

#39.120

12/31/74

Memorandum 75-7

Subject: Study 39.120 - Enforcement of Judgments

Attached to this memorandum is a revised draft of the Enforcement of Judgments title. The statute has been revised to reflect decisions made by the Commission at the March 1974 meeting and the comments of Professor Riesenfeld. The title has been reorganized and some new material has been added (see Chapter 8 on supplementary procedures). The sections are discussed in their Comments; frequently additional background material and problems are discussed in the Notes following the Comments. At the meeting, we plan to consider the title section by section.

Also attached to this memorandum is a copy of Memorandum 74-25 on third-party claims which was prepared last spring but never considered by the Commission. The staff was not able to draft the chapter on third-party claims before the problems discussed in Memorandum 74-25 are resolved.

An appendix containing Code of Civil Procedure Sections 681-689d and 691-724e is attached to the statute. We have not provided the sections on exemptions (Sections 690-690.52) since the Commission has postponed its consideration of exemptions until the federal law is certain. Note that the appendix contains the law as of January 1, 1974. Where 1974 amendments are important, they are discussed in the Comments or Notes to related sections in the draft.

Respectfully submitted,

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TITLE 9. ENFORCEMENT OF JUDGMENTS

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TITLE 9. ENFORCEMENT OF JUDGMENTS

CHAPTER 1. GENERAL PROVISIONS

§ 701.010. Short title

701.010. This title shall be known and may be cited as the Enforcement of Judgments Law.

Note. The Comment to this section will provide an overview of the remedies provided for the enforcement of judgments.

404-141

§ 701.020. Enforcement of judgment for the payment of money

701.020. A judgment for the payment of money may be enforced pursuant to Chapter 3 (commencing with Section 703.010) through Chapter 8 (commencing with Section 708.010).

Comment. Section 701.020 is new. It simply refers to the chapters of this title which provide the various means available to a judgment creditor to collect a money judgment. See also Title 11 (commencing with Section 1710.10) (enforcement of sister state and foreign money judgments).

404-142

§ 701.030. Enforcement of judgment for the possession of personal property

701.030. A judgment for the possession of personal property may be enforced pursuant to Article 3 (commencing with Section 708.210) of Chapter 8 and Article 1 (commencing with Section 710.010) of Chapter 10.

Comment. Section 701.030 refers to the articles in chapters of this title which provide the means for enforcing a judgment for the possession of personal property.

404-143

§ 701.040. Enforcement of judgment for the possession of real property

701.040. A judgment for the possession of real property may be enforced pursuant to Article 3 (commencing with Section 708.210) of Chapter 8 and Article 2 (commencing with Section 710.110) of Chapter 10.

Comment. Section 701.040 refers to the articles in chapters of this title which provide for the enforcement of judgments for the possession of real property.

404-145

§ 701.050. Enforcement of judgment for the sale of property

701.050. A judgment for the sale of real or personal property may be enforced pursuant to Article 3 (commencing with Section 708.210) of Chapter 8 and Article 3 (commencing with Section 710.210) of Chapter 10.

Comment. Section 701.050 refers to the articles in chapters of this title which provide the means for enforcing a judgment for the sale of real or personal property.

404-146

§ 701.060. Enforcement of other judgments by contempt

701.060. A judgment requiring the performance of any act not described in Sections 701.020 through 701.050 may be enforced by a contempt order pursuant to Article 4 (commencing with Section 710.310) of Chapter 10.

Comment. Section 701.060 refers to the article in Chapter 10 which provides the means for enforcing a judgment other than a judgment for the payment of money, the possession of real or personal property, or the sale of property.

998-828

§ 701.070. Time for enforcement of judgment; installment judgments

701.070. (a) Except as otherwise provided in this section and in Section 701.080, no judgment shall be enforced and no sale or delivery pursuant to such judgment or to a writ issued pursuant to such judgment shall take place more than 10 years after the date of entry of such judgment.

(b) Where a judgment is payable in installments, the period provided in subdivision (a) shall be measured as to each installment from the date such installment became due.

Comment. Sections 701.070 and 701.080 supersede former Sections 681 and 685. Together, they provide a basic 10-year period for enforcement of a judgment and a simple but exclusive procedure for extending within that period the effectiveness of a judgment for another 10 years. In addition, subdivision (b) of Section 701.070 preserves the rule that the period applicable to the installments under an installment judgment commences on the date each installment becomes due. However, several important changes should be noted. First, former Section 681 spoke in terms of when a writ or order for the execution or enforcement of a judgment could be issued. Implicit in this rule was the corollary that a writ timely issued could be enforced after the 10-year period. See, e.g., James v. James, 84 Cal. App.2d 115, 190 P.2d 219 (1948)(execution may be issued on judgment payable in installments for all amounts accrued during entire period prior to date of application). However,

former Section 685 suggested that enforcement after the applicable period was a matter which was subject at least to the court's discretion. Whatever the prior rule, subdivision (a) is intended to make clear that enforcement is limited to a basic 10-year period. At the end of the period (unless the judgment has been renewed), process previously issued becomes void.

Second, it should be noted that, unlike former Section 681, Section 701.070 does not provide for tolling for any reason. Ten years should provide ample time to enforce any judgment; moreover, Section 701.080 provides a simple procedure enabling a judgment creditor to extend the life of the judgment for an additional 10 years. A judgment, or portion thereof, which is not enforced within these periods is in effect discharged under these provisions.

Section 701.080 permits the judgment creditor to extend the enforcement period for another 10 years. Analogous to the former action on a judgment, the judgment creditor must act within the initial 10-year period during which the judgment is enforceable. Compare Section 337.5. However, all that is required is that, during the ninth year after the date of entry of the judgment, the judgment creditor file with the court which rendered the judgment a statement that he is extending the effectiveness of the judgment. No action is required, and such extension is not subject to judicial review. On the other hand, if the judgment is not extended in the manner provided, it is in effect discharged 10 years after its date of entry. No provision is made for discretionary enforcement (compare former Section 685), and no action on a judgment entered in this state is permitted. See subdivision (c) of Section 701.080. Compare Section 1710.60 (action on sister state judgment authorized).

Note. Sections 701.070 and 701.080 attempt to implement the tentative policy decisions made at the March 1974 meeting. We will deal with the issue of priorities under a judgment lien after renewal in Section 674.

Professor Riesenfeld has commented that it seems unnecessary to provide an extension procedure that has no substantive limitations. He suggests that either the judgment creditor should be required to show that extenuating circumstances require extending the enforcement period or the period should simply be increased to 20 years without the act of the plaintiff.

When the matter was discussed previously, it seemed to be assumed that we were dealing with money judgments. This section is not so limited. Do we need to make clearer that Sections 701.070 and 701.080 apply to judgments generally, and should such a rule be provided in the first place?

998-830

§ 701.080. Extension of judgment; action on judgment prohibited

701.080. (a) Within one year prior to the expiration of the 10-year period provided by Section 701.070, the party in whose favor judgment is given may file a statement with the court which rendered the judgment. The statement shall identify the original judgment by stating the title of the court and cause and number of the action, the date of entry of the judgment, the names of the judgment creditor and the judgment debtor, the amount of the judgment and where entered in the judgment book, minutes, or docket and shall state that the effect of the original judgment is extended. If the statement is timely filed by the judgment creditor, the judgment may continue to be enforced until 20 years after the date of entry of such judgment.

(b) The clerk of the court shall file the statement in the file of the action and note that the judgment has been extended in the judgment book, minutes, or docket.

(c) No action may be brought to enforce a judgment which has previously been entered in this state.

Comment. The effect of Section 701.080 is discussed in the Comment to Section 701.070.

368-223

§ 701.090. Stay of enforcement without bond

701.090. (a) Upon the [ex parte] application of the party against whom judgment is rendered, the court in its discretion may stay without bond the enforcement of the judgment or any order issued thereon.

(b) Where enforcement of the judgment would be stayed on appeal only if a bond were given, enforcement of the judgment may be stayed pursuant to this section for no more than 10 days in a justice court or no more than 30 days in any other court.

(c) Notwithstanding subdivision (b), if a motion for a new trial or for judgment notwithstanding the verdict is pending, enforcement of the judgment may be stayed until 10 days after the determination of the motion.

Comment. Section 701.090 is substantively the same as former Section 681a. See generally 5 B. Witkin, California Procedure Enforcement of Judgment § 84 at 3453 (2d ed. 1971); E. Jackson, California Debt Collection Practice § 17.65 (Cal. Cont. Ed. Bar 1968). Section 701.090 does, however, make explicit that the stay provided for here may be granted [ex parte and] without bond. Section 701.090 provides a stay for very limited periods of time. Of course, nothing in this section precludes the parties from stipulating to a stay for a longer period. Moreover, if a judgment debtor appeals from a judgment, he may also obtain a stay of execution pending appeal although this usually requires the giving of a bond. See Section 916 et seq. See also Section 1174 (mandatory five-day stay under certain circumstances in unlawful detainer proceedings).

Note. We redrafted this section after the March 1974 meeting in an effort to make it a little clearer. In reviewing the section, we also came to the conclusion that the period of the stay provided in subdivision (b) must commence on the date the stay is granted. We believe subdivision (b) now so provides. We also have included (in brackets) an authorization for ex parte issuance.

Questions:

1. Should a stay be granted without bond on the judgment debtor's ex parte application?

368-224

§ 701.100. Enforcement after death of judgment creditor

701.100. Where the judgment creditor dies after entry of a judgment, the judgment may be enforced upon the application of his executor or administrator or successor in interest.

Comment. Section 701.090 reenacts without substantive change paragraph 1 of former Section 686.

368-225

§ 701.110. Enforcement after death of judgment debtor

701.110. (a) After the death of the judgment debtor, a judgment for the payment of money may only be enforced as provided by Probate Code Section 732.

(b) Notwithstanding subdivision (a), a judgment creditor may enforce by foreclosure any judgment lien acquired prior to the death of the judgment debtor and any attachment lien against property which is transferred by his judgment debtor prior to death.

(c) After the death of the judgment debtor, a judgment for the possession or for the sale of real or personal property may be enforced against the executor or administrator in the manner provided by this title.

Comment. Section 701.110 reenacts without substantive change paragraph 2 of former Section 686. Probate Code Section 732 permits claims to be filed and permits sale where levy has been made before death, but a new writ of execution may not be issued or levy made after death. Subdivision (b), however, continues two rules that mitigate this effect: One, prior law recognized a right in a judgment lien creditor to bring an equitable action to foreclose his lien on the death of the judgment debtor. Corporation of America v. Marks, 10 Cal.2d 218, 73 P.2d 1215 (1937). Two, prior law also permitted a judgment creditor to enforce an attachment lien acquired prior to death against property which had been transferred to a third person by the judgment debtor. See Everett v. Haynes, 94 Cal. App. 31, 270 P. 458 (1928). See also Hibernia Sav. & Loan Soc'y v. London & Lancashire Fire Ins. Co., 138 Cal. 257, 71 P. 334 (1903).

Note. Section 701.110 attempts to implement the tentative policy decisions made by the Commission at the March 1974 meeting. Professor Riesenfeld has suggested that it may be desirable instead to repeal Probate Code Section 732 and incorporate its substance here.

Question:

1. Should the attachment lien be continued and made subject to foreclosure after the judgment debtor's death where there is no transfer?

405-484

§ 701.120. Contribution among judgment debtors; repayment of surety by principal; enforcement; notice, filing, and entry

701.120. (a) Whenever one of several joint judgment debtors pays more than his share of the judgment, he may compel contribution from the others.

(b) Whenever a judgment is against several joint judgment debtors upon an obligation of one of them as security for another and the surety pays the judgment or any part thereof, the surety may compel repayment from the principal.

[(c) The person who pays more than his share or the surety is entitled to the benefit of the judgment, to enforce contribution or repayment, if within 10 days after his payment he files with the clerk of the court which rendered the judgment notice of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the judgment book or docket. Thereafter, the person entitled to contribution or repayment may apply on noticed motion for issuance of execution against the other judgment debtors; and, at the hearing on the motion, the court shall determine the liability, if any, of the other judgment debtors and shall issue execution accordingly.]

or

[(c) A person entitled to contribution or repayment pursuant to subdivision (a) or (b) may apply on noticed motion to the court which entered the original judgment for a judgment in his behalf against the other judgment debtors. At the hearing on the motion, the court shall determine the liability of the other judgment debtors and have judgment entered accordingly. Such judgment may be enforced in the same manner as any other judgment for the payment of money.]

Comment. Section 701.120 is substantively the same as former Section 709 except that the last sentence of subdivision (c) has been added to reflect the actual practice regarding issuance of an execution. See Stowers v. Fletcher, 84 Cal. App.2d Supp. 845, 190 P.2d 338 (1948). See generally 5 B. Witkin, California Procedure Enforcement of Judgment §§ 209-211 at 3563-3565 (2d ed. 1971). See also Sections 878 (contribution between joint tortfeasors) and 1059 (right to subrogation of surety on appeal bond).

Note. As indicated above, this section continues the existing law. However, we do feel that the present 10-day notice provision is an

unnecessary procedural trap. We suggest that the period either be substantially increased--i.e., to six months or more--or eliminated altogether. Our preference is for complete elimination and a procedure comparable to that provided by Section 878 and set forth in the second alternative subdivision (c).

368-226

§ 701.130. Remedies of agency issuing warrant; jurisdiction

701.130. (a) Whenever a warrant may properly be issued pursuant to Section 1785 of the Unemployment Insurance Code or Section 6776, 7881, 9001, 10111, 18906, 26191, 30341, or 32365 of the Revenue and Taxation Code to enforce any lien arising under the provisions of the Unemployment Insurance Code or the Revenue and Taxation Code, the state agency authorized to issue the warrant shall be entitled to all of the remedies available to judgment creditors.

(b) Where jurisdiction of any court is required for enforcement of such remedies, jurisdiction is conferred upon the superior court of the State of California in and for the county where the person against whom enforcement is sought resides or the property against which enforcement is sought is situated, or if the person does not reside in this state, in any county of this state.

Comment. Section 701.130 is substantively identical to former Section 722.5. See also Section .

Note. Tentatively approved March 1974.

405-954

§ 701.140. Rules for practice and procedure; forms

701.140. (a) The Judicial Council may provide by rule for the practice and procedure in proceedings under this title.

(b) The Judicial Council shall prescribe the form of the application, notices, orders, and other documents required by this title.

Comment. Section 701.140 imposes certain duties on the Judicial Council. Compare Section 482.030. Subdivision (b) requires the Judicial Council to prescribe the forms necessary for the purposes of this title. The Judicial Council has authority to adopt and revise forms as necessary but must act in a manner consistent with the provisions of this title.

Note. Tentatively approved March 1974.

404-147

§ 701.150. Clerk's duties performed by judge

701.150. The duties assigned to the clerk of court by this title may be performed by the judge if there is no clerk.

Comment. Section 701.150 is new. It is a general provision which replaces similar language in several sections of former law. See, e.g., former Sections 682, 682.2.

404-148

CHAPTER 2. WORDS AND PHRASES DEFINED

§ 702.010. Application of definitions

702.010. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this title.

Comment. Section 702.010 is a standard provision found in the definitional portion of several California codes and laws. See, e.g., Code Civ. Proc. §§ 481.010, 1235.110; Evid. Code § 100; Veh. Code § 100.

Additional definitions are provided in the preliminary provisions of the Code of Civil Procedure. [E.g., subdivision 11 of Section 17 provides that "the words 'levying officer' refer to a sheriff, constable, or marshal."}]

Note. The bracketed part of the Comment refers to an amendment proposed in the conforming changes accompanying this title.

In addition to the definitions included here, we plan to add necessary definitions from the attachment title if and when the levy procedures are incorporated in this title. See Note to Section 704.050.

404-149

§ 702. . Court

702. . "Court" means the court where the judgment sought to be enforced was entered.

368-227

CHAPTER 3. WRIT OF EXECUTION

§ 703.010. Application for writ; several writs; additional writs

703.010. (a) After the entry of a judgment for the payment of money, upon application of the party in whose favor the judgment is given, the clerk of the court shall issue a writ of execution.

(b) Two or more writs may be issued to obtain execution in different counties. A separate writ shall be issued for each county in which execution is sought.

(c) Additional writs may be issued upon further application until the judgment is satisfied; however, no writ may be issued to obtain execution in a county until any prior writ of execution issued for that county is returned unsatisfied.

Comment. Subdivision (a) of Section 703.010 is based on the first sentence of former Section 681. Subdivision (b) is based on the last sentence of former Section 687. Subdivision (c) is based on the second paragraph of former Section 683. These general provisions are, of course, subject to limitations provided elsewhere. See, e.g., Sections 701.070 and 701.080 (time for enforcement), 701.090 (stay of execution), 701.110 (enforcement after death of judgment debtor).

Note. The second paragraph of former Section 683 provided that, "if an execution is returned unsatisfied, another may be issued afterward" We see no reason why issuance of additional writs to other counties must await return of an unsatisfied execution. We would, however, provide for liability where the judgment creditor levies on an excessive amount of property. See Section 711.010.

363-228

§ 703.020. Writ of execution; form; contents

703.020. The writ of execution [shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk or judge. It shall be directed to a levying officer and shall identify the judgment, stating the court, the county, and, in municipal and justice courts, the judicial district, where the judgment is entered. The writ] shall state the amount of the judgment and the amount actually due thereon and shall require the levying officer to satisfy the judgment, with interest, out of the property of the debtor or any real property subject to a lien of judgment obtained pursuant to Section 674. The writ shall inform the person upon whom it is served of his duties and rights under the execution, including any right to make a third-party claim pursuant to Chapter [6] (commencing with Section [706.010]) and any right to claim an exemption pursuant to Chapter [9] (commencing with Section [709.010]).

Comment. Section 703.020 is based on portions of former Sections 682 and 684. See also former Section 682.1. In general, Section 703.020 merely continues the formal requirements of prior law. It should be noted, however, that Section 701.140 authorizes the Judicial Council to prescribe whatever formal requirements it believes are necessary or desirable. In addition, some statutory changes should be noted. The requirement that the writ state the kind of money or currency in which the judgment is payable is not continued. Section 667 has been revised to require a money judgment in all cases to be made payable in dollars. See Section 667 and Comment thereto. The reference to earnings has been deleted. Levy on earnings of an employee must be made pursuant to

Chapter 7 (commencing with Section 707.010). Finally, the statute no longer requires levy on personalty first. The creditor is permitted to designate the order of levy. See Section 704.010. Presumably, he will go after the most liquid assets first, and the sheriff must comply with this request. Former law required satisfaction of the judgment first out of property previously attached in the action, then out of personalty, and finally out of realty. See former Sections 550 and 682(1). These requirements are eliminated. The creditor will generally follow such order in any event, but in some cases the relative cost and delay of collection or sale may indicate that a different order is preferable. E.g., certain real property may be more easily sold than an item of special equipment, or levy of execution on a bank account not discovered until after judgment may be preferable to the collection of attached accounts receivable or the sale of attached tangible property. Under this scheme, however, the creditor might hold attached property for extended periods while searching for other property. To avoid this, the debtor, under Section 704.020, may force either release of the attached property or application of such property to the satisfaction of the judgment. The debtor can also, of course, avoid any hardship that results from the creditor's choice of property levied upon by voluntary satisfaction of the judgment.

Note. The first two sentences of this section are substantively identical to the first paragraph of Section 682 except for the reference to payment in a special kind of currency. We have, however, some doubt whether it is necessary or desirable to preserve these formal requirements in the statute. See Section 701.140 (Judicial Council to prescribe forms). Accordingly, we would suggest deleting the material in brackets. We have not continued Section 682.1 which sets out the actual form for a writ of execution; this seems to us to be something better left to the discretion of the Judicial Council.

Additional references to the wage garnishment provisions will be added, depending on the final content of the wage garnishment recommendation.

We have eliminated the requirement of levy on personalty first. This change was also made recently in New York basically for the reasons that there seems to be no justification to prefer one kind of property over another and that the debtor can in effect make the choice by satisfying the judgment before levy from whatever assets he selects. See N.Y.C.P.L.R. § 5230 and Comments thereto.

Questions:

(1) Should we delete the formal requirements as suggested in the Note?

(2) Should Section 667 be revised to require the payment of money judgments in dollars (see conforming amendments)?

(3) Should the creditor be permitted to designate the order of levy? (See also Section 703.010).

368-230

§ 703.030. Entry on writ of amount of interest and costs; additional interest

703.030. (a) Before issuing a writ of execution, the clerk of the court shall enter on the face of the writ the amounts of any costs which have accrued from the date of entry of the judgment to the date of the issuance of the writ.

(b) If the judgment creditor has filed an affidavit stating the amount of interest which has accrued from the date of entry of the judgment to the date of issuance of the writ of execution, the amount of such interest shall be entered in the same manner as costs. The clerk shall also enter the amount of interest which accrues daily, from the date of issuance of the writ, on the amount due on the judgment as entered.

(c) Interest on the amount of the judgment remaining unpaid as shown on the writ, from the date of issuance of the writ to the date of levy of execution, shall be computed by the levying officer and this amount plus the commissions and costs of the levying officer shall be added to the net balance actually due on the date of the issuance of the writ, as stated therein, in determining the total amount to be satisfied by execution.

Comment. Section 703.030 is substantively the same as former Section 682.2.

Note. As the Comment states, this section continues almost verbatim present law. We believe, however, that the actual practice is for the attorney for the judgment creditor to enter costs and interest to the date of issuance. See E. Jackson, California Debt Collection Practice § 17.17 (Cal. Cont. Ed. Bar 1968). We wonder accordingly whether this section should not be revised to provide in substance that the judgment creditor shall prepare the writ of execution in the form prescribed by the Judicial Council (or on the form provided by the court) and the writ shall include any costs or interest claimed to the date of issuance and the amount of interest which will accrue daily after the date of issuance. It is interesting in this regard that, in New York, the attorney for the judgment creditor apparently "issues" execution as an officer of the court. See N.Y.C.P.L.R. § 5230(b).

368-231

§ 703.040. Request for notice of execution sale; filing; contents; notation on writ; mailing notice

703.040. (a) After judgment has been entered, any person may file with the clerk a written request that he be given notice by mail of any sale under any execution issued upon such judgment. In such request, the person shall specify the title of the court, case and number of the action in which such judgment was rendered, and the date of entry thereof and shall give the address to which he desires such notice of execution sale to be mailed.

(b) Whenever a writ of execution is issued upon a judgment, the clerk shall note upon such writ the fact that notice by mail has or has not been requested. If notice has been requested, the clerk shall note upon the writ the name and address of the person requesting notice.

(c) The officer conducting a sale under any writ of execution upon which appears a notation that notice has been requested shall mail a

copy of the notice of time and place of sale to such person at the address noted upon the writ. The copy of the notice shall be mailed at the time notice is posted pursuant to Section 705.010.

Comment. Section 703.040 is substantively identical to former Section 692a.

368-233

CHAPTER 4. LEVY; RETURN; LIEN OF EXECUTION

§ 704.010. Levying officer to execute writ

704.010. [(a)] The judgment creditor shall deliver the writ of execution to the levying officer to whom the writ is directed, together with written instructions containing a description of the property to be levied upon and the order in which levy is to be made. The levying officer shall execute the writ without delay in the manner provided in this title.

[(b) If any property sought to be levied upon is located in a private place, the judgment creditor shall apply ex parte to the court which issued the execution for an order directing the levying officer to seize the property at such place. The court may issue such order only if the judgment creditor has established that there is probable cause to believe that property subject to levy is located there.]

Comment. Section 704.010 is new. Subdivision (a), however, is based on the first portion of the first sentence of former Section 691. See also subdivision (b) of Section 488.030 (introductory paragraph of former Section 542). Subdivision (a) is a general provision which reflects the former practice, i.e., that the levying officer will not act until the judgment creditor delivers to him the writ of execution and written instructions to levy upon specific property. In addition, this subdivision permits the creditor to designate the order of levy. See Comment to Section 703.020.

[Subdivision (b) is new; however, it is based on somewhat comparable provisions set forth in Sections 512.060 and 512.080. See Comment to Section 512.010(b) concerning "private place."]

Note. Subdivision (b) has been added at the suggestion of the sheriffs. It seems that the issue should be dealt with and apparently the problem does arise now and causes conflicts between the sheriff's office and attorneys.

405-420

§ 704.020. Order requiring either release of attached property or its application to the satisfaction of the judgment

704.020. Notwithstanding Section 704.010, where any property of the judgment debtor is held under an attachment, the judgment debtor may apply to the court upon noticed motion for an order requiring that such property either be executed against and applied to the satisfaction of the judgment against him or be released from the levy and lien of attachment.

Comment. Section 704.020 is designed to avoid a potential problem caused by the elimination from this title of a fixed priority of property subject to levy. Under former law, a judgment was satisfied first out of property previously attached in the action, then out of personalty, and finally out of realty. See former Sections 684.2 [presently Sections 550 and 551] and 682(1). However, under Section 704.010, the judgment creditor may designate the order in which levy is to be made. To avoid the danger that the creditor might hold attached property for extended periods while searching for other property, Section 704.020 provides a means by which the debtor can compel either the application of the attached property to the satisfaction of his debt or the release of such property.

368-234

§ 704.030. Deposit of fees prior to execution of writ

704.030. (a) The levying officer may demand that, prior to levy, the judgment creditor deposit a sum of money sufficient to pay the costs

of the officer executing the writ.

(b) As a prerequisite to the taking of possession of property by the levying officer, whether by keeper or otherwise, the judgment creditor shall be required to deposit with the levying officer a sum of money sufficient to pay the expenses of taking and keeping safely such property for a period not to exceed 15 days. In the event that further detention of the property is required, the levying officer shall, from time to time, make written demand upon the judgment creditor or his attorney of record for further deposits to cover estimated expenses for periods not to exceed 30 days each. Such demand shall be served as provided in Section 1011 or by depositing such notice in a post office in a sealed envelope, as first-class mail, postage prepaid, addressed to the person on whom it is served at his last known office or place of residence. In the event that the money so demanded is not paid within the time specified in the demand, the levying officer shall release the property in the manner provided by Section 488.560.

Comment. Section 704.030 had no counterpart in the former execution title. However, the section simply makes more specific the general authority to demand fees in advance. See Govt. Code §§ 24000(b), 24350.5, 26720 et seq. Compare Section 488.050 (former Section 542(4)).

368-235

§ 704.040. Property not affected until levy is made

704.040. Until levy, no property shall be affected by issuance of a writ of execution or the delivery of a writ of execution to the levying officer.

Comment. Section 704.040 is identical to subdivision (c) of former Section 688.

Note. The reference above to former Section 688 is to Section 688 as revised by the prejudgment attachment recommendation. Under the current law, Section 704.040 is the same in substance as a portion of the fourth sentence of that section.

368-236

§ 704.050. Manner of levy

704.050. The levying officer shall levy the writ of execution in the same manner as he would levy a writ of attachment on the same property except that tangible personal property in the possession of the judgment debtor shall always be levied upon in the manner provided by Section 488.320. The levying officer shall also serve copies of the writ of execution in the same manner as he would serve copies of a writ of attachment in conjunction with such levy. To levy on any property or debt owed to the judgment debtor which is subject to execution but for which a method of levy of attachment is not provided, the levying officer shall serve the writ of execution on the person in possession of such property or owing such debt.

Comment. Section 704.050 requires execution to be levied in the same manner as under subdivision (b) of former Section 688. For the most part, this means that an execution is levied in the same manner as an attachment. See Chapter 8 (commencing with Section 488.010) of Title 6.5 of this part. However, for attachment, some nonseizure methods of levy are utilized to avoid undue disturbance of the defendant's affairs prior to judgment. See, e.g., Section 488.340 (levy on equipment of going business). After judgment, seizure is a more appropriate method where tangible personal property is in the possession of the debtor;

hence, this section incorporates this method by reference to Section 488.320. Moreover, the attachment title does not provide a method of levy for every type of property. Therefore, Section 704.050 also provides a garnishment procedure for levy on any property not already provided for.

Note. This section is substantively the same as subdivision (b) of Section 688 (as amended by the Law Revision Commission's prejudgment attachment recommendation). The Commission has tentatively decided that the general levy procedures should be incorporated into this title. In actions generally, it seems that attachment will be the exception rather than the rule and that the levy procedures would be more appropriately located in this title which has more general applicability. When this is done, the method of levy procedures should incorporate provisions comparable to Section 514.010. The absence of specific procedures in the present law has apparently caused the sheriffs difficulties when property is located in a private place.

Professor Riesenfeld notes that, under present law where a judgment lien exists against real property, a further levy is not required. See Lenhardt v. Jennings, 119 Cal. 192, 51 P. 195 (1897). He has suggested that this practice be continued. The staff, however, believes that the additional recording and notice giving might be worth the expense entailed. In short, we suggest that it might be desirable to have the additional levy in all cases, whether or not an attachment or judgment lien already exists. In any event, the matter should be clarified when the levy procedures are incorporated here.

If levy is required, then we think that the remainder of the statute is clear that execution sale may follow; i.e., a foreclosure action is not required. If it is decided that an additional levy is not required, then the statute should be revised to make clear that, after a judgment lien is acquired on real property, the property may be sold in the manner provided by Chapter 5. See, e.g., Section 704.080 (levy impliedly a prerequisite to sale).

405-372

§ 704.060. Levy on deposit account, or contents of safe deposit box, not wholly in name of judgment debtor

704.060. (a) In addition to any other provision of law, the provisions of this section shall be complied with where any of the following personal property is sought to be levied upon:

(1) A deposit account, or interest therein, not standing in the name of the judgment debtor alone.

(2) Property in a safe deposit vault or box maintained by a bank, trust company, savings and loan association, or other corporation authorized and empowered to conduct a safe deposit business and rented by it to a person other than the judgment debtor.

(b) The judgment creditor shall provide and the levying officer shall deliver to the bank, trust company, savings and loan association, or safe deposit corporation a bond in an amount not less than twice the amount of the judgment. The bond shall indemnify any person (other than the judgment debtor whose interest is sought to be levied upon) rightfully entitled to the property (which person need not be named specifically in the bond but may be referred to generally in the same manner as in this sentence), against actual damage by reason of the taking of the property and shall assure to such person the return of the property to him upon proof of his right thereto.

(c) Upon delivery to it of the bond, the bank, trust company, savings and loan association, or safe deposit corporation shall immediately notify any person in whose name the account stands, other than the judgment debtor, or any person to whom the safe deposit box is rented, other than the judgment debtor, by registered mail addressed to the last address of such person known to the bank, trust company, savings and loan association, or safe deposit corporation of the fact of the service of the writ and of the delivery of the bond.

(d) From the time of levy and the delivery to it of the bond, the bank, trust company, savings and loan association, or safe deposit

corporation shall not honor a check or other order for the payment of money drawn against the account levied upon, shall not permit withdrawals from the account levied upon, and shall not permit the removal of any of the contents of the safe deposit vault or box levied upon for a period of 15 days from the mailing of the notice or until the levy is sooner released.

(e) After 15 days from the making of the levy and the delivery of the bond, if no proceedings excepting to the sufficiency of the sureties have been commenced, or if such proceedings have been commenced, when the sureties have justified, the bank, trust company, savings and loan association, or safe deposit corporation shall comply with the levy unless it has been sooner released and shall not be liable to any person by reason of such compliance or by reason of the nonpayment of any check or other order for the payment of money drawn against the account levied upon and presented while the levy is in force or by reason of the removal, pursuant to the levy, of any of the contents of the safe deposit vault or box or by reason of the refusal of the bank, trust company, savings and loan association, or safe deposit corporation to permit access to such safe deposit vault or box by the renter thereof.

(f) The bond described in subdivision (b) shall be executed, exceptions to the sufficiency of the sureties may be taken by any person claiming to be the rightful owner of property levied upon, and, when excepted to, the sureties must justify in the same manner as that provided with respect to an undertaking on attachment.

Comment. Section 704.060 continues the substance of former Section 682a. See also Fin. Code § 1650.

Note. We believe that Section 704.060 preserves the present law. However, the attachment title had a similar provision (Section 539a) which also required delivery of the bond to the bank. There, we changed this procedure and required the plaintiff to file all undertakings with the court. The same procedure could be followed here, but we did not want to make the change without your approval. In attachment, the plaintiff always posts a bond, and we wanted the same treatment for all bonds. Here it is rare that the judgment creditor will have to post a bond; hence, the same justification for filing with the court does not exist.

405-387

§ 704.070. Levy on third person; duties; liability

704.070. (a) A levy of a writ of execution by notice to a person other than the judgment debtor shall be effective only as to property in the possession of the person served and debts due and owing by the person served at the time of service.

(b) Within 10 days after the levy, the person served shall deliver possession of any property belonging to the judgment debtor concerning which the person served claims no right of possession, shall pay to the levying officer any debt due and owing to the judgment debtor, and shall execute any documents necessary to effect such transfer or payment. The receipt of the levying officer is a sufficient discharge for the amount paid.

(c) At the time of levy, the levying officer shall request from the person served a sworn statement describing any property in his possession in which he knows or has reason to believe the judgment debtor has an interest and any debt which he knows or has reason to believe is or will become due and owing to the judgment debtor. The person served shall mail or deliver such statement to the levying officer within 10

days after the levy. Upon receipt of such statement, the levying officer shall promptly mail a copy thereof to the judgment creditor.

(d) If the person served fails to comply with the requirements of subdivision (b) or (c), the levying officer shall state such fact at the time he makes his return pursuant to Section 704.090, and such person may be required to pay the costs of any proceedings taken for the purpose of obtaining payment or possession of the judgment debtor's property or the information required by the statement.

Comment. Section 704.070 prescribes the duties and liability of a garnishee under levy of a writ of execution. As a general rule, the garnishee must promptly deliver property belonging to the judgment debtor and pay over money owing to the judgment debtor to the levying officer. However, subdivision (a) makes clear that the levy is effective only as to property in the possession of the garnishee and debts due and owing at the time of service. Subdivision (b), moreover, requires delivery only of property to which the garnishee claims no right of possession. The garnishee may, of course, also deliver property in which he claims some interest, but the disposition of such third-party claims and property subject thereto is dealt with in Chapter 6 (commencing with Section 706.010). On the other hand, subdivision (c) requires the garnishee to provide a sworn statement describing any property in which he knows or has reason to believe the judgment debtor has an interest as well as any debt which he also knows or has reason to believe is or will become due and owing to the judgment debtor. This is analogous to a written interrogatory and supplements the examination procedures provided by Article 1 (commencing with Section 708.010) of Chapter 8. Under subdivision (d), a garnishee who fails to deliver property, pay over money due and owing, or provide the required information may be assessed the costs of proceedings instituted to compel such action. See Sections 708.040 and 708.050 (examination of third person indebted to judgment debtor and order directing application of debt to satisfaction of judgment creditor's judgment), 708.110 (enforcement of

garnishee's liability by suit). Pending such enforcement proceedings, the levy of execution creates a lien on the property or debt owed which preserves the judgment creditor's priority. See Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P. 242 (1909). See also Section 704.100 (lien of execution).

405-389

§ 704.080. Sale of property levied upon

704.080. (a) Upon receipt of written instructions from the judgment creditor or his attorney of record, the levying officer shall sell any personal property which comes into his actual custody after levy and any real property. The sale shall be conducted in the manner provided by Chapter 5 (commencing with Section 705.010). The levying officer shall apply the proceeds of the sale as provided in Section 705.130.

(b) Notwithstanding subdivision (a), no chattel paper, negotiable instrument, account receivable, chose in action, judgment or other right to payment may be sold except pursuant to a court order. Such order may be issued only after a noticed hearing and on such terms and conditions as shall insure that a fair consideration is obtained by the sale.

Comment. Section 704.080 continues the authority of the levying officer to sell property after levy of execution on a judgment for money. Such property may include such assets as securities and negotiable documents of title as well as goods, equipment, and other tangibles. See former Section 691. Subdivision (a) makes clear that sale generally shall be conducted in the manner provided by Chapter 5 and that the levying officer must apply the proceeds in the manner provided by Section 705.130.

Subdivision (b), however, makes clear that rights to payment--as evidenced by various means--may not be sold without prior court approval. Such judicial review, after a noticed hearing, is intended to

insure that sale will obtain a fair price. Subdivision (b) does not attempt to limit the court's discretion in this regard. In some circumstances, lack of interested buyers or other causes may require that sale not be permitted at all. In other situations, the court may wish to set a minimum price or require court confirmation. Sales pursuant to subdivision (b) may be conducted in the same manner as other execution sales or may be made by other means, e.g., a negotiated private sale through a broker or other commercial channel. It should be noted that, even where sale is not permitted, the judgment creditor is not remediless, for he may still have the obligation collected as it becomes payable. See Section 708.210 (appointment of receiver to enforce judgment).

405-374

§ 704.090. Return; issue of new writ; redelivery of writ for alias
return

704.090. (a) The levying officer to whom the writ of execution is directed shall return the writ to the court from which it was issued. Such return shall be made promptly in accordance with the instructions given to the officer at the time the writ is delivered to him but in no event later than 60 days after he receives the writ. [When the writ is returned, the clerk shall attach it to the judgment roll or, if there is no clerk, the judge shall make the proper entry in the docket.]

(b) If property has been levied upon under a writ of execution but the sale thereunder is postponed beyond or cannot be held within the return date provided by subdivision (a), after the writ has been returned to the clerk of the court in which the judgment is entered and, upon request of the person in whose favor the writ runs, the court may

direct the clerk to redeliver the writ to the officer to whom it was directed in order to permit the officer to make a supplementary return for the sale proceedings or levy thereon as in the case of an original return.

Comment. Section 704.090 is based on former Section 683. Subdivision (a) is substantively similar to the first paragraph of former Section 683 except that the reference to execution upon earnings has been deleted and the creditor can instruct the levying officer to make his return in less than 60 days. See Chapter 7 (commencing with Section 707.010) (wage garnishment). Compare Section 488.070 (return of writ of attachment). Subdivision (b) is substantively the same as the third paragraph of former Section 633. The second paragraph of former Section 683 is superseded by subdivision (b) of Section 703.010 (additional writs).

Note. The levying officer's powers are derived from the writ. We are not sure, therefore, that it is desirable to have a fixed date for the return of the writ or, at least, not one that occurs less than a year from the date of issuance. The officer may still be exercising the power derived from the writ and it seems unnecessary to have to go through the process of return and redelivery in these circumstances. Would it be desirable to make the return date more flexible?

As noted above, we have continued the present law here, but Professor Riesenfeld has suggested (and the staff sees no objection) to measuring the return date from the date of issuance of the writ (rather than date of receipt by the levying officer). It should be noted that the life of the lien is measured from the date of issuance under both our draft and present law. See Section 704.100.

The last sentence of subdivision (a) is the sort of technical detail we would like to delete from the statute. See Note to Section 703.020.

405-375

§ 704.100. Lien of execution

704.100. (a) No levy binds any property for a longer period than one year from the date of issuance of the writ of execution under which the levy was made.

(b) Notwithstanding subdivision (a), a levy made pursuant to Section 488.430 upon an interest in personal property in the estate of a decedent is effective until the decree distributing the interest has become final.

Comment. Section 704.100 is substantively identical to the first sentence of subdivision (d) of former Section 688. The second sentence of that subdivision is not continued. Section 704.090 makes clear that a writ may be redelivered to the levying officer to permit him to conduct a sale and make his return thereon after an original return has been made. However, Section 704.090 does not extend the effectiveness of the original levy beyond the one year provided by this section.

Note. The reference above to former Section 688 is to Section 688 as revised by the prejudgment attachment recommendation. Under the current law, Section 704.100 is the same in substance as a portion of the fourth sentence of that section.

405-383

CHAPTER 5. SALE AND REDEMPTION
FROM SALE ON EXECUTION

Comment. Chapter 5 provides procedures for sale and redemption from sale on execution. It should be noted that these procedures are not exclusive; either the creditor or debtor may apply pursuant to Section 708.210 to have a receiver appointed and the receiver may be authorized to receive any property and sell it in any manner approved by the court and subject to such terms and conditions as the court requires. For example, the court may permit a negotiated private sale through brokers or otherwise. It may require court confirmation of the sale or establish a minimum price. It may make any sale final, i.e., not subject to redemption. In short, Section 708.210 is intended to introduce flexibility into the usual sale procedures subject, of course, to court control. On the other hand, Chapter 5 provides a statutory procedure where this flexible alternative is not needed or desired by the respective parties.

405-487

Article 1. Sale on Execution

§ 705.010. Notice

705.010. (a) Before the sale of property on execution, the levying officer shall give notice of sale in the manner required by this section. The notice shall be in writing, shall describe the property, and shall state the time and place of sale. In the case of real property, the notice shall describe the property by giving its street address or other common designation, if any; but, if a legal description of the property is given, the validity of the notice is not affected by the fact that

the street address or other common designation recited is erroneous or that the street address or other common designation is omitted.

(b) In the case of perishable property, the notice shall be posted in three public places in the city where the property is to be sold, if the property is to be sold in a city, or, if not, then in three public places in the judicial district in which the property is to be sold, for such time as may be reasonable, considering the character and condition of the property.

(c) In the case of personal property not described in subdivision (b), the notice shall be posted in three public places in the city where the property is to be sold, if the property is to be sold in a city, or, if not, then in three public places in the judicial district in which the property is to be sold, for not less than 10 days. Not less than 10 days before the sale, the notice shall be mailed to any person who has requested notice pursuant to Section 703.040 and shall be delivered personally to the judgment debtor or mailed to the judgment debtor at his business or residence address last known to the judgment creditor or his attorney. The party delivering an execution to an officer for levy shall furnish the information required by the levying officer to comply with the provisions of this subdivision.

(d) In the case of real property or a leasehold estate in real property, at least 20 days before the date of sale, the notice shall be posted (1) in one public place in the city where the property is to be sold, if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and (2) in some conspicuous place on the property to be sold or, where a leasehold estate in real property is to be sold, on the real

property in which the leasehold estate was demised. A copy of the notice shall be published once a week for the same period in some newspaper of general circulation published in the city in which the property or some part thereof is situated if any part thereof is situated in a city; if not, then in some newspaper of general circulation published in the judicial district in which the property or some part thereof is situated, or, in case no newspaper of general circulation is published in the city or judicial district, as the case may be, in some newspaper of general circulation published in the county in which the property or some part thereof is situated. At least 20 days before the date of sale, the notice shall be mailed to any person who has requested notice pursuant to Section 703.040 and shall be delivered personally to the judgment debtor or mailed [by certified mail] to either the judgment debtor at his business or residence address last known to the judgment creditor or his attorney. It shall be the duty of the party delivering an execution to an officer for levy to furnish the information required by the levying officer to comply with the provisions of this subdivision. The term "newspaper of general circulation" as used herein is defined in Article 1 (commencing with Section 6000) of Chapter 1 of Division 7 of Title 1 of the Government Code. The term "judgment debtor" does not include a trustor or mortgagor.

Comment. Section 705.010 is substantively the same as former Section 692. However, subdivision 4 of former Section 692 is not continued. The former requirement of payment in a specific kind of money has been deleted from Section 667. See Section 667 and Comment. Section 705.010 provides for notice to the judgment debtor except under subdivision (b). It should be noted, however, that other persons may request pursuant to Section 703.040 that notice also be sent to them.

Note. We have not continued Sections 724a through 724e relating to the sale of franchises. These sections are derived from provisions in the Civil Code which were first enacted in 1850. They were intended to deal with franchises granted by the state, but the most recent case which we have found which even refers to one of these sections is more than 50 years old. We are inclined to believe that these sections are obsolete. If so, we suggest that they not be continued. Perhaps a good way to find out whether they do need to be continued is to not continue them and solicit comments on such action. Is this satisfactory?

Query: Should the description be required to indicate at least the approximate value of the property? Is posting of the notice of sale of personal property worthwhile? Would publication in the classified section of the newspaper be preferable? Should notice be required to be given to interest holders of record? Note that they can request notice if they so desire.

405-489

§ 705.020. Sale without notice; defacing notice; penalties

705.020. [(a)] Any levying officer who sells property without giving the notice prescribed by Section 705.010 shall be liable to the judgment creditor, the judgment debtor, and any person who has requested notice of sale pursuant to Section 703.040 for the actual damages caused by the failure to give such notice [and for the additional sum of one hundred dollars (\$100) payable to each such person regardless of whether that person has suffered any actual damage].

[(b) Any person who willfully takes down or defaces a notice posted pursuant to Section 705.010 before the sale announced by such notice or, if the judgment is satisfied before the announced sale, before such satisfaction shall be liable to the judgment creditor and the judgment debtor for the sum of five hundred dollars (\$500).]

Comment. Section 705.020 continues the sheriff's liability under former Section 693 for actual damages from failing to give proper notice. [The liability of a person for removing or defacing a notice is

not continued here. But see Penal Code § 616 (criminal liability for defacing a legal notice).]

Note. We believe that Section 705.020 continues the present law as to the sheriff's liability. Section 693 now provides for liability to the "aggrieved party" and the cases under the section indicate that this may include both the judgment creditor and the judgment debtor. There are no cases mentioning a person who has properly requested notice, but we have included him because we think that the section was probably intended to include him also. We do not, however, believe that the forfeitures are desirable and would prefer to eliminate them, i.e., restrict subdivision (a) to liability for actual damage and delete subdivision (b). It might be noted that Penal Code Section 616 already provides a criminal penalty (one-month imprisonment or \$100) for tearing down or destroying a legal notice.

405-490

§ 705.030. Time and place of sale; exhibition of personalty; sale of items or parcels separately or together; directions of judgment debtor

705.030. (a) All sales of property on execution shall be held in the county where the property or some part thereof is situated and shall be made at auction, to the highest bidder, between the hours of 9 in the morning and 5 in the afternoon.

(b) When the sale is of personal property capable of manual delivery, it shall be within view of those who attend the sale [unless, upon application of either the judgment creditor or the judgment debtor, the court which issued the execution pursuant to which the sale is made orders otherwise].

(c) All property shall be sold separately or together in such groups or lots as are likely to bring the highest price.

(d) Notwithstanding subdivision (c), [a third person who claims an interest in a portion of real property or] the judgment debtor [if present at the sale] may direct that property be sold separately or

together and may direct the order in which property shall be sold, and the sheriff shall follow such directions.

(e) After sufficient property has been sold to satisfy the execution, no more shall be sold.

Comment. Section 705.030 is based on the first paragraph of former Section 694. The third sentence of that paragraph now appears in Section 705.060. The second and last paragraph of former Section 694 is now Section 705.040. Subdivision (c) makes clear that all property should be sold in the manner which will bring the best price, whether this requires sale of separate items or parcels or sale en masse, including personal and real property together, e.g., a motel including land, improvements, and furnishings. Subdivision (d), however, makes clear that the judgment debtor has ultimate control and may not only direct the order in which property may be sold but may also direct that property be sold en masse, separately, or in such groups or parcels as the debtor believes will bring the highest price.

Note. We believe that Section 705.030 continues the substance of existing law. Although Section 694 seemed to require that real property be sold in separate parcels, the cases under this section suggest that sale en masse constitutes at most an irregularity and that the true test is whether separate sale would produce a higher price. See 5 B. Witkin, California Procedure Enforcement of Judgment § 80 at 3451 (2d ed. 1970). Professor Riesenfeld has suggested (and the staff agrees) that it might be helpful to add the bracketed phrase to subdivision (b).

In subdivision (d), we have placed the "third person" in brackets. There seem to be no cases under Section 694 dealing with third persons and we do not know what the sheriff would do if he received conflicting instructions from the judgment debtor and third persons. In short, we would like to delete the reference to third persons here and deal comprehensively with the rights of third persons in a separate chapter.

We have also placed the phrase "if present at the sale" in brackets. It seems to us that the judgment debtor should be able to give directions in writing to the sheriff in advance of sale as well as give directions in person at the sale itself.

405-491

§ 705.040. Postponement of sale

705.040. (a) The judgment debtor and judgment creditor together may request in writing that a sale on execution be postponed to an agreed day and hour. The request shall be delivered to the officer conducting the sale, and he shall by public declaration at the time and place originally fixed for the sale postpone the sale to the day and hour fixed in such request.

(b) In case of additional postponements, notice of each shall be given by public declaration by the officer at the time and place last appointed for the sale. No other notice of postponed sale need be given.

Comment. Section 705.040 is substantively identical to the last paragraph of former Section 694.

405-492

§ 705.050. Cash payment; exception

705.050. (a) The purchaser at a sale on execution shall pay cash or the equivalent of cash.

(b) Notwithstanding subdivision (a), the officer conducting the sale shall accept the amount of the bid of a judgment creditor as a credit on the judgment in lieu of a cash payment; however, the judgment creditor shall pay any costs and fees of the officer in cash or the equivalent of cash.

Comment. Section 705.050 had no statutory counterpart under former law but generally continues the former practice. Subdivision (a) states

the general rule that payment must be in cash. See Kelley v. Barnet, 24 Cal. App. 119, 140 P. 605 (1914). However, a certified check or cashier's check should be accepted as the equivalent of cash. See Marshal of Municipal Courts, Los Angeles County, Manual of Procedure § 423.4 (revised 3/4/72).

Subdivision (b) states an important exception to subdivision (a). The judgment creditor may, of course, bid at the auction and, under subdivision (b), he may use his judgment as a credit to pay all or a portion of his bid where he is the high bidder; however, he must pay in cash the proper costs and fees of the officer conducting the sale. The basic exception recognizes that a transfer of cash back and forth between the judgment creditor and the officer can be dispensed with, but the rule extends only so far as the reason for the rule. Since the officer must be paid for his efforts before the judgment is satisfied, the judgment creditor must pay the officer's costs and fees in cash. It should be noted that, under subdivision (b), the sheriff must accept the judgment as a credit; under former law, the sheriff apparently had the discretion to refuse this manner of payment and require cash payment. See generally Mitchell v. Alpha Hardware & Supply Co., 7 Cal. App.2d 52, 45 P.2d 442 (1935); Kelley v. Barnet, *supra*.

Note. Subdivision (b) raises an issue which cannot be satisfactorily resolved until other determinations are made. We have proposed here that the judgment creditor be permitted to make a credit bid. This approach only works, however, if liens prior to the lien under which the sale is made are preserved. If any prior liens are required to be paid off, there must be a cash fund to accomplish this result. Alternatively, property could be sold free and clear of all liens, and each lienholder could be required to pay cash to cover any bid made by a prior lienholder but permitted then to add the amount of his lien to his bid. However, the latter approach would be a drastic change and may not be feasible--certainly the levying officer should not be responsible for determining priorities between lienholders or the proper credit for each lienholder. Nevertheless, if--as suggested in Article 2 of this chapter--we do not permit redemption by junior lienholders, then it seems that we must face the problem of credit bids by such persons. At least, it seems unreasonable to require a full cash bid where a portion of the cash will simply be returned to the bidder if he is the high bidder.

405-493

§ 705.060. Persons ineligible to purchase

705.060. Neither the levying officer holding the execution nor his deputy shall be a purchaser or be interested in any purchase at a sale on execution.

Comment. Section 705.060 is substantively identical to the third sentence of former Section 694.

405-494

§ 705.070. Nonpayment of bid; resale; recovery from defaulting bidder

705.070. (a) If a bidder refuses to pay the amount bid by him for property struck off to him at a sale on execution, at the request of the judgment creditor the officer shall sell the property either immediately to the next highest bidder who pays the amount he bid or to the highest bidder at a new sale which satisfies the requirements of notice and time and place provided by this article. Such resale shall be a prerequisite to recovery pursuant to subdivision (b).

(b) Where the high bidder refuses to pay the amount he bid, either the judgment creditor or judgment debtor may recover the amount of any loss, the costs of resale, and the attorney's fees reasonably incurred in pursuing such recovery, from the high bidder in an action in any court of competent jurisdiction.

Comment. Section 705.070 is derived from former Section 695. See Bell v. Redwine, 98 Cal. App. 784, 277 P. 1050 (1929). However, subdivision (a) now permits either immediate sale, if possible, to the next

highest bidder who pays the amount bid or resale at a new sale which satisfies the requirements of notice and time and place as provided in the preceding sections of this article. Such resale is a prerequisite to suit against a refusing bidder. Subdivision (b) makes clear that either the judgment creditor or the judgment debtor is specifically authorized to pursue the refusing bidder directly for the loss occasioned by the latter's refusal. See, e.g., Meherin v. Saunders, 131 Cal. 681, 63 P. 1084 (1901) (judgment debtor can recover from purchaser at sale who fails to pay amount bid). Former Section 695 authorized suit by the sheriff on behalf of the judgment creditor only. Finally, the loss caused now specifically includes the costs of resale and the attorney's fees incurred in pursuing the recovery under this section.

Query: Is any provision needed to join the creditor and debtor in one action under subdivision (b)?

404-976

§ 705.080. Nonpayment of bid; rejection of subsequent bids of defaulting bidder on resale

705.080. Where a bidder refuses to pay the amount bid by him for property struck off to him at a sale on execution, the officer may, in his discretion, thereafter reject any subsequent bid of such bidder on the resale of such property.

Comment. Section 705.080 is substantively identical to former Section 696.

Note. Former Section 696 was once included in the same section as former Section 695. Hence, we believe that Section 696 was intended to permit only rejection of subsequent bids by a defaulting bidder on the same property. The section could perhaps as well permit rejection of bids by the defaulting bidder on other property at the same execution sale, but this would, we think, be an extension of the former law and might tend to inhibit bidding and hence reduce the price obtained at sale.

405-495

§ 705.090. Nonpayment of bid; resale; liability of officer

705.090. Nothing in Sections 705.070 and 705.080 shall be construed to make the officer conducting an execution sale liable for any more than the amount bid by the subsequent purchaser.

Comment. Section 705.090 is based on former Section 697.

Note. We have continued the substance of former Section 697 for the present, but we do not believe that the section is necessary. See Govt. Code § 320.2 (public employee not liable for discretionary acts even where discretion is abused).

405-496

§ 705.100. Personal property capable of manual delivery; delivery; certificate of sale

705.100. (a) When the purchaser of any personal property pays the purchase money, the officer making the sale shall deliver property capable of manual delivery to the purchaser or, pursuant to a court order, assist the purchaser in getting possession and shall execute and deliver a certificate of sale to the purchaser.

(b) The certificate of sale conveys to the purchaser all the right which the judgment debtor had in such property on, or at any time after, the day the execution or attachment was levied.

Comment. Section 705.100 continues the substance of former Sections 698 and 699. However, it requires the officer to deliver a certificate of sale whether or not the purchaser so requests. As to real property, see Section 705.120.

Note. Under present law, the purchaser must apparently request a certificate of sale. We do not see why the purchaser should have to

make such a request. The Marshal's Manual simply says that a certificate of sale shall be issued after every sale (see Section 424.1). The requirement of a request also presents a potential trap if the last sentence of this section is construed to make the certificate a prerequisite to obtaining any rights by purchase at an execution sale. Accordingly, we have deleted the request requirement.

We have added the phrase "or at any time after" to subdivision (b). This was done to conform this provision to subdivision (b) of Section 705.110. We believe that the language continues the present law under Section 700.

As suggested by Professor Riesenfeld, we have combined provisions of former Sections 698 and 699 that the requirement of delivery under Section 705.100 be eliminated, and that the statute specifically provide that the purchaser shall have all rights of the debtor, including the right of immediate possession to the property. Shall these changes be made?

405-498

§ 705.110. Real property; certificate of sale

705.110. (a) When the purchaser of real property pays the purchase money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and shall record a duplicate of the certificate in the office of the recorder of the county where the property is located.

(b) Except as otherwise provided by Article 2 (commencing with Section 705.210), the certificate of sale shall convey to the purchaser all the right, title, and interest which the judgment debtor had in such real property on, or at any time after, the day the execution or attachment was levied and, if the judgment is a lien upon the property, all the right, title, and interest which the debtor had on, or at any time after, the day such judgment became a lien on such property.

Comment. Section 705.110 continues the former law. Subdivision (a) continues a portion of the third sentence of subdivision (a) of

former Section 700a. As to the contents of the certificate of sale, see Section 705.120. Subdivision (b) continues the substance of former Section 700. The introductory clause to subdivision (b) recognizes that the purchaser's title may be defeasible, i.e., may be subject to redemption, and that the judgment debtor may be entitled to remain in possession for a period of time, i.e., during the redemption period.

Note. As the Comment indicates, we have intended no substantive change here. We have, however, revised subdivision (b) in an attempt to make clear that the sale on execution conveys the title or interest which the judgment debtor has on the date of levy or date that the judgment became a lien and that which he thereafter acquires up to the date of sale (assuming the lien has been maintained throughout such period). This, we believe, is the existing law. See Kenyon v. Quinn, 41 Cal. 325 (1871); Frink v. Roe, 70 Cal. 296, 11 P. 820 (1886). Interests acquired after the execution sale are not, however, subject to the sale. See Emerson v. Sansome, 41 Cal. 552 (1871).

405-499

§ 705.120. Certificate of sale; form

705.120. The certificate of sale shall identify the judgment under which the sale on execution was made and shall contain:

(a) A description of the property sold;

(b) The price paid for the property. Where property is sold together in groups or lots pursuant to Section 705.030, the price paid for the entire group or lot may be stated; otherwise, the price paid for each item or parcel of property shall be separately stated.

(c) Where the property is subject to redemption, a statement to that effect.

Comment. Section 705.120 generalizes the requirements for the certificate of sale provided by subdivision (a) of former Section 700a.

Note. Section 700a provides certain requirements for a certificate of sale of real property. We have continued the substance of these requirements here and made them applicable to all certificates of sale.

404-977

§ 705.130. Disposition of proceeds from sale

705.130. (a) Following sale, the proceeds of the sale shall be applied in the following order of priority:

(1) To the levying officer or to the judgment creditor for the reimbursement of any costs incurred in executing the writ under which sale was made or in making the sale.

[(2) To the seller or holder of a purchase money security interest in the property sold.]

(3) To the judgment debtor in an amount equal to his claim of exemption under Sections [listed here will be sections under which the debtor is entitled to a certain minimum dollar amount].

[(4) To the holder of any lien or encumbrance other than one described in paragraph (2) which is prior to the lien under which the sale was made.]

(5) To the judgment creditor.

[(6) To the holder of any lien or encumbrance which is subsequent to the lien under which the sale was made.]

(7) To the judgment debtor.

[(b) Notwithstanding subdivision (a), the officer conducting the sale shall not be liable for failing to distribute the proceeds to any third person who has not made a claim therefor pursuant to Chapter 6 (commencing with Section 706.010).]

Comment. Section 705.130 continues the prior law. It is based in part on former Section 689c, the second paragraph of former Section 690.2, and portions of former Section 691.

Note. This section is retained here merely as a reminder to deal with the issue of disposition of proceeds. The section must be revised to conform to whatever decisions are made in connection with the rights of third persons. We note, for example, that Professor Riesenfeld has suggested that payment of a lien on personal property (as well as real property) which is prior to the lien under which the sale was made should not be required.

405-501

§ 705.140. Sale set aside; recovery of price and interest; revival of judgment

705.140. (a) If a sale on execution is set aside because the judgment on which it was based is reversed or discharged, the purchaser, or his successor in interest, may recover the price paid, with interest, from the judgment creditor. A judgment for such purpose may be entered against the judgment creditor and in favor of the purchaser, or his successor in interest, by the court which issued the execution after notice to the judgment creditor and on motion of the purchaser or his successor.

(b) If a sale on execution is set aside because of irregularities in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the purchaser, or his successor in interest, may recover the price paid, with interest, from either the judgment creditor or the judgment debtor. To recover from the judgment debtor, the purchaser may have the judgment revived in his name as provided in subdivision (c). Where the purchaser recovers any amount from the judgment creditor pursuant to this subdivision, the judgment creditor may have the judgment revived as provided in subdivision (c) to recover the amount paid to the purchaser, with interest, from the judgment debtor.

(c) After notice to the parties to the action, and on motion of a person authorized by subdivision (b), the court which issued the execution upon which the sale was based shall revive the original judgment in the name of such person for the amount which such person is entitled to recover from the judgment debtor. The revived judgment shall have the same force and effect as would an original judgment made on the date of revival.

Comment. Section 705.140 is based on former Section 708. However, under former Section 708, a third person--who purchased at an execution sale which was later set aside because, for example, the property attempted to be sold was exempt or belonged to one other than the judgment debtor--was authorized to pursue only the judgment debtor for his recovery. This seemed unfair since the judgment debtor may be unable to satisfy a judgment; hence, subdivision (b) in these circumstances permits the third-person purchaser to recover from either the judgment debtor or the judgment creditor. Recovery from the judgment creditor restores the original parties to the relative positions they were in before the execution sale, and the judgment creditor is therefore authorized to pursue the judgment debtor afresh.

Note. We have revised Section 708 to accomplish the purpose stated above in the Comment. We believe that it is relatively rare for an execution sale to be set aside for any reason and the relatively meager case law which has developed under Section 708 would indicate that the section has operated in a satisfactory way. Accordingly, we have made the revisions in this section with some hesitance, but we believe that they are desirable.

It should be noted that subdivision (a) permits recovery by a purchaser from the judgment creditor where an execution sale is set aside because the judgment on which it is based is reversed. However, Section 708 provides for restitution of property after a reversal only "so far as such restitution is consistent with rights of third parties." Implicit in this latter provision is the rule that a sale on execution to a third person (where there has been no stay on appeal) may not be avoided after reversal. (The purported judgment debtor can, of course, recover compensation from the judgment creditor for property not restored.) However, the courts may distinguish between a judgment which is simply erroneous and one which is "void" and permit avoidance where

the judgment is void. See Mills v. Laing, 38 Cal. App. 776, 177 P. 493 (1918)(dictum). Hence, we have kept the reference to reversal in subdivision (a) although it has very limited application.

We have tried to make clear in Section 705.140 that the purchaser (and under subdivision (b) the judgment creditor) acquires a new right to recover amounts paid. Thus, for example, the limitations period provided by Section 701.070 starts to run when a judgment is entered pursuant to subdivision (a) or "revived" pursuant to subdivision (c). This seems more fair than merely giving a subrogated right to the person entitled to recover. Is this approach satisfactory?

405-503

Article 2. Redemption From Execution Sale

§ 705.210. Property subject to redemption

705.210. Sales of personal property, and of real property where the estate therein is a leasehold with an unexpired term of less than two years, are absolute. In all other cases, the property is subject to redemption as provided in this article.

Comment. Section 705.210 continues the prior law as to the circumstances when redemption is permitted. Compare the first two sentences of subdivision (a) of former Section 700a. It should be noted, however, that the procedures for redemption provided by this article depart significantly from the former law.

Note. Article 2 is presented primarily as a basis for discussion. It provides a procedure for redemption which is available generally only to the judgment debtor. See Section 705.220. This approach has been taken with the thought that it might be more politically palatable than the complete elimination of redemption. The latter tack would, however, be preferable to the staff and also, we believe, to Professors Warren and Riesenfeld. Another alternative would be a "stagger" system under which the judgment debtor is first given a period of time in which to redeem and then junior lienholders are subsequently each given a short period of time to redeem in the order of their priority. See Minn. Stat. Ann. § 550.25. Perhaps any of these alternatives are superior to the present California "scramble" system which has been described as follows by Professor Warren:

6. If we are to retain the concept of the right of redemption, some consideration should be given to revising the present

law of redemption which has been aptly described as the "scramble" system. CCP Sections 701-703 set up a system that works like this: The parties that may redeem are the judgment debtor (in our case that is the mortgagor or trustor), his successor in interest, or any creditor having a lien by judgment or mortgage subsequent to that on which the property was sold. These junior lien holders are called redemptioners. After foreclosure sale either the debtor or redemptioner has one year in which to redeem by paying the amount the purchaser paid at the sale plus certain sums. (Note the discussion of CCP Section 725(a) below explaining that in some cases the time of redemption is three months.) If the judgment debtor redeems, the effect of the sale is "terminated" and the junior liens which would have been cut off by the foreclosure sale are reinstated. However, if a redemptioner redeems the sale is "continued" and any junior liens are dead unless their holders exercise their rights to redeem from the redemptioner, which they must do within 60 days after a redemption by a redemptioner. In effect, when a redemptioner redeems he takes the rights of the purchaser.

All this can be illustrated by this hypothetical: Debtor's property is burdened by a \$10,000 trust deed in favor of Creditor 1 (C-1), a \$5,000 trust deed in favor of Creditor 2 (C-2), and judgment lien in the amount of \$1,000 in favor of Creditor 3 (C-3). Suppose C-1 foreclosed by judicial action and the property was sold on judicial sale to P for \$8,000. C-1's trust deed was purchase money so he cannot get a deficiency judgment. Debtor has one year in which to redeem from Purchaser and he must pay \$8,000 plus additional sums stated by the statute. His redemption revives the liens of C-2 and C-3 which would otherwise have been cut off by being joined in the foreclosure action. Suppose C-2 redeems first from Purchaser by paying \$8,000 plus additional sums. Now C-2 owns the property subject only to the rights of redemption of C-3 and Debtor. If C-3 is to redeem he must do so within 60 days after C-2's redemption and he must pay not only what C-2 paid Purchaser but also the amount of C-2's lien. So it will cost C-3 \$8,000 plus \$5,000 plus additional sums to redeem. Now if Debtor wants his property back he can redeem from C-3 only by paying \$8,000 plus \$5,000 plus the amount of C-3's lien (\$1,000) plus additional sums. If this sequence of events occurred, Debtor would own the property free of any liens for they have all been paid off.

The Marx Brothers aspects of the scramble system are best seen in a case in which C-3 redeemed from Purchaser for \$8,000 plus. Now C-2 is cut off unless he does something, so he redeems from C-3 by paying \$8,000 plus -- he needn't pay the amount of C-3's lien because it is not prior to his. Now C-3 is cut off unless he does something, so he re-redeems from C-2 for \$8,000 plus \$5,000 plus additional amounts. Now C-3 owns the property unless Debtor redeems from him.

It is our belief that the elimination or substantial curtailment of redemption together with a provision which wipes out all liens subsequent to that on which the property is sold should enhance the chance

that the property sold will bring a price close to its real value. As indicated in the Note to Section 705.050, fairness requires that junior lienholders (who are no longer permitted to redeem) should be able to make at least partial credit bids but otherwise they should be required to participate in the bidding procedure. The presence of such lienholders and the increased likelihood that completely independent persons will participate because they no longer have to wait through a long redemption period should make for more spirited bidding. This at least is our hope, and we present the idea for your consideration.

405-504

§ 705.220. Elimination of liens by execution sale

705.220. Whether or not the property is redeemed, neither the lien on which the property is sold nor any other lien subsequent to that on which the property is sold shall continue in effect after such sale.

Comment. Section 705.220 is new. By preserving only liens which are prior to that on which the property is sold, this section should encourage the judgment creditor and junior lienholders to protect their interests by looking to the property sold. This should, in turn, increase the likelihood that such property will be sold at a price equivalent to its fair market value.

999-340

§ 705.230. Persons entitled to redeem

705.230. Property sold subject to redemption may only be redeemed by the judgment debtor or his successor in interest.

Comment. Section 705.230 changes the former law by restricting the right of redemption to the judgment debtor and any successor in interest. Contrast former Section 701. Successors in interest may include a new owner who purchased the property from the judgment debtor after a judgment lien was acquired but before the sale, an assignee

after the sale of the debtor's right of redemption, or even a junior lienholder who has acquired the judgment debtor's interest in the property through a prior foreclosure.

405-390

§ 705.240. Notice of right of redemption; liability of officer

705.240. (a) Where property is sold subject to redemption, the officer who conducted the sale shall inform the judgment debtor, by certified mail or personal service, of his right of redemption.

(b) Failure to give the notice required by subdivision (a) within one week after the sale shall make the officer liable to the judgment debtor for both actual damages and a penalty of one hundred dollars (\$100).

Comment. Section 705.240 continues the substance of subdivision (b) of former Section 700a.

Note. We have preserved this provision, but we have some doubt whether it is really necessary. Assuming that it is necessary, we wonder whether notice should also be given to "successors in interest"-- at least those of record. It should be noted, however, that a certificate of sale is required to be recorded by the officer making the sale. See Section 703.110.

405-391

§ 705.250. Deposit of redemption price; time for deposit; proof of right to redeem

705.250. (a) Any person who seeks to redeem property pursuant to this article shall deposit with the officer who conducted the sale the amount of the purchase price at such sale together with interest from the date of sale until the date the deposit is made. The deposit shall

be made not more than 30 days after the date the certificate of sale is recorded pursuant to Section 705.110.

(b) At the time he makes his deposit, a successor in interest to the judgment debtor shall file with the officer a copy of the conveyance establishing his claim verified by his affidavit, or the affidavit of a subscribing witness to the conveyance, and a note of the record thereof, certified by the recorder.

Comment. Section 705.250 is based on former Section 705.

405-392

§ 705.260. Issuance of deed of sale or certificate of redemption;
tender of deposit; effect of redemption on liens

705.260. (a) As used in this section and Section 705.280, the "date of redemption" refers to the day immediately following the last day upon which a deposit may be made pursuant to Section 705.250.

(b) If no deposit is made before the date of redemption, the officer who conducted the sale shall execute and deliver to the purchaser a deed of sale.

(c) If the judgment debtor, or his successor in interest, makes a deposit pursuant to Section 705.250 before the date of redemption, the officer who conducted the sale shall forthwith execute and deliver to such person a certificate of redemption and tender the deposit to the purchaser at the sale. The officer shall also immediately thereafter record a duplicate of the certificate in the office of the recorder of the county where the property is located. The person who redeems shall acquire all rights to the property acquired by the purchaser at the sale.

(d) If the tender of the officer pursuant to subdivision (c) is refused, the amount tendered shall be deposited with the county treasurer of the county where the property is located, payable to the order of the purchaser.

405-393

§ 705.270. Liability for additional sums paid by purchaser; procedure for recovery

705.270. (a) The person to whom a certificate of redemption is issued pursuant to Section 705.260 shall be liable to the purchaser for the following:

(1) The amount of any assessment or taxes paid by the purchaser together with interest from the date of payment;

(2) Any reasonable sum paid by the purchaser for fire insurance, maintenance, upkeep, or repair of the improvements upon the property together with interest from the date of payment;

(3) Any sum paid by the purchaser on a prior obligation secured by the property to the extent such payment was necessary for the protection of the purchaser's interest together with interest from the date of payment.

(b) The liability of the redeeming person may be enforced on motion filed in the court which issued the execution on which the sale was based from which redemption was made. Notice of the motion shall be served on the persons whose liability is sought to be enforced at least 30 days prior to the time set for hearing of the motion. The notice shall state the amount of the claim and shall be supported by an affidavit or affidavits setting forth the facts on which the claim is based.

Such notice and affidavit shall be served in the same manner as a summons and complaint. Judgment may be entered in accordance with the notice against the person or persons served therewith unless such person or persons shall serve and file an affidavit or affidavits in opposition to the motion showing such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact. If such showing is made, the issues to be tried shall be specified by the court and trial thereof shall be set for the earliest date convenient to the court, allowing sufficient time for discovery. Affidavits filed pursuant to this section shall conform to the standards prescribed for affidavits filed pursuant to Section 437c.

Note. The short period of time provided for redemption suggests that the purchaser will seldom spend significant amounts which may be recovered from the redeeming party. Nevertheless, we have provided a procedure based on Section 1058a (enforcement of surety's liability on a bond given in any action) to deal with the occasional dispute which will arise. It should be noted that such disputes do not affect the redemption itself. Redemption is based on a deposit of the purchase price and interest only, and the officer issues the certificate of redemption so that the purchaser cannot delay that procedure.

405-587

§ 705.280. Possession during redemption period; rents and profits; entry by purchaser or redemptioner; waste

705.280. (a) The purchaser, from the time of the sale until a redemption, is entitled to receive, from the person in possession, the rents of the property sold, or the value of the use and occupation thereof.

(b) Notwithstanding subdivision (a), the purchaser shall be liable to the person who redeems for any rents or profits which have been

received by a purchaser pursuant to subdivision (a). The person who redeems may demand in writing a written and verified statement of the rents and profits received. Any disagreement concerning such rents and profits may be determined in the manner provided by Section 705.270.

(c) The purchaser, from the time of sale until a redemption, is entitled to enter the property during reasonable hours to repair and maintain the premises and is entitled to an order restraining waste on the property from the court which issued the execution on which the sale was based. Such order may be granted with or without notice in the discretion of the court. [It shall not be waste for the person entitled to possession during the period allowed for redemption to continue to use the property in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repair of fences, or for fuel for his family while he occupies the property.]

Comment. Section 705.280 continues the substance of former Sections 706 and 707 and the second sentence of the first paragraph of former Section 702. The importance of these provisions is, however, drastically reduced since the judgment debtor (or his successor in interest) is entitled to remain in possession of the property only for a period of 30 days after the sale. Compare First Nat'l Trust & Sav. Bank v. Staley, 219 Cal. 225, 25 P.2d 982 (1933) (under former law, period of possession was one year). (Of course, if there is a tenant on the property under a lease which preceded the lien under which the property was sold, the purchaser at the sale acquires only the lessor's reversionary interest and his right to rents, and the tenant may remain in possession during the term of his lease.) However, the purchaser is

entitled to the rents from the property or the reasonable value of the use of the property.

Under subdivision (b), a person who redeems is entitled to recover the rents received by a purchaser. Former Section 707 provided a special procedure to resolve disputes concerning the existence and amount of a similar credit, but subdivision (b) simply incorporates the procedure provided by Section 705.270 for resolving similar disagreements as to the amounts required to be paid by a redeeming party. It should be noted that, even where a dispute arises, redemption is not affected.

Subdivision (c) combines the substance of former Section 706 and the second sentence of former Section 702.

Note. The Comment to Section 705.280 is largely self-explanatory. We have placed the last sentence of subdivision (c) in brackets. This is an existing provision, but we do not think that it is entirely necessary or desirable. We would prefer to have the court determine on the particular facts what is and is not waste; e.g., can a judgment debtor cut down fine old shade trees out of spite but purportedly for firewood in these days of fuel shortages?

The most significant change in this section is, of course, the greatly reduced period for possession by the judgment debtor. He will, however, have at the very least 50 days from the time of notice of sale until the time when he must vacate the property. See Sections 705.010 (notice of sale on execution) and 705.250 (redemption period).

CHAPTER 6. THIRD-PARTY CLAIMS

Note. See Memorandum 74-25 presenting various questions concerning third-party claims which must be considered before we draft this chapter.

CHAPTER 7. WAGE GARNISHMENT

Note. Wage garnishment is the subject of a separate recommendation. Whatever is ultimately produced will be plugged into this chapter.

405-385

CHAPTER 8. SUPPLEMENTARY PROCEDURES FOR THE
ENFORCEMENT OF A MONEY JUDGMENT

Comment. Chapter 8 makes available to the judgment creditor a variety of procedures for the enforcement of a money judgment. It is anticipated that the writ of execution will remain the primary enforcement tool. However, in some circumstances, execution operates in a less than satisfactory way, and sometimes it is not effective at all. The procedures provided in this chapter supplement execution and should provide an arsenal adequate to protect the judgment creditor. Article 1 continues the substance of former Sections 714-715, 717-722, and 723 relating to the examination of the judgment debtor as well as examination of a third person indebted to the judgment debtor. Article 2 authorizes the judgment creditor to bring suit against third persons indebted to or in possession of property belonging to the judgment debtor. Article 3 provides for the appointment of a receiver to aid in the enforcement and satisfaction of a judgment. Article 4 provides for the issuance of an installment payment order directed to the judgment debtor which enables the judgment creditor to reach periodic payments not otherwise subject to process. Article 5 provides an exclusive procedure for collection of money judgments where the judgment debtor is a creditor of a public entity. Article 6 provides for charging orders against the interest of a debtor-partner in partnership property. Article 7 provides for a lien on a cause of action and judgment. Article 8 provides for assignment of assets which are not subject to levy, i.e., patents, copyrights, trademarks, and wages in the hands of the federal government.

404-944

Article 1. Examination of Judgment Debtor,
Third Person Indebted to Judgment Debtor
and Additional Witnesses

§ 708.010. Power of court commissioner and referee; qualifications of
referee; disobedience of order of court commissioner or
referee a contempt

708.010. (a) An order to appear and answer concerning property may be issued pursuant to Sections 708.020, 708.030, and 708.040 by a court commissioner.

(b) The examination proceedings authorized by Sections 708.020, 708.030, and 708.040 may be conducted by a court commissioner or a referee appointed by the court, and such officer may issue any order authorized by Section 708.050 or warrant authorized by Section 708.060 and shall have the same powers as the court to grant adjournments, to preserve order, and to subpoena witnesses to attend before him.

(c) Any referee appointed pursuant to the provisions of this article shall be an attorney duly licensed to practice law in all the courts of this state at least five years prior to the date of such appointment.

(d) If any person disobeys an order of a court commissioner or referee, properly made pursuant to this article, such person may be punished by the court for a contempt.

Comment. Section 708.010 reenacts the substance of portions of several former sections and supplements Sections 259 and 259a (court commissioners) and 639 (reference). Subdivision (a) codifies a rule stated in Lewis v. Neblett, 188 Cal. App.2d 290, 10 Cal. Rptr. 441

(1961). Insofar as subdivision (b) authorizes a court commissioner or referee to preside over an examination proceeding, it continues the authority provided by former Sections 714, 715, and 717. See also Sections 259 and 259a. The authority of such officer to issue an order requiring the application of property to the satisfaction of a judgment or forbidding transfer of property (Section 708.050) continues authority provided by former Sections 719 and 720. The authority of such officer to issue a warrant to compel the appearance of a person and to control the proceeding generalizes the authority provided by former Section 723. See also former Sections 714, 715, and 717.

Subdivision (c) makes applicable to all referees the qualifications formerly required of referees appointed in a county or city and county having a population of one million or more. Compare former Section 723. See also Govt. Code § 70142.

Subdivision (d) reenacts the substance of former Section 721. It should be noted that, although a court commissioner or referee may issue a warrant of attachment pursuant to Section 708.050, only a judge of the court may exercise power to punish contempt for failure to appear.

Note. We believe that this section preserves the existing law and its division of authority among court (judge), court commissioner, and referee.

404-945

§ 708.020. Examination of judgment debtor; order; frequency

708.020. (a) Whenever an execution against property of a judgment debtor may properly be issued, whether or not an execution has been issued or returned, the judgment creditor is entitled to an order from the court requiring the judgment debtor to appear and answer concerning his property before the court at a time and place specified in the order.

(b) Notwithstanding subdivision (a), a judgment debtor may not be required to appear and answer more frequently than every four months. However, nothing in this section shall be construed to restrict the rights granted by Section 708.030.

(c) An order made pursuant to subdivision (a) shall contain the following statement in boldface type: "Failure to appear may subject the party served to arrest and punishment for contempt of court."

Comment. Section 708.020 reenacts the substance of the first paragraph of former Section 714. Although Section 708.020 no longer specifically so provides, an order requiring a judgment debtor to appear for an examination may still be issued against any one (or more) of several judgment debtors. Moreover, Section 708.010 continues the authority for a court commissioner or other appointed officer both to issue an order requiring an appearance and to preside over the examination itself. See Section 708.010 and the Comment thereto. Compare former Section 714. Finally, the second paragraph of former Section 714 provided for the arrest of the judgment debtor where he failed to appear in compliance with an order issued under Section 714. This provision has been continued by Section 708.060 (arrest of person ordered to appear under this article). Subdivision (c) continues the fourth paragraph of former Section 714.

Note. New York procedure provides for issuance of one or more of the following: (1) a subpoena requiring attendance for the taking of a deposition; (2) a subpoena duces tecum requiring the production of books or documents; or (3) an information subpoena (basically written interrogatories). See N.Y.C.P.L.R. §§ 5223-5224. In short, the New York procedure has attempted to remove any vestiges of a separate proceeding and is now analogous to ordinary prejudgment discovery procedures. We have not attempted to pursue such a course but offer the idea for your consideration. The notice provision was added by Cal. Stats. 1974, Ch. 213.

404-946

§ 708.030. Proceedings in aid of execution; examination; arrest of debtor; undertaking or imprisonment

708.030. (a) After the issuance of an execution against property of the judgment debtor, and upon proof by affidavit or otherwise to the satisfaction of the court that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, the court may, by an order, require the judgment debtor to appear at a specified time and place before the court to answer concerning the same.

[(b) Instead of the order requiring the attendance of the judgment debtor, the court may, upon affidavit of the judgment creditor, his agent, or attorney, if it appears to him that there is danger that the debtor will abscond, order the sheriff, or a constable, or marshal to arrest the debtor and bring him before the court. Upon being brought before the court, the judgment debtor may be ordered to make an undertaking, with sufficient sureties, that he will attend from time to time before the court as may be directed during the pendency of proceedings and until the final determination thereof and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.]

[(c) An order made pursuant to subdivision (a) shall contain the following statement in boldface type: "Failure to appear may subject the party served to arrest and punishment for contempt of court."

Comment. Section 708.030 reenacts the substance of a portion of former Section 715. The authority for a commissioner or other appointed

officer both to issue an order requiring an examination and to preside over the examination itself is continued in Section 708.010. The authority of the court to order the application of property of the judgment debtor toward the satisfaction of the judgment is continued in Section 708.050. [The authority to arrest the debtor on the creditor's ex parte application has been deleted. However, the debtor may still be arrested pursuant to Section 708.060 where he fails to appear after being ordered to do so, and he is, of course, subject to being held in contempt of court for such failure.] Subdivision [c] is based on similar provisions in former Sections 714 and 717.

Note. We have retained subdivision (b) only for purposes of discussion. This provision was considered in connection with the civil arrest recommendation, but it was decided then to take no action until the execution topic was taken up. The staff recommends that subdivision (b) now be deleted. We believe that the contempt power is an adequate sanction for the protection of the judgment creditor and that the reasons which supported the repeal of the civil arrest remedy generally are also applicable here. See Recommendation and Study Relating to Civil Arrest, 11 Cal. L. Revision Comm'n Reports 1, 27-37 (1973). See also Section 708.160 (arrest of person ordered to appear under this chapter.

404-947

§ 708.040. Examination of debtor of judgment debtor [; exception for spouse of debtor]

708.040. (a)[After the issuance of an execution against property of the judgment debtor, and] upon proof by affidavit or otherwise, to the satisfaction of the court, that any person has property of the judgment debtor, or is indebted to him in an amount exceeding fifty dollars (\$50), the court may, by an order, require such person, or, in the case of a corporation, any officer or member thereof, to appear at a specified time and place before the court to answer concerning the indebtedness. [The spouse of a judgment debtor to the extent provided by Sections 970 and 971 of the Evidence Code may not be required to so

testify if there has not been a waiver of such provisions in the action giving rise to the judgment.]

(b) An order made pursuant to subdivision (a) shall contain the following statement in boldface type: "Failure to appear may subject the party served to arrest and punishment for contempt of court."

Comment. Section 708.040 reenacts the substance of the first sentence of former Section 717. Although Section 708.040 no longer specifically so provides, an order requiring the appearance of a debtor of one (or more) of several judgment debtors may still be issued. Moreover, Section 708.010 continues the authority for a court commissioner or other appointed officer both to issue an order requiring the appearance and to preside over the examination itself. See Section 708.010 and the Comment thereto.

[The second sentence of former Section 717 has been deleted; however, this works no change in the law. Evidence Code Sections 970 and 971 provide that a married person has a privilege not to testify or even be called to testify against his spouse in any proceeding. These privileges apply as well in the proceedings under this chapter unless, of course, the privilege has been waived earlier in the action giving rise to the judgment. See Evid. Code § 973 and Comment thereto.]

The second paragraph of former Section 717 provided for the arrest of a person where he failed to appear in compliance with an order issued under Section 717. This provision has been continued by Section 708.060. Subdivision (b) continues the third paragraph of former Section 717.

Note. The second sentence of former Section 717 was only enacted in 1972. However, we believe that the matter can be adequately covered by a Comment. Is this approach satisfactory?

We have placed the introductory clause to Section 708.040 in brackets because we do not believe that issuance of an execution should be a prerequisite to examination. May we delete this requirement? The notice provision was added by Cal. Stats., 1974, Ch. 214.

404-948

§ 708.050. Order applying property toward satisfaction of judgment

708.050. (a) After an examination pursuant to Section 709.020, 708.030, or 708.040, the court may order any property of the judgment debtor, not exempt from execution, in the hands of the debtor or any other person or any debt due to the judgment debtor, to be applied toward the satisfaction of the judgment.

(b) Notwithstanding subdivision (a), if a person alleged to have property of the judgment debtor or to be indebted to him, claims an interest in the property adverse to the judgment debtor or denies the debt, the court may not order that such interest or alleged debt be applied toward the satisfaction of the judgment, but the court may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced by the judgment creditor pursuant to Section 708.110.

Comment. Section 708.050 reenacts the substance of former Section 719 and a portion of former Section 720. Although Section 708.050 no longer refers specifically to referees, the orders authorized by this section may be made by a referee. See Section 708.010 and Comment thereto.

Note. This section provides only for restraining orders after examination. Present law does not provide specifically for orders restraining transfer of property pending the examination proceeding. Where a writ of execution has been levied on property, the levy will bind the property; however, a levy will not always have been made, and we wonder whether specific authority for a temporary restraining order, which provides protection pending the hearing, should be provided. Compare N.Y.C.P.L.R. § 5222 (T.R.O. issued by clerk or attorney for judgment creditor himself!).

404-949

§ 708.060. Arrest of person ordered to appear under this article

708.060. If a person ordered to appear pursuant to Section 708.020, 708.030, or 708.040 fails to appear, and if the order requiring his appearance has been served by a levying officer or some person specially appointed by the court in the order, or a registered process server, the court may, pursuant to a warrant, have such person brought before the court to answer [concerning the property and] for such failure to appear.

Comment. Section 708.060 reenacts the substance of the second paragraph of former Section 714 and former Section 717. [It also supersedes the authority to arrest the judgment debtor on the ex parte application of the judgment creditor which was provided by the last three sentences of former Section 715.]

Note. The sentence in brackets will be included if we delete subdivision (b) of Section 708.030 as recommended above. This section apparently limits the courts contempt power to cases where the order is served by one of the specified persons. Is it needed? Registered process servers were added by Cal. Stats. 1974, Chs. 213 and 214. The phrase in brackets is added since it would be absurd to arrest the debtor or third person for failure to appear and then fail to examine him.

404-950

§
§ 708.070. Examination; attendance outside county of residence or place of business; tender of mileage fees; costs

708.070. (a) Neither a judgment debtor nor a debtor of a judgment debtor shall be required to attend before a court located outside of the county in which he resides or in which he has a place of business unless

the distance is less than 150 miles from his place of residence or his place of business to such court.

(b) No process to require the attendance, pursuant to this article, of a debtor of a judgment debtor is effective unless, at the time of service of process, the person serving it tenders to such person mileage fees in the amount of fifteen cents (\$0.15) per mile necessary to be traveled, one way, from such person's residence to the court. Such mileage fees are an item of costs chargeable to the judgment debtor, and the court may, pursuant to Section 708.050, order the application of [any] property of the judgment debtor to the satisfaction of such costs.

Comment. Section 708.070 is substantively identical to former Section 717.1.

Note. Should the property chargeable for mileage fees be "non-exempt," as opposed to "any?"

404-951

§ 708.080. Examination proceedings in other counties

708.080. When any judgment debtor, or any person or corporation or officer or member of such corporation, does not reside or have a place of business in the county where the judgment roll is filed, or where the judgment is entered in the docket in the justice court, an order authorized to be made under any of the provisions of this article may be made by any court of similar jurisdiction of the county where such judgment debtor or other person resides or has a place of business or, if there be no court of similar jurisdiction in such county, by a court of higher jurisdiction therein, upon filing with the clerk or judge of said court

an abstract of the judgment, in the form prescribed by Section 674 and upon presenting to such court an affidavit showing the existence of the facts required to be shown herein. At the time of filing such abstract, there shall be paid to such clerk or judge, a filing fee of four dollars (\$4) when filed in a justice court or six dollars (\$6) when filed in a superior or municipal court.

Comment. Section 708.080 is substantively identical to former Section 722.

404-952

§ 708.090. Witnesses

708.090. Witnesses may be required to appear and testify before the court in any proceeding under this article in the same manner as upon the trial of an issue.

Comment. Section 708.090 is substantively identical to former Section 718. Although Section 708.090 no longer refers specifically to referees, the proceedings authorized by this article may be conducted by such officers. See Section 708.010 and Comment thereto.

405-394

Article 2. Creditor's Suit Against Third Person

§ 708.110. Action by judgment creditor to enforce right to possession of judgment debtor or payment of debt owed to judgment debtor

708.110. A judgment creditor may bring an action against any person against whom his judgment debtor could have maintained an action for the possession of personal property or the payment of a debt. The judgment debtor shall be joined in the action. If it is shown that the

judgment debtor is entitled to possession of the personal property, the judgment in the action shall require the sale of the property, or so much of it as is required to satisfy the judgment creditor's judgment, and the payment of the proceeds of the sale to the judgment creditor. If it is shown that the defendant in the action is indebted to the judgment debtor, a judgment in the action may be entered against the defendant and in favor of the judgment creditor. Costs of the action shall not be awarded against a person who did not dispute the judgment debtor's right to possession or the indebtedness.

Comment. Section 708.110 supersedes a portion of former Section 720 and authorizes suit by a judgment creditor to enforce his judgment debtor's right to possession of personal property or to collect a debt owed to his judgment debtor. This is a separate and distinct remedy. It is anticipated that it will be used only when the third person has failed to perform his duties under Section 704.070 (duties of garnishee under levy of execution) and an order requiring the application of property to the satisfaction of the judgment creditor's judgment is unavailable under Section 708.050. Costs of the action will not be awarded against a defendant who does not dispute the judgment debtor's rights; hence, the judgment creditor is encouraged to pursue the faster and less expensive procedures first. However, neither issuance or levy of execution nor an examination proceeding is a prerequisite to suit.

Note. Section 708.110 is based in part on Section 720 and also incorporates some features of N.Y.C.P.L.R. §§ 5225 and 5227 and Cal. Code Civ. Proc. § 488.550. We note that this section, Section 704.070 (liability of garnishee), and Section 708.050 (order following examination proceedings) are all limited to debts due and owing when the respective procedure is utilized. The staff believes that some provision should be made for payment of unmatured debts as they become due. This can be accomplished perhaps by the appointment of a receiver. See Section 708.210. However, we wonder whether a receiver is always necessary or desirable.

405-395

Article 3. Receiver to Enforce Judgment

§ 708.210. Receiver to enforce judgment

708.210. (a) Whenever an execution against property of a judgment debtor may properly be issued, whether or not an execution has been issued or returned, upon application of either the judgment creditor or judgment debtor after a noticed hearing, the court may appoint a receiver who may be authorized to do any acts designed to satisfy the judgment.

(b) The order of appointment shall specify the property to be received, the duties of the receiver, and the manner in which these duties are to be performed. The order may direct a levying officer to deliver to the receiver any property previously levied upon under a writ of execution or attachment and may authorize the receiver to sell any real or personal property in any manner and on such terms and conditions as will insure that a fair consideration is obtained by the sale. Any sale made pursuant to this section may be made absolute.

(c) The court, without the consent of the judgment debtor, may appoint the judgment creditor or his attorney as the receiver but, if such appointment is made, the receiver is not entitled to compensation.

(d) Except as otherwise provided in this article, the provisions of Chapter 5 (commencing with Section 564) and Chapter 5A (commencing with Section 571) of Title 7 govern the appointment, qualifications, powers, rights, and duties of a receiver appointed under this section.

Note. Section 708.210 is essentially a new section. Under present law, Section 564 provides in part:

In superior courts a receiver may be appointed by the court in which an action or proceeding is pending:

* * * * *

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment; or after sale of real property under execution of a judgment or pursuant to a decree of foreclosure or sale during the period provided by law for the redemption thereof from sale, to collect rents thereon, and to expend and disburse such rents as may be directed by the court or otherwise provided by law;

Municipal courts are also authorized to appoint a receiver in aid of execution as provided in paragraph 4 of Section 564. See Section 89(a)(8). However, the appointment of a receiver seems to have been approached by the courts in a generally restrictive way. The staff believes that this is unfortunate because, in some circumstances and with appropriate controls, we believe that the use of a receiver could be very beneficial to all concerned. We suggest accordingly that a section be added along the lines indicated in an attempt to encourage a new judicial approach.

Section 708.210 makes clear that issuance or return of an execution is not a prerequisite to the appointment of a receiver. We think that in some circumstances a receiver may be preferable to enforcement by execution, e.g., collection of the rents from an apartment house for a period of time may be much more desirable for both parties than sale of such property. Similarly, collection of periodic payments under notes, accounts receivable, and so on may be greatly simplified through use of a receiver. Hence, we have eliminated the suggestion that execution must first be pursued. See generally 5 B. Witkin, California Procedure Enforcement of Judgment §§ 179-182 at 3538-3540 (2d ed. 1971).

Section 568 provides a receiver with broad general powers; Section 568.5, however, requires the receiver to make sales in the same manner as under execution. We take a quite different approach. Subdivision (b) authorizes the court to permit sales to be made in any manner as long as a fair price is obtained. Our intent here is to use a "receiver" as a more flexible alternative to the usual sale under execution. For example, the creditor himself can be appointed the receiver for the sole purpose of selling a particular item of property through a negotiated private sale.

Section 566 provides that "no party, or attorney of a party, . . . can be appointed receiver . . . without the written consent of the parties . . ." Subdivision (c) changes this rule. The receiver must be bonded and, as long as the court is satisfied that the judgment creditor or his attorney will do a satisfactory job, we see no reason to require the judgment debtor's consent. Subdivisions (b) and (c) both

express features of the present law in New York. See N.Y.C.P.L.R. § 5228. Pennsylvania also seems to have a liberal approach to the use of a receiver. See Pa. R. Ct. 3114.

If the general scheme outlined above is satisfactory, it may be helpful to provide specifically for the priorities between judgment creditors who have utilized this procedure and those who have levied execution, recorded a judgment lien, or pursued some other remedy. We would assume that the basic rule--first in time, first in right--would apply but, if desired, we can make the point clear. Compare N.Y.C.P.L.R. § 5234.

406-210

§ 708.220. Receiver to transfer alcoholic beverage license

708.220. (a) A receiver may be appointed pursuant to Section 708.210 for the purpose of transferring an alcoholic beverage license held by the judgment debtor which is transferable under Article 5 (commencing with Business & Professions Code Section 24070) of Chapter 6 of the Alcoholic Beverage Control Act.

(b) If, at the hearing provided by Section 708.210, the judgment debtor shows that claims of creditors with priority over the judgment creditor as provided by Business and Professions Code Section 24074 exceed the probable sale price of the license, the court may not authorize the appointment of a receiver for the purpose of transferring the license.

(c) The receiver may exercise the powers of the licensee as necessary, and shall comply with the applicable provisions of Article 5 (commencing with Business and Professions Code Section 24070) of Chapter 6 of the Alcoholic Beverage Control Act and any applicable regulations of the Department of Alcoholic Beverage Control.

(d) An alcoholic beverage license may be applied to the satisfaction of a judgment for the payment of money only as provided in this section.

Comment. Section 708.220 allows the judgment creditor to force the sale by a receiver of an alcoholic beverage license held by the judgment debtor. Alcoholic beverage licenses are not subject to the normal execution procedures. See Section [705.020]. The Alcoholic Beverage Control Act (commencing with Business and Professions Code Section 23000) provides detailed procedures for the sale of alcoholic beverage licenses which make use of a receiver appropriate. Cf. Mollis v. Jiffy-Stitcher Co., 125 Cal. App.2d 236, 270 P.2d 25 (1954). Apparently, since the amendment to former Section 688 in 1959 (Cal. Stats. 1959, Ch. 2140, §1) alcoholic beverage licenses had not been reachable by any state enforcement process. See 37 Ops. Cal. Atty. Gen. 4 (1961).

In order to prevent punitive forced sales of the judgment debtor's license, subdivision (b) of Section 708.220 allows the judgment debtor to show that it is unlikely that the judgment held by the judgment creditor would be satisfied in whole or in part if the license were sold because claims of creditors with priority over the judgment creditor pursuant to Business and Professions Code Section 24074 exceed the probable sale price of the license. The scheme of priorities set out in Section 24074 is "mandatory and exclusive." See Grover Escrow Corp. v. Gole, 71 Cal.2d 61, 453 P.2d 461, 77 Cal. Rptr. 21 (1969); Bus. & Prof. Code § 24076.

Subdivision (c) enables the receiver to exercise the powers of the licensee necessary to comply with the transfer provisions of the Alcoholic Beverage Control Act. The strict regulation of all aspects of alcoholic beverage licenses by the Alcoholic Beverage Control Act requires that the receiver comply with the procedures set out in Article 5 (commencing with Business and Professions Code Section 24074) of Chapter 6 of the act and the regulations of the Department of Alcoholic Beverage Control.

Note. This section implements a decision made at the March 1974 meeting to provide a procedure for reaching liquor licenses. As an alternative it would be possible to provide for levy and sale by an officer; however, the staff thinks this would be awkward since the transfer would still have to be approved by the Department of Alcoholic Beverage Control. Special levy procedures would also have to be provided.

In Division of Labor Law Enforcement v. U.S., 301 F2d 82 (9th Cir. 1962), a federal officer levying on a liquor license for purposes of a tax lien under 26 U.S.C. Section 6331 took possession of the license certificate and sent notice to both the licensee and the ABC.

Business and Professions Code Section 24074, incorporated in the proposed section, provides as follows:

24074. Before the filing of such a transfer application with the department, if the intended transfer of the business or license involves a purchase price or consideration, the licensee and the intended transferee shall establish an escrow with some person, corporation, or association not a party to the transfer acting as escrow holder, and the intended transferee shall deposit with the escrow holder the full amount of the purchase price or consideration. The transfer application shall be accompanied by a description of the entire consideration. Such description shall include a designation of cash, checks, promissory notes, and tangible and intangible property, and the amount of each thereof. The licensee and intended transferee shall also enter into an agreement, which agreement shall be deposited with the escrow holder, directing the escrow holder, after the requirements for transfer as provided in Section 24049 are satisfied, to pay out of the purchase price or consideration, the claims of the bona fide creditors of the licensee who file their claims with the escrow holder before the escrow holder is notified by the department of its approval of the transfer of the license or if the purchase price or consideration is not sufficient to pay the claims in full, to distribute the consideration as follows:

First, to the payment of claims for wages, salaries, or fringe benefits of employees of the seller or transferor earned or accruing prior to the sale, transfer, or opening of an escrow for the sale thereof;

Second, to the payment of claims of secured creditors to the extent of the proceeds which arise from the sale of the security;

Third, to the United States for claims based on income or withholding taxes; and thereafter for claims based on any tax other than taxes specified in Section 24049;

Fourth, to the payment of claims on mechanics' liens;

Fifth, to the payment of escrow fees and the payment of claims for prevailing brokerage fees for services rendered and claims for reasonable attorney's fees for services rendered;

Sixth, to the payment of claims for goods sold and delivered to the transferor for resale at his licensed premises and the payment of claims for services rendered, performed, or supplied in connection with the operation of the licensed business.

Seventh, to the payment of all other claims. The payment of these claims if sufficient assets are not available for the payment of the claim in full shall be paid pro rata.

If the transferor licensee disputes any claim, the escrow holder shall notify the claimant, and the amount or pro rata amount thereof shall be retained by the escrow holder for a period of 25 days, and if not attached shall be paid to the transferor licensee. The agreement shall also provide that the escrow holder shall make the payment or distribution within a reasonable time after the completion of the transfer of the license.

Business and Professions Code Section 24075 purports to exempt receivers and others from the requirements of Section 24074:

24075. The provisions of Sections 24073 and 24074 do not apply to any transfer of a license made by an executor, administrator, guardian, conservator, trustee, receiver, or other person acting in the legal or proper discharge of official duty, or in the discharge of any trust imposed upon him by law, nor to any transfer or assignment, statutory or otherwise, made for the benefit of creditors, nor to a surviving spouse or fiduciary or other person within the meaning of Section 24071.

At present Section 24075 is ineffective so far as receivers or officers conducting execution sales are concerned because licenses may not be reached to satisfy a money judgment. It appears that the original intent of the language was to enable fiduciary officers to perform the functions of the escrow agent provided in Section 24074. The rigid system of priorities was enacted later and Section 24075 was apparently overlooked. The staff can see no reason why the persons listed in Section 24075 should be exempt from following the priorities set out in Section 24074. Accordingly, the staff proposes to amend Section 24075 by adding the following phrase: "Except as otherwise provided by Code of Civil Procedure Section 708.220, . . ."

405-397

Article 4. Installment Payment Order

§ 708.310. Installment payment order

708.310. (a) Whenever an execution against property of a judgment debtor may properly be issued, whether or not an execution has been issued or returned, upon application of the judgment creditor, after a noticed hearing where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation,

the court may order that the judgment debtor make specified installment payments to the judgment creditor.

(b) In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

(c) Upon application of either party, after a noticed hearing where it is shown that there has been a material change in circumstances since the time of the last prior hearing on the installment payment order, the court may modify or set aside such order.

Comment. Section 708.310 is substantively similar to N.Y.C.P.L.R. § 5226. It does not alter the rule that Chapter 7 provides the exclusive procedure for withholding earnings of an employee. However, it does seem to provide a useful supplementary remedy to reach income from federal employment, out-of-state employers, or from self-employment. Moreover, because it is not a garnishment or withholding procedure but rather operates directly against the judgment debtor, it can also be used to reach amounts greater than those permitted under the wage garnishment provisions (e.g., where the employee's income is large and the amount remaining after withholding is more generous than seems necessary) or it can be used by a second judgment creditor where a prior earnings withholding order is in effect. This should not undermine the wage garnishment law and subdivision (c) attempts to make clear that the order issued is not irrevocable and the judgment debtor can seek further review where the impact of the order has increased due to a change in circumstances. (Of course, on the other hand, the debtor's circumstances

may change for the better; hence, subdivision (c) permits either party to move to have the order modified, i.e., the creditor may seek to have the amount to be paid over increased.)

Note. Section 708.310 is new; we know of no present counterpart. Is the idea worth preserving?

In New York, this procedure has created certain priority problems since it was held in Schwartz v. Goldberg, 58 Misc.2d 308, 295 N.Y.S.2d 245 (1968), that a creditor using the installment payment order had priority over six creditors who were waiting in line for income executions (wage garnishment). It should also be noted that New York's wage garnishment law which exempts all but 10 percent of weekly wages over \$85 leaves more disposable income to the debtor to be subjected to an installment payment order than does either present California law or the Commission's wage garnishment recommendation.

The installment order procedure could be limited to situations where there is no wage garnishment. To do otherwise would defeat the purpose of the exemption of a certain amount of wages, whether paid or unpaid, when there has been a wage garnishment.

Another objection is that subdivision (b) creates a very vague test in the nature of a standard of living test.

The Commission should also note the newly-enacted Code of Civil Procedure Section 85 (Cal. Stats. 1974, Ch. 1415) which provides that in municipal or justice courts the judgment debtor may be ordered to pay the amount of the judgment "immediately or at any time and upon such terms and conditions, including installment payments, which the court may prescribe." In making its determination the court must consider factors relevant to exemptions and examinations of debtors.

This procedure may be so similar to that proposed in Article 8 that the two would best be merged. What does the Commission wish to do?

969-010

Article 5. Collection of Judgment Where

Judgment Debtor is Creditor of Public Entity

§ 708.410. "Public entity," "state," and "local public entity" defined

708.410. As used in this article "public entity" means the state, a county, city, district, public authority, public agency, and any other political subdivision in the state. "State" means the State of California

and includes the Regents of the State of California. "Local public entity" means any public entity other than the state.

969-011

§ 708.420. Exclusive procedure provided by this article and Chapter 7

708.420. A judgment for the payment of money against a person to whom money is owing and unpaid by a public entity, may only be enforced against such entity in the manner provided by this article and Chapter 7 (commencing with Section [707.010]).

405-380

§ 708.430. Collection of judgment where judgment debtor is creditor of state or political subdivision

708.430. (a) Whenever a judgment for the payment of money is rendered against a person to whom money is owing and unpaid by a public entity, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit which states that he desires to avail himself of the relief provided by this section and states the exact amount then due, owing, and unpaid on the judgment.

(b) If the money is owing and unpaid by the state to the judgment debtor, the judgment creditor shall file the abstract or transcript and affidavit with the state department, board, office, or commission owing such money to the judgment debtor prior to the time the department, board, office, or commission presents the claim of the judgment debtor therefor to the State Controller. The department, board, office, or commission in presenting the claim of the judgment debtor to the State

Controller shall note thereunder the fact of the filing of the abstract or transcript and affidavit and state the amount unpaid on the judgment as shown by the affidavit and shall also note any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the state by reason of advances for expenses or for any other purpose. The State Controller, to discharge the claim of the judgment debtor, shall pay into the court which issued the abstract or transcript, by his warrant or check payable to the court, the whole or such portion of the amount due the judgment debtor on the claim, after deducting from the claim an amount sufficient to reimburse the department, board, office, or commission for any amounts advanced to the judgment debtor or by him owed to the state, as will satisfy in full or to the greatest extent the amount unpaid on the judgment and the balance thereof, if any, to the judgment debtor.

(c) If the money is owing and unpaid to the judgment debtor by any local public entity the judgment creditor shall file the abstract or transcript and affidavit with the auditor of such local public entity (and in case there be no auditor then with the official whose duty corresponds to that of auditor). The auditor (or other official), to discharge the claim of the judgment debtor, shall pay into the court which issued the abstract or transcript, by his warrant or check payable to the court, the whole or such portion of the amount due the judgment debtor on the claim, after deducting from the claim an amount sufficient to reimburse the local public entity for any amounts advanced to the judgment debtor or by him owed to such public entity, as will satisfy in full or to the greatest extent the amount unpaid on the judgment and the balance thereof, if any, to the judgment debtor.

(d) The judgment creditor upon filing the abstract or transcript and affidavit shall pay a fee of two dollars and fifty cents (\$2.50) to the person or agency with whom the same is filed.

(e) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution to the judgment creditor and the balance thereof, if any, to the judgment debtor. The procedure for determining the claim of exemption shall be governed by the procedure set forth in Section [709.000], and the court rendering the judgment shall be considered the levying officer for the purpose of that section.

(f) In the event the money owing to a judgment debtor by any public entity is owing by reason of an award made in a condemnation proceeding brought by the public entity, such public entity may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried and shall file therewith the abstract or transcript of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251. Upon such payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in the award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to the award. At such time and place, the court shall make such determination and order the distribution of the money held by the county clerk in accordance therewith.

(g) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any

duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

(h) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any overpayment of tax, penalty, or interest, or interest allowable with respect to such overpayment, under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code.

(i) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section.

(j) This section does not authorize the withholding of earnings of a public officer or employee. The earnings of a public officer or employee may be withheld only pursuant to Chapter 7 (commencing with Section 707.010).

Comment. Section 708.430 is substantively identical to former Section 710.

Note. Section 708.430 is presented here in substantially the same form as it appears in our old wage garnishment recommendation. Of course, its final content depends on what form any new recommendation takes.

405-482

§ 708.440. Collection of judgment where judgment debtor is contractor on public work; subordination to claims of laborers and materialmen

708.440. (a) Where the judgment debtor named in any abstract or transcript of judgment filed under Section 708.430 is a contractor upon any public work, the cost of which is to be paid out of any public moneys voted, appropriated, or otherwise set apart for the purpose of paying therefor, only so much of the contract price shall be deemed owing to the contractor, within the meaning of Section 708.430, as may remain payable to him under the terms of his contract, upon the completion thereof, after the sums severally due and to become due to all persons who perform labor upon such work or who bestow skill or other necessary services or furnish materials, appliances, teams, or power used or consumed in the performance of such work have been ascertained and paid.

(b) In ascertaining the sums severally due or to become due to the persons who perform labor upon public works or other necessary services or furnish materials, appliances, teams, or power used or consumed in the performance of such work, only such claims shall be considered as are filed against the moneys due or to become due to the judgment debtor in accordance with the provisions of Chapter 4 (commencing with Section 3179) of Title 15 of Part 4 of Division 3 of the Civil Code.

(c) The controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract shall not draw his warrant in favor of the court which issued the abstract or transcript until the contract is completed and the payments

above specified are made and then only for the excess, if any, of the contract price over the aggregate of the sums so paid.

Comment. Section 708.440 is substantively identical to former Section 710a.

Note. This section has been tentatively approved; however, the Commission reserved for further consideration the question whether a comparable provision should be made applicable to private construction contracts.

969-013

Article 6. Charging Orders

§ 708.510. Order charging interest of partner in partnership property; appointment of receiver; exclusive procedure

708.510 (a) Whenever an execution against property of a judgment debtor may properly be issued, whether or not an execution has been issued or returned, upon application by the judgment creditor of a partner to the court which entered the judgment, and after notice to each co-partner of the judgment debtor and a hearing, the court may [charge the interest of the debtor partner with payment of the unsatisfied amount of the judgment with interest thereon, may appoint a receiver as provided in Section 708.000 to collect the debtor's share of the profits and any other money as it becomes due to him from the partnership, and may] make any [other] orders directed to the partners or to a receiver appointed by the court which are necessary to secure the satisfaction of the judgment.

(b) If the judgment is not satisfied within a reasonable period of time pursuant to subdivision (a), the court in its discretion may

appoint a receiver, if it has not previously done so, and authorize the receiver to sell the interest charged in the manner and on the terms and conditions prescribed by the court. Before sale, the interest charged may be purchased without thereby causing a dissolution (1) with separate property, by any one or more of the partners, or (2) with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(c) Except on a claim against the partnership, the right of a partner in specific partnership property may only be applied to the satisfaction of a judgment pursuant to this section.

Comment. Section 708.510 provides the exclusive procedure for reaching the interest of a partner in specific partnership property where the partner, but not the partnership, is a judgment debtor. This section implements the practice developed under Corporations Code Section 15028.

405-483

Article 7. Lien on Cause of Action and Judgment

§ 708.610. Judgment creditor of party; order granting lien; notice; intervention; extent of lien; endorsement upon judgment and abstract

708.610. (a) Upon motion of a judgment creditor of any party to an action or special proceeding made in the court in which the action or proceeding is pending upon written notice to all parties, the court may, in its discretion, order that the judgment creditor be granted a lien upon the cause of action, and upon any judgment subsequently procured in such action or proceeding, and, during the pendency of such action, may permit such judgment creditor to intervene therein.

(b) The judgment creditor shall have a lien to the extent of his judgment upon all money recovered by his judgment debtor in such action or proceeding, and no compromise, settlement, or satisfaction shall be entered into by or on behalf of such debtor without the consent of such judgment creditor unless his lien is sooner satisfied or discharged.

(c) The clerk or judge of the court shall endorse upon the judgment recovered in such action or proceeding a statement of the existence of the lien, the date of the entry of the order creating the lien, and the place where entered; and any abstract issued upon the judgment shall contain, in addition to the matters set forth in Section 674, a statement of the lien in favor of such judgment creditor.

Comment. Section 708.610 is substantively identical to subdivision (a) of former Section 688.1. See generally Section [705.020] and the Comment thereto.

969-012

§ 708.620. Exclusive procedure provided by this article; other liens preserved

708.620. (a) When an action or special proceeding is pending in which the judgment debtor is a party, this article provides the exclusive procedure for the judgment creditor to obtain a lien upon the cause of action and any judgment subsequently obtained.

(b) Any lien on the cause of action obtained before the action or special proceeding was commenced is continued and is superior to the lien provided by this article.

Comment. Subdivision (a) of Section 708.620 makes clear that once an action or special proceeding, in which the judgment debtor is a

party, has been commenced, the judgment creditor may obtain a lien on the cause of action and any eventual judgment only by following the procedure set out in Section 708.610 although prior liens are continued as provided in subdivision (b). See e.g., §§ 708.050 (order applying property toward satisfaction of judgment and 708.110 (creditor's suit).

969-024

Article 8. Assignment Orders

§ 708.710. Order assigning rights to future payments

708.710. (a) Whenever an execution against property of a judgment debtor may properly be issued, whether or not an execution has been issued or returned, upon application of the judgment creditor and after a noticed hearing, the court may order the judgment debtor to assign to the judgment creditor or to a receiver appointed pursuant to Article 3 (commencing with Section 708.210) all or part of any right to future payments, including, but not limited to, payments and wages due from the federal government, rents, commissions, surplus amounts from spendthrift trust, and payments due from a patent or copyright.

(b) When determining whether to order an assignment or fixing the amount of an assignment of part of a right to future payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

Note. Article 8 provides a procedure for reaching certain forms of property which cannot be reached by levy of execution and sale. Patents and copyrights have been reached by creditor's suits and supplementary proceedings where the debtor is ordered to assign his patent rights to a receiver. See Pacific Bank v. Robinson, 57 Cal. 520 (1881)(patent rights); Finnegan v. Finnegan, 64 Cal. App.2d 109, 148 P.2d 37 (1944) (patent rights); Security-First Nat'l Bank v. Republic Pictures Corp., 97 F. Supp. 360 (S.D. Cal. 1951)(copyrights). The surplus income from a spendthrift trust may be reached by a creditor's suit where it is shown that there is no provision in the trust for accumulation of surplus income and that the income is not at all necessary for the beneficiary's education and support. See Civil Code § 859; Estate of Lawrence, 267 Cal. App.2d 77, 72 Cal. Rptr. 851 (1968); Canfield v. Security-First Nat'l Bank, 13 Cal. 2d 1, 87 P.2d 830 (1939). Wages due a federal employee may not be garnished, but may be reached in supplementary proceedings by an order to the debtor to endorse and deliver his pay-checks to a receiver. See Sheridan v. Sheridan, 33 Cal. App.3d 917, 109 Cal. Rptr. 466 (1972).

404-343

§ 708.720. Modifying or setting aside assignment order

708.720. Upon application of either party, after a noticed hearing where it is shown that there has been a material change in circumstances since the time of the last prior hearing on the installment payment order, the court may modify or set aside such order, except as provided in Section 708.730.

969-050

§ 708.730. Assignment by receiver of right to future payment

708.730. Rights to future payments may be assigned to third persons only as provided in Article 3 (commencing with Section 708.210). Where an assignment by a receiver to a third person is made absolute, the order of assignment made pursuant to Section 708.710 may not be modified or set aside.

Note. The intent of this provision is to guarantee court supervision of any assignment of a right to future payment by the receiver to third persons. Section 708.210 tentatively provides that the sale or assignment of property by the receiver (who may be the judgment creditor) must be on such terms and conditions as will insure a fair consideration. Normally it is contemplated that collection of the payments as they accrue is the best method to satisfy the judgment, but there may be circumstances where outright sale of the right to future payments is advantageous to both debtor and creditor.

405-996

§ 708.740. Recording patent and copyright assignment

708.740. (a) An assignment of a patent pursuant to this article shall be recorded in the United States Patent Office as provided by federal law.

(b) An assignment of a copyright pursuant to this article shall be recorded in the United States Copyright Office as provided by federal law.

Note. This section puts the creditor or receiver on notice of the existence of 35 U.S.C. § 261 (1970), which provides in part:

Subject to the provisions of this title, patents shall have the attributes of personal property.

Applications for patents, or any interest therein shall be assignable in law by an instrument in writing An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for valuable consideration, without notice, unless it is recorded in the Patent Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

And 17 U.S.C. § 28 (1970):

Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

Does the Commission think we need such a provision, or should reference be made only in a Comment?

992-904

CHAPTER 9. EXEMPTIONS

Note. The Commission has postponed work on the exemption provisions until the nature of the federal bankruptcy exemptions is certain.

992-905

CHAPTER 10. ENFORCEMENT OF JUDGMENTS FOR THE POSSESSION
OR SALE OF PROPERTY AND CONTEMPT ORDERS

Article 1. Enforcement of Judgment for Possession of
Personal Property

§ 710.010. Issuance of writ of possession

710.010. A judgment for the possession of personal property may be enforced by a writ of possession. The writ [shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk or judge, and shall identify the judgment, stating the court, the county, and, in municipal and justice courts, the judicial district, where the judgment is entered. The writ] shall be directed to a levying officer in the county where the property, or some part thereof, is situated and shall describe the property and state its value. The writ shall require the levying officer to search for and take custody of the property in the manner prescribed by Section 514.010 and promptly thereafter deliver possession of the property described in the writ to the party entitled thereto. The writ of possession may also require the levying officer to satisfy any costs, damages, rents, or profits recovered by the judgment in the same manner as a writ of execution.

Comment. Section 710.010 provides for the enforcement of a judgment for the possession of personal property by a writ of possession. This section continues the substance of the prior law under Sections 682(4), 684, 684.1, and 687. However, the term "writ of possession" is used here to be consistent with the usage in Chapter 2 (commencing with Section 511.010) of Title 7. It should be noted that the judgment

enforced hereunder is one which entitles a party to specific property, i.e., the party in whose favor the judgment runs is not obliged to accept merely the value of the property. See Griffith v. Reddick, 41 Cal. App. 458, 182 P. 984 (1919). The value of the property is substituted only where delivery becomes impossible by reason of destruction or otherwise. See Section 710.020. Cf. Steele v. Marlborough Hall Corp., 100 Cal. App. 491, 280 P. 380 (1929).

The requirements of former Section 682(4) that costs, damages, rents, or profits be satisfied first from personal property and only then from real property and of former Section 684.1 that the levying officer place a keeper in personal property occupied as a dwelling for at least two days have been discontinued.

Note. We have used the term "writ of possession" here in connection with personal property and the term "writ of restitution" in the next article (Section 710.110) in connection with real property. Present law refers to a writ of execution in both instances although the Judicial Council forms are then subtitled "Possession of Personal Property" and "Possession of Real Property" respectively. The staff believes that there is some benefit in separating the special provisions relating to the enforcement of judgments for the possession of real and personal property into two articles as is done in this draft. Is this a satisfactory solution?

The language in brackets provides formal requirements similar to those in Section 703.020. Is it needed?

992-907

§ 710.020. Writ of possession unsatisfied; return; issuance of writ of execution

710.020. If the property described in the writ of possession cannot be delivered, the judgment shall be satisfied in the same manner as a judgment for the payment of money. The levying officer shall return the writ of possession and a writ of execution shall be issued as provided in Chapter 3 (commencing with Section 703.010).

Comment. The first sentence of Section 710.020 continues the substance of a part of former Section 682(4). The last sentence makes

§ 710.020

clear that the writ of possession must be returned where the property described in it cannot be delivered and that a writ of execution is required before the debtor's property may be levied upon for the value of the personal property described in the writ of possession.

405-470

§ 710.030. Issuance of order directing transfer

710.030. After entry of judgment for the possession of personal property, in addition to a writ of possession, the court may issue an order directing any party in possession of the property to transfer possession of the property to the party entitled thereto. The order shall contain a notice to the party in possession that failure to comply with the order may subject him to being held in contempt of court.

Comment. Section 710.030 is new. However, it is based on a comparable provision (Section 512.070) which is applicable before judgment. This subdivision simply makes clear that the court has power to issue a "turnover" order directing a party to cooperate in transferring possession. The order is not issued in lieu of a writ but rather in addition to or in aid of a writ, permitting the person entitled to possession to select a more informal and less expensive means of securing possession.

Note. Does the Commission think this is a useful addition?

405-463

§ 710.040. Appointment of receiver

710.040. Upon application of the judgment creditor and after a noticed hearing, the court may order the appointment of a receiver pursuant to Article 3 (commencing with Section 708.210) of Chapter 8

where enforcement of a judgment for the possession of personal property would be aided by such appointment.

Comment. Section 710.040, together with Article 3 of Chapter 8 (receivers), supersedes the authority formerly provided by paragraphs 3 and 4 of Section 564.

405-928

Article 2. Enforcement of judgment for
Possession of Real Property

§ 710.110. Issuance of writ of restitution

710.110. A judgment for the possession of real property may be enforced by a writ of restitution. The writ [shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk or judge, and shall identify the judgment, stating the court, the county, and, in municipal and justice courts, the judicial district, where the judgment is entered. The writ] shall be directed to a levying officer in the county where the property, or some part thereof, is situated. The writ shall require the levying officer to place the party entitled thereto in possession of the property described. The levying officer shall serve the notices provided by subdivision (d) of Section 1174 in the manner prescribed therein. If necessary, the levying officer shall remove the occupant and place the party entitled thereto in possession in the manner prescribed by subdivision (d) of Section 1174. The writ of restitution may require the officer to satisfy any costs, damages, rents, or profits recovered by the judgment in the same manner as a writ of execution.

Comment. Section 710.110 provides for the enforcement of a judgment for the possession of real property by a writ of restitution. This section is based on former Sections 682(4), 684, and 687. However, under former law, the manner of enforcement was not prescribed by statute; Section 710.110 incorporates by reference the provisions for delivery of possession of the premises following an action for unlawful detainer set forth in Section 1174. Moreover, the term "writ of restitution" is used here to be consistent with the term used in Section 1174. The requirement of former Section 682(4) that costs, damages, rents, or profits be satisfied first from personal property and only then from real property has been discontinued.

Note. The above Comment is self-explanatory. The applicable provisions in Section 1174 are set out below in the form in which they have been enacted pursuant to our landlord-tenant recommendation and our attachment recommendation:

(d) A plaintiff, having obtained a writ of restitution of the premises pursuant to an action for unlawful detainer, shall be entitled to have the premises restored to him by officers charged with the enforcement of such writs. Promptly upon payment of reasonable costs of service, the enforcing officer shall serve an occupant or post a copy of the writ in the same manner as upon levy of writ of attachment pursuant to subdivision (d) of Section 488.310. In addition, where the copy is posted on the property, another copy of the writ shall thereafter be mailed to the defendant at his business or residence address last known to the plaintiff or his attorney or, if no such address is known, at the premises. The writ of restitution of the premises shall include a statement that personal property remaining on the premises at the time of its restitution to the landlord will be sold or otherwise disposed of in accordance with Section 1174 of the Code of Civil Procedure unless the tenant or the owner pays the landlord the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the premises are restored to the landlord. If the tenant does not vacate the premises within five days from the date of service, or, if the copy of the writ is posted, within five days from the date of mailing of the additional notice, the enforcing officer shall remove the tenant from the premises and place the plaintiff in possession thereof. It shall be the duty of the party delivering the writ to the officer for execution to furnish the information required by the officer to comply with this section.

The language in brackets provides formal requirements similar to those in Section 703.020. Is it needed?

405-929

§ 710.120. Issuance of order directing transfer

710.120. After entry of judgment for the possession of real property, in addition to a writ of restitution, the court may issue an order directing any party in possession of the property to transfer possession of the property to the party entitled thereto. The order shall contain a notice to the party in possession that failure to comply with the order may subject him to being held in contempt of court.

Comment. Section 710.120 is new. It is the same in substance as Section 710.030. See Section 710.030 and Comment.

Note. Is this a useful provision?

405-473

§ 710.130. Appointment of receiver

710.130. Upon application of the judgment creditor and after a noticed hearing, the court may order the appointment of a receiver pursuant to Article 3 (commencing with Section 708.210) of Chapter 8 where enforcement of a judgment for the possession of real property would be aided by such appointment.

Comment. Section 710.130, together with Article 3 of Chapter 8, supersedes the authority formerly provided by paragraphs 3 and 4 of Section 564.

405-472

Article 3. Enforcement of Judgment for Sale of Property

§ 710.210. Issuance of writ of enforcement

710.210. A judgment for the sale of real or personal property may be enforced by a writ of enforcement. The writ [shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk or judge, and shall identify the judgment, stating the court, the county, and, in municipal and justice courts, the judicial district, where the judgment is entered. The writ] shall state the material parts of the judgment and shall require the proper officer to execute the judgment by taking custody of any personal property included in the judgment and making the sale and applying the proceeds in conformity with the judgment.

Comment. Section 710.210 provides for the enforcement of a judgment requiring the sale of either real or personal property. The section is based on former Sections 682 and 684. See Laubisch v. Roberdo, 43 Cal.2d 702, 277 P.2d 9 (1954)(judgment which requires sale of specific property must be enforced by writ of enforcement). It should be noted that the writ here is directed to the "proper officer." This may be a "levying officer" as defined in Section [702.000] or a commissioner or elisor as provided in Section 726. See also Government Code Section 27469 (coroner discharges duties of sheriff where latter is a party to the proceeding).

Note. For the time being, this section simply continues portions of the present law. Eventually, we believe, more specific directions--at least for making the sale--may be required. We also believe that this section (or perhaps Section 703.040) should be revised to permit third persons to request notice of sale under a writ of enforcement as well as a writ of execution. The language in brackets provides formal requirements similar to those in Section 703.020.

405-473

§ 710.220. Appointment of receiver

710.220. Upon application of the judgment creditor and after a noticed hearing, the court may order the appointment of a receiver pursuant to Article 3 (commencing with Section 708.210) of Chapter 8 where enforcement of a judgment for the sale of real or personal property would be aided by such appointment.

Comment. Section 710.220, together with Article 3 of Chapter 4, supersedes the authority formerly provided by paragraphs 3 and 4 of Section 564.

968-904

Article 4. Enforcement of Judgment by Contempt

§ 710.310. Enforcement by contempt

710.310. Where a judgment requires the performance of any act not described in this title, a certified copy of the judgment may be served upon the party against whom the judgment is rendered or upon the person or officer required by the judgment or by law to obey the judgment and obedience thereto may be enforced by the power of the court to punish for contempt [obedience thereto may be enforced by the court].

Comment. Section 710.310 continues the substance of a portion of former Section 684. As to the power of the court to punish for contempt generally, see Section 1209. [For particular orders which may be enforced by contempt, see Sections 710.030 (order requiring delivery of chattel), 710.120 (order requiring delivery of realty).]

Note. The bracketed phrase employs the language of present Section 684. It has been suggested that the latter would be preferable because

it seems less inflexible. We think that the substance is the same and would be satisfied with either version, although the existing language is somewhat vague.

405-423

CHAPTER 11. LIABILITY FOR WRONGFUL EXECUTION

§ 711.010. Acts constituting wrongful execution

711.010. A wrongful execution consists of any of the following:

(a) The levy of a writ of execution on property possessing a value greatly in excess of the amount required to satisfy the judgment on which the execution is issued except where the judgment creditor shows that he reasonably believed that all other property of the judgment debtor was exempt from or not subject to execution.

(c) The levy of a writ of execution on property of a person other than the judgment debtor except that it is not a wrongful execution if all of the following exist:

(1) The property levied on is required by law to be registered or recorded in the name of the owner.

(2) It appeared that, at the time of the levy, the person against whom the writ was issued was such registered or record owner.

(3) The judgment creditor made the levy in good faith and in reliance on the registered or recorded ownership.

Note. Sections 711.010 through 711.060 are obviously based on the comparable provisions included in the prejudgment attachment recommendation. We are not so sure that in this area any such sections are necessary or desirable; however, we have included them to stimulate and serve as a focus for discussion. These provisions cover only wrongful execution as opposed to wrongful enforcement.

405-424

§ 711.020. Liability for wrongful execution

711.020. The liability of a judgment creditor for causing a wrongful execution includes both of the following:

(a) All damages proximately caused to the judgment debtor or any other person by the wrongful execution, whether direct or consequential.

(b) All costs and expenses, including attorney's fees, reasonably expended in defeating the execution.

Note. These rules would probably change existing law. See, e.g., Selden v. Cashman, 20 Cal. 56 (1862)(lost profits not recoverable).

405-425

§ 711.030. Procedure for recovery for wrongful execution

711.030. (a) A judgment debtor may recover damages for wrongful execution by motion made in the court which issued the execution without necessity of an independent action.

(b) A motion under this section may not be filed or notice served on the judgment creditor until after the time for appeal from the judgment has expired or, if an appeal is filed, until such appeal is finally determined. The motion may not be filed or notice served more than one year after the levy upon which the claim is based. The period during which an appeal is pending is not part of the time limited for filing or serving under this section.

(c) The judgment debtor may join in such motion any sureties on an undertaking for wrongful execution liability, and any judgment of liability shall bind the judgment creditor and sureties jointly and severally, but the liability of a surety is limited to the amount of the undertaking.

(d) The procedure for recovery of wrongful execution damages on motion of the judgment debtor is as provided in Section 1058a for recovery on an undertaking.

405-426

§ 711.040. Setoff of wrongful execution recovery

711.040. The amount of any recovery for wrongful execution shall be offset insofar as possible against any unsatisfied amounts owed to the judgment creditor by the judgment debtor on the judgment in the action for which wrongful execution damages are awarded.

405-427

§ 711.050. Recovery by third-party claimants

711.050. A person not originally a party to an action whose property is executed against is entitled to intervene in the action and to recover damages for wrongful execution to the same extent and in the same manner as a judgment debtor in the action. For this purpose, the person whose property is executed against shall be deemed to be the beneficiary of any undertaking given to permit execution against such property and has all rights of the beneficiary, including the right to recover such damages by using the procedure provided by Section 711.030.

405-428

§ 711.060. Common law remedies not limited

711.060. Nothing in this chapter limits the right to recover for damages caused by an execution or other enforcement process based on any common law theory of recovery.