

Memorandum 77-74

Subject: Study 39,200 - Enforcement of Judgments (Comprehensive Statute--Third-Party Claims)

Attached to this memorandum is a staff draft of Chapter 6 of the Enforcement of Judgments Law pertaining to third-party claims. This chapter has been revised to reflect decisions made at the May 1977 meeting. At the November meeting, we hope to be able to complete consideration of this chapter subject to later consideration of any further revisions. It would be best if we were to proceed through this chapter section by section since it has not as yet received full consideration.

The materials attached to this memorandum include a draft of the text relating to the third-party claims procedure (to be included in the preliminary part of the recommendation when it is assembled), Chapter 6 with Comments, and an Appendix setting forth the existing statute and showing its disposition.

Preliminary Part

The Commission has not yet reviewed the textual discussion.

§ 706.210. Manner of making third-party claim; contents

This section has been substantially rewritten to implement Commission decisions. We have added to subdivision (c)(2) a provision permitting an unsecured third person to indicate whether he will accept payment for the claimed interest. Previously, the statute was drafted so as to give the judgment creditor the option of giving an undertaking or making a deposit in response to an unsecured third-party claim just as in the case of a claim by a secured party. See Sections 706.220, 706.230. However, existing law provides only for the giving of an undertaking in response to the claim of an unsecured third person. It makes sense not to force the third person to sell an ownership interest since the item of property may have special meaning to him, such as an heirloom or a work of art. Of course, the situation is different in the case of a secured party where the interest in the property secures a monetary obligation.

§ 706.220. Demand to judgment creditor for undertaking or deposit

Under existing law, the levying officer sends the demand to the judgment creditor by registered or certified mail. The judgment creditor then has five days from receipt of the demand to file an undertaking or make a deposit. As Section 706.220 is drafted, the demand would be sent by first-class mail, and the judgment creditor is allowed 10 days from the date of mailing.

§ 706.260. Disposition of released property

This section has been revised to incorporate the general provisions concerning release of property from a lien and from custody. The general rule provided in Section 703.290 (included in draft statute attached to Memorandum 77-56) is that property which has been taken into custody is released to the person from whom it was taken. If the person cannot be found, the property is sold and the proceeds deposited with the county. Section 706.260 still preserves the special rule stated in existing Section 689.5 which provides that the property goes to the third person if the judgment debtor cannot be found.

§ 706.280. Waiver of default

At the May 1977 meeting, it was suggested that the statute should provide that the failure of the secured party to accelerate the obligation and claim the entire amount in the third-party claim is considered a waiver of the default. Section 706.280 implements that decision.

§§ 706.510-706.530. Request for statement of secured indebtedness or collateral

The Commission has not previously considered this article. It has been drafted in response to a Commission decision that a judgment creditor should have the right to obtain from a secured party a statement of the secured indebtedness of the judgment debtor. It was suggested that this right be patterned after Commercial Code Section 9208. A copy of Section 9208 is attached as Exhibit 1. It requires the judgment creditor to submit a statement to the secured party for approval or correction. This aspect of the procedure would not be very helpful to a judgment creditor who knows very little or nothing about the nature of the security agreement between the judgment debtor and the secured party. We do not see this as a serious drawback, however, since in that

case the judgment creditor may resort to the procedure for forcing the secured party to file a third-party claim or forego his interest. It would be inadvisable to make the secured party vulnerable to fishing expeditions conducted by judgment creditors of his debtor. It should also be noted that the proposed procedure would conflict somewhat with the spirit of Commercial Code Section 9208 which, as the Comment indicates, was drafted in such a way that the secured party would not be "under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them." See Exhibit 1.

§§ 706.710-706.780. Third-party claims procedure in absence of levy by levying officer

As indicated in the draft of the preliminary part of this portion of the recommendation, the existing third-party claims procedure applies by its terms only when there is a levy by a levying officer. We have drafted a summary procedure for determining adverse claims when the lien on the property is not created by the levying officer's levy but through some procedure such as a charging order or an order in supplementary proceedings. The proposed sections are patterned on the existing third-party claims procedure except that the role of the levying officer has been eliminated since he is not involved in the enforcement process in such situations.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

[Commercial Code Section 9208]

§ 9208. Request for Statement of Account or List of Collateral.

(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars (\$10) for each additional statement furnished.

(4) If the secured party is an organization maintaining branches or branch offices the requests herein provided for shall be sent to the branch or branch office at which the security transaction was entered into or at which the debtor is to make payment of his obligation, and the secured party's statement, unless otherwise specified, shall be deemed to apply only to indebtedness entered into at or payable to such branch or branch office and to any collateral taken by such branch or branch office. (Stats.1963, c. 813, § 9208.)

- 1 -

California Code Comment

By John A. Bohn and Charles J. Williams

Prior California Law

1. This section is new. The rationale for it is explained in Official Comments 1-2.

2. Similar duties to provide information upon the debtor's request were imposed by statutes upon the assignee of an account (former Civil Code § 3026) and the lender under an inventory lien (former Civil Code § 3041). Under each of these former provisions, the secured party rather than the debtor was required to prepare the information and there was no limit on the frequency of requests. However, there was also no liability on the secured party for his refusal to supply the information.

3. Subdivision (2) imposes liability upon the secured party for his refusal to comply with the debtor's request. An interesting question is raised in the case of a mistake by the secured party in supplying the information requested:

"The sanctions discussed previously are provided in cases of the secured party's refusal to return the statement of the debtor's current position. But what if the secured

party in good faith returns an understatement of his interest? The subsequent creditor who relied on the returned statement would appear to have an excellent defense of estoppel to any such excuse by the secured party. In contrast, what if a good faith *overstatement* were returned? Such statement may prevent successful negotiations by the debtor, and yet the Code imposes sanctions only on the failure to reply. Perhaps future cases may imply the word 'properly' after reply to cover this eventuality". 8 UCLA L.Rev. 806, 891.

Changes from U.C.C. (1962 Official Text)

2. Subdivision (4) does not appear in the Official Text. It is part of a series of "branch offices" amendments which California has made to the Official Text to meet the branch banking practice prevalent in California. Sixth Progress Report to the Legislature by Senate Fact Finding Committee on Judiciary (1959-1961) Part 1, The Uniform Commercial Code, p. 654.

Uniform Commercial Code Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. To provide a procedure whereby a debtor may obtain from the secured party a statement of the amount due on the obligation and in some cases a statement of the collateral.

2. The financing statement required to be filed under this Article (see Section 9-402) may disclose only that a secured party may have a security interest in specified types of collateral owned by the debtor. Unless a copy of the security agreement itself is filed as the financing statement third parties are told neither the amount of the obliga-

tion secured nor which particular assets are covered. Since subsequent creditors and purchasers may legitimately need more detailed information, it is necessary to provide a procedure under which the secured party will be required to make disclosure. On the other hand, the secured party should not be under a duty to disclose details of business operations to any casual inquirer or competitor who asks for them. This Section gives the right to demand disclosure only to the debtor, who will typically request a statement in connection with negotiations with subsequent creditors and purchasers, or for the purpose of establishing his credit standing and proving which of his assets are free of the security interest. The secured party is further protected against onerous requests by the provisions that he need furnish a statement of collateral only

when his own records identify the collateral and that if he claims all of a particular type of collateral owned by the debtor he is not required to approve an itemized list.

Cross Reference:

Point 2: Section 9-402.

Definitional Cross References:

"Collateral". Section 9-106.

"Debtor". Section 9-105.

"Good faith". Section 1-201.

"Know". Section 1-201.

"Person". Section 1-201.

"Receive". Section 1-201.

"Secured party". Section 9-105.

"Security agreement". Section 9-105.

"Security interest". Section 1-201.

"Send". Section 1-201.

"Written". Section 1-201.

STAFF DRAFT

THIRD-PARTY CLAIMS AND RELATED PROCEDURES

Existing Law

Sections 689 and 689b¹ provide summary special proceedings permitting a person other than the judgment creditor or judgment debtor to claim an interest in personal property that has been levied upon.² Section 689 applies where the third person claims title and the right to

1. Except as otherwise noted, all statutory citations are to the Code of Civil Procedure.
2. The existing third-party claims procedure derives from Section 218 of the Practice Act, enacted in 1851, under which the sheriff could summon a jury of six persons in the county to determine the validity of a third-party claim. The purpose of this procedure was to aid the sheriff, although he remained liable for a wrongful levy or for improperly releasing the property despite the determination of the jury which was held not to be conclusive against the parties. See Perkins v. Thornburgh, 10 Cal. 189 (1858); see generally 2 A. Freeman, Law of Executions § 276 (3d ed. 1900); Curtis, A Legal Headache, 9 Cal. St. B.J. 167 (1934). In 1891, the statute was amended to substitute a provision for an undertaking in favor of the sheriff for the provision for a sheriff's jury. 1891 Cal. Stats., Ch. 32, § 1. In light of this history, it has frequently been stated by the courts that a main purpose of the procedure is to protect the levying officer from liability for taking, holding, and selling the property. See, e.g., Sunset Realty Co. v. Dadmun, 34 Cal. App.2d Supp. 733, 736, 88 P.2d 947, 949 (1939). Since 1929, however, Section 689 has provided that the undertaking is in favor of the third person and, since 1933, the section has specifically provided that the levying officer is not liable if he complies therewith. 1929 Cal. Stats., Ch. 341, § 1; 1933 Cal. Stats., Ch. 744, § 135.

The statutory third-party claims procedure applies only to the determination of claims to personal property which has been levied upon. The usual remedy where real property is wrongfully sold is an action to quiet title. See First Nat'l Bank v. Kinslow, 8 Cal.2d 339, 345, 65 P.2d 796, 799 (1937). The third-party claims procedure also applies to the determination of adverse claims in attachment (see Section 488.090) and claim and delivery (see Section 514.050). In at least one case, Section 689 was applied to a dispute between an innkeeper asserting a lien on a violin and the owner even though there was no levy and no levying officer was involved. See Rudolph Wurlitzer Co. v. Farb, 120 Cal. App. Supp. 773, 774, 6 P.2d 358, 358 (1932).

possession of the property. Section 689b applies where the third person claims a security interest based on a conditional sale or chattel mortgage. In general, these procedures are parallel, but there are some significant differences.

Under both procedures, once property has been levied upon but before it has been sold or otherwise disposed of,³ the third person may file a claim with the levying officer who then serves by certified or registered mail a copy of the claim on the judgment creditor. If the judgment creditor does nothing within five days after receipt⁴ of the claim and the demand for an undertaking, the property is released from the levy.

Under Section 689, where the third person claims title and right to possession, the judgment creditor may maintain the levy simply by posting with the levying officer an undertaking in twice the value of the property⁵ which indemnifies the third person for any loss caused by the levy.⁶

-
3. Sections 689 and 689b refer only to disposition by sale under the writ but, inasmuch as these provisions specifically apply to garnishment of intangibles and to claim and delivery proceedings, they must be read broadly to include collection and payment and to delivery of possession to the judgment creditor. Cf. *National Bank v. Finn*, 81 Cal. App. 317, 337, 253 P. 757, 766 (1927) (third-party claim must be made before it has become impossible for sheriff to deliver property to claimant or to obtain undertaking from creditor).
 4. Section 689 requires an undertaking "within five days after written demand . . . made by registered or certified mail," whereas Section 689b requires the undertaking or deposit "[w]ithin five days after receipt by the plaintiff or his attorney of such officer's demand." It appears that the practice is to allow five days after the date of receipt of the demand as shown by the return receipt. See *Marshal's Manual of Procedure* §§ 533.2, 542.2 (J. Matarazzo ed. n.d.).
 5. The procedures for objecting to the sufficiency of sureties and for the justification of sureties in attachment proceedings are incorporated by the third paragraph of Section 689 and the second paragraph of subdivision (9) of Section 689b. The fourth and fifth paragraphs of Section 689 also provide an appraisal procedure for determining an objection to the amount of an undertaking to indemnify an unsecured third-party claimant. Subdivision (9) of Section 689b gives the levying officer discretion to determine the value of the property for the purpose of setting the amount of the undertaking required to maintain the levy against a claim by a secured party.
 6. Under the second paragraph of Section 689, there is no liability on the undertaking where the property is required by law to be registered or recorded in the name of the owner and where, at the time of levy, the judgment debtor was the registered or recorded owner so long as the judgment creditor relied in good faith on the registered or recorded ownership.

Under Section 689b, where the third person claims under a conditional sale or chattel mortgage, the claim demands payment of all sums due or to accrue under the agreement, plus interest to date of tender. In order to maintain the levy, the judgment creditor must either (1) deposit the amount demanded or (2) post an undertaking and file a statement contesting the existence of the third person's interest. Whichever course is chosen, the third person's security interest is accelerated and paid off and the property is sold free and clear of the third person's interest.⁷ The judgment creditor can initiate this procedure by serving a demand on the secured party that a claim be made and, if the secured party makes no claim within 30 days after being served with the demand, the interest of the secured party is forfeited.⁸

Whether or not any undertaking is posted or deposit made in response to the third-party claim, either the judgment creditor or the third person may, within 15 days after the filing of the claim with the levying officer, petition for a hearing to determine the respective interests.⁹ The court may order the sale of perishables and may stay the sale, transfer, or other disposition of the property involved pending the determination at the hearing. The hearing is to be held within 20 days from the filing of the petition unless a continuance is granted. Ten days' notice is required to be given the levying officer and the judgment creditor or third person, whichever one is not the petitioner. The judgment debtor is not required to be given notice. The third person has the burden of proof at the hearing. At the conclusion of the hearing, the court makes such orders determining title and the disposition of the property as it deems appropriate.

Where the property has been levied upon under a writ of execution issued to enforce a money judgment, a third person claiming ownership may obtain the release of the property by posting an undertaking in twice the value of the property (but not more than twice the amount for which execution was levied) on condition that, if the property is determined to belong to the judgment debtor, the third person will pay the

7. Sections 689b(9), 689c.

8. Section 689b(8).

9. Sections 689, para. 8, 689b(10).

judgment creditor.¹⁰ This procedure may be used whether or not the third person has filed a third-party claim and may accomplish the release of the property even though the judgment creditor has given an undertaking in response to a claim.¹¹

Recommendations

The Commission concludes that the third-party claims procedures have operated generally in a satisfactory manner but that several modifications should be made to clarify the existing procedures and to promote their more efficient operation.

Nature of interests which may be claimed. Any third person who claims an interest in personal property levied upon which is superior to the judgment creditor's lien should be permitted to assert that interest through the third-party claims procedure. Existing law is limited to persons claiming title and right to possession or claiming under a conditional sales agreement or chattel mortgage.

Payment for interest of unsecured third person. An unsecured third person should have the option of accepting payment for the interest claimed. Section 689 provides only for an undertaking indemnifying the third person for any loss or expense caused by the levy and sale of the property. While it may be that, in most cases, an unsecured third person will not want to relinquish the claimed interest and will seek release of the property or the protection of an undertaking pending the determination of the claim, in situations where the third person is willing to sell the claimed interest, this alternative should be available. The judgment creditor would then have the option of either giving an undertaking or depositing the amount of the claimed interest. Upon payment of the deposited amount to the third person, the third person's interest would pass to the judgment creditor.

Preservation of unaccelerated security interest. If a security agreement does not provide for acceleration of the obligation upon levy or if the secured party does not choose to exercise the right to accelerate, it should be provided that the security interest continues in

10. See Sections 689, para. 7, 710b to 713-1/2.

11. See Sections 689, para. 7, 710b; *Mazuran v. Finn*, 53 Cal. App. 656, 657-58, 200 P. 769, 770 (1921).

the property upon sale and that the judgment creditor need provide an undertaking or make a deposit covering only the amount of the obligation which was due.

Notice of hearing given to judgment debtor. The judgment debtor should be given notice of a hearing on the third-party claim since the judgment debtor is vitally interested in the disposition of the property and in order to prevent an incorrect determination of the respective interests of the parties and a misallocation of the property or its proceeds.¹²

No claim of invalidity of security interest as condition to undertaking. The requirement of Section 689b(9) that, as a condition to giving an undertaking to indemnify a person claiming under a conditional sale or chattel mortgage, the judgment creditor must file a verified statement that the sales contract or mortgage is void or invalid should be eliminated. This requirement serves no useful purpose. The validity of the security interest will be determined at the hearing on the claim, if one is held, or at some later time after sale.

Judgment creditor's right to statement of secured indebtedness or collateral. The judgment creditor should be afforded the right to obtain from the secured party a statement of the unpaid indebtedness or collateral under the security agreement, similar to the right of the debtor under Commercial Code Section 9208.¹³ This procedure will permit the judgment creditor to obtain the necessary information concerning the respective interests in the property without the need to resort to the procedure for demanding that the secured party make a formal third-party claim.¹⁴

12. See, e.g., *Rubin v. Barasch*, 275 Cal. App.2d 835, 80 Cal. Rptr. 337 (1969).

13. Under Commercial Code Section 9208, the debtor may send to the secured party a statement of the indebtedness or collateral to be approved or corrected and returned. The secured party is afforded two weeks within which to comply and is liable for failure to comply without reasonable excuse. The secured party is bound by the statement as against persons misled thereby. The debtor may obtain a statement free of charge every six months and more frequently by paying a charge of not more than \$10.

14. See Section 689b(8).

Summary third-party claims procedure in absence of levy by levying officer. The existing summary special proceeding for making and determining third-party claims on its face applies only where there is a levy by a levying officer.¹⁵ Where property is reached through some other procedure for the enforcement of a judgment, such as an order applying property issued in supplementary proceedings¹⁶ or a creditor's suit¹⁷ or an order charging the interest of a partner in specific partnership property,¹⁸ a third person should be able to resort to the same type of summary procedures that are available where the lien on the property is created by levy under a writ. The recommended procedure would be initiated by a petition since there would be no levying officer involved.

Additional changes. For the sake of uniformity, the general provisions pertaining to objections to undertakings and to the release of property from a lien and from custody¹⁹ should be incorporated by the third-party claims procedure. Notices mailed by the levying officer should be mailed by first-class rather than registered or certified mail.

15. It should be noted, however, that Section 689d makes the third-party claims procedures applicable to a determination of adverse claims to certain liens arising under the Revenue and Taxation Code and the Unemployment Insurance Code. One of these provisions--Unemployment Insurance Code Section 1755--provides for service of a notice of levy by an official of the Department of Employment Development and does not involve a levy by a levying officer. It is not clear whether a third-party claim would be served on the Department of Employment Development in such a case or whether only the hearing provisions are incorporated by Section 689d. See also *Rudolph Wurlitzer Co. v. Farb*, 120 Cal. App. Supp. 773, 774, 6 P.2d 358, 358 (1932) (Section 689 hearing provisions applied in dispute between innkeeper claiming a possessory lien and the owner of property).

16. See Section 719.

17. See Section 720.

18. See Corp. Code §§ 15028, 15522.

19. The provision in Section 689.5 to the effect that, if the judgment debtor cannot be found, the property should be released to the third-party claimant should be retained as an exception to the general rules pertaining to release.

CHAPTER 6. THIRD-PARTY CLAIMS PROCEDURE

Article 1. General Provisions§ 706.110. General provisions relating to undertakings

706.110. The provisions of Article 1 (commencing with Section 489.010) of Chapter 9 of Title 6.5 apply to any undertaking given or sought to be given under this chapter.

Comment. Section 706.110 incorporates by reference the general provisions relating to undertakings in attachment proceedings.

§ 706.120. Third-party claim in proceeding to collect state tax

706.120. Where a warrant or notice of levy is issued by the State of California, or a department or agency thereof, pursuant to Section 1755 or 1785 of the Unemployment Insurance Code or Section 6776, 7881, 9001, 10111, 18906, 26191, 30341, or 32365 of the Revenue and Taxation Code, for the collection of a tax liability owed to the state or a department or agency thereof, the procedures provided by this chapter are applicable to third-party claims, and the proceedings provided shall be held by the superior court of the county, or city and county, in which the property levied upon or otherwise sought to be reached is located.

Comment. Section 706.120 continues the substance of former Section 689d. [See Article 7 (commencing with Section 706.770) (procedure where no levy by levying officer).]

§ 706.130. Liability of levying officer

706.130. The levying officer is not liable for damages to a third person for the levy, or the holding, release, or other disposition of the property claimed by the third person in accordance with this chapter.

Comment. Section 706.130 continues the substance of the second sentence of the sixth paragraph of former Section 689 and the third paragraph of subdivision (9) of former Section 689b.

Article 2. Third-Party Claims

§ 706.210. Manner of making third-party claim; contents

706.210. (a) Where personal property has been levied upon a third person may claim an interest which is superior to the judgment creditor's lien on the property by filing with the levying officer a verified written claim, together with a copy thereof.

(b) Where the third person is a secured party claiming a security interest in the property, the claim shall be accompanied by two copies of the security agreement and shall contain all of the following:

(1) A description of the security interest claimed, including a statement of the facts upon which the security interest is based.

(2) A statement of the amount due, taking into account any provision for acceleration and any setoffs, with interest to date of tender.

(3) A statement of the entire amount secured by the security interest and the terms of payment of amounts not yet due.

(4) A statement whether prepayment of amounts not yet due is permitted and, if so, the amount of any prepayment penalties.

(5) The address in this state to which notice may be mailed to the secured party.

(c) Where the third person is not a secured party, the claim shall contain all of the following:

(1) A description of the interest claimed, including a statement of the facts upon which the claim is based.

(2) A statement of the reasonable value of the interest claimed and whether the third person will accept payment for the interest.

(3) The address in this state to which notice may be mailed to the third person.

Comment. Section 706.210 is based on part of the first paragraph of former Section 689 and the first sentence of subdivision (2) of former Section 689b. Section 706.210 permits any person claiming a superior interest in the personal property levied upon to use the procedure provided by this chapter. Under former Section 689 the claimant had to show title and right to possession. See *Palmquist v. Palmquist*, 228 Cal. App.2d 789, 39 Cal. Rptr. 871 (1964) (attaching creditor

could not use third-party claim procedure). Under Section 706.210, any interest that is superior to the lien of the judgment creditor may be claimed, including title, right to possession, a consensual security interest, agreement, and a judicial or statutory lien.

Section 706.210 uses the terminology relating to secured transactions which has replaced the terms relating to chattel mortgages and conditional sales. Hence, "seller or mortgagee" in former Section 689b(2) is now "secured party." See Com. Code § 1201(37); Division 9 (commencing with Com. Code § 9101) (secured transactions).

Subdivision (b) requires the secured party to state the total amount due whereas subdivision (2) of former Section 689b called for a statement of amounts due or to accrue under the contract or mortgage. This change reflects the policy that the secured party should be able to claim only what is due, not what is to accrue. However, if the security agreement contains an acceleration clause which comes into effect when levy occurs, the entire amount will be due under this section. See Com. Code § 9311. [Failure to claim the entire amount due under an acceleration clause constitutes waiver of the default. See Section 706.280.]

Subdivision (c) is intended to enable the purchaser at any eventual sale of the property to know the exact interest of the secured party in the property where it is sold subject to the security interest. See Section 706.250(b). It also provides the judgment creditor with information necessary to determine whether to pay off the entire security interest, what is due and what is yet to accrue, plus any prepayment penalties. See Section 706.230. Note that the judgment creditor may not force the secured party to accept payment for amounts not yet due where the security agreement does not permit prepayment.

405/594

§ 706.220. Demand to judgment creditor for undertaking or deposit

706.220. (a) Not later than five days after filing the claim prescribed by Section 706.210 with the levying officer, the levying officer shall mail to the judgment creditor both of the following:

- (1) A copy of the claim.
- (2) A demand that the judgment creditor elect either (i) to pay the amount demanded in the claim plus interest due to the date of tender,

unless the third person has stated in the claim that payment will not be accepted, or (ii) to give an undertaking as provided in Section 706.270.

(b) The levying officer may mail the copy of the claim and the demand notwithstanding any defect, informality, or insufficiency of the verified claim.

Comment: Subdivision (a) of Section 706.220 continues portions of the first paragraph of former Section 689 and subdivision (3) of former Section 689b. See also the Comment to Section 706.210. The alternative of giving an undertaking or making a deposit provided in subdivision (3) of former Section 689b is continued and extended to apply to all third-party claims except where a third person who is not a secured party has stated pursuant to Section 706.210(c)(2) that payment for the claimed interest is unacceptable. The creditor may, of course, deposit money in lieu of an undertaking pursuant to Section 1054a. See Section 702.210 (manner of mailing notice).

Subdivision (b) continues the substance of the first sentence of the sixth paragraph of former Section 689 and the second sentence of subdivision (2) of former Section 689b.

405/595

§ 706.230. Judgment creditor's undertaking or deposit; release of levy

706.230. (a) Not later than 10 days after a demand is sent pursuant to Section 706.220, the judgment creditor shall deposit the amount demanded with the levying officer or file an undertaking with the levying officer pursuant to Section 706.270. In the case of a security interest prepayment of which is not precluded, where the entire amount of the security interest is not due, the judgment creditor may deposit the entire amount of the security interest, plus any applicable prepayment penalties, in lieu of the amount demanded.

(b) If the judgment creditor does not comply with subdivision (a) within 10 days after the levying officer sends the demand, the levying officer shall release the property in the manner provided by Section 703.290 unless it is to be held under another lien or unless otherwise ordered by the court pursuant to Section 706.340.

Comment. Section 706.230 continues the substance of a portion of the first paragraph of former Section 689 and subdivision (4) of former Section 689b. However, Section 706.230 increases the time within which the judgment creditor must either give an undertaking or make a deposit from five days after it is served (former Section 689) or received (former Section 689b) to 10 days after it is sent. Subdivision (a) permits the judgment creditor to pay off the entire interest of the secured party where the security agreement does not preclude prepayment even though the secured party has demanded only payment of what is due.

405/596

§ 706.240. Payment to third person

706.240. (a) Within five days after the levying officer receives a deposit under Section 706.230, the levying officer shall tender or pay it to the third person. If the deposit is made by check, the levying officer is allowed a reasonable time for the check to clear.

(b) If the tender is accepted, the interest of the third person in the property for which payment is made passes to the judgment creditor making the payment.

(c) If the tender is refused, the amount thereof shall be deposited with the county treasurer, payable to the order of the third person.

Comment. Section 706.240 is based on subdivisions (5)-(7) of former Section 689b; however, this section now permits the judgment creditor to acquire the interests of both unsecured third persons and secured parties. The judgment creditor may not, however, force an unsecured third person to accept payment for the interest claimed where the third person has indicated in the claim that payment will not be accepted. See Section 706.210(c)(2). Where property has been levied upon under a writ of execution, a third person who does not want to sell the interest to the judgment creditor or to rely on an undertaking may give an undertaking to release the property pursuant to Article 6 (commencing with Section 706.610).

§ 706.250. Delay of sale or delivery of possession; interest conveyed

706.250. (a) If a claim is made pursuant to Section 706.210 prior to sale, payment, or delivery of possession under the writ, the property described in the claim may not be sold, paid, or delivered without the written consent of the third person until a payment or deposit is made pursuant to subdivision (b) or (c) of Section 706.240 or an undertaking is given pursuant to Section 706.270. After such payment or deposit is made or undertaking is given, the levying officer shall maintain the lien on the property and execute the writ in the manner provided by law unless, in the case of a judgment for the payment of money, the third person gives an undertaking to release the property as provided in Article 5 (commencing with Section 706.510). The property, upon sale, payment, or delivery, is free of all liens or claims of the third person for which a payment or deposit is made or undertaking is given.

(b) If no claim is made by the third person pursuant to Section 706.210 before sale, payment, or delivery under the writ, the property, after sale, payment, or delivery, remains subject to the interest of the third person except as otherwise provided by Article 4 (commencing with Section 706.410).

Comment. Subdivision (a) of Section 706.250 is based on the seventh paragraph of former Section 689 and parts of subdivisions (8) and (9) of former Section 689b. Under the last sentence of subdivision (a), the property is sold free of all liens or claims for which a payment or deposit is made or undertaking is given. However, where the interest of a secured party has not fully accrued--e.g., where there is no acceleration clause in the security agreement and the interest is accordingly not required to be completely paid off--the secured party's interest in the collateral will continue. Moreover, a third person need not press a claim immediately. Subdivision (b) makes clear that, if no claim is presented before sale, the property remains subject to the third person's interest unless the judgment creditor has resorted to the procedure for demanding a claim by a secured party which is set forth in Sections 706.410 and 706.420.

Section 706.250, unlike former law, refers to delivery of possession, recognizing that the third-party claims procedure applies in claim and delivery proceedings. See Section 514.050.

§ 706.260. Disposition of released property

706.260. When the lien upon and custody of the property is to be released either because the judgment creditor fails to make a deposit or furnish and maintain a sufficient undertaking, the property shall be released in the manner provided by Section 703.290. Notwithstanding Section 703.290, where property which has been taken into custody is to be released to the judgment debtor and the judgment debtor has not claimed the property within [10] [30] days from the date notice was sent, the levying officer shall release the property to the third person making the claim.

Comment. Section 706.260 supersedes former Section 689.5. Section 706.260 incorporates the general provisions governing release of property from a lien and from custody except that the property is released to the third person if the judgment debtor to whom it would otherwise have been released cannot be found. Normally, if property is to be released to a person who cannot be found, it is sold and the proceeds deposited with the county. See Section 703.290(b).

405/599

§ 706.270. Judgment creditor's undertaking; reliance on registered ownership

706.270. (a) Where the judgment creditor provides an undertaking in response to the demand made pursuant to Section 706.220, the undertaking shall be made in favor of the third person in an amount equal to twice the value of the interest claimed by the third person, unless the third person agrees in writing to a lesser amount, and shall indemnify the third person against any loss, liability, damages, costs, and attorney's fees by reason of the enforcement proceedings.

(b) Where the property levied upon is required by law to be registered or recorded in the name of the owner and it appears at the time of the levy that the judgment debtor was the registered or record owner of the property and the judgment creditor caused the levy or service to be made and the lien maintained in good faith and in reliance upon such registered or recorded ownership, neither the judgment creditor, the judgment creditor's sureties, nor the levying officer is liable to the third person for the levy or service itself.

Comment. Section 706.270 continues and combines the provisions regarding undertakings given by the judgment creditor under the first and second paragraphs of former Section 689 and subdivision (9) of former Section 689b. It should be noted that, where a levy has been made based on upon a good faith reliance upon the registered or recorded ownership, there is no liability for the levy; but, after making a proper claim, the third person's interest must be recognized and a failure to deal properly with such interest may result in liability to the third person. For provisions relating to undertakings generally, see Section 706.110. The judgment creditor is not required by this section, as under former Section 689b(9), to claim that a "sales contract or mortgage is void or invalid" as a condition of giving the undertaking.

67719

[\$ 706.280. Waiver of default]

706.280. If the security agreement between the secured party and the judgment debtor provides that a levy which creates a lien on the property constitutes a default making the entire amount of the secured obligation due and the secured party does not claim the entire amount in the claim made pursuant to Section 706.210, the default is waived.

Comment. Section 706.280 is a new provision that is intended to protect purchasers of the collateral from finding that a prior default under the security agreement by the judgment debtor has resulted in the entire amount of the secured obligation falling due. When property is sold subject to the security interest as provided in Section 706.250, the purchaser should be able to rely on the facts as stated in the security agreement and the claim made by the secured party.

Article 3. Hearing on Third-Party Claims§ 706.310. Application for hearing; jurisdiction; continuance

706.310. (a) Not later than 15 days after the delivery of the third-party claim to the levying officer, whether or not an undertaking is given or a deposit is made pursuant to Section 706.230, either the judgment creditor or the third person may petition the court from which the writ was issued for a hearing to determine the respective interests in and the proper disposition of the property that is the subject of the claim.

(b) The court from which the writ was issued has original jurisdiction and shall set the matter for hearing within 20 days from the filing of the petition. The court may continue the matter for good cause shown.

Comment. Subdivision (a) of Section 706.310 continues the substance of the first two sentences of the eighth paragraph of former Section 689 and the first two sentences of subdivision (10) of former Section 689(b). Subdivision (b) continues the substance of the third and fifth sentences of the eighth paragraph of former Section 689 and the second and fourth sentences of subdivision (10) of former Section 689b.

§ 706.320. Notice of hearing

706.320. Not less than 10 days before the date set for the hearing, the petitioner shall mail notice of the time and place of the hearing to the judgment debtor and the levying officer, and to the judgment creditor or the third person (whichever person is not the petitioner). The notice shall state that the purpose of the hearing is to determine the respective interests in and the proper disposition of the property which is the subject of the third-party claim.

Comment. Section 706.320 is based on the fourth sentence of the eighth paragraph of Section 689. See also the second sentence of subdivision (10) of former Section 689b. Section 706.320, however, provides for notice by mail. See Section 702.210 (manner of mailing

notice). By requiring notice to be sent to the judgment debtor, this section avoids the problem is misapplication of funds that could occur under former law. See *Rubin v. Barash*, 275 Cal. App.2d 835, 80 Cal. Rptr. 337 (1969).

405/602

§ 706.330. Pleadings; dismissal; burden of proof

706.330. (a) The levying officer shall file with the court the third-party claim delivered under Section 706.310. The third-party claim constitutes the pleading of the third person, subject to the power of the court to permit an amendment in the interest of justice. The claim shall be deemed controverted by the judgment creditor.

(b) Whenever the request for the hearing is made by the third person, neither the request nor the proceedings pursuant thereto may be dismissed without the consent of the judgment creditor.

(c) At the hearing, the third person has the burden of proof as to the nature and extent of the third person's interest.

Comment. Subdivision (a) of Section 706.330 continues the substance of the eleventh sentence of the eighth paragraph of former Section 689. Subdivision (b) continues the substance of the sixth sentence of that paragraph. Subdivision (c) continues the substance of the tenth sentence of that paragraph. See the second sentence of subdivision (10) of former Section 689b.

30/175

§ 706.340. Disposition of property during pendency of proceedings

706.340. (a) Notwithstanding Section 706.250, upon application by the judgment creditor, the judgment debtor, or the third person, made ex parte or, if the court so orders, upon noticed motion, the court may order the sale of any perishable property held by the levying officer and may, by order, stay the release of the property or stay any sale under a writ or restrain any transfer or other disposition of the property until the proceedings under this article are concluded. The court may, as a condition for the issuance of the order, require such bond as the court considers necessary.

(b) An order made pursuant to subdivision (a) may be modified or vacated by the court which issued the order or by the court in which the hearing on the third-party claim is pending at any time prior to the termination of the proceedings upon such terms as may be just.

(c) The proceeds of a sale of perishable property under subdivision (a) shall be deposited with the court until the conclusion of the proceedings under this article. Any other property which is the subject of the proceedings shall be held under the judgment creditor's lien until the conclusion thereof except as provided by Article 6 (commencing with Section 706.610).

Comment. Section 706.340 is derived from the seventh, eighth, and ninth sentences of the eighth paragraph of former Section 689. See also the second sentence of subdivision (10) of former Section 689b. Subdivision (a) clarifies the manner of application for orders for the sale of perishable property or orders staying the sale, release, or transfer of the property. Subdivision (b) continues the substance of the ninth sentence of the eighth paragraph of former Section 689. The first sentence of subdivision (c) continues a portion of the seventh sentence of the eighth paragraph of former Section 689. The provision concerning disposition of the proceeds of the sale of perishable property is continued in Section 706.350. The second sentence of subdivision (c) is a new provision but reflects former practice.

405/605

§ 706.350. Determination of interests; disposition of property after hearing

706.350. At the conclusion of the hearing, the court shall determine the interests of the parties and shall order the disposition of the property, and the proceeds of any property, in accordance with the respective interests of the parties. The order is conclusive between the parties to the proceeding.

Comment. Section 706.350 continues the substance of a portion of the seventh and of the fourteenth and fifteenth sentences of the eighth paragraph of former Section 689 and the third sentence of subdivision (10) of former Section 689b. The proper disposition depends on the

interests determined at the hearing. For example, if the third person is found to be the sole owner, such person would normally be entitled to possession; if the third person has a superior lien, such person would normally be entitled to a share of the proceeds of sale.

405/412

§ 706.360. Findings

706.360. No findings are required in any proceedings under this article.

Comment. Section 706.360 continues the thirteenth sentence of the eighth paragraph of former Section 689. See also the second sentence of subdivision (10) of former Section 689 (hearing under former Section 689b conducted in same manner as under former Section 689).

405/413

§ 706.370. Appeal

706.370. An appeal may be taken from any judgment determining the interests of the parties under Section 706.360 in the manner provided for appeals from the court in which the proceeding takes place.

Comment. Section 706.370 continues the seventeenth sentence of the eighth paragraph of former Section 689.

405/414

§ 706.380. Relevy; additional writs

706.380. If property has been released from the lien and from custody pursuant to Section 706.230 and the final judgment is in favor of the judgment creditor, the levying officer, upon receipt of instructions from the judgment creditor, shall levy again upon the property if the writ under which the original levy was made is still in the levying officer's possession. If the writ has been returned, another writ may be issued pursuant to which the levying officer may levy upon the property.

Comment. Section 706.380 continues the substance of the sixteenth sentence of the eighth paragraph of former Section 689 and the second paragraph of subdivision (10) of former Section 689b.

Article 4. Judgment Creditor's Demand for Third-Party
Claim by Secured Party

§ 706.410. Judgment creditor's demand for claim by secured party

706.410. (a) Upon receipt of the judgment creditor's written request therefor, the levying officer shall serve upon a designated secured party a written demand that the secured party make a claim pursuant to Section 706.210.

(b) If the secured party does not serve a claim within 30 days after the service of the demand, the secured party shall be deemed to have waived any superior interest the secured party may have in the property levied upon.

Comment. Section 706.410 is based on a procedure provided by subdivision (8) of former Section 689b by which a judgment creditor may demand that a secured party file a claim or waive the security interest in the property levied upon. It should be noted that, under Section 706.410, failure to make a claim is a complete waiver of any superior interest. The secured party must claim the interest in the property even though there are no amounts currently due. Subdivision (a) clarifies prior law by providing that the levying officer serves the demand for the claim pursuant to the judgment creditor's request; under former law, it was unclear how the procedure was initiated.

§ 706.420. Service of demand for claim

706.420. The demand for a claim shall be served in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5. The demand may be served by the levying officer or for the levying officer by any other levying officer whose office is closer to the place of service. The fees and mileage of the other levying officer shall be paid out of the prepaid fees in the possession of the levying officer.

Comment. Section 706.420 makes clear that the demand for a third-party claim by a secured party must be served in the same manner as a summons and complaint. The second and third sentences of this section continue the substance of the second sentence of subdivision (8) of former Section 689b.

[Article 5. Request for Statement of Secured Indebtedness
or Collateral]

§ 706.510. Judgment creditor's request for statement of secured
indebtedness or collateral

706.510. (a) Where personal property which is subject to a security interest has been or is sought to be levied upon or subjected to other enforcement process, the judgment creditor may mail to the secured party a signed statement of what the judgment creditor believes to be the aggregate amount of unpaid indebtedness under the security agreement as of a specified date with a request that the statement be approved or corrected and returned to the judgment creditor. Where the security agreement or any other record kept by the secured party identifies the collateral, the judgment creditor may similarly request the secured party to approve or correct a list of the collateral.

(b) A judgment creditor is entitled to a statement from the same secured party once every six months without charge. The secured party may require payment of a charge not exceeding ten dollars (\$10) for each additional statement furnished.

Comment. This article provides the judgment creditor the right to obtain a statement of the unpaid indebtedness or the collateral under a security agreement which corresponds to the debtor's rights under Commercial Code Section 9208. This is a less burdensome alternative to the procedure for requiring a secured party to make a third-party claim provided by Article 4 (commencing with Section 706.410).

§ 706.520. Secured party's response to request for statement; liability

706.520. (a) The secured party shall comply with a request made pursuant to Section 706.510 within two weeks after receipt by sending a written correction or approval.

(b) If the secured party claims a security interest in all of a particular type of collateral, the secured party may indicate that fact in the reply and need not approve or correct an itemized list of such collateral.

(c) If the secured party without reasonable excuse fails to comply with the request, the secured party is liable for any loss caused to the

judgment creditor by the failure. If the judgment creditor has made a good faith statement of the obligation or a list of the collateral in the request, the secured party may claim a security interest only as shown in the statement against persons misled by the secured party's failure to comply.

(d) If the secured party no longer has an interest in the obligation or collateral at the time the request is received, the secured party shall disclose the name and address of any successor in interest known to the secured party. The secured party is liable for any loss caused to the judgment creditor as a result of a failure to disclose. A successor in interest is not subject to liability under this section until a request is received.

Comment. Section 706.520 corresponds to subdivision (2) of Commercial Code Section 9208.

405/417

§ 706.530. Secured party maintaining branch offices

706.530. If the secured party is an entity maintaining branches or branch offices, the request made pursuant to Section 706.510 shall be sent to the branch or branch office where the security transaction was entered into or where the judgment debtor is to make payment of the obligation. The secured party's statement, unless otherwise specified, shall be deemed to apply only to indebtedness entered into at or payable to such branch or branch office.

Comment. Section 706.530 corresponds to subdivision (4) of Commercial Code Section 9208.

Article 6. Third-Party Undertaking
to Release Property

§ 706.610. Third-party undertaking to obtain release of property

706.610. Where personal property has been levied upon under a writ of execution, a third person may give an undertaking, as provided in this article, to obtain the release of the personal property from the lien and from custody.

Comment. Section 706.610 continues the substance of former Section 710b. Although Section 706.610 does not specifically require that the third person be a claimant to the property, this is the practical result since, if it is determined that the judgment debtor has any interest in the property levied upon, the third person and the sureties will be liable to the judgment creditor for the value of such interest. See Section 706.620.

405/418

§ 706.620. Contents of undertaking

706.620. (a) The amount of the undertaking given pursuant to Section 706.610 shall be the least of the following amounts:

- (1) Twice the value of the property sought to be released.
- (2) Twice the amount of the lien on the property sought to be released.

- (3) An amount agreed to in writing by the judgment creditor.

(b) The undertaking shall provide that, if the judgment debtor is finally adjudged to have an interest in the property levied upon, the third person shall pay in satisfaction of the judgment under which the writ of execution was issued a sum equal to the value of the judgment debtor's interest.

Comment. Section 706.620 is based on former Section 710c. See Section 706.110 (general provisions relating to undertakings).

§ 706.630. Filing of undertaking

706.630. The third person shall file the undertaking given pursuant to Section 706.610 in the action with the court which issued the writ of execution under which levy was made. The third person shall serve a notice of the filing of the undertaking and a copy of the undertaking on the judgment creditor and on the levying officer.

Comment. Section 706.630 continues the substance of former Section 711 and also requires service of notice and a copy of the undertaking on the levying officer.

§ 706.640. Release of property

706.640. Unless the property is to be held under another lien or unless otherwise ordered by the court in which the undertaking given pursuant to Section 706.610 is filed, the levying officer shall release the personal property described in the undertaking in the manner provided by Sections 703.290 and 706.260 promptly after the expiration of 10 days from receipt of the notice of the filing of the undertaking.

Comment. Section 706.640 is based on a portion of the seventh paragraph of former Section 689. Through its incorporation of Sections 703.290 and 706.260, Section 706.630 provides for release of custody to the person from whom the property was taken but, if that person is a judgment debtor who cannot be found, to the third person.

[Article 7. Third-Party Claims Procedure in Absence of
Levy by Levying Officer]

§ 706.710. Manner of making third-party claim; contents

706.710. (a) Where personal property has been subjected to a lien created by service of process in the enforcement of a judgment, other than a lien created by levy under a writ by a levying officer, a third person may claim an interest which is superior to the judgment creditor's lien on the property by filing a verified petition with the court which issued the process the service of which created the lien on the property.

(b) The petition shall set forth the matters required in a third-party claim pursuant to Section 706.210 and, in the case of a claim based on a security interest, shall be accompanied by a copy of the security agreement.

Comment. This article provides a summary special proceeding for the determination of third-party claims to personal property subject to a lien for the enforcement of a judgment in favor of a judgment creditor other than a lien created by the levying officer's levy under a writ. The issues to be determined pursuant to this article are the same as those under Sections 706.210-706.380 which apply to the determination of third-party claims to property which has been levied upon by the levying officer. The procedures of this article are initiated by a petition, whereas under Sections 706.210-706.380, pursuant to which the third party first files the claim with the levying officer, the dispute may never reach the courts.

This article provides the means to determine third-party claims where, for example, the lien on the property is created by service of a notice or order under an enforcement procedure prescribed by Chapter 5 (commencing with Section 705.110) or by service of a notice of levy pursuant to Unemployment Insurance Code Section 1755.

The existence of this remedy is not intended to restrict the availability of other remedies such as an action for specific recovery of property or an action for damages for conversion.

§ 706.720. Setting for hearing; continuance

706.720. The petition shall be set for hearing not later than [20] days after filing. The court may continue the matter for good cause shown.

Comment. Section 706.720 is analogous to subdivision (b) of Section 706.310.

§ 706.730. Notice of hearing

706.730. (a) Not less than 10 days before the hearing, the third person shall serve notice of the time and place of the hearing, and a copy of the petition and any accompanying papers, on the judgment creditor. Service shall be made in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5.

(b) Not less than 10 days before the hearing, the third person shall mail notice of the time and place of the hearing to the judgment debtor.

(c) The notice shall state that the purpose of the hearing is to determine the respective interests in and the proper disposition of the property which is the subject of the third-party claim.

Comment. Section 706.730 corresponds to Section 706.320, except that notice is required to be served on the judgment creditor in the manner provided for service of summons and complaint. Notice is mailed to the judgment debtor as provided in Section 702.210.

§ 706.740. Petition deemed controverted; burden of proof

706.740. (a) The petition shall be deemed controverted by the judgment creditor.

(b) At the hearing, the third person has the burden of proof as to the nature and extent of the third person's interest.

Comment. Subdivision (a) of Section 706.740 is the same as the last sentence of Section 706.330(a). Subdivision (b) is the same as Section 706.330(c).

§ 706.750. Disposition of property during pendency of proceedings

706.750. (a) Upon application by the judgment creditor, the judgment debtor, or the third person, made ex parte or, if the court so orders, upon noticed motion, the court may order the sale of any perishable property which is claimed and may, by order stay the release of the property or stay any sale or restrain any transfer or other disposition of the property until the proceedings under this article are concluded. The court may, as a condition for the issuance of the order, require such bond as the court considers necessary.

(b) An order made pursuant to subdivision (a) may be modified or vacated by the court which issued the order or by the court in which the hearing on the third-party claim is pending at any time prior to the termination of the proceedings upon such terms as may be just.

(c) The proceeds of a sale of perishable property under subdivision (a) shall be deposited with the court until the conclusion of the proceedings under this article. Any other property which is the subject of the proceedings shall be held under the judgment creditor's lien until the conclusion thereof [except as provided by Article 6 (commencing with Section 706.610)].

Comment. Section 706.750 is essentially the same as Section 706.340.

§ 706.760. Determination of interests; disposition of property after hearing

706.760. At the conclusion of the hearing, the court shall determine the interests of the parties and shall order the disposition of the property, and the proceeds of any property, in accordance with the respective interests of the parties. The order is conclusive between the parties to the proceeding.

Comment. Section 706.760 is the same as Section 706.350.

§ 706.770. Findings

706.770. No findings are required in any proceedings under this article.

Comment. Section 706.770 is the same as Section 706.360.

§ 706.780. Appeal

706.780. An appeal may be taken from any judgment determining the interests of the parties under Section 706.760 in the manner provided for appeals from the court in which the proceeding takes place.

Comment. Section 706.780 is the same as Section 706.370.

APPENDIXDisposition of Existing Law Relating to Third-Party Claims--
Code Civ. Proc. §§ 689-689.5, 710b to 713-1/2§ 689 (repealed). Third-party claim of title and right to possession

689. If tangible or intangible personal property levied on, whether or not it be in the actual possession of the levying officer, is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out the reasonable value thereof, his title and right to the possession thereof and delivered, together with a copy thereof, to the officer making the levy, such officer must release the property and the levy unless the plaintiff, or the person in whose favor the writ runs, within five days after written demand by such officer, made by registered or certified mail within five days after being served with such verified claim, gives such officer an undertaking executed by at least two good and sufficient sureties, in a sum equal to double the value of the property levied upon.

Such undertaking shall be made in favor of and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such levy or such seizing, taking, collecting, withholding, or sale of such property by such officer; provided, however, that where the property levied upon is required by law to be registered or recorded in the name of the owner and it appears that at the time of the levy the defendant or judgment debtor was the registered or record owner of such property and the plaintiff, or the person in whose favor the writ runs, caused the levy to be made and maintained in good faith, and in reliance upon such registered or record ownership, there shall be no liability thereunder to the third person by the plaintiff, or the person in whose favor the writ runs, or his sureties, or the levying officer.

Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment. If they, or others in their place, fail to justify at the time and place appointed, such officer must release the property and the levy; provided, however, that if no exception is taken within five days after notice of receipt of the undertaking, the third person shall be deemed to have waived any and all objections to the sufficiency of the sureties.

If objection be made to such undertaking, by such third person, on the ground that the amount thereof is not sufficient, or if for any reason it becomes necessary to ascertain the value of the property involved, the property involved may be appraised by one or more disinterested persons, appointed for that purpose by the court in which the action is pending or from which the writ issued, or by a judge thereof, or the court or judge may direct a hearing to determine the value of such property.

If, upon such appraisal or hearing, the court or judge finds that the undertaking given is not sufficient, an order shall be made fixing the amount of such undertaking, and within five days thereafter an undertaking in the amount so fixed may be given in the same form and manner and with the same effect as the original.

The officer making the levy may demand and exact the undertaking herein provided for notwithstanding any defect, informality or insufficiency of the verified claim delivered to him. Such officer shall not be liable for damages to any such third person for the levy upon, or the collection, taking, keeping or sale of such property if no claim is delivered as herein provided, nor, in any event, shall such officer be liable for the levy upon, or the holding, release or other disposition of such property in accordance with the provisions of this section.

If such undertaking be given, the levy shall continue and such officer shall retain any property in his possession for the purposes of the levy under the writ; provided, however, that if an undertaking be given under the provisions of Section 710b of this code, such property and the levy shall be released.

Whenever a verified third party claim is delivered to the officer as herein provided, upon levy or execution or attachment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining title to the property in question. Such hearing must be granted by the said court upon petition therefor, which must be filed within 15 days after the delivery of the third party claim to the officer. Such hearing must be had within 20

days from the filing of such petition, unless continued as herein provided. Ten days' notice of such hearing must be given to the officer, to the plaintiff or the person in whose favor the writ runs, and to the third party claimant, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question; provided, that no such notice need to be given to the party filing the petition. The court may continue the hearing beyond the said 20-day period, but good cause must be shown for any such continuance. Whenever the petition for such hearing is filed by the third party claimant, or by any one or more joint third party claimants, neither such petition nor proceedings pursuant thereto may be dismissed without consent of the plaintiff or the person in whose favor the writ runs. The court may order the sale of any perishable property held by such officer and direct the disposition of the proceeds of such sale. The court may, by order, stay execution sale, or forbid a transfer or other disposition of the property involved, until the proceedings for the determination of such title can be commenced and prosecuted to termination, and may require, as a condition of such order, such bond as the court may deem necessary. Such orders may be modified or vacated by the judge granting the same, or by the court in which the proceeding is pending, at any time prior to the termination of such proceedings, upon such terms as may be just. At the hearing had for the purpose of determining title, the third party claimant shall have the burden of the proof. The third party claim delivered to the officer shall be filed by him with the court and shall constitute the pleading of such third party claimant, subject to the power of the court to permit an amendment in the interest of justice, and it shall be deemed controverted by the plaintiff or other person in whose favor the writ runs. Nothing herein contained shall be construed to deprive anybody of the right to a jury trial in any case where, by the Constitution, such right is given; but a jury trial shall be waived in any such case in like manner as in the trial of an action. No findings shall be required in any proceedings under this section. At the conclusion of the hearing the court shall give judgment determining the title to the property in question, which shall be conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have said property levied upon, taken, or

held, by the officer and to subject said property to payment or other satisfaction of his judgment. In such judgment the court may make all proper orders for the disposition of such property or the proceeds thereof. If the property or levy shall have been released by the officer for want of an undertaking, and final judgment shall go for the plaintiff, or other person in whose favor the writ runs, the officer shall retake or levy upon the property on such writ if the writ is still in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take or otherwise levy upon such property. An appeal lies from any judgment determining title under this section, such appeal to be taken in the manner provided for appeals from the court in which such proceeding is had.

Comment. The first paragraph of former Section 689 is superseded by Sections 706.210-706.230 and 706.270. Under Section 706.210, the third person may claim only a superior interest and the third person need not claim the property "as his property." Under subdivision (b) of Section 706.230, the property is released if the judgment creditor does not provide an undertaking or make a deposit within 10 days after the levying officer sends the demand rather than within five days after the claim is served on the judgment creditor. Section 706.220(a) requires the levying officer to mail the claim to the judgment creditor within five days after it is filed by the third person. Pursuant to Sections 702.210 and 706.220, the claim may be mailed by first-class mail, rather than by registered or certified mail. The amount of the undertaking is specified in Section 706.270(a). The requirement of two sureties is continued by Section 706.110 which incorporates the general provisions regarding undertakings in Article 1 (commencing with Section 489.010) of Chapter 9 of Title 6.5, the Attachment Law. See Section 489.040.

The substance of the second paragraph of former Section 689 is continued in Section 706.270. The third, fourth, and fifth paragraphs, relating to exceptions to the sufficiency of sureties, are superseded by Article 1 (commencing with Section 489.010) of Chapter 9 of Title 6.5, incorporated by Section 706.110.

The first sentence of the sixth paragraph of former Section 689 is continued in Section 706.220(b). The second sentence is superseded by Section 706.130.

The substance of the seventh paragraph of former Section 689 is continued in Section 706.250(a); former Section 710b is superseded by Sections 706.610-706.640.

The first, second, third, and fifth sentences of the eighth paragraph of former Section 689 are superseded by Section 706.310. The substance of the fourth sentence is continued in Section 706.320. The sixth sentence is continued in Section 706.330(b) (dismissal). The seventh, eighth, and ninth sentences are superseded by Section 706.340 (disposition of property during pendency of proceedings) and 706.350 (disposition of property after hearing). The tenth and eleventh sentences are continued in Section 706.330(a) and (c) (pleadings; burden of proof). The twelfth sentence is not continued since it is superfluous; it has been decided that there is no right to a jury trial in third-party claim proceedings (see *Misrach v. Liederman*, 14 Cal. App.2d Supp. 757; 58 P.2d 746 (1936)) and, in any event, if there were a right to a jury trial, it would exist independently under the Constitution. The thirteenth sentence is continued in Section 706.360 (findings). The fourteenth and fifteenth sentences are continued in Section 706.350 (disposition of property after hearing). The sixteenth sentence is continued in Section 706.380 (relief; additional writs). The last sentence is continued in Section 706.370 (appeal).

14910

§ 689a. (repealed). Personal property under purchase contract or subject to chattel mortgage

689a. Personal property in possession of the buyer under an executory agreement of sale and property on which there is a chattel mortgage may be taken under attachment or execution issued at the suit of a creditor of the buyer or mortgagor, notwithstanding any provision in the agreement or mortgage for default or forfeiture in case of levy or change of possession.

Comment. Former Section 689a is not continued. It is unnecessary in view of Commercial Code Section 9311.

§ 689b. (repealed). Third-party claim based on conditional sale or chattel mortgage.

689b. (1) Where the property levied upon is a vehicle or a vessel required to be registered with the Department of Motor Vehicles, the officer shall forthwith determine from such department the name and address of the legal owner of the vehicle or vessel and shall notify any such legal owner who is not also the registered owner of such vehicle or vessel of the levy by registered mail or certified mail or personal service.

(2) A seller or mortgagee may file with the officer levying on personal property a verified written claim, together with a copy thereof, containing a detailed statement of the sales contract or mortgage and the total amount of sums due or to accrue to him under the contract or mortgage, above setoffs, with interest to date of tender, and also stating therein his address within this state for the purpose of permitting service by mail upon him of any notice in connection with said claim. The officer making the levy may demand and exact the payment or undertaking herein provided for, notwithstanding any defect, informality or insufficiency of the verified claim delivered to him.

(3) Within five days after being served with such verified claim the officer levying on such property must make demand by registered mail or certified mail on the plaintiff or his attorney for the amount of the claimed debt and interest due to date of tender or the delivery to the officer of an undertaking and statement as hereinafter provided, which demand shall include the copy of such claim.

(4) Within five days after receipt by the plaintiff or his attorney of such officer's demand the plaintiff shall deposit with the officer the amount of such debt and interest or deliver the undertaking and statement hereinafter provided, or the levying officer must release the property.

(5) Within five days after receipt by him of such deposit the officer must pay or tender same to the seller or mortgagee; provided, that should such deposit be made by check the officer shall be allowed a reasonable time for check to clear.

(6) If the tender is accepted, all right, title, and interest of the seller or mortgagee in the property levied upon shall pass to the party to the action making the payment.

(7) If the tender is refused, the amount thereof shall be deposited with the county treasurer, payable to the order of the seller or mortgagee.

(8) Until such payment or deposit covering such claim is made, or the undertaking and statement herein provided delivered to the officer, the property cannot be sold under the levy; but when made (and also in case the seller or mortgagee fails to render his claim within 30 days after the personal service upon him of a written demand therefor, which service must be attested by the certificate of the serving officer, filed before the sale with the papers of the action wherein the attachment or execution was issued), then the officer must retain the property, and, in the case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee. Such written demand of the levying officer may be served by him, or for him by any sheriff, marshal, or constable whose office is closer to the place of service, and whose fees and mileage shall be paid out of the prepaid fees in the possession of the levying officer.

(9) When an attachment or execution creditor presents to the officer, within the time allowed from the officer's demand, a verified statement that the sales contract or mortgage is void or invalid for the reasons specified therein, and delivers to the officer a good and sufficient undertaking in double the amount of the indebtedness claimed by the seller or mortgagee or double the value of the personal property as the officer may determine and require, the officer shall retain the property and in case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee.

The undertaking shall be made to the seller or mortgagee and shall indemnify him for the taking of the property against loss, liability, damages, costs and counsel fees. Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment.

If such undertaking be given, such officer shall not be liable for damages to any such claimant for the taking, keeping, or sale of such property in accordance with the provisions of this code.

(10) Whenever a verified claim herein is delivered to the officer as herein provided, upon levy of execution or attachment (whether any

undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the claimant, or any one or more such joint claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the validity of such sales contract or chattel mortgage. Such hearing may be had and taken, and stay of execution or other order made in the same manner as on third party claims under Section 689 of this code. At the conclusion of the hearing the court shall give judgment determining the validity of the claim under the sales contract or chattel mortgage which shall be conclusive between the claimant and the plaintiff, or other person in whose favor the writ runs. The court in which the action is pending, or which issued such writ, shall have original jurisdiction in all proceedings under this section.

If the property shall have been released by the officer for want of an undertaking or payment, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake the property on such writ, if the writ shall still be in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take such property.

Comment. Subdivision (1) of former Section 689b is superseded by Section 703.350. The first sentence of subdivision (2) is superseded by Section 706.210 which permits a secured party to claim a superior interest in the property. However, the entire amount of the secured interest may not be claimed unless it is due. See the Comment to Section 706.210. The last sentence of subdivision (2) is continued in Section 706.220(b). Subdivision (3) is superseded by Section 706.220(a), except that the reference to the judgment creditor's attorney has been omitted as unnecessary. Pursuant to Sections 702.210 and 706.220, the claim may be mailed by first-class rather than registered or certified mail. Subdivision (4) is superseded by Section 706.230(a) which dates the time within which the deposit or undertaking must be given to the levying officer from the time of the demand is sent rather than its receipt. Subdivisions (5), (6), and (7) are continued in Section 706.240 (payment to third person). Subdivision (8) is superseded by Section 706.250 (delay of sale until deposit or undertaking; interest of third person in property sold) and Sections 706.410 (judgment creditor's demand for third

party claim) and 706.420 (service of demand for claim). Under Section 706.250(a), the property remains subject to liens and claims which are not required or permitted to be paid off pursuant to Section 706.230(a). The first paragraph of subdivision (9) is superseded by Section 706.250 except that the third person is not required to deliver a verified statement that the security interest claimed is invalid, and the levying officer does not have the discretion to require an undertaking in the amount of twice the value of the property. The first sentence of the second paragraph of subdivision (9) is continued in Section 706.270(a). The second sentence of the second paragraph of subdivision (9) is continued in Section 706.110. The third paragraph of subdivision (9) is superseded by Section 706.130. The first sentence of the first paragraph of subdivision (10) is continued in Section 706.310(a). The second sentence of the first paragraph of subdivision (10) is unnecessary because the third party claims procedures formerly contained in Sections 689 and 689b are merged in Chapter 6 (commencing with Section 706.110). The third sentence of subdivision (10) of the first paragraph is continued in Section 706.350. The fourth sentence of the first paragraph of subdivision (10) is superseded by Section 706.310(b). The second paragraph of subdivision (10) is continued in Section 706.380.

14912

689c (repealed). Proceeds of sale; application

689c. When the property thus taken is sold under process the officer must apply the proceeds of the sale as follows:

1. To the repayment of the sum paid to the seller or the mortgagee, or deposited to his order, with interest from the date of such payment or deposit.

2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

Comment. Former Section 689c is superseded by Sections 706.340 (disposition of property after hearing on third-party claim) and [703.750] (disposition of proceeds of sale).

§ 689d (repealed). Warrant to collect tax; hearing to determine title

689d. In cases in which a warrant or notice of levy is issued by the State of California, or a department or agency thereof, pursuant to Section 1755 or 1785 of the Unemployment Insurance Code, or Section 6776, 7881, 9001, 10111, 18906, 26191, 30341 or 32365 of the Revenue and Taxation Code, for the collection of tax liability owned to said state, a department or agency thereof, a hearing, for the purpose of determining title to the property in question as provided in Section 689 of this code, may be held by the superior court of the county, or city and county, in which the property levied upon is located.

Comment. Former Section 689d is continued in Section 706.120.

§ 689.5 (repealed). Release; delivery of property to claimant

689.5. Whenever, under Section 689 or 689b of this code a claim has been filed as to property levied on and the plaintiff has failed to furnish or maintain a sufficient undertaking to authorize the levying officer to continue to hold the property and such officer is unable to find the defendant to deliver the property, the levying officers shall notify the defendant in writing at his last known address, and if within ten (10) days thereafter the levying officer is unable to locate the defendant he must return the property to the party filing the third party claim.

Comment. Former Section 689.5 is superseded by Section 706.260 which incorporates the general rules pertaining to release. See Section 703.290. The provision in former Section 689.5 for release to the third person where the judgment debtor cannot be found has been retained in Section 706.260 as an exception to the general rules.

§ 710b (repealed). Third-party claimants; undertaking to release property

710b. Where personal property levied upon under execution to satisfy a judgment for the payment of money is claimed, in whole or in part, by a person, corporation, partnership or association, other than

the judgment debtor, such claimant may give an undertaking as herein provided, which undertaking shall release the personal property in the undertaking described from the lien and levy of such execution.

Comment. The substance of former Section 710b is continued in Section 706.610 except that the third person is not specifically required to be a claimant. See the Comment to Section 706.610. See also Section 701.____ ("person" defined).

28762

§ 710c (repealed). Form of undertakings to release

710c. Such undertaking, with two sureties, shall be executed by the person, corporation, partnership or association, claiming in whole or in part, the property upon which execution is levied in double the estimated value of the property claimed by the person, corporation, partnership or association; provided, in no case need such undertaking be for a greater sum than double the amount for which the execution is levied; and where the estimated value of the property so claimed by the person, corporation, partnership or association is less than the sum for which such execution is levied, such estimated value shall be stated in the undertaking. Said undertaking shall be conditioned that if the property claimed by the person, corporation, partnership or association is finally adjudged to be the property of the judgment debtor, said person, corporation, partnership or association will pay of said judgment upon which execution has issued a sum equal to the value, as estimated in said undertaking, of said property claimed by said person, corporation, partnership or association, and said property claimed shall be described in said undertaking.

Comment. Former Section 710c is superseded by Sections 706.610 (third-party undertaking to obtain release of property) and 706.620 (contents of undertaking). See Section 706.110 (general provisions relating to undertakings in attachment applicable to undertakings under Chapter 6).

§ 711 (repealed). Filing and service of undertaking

711. Said undertaking shall be filed in the action in the court in which said execution issued, and a copy thereof served upon the judgment creditor or his attorney in said action.

Comment. The substance of former Section 711 is continued in Section 706.630, except that the reference to the judgment creditor's attorney has not been continued since it is unnecessary.

§ 711-1/2 (repealed). Objections to sureties

711-1/2. Within ten days after the service of the copy of the undertaking, the judgment creditor may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of property therein is less than the market value of the property claimed. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market value of the property claimed. Such objection shall specify the judgment creditor's estimate of the market value of the property claimed. Such written objection shall be served upon the person, partnership, corporation or association giving such undertaking and claiming the property therein described.

Comment. Former Section 711-1/2 and also Sections 712 to 713-1/2 are superseded by Section 706.110 which makes the provisions pertaining to objections to undertakings under attachment applicable to undertakings given pursuant to Chapter 6 (commencing with Section 706.110) of Title 9. See Article 1 (commencing with Section 489.010) of Chapter 9 of Title 6.5.

§ 712 (repealed). Justification of sureties

712. When the sureties, or either of them, are objected to, the surety or sureties so objected to shall justify before the court out of which such execution issued, upon ten days' notice of the time when they

will so justify being given to the judgment creditor or his attorney. Upon the hearing and examination into the sufficiency of a surety, witnesses may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases. Upon such hearing and examination, the court shall make its order, in writing, approving or disapproving the sufficiency of the surety or sureties on such undertaking. In case the court disapproves of the surety or sureties on any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this section the same objection to the sureties may be made, and the same proceedings had as in case of the first undertaking filed and served.

Comment. See the Comment to former Section 711-1/2.

67702

§ 712-1/2 (repealed). Dispute as to estimated value of property;
new undertaking

712-1/2. When objection is made to the undertaking upon the ground that the estimated value of the property claimed, as stated in the undertaking, is less than the market value of the property claimed, the person, corporation, partnership or association may accept the estimated value stated by the judgment creditor in said objection, and a new undertaking may be at once filed with the judgment creditor's estimate stated therein as the estimated value, and no objection shall thereafter be made upon that ground; if the judgment creditor's estimate of the market value is not accepted, the person, corporation, partnership or association giving the undertaking shall move the court in which the execution issued, upon ten days' notice to the judgment creditor, to estimate the market value of the property claimed and described in the undertaking, and upon the hearing of such motion witnesses may be required to attend and testify, and evidence be produced in the same manner as in the trial of civil actions. Upon the hearing of such motion, the court shall estimate the market value of the property described in the undertaking, and if the estimated value made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served, with the market value determined by the court stated therein as the estimated value.

Comment. See the Comment to former Section 711-1/2.

§ 713 (repealed). Justification of sureties on new undertaking.

713. The sureties shall justify on the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure.

Comment. See the Comment to former Section 711-1/2.

§ 713-1/2 (repealed). Effective date of undertaking

713-1/2. The undertaking shall become effective for the purpose herein specified ten days after service of copy thereof on the judgment creditor, unless objection to such undertaking is made as herein provided, and in case objection is made to the undertaking filed and served, then the undertaking shall become effective for such purposes when an undertaking is given as herein provided.

Comment. See the Comment to former Section 711-1/2.