

Memorandum 76-110

Subject: Study 39.230 - Enforcement of Judgments (Supplementary Procedures)

This memorandum considers three articles of the chapter on supplementary procedures in the enforcement of judgments law: receivers, liens on causes of action and judgments, and assignment orders. The draft of these provisions is attached as Exhibit 4.

Receivers

The subject of receivers to enforce money judgments was considered at the September meeting; the draft of Section 705.310 (see Exhibit 4) implements the tentative decisions made at that meeting. We are bringing this subject back for your consideration in light of the comments received from Professor Riesenfeld, the Commission's consultant on creditors' remedies, which we solicited at the Commission's request. (Professor Riesenfeld's memorandum is attached hereto as Exhibit 1; the earlier draft of the receiver provisions (Section 705.210) to which his comments are directed and which was considered at the September meeting is attached as Exhibit 2.)

Professor Riesenfeld recognizes that receivership is a harsh and expensive remedy that should be used only where enforcement by execution or some other means would not be adequate. This view is consistent with the Commission's decisions at the September meeting as reflected in the draft of Section 705.310.

Professor Riesenfeld would not retain the provision requiring return of the writ of execution unsatisfied. The Commission tentatively decided in September to retain this provision as an alternative prerequisite. (See Section 705.310(a)(1) in Exhibit 4.) The staff agrees with Professor

Riesenfeld's recommendation that this "relic of the old creditors bill when law and equity were administered by different courts" be eliminated.

When draft Section 705.210 was considered at the September meeting, the Commission decided not to adopt the staff's recommendations to permit the judgment debtor to apply for the appointment of a receiver and to require a noticed hearing on the appointment. We assume that the Commission does not intend to reconsider these decisions. The provision to the effect that a receiver may be appointed whenever a writ could be issued is not needed in this section because it is provided elsewhere in a general section. We have revised the draft of Section 705.310 to reflect the recommendations made by Professor Riesenfeld:

705.310. (a) The court may appoint a receiver to enforce the judgment where the judgment creditor shows that, considering the interests of both the judgment creditor and the judgment debtor, the appointment of a receiver is the most reasonable method to obtain fair and orderly satisfaction of the judgment.

(b) Except as otherwise provided in subdivision (a), 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.

Comment. Section 705.310 provides for the appointment of a receiver to enforce the judgment where it is shown to be the most fair and orderly manner of enforcement. Hence, a receiver may be appointed where a writ of execution would not reach certain non-exempt property and other remedies appear inadequate. Section 705.310 eliminates as a prerequisite to the appointment of a receiver a showing that a writ of execution has been returned unsatisfied or that the judgment debtor refuses to apply his property in satisfaction of the judgment formerly required by Section 564. The appointment of a receiver is subject to the general rules concerning the time within which judgments may be enforced. See Sections 702.170-702.190.

Liens of Causes of Action and Judgments

Sections 705.610 through 705.640 (see Exhibit 4), providing for liens on causes of action and judgments, have not yet been considered by the Commission. These provisions continue existing law. (See Sections 688 and 688.1, attached as Exhibit 3.)

We have not attempted to deal with a priority problem that is revealed by the decisions. In Del Conte Masonry Co. v. N. T. Lewis, 16 Cal. App.3d 678, 94 Cal. Rptr. 439 (1971), the court held that a lien granted under Section 688.1 to Del Conte's creditor had priority over a contractual lien granted by Del Conte to its attorney to secure fees and other creditors after notice of motion but before the hearing under Section 688.1. The court applied an equitable rule giving priority to the one who first asserts a claim rather than the normal rule of first in time. In Takehara v. H. C. Muddox Co., 8 Cal.3d 168, 501 P.2d 913, 104 Cal. Rptr. 345 (1972), the court held that the lien first created has priority. In this case, satisfaction of a 1965 lien on the cause of action completely exhausted the recovery on the judgment; other creditors who had obtained an order for a lien under Section 688.1 in 1968 claimed that they should share in the recovery on the theory that the liens all attached when the judgment was rendered.

Assignment Orders

Sections 705.710 and 705.720 (see Exhibit 4) provide a new procedure for ordering the assignment of rights to future payments, which cannot conveniently be reached by normal collection procedures under existing law. This remedy was worked out some time ago with Professor Riesenfeld.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

Observations on
Proposed Section 705.210
[Memorandum 75-70]
(Receivers)

by

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Consultant

The proposed section 705.210 authorizes the appointment of a receiver in aid of execution without setting forth any substantive principles guiding the exercise of discretion by the appointing judge and without requiring the return of an unsatisfied writ of execution as a prerequisite in any case.

In my judgment the proposal of dispensing with the need for the return of an unsatisfied writ of execution for the appointment of a receiver in all cases of proceedings in aid of execution is sound, but I suggest that the governing section should specify that a receiver should only be appointed if execution or any other court order in aid of execution would not furnish an efficient and fair remedy for the collection of the judgment.

1.

Obsolescence of the Need for an Unsatisfied Execution

The requirement of the return of an execution nulla bona is an atavism which under modern conditions, performs no valid functions, particularly after the

fusion of the law and equity.

A sheriff will not make any independent effort to find and levy on property of the judgment debtor unless the creditor instructs him as to what assets should be levied upon and he certainly will return the writ as unsatisfied if so instructed by the creditor. Thus, an unsatisfied return of a writ of execution no longer creates a valid presumption of the absence of any property subject to levy and sale or collection. It is no more than an empty formality causing merely a delay of ten days for the creditor and collection costs for the debtor.

Modern rules of procedure in many other jurisdictions have abolished the need for the return of a writ nulla bona which is merely a relic of the days of the old creditors bill when law and equity were administered by different courts. Examples from other jurisdictions are:

Florida, R.C.P., Rules 1-560 and 1-570;

Indiana, T.R. 69 (E) in conjunction with Ind.
Stat. Ann. (Code Ed.) §§ 34-1-44-1,
34-1-44-2 and 34-1-12-1;

Maryland, R.P., Rule 628 (a) and (d);

New Jersey, R.C.P., Rules 4:59-1 (d) and 6:7-2 (a);

New York, C.P.L.R., § 5228;

Pennsylvania, R.C.P., Rules 3117 and 3118;

Utah, R.C.P. Rule, 69 (o) and (p), but cf. Rule 66
(a)(4).

Most of all, even under present California law, a strong case can be made for the proposition that the return of an unsatisfied writ of execution has ceased to be even an alternative prerequisite for the appointment of a receiver in aid of execution.

True, Cal. C.C.P. § 564 (4) authorized appointment of a receiver "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." It must be noted, however, that the words quoted supplement C.C.P. §§ 714 and 715 governing proceedings for examination of judgment debtor (§ 714) and proceedings for application of property in case of recalcitrancy (§ 715). In the latter case the initiation of proceedings did not require more than the issuance of a writ of execution since the enactment of the Code in 1872, while in the former case a return nulla bona remained a prerequisite until its deletion in 1955. As the appointment of receivers in aid of execution is sought in proceedings either under § 714 or § 715 it would seem that the amendment of § 714 in 1955 by implication also amended § 564 (5), inasmuch as the receiver will be appointed either for property discovered pursuant to § 714 or unjustly withheld in accordance with § 715. It would seem to be quite illogical to still require the return of an unsatisfied

writ as prerequisite for the appointment of a receiver for property discovered in proceedings under § 714, because an outstanding writ would be necessary to expose the property thus discovered to the sheriff for levy and sale. Consequently the only rational conclusion must be that receivers may be appointed either in proceedings under § 714 or under § 715 without the need for a return of an unsatisfied writ and that the literal inconsistency between § 714 as amended and § 564 (4) is due to a technical oversight.

California case law strongly supports the view advanced in this memorandum. The leading California cases on the appointment of receivers in aid of execution are

Bruton v. Tearle, 7 C2d 48, 59 P.2d. 953 (1936),

Habenicht v. Lissak, 78 Cal. 351, 20 Pac. 874 (1889),

Pacific Bank v. Robinson, 57 Ca. 520 (1881),

Morand v. Superior Court, 38 C.A. 3d 347, 113 Cal. Repr. 281 (1974),

Hustead v. Superior Court, 2 CA3 786, 93 Cal. Rptr. 26 (1969),

Tucker v. Fontes, 70 CA2d 766, 151 P2d 697 (1945),

Medical P. Ass'n. v. Short, 36 CA2d Supp. 745, 92 P2d 961 (1935),

McCutcheon v. Superior Court, 134 Cal. App. 5, 24 P2d 911 (1933).

These cases make it abundantly clear that CCP §§ 714, 715 and 564 form a coherent body of law and that a receiver may be appointed in proceedings properly commenced either

under S 714 or 715 without additional formalities. See especially Bruton v. Tearle, supra, Tucker v. Fontes, supra, and McCutcheon v. Superior Court, supra. In Bruton v. Tearle, supra, the debtor had thwarted garnishment by making an agreement with his employer that his wages as an actor should be paid daily in advance. The Supreme Court held that under the circumstances of the case the appointment of a receiver was entirely proper not only with respect to wages earned in the interval between the initiation of the proceedings and the appointment of a receiver but also with respect to future earnings, as the judgment was one for alimony. In Tucker v. Fontes, supra, appointment of a receiver was upheld to collect certain outstanding accounts receivable and forthcoming dividends from the estate of a bankrupt debtor of the judgment debtor. The court recognized that, at least ordinarily, garnishment of accounts would permit satisfaction but it did not relegate the judgment debtor to such proceedings since the evidence showed that appointment of a receiver would furnish a more orderly remedy. A similar situation existed in Ex parte Ferguson, 123 CA2 799, 268 P.2d 71 (1954).

Other cases involved property, not subject to levy and sale or collection on execution, sought to be reached in or by supplementary proceedings,

Pacific Bank v. Robinson, supra (patent) Habenicht v. Lissa K, supra (seat in stock exchange), Medical F. Ass'n. v. Short, supra (proceedings under § 715 to reach half of the proceeds of federal government employee).

2.

Need for Substantive Prerequisites

Although receivers may be appointed in discovery proceedings in aid of execution (§ 714) as well as in proceedings to reach and apply withheld assets (§ 715) the courts have not used the power when levy and sale or collection or other court orders would constitute an adequate remedy.

Thus, in the early case of McCullough v. Clark, 51 Cal. 298 (1871), the court ordered delivery of an endowment policy to the sheriff rather than to a receiver and in other cases the court expressly relegated the creditor to levy by seizure or garnishment. In Hustead v. Superior Court, 2CA 3d 783, 83 Cal. Rptr. 26 (1969), for example, the court intimated that a creditor of a lessor should levy on the estate of the lessor rather than resort to supplementary proceedings, to obtain appointment of a receiver to collect future rents. The actual order vacated in that case, however, was an order issued in supplementary proceedings under § 717 against the tenant

of the judgment creditor and not an order obtained in supplementary proceedings against the judgment debtor himself. The main reason of the holding was that the order, in effect, amounted to a garnishment of future rents which is not possible under California law.

Similarly in McCutcheon v. Superior Court, supra, the appellate court upheld an order vacating the appointment of a receiver for an oil well, because the creditor inconsistently had pleaded the return of an unsatisfied writ of execution and, at the same time, the ownership of a leviable interest in land of the judgment debtor. For additional reasons the court pointed out that the proceedings below were in form of a true creditors bill rather than supplementary proceedings and that supplementary proceedings had supplanted the old equitable remedy in most cases. Moreover, the creditor's bill in question sought institution of a general consent receivership rather than a special receivership, a remedy not recognized in California, at least not in the case of corporations not affected with a public interest. This issue was much debated at the time of the decision. In Morand v. Superior Court, supra, the court made it clear that even in supplementary proceedings the appointment of a receiver should only be made when less onerous remedies would be inadequate or unavailable.

In addition the interests of both parties must be

weighed against each other. Thus, in Elson v. Nyhan, 45 CA2 1, 113 P.2d 474 (1941) the court rejected the appointment of a receiver with respect to certain cab licenses sought in supplementary proceedings for the reason that the application of the licenses to the satisfaction of the judgment would not result in reasonably certain benefits to the judgment creditor but would cause distinct disadvantages to the judgment debtor. The facts of the case indicated that the holder of the judgment was a competitor who had obtained the judgment by assignment and that the creditor could have obtained satisfaction from a liability insurer.

Summarizing the cases where the courts have appointed receivers, by orders upheld on review, it seems to be possible to classify them under three categories:

1. Where the property involved is not exempt but nevertheless not subject to be reached by the writ of execution and where outright transfer or assignment to the creditor would be unfair to the judgment debtor or excessive.
2. Where the property involved is subject to execution by levy and sale or collection but where resort to execution would be unduly cumbersome or inefficient under the circumstances of the case.

3. Where the property is subject to levy and sale but appointment of a receiver for the management of and collection of profits from the property assures a larger satisfaction of the judgment despite the costs involved or where a receivership otherwise avoids undue hardship for the judgment debtor without subjecting the creditor to unjust delay.

Although other jurisdictions have refrained from spelling out the appropriate substantive principles governing the appointment of receivers for the collection of judgments it may be in the interest of a fair administration of justice to cast them in statutory language.

Two alternatives of a tentative draft are appended.

Tentative draft no. 1

(a) Whenever a writ of execution upon a judgment for the payment of money may properly be issued, whether or not a writ of execution has been issued or returned, the court, upon application of either the judgment creditor or the judgment debtor after a noticed hearing, may appoint a receiver authorized to perform the acts deemed necessary to satisfy the judgment, if the court finds that, taking account of the proper interests of both parties, such order results in the most reasonable method of an orderly satisfaction of the judgment.

(b) ...

Tentative draft No. 2

(a) When non-exempt property of the judgment debtor cannot be reached under a writ of execution or when levy and sale or collection under a writ of execution do not permit an efficient and orderly satisfaction of the judgment or create undue hardship for either party, the court, upon application by the judgment creditor or the judgment debtor stating the facts causing the need for the relief requested and

after noticed hearing, may appoint a receiver to perform the acts deemed necessary for the collection of the judgment.

(b) Relief under this section may be sought whenever a writ of execution may properly be issued upon a judgment for the payment of money whether or not such writ has been issued or returned.

(c) ...

[Former Draft of Section 705.210--Receiver
to Enforce Judgment]

405/395

§ 705.210. Receiver to enforce judgment

705.210: (a) Whenever a writ of execution against property of a judgment debtor may properly be issued, whether or not a writ of 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 705.210 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 705.210 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.

EXHIBIT 3

Code of Civil Procedure §§ 688, 688.1

§ 688. Property liable; manner of levy or release; effective period of levy; exemptions

688. (a) All goods, chattels, moneys or other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, and all property and rights of property levied upon under attachment in the action, are subject to execution.

(b) All property subject to execution may be levied upon or released from levy in like manner as like property may be levied upon or released from attachment, 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.

Notwithstanding the provisions of Title 6.5 (commencing with Section 481.010), service on the judgment debtor of a copy of the writ of execution shall be made either by personal delivery or by mail to the judgment debtor at the address furnished by the judgment creditor. To levy upon 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 upon the person in possession of such property or owing such debt, or his agent (1) a copy of the writ of execution and (2) a notice that such property or debt is levied upon in pursuance of such writ.

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

(d) No levy shall bind any property for a longer period than one year from the date of the issuance of the execution, except a levy on the interests or claims of heirs, devisees, or legatees in or to assets of deceased persons remaining in the hands of executors or administrators thereof prior to distribution and payment. However, an alias execution may be issued on said judgment and levied on any property not exempt from execution.

(e) Notwithstanding subdivision (a), no cause of action nor judgment as such, nor license issued by this state to engage in any business, profession, or activity, shall be subject to levy or sale on execution.

(f) When a check, draft, money order, or other order for the withdrawal of money from a banking corporation or association, the United States, any state, or any public entity within any state, payable to the defendant on demand, comes into the possession of a levying officer under a writ of execution, the provisions of Section 488.520 are applicable.

§ 688.1 Judgment creditor of plaintiff; order granting lien; notice; intervention; extent of lien; endorsement upon judgment and abstract

688.1. (a) Except as provided for in subdivision (b), upon motion of a judgment creditor of any party in 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 or judge thereof may, in his 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. Such judgment creditor shall have a lien to the extent of his judgment upon all moneys 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. 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 of the Code of Civil Procedure, a statement of the lien in favor of such judgment creditor.

(b) Nothing in this section shall be construed to permit an assignee by operation of law of a party to a personal injury action to acquire any interest in or lien rights upon any moneys recovered by such party for general damages.

999/321

Substance Tentatively Approved September 1976

STAFF DRAFT

Articles 3 (in part), 6, and 7 of Chapter 5 (Supplementary
Procedures for Enforcement of Money Judgments)

Article 3. Receiver to Enforce Judgment

§ 705.310. Appointment of receiver

705.310. (a) The court may appoint a receiver to enforce the judgment where the judgment creditor shows both of the following:

(1) That a writ of execution has been issued and returned unsatisfied or that the judgment debtor or a person possessing or controlling property of the judgment debtor or indebted to the judgment debtor refuses to apply the judgment debtor's property to the satisfaction of the judgment.

(2) That a receiver is needed to obtain satisfaction of the judgment.

(b) Except as otherwise provided in subdivision (a), 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.

Comment. Section 705.310 continues former law concerning receivers to enforce a judgment except for the addition of paragraph (2) of subdivision (a) which requires an affirmative showing of the need for a receiver. Subdivision (a) does not specifically require that a writ of execution be issued since the judgment creditor may have tried and failed to enforce the money judgment by some other means such as an examination of the judgment debtor under Section 705.120, or the judgment creditor may be able to show that the judgment debtor refuses to apply property to the satisfaction of the judgment by showing that the judgment debtor failed to properly respond to written interrogatories propounded under Section 705.110. The reference in subdivision (a)(1) to a person holding property of the judgment debtor or indebted to the judgment debtor recognizes that a receiver may be appointed after an order to apply property to the satisfaction of the judgment is issued in examination proceedings under Article 1 (commencing with Section 705.110). Note also that a receiver may be appointed to enforce a charging order against a partnership under Corporations Code Section 15028. See Section 705.510 (charging orders).

Article 6. Liens on Causes of Action and Judgments

§ 705.610. Application for lien on cause of action and judgment

705.610. Upon motion of a judgment creditor of any party to an action or special proceeding made in the court in which the action or special 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 the action or special proceeding in favor of the judgment debtor and, during the pendency of the action, may permit the judgment creditor to intervene therein. The lien shall be granted upon the money recovered by the judgment debtor in the action or special proceeding in the amount of the judgment creditor's judgment.

Comment. Section 705.610 continues the substance of the first sentence and a portion of the second sentence of former Section 688.1. Enforcement pursuant to this article is subject to the general rules concerning the time within which judgments may be enforced. See Sections 702.170-702.190.

29/627

§ 705.620. Endorsement of lien on judgment and abstract

705.620. (a) The clerk shall endorse upon the judgment recovered in the action or special proceeding in which the judgment debtor is a party a statement of the existence of the lien, the date of entry of the order creating the lien, and the place where entered.

(b) 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 the judgment creditor.

Comment. Section 705.620 continues the substance of the third sentence of former Section 688.1.

29/628

§ 705.630. Compromise, settlement, satisfaction before judgment

705.630. No compromise, settlement, or satisfaction may be entered into by or on behalf of the judgment debtor without the consent of the judgment creditor unless the lien is first satisfied or discharged.

Comment. Section 705.630 continues the substance of a portion of the second sentence of former Section 688.1.

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

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

(b) A 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 705.640 continues the rule of former law (see former Sections 688(e), 688.1) 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 judgment eventually obtained by the judgment debtor only by following the procedure set out in Section 705.610 although prior liens are continued as provided in subdivision (b).

Article 7. Assignment Orders

§ 705.710. Order assigning rights to future payments

705.710. (a) 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 705.310) 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 a spend-thrift trust, and payments due from a patent or copyright.

(b) In the determination of whether to order an assignment or of 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 persons supported in whole or in part by the judgment debtor, any payments the judgment debtor is required to make or that are deducted from the money the judgment debtor would otherwise receive in satisfaction of other judgments and wage assignments, the amount remaining due on the judgment, and the amount being or to be

received, or, if the judgment debtor is attempting to impede the satisfaction of the judgment by rendering services without adequate compensation, the reasonable value of the services rendered.

Comment. Section 705.710 provides a new procedure for reaching certain forms of property that cannot be reached by levy of a writ of execution and sale. Patents and copyrights have been reached by creditor's suits and supplementary proceedings where the debtor is ordered to assign 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). It should be noted that federal law requires that, to be effective against subsequent purchasers or mortgagers, an assignment of a patent must be recorded in the United States Patent Office (35 U.S.C. § 261 (1970)) and an assignment of a copyright must be recorded in the U.S. Copyright Office (17 U.S.C. § 28 (1970)). 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 generally may not be garnished but may be reached in supplementary proceedings by an order to the debtor to endorse and deliver paychecks to a receiver. See Sheridan v. Sheridan, 33 Cal. App.3d 917, 109 Cal. Rptr. 466 (1972). However, pursuant to recent federal amendments, the wages of federal employees may be garnished for enforcement of child support and alimony payments "as if the United States were a private person." See 42 U.S.C. § 659 (effective January 1, 1975).

29/632

§ 705.720. Modifying or setting aside assignment order

705.720. (a) Upon application of either party and after a noticed hearing where it is shown that there has been a material change in circumstances since the time of the previous hearing on the assignment order, the court may modify or set aside the assignment order, except as provided in subdivision (b).

(b) Where an assignment by a receiver to a third person is confirmed by the court, the assignment order may not be modified or set aside insofar as the assignment to the third person is concerned.

Comment. Subdivision (a) recognizes the court's authority to modify or set aside an assignment order it has made where conditions have changed materially. Subdivision (b) provides an exception in a case where a receiver has been appointed and an assignment of the right to future payments has been made by the receiver and confirmed by the court pursuant to Section 568.5. 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 the judgment debtor and the judgment creditor.