

Memorandum 84-87

Subject: Study D-303 - Creditors' Remedies (Followup Legislation)

The attached letter from the office of the County Counsel of the County of Shasta raises two problems concerning the Enforcement of Judgments Law enacted upon Commission recommendation.

The first problem is an ambiguity in the provision of Section 701.680 of the Code of Civil Procedure as to who can bring an action to set aside an execution sale. As the letter correctly points out, the provision for bringing an action to set aside an execution sale exists solely for the benefit of the judgment debtor. The staff would make this clear by an appropriate amendment (see page 2 of the attached letter) in the bill the Commission approved at the last meeting for introduction in 1985 to make technical corrections in the Enforcement of Judgments Law.

The second problem is an important one and merits study. The problem is whether when an execution sale is set aside the liens of junior creditors should be restored. (The execution sale wipes out the liens of junior creditors, and under existing law the junior liens are not restored when the sale is set aside.) This is a difficult policy issue, and changing the existing rule would require a determination that the policy decision made when the statute was drawn is unsound. Since we are devoting all our time to the preparation of a new Probate Code, the staff recommends that we advise the writer of the letter that we are not in a position to study the second problem at this time.

Respectfully submitted,

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Re: Action to Set Aside Sale of Real Property Made to Satisfy
Judgment - CCP §§701.680 and 701.630

Dear Mr. DeMouilly:

Recently this office encountered an ambiguity regarding the above code sections, enacted as portions of the Enforcement of Judgments Law. The first sentence of paragraph (1) of subdivision (c) of section 701.680 states that an action may be commenced within six months after an execution sale to set aside that sale if the purchaser is the judgment creditor. The ambiguity is that the paragraph does not identify who may bring such an action.

Our problem arises from a civil case in San Mateo Superior Court in which defendant defaulted and plaintiff, represented by counsel, proceeded to compel the sale of the defendant's property in Shasta County. At the sale, plaintiff, as judgment creditor, bid an even \$43,000, about \$350 more than was required for the judgment creditor to break even. The judgment creditor credited all of the judgment against the purchase price, leaving the \$350 "overage" to be paid to the sheriff for transmission to the judgment debtor. Now, two months after the sale, the sheriff has been served with an order to show cause issued out of the San Mateo Superior Court as to why the sale should not be set aside because of irregularity in the sale proceedings. Note that the order to show cause was issued in the same action - in which the sheriff is not a party - and was obtained by the judgment creditor not the judgment debtor. The allegation in the application for the order to show cause is that the sheriff somehow misled the judgment creditor into believing that the judgment creditor had to bid some amount higher than the amount of his judgment.

It appears to us that the statute does not contemplate any such action by a judgment creditor. Rather, the provision appears to exist solely for the benefit of the judgment debtor. (The judgment creditor, having chosen to enforce his judgment by forced

sale, and having further chosen to bid in the judgment amount plus cash, is hardly in a position to complain about "irregularities". Moreover, an action to set aside a sale appears to be wholly separate from the action in which the judgment sought to be enforced was originally obtained. Hence, the use of the order to show cause procedure against the sheriff and the judgment debtor appears to be unauthorized by statute.) This reading of paragraph (1) is consistent with the provision of paragraph (2) of this subsection which permits only a judgment debtor to recover damages for impropriety in the sale.

Assuming that I'm not misunderstanding the Enforcement of Judgments Law, I suggest that this paragraph be amended to read:

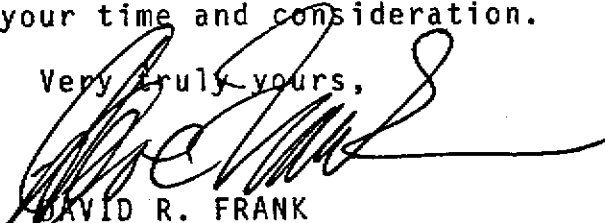
"An action may be commenced by the judgment debtor within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor.
. . . ."

The second problem involves the construction of the second sentence of paragraph (1) of subdivision (c) of Section 701.680. It provides that if the sale is set aside, the judgment is revived to reflect the amount that was satisfied from the proceeds of the sale. The judgment creditor is entitled to interest on the amount of the judgment, as if there had been no sale. This sentence does not address the revival of any liens extinguished by operation of section 701.630. Unless I (again) misunderstand something in the Enforcement of Judgments Law, I would suggest that this sentence be amended to read:

~~"Subject to paragraph (2), if the sale is set aside,~~ If the sale is set aside, (i) all liens extinguished by operation of Section 701.630 are revived as if the sale had not been made, and (ii) subject to paragraph (2), the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the revived judgment as-so-revived as if the sale had not been made."

The thoughts of you or your staff on these suggestions would be appreciated. Thank you for your time and consideration.

Very truly yours,



DAVID R. FRANK
Deputy County Counsel

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