. Jur.3d, Franchises From Governmental Bodies.

At common law, franchises were exempt from levy and sale under execution on the theory that the franchise was a grant of special privileges from the sovereign to particular persons and was therefore not assignable or transferable except by permission of the sovereign. 2 Freeman on Executions § 179, at 908 (3d ed. 1900); Wood v. Truckee Turnpike Co., 24 Cal. 474, 486-87 (1864). As a result, it was held that franchises could be sold on execution only if authorized by statute and only according to procedures specified in the statute. Wood, id.;

Gregory v. Blanchard, 98 Cal. 311, 313, 33 P. 199 (1893). Statutes authorizing the sale of franchises under execution were strictly construed as being in derogation of the common law. Gregory v. Blanchard, 98 Cal. at 314; 2 Freeman on Executions at 919.

California courts followed the common law rule exempting franchises from sale prior to the enactment in 1872 of Civil Code Section 388 et seq., from which the present Code of Civil Procedure sections were derived. See Risdon Iron & Locomotive Works v. Citizens Traction Co., 122 Cal. 94, 54 P. 529 (1898); Wood v. Truckee Turnpike Co., 24 Cal. 474 (1864). The franchise in these cases was characterized as a personal trust which could not be voluntarily assigned or transferred by forced sale. See also Monroe v. Thomas, 5 Cal. 470 (1855); Thomas v. Armstrong, 7 Cal. 286 (1857); and 2 Freeman on Executions at 912 ("So far as any general rule can be formulated on the subject, it is this: that property of a corporation is not subject to execution which is not subject to voluntary transfer by the corporation.").

Later cases, however, have held that a franchise is "property" within the meaning of Civil Code Section 1044 (property subject to transfer) and includes all rights which normally attach to property. People ex rel. Spiers v. Lawley, 17 Cal. App. 331, 119 P. 1089 (1911) [franchise not a personal trust ceasing at death of person to whom it was granted]; Spring Valley Water Works Co. v. Schottler, 62 Cal. 69, 107, aff'd, 4 S. Ct. 48, 110 U.S. 347, 28 L. Ed 173 (1882) and Stockton Gas etc. Co. v. San Joaquin Co., 148 Cal. 314, 83 P. 54 (1905) [franchise is incorporeal property subject to taxation]; O'Sullivan v. Griffith, 153 Cal. 502, 95 P. 873, reh. den. 153 Cal. 508, 96 P. 323 (1908) [upholding transfer of street-railroad franchise prior to enactment of Pub. Util. Code § 851]; South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 P. 490 (1908) [upholding transfer of water franchise to city].

By statute, certain types of franchises, and also public utilities generally, are transferable only with the authorization of the Public Utilities Commission. See Pub. Util. Code §§ 851 [public utilities]; 1009 [vessels]; 1031 [passenger stage corporations]; 1052 (warehousemen); 1063 [carriers]; 34 Cal. Jur.3d at 514-15. Unless required by statute or in the grant of the franchise itself, consent of the state is not otherwise necessary in order to sell or transfer. See, e.g., 37

Cal. Jur.3d Highways and Streets § 140 (toll roads). However, where the franchise and related property so conveyed is used in a public service, its transfer is invalid unless the transferee is able to continue that use, subject to state regulation and control and to all the duties and obligations that rested upon the original holder. 34 Cal. Jur.3d at 516-17; Cal. Const. art. XX, § 4 (no law shall permit leasing or alienation of a franchise so as to relieve the franchise from liabilities); South Pasadena, 152 Cal. at 586-87. These include the duty to provide service that will be reasonably adequate to meet the needs of the community, implied from the grant of franchise rights and privileges, in accordance with the theory that the franchise is based on some benefit accruing to the public. Russell v. Sebastian, 233 U.S. 195, 58 L. Ed 912, 64 S. Ct. 517; Lukrawka v. Spring Valley Water Co., 169 Cal. 318, 146 P. 640 (1915); 34 Cal. Jur.3d at 503-04, 517.

Because no cases under Sections 724a-724e have come before the courts since 1920, it is unclear to what extent these considerations would apply to the sale of a franchise under execution. However, there seems to be no good reason for allowing a transfer, by sale under execution, of a franchise to conduct a vital public utility on conditions other than those pertaining to transfer of such franchises generally. If the Legislature wishes to continue to subject these franchises to execution, their sale and transfer should be subject to the same amount of control by the Public Utilities Commission as is their voluntary transfer.

The following is a brief listing of public utilities and franchises under present state law. While public utilities are not statutorily referred to as "franchises," this term being limited in the codes to grants from local governmental agencies, their subject matter often overlaps, and nowhere is this distinction made in defining either term. See, e.g., 34 Cal. Jur.3d, Franchises From Governmental Bodies.

1. Public Utilities

For purposes of the Public Utilities Code, public utilities are defined in Section 216(a) to include common carriers; toll bridge, pipeline, gas, electrical, telephone, telegraph, water, heat, or sewer system corporations; wharfingers; and warehousemen, "where the service is performed for or the commodity delivered to the public or any portion

thereof." By virtue of Public Utilities Code Section 217 (common carriers), this includes street railroads and other railroads, when serving a public purpose. Private corporations and persons that own, operate, control, or manage a line, plant, or system "directly or indirectly to or for the public" for these uses, and common carriers, are made public utilities subject to control by the Legislature under Section 3 of Article 12 of the California Constitution. Public utilities are regulated generally by the Public Utilities Commission and may not be transferred by sale, lease, assignment, etc., without an order from the commission authorizing such transfer. (Pub. Util. Code § 851.)

2. Franchises From Local Governments

Under the Boughton Act (Pub. Util. Code § 6001 et seq.), local governments may grant public utility franchises "to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for light, heat, or power, to erect poles or wires for transmitting electricity for light, heat, or power, along or upon any public street or highway." (Section 6001.) Cities and counties are empowered to grant franchises for the laying of pipes in the streets for purposes of carrying steam heat to their inhabitants under Public Utilities Code Section 6091, and for the construction and use of appropriate appurtenances for transmitting and distributing electricity, gas, and water under Section 6202. The grantee of such a franchise must file written evidence of transfer, sale, assignment or lease of the franchise with the legislative body of the municipality within thirty days (Section 6298).

Parking franchises may be granted by a city, county or subdivision of the state (Gov't Code § 54034) or by a board of parking place commissioners (Sts. & Hy. Code § 31786). A city, county, or city and county may grant a franchise or license for a community antenna TV system (Gov't Code § 53066).

Under Civil Code Section 528, no corporation may construct or take tolls on a bridge, ferry, wharf, chute or pier until granted authority to do so by the supervisors or other governing body having authority in that behalf. County boards of supervisors may grant authority, under the approval of the Public Utilities Commission, for the construction of

wharves with a license to take tolls (Harb. & Nav. Code §§ 4000-4017). A franchise or lease of port district property may be granted by the Board of Port Commissioners, under Harbors and Navigation Code Sections 6271 and 6860.

To the extent that these franchises constitute a grant of a right to use public streets, ways, and other property for the delivery of public services within a municipality or other political subdivision, there are no statutory restraints on their alienability. To the extent that a franchise constitutes a public utility or part of a public utility, its transfer is subject to Public Utilities Commission approval.

3. Seizure of Public Utility Property

No case involving the levy and sale of public utility property other than the franchise itself under the existing statutes (Code Civ. Proc. §§ 724a-724e; 688) has been found.

The exemption of franchises from execution at common law raised the question of what property, connected with a public franchise by ownership and use, could be withdrawn from execution by virtue of that connection. See, generally, 2 Freeman on Executions § 179 at 910-19. The general rule seems to have been that: (1) Personal property will not be regarded as part of the real estate or franchise of the corporation so as to withdraw it from execution, though its use is required for the successful operation of the franchise; but that (2) no real property of the corporation which might have been acquired by the corporation in the exercise of its right of eminent domain, whether actually so acquired or not, and which is therefor essential to the enjoyment of the franchise and without which the corporation may be disabled from performing its duties to the public, may be subject to execution. Id. at 914-16.

In Risdon Iron & Locomotive Works v. Citizens Traction Co., 122 Cal. 94, 54 P. 529 (1898), the court held that the cars, trucks, and other movables of a railroad corporation may be seized under execution, stating:

[T]he quality of the exemption from execution which pertains, except when otherwise provided by statute, to the franchise of a corporation . . . does not extend also to property of the kind attached in this action, although it may be proper or even necessary under the franchise. Such property does not emanate mediately or immediately from the state like the privileges embraced in a

franchise; it has no character of personal trust as in the case of the franchise, and in our opinion it is subject to attachment or execution in like manner as other property, not exempt by statute.

Id., at 97. The court declined to decide whether this rule should extend to railway lines and parts of other property which is susceptible of use only as a unit. (Id.)

Where franchises are made subject to execution by statute, related property of the corporation or individual holding the franchise, whether real or personal, would seem to be likewise subject to levy and sale. In the case of franchises which involve a right to use public streets or other property of the public, a levy under execution would fail to give the subsequent purchaser any title to property other than the right to exercise the privileges of the franchise. Wood v. Truckee Turnpike Co., 24 Cal. 474 (levy and sale of a road did not give purchaser any right or title to road, since turnpike company whose franchise was sold had no interest in the road beyond the easement or right of way over it).