

Memorandum 78-7

Subject: Study D-39.200 - Enforcement of Judgments (Comprehensive Statute--Special Procedures for Enforcement of Money Judgments)

Attached to this memorandum is a copy of the preliminary text and statute concerning special procedures for the enforcement of money judgments (Chapter 5 of the Enforcement of Judgments Law). We are sending this in a binder and will be sending other portions of the statute to be inserted in the binder as they are prepared. The binder also includes an outline of the complete title so that you may have an overview of the structure of the draft statute.

This chapter has previously been tentatively approved in substantially this form. We have several comments:

§ 705.145. Privilege of spouse of judgment debtor

The privilege of the judgment debtor's spouse not to testify in an examination under existing Section 717 (examination of debtor of judgment debtor) is extended to all examinations under Article 1 by Section 705.145.

§ 705.270. Costs in creditor's suit

This section has been redrafted. It used to provide that the costs could not be awarded against a third person who did not dispute the judgment debtor's interest in the property or the debt to the judgment debtor.

§ 705.310. Application of general receiver provisions

The second and third paragraphs of the Comment should be deleted. This material appears in the Comment to the next section.

§ 705.510. Lien on cause of action and judgment

Existing Section 688.1 permits the court to grant a lien on a cause of action and any judgment subsequently procured. It appears that a lien may be granted only on a money judgment since Section 688.1 refers to the money recovered by the judgment debtor and to judgment liens obtained under Section 674. We have drafted Section 705.510 to permit the court to order a lien on a cause of action and judgment for the recovery of other property and for the foreclosure of a mortgage or

other lien as well. Subdivision (c) has been revised to codify the case law concerning the priority of such liens.

§ 705.610. Assignment orders

This section is broader in scope than it was when previously considered by the Commission. It would now permit the court to order assignment of the right to payment under forms of property which may also be levied upon, such as negotiable instruments and accounts receivable. In addition, it permits the assignment of rights which are not now subject to levy because they are conditioned on future developments, such as rents.

§ 705.710 et seq. Collection where judgment debtor is creditor of public entity

See the discussion in the preliminary part accompanying the statute.

Respectfully submitted,

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STAFF DRAFT

SPECIAL PROCEDURES FOR THE ENFORCEMENT OF MONEY JUDGMENTS

Introduction

Levy under a writ of execution is not a complete remedy. It may be ineffective where the judgment debtor conceals or disposes of assets which are subject to execution or where a third person refuses to cooperate with the levy. There are types of property which for historical and practical reasons cannot be reached by execution. Other procedures have been developed to deal with these special situations, first by the courts of equity, and later by statute.

The Commission recommends that the various special procedures be revised and expanded to provide a greater variety of remedies to the judgment creditor consistent with fair treatment of the interests of the judgment debtor.

Examination Proceedings

Examination proceedings¹--frequently called proceedings in aid of execution or supplementary proceedings--permit the judgment creditor to examine the judgment debtor or a third person who has property of, or is indebted to, the judgment debtor in order to discover property and apply it toward the satisfaction of the judgment. Examination proceedings are initiated by application for an order that the judgment debtor or third person appear and answer concerning the judgment debtor's property.

A judgment debtor may be examined once every four months² or more frequently where a writ of execution has been issued and the judgment creditor shows that there is property which the judgment debtor "unjustly refuses" to apply toward the satisfaction of the judgment.³ The four-month limitation should be retained since it is designed to prevent harrassment of the judgment debtor.⁴ However, the requirements that, in

1. See Sections 714-723.

2. Section 714.

3. Section 715.

4. For the sake of precision, it is recommended that the four-month period be changed to 120 days.

order to obtain a more frequent examination, the judgment creditor must (1) obtain issuance of a writ of execution and (2) show that the judgment debtor's refusal to apply property has been "unjust," should be eliminated.⁵

Examinations of third persons are more circumscribed. The order to appear may be issued only if a writ of execution has been issued or returned and the judgment creditor must show that the third person has property of the judgment debtor or is indebted in an amount exceeding \$50. The prerequisite of the issuance or return of a writ of execution should be eliminated as an outmoded historical relic.⁶ The judgment

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5. Originally, California adopted the system provided in the Field draft of a Code of Civil Procedure for New York under which issuance and return unsatisfied were required for an examination of the judgment debtor, but mere issuance was required where the proceedings were aimed at the application of particular property which the judgment debtor unjustly refused to apply. See 1851 Cal. Stats., Ch. 5, §§ 238, 239; S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 283-84 (2d ed. 1975). It was not until 1957 that the four-month limitation was added to judgment debtor examinations where no special showing is made. See 1957 Cal. Stats., Ch. 1194 § 1. A 1955 amendment of Section 714 eliminated the requirement that a writ be issued and returned unsatisfied, and substituted therefor the requirement that a writ be "issuable"—in effect, a test of whether the judgment is currently enforceable. See 1955 Cal. Stats., Ch. 1191, § 1. This amendment recognized that the former requirement was an outgrowth of the time when the courts of equity and law were separate and when equity would not act unless the legal remedies had been exhausted, and that the return of a writ unsatisfied creates no presumption that the legal remedy is inadequate since the levying officer may not have been instructed to levy under the writ. See S. Riesenfeld, *supra* at 283.

The requirement that the judgment debtor's refusal to apply property under Section 715 be alleged to be unjust serves no apparent purpose. If it means that the judgment debtor has nonexempt property, as opposed to exempt property or property of third persons which may properly not be applied to the judgment, then the language is unneeded because the proposed law elsewhere makes clear which property may be applied toward the satisfaction of a judgment. If it is designed to make sure the judgment creditor first attempts to reach property by levy under a writ of execution, it should be eliminated, consistent with the 1955 amendment of Section 714 and the policy of the proposed law to expunge the exhaustion of legal remedies doctrine and permit the judgment creditor to pursue whichever remedy is thought to be most effective in given circumstances.

6. See note 5 *supra* and note 49 *infra*.

creditor should be free to select the most appropriate means of reaching the property held or controlled by the third person. The \$50 requirement dating from 1851⁷ should be increased to \$250 to compensate for the change in the value of the dollar. The proposed law would require that notice of the examination of the third person be given the judgment debtor since the judgment debtor is an interested party.

Because examination is a summary proceeding, a third person who denies the debt or possession of the property, or who claims an interest adverse to the judgment debtor, may not be ordered to apply the property toward the satisfaction of the judgment.⁸ The judgment creditor must then resort to a creditor's suit in which the interest of the third person may be determined.⁹ This restriction on examination of third persons should be retained in order to protect the interests of persons who are not parties. If the judgment creditor is unable to obtain an order against the third person in examination proceedings, the third person may be enjoined from transferring property to the judgment debtor or from paying any debt to the judgment debtor until a creditor's suit can be brought.¹⁰

The proposed law codifies the case law concerning the lien created by service of an order of examination.¹¹ Service on the judgment debtor creates a lien on the judgment debtor's property which is subject to the enforcement of a money judgment. Service on a third person creates a lien on the property in the third person's possession in which the judgment debtor has an interest and on any debt owing to the judgment debtor

7. 1851 Cal. Stats. Ch. 5, § 241.

8. See Section 719. The third person is entitled to a determination of the respective interests in the property or debt in an independent action. *Takahashi v. Kunishima*, 34 Cal. App.2d 367, 373, 93 P.2d 645, 648 (1939).

9. See Section 720 and the discussion under "Creditor's Suit" infra.

10. See Section 720 and the discussion under "Creditor's Suit" infra.

11. See *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 28-30, 87 P.2d 830, 844 (1939); *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242, 245 (1909).

if the property or debt is eventually ordered to be applied to the satisfaction of the judgment.¹²

The proposed law would make several other changes in the existing examination procedure. The provision of existing law permitting the arrest of the judgment debtor on ex parte application of the judgment creditor where it appears that there is a danger of the judgment debtor absconding and providing for the imprisonment of the judgment debtor unless an undertaking is given¹³ should be repealed as in conflict with the policies supporting the repeal of the civil arrest provisions.¹⁴ The provision of existing law which grants a privilege to the spouse of the judgment debtor not to testify at an examination of a third person¹⁵ should also apply to examinations of the judgment debtor. Mileage fees for third persons attending examination proceedings should be the same as for witnesses generally.¹⁶ The proposed law would also permit the judgment creditor to recover reasonable attorney's fees incurred in an examination proceeding where the judgment debtor has been served with an order to appear at an examination by a person authorized to serve the order¹⁷ but fails to appear. The proposed law provides that a corporation, partnership, association, or trust is to appear at an examination through an officer, director, managing agent, or other person familiar

12. See the discussion under "Effect of Liens" supra.

13. Section 715.

14. See Recommendation and Study Relating to Civil Arrest, 11 Cal. L. Revision Comm'n Reports 1 (1973).

15. Section 717.

16. Section 717.1 provides mileage fees for third persons to be examined in the amount of \$0.15 per mile one way. Government Code Section 68093 was amended in 1970 to raise the fee for witnesses to \$0.20 per mile one way. 1970 Cal. Stats., Ch. 1061, § 2.

17. Sections 714 and 717 provide that service be made by a sheriff, constable, marshal, some person specially appointed by the court, or a registered process server as a condition to bringing the judgment debtor before the court.

with its property and debts.¹⁸ Existing law provides that a referee appointed to conduct examinations in a county with a population of one million or more must have been licensed to practice law for five years.¹⁹ The proposed law would require that all referees be members of the State Bar of California.

Creditor's Suit

Under existing law, the judgment creditor may bring an action against a third person who has property in which the judgment debtor has an interest or who is indebted to the judgment debtor for the application of the property or debt toward the satisfaction of the money judgment.²⁰ The remedy of the creditor's suit developed when the types of property reachable by the writs which were predecessors of the writ of execution were fairly limited.²¹ Although the reach of the writ of execution has been considerably expanded,²² the creditor's suit has persisted and is continued in the proposed law in order to reach types of property which still cannot be reached by execution, or only inefficiently so, and to enforce the liability of a recalcitrant third person holding property of, or owing debts to, the judgment debtor.²³

18. This provision is derived from Rule 30(b)(6) of the Federal Rules of Civil Procedure.

19. Section 723.

20. See Section 720; 5 B. Witkin, California Procedure Enforcement of Judgment § 143, at 3506-07 (2d ed. 1971).

21. See generally, G. Gilbert, The Law of Executions 1-58 (1763); R. Millar, Civil Procedure of the Trial Court in Historical Perspective 419-26, 437-42 (1952); Riesenfeld, Collection of Money Judgments in American Law--A Historical Inventory and a Prospectus, 42 Iowa L. Rev. 155, 160-63 (1957).

22. Section 688(a) provides (somewhat overinclusively):

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

23. A creditor's suit and an examination proceeding against third persons may reach the same types of property (examination proceedings being an outgrowth of the creditor's suit), but a creditor's suit is necessary where the third person claims an adverse interest or denies the debt in an examination proceeding. See the discussion

Being a creation of the courts of equity, creditors' suits are subject to the doctrine requiring exhaustion of legal remedies before the action can be commenced.²⁴ Consistent with the policy of providing flexibility to the judgment creditor in the selection of the appropriate remedy, the proposed law does not require the exhaustion of any other remedies. Costs would, however, be recoverable only against the third person and only if reasonably necessary.²⁵ Unlike existing law,²⁶ the proposed law would require that the judgment debtor be joined in the creditor's suit although the judgment debtor would not be considered an indispensable party, nor would the judgment debtor's residence be considered in the determination of proper venue unless otherwise provided in the contract between the judgment debtor and the third person.

Under existing law, it appears that the creditor's suit is subject to the general four-year statute of limitations²⁷ and, at least in certain circumstances, that the time begins to run from the return of the

under "Examination Proceedings," supra. This discussion is not concerned with another aspect of creditors' suits--the action to set aside a fraudulent conveyance--from which the action to set aside under the Uniform Fraudulent Conveyance Act was derived. See Civil Code § 3439.09; 5 B. Witkin, California Procedure Enforcement of Judgment §§ 152-153, at 3516-18 (2d ed. 1971).

24. See *Farmers' & Merchants' Bank v. Bank of Italy*, 216 Cal. 452, 455-58, 14 P.2d 527, 528-29 (1932) (resort to examination proceedings required); *Bond v. Bulgheroni*, 215 Cal. 7, 10-11, 8 P.2d 130, 132 (1932) (resort to examination proceedings not required where inadequate or futile).
25. The general procedure for recovering costs would be applicable. See Section 1033.7.
26. Cf. *Coffee v. Haynes*, 124 Cal. 561, 564-565, 57 P. 482, ____ (1899) (notice to judgment debtor not required in examination proceedings under Sections 717 and 719); *Blanc v. Paymaster Mining Co.*, 95 Cal. 524, 528-29, 30 P. 765, ____ (1892) (fraudulent transferor a proper but not necessary party in action to set aside); *High v. Bank of Commerce*, 95 Cal. 386, 387-88, 30 P. 556, ____ (1892) (notice to judgment debtor not required when court authorizes creditor's suit pursuant to Section 720).
27. See Section 343 (four-year statute of limitations where no specific provision); *Sherman v. S.K.D. Oil Co.*, 185 Cal. 534, 538, 545, 197 P. 799, 801, ____ (1921).

writ of execution unsatisfied.²⁸ Under the proposed law, the creditor's suit could be commenced at any time when the judgment debtor may bring an action against the third person concerning the property or debt or, if a lien is created on the property or debt within such time, at a later time extending for one year from the creation of the lien. This provision would have the effect of extending the liability of the third person for up to an additional year after the judgment debtor could no longer sue, in order to prevent the third person from avoiding liability by delaying tactics. Once commenced, the creditor's suit could be pursued to judgment, even though the judgment creditor could no longer enforce the original judgment against the judgment debtor.²⁹ The judgment in the creditor's suit would be independently enforceable against the third person.³⁰ The existing case law to the effect that service of summons in a creditor's suit creates a lien on the property that is the subject of the action is codified in the proposed law.³¹

Under existing law, if a third person in an examination proceeding claims an interest in property adverse to the judgment debtor or denies the debt, an order applying the property toward the satisfaction of the judgment may not be issued, but the court may forbid a transfer or other disposition of the property or debt until a creditor's suit can be

28. See *Spencer v. Anderson*, 193 Cal. 1, 5, 222 P. 355, ____ (1924); *Sherman v. S.K.D. Oil Co.*, 185 Cal. 534, 538, 197 P. 799, 801 (1921). There is, however, no requirement that a writ be returned unsatisfied as a precondition to bringing a creditor's suit. Even if exhaustion of the remedy of examination proceedings is required, only issuance of a writ is necessary pursuant to Section 717.

29. See the discussion under "Time for Enforcement of Judgments" *supra*,

30. Where it is determined that the third person owes a debt to the judgment debtor, the judgment in the creditor's suit will be, in effect, a money judgment against the third person. Where it is determined that the third person has property of the judgment debtor, the judgment creditor may apply only that property, or if it cannot be found, its value, to the satisfaction of the judgment against the judgment debtor. Any money collected from the third person goes toward the satisfaction of both the judgment in the creditor's suit and the original money judgment.

31. See *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 28-30, 87 P.2d 830, 844 (1939); *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242, 245 (1909).

commenced and prosecuted to judgment.³² The proposed law continues this injunctive remedy in a modified form. The judgment creditor would be able to apply for an order in any situation, not just where a third person has resisted examination proceedings. The order would be limited to a reasonable time, not to exceed 60 days,³³ but could be extended if a creditor's suit is commenced within the time allowed. Under the proposed law, the order would restrain only a transfer to the judgment debtor since a more sweeping order issuable without notice and without bond and directed to a third person who is not a formal party is constitutionally suspect.³⁴

Interrogatories to the Judgment Debtor

Existing law permits a judgment creditor to serve interrogatories upon the judgment debtor if the debtor is represented by counsel.³⁵ The form of, answer to, and enforcement of the interrogatories is the same as that provided for interrogatories in a civil action.³⁶ The proposed law would continue this procedure but would make clear that, in order to prevent harrassment, interrogatories may not be served if, within the preceding 120 days, interrogatories have been served or an examination has been conducted.³⁷ Under this provision, judgment creditors would be

32. Section 720.

33. In *Pioneer Inv. & Trust Co. v. Muncey*, 33 Cal. App. 740, 743, 166 P. 591, 592 (1917), it was held that the order should be vacated if the judgment creditor does not "seasonably" commence the creditor's suit.

34. Cf. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-08 (1975); *Randone v. Appellate Dep't*, 5 Cal.3d 536, 547-52, 488 P.2d 13, 20-23, 96 Cal. Rptr. 709, 716-19 (1971).

35. Section 714.5.

36. See Sections 714.5, 2030.

37. Section 714.5 provides that interrogatories may be used "cumulative to" and "in conjunction with" examination proceedings under Section 714 and also that the judgment debtor may not be required to respond to interrogatories more frequently than once in any four-month period or within any four-month period during which an examination has been conducted pursuant to Section 714. The effect on the right to examine the judgment debtor of using interrogatories is not specified in Section 714.5, nor is the relation between interrogatories and an examination under Section 715 indicated.

able to use the order obtainable in an examination proceeding to apply property that is described in the answer to the interrogatories to the satisfaction of the judgment. Service of interrogatories would not have the effect of creating a lien on property of the judgment debtor, as does service of an order of examination.³⁸

Charging Orders

A charging order³⁹ is the proper means to reach the judgment debtor's interest in a partnership⁴⁰ and apply it to the satisfaction of a money judgment.⁴¹ This procedure, which provides an orderly means of reaching a partner's interest without destroying the partnership, is continued in the proposed law. Existing law recognizes that a lien arises from a charging order but is unclear as to the time of its creation and its effect.⁴² The proposed law provides for creation of the lien at the time the notice of motion for a charging order is served on the judgment debtor.⁴³

38. See the discussion under "Examination Proceedings" supra.

39. See Corp. Code §§ 15028 (charging order under Uniform Partnership Act), 15522 (charging order under Uniform Limited Partnership Act); 5 B. Witkin, California Procedure Enforcement of Judgment § 142, at 3504-06, Supp. at 29-30 (2d ed. 1971 & Supp. 1977).

40. A general partner's interest in the partnership which may be reached by a judgment creditor are the rights in specific partnership property and the interest in the partnership as such. See Corp. Code § 15024. A limited partner's interest in the partnership which may be reached by a judgment creditor is a share of the profits but not an interest in specific partnership property. See Corp. Code § 15510(2); *Evans v. Galardi*, 16 Cal.3d 300, 307-10, 546 P.2d 313, ___, 128 Cal. Rptr. 25, ___ (1976).

41. The charging order procedure is a special case of the creditor's suit.

42. See *Taylor v. S & M Lamp Co.*, 190 Cal. App.2d 700, 707-12, 12 Cal. Rptr. 323, 329-31 (1961).

43. The lien provision in the proposed law is analogous to that provided in examination proceedings. See the discussions under "Examination Proceedings" supra and "Effect of Liens" supra.

Receiver to Enforce Judgment

Existing law permits the appointment of a receiver in aid of execution where the writ of execution has been returned unsatisfied or where the judgment debtor refuses to apply property toward the satisfaction of the judgment.⁴⁴ Appointment of a receiver may also enable the judgment creditor to reach and apply forms of property which cannot be reached by levy under a writ of execution.⁴⁵ Generally, receivers are appointed in examination proceedings where the requisite showing is made,⁴⁶ but a receiver may be appointed in proceedings on noticed motion.⁴⁷ Receivership is considered a drastic remedy, and the courts are reluctant to appoint a receiver unless it is shown that other remedies are inadequate.⁴⁸

Under the proposed law, the appointment of a receiver to enforce a money judgment would continue to be a remedy requiring a special showing. The judgment creditor should be able to obtain the appointment of a receiver upon a showing that, considering the interests of both the judgment creditor and the judgment debtor, it is a reasonable method to achieve the fair and orderly satisfaction of the judgment. The existing statutory requirement that the writ be returned unsatisfied should be eliminated since it is an empty formality which results in a delay of at least 10 days in the attempt to reach the judgment debtor's assets and merely increases the costs of collection.⁴⁹ The law concerning the

44. Section 564, subd. 4.

45. See *Habenicht v. Lissak*, 78 Cal. 351, ___, 20 P. 874, 877 (1889) (seat on stock exchange); *Pacific Bank v. Robinson*, 57 Cal. 520, ___ (1881) (patent); *Medical Fin. Ass'n v. Short*, 36 Cal. App.2d Supp. 745, 747, 92 P.2d 961, ___ (1935) (federal wages).

46. See *Tucker v. Fontes*, 70 Cal. App.2d 768, 771, 161 P.2d 697, ___ (1945); *Bruton v. Tearle*, 7 Cal.2d 48, 53, 59 P.2d 953, ___ (1936).

47. *Olsan v. Comora*, 73 Cal. App.3d 642, 647-49, ___ Cal. Rptr. ___, ___ (1977).

48. *Jackson v. Jackson*, 253 Cal. App.2d 1026, 1040-41, 62 Cal. Rptr. 121 (19__); *Olsan v. Comora*, 73 Cal. App.3d 642, 646-47, ___ Cal. Rptr. ___, ___ (1977).

49. The 10-day delay is the result of Section 683 which provides that the writ is returnable not less than 10 nor more than 60 days after its receipt by the levying officer. The cost of issuance of a writ is recoverable pursuant to Section 1033.7(c). It may be argued that the provision that the writ be returned nulla bona (no goods) before a receiver may be appointed is no longer the law since a

appointment, qualification, powers, and duties of receivers should remain unchanged.⁵⁰ Existing law is unclear as to the effect of the appointment and enforcement activities of a receiver. The proposed law provides for a receiver's lien which arises when a copy of the order appointing the receiver is served in the manner provided for levy under a writ or for service of other process that creates a lien.⁵¹ The proposed law also specifically provides for the appointment of a receiver to transfer a liquor license which, under existing law, may not be reached to satisfy a money judgment.⁵²

Lien on Cause of Action and Judgment

Existing law precludes levy upon or sale of a cause of action or judgment "as such."⁵³ The judgment creditor may, however, seek to establish a priority over other creditors in the eventual recovery by the

receiver may be appointed in examination proceedings under Section 714 which, since 1955, has not required the return of the writ unsatisfied. See 1955 Cal. Stats., Ch. 1191, § 1. Levying officers no longer make an independent search for property subject to execution, but instead act at the instructions of the judgment creditor. See 1 A. Freeman, Law of Executions § 107, at 395-98 (3d ed. 1900) (former practice); Cal. State Sheriffs' Ass'n, Civil Procedural Manual § 7.30 (rev. 1971). If so instructed, the levying officer will return the writ unsatisfied and will not attempt to levy under the writ. Obviously, this procedure does not result in a presumption that there is no property subject to levy and sale.

50. See Sections 564-571.

51. See the discussion under "Effect of Liens" supra.

52. Section 688(f) has, since 1959, precluded the use of any enforcement process against licenses, including liquor licenses. See 37 Op. Cal. Att'y Gen. 4 (1961). The use of a receiver permits application of the proceeds to the set of priorities spelled out in Business and Professions Code Section 24074. See Grover Escrow Corp. v. Gole, 71 Cal.2d 61, 65, 453, P.2d 461, 463, 77 Cal. Rptr. 21, 23 (1969) (statutory priorities are mandatory and exclusive). The proposed law will not permit appointment of a receiver to sell a liquor license if the probable sale price of the license does not exceed the amount necessary to satisfy the claims of creditors with priority over the judgment creditor who is seeking the appointment of a receiver.

53. Section 688(f).

judgment debtor in the action against a third person by applying on noticed motion for an order granting a lien on the cause of action and judgment.⁵⁴ The general rule is that the priority of the lien is determined as of the time the lien is granted⁵⁵ but the equitable rule granting priority to the one who first applies for the lien has also been invoked.⁵⁶ The proposed law provides that the lien is created at the time it is granted by the court, but that it relates back to the time of the application for the order creating the lien.⁵⁷

Existing law is silent concerning the manner of enforcing the lien. It has been suggested that the judgment creditor would have to bring an action to foreclose the lien in order to reach the amount represented by the judgment.⁵⁸ Such a remedy is needlessly formal and restrictive. There is no reason why a debt of a third person represented by a judgment cannot be applied to the satisfaction of the judgment against the judgment debtor in the same manner as other debts are applied. Enforcement against a debt that has been reduced to judgment requires fewer safeguards because the existence of the debt and the amount due are certain so that enforcement is less likely to result in a windfall to the judgment creditor or a purchaser at a sale, should the judgment be sold. Under the proposed law, the judgment creditor may select the most effective means to collect the judgment subject to the lien, such as by

54. Section 688.1(a). The court may also permit the judgment creditor to intervene in the action.

55. See Takehara v. H.C. Muddox Co., 8 Cal.3d 168, 170, 501 P.2d 913, ___, 104 Cal. Rptr. 345, ___ (1972); Civil Code § 2897 (priority based on time of creation of lien, other things being equal).

56. See Del Conte Masonry Co. v. Lewis, 16 Cal. App.3d 678, 681, 94 Cal. Rptr. 439, ___ (1971).

57. The proposed law does not specify any duration of the lien, but it would not be enforceable after expiration of the time for enforcement of the judgment creditor's judgment. See discussions under "Time for Enforcement of Judgments" supra and "Effect of Liens" supra.

58. See Roseburg Loggers, Inc. v. Plywood-Champion Papers, Inc., 14 Cal.3d 742, 748, 537 P.2d 399, ___, 122 Cal. Rptr. 567, ___ (1975) (dictum); Work of the 1941 California Legislature, 15 So. Cal. L. Rev. 1, 18 (1941).

levy under a writ of execution and sale or collection, by appointment of a receiver to collect the judgment, by application for an assignment order, or by the procedures for collection from a public entity owing money to the judgment debtor.

Existing law provides that no compromise, settlement, or satisfaction of the claim or judgment may be entered into on behalf of the judgment debtor without the consent of the judgment creditor.⁵⁹ This prohibition should be modified to permit compromise, settlement, or satisfaction with the approval of the court where the action is pending or judgment was entered in order to prevent the judgment creditor from forcing the judgment debtor to proceed with the action in circumstances where it is advisable to settle.

Existing law does not specify the type of judgments upon which a lien may be granted. The proposed law permits the granting of a lien on money judgments and also on judgments for the possession or sale of property. Where the lien is on a money judgment, the judgment creditor would be able to proceed against the third person as if the third person were the judgment creditor's judgment debtor. Where the lien is on a judgment for the sale of property, such as where the judgment debtor has foreclosed a mortgage, the judgment creditor would be able to proceed only against the property which is the subject of the judgment debtor's action against the third person and have it sold in satisfaction of the judgment creditor's money judgment. Similarly, where the lien is on a judgment for the possession of property, the judgment creditor would be able to proceed only against the property which is the subject of the judgment for possession. In this case, the judgment creditor would be entitled to have the property applied to the satisfaction of the judgment creditor's money judgment, but would not have the right to possession of the property.

Existing law provides that an assignee by operation of law of a party to a personal injury action may not acquire a lien on money recovered for general damages.⁶⁰ This provision should not be continued because it has been held to be in conflict with the Bankruptcy Act.⁶¹

59. Section 688.1(a).

60. Section 688.1(b).

61. See In re Kanter, 505 F.2d 228, ____ (9th Cir. 1974), aff'g 345 F. Supp. 1151 (C.D. Cal. 1972).

Orders to Assign Rights to Future Payments

The proposed law would permit the judgment creditor to apply to the court on noticed motion for an order requiring the judgment debtor to assign all or part of a right to future payments to the judgment creditor or a receiver.⁶² The terms of the assignment would be subject to the court's discretion, but the judgment creditor would not be permitted to receive amounts in excess of that needed to satisfy the judgment. The terms of the order would be subject to later modification to take account of changed circumstances. Service of the assignment order on the judgment debtor would create a lien on the right assigned or to be assigned.⁶³

The assignment order remedy is designed to be used to reach forms of property that cannot be reached by levy under a writ of execution,⁶⁴ such as rights to payment dependent on future developments,⁶⁵ rent,⁶⁶

62. This procedure is derived from cases involving examination proceedings or creditors' suits where property was ordered to be assigned or delivered to a receiver. See *Habenicht v. Lissak*, 78 Cal. 351, ___, 20 P. 874, 877 (1889); *Pacific Bank v. Robinson*, 57 Cal. 520, ___ (1881); *Hathaway v. Brady*, 26 Cal. 581, ___ (1864); *Tucker v. Fontes*, 70 Cal. App.2d 768, ___ 161 P.2d 697, 701 (1945); and cases cited notes 67 & 68, *infra*. See also N.Y. Civ. Prac. Law & R. § 5226 (order requiring judgment debtor to make specified installment payments where shown that debtor will be receiving money).

63. See the discussion under "Effect of Liens," *supra*.

64. The law is not especially clear in delineating the conditions making a debt subject to garnishment. Compare *Philbrook v. Mercantile Trust Co.*, 84 Cal. App. 187, ___, 257 P. 882, ___ (1927) (existing debt fixed in amount but payable in the future subject to garnishment), *Brainard v. Rogers*, 74 Cal. App. 247, ___, 239 P. 1095, ___ (1925) (fire insurance policy after fire but before adjustment subject to garnishment), *Meacham v. Meacham*, 262 Cal. App.2d 248, 252, 68 Cal. Rptr. 746, ___ (1968) (contract for royalties from marketing invention subject to garnishment), and Section 682.3 (continuing levy on future earnings) *with* *Early v. Redwood City*, 57 Cal. 193, 195 (1881) (garnishment did not reach money due only after completion of work under contract), *Hustead v. Superior Court*, 2 Cal. App.3d 780, 785-88, 83 Cal. Rptr. 26, ___ (1969) (future rent not subject to garnishment), and *Dawson v. Bank of America*, 100 Cal. App.2d 305, 309-310, 223 P.2d 280, ___ (1950) (escrow not subject to garnishment where amount not certain and conditions necessary to establish proper claimant not fulfilled).

65. See *Dawson v. Bank of America*, *supra* note 64.

66. See *Hustead v. Superior Court*, *supra* note 64.

surplus amounts from a spendthrift trust,⁶⁷ and wages due from the federal government.⁶⁸ This remedy would also be available to reach and apply royalties and commissions, and payments falling due on accounts receivable, chattel paper, choses in action, judgments, and negotiable instruments--forms of property that are subject to levy and either sale or collection.⁶⁹ By restricting the assignment of payments to the amount necessary to satisfy the judgment, the assignment order procedure, in conjunction with the proposed restrictions on the sale of certain obligations, should severely limit cases where valuable or potentially valuable obligations are purchased by the judgment creditor on a speculative basis, perhaps resulting in a large windfall to the judgment creditor.⁷⁰

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67. Under existing law surplus income from a spendthrift trust may be reached by a creditor's suit or an order in examination proceedings where it is shown that there is no valid direction in the trust instrument for the accumulation of surplus income and that the income is not all necessary for the beneficiary's education and support. See Civil Code § 859; *Canfield v. Security First Nat'l Bank*, 13 Cal.2d 1, ___, 87 P.2d 830, ___ (1939); *Estate of Lawrence*, 267 Cal. App.2d 77, ___, 72 Cal. Rptr. 851, ___ (1968). Under the proposed law, such property could still be reached in this manner, but would also be reachable by way of an assignment order.
68. As a function of the principle of sovereign immunity, wages in the hands of the federal government are not subject to garnishment without the consent of the government. However, wages may be reached by an order obtained in examination proceedings directed to the judgment debtor to endorse and deliver paychecks to a receiver. See *Sheridan v. Sheridan*, 33 Cal. App.3d 917, ___, 109 Cal. Rptr. 466, ___ (1972). Pursuant to 42 U.S.C. § 659 (Supp. V 1975), the wages of federal employees may be garnished for the enforcement of child support and alimony payments as if the United States were a private person. See also *Standard Oil Div., American Oil Co. v. Starks*, 528 F.2d 201, 203-04 (7th Cir. 1975) (employees of U.S. Postal Service not immune from garnishment).
69. See the discussion under "Sale and Collection," supra.
70. See, e.g., *Meacham v. Meacham*, 262 Cal. App.2d 248, 253, n.2, 68 Cal. Rptr. 746, ___ n.2 (1968), where it was asserted that a \$13,000 windfall would result from the sale of a right to royalties from the marketing of an invention in satisfaction of judgment for plaintiff's attorney's fees.

Collection Where Judgment Debtor Is Creditor of Public Entity

Existing law provides an exclusive procedure for reaching money, other than wages, owed to the judgment debtor by a public entity.⁷¹ Under this procedure, the judgment creditor files with the state agency or local public entity an abstract or transcript of the judgment and an affidavit stating the amount owing on the judgment. Filing in this manner is the equivalent of levy under a writ of execution and the priorities between creditors is determined as of the time of filing with the public entity.⁷² The public entity is required to pay the money into court and the court then pays the nonexempt portion of the money to the judgment creditor.

This scheme is generally continued in the proposed law;⁷³ however, several revisions are called for. Under existing law, the relation between provisions for obtaining a lien on a pending cause of action and any eventual judgment⁷⁴ and the procedure for reaching money owed the judgment debtor by a public entity. The proposed law makes clear that the motion procedure for obtaining a lien must be followed when the obligation is the subject of a pending cause of action. Under existing law, the general procedure for determining exemptions from execution by Section 690.50 is incorporated with the provision that the court is to be considered the levying officer.⁷⁵ This exemption procedure is inadequate. The judgment debtor is not required to be given notice of the filing, the payment into court, or the payment to the judgment creditor,

71. See Sections 710, 710a. As provided in Section 710(h), earnings are withheld pursuant to Section 682.3.

72. See Department of Water & Power v. Inyo Chem. Co., 16 Cal.2d 744, ___, 108 P.2d 410, ___ (1940); Ott Hardware Co. v. Davis, 165 Cal. 795, 800, 134 P.2d 973, ___ (1913). This principle is codified in the proposed law.

73. Several minor and technical changes are recommended. For example, the provision for setting off amounts owed by, or advanced to, the judgment debtor applies only to the state under Section 710(a), para. 2; this provision should also apply to local public entities.

74. See discussion under "Lien on Cause of Action and Judgment," supra.

75. Section 710(c).

although the statute assumes that exemptions will be claimed and determined.⁷⁶ The judgment creditor should give notice of the filing to the judgment debtor, just as a judgment debtor is given notice of levy under a writ of execution. The court clerk should give the judgment debtor notice when the court receives the payment from the public entity and the judgment debtor should be afforded 10 days from the mailing of the notice of payment within which to make a claim of exemption on noticed motion before the court pays over to the judgment creditor.

Existing law provides a special procedure where the money owed to the judgment debtor by a public entity is an award in a condemnation proceeding brought by the public entity. It is provided that the money may be paid into the court in which the condemnation proceeding was tried and that the clerk then sends notice to "all parties interested in said award" of the hearing to determine conflicting claims to the award.⁷⁷ The court is directed to determine the conflicting claims and order the distribution of the money accordingly. This special procedure is unnecessary;⁷⁸ the general procedures under the proposed law for

76. The purpose of this special procedure is "to shift to the court the burden of adjudicating any claims of exemption which may arise and to insulate the governmental units from liability for wrongful payments to garnishing creditors." *McDaniel v. City & County of San Francisco*, 259 Cal. App.2d 356, 363, 66 Cal. Rptr. 384, ____ (1968).

77. Section 710(d). It is not clear under this provision whether the judgment creditor is to receive notice.

78. The existing procedure is also inadequate in several respects and is not consistent with the relevant provisions of the Eminent Domain Law. For example, the reference to the hearing where conflicting claims to the award are to be determined is ambiguous, and the provision that the court order the distribution of the money deposited conflicts with the Eminent Domain Law. The value of divided interests in property acquired by eminent domain are determined in the condemnation proceeding itself pursuant to Section 1260.220. If an amount of probable compensation is deposited, it may be withdrawn on application pursuant to Section 1255.210. If the amount of compensation has been determined, the defendant may apply for withdrawal of the deposit pursuant to Section 1268.140. There is no reason for the judgment creditor to be involved in the condemnation proceeding at the time the interests of the condemnation defendants are determined; the creditor should be involved only when payment is to be made to the judgment debtor, at which time the issue is whether the award is exempt, such as where it represents the homestead exemption or is composed of relocation benefits.

reaching money owed to the judgment debtor by a public entity afford an adequate remedy. Before final judgment in the condemnation proceeding, the judgment creditor would be able, by motion, to obtain a lien on any amounts eventually awarded.⁷⁹ If the judgment is final and the public entity has not paid the award or previously deposited the award with the court,⁸⁰ the judgment creditor could follow the general procedure for reaching money owed to the judgment debtor by a public entity. If the public entity has deposited the amount of the award with the court where the condemnation proceeding is held and the creditor has not obtained a lien before final judgment, the creditor could use some other appropriate procedure, such as garnishment or motion.⁸¹

79. See the discussion under "Lien on Cause of Action and Judgment," supra.

80. See Sections 1255.010 (deposit of probable compensation), 1268.010 (payment directly to defendant), 1268.110 (deposit of full amount of award).

81. See, e.g., *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 394, 43 P. 1111, ____ (1896) (levy of attachment); *Phoenix v. Kovacevich*, 246 Cal. App.2d 774, 778-79, 55 Cal. Rptr. 135, ____ (1966) (permission to levy by court order); *Credit Bureau of San Diego v. Getty*, 61 Cal. App.2d Supp. 823, 826-29, 142 P.2d 105, ____ (1943) (affidavit procedure for former Section 710 not effective where court deposited money with county); *Colver v. W.B. Scarborough*, 73 Cal. App. 455, 457-59, 238 P. 1110, ____ (1925) (levy of execution).

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CHAPTER 5. SPECIAL PROCEDURES FOR THE
ENFORCEMENT OF A MONEY JUDGMENT

Article 1. Interrogatories and Examination Proceedings

Comment. The procedures of Article 1 (commencing with Section 705.110) are available for the enforcement of a money judgment. See Section 702.110(a). This continues prior law. See former Sections 714, 714.5 (procedure available when execution may issue).

968/031

§ 705.110. Written interrogatories to judgment debtor

705.110. (a) The judgment creditor may propound written interrogatories to the judgment debtor in the manner set forth in Section 2030 if the judgment debtor is represented by counsel. The judgment debtor shall answer the interrogatories in the same manner and within the same time as provided by Section 2030.

(b) If, within the preceding 120 days, the judgment creditor has served interrogatories on the judgment debtor or the judgment debtor has been examined pursuant to this article, the judgment creditor may not serve the interrogatories and the judgment debtor is not required to respond to the interrogatories.

(c) Interrogatories served pursuant to this section may be enforced, to the extent practicable, in the same manner as interrogatories in a civil action.

Comment. Subdivision (a) of Section 705.110 is the same in substance as the first sentence of former Section 714.5. Unlike service of an order of examination pursuant to Section 705.120, service of interrogatories does not create a lien. The interrogatories are informational only.

Subdivision (b) makes clear that the interrogatory procedure may not be used if interrogatories have been served or an examination under Section 705.120 held within the preceding 120 days. See also Section 705.120(b)(1) (examination may be ordered within 120 days after service of interrogatories). Subdivision (b) thus resolves the apparent conflict between the last two sentences of former Section 714.5 which provided that the interrogatory procedure could be used "in conjunction with" the examination procedure and also that the judgment debtor could not be required to respond to interrogatories "more frequently than once in any four-month period or within any four-month period during which he has been subject to an examination." The former four-month period has been changed to 120 days which is approximately the same length of time but is more precise.

Subdivision (c) continues the substance of the third sentence of former Section 714.5.

§ 705.120. Examination of judgment debtor

705.120. (a) The judgment creditor may apply for an order from the court requiring the judgment debtor to appear before the court at a time and place specified in the order and answer concerning the judgment debtor's property.

(b) The court shall issue the order if either of the following conditions is satisfied:

(1) The judgment creditor has not caused the judgment debtor to be examined concerning the judgment debtor's property during the preceding 120 days.

(2) The judgment creditor shows by affidavit or otherwise to the satisfaction of the court that the judgment debtor has property which is not exempt and which the judgment debtor refuses to apply toward the satisfaction of the judgment. The affidavit in support of this showing may be based on the affiant's information and belief.

(c) The judgment creditor shall serve a copy of the order on the judgment debtor not less than 10 days prior to the date set for the examination.

(d) Service of the order creates a lien on the property of the judgment debtor.

(e) The order shall contain the following statement in boldface type: "Failure to appear may subject the party served to arrest and punishment for contempt of court."

Comment. Section 705.120 is derived from former Sections 714 and 715. The judgment creditor may apply for an order for examination at any time that the requirements of subdivision (b) can be satisfied so long as the period of enforceability of the judgment has not expired. See Sections 702.120, 702.130. The provision of former Section 715 that required a writ of execution to be issued before applying for an order based on the judgment debtor's refusal to apply property to the satisfaction of the judgment and that apparently limited the scope of the examination to such property is not continued.

Although Section 705.120 no longer specifically so provides, an order requiring a judgment debtor to appear for an examination may still be issued against any one or more of several judgment debtors. Section 705.190 continues the authority of the court to appoint a referee to conduct the examination provided in former Sections 714 and 715.

Subdivision (b) makes clear that the order for an examination of the judgment debtor may be obtained every 120 days, or more frequently if there is a showing that the judgment debtor has nonexempt property

that the judgment debtor refuses to apply to the satisfaction of the judgment. The requirement that the property be nonexempt replaces the requirement of former Section 715 that the judgment debtor has unjustly refused to apply the property to the satisfaction of the judgment. Of course, the property must also be subject to enforcement of a money judgment. See Section 707.110. Service of written interrogatories on the judgment debtor pursuant to Section 705.110 does not preclude an examination within the 120-day period. The scope of an examination may be the same whether the order is issued on the grounds stated in subdivision (b)(1) or (b)(2). The provision for giving an affidavit on information and belief codifies case law. See *Collins v. Angell*, 72 Cal. 513, 515, 14 P. 135, 136 (1887); *Tucker v. Fontes*, 70 Cal. App.2d 768, 771, 161 P.2d 697, 699 (1945).

Subdivision (c) is new. Prior law did not prescribe the time within which the judgment debtor was to receive notice.

Subdivision (d) codifies the rule in *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 28-30, 87 P.2d 830, 844 (1939), and *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242, 245 (1909). No duration is specified for the lien; however, it may not be enforced beyond the time for enforcement of the judgment under Sections 702.120 and 702.130. See also Sections 702.150 (relation back of liens), 702.155 (effect of liens).

Subdivision (e) continues the substance of the third paragraph of former Section 714.

045/202

§ 705.130. Examination of third person

705.130. (a) Upon proof by the judgment creditor by affidavit or otherwise to the satisfaction of the court that a third person has property in which the judgment debtor has an interest or is indebted to the judgment debtor in an amount not less than two hundred fifty dollars (\$250), if the property is not exempt, the court may order the third person to appear before the court at a time and place specified in the order and answer concerning the property or indebtedness. The affidavit in support of this showing may be based on the affiant's information and belief.

(b) A copy of the order shall be served on the third person not less than 10 days prior to the date set for the examination. Notice of the time and place of the examination shall be mailed to the judgment debtor.

(c) Service of the order on the third person creates a lien on the property in the third person's possession in which the judgment debtor has an interest and on any debt owing by the third person to the judgment debtor which property or debt is ordered to be applied to the satisfaction of the judgment.

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

(e) An order made pursuant to subdivision (a) is not effective unless, at the time it is served on the third person, the person serving the order tenders to the third person mileage fees in the amount of twenty cents (\$0.20) per mile necessary to be traveled, one way, from the third person's residence to the place of examination.

Comment. Subdivision (a) of Section 705.130 supersedes the first sentence of the first paragraph of former Section 717. It provides for the issuance of an order for the examination of the debtor of a judgment debtor or a person holding property of the judgment debtor. The minimum amount of indebtedness required before an examination order may issue has been raised from \$50 to \$250 to compensate for the change in the value of the dollar since this procedure was originally enacted. The requirement of the first sentence of former Section 717 that a writ of execution be first issued against the property of the judgment debtor has not been continued. The third person may not be ordered to appear where the property has been determined to be exempt nor, of course, where the property is not subject to enforcement of a money judgment. See Section 707.110. An order may be sought under this section whenever the judgment is enforceable. See Sections 702.120, 702.130. The provision for an affidavit based on information and belief codifies the result in *Tucker v. Fontes*, 70 Cal. App.2d 768, 771, 161 P.2d 697, 699 (1945). Although subdivision (a) does not specifically refer to referees, the proceedings authorized by this article may be conducted by such officers. See Section 705.190 and Comment thereto.

Subdivision (b) is new. Prior law did not prescribe the time within which the debtor of the judgment debtor was to be served and did not provide for any notice to the judgment debtor.

Subdivision (c) corresponds to subdivision (d) of Section 705.120.

Subdivision (d) continues the substance of the third paragraph of former Section 717. Subdivision (e) continues the provisions of the second paragraph of former Section 717.1; however, the amount of the mileage fee has been made consistent with that for witnesses generally. See Govt. Code § 68093. Mileage fees are recoverable costs under Sections 1032.6 and 1033.7.

The manner of appearance where a corporation is indebted to or holds property of a judgment debtor is prescribed in Section 705.180. Where the debtor of the judgment debtor is a public entity, the judgment creditor must follow the procedures set forth in Article 7 (commencing with Section 705.710).

404/336

§ 705.140. Witnesses

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

Comment. Section 705.140 continues the substance of former Section 718. Although Section 705.140 does not specifically refer to referees, the proceedings authorized by this article may be conducted by such officers. See Section 705.190 and Comment thereto.

30/683

§ 705.145. Privilege of spouse of judgment debtor

705.145. The spouse of the judgment debtor, to the extent provided by Sections 970 and 971 of the Evidence Code, may not be required to testify pursuant to this article if there has not been a waiver of the privilege in the action giving rise to the judgment.

Comment. Section 705.145 continues the substance of the second sentence of the first paragraph of former Section 717 which was applicable to examinations of third persons. Section 705.145 also makes this privilege applicable where the spouse is called as a witness in an examination of the judgment debtor.

968/993

§ 705.150. Attendance at examination outside county of residence or place of business; examinations in other counties

705.150. (a) A person sought to be examined may not be required to attend an examination before a court located outside the county in which the person resides or has a place of business unless the distance from the person's place of residence or place of business to the place of examination is less than 150 miles.

(b) If a person sought to be examined does not reside or have a place of business in the county where the judgment roll is filed, or where the judgment is entered in the docket in the justice court, the judgment creditor may apply to a court of similar jurisdiction in the county where the person resides or has a place of business for an order for an examination. If there is no court of similar jurisdiction in the county, application shall be made to a court of higher jurisdiction. In addition to satisfying the requirements of Section 705.120 or 705.130, the judgment creditor shall file with the court clerk in such county an abstract of judgment in the form prescribed by Section 674 and an affidavit showing the place of residence or place of business of the person sought to be examined and the filing of the abstract of judgment.

Comment. Subdivision (a) of Section 705.150 is the same in substance as the first paragraph of former Section 717.1. Subdivision (b) is the same in substance as the first sentence of former Section 722.

§ 705.160. Order applying property to satisfaction of judgment

705.160. (a) Except as provided in subdivision (b), after an examination pursuant to this article, the court may order property of the judgment debtor in the possession or under the control of the judgment debtor or a third person or any debt owed by a third person to the judgment debtor to be applied toward the satisfaction of the judgment, if the property is not exempt.

(b) If a third person alleged to have property in which the judgment debtor has an interest or to be indebted to the judgment debtor claims an interest in the property adverse to the judgment debtor or denies the debt, the court may not order that the property or debt be applied toward the satisfaction of the judgment, but may forbid transfer or payment to the judgment debtor pursuant to Section 705.240.

(c) The court may determine any exemption claim made in the examination proceedings.

Comment. Subdivision (a) of Section 705.160 continues the broad authority provided by former Section 719 for the court to order any non-exempt property or debt to be applied toward the satisfaction of the judgment. See also the last portion of the first sentence of former Section 715. Under subdivision (a), the person examined--whether the judgment debtor or a third person--may be ordered to deliver property or funds to the levying officer. See *Lewis v. Neblett*, 188 Cal. App.2d 290, ___, 10 Cal. Rptr. 441, 444 (1961) (funds in hands of administrator of estate). The person examined may also be ordered to pay the judgment creditor directly. See *Hustead v. Superior Court*, 2 Cal. App.3d 780, 783-87, 83 Cal. Rptr. 26, 27-30 (1969) (sublessee of judgment debtor ordered to pay rent to judgment creditor, order held invalid on other grounds). A receiver may be appointed with the powers ordered by the court, and the judgment debtor may be ordered to make any necessary assignments or deliveries to the receiver for the purpose of sale or collection. See *Habenicht v. Lissak*, 78 Cal. 351, ___, 20 P. 874, 877 (1889) (seat on stock exchange); *Pacific Bank v. Robinson*, 57 Cal. 520, ___ (1881) (patent rights); *Hathaway v. Brady*, 26 Cal. 581, ___ (1864) (note); *Tucker v. Fontes*, 70 Cal. App.2d 768, ___, 161 P.2d 697, 701 (1945) (business assets). The court may order execution to be issued to collect the amount due. See *William Deering & Co. v. Richardson-Kimball Co.*, 109 Cal. 73, 41 P. 801-02 (1895) (funds in bank). If property is to be sold pursuant to the court's order under subdivision (a), it will be sold either by a levying officer, in which case there must be a valid writ of execution outstanding, or by a receiver appointed by the court. Orders made in examination proceedings are enforceable by contempt.

Subdivision (b) continues from former Section 719 the exception to the power of the court to order the application of the property or debt to the satisfaction of the judgment in a case where a third person claims an interest in the property adverse to the judgment debtor or

denies the debt. The third person is entitled to a determination of the respective interests in the property or debt in an independent action. See former Section 719; *Takahashi v. Kunishima*, 34 Cal. App.2d 367, 373, 93 P.2d 645, 648 (1939). Hence, issues of ownership by the third person, the existence of superior liens on the property, or a right of setoff are not determined in the examination proceeding. Pending the conclusion of a creditor's suit, the judgment creditor may obtain an order forbidding the transfer of the property or payment of the debt by the third person to the judgment debtor. See Section 705.240.

Subdivision (c) makes explicit a principle that was implicit in a provision of former Section 719 for the application of property "not exempt from execution" toward the satisfaction of the judgment. This necessarily involves a determination of the existence of exemptions prefatory to issuing an order applying the property toward the satisfaction of the judgment.

The court may also determine in the examination proceedings that the property sought to be reached may properly be applied to the satisfaction of the judgment through an order in examination proceedings. Cf. *Pacific Bank v. Robinson*, 57 Cal. 520, ____ (1881) (supplementary proceedings appropriate to reach patent rights).

For the extent of the duty of a third person to protect the exemption rights of the debtor, see *Powle v. Union Bank*, 11 Cal. App.3d 807, 815-16, 90 Cal. Rptr. 103, ____ (1970); *Agnew v. Cronin*, 148 Cal. App.2d 117, 126-29, 306 P.2d 527, 533-34 (1957); *Hing v. Lee*, 37 Cal. App. 313, 316-18, 174 P. 356, 358-59 (1918); 3 A. Freeman, *Law of Executions* § 416, at 2221-23 (3d ed. 1900).

998/991

§ 705.170. Arrest of person ordered to appear

705.170. (a) If a person ordered to appear for an examination fails to appear, the court may, pursuant to a warrant, have the person brought before the court to answer for the failure to appear only if the order requiring the person's appearance was served by a levying officer, some person specially appointed by the court in the order, or a registered process server.

(b) If the judgment debtor has been served with an order to appear for an examination by a person authorized to serve the order pursuant to subdivision (a) and fails to appear, the judgment creditor may recover reasonable attorney's fees incurred in the examination proceeding.

(c) A person who willfully makes an improper service of an order for an examination which subsequently results in the arrest pursuant to subdivision (a) of the person who fails to appear is guilty of a misdemeanor.

Comment. Subdivision (a) of Section 705.170 continues the substance of the second paragraph of former Section 714 and the second

paragraph of former Section 717. Subdivision (b), providing for the award of reasonable attorney's fees against a judgment debtor who improperly fails to appear for an examination, is new. Subdivision (b) does not affect any right to attorney's fees the parties may have under a contract or statute. Subdivision (c) continues the substance of the last paragraphs of former Sections 714 and 717. The authority provided by former Section 715 for having the judgment debtor arrested where there is a danger of the debtor absconding and for imprisoning the judgment debtor for failure to give an undertaking when ordered to do so is not continued. This section is not intended to limit in any way the contempt power of the court under Sections 1209-1222.

405/184

§ 705.180. Appearance at examination by representatives of organizations

705.180. Where a corporation, partnership, association, trust, or other organization is to be examined, it shall designate to appear and be examined one or more officers, directors, managing agents, or other persons who are familiar with its property and debts.

Comment. Section 705.180 is new. It is derived from Rule 30(b)(6) of the Federal Rules of Civil Procedure.

968/611

§ 705.190. Powers and qualifications of referee

705.190. (a) The examination proceedings authorized by this article may be conducted by a referee appointed by the court. The referee may issue, modify, or vacate an order authorized by Section 705.160 or issue a warrant authorized by Section 705.170 and has the same powers as the court to grant adjournments, to preserve order, and to subpoena witnesses to attend the examination, but only the court that ordered the reference has power to punish for contempt for disobeying an order of the referee.

(b) Only a member of the State Bar of California is eligible for appointment as a referee pursuant to this article.

Comment. Subdivision (a) continues the authority of a referee appointed by the court provided in former Sections 714-715, 717-721, and 723. The authority to modify and vacate orders is generalized from former Section 720. The authority to compel the appearance of a person at the examination and to control the proceeding generalizes the authority of a referee appointed by a superior court formerly provided by Section 723. The limitation on the power to punish for contempt provided in subdivision (a) continues the substance of former Section 721.

Subdivision (b) supersedes the portion of former Section 723, applicable to referees appointed by a superior court in a county or city and county having a population of one million or more, which required referees to have been members of the State Bar for five years.

Article 2. Creditor's Suit

Comment. Article 2 (commencing with Section 705.210) authorizes the judgment creditor to bring suit against third persons indebted to or in possession of property of the judgment debtor. It is anticipated, however, that the less expensive and less cumbersome enforcement procedures will be used in the normal case and that the creditor's suit will be used where the third person has failed to perform the duties under Section 703.240 (duties of garnishee under levy of execution), where the third person has denied the interest or debt in an answer to interrogatories under Section 705.110 or in an examination proceeding under Section 705.130, or where for some other reason the judgment creditor believes that the third person will not cooperate or will claim an adverse interest. Costs will not be awarded against a defendant in a creditor's suit if the defendant has not disputed the judgment debtor's interest in the property or the indebtedness to the judgment debtor. Section 705.260. Disputes concerning the interests of a third person and a judgment debtor in personal property may also be resolved through the third-party claims procedure. See Chapter 6 (commencing with Section 706.110).

968/680

§ 705.210. Creditor's suit

705.210. A judgment creditor may bring an action against a third person who has property in which the judgment debtor has an interest or who is indebted to the judgment debtor for the application of the judgment debtor's interest or the payment of the debt toward the satisfaction of the judgment creditor's judgment against the judgment debtor.

Comment. Subdivision (a) of Section 705.210 supersedes the first portion of the first sentence of former Section 720. An action may be brought under this article without the necessity of first levying under a writ of execution, examining the third person, or resorting to any other procedure for the satisfaction of the judgment. The normal rule under former law requiring the exhaustion of "legal" remedies before the "equitable" remedy of the creditor's suit could be employed is not continued. For the former rule, see *Farmers' & Merchants' Bank v. Bank of Italy*, 216 Cal. 452, 455-58, 14 P.2d 527, 528-29 (1932) (resort to supplementary proceedings required); *Bond v. Bulgheroni*, 215 Cal. 7, 10-11, 8 P.2d 130, 132 (1932) (resort to supplementary proceedings not required where inadequate or futile).

4438

§ 705.220. Joinder of judgment debtor

705.220. The judgment debtor shall be joined in an action brought pursuant to this article but is not an indispensable party. The residence of the judgment debtor shall not be considered in the determination of proper venue unless otherwise provided by contract between the judgment debtor and the third person.

Comment. Section 705.220 is new. If the judgment debtor cannot be joined, the creditor's suit should proceed, the judgment debtor not being an indispensable party. See Section 389(b).

968/694

§ 705.230. Time for bringing creditor's suit

705.230. An action may be brought pursuant to this article:

(a) At any time when the judgment debtor may bring an action against the third person concerning the property or debt.

(b) If a lien is created on the property or debt pursuant to this title within the time specified in subdivision (a), not later than one year after creation of the lien.

Comment. Section 705.230 is new. It provides a statute of limitations for bringing a creditor's suit subject, of course, to the general rules concerning the period of enforceability of judgments provided by Sections 702.120 and 702.130. Under prior law, the general four-year statute of limitations was applicable and began to run from the return of the writ of execution unsatisfied. See *Sherman v. S.K.D. Oil Co.*, 185 Cal. 534, 538, 197 P. 799, 801 (1921). However, the statute of limitations is no longer tied to the return of the writ unsatisfied or the failure of examination proceedings because the judgment creditor is not required to exhaust these remedies before resorting to a creditor's suit. See Section 705.220 and the Comment thereto.

Subdivision (a) places the judgment creditor in the position of the judgment debtor. The judgment creditor must therefore commence the creditor's suit at a time when the judgment debtor could bring an action against the third person.

Subdivision (b) provides a one-year extension of the limitation period, but does not extend the enforceability of the judgment beyond the 20-year period provided by Sections 702.120 and 702.130.

A creditor's suit commenced within the periods prescribed by this section may be pursued to judgment after the judgment is no longer enforceable against the original judgment debtor notwithstanding Sections 702.120 and 702.130. The judgment in the creditor's suit may then be enforced as provided in Section 705.260, and the 20-year period of enforceability provided by Sections 702.120 and 702.130 apply to the judgment in the creditor's suit.

968/676

§ 705.240. Order forbidding transfer or payment to judgment debtor

705.240. (a) Upon application of the judgment creditor, made ex parte or, if the court so orders, upon noticed motion the court may issue an order forbidding transfer to the judgment debtor of the property in which the judgment debtor is claimed to have an interest or payment to the judgment debtor of the alleged debt for a reasonable time

not to exceed 60 days until an action against the third person can be commenced under this article. If an action is commenced within the time allowed in the order, the order may be extended until the action can be prosecuted to judgment.

(b) An order issued under subdivision (a) may be modified or vacated by the court which issued it or the court in which the action under this article is brought. The court, in its discretion, may modify or vacate the order at any time, with or without a hearing, upon such terms as are just.

Comment. Subdivision (a) of Section 705.240 supersedes the last portion of the first sentence of former Section 720; however, an application under Section 705.240 is not limited as under former law to situations where the third person has denied the debt or claimed an adverse interest in the property at an examination proceeding. The judgment creditor may apply for an order forbidding transfer or payment to the judgment debtor at any time after judgment in the main action when it is thought necessary to preserve the status quo between the judgment debtor and the third person, such as where the third person has denied the debt or the judgment debtor's interest in property in a return on garnishment under Section 703.240, where the third person makes a denial at examination proceedings under Section 705.160(b), or where the judgment creditor otherwise believes that the third person is likely to make such a denial. An order issued under subdivision (a) is good for not more than 60 days unless an action is commenced within the time allowed, in which case the order may be extended until judgment in the creditor's suit. Former law did not prescribe any time limits. But cf. Pioneer Inv. & Trust Co. v. Muncey, 33 Cal. App. 740, 743, 166 P. 591, 592 (1917) (order vacated if creditor does not seasonably commence creditor's suit).

The scope of the order issuable under this section is more limited than that provided under former Section 720. Under this section, the order restrains only a transfer to the judgment debtor, whereas under former Section 720, the order restrained any transfer of the property or debt. Such a sweeping order, issuable without a hearing and without bond and directed to a person who is not a formal party, is constitutionally suspect. Cf. North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601, 606-08 (1975); Randone v. Appellate Dep't, 5 Cal.3d 536, 547-52, 488 P.2d 13, 20-23, 96 Cal. Rptr. 709, 716-19 (1971).

Subdivision (b) continues the substance of the last sentence of former Section 720.

A referee may issue an order under this section. See Sections 705.160 and 705.190.

968/692

§ 705.250. Lien of creditor's suit

705.250. Service of summons on the third person creates a lien on the property that is the subject of an action under this article.

Comment. Section 705.250 codifies case law. See Canfield v. Security-First Nat'l Bank, 13 Cal.2d 1, 28-30, 87 P.2d 830, 844 (1939); Nordstrom v. Corona City Water Co., 155 Cal. 206, 212-13, 100 P. 242, 245 (1909); cf. Seymour v. McAvoy, 121 Cal. 438, 441, 53 P. 946, 947 (1898) (filing bill in equity creates equitable lien). No duration of the lien is specified; however, it may not be enforced beyond the time for enforcement of the judgment provided by Sections 702.120 and 702.130. See also Sections 702.150 (relation back of liens), 702.155 (effect of liens).

045/207

§ 705.260. Judgment in creditor's suit

705.260. (a) If the judgment creditor establishes that the third person has property in which the judgment debtor has an interest or is indebted to the judgment debtor, the court shall render judgment accordingly. The property or debt may be applied to the satisfaction of the judgment creditor's judgment against the judgment debtor as ordered by the court.

(b) If the court determines that the third person has property in which the judgment debtor has an interest, the court may order the third person not to transfer the property until it can be levied upon or otherwise applied to the satisfaction of the judgment.

(c) If the court determines that the third person has transferred property which was subject to the lien created by service of summons, the court shall render judgment against the third person in an amount equal to the value of the judgment debtor's interest in the property.

Comment. Section 705.260 is new. At the conclusion of a creditor's suit, the property may be applied toward the satisfaction of the judgment in a manner appropriate to the particular type of property. See the Comment to Section 705.160. Ordinarily the property or debt that has been determined in the creditor's suit to belong to or to be owing to the judgment debtor will be levied upon under a writ of execution. If the judgment creditor does not have a valid writ of execution, the judgment creditor may apply for an order under subdivision (b) preventing the third person from transferring the property until it can be applied to the satisfaction of the judgment. If the property cannot be levied upon, some other manner of enforcement will be necessary. Where a money judgment has been rendered against the third person as provided in subdivision (c), the judgment creditor may be left free to select the manner of enforcement.

08/946

§ 705.270. Costs

705.270. Costs in an action under this article may be awarded in the manner provided by Section 1033.7 only against the third person.

Comment. Section 705.270 supersedes the portion of former Section 720 that permitted use of a creditor's suit only where the third person denied the debt or the judgment debtor's interest. The intent of this section is to encourage judgment creditors to use the creditor's suit as a last resort since, under Section 1033.7, only reasonably necessary costs may be awarded.

Article 3. Receiver to Enforce Judgment

§ 705.310. Application of general provisions

705.310. The provisions of Chapter 5 (commencing with Section 564) and Chapter 5a (commencing with Section 571) of Title 7 govern the appointment, qualifications, powers, rights, and duties of a receiver appointed under this article.

Comment. Section 705.310 makes clear that the general receiver provisions continue to apply to receivers for enforcement of judgments. The appointment of a receiver is subject to the general rules concerning the time within which judgments may be enforced. See Sections 702.120 and 702.130.

Under Section 705.320, a receiver may be appointed where a writ of execution would not reach certain property and other remedies appear inadequate. A receiver may also be appointed in examination proceedings under Article 1 (commencing with Section 705.110) where the requisite showing is made under this section. Cf. *Tucker v. Pontes*, 70 Cal. App.2d 768, 771-72, 161 P.2d 697, 699 (1945), and *Medical Finance Ass'n v. Short*, 36 Cal. App.2d Supp. 745, 747, 92 P.2d 961, 962 (1939) (appointment of receiver in supplementary proceedings under former law). A receiver may be appointed to enforce a charging order against a partnership under Corporations Code Section 15028 or 15522. See Section 705.410 (charging orders).

A receiver may also be appointed to enforce a judgment for the possession of personal property (see Section 708.____), for the possession of real property (see Section 709.____), or for the sale of real or personal property (see Section 710.____).

045/191

§ 705.320. Appointment of receiver

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

Comment. Section 705.320 supersedes portions of Section 564 that authorized the appointment of a receiver to enforce a judgment. It eliminates as a prerequisite to the appointment of a receiver the showing that a writ of execution has been returned unsatisfied or that the judgment debtor refuses to apply property in satisfaction of the judgment as was formerly required by subdivision 4 of Section 564. See *Olson v. Comora*, 73 Cal. App.3d 642, 647-49, ____ Cal. Rptr. ____, ____ (1977).

Under Section 705.320, a receiver may be appointed where a writ of execution would not reach certain property and other remedies appear

inadequate. A receiver may also be appointed in examination proceedings under Article 1 (commencing with Section 705.110) where the requisite showing is made under this section. Cf. Tucker v. Fontes, 70 Cal. App.2d 768, 771-72, 161 P.2d 697, 699 (1945); Medical Finance Ass'n v. Short, 36 Cal. App.2d Supp. 745, 747, 92 P.2d 961, 962 (1939) (appointment of receiver in supplementary proceedings under former law). A receiver may be appointed to enforce a charging order against a partnership under Corporations Code Section 15028 or 15522. See Section 705.510 (charging orders).

A receiver may also be appointed to enforce a judgment for the possession of personal property (see Section 708.____), for the possession of real property (see Section 709.____), or for the sale of real or personal property (see Section 710.____).

045/206

§ 705.330. Receiver to transfer alcoholic beverage license

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

(b) The court may appoint a receiver for the purpose of transferring an alcoholic beverage license held by the judgment debtor which is transferable under Article 5 (commencing with Section 24070 of the Business and Professions Code) of Chapter 6 of the Alcoholic Beverage Control Act, unless the judgment debtor shows that claims of creditors with priority over the judgment creditor as provided by Section 24074 of the Business and Professions Code exceed the probable sale price of the license.

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

Comment. Section 705.330 supersedes a portion of former Section 688(f). After the amendment of former Section 688 in 1959 (1959 Cal. Stats., Ch. 2140, § 1), alcoholic beverage licenses were not reachable by any state enforcement process. See 37 Op. Cal. Att'y Gen. 4 (1961). Alcoholic beverage licenses are not subject to levy under a writ of execution. See Section 703.110(b)(1). The Alcoholic Beverage Control Act (commencing with Business and Professions Code Section 23000) provides detailed procedures for the sale of alcoholic beverage licenses which make use of a receiver appropriate. Cf. Mollis v. Jiffy-Stitcher Co., 125 Cal. App.2d 236, 238, 270 P.2d 25, 26 (1954).

In order to prevent a situation where the judgment creditor forces the sale of the judgment debtor's license but does not receive any proceeds to be applied toward satisfaction of the judgment, subdivision (b) precludes transfer if the judgment debtor shows that it is unlikely that the sale of the license would yield any excess over the amount required to satisfy claims of creditors with priority over the judgment creditor under Business and Professions Code Section 24074. The scheme of priorities set out in Section 24074 is "mandatory and exclusive." *Grover Escrow Corp. v. Gole*, 71 Cal.2d 61, 65, 453 P.2d 461, 463, 77 Cal. Rptr. 21, 23 (1969). See Bus. & Prof. Code § 24076.

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

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§ 705.340. Receiver's lien

705.340. Service of a copy of the order appointing the receiver, if made in the manner provided for the levy under a writ or for the service of other process that creates a lien under this title, creates a lien on the judgment debtor's property subject to the receivership to the same extent and with the same duration as would be obtained by a levy under a writ or service of other process.

Comment. Section 705.340 provides for a receiver's lien in favor of the judgment creditor. Prior law was unclear as to the effect of the appointment and enforcement activities of the receiver. In *Pacific Bank v. Robinson*, 57 Cal. 520, 522 (1881), the court did not consider the precise question of what the receiver takes upon appointment and qualification but did decide that a court has the power in equity to compel the assignment of a patent right to a receiver appointed in supplementary proceedings. Accord, *Habenicht v. Lissak*, 78 Cal. 351, ___, 20 P. 874, 877 (1889) (seat on stock exchange). Section 705.340 is consistent with the result of these cases and varies from the principles of general law that held that the appointment and qualification of a receiver vested the property of the judgment debtor in the receiver. See 3 A. Freeman, *Law of Executions* § 419, at 2243-46 (3d ed. 1900). Pursuant to Section 702.150, the lien obtained by a receiver under the provisions of this section relate back to the creation of earlier liens, contrary to some early decisions in other jurisdictions. See *id.* at 2246. See also Section 702.155 (effect of lien).

For the manner provided for levy under a writ, see Sections 703.310-703.450. For the manner provided for the service of other process which creates a lien under this title, see Section 702.210. For the lien

created by levy under a writ of execution, see Section 703.250. For liens created by the service of other process, see Sections 705.120 (examination of judgment debtor), 705.130 (examination of third person), 705.250 (creditor's suit), 705.420 (charging order), 705.510 (cause of action and nonfinal judgment), 705.620 (assignment order), 705.780 (lien where judgment debtor is creditor of public entity).

Article 4. Charging Orders

§ 705.410. Charging orders

705.410. The judgment debtor's interest in a partnership may be applied toward the satisfaction of the judgment, other than a judgment against the partnership, only by an order charging the judgment debtor's interest pursuant to Section 15028 or 15522 of the Corporations Code.

Comment. Section 705.410 incorporates the charging order provisions of Corporations Code Sections 15028 and 15522. Where the existence of the partnership is not in dispute, the charging order is the exclusive manner for applying the interest of a partner in specific partnership property or the partnership to the satisfaction of a judgment against a judgment debtor who is a partner. See Section 703.110(b)(2) (property subject to execution): *Baum v. Baum*, 51 Cal.2d 610, 612-13, 335 P.2d 481, 483 (1959); *Evans v. Calardi*, 16 Cal.3d 300, 310, 546 P.2d 313, ___, 128 Cal. Rptr. 25, 33 (1976). Enforcement pursuant to this section is subject to the general rules concerning the time within which judgments may be enforced. See Sections 702.120, 702.130.

968/693

§ 705.420. Lien of charging order

705.420. Service on the judgment debtor of notice of motion for a charging order creates a lien on the judgment debtor's interest in the partnership.

Comment. Section 705.420 is new. Prior law did not explicitly provide for a lien of a charging order. Under former law the lien of a charging order was recognized in the decisions, but the time of its creation and its effect were unclear. See *Taylor v. S & M Lamp Co.*, 190 Cal. App.2d 700, 707-12, 12 Cal. Rptr. 323, 329-31 (1961). Section 705.420 establishes the time of creation of the lien by reference to service of notice of motion for the charging order. Cf. *Ribero v. Callaway*, 87 Cal. App.2d 135, 138, 196 P.2d 109, ___ (1948) (charging orders issued on noticed motion). This provision is analogous to the creation of a lien in an examination proceeding under Article 1 (commencing with Section 705.110) by service of the order of examination. See Sections 705.120(d), 705.130(c). No duration of the lien is specified; however, it may not be enforced beyond the time for enforcement of the judgment provided by Sections 702.120 and 702.130. See also Section 702.155 (effect of lien).

Article 5. Liens on Causes of Action and Judgments

§ 705.510. Lien on cause of action and judgment

705.510. (a) The judgment creditor of a party to an action or special proceeding may apply to the court in which the action or special proceeding is pending, upon written notice to all parties, for a lien upon the cause of action and upon any judgment subsequently procured in the action or special proceeding in favor of the judgment debtor.

(b) The court may, in its discretion, grant the lien in favor of the judgment creditor and, during the pendency of the action or special proceeding, may permit the judgment creditor to intervene therein.

(c) The lien shall be in the amount of the judgment creditor's judgment remaining unsatisfied and shall be upon the money or other property recovered or ordered to be sold in the action or special proceeding. The lien is created at the time it is granted and is effective from the date of application therefor.

Comment. Section 705.510 continues the substance of the first sentence and the first portion of the second sentence of former Section 688.1, and extends the coverage of the lien to judgments for the recovery of property. The lien obtained pursuant to this section is subject to any prior liens of the same type or another type, such as an attorney's charging lien. See *Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc.*, 14 Cal.3d 742, 748-51, 537 P.2d 399, ___, 122 Cal. Rptr. 567, 571-73 (1975); cf. *Haupt v. Charlie's Kosher Mkt.*, 17 Cal.2d 843, 846, 121 P.2d 627, ___ (1941) (attorney's lien prevails over subsequent attachment lien under former statute). The principle of subdivision (c) that the lien is created when granted but relates back to the time the application for the lien is made codifies existing law. See Civil Code § 2897; *Del Conte Masonry Co. v. Lewis*, 16 Cal. App.3d 678, ___, 94 Cal. Rptr. 439, ___ (1971) (application of equitable rule granting priority to first assertion of claim); *Takehara v. H. C. Muddox Co.*, 8 Cal.3d 168, ___, 501 P.2d 913, ___, 104 Cal. Rptr. 345, ___ (1972) (application of general rule granting priority to first in time of creation). No duration is specified for the lien; however, it may not be enforced beyond the time for enforcement of the original judgment under Sections 702.120 and 702.130.

The purpose of this lien is to establish and preserve the judgment creditor's priority until the judgment is final and nonappealable. At that time, the judgment creditor may seek to reach the judgment which has been subjected to the lien by some other enforcement procedure, such as, for example, levy under a writ of execution and sale or collection (see Sections 703.440, 703.610), appointment of a receiver to collect the judgment (see Section 705.310), application for an assignment order (see Section 705.610), and collection from a public entity owing money to the judgment debtor (see Sections 705.710-705.795). The judgment creditor is not required to bring an equitable action to foreclose the lien.

Under former law, it appeared that where the judgment debtor of the judgment debtor did not voluntarily pay the judgment creditor to discharge the lien and the judgment debtor took no steps to enforce the judgment, the judgment creditor had to bring an action to foreclose the lien in order to reach the amount represented by the judgment. See Roseburg Loggers, Inc. v. Plywood-Champion Papers, Inc., supra at 748, 537 P.2d at ___, 122 Cal. Rptr. at 571 (dictum).

29/627

§ 705.520. Endorsement of lien on judgment and abstract

705.520. (a) If the court grants a lien pursuant to this article, the clerk shall endorse upon the judgment recovered in the action or special proceeding a statement of the existence of the lien, the date of entry of the order creating the lien, and the place where entered.

(b) Any abstract issued upon the judgment shall contain, in addition to the matters set forth in Section 674, a statement of the lien in favor of the judgment creditor.

Comment. Section 705.520 continues the substance of the third sentence of former Section 688.1.

29/628

§ 705.530. Compromise, settlement, satisfaction of judgment

705.530. No compromise, settlement, or satisfaction may be entered into by or on behalf of the judgment debtor without either the consent of the judgment creditor, or the approval of the court where the action or special proceeding is pending, or the judgment in favor of the judgment debtor is entered, obtained at a hearing on noticed motion, unless the lien is first satisfied or discharged.

Comment. Section 705.530 supersedes a portion of the second sentence of former Section 688.1. The provision permitting compromise, settlement, or satisfaction pursuant to court order despite the opposition of the judgment creditor has been added to prevent the judgment creditor from forcing the judgment debtor to proceed with the action despite the judgment debtor's conviction that it is advisable to settle.

Article 6. Assignment Orders§ 705.610. Order to assign right to future payments

705.610. (a) Except as otherwise provided by law, upon application of the judgment creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor or to a receiver appointed pursuant to Article 3 (commencing with Section 705.310), to the extent necessary to satisfy the judgment, all or part of a right to future payments, whether or not the right is conditioned on future developments, including, but not limited to, the following types of payments:

- (1) Wages due from the federal government.
- (2) Rents.
- (3) Commissions.
- (4) Royalties.
- (5) Surplus amounts from a spendthrift trust liable pursuant to Civil Code Section 859.

(b) In determining whether to order an assignment or the amount of an assignment pursuant to subdivision (a), the court shall take into consideration the reasonable requirements of the judgment debtor and persons supported in whole or in part by the judgment debtor, any payments the judgment debtor is required to make or that are deducted from the money the judgment debtor would otherwise receive in satisfaction of other judgments and wage assignments, the amount remaining due on the judgment, and the amount being or to be received.

Comment. Section 705.610 provides a new procedure for reaching certain forms of property that cannot be reached by levy under a writ of execution. It also provides an optional procedure for reaching forms of property which are subject to levy, such as accounts receivable, chattel paper, choses in action, judgments, and negotiable instruments. A right to payment may be assigned under this section only to the extent necessary to satisfy the judgment. This section does not make any property assignable that is not already assignable. This remedy is in addition to other remedies provided in this title for reaching rights to payment, such as execution, orders in examination proceedings, creditors' suits, and receivership.

The introductory clause of subdivision (a) recognizes that certain rights to future payments, such as pension benefits, are protected by law from assignment. See, *e.g.*, 5 U.S.C. § 8346 (1970) (federal government employees' retirement benefits); 45 U.S.C. § 231m (Supp. V 1975) (railroad employees' annuities).

Paragraph (1) of subdivision (a) provides a means to reach federal employees' wages. Such wages generally may not be garnished but may be reached in examination proceedings by an order to the judgment debtor to endorse and deliver paychecks to a receiver. See *Sheridan v. Sheridan*, 33 Cal. App.3d 917, ___, 109 Cal. Rptr. 466, ___ (1972). However, pursuant to 42 U.S.C. § 659 (Supp. V 1975), the wages of federal employees may be garnished for the enforcement of child support and alimony payments "as if the United States were a private person."

Paragraph (2) permits issuance of an order for the assignment of the right to payment of rent. Under former law, it was held that future rental installments could not be reached by garnishment. See *Hustead v. Superior Court*, 2 Cal. App.2d 780, 786-87, 83 Cal. Rptr. 26, ___ (1969).

The assignment of a right to commissions or royalties pursuant to paragraphs (3) and (4) is a more appropriate manner for reaching such uncertain amounts than through levy and sale as permitted in *Meacham v. Meacham*, 262 Cal. App.2d 248, 252, 68 Cal. Rptr. 746, ___ (1968).

The surplus income from a spendthrift trust may still be reached, as under former law, by a creditor's suit (or by an order in examination proceedings) where it is shown that there is no valid direction in the trust instrument for accumulation of surplus income and that the income is not all necessary for the beneficiary's education and support. See Civil Code § 859; *Canfield v. Security First Nat'l Bank*, 13 Cal.2d 1, ___, 87 P.2d 830, ___ (1939); *Estate of Lawrence*, 267 Cal. App.2d 77, ___, 72 Cal. Rptr. 851, ___ (1968).

Subdivision (b) is based on the standard for fixing the amount of payments under the New York installment payment order procedure. See N.Y. Civ. Prac. Law & R. § 5226 (McKinney ___). The period of assignment may not extend beyond the 20-year period of enforceability provided by Sections 702.120 and 702.130.

18301

§ 705.620. Lien of assignment order

705.620. Service upon the judgment debtor of the order to assign the right to future payments creates a lien on the property assigned or to be assigned, lasting for the time specified in the order or when the judgment is satisfied.

Comment. Section 705.620 provides for the creation of a lien of an assignment order. The lien created pursuant to this article may not be enforced beyond the time for enforcement of the judgment under Sections 702.120 and 702.130.

29/632

§ 705.630. Modifying or setting aside assignment order

705.630. Upon application of either party and after a noticed hearing and a showing that there has been a material change in circumstances since the time of the previous hearing on an assignment

order, the court may modify or set aside the assignment order. An order modifying or setting aside the assignment order operates prospectively.

Comment. Section 705.630 is new.

Article 7. Collection of Judgment Where Judgment
Debtor Is Creditor of Public Entity

§ 705.710. Definitions

705.710. As used in this article:

(a) "Local public entity" means any public entity other than the state.

(b) "Public entity" means the state, a county, city, district, public authority, public agency, and any other political subdivision in the state.

(c) "State" means the State of California.

Comment. Section 705.710 defines several terms used in this article but makes no substantive change in former law. See former Section 710.

27873

§ 705.715. Exclusive procedures

705.715. A money judgment against a person to whom money is owing and unpaid by a public entity may be enforced against the public entity only in the manner provided by this article, by Article 5 (commencing with Section 705.510), and by Chapter 4 (commencing with Section 704.110).

Comment. Section 705.715 makes clear what was implicit under former law.

30/191

§ 705.720. Filing and notice generally

705.720. (a) Except as otherwise provided in Article 5 (commencing with Section 705.510) and by Chapter 4 (commencing with Section 704.110), to enforce a money judgment rendered against a person to whom money is owing and unpaid by a public entity, the judgment creditor may file, in the manner provided in this article, a duly authenticated abstract or transcript of the judgment, together with an affidavit which states that the judgment creditor desires the relief provided by this article and states the exact amount then due, owing, and unpaid on the judgment. The judgment creditor may state in the affidavit any fact tending to establish the identity of the judgment debtor.

(b) Promptly after filing the abstract or transcript and the affidavit with the public entity, the judgment creditor shall mail notice of the filing to the judgment debtor.

Comment. Subdivision (a) of Section 705.720 continues the substance of the introductory paragraph of subdivision (a) and the first sentence of subdivision (e) of former Section 710, but makes clear that, if the liability is the subject of a pending action, the procedures for obtaining a lien on a cause of action and judgment must be followed. See Sections 705.510-705.530. The introductory clause of subdivision (a) also recognizes that earnings of public officers and employees may be withheld only pursuant to Chapter 4 (commencing with Section 704.110).

Money is "owing and unpaid" under these provisions when there is an existing and unsatisfied legal liability on the part of the public entity. *McDaniel v. City & County of San Francisco*, 259 Cal. App.2d 356, 361, 66 Cal. Rptr. 384, 387 (1968); *Department of Water & Power v. Inyo Chem. Co.*, 16 Cal.2d 744, 751-53, 108 P.2d 410, ____ (1940).

Subdivision (b) is new. Former Section 710 did not provide for a notice of filing. See *McDaniel v. City & County of San Francisco*, 259 Cal. App.2d 356, 363, 66 Cal. Rptr. 384, ____ (1968). This notice is analogous to notice of levy under a writ of execution. See Section 703.220.

The procedure provided by this article also applies in cases where money is owed to the judgment debtor by reason of an award in a condemnation proceeding. Former Section 710(d) provided a distinct but similar procedure for reaching such awards. Under this title, the judgment creditor may seek to apply such property toward the satisfaction of a money judgment through the procedures normally applicable, depending upon the status of the money at the time when it is sought to be reached. Hence, if a condemnation proceeding has been commenced, the judgment creditor may obtain a lien on the cause of action and judgment pursuant to Article 5 (commencing with Section 705.510). If the judgment is final and the public entity has not paid the award to the judgment debtor, the judgment creditor may file an abstract or transcript and an affidavit with the public entity pursuant to this article. If the public entity has deposited the amount of the award with the court where the condemnation proceeding was held and the judgment creditor has not obtained a lien under Article 5, the judgment creditor may use some other appropriate procedure, such as garnishment or motion. See, e.g., *Kimball v. Richardson-Kimball Co.*, 111 Cal. 396, 394, 43 P. 1111, ____ (1896) (levy of attachment); *Phoenix v. Kovacevich*, 246 Cal. App.2d 774, 778-79, 55 Cal. Rptr. 135, ____ (1966) (permission to levy by court order); *Credit Bureau of San Diego v. Getty*, 61 Cal. App.2d Supp. 823, 826-29, 142 P.2d 105, ____ (1943) (affidavit procedure of former Section 710 not effective where court deposited money with county); *Colver v. W.B. Scarborough Co.*, 73 Cal. App. 455, 457-59, 238 P. 1110, ____ (1925) (levy of execution).

30/192

§ 705.730. Collection where judgment debtor is creditor of state

705.730. (a) If money is owing and unpaid to the judgment debtor by the state, the judgment creditor shall file the abstract or transcript and the affidavit with the state department, board, office, or commission owing the money to the judgment debtor prior to the time the

department, board, office, or commission presents the claim of the judgment debtor to the State Controller.

(b) The department, board, office, or commission in presenting the claim of the judgment debtor to the State Controller shall note the fact of the filing of the abstract or transcript and the affidavit, state the amount due, owing, and unpaid on the judgment as shown by the affidavit, and shall state any amounts advanced to the judgment debtor by, or owed by the judgment debtor to, the state by reason of advances for expenses or for any other purpose.

(c) The State Controller, to discharge the claim of the judgment debtor, shall deposit with the court which issued the abstract or transcript, by a warrant or check payable to the court, the whole or such portion of the amount due the judgment debtor on the claim, after deducting an amount sufficient to reimburse the department, board, office, or commission for any amounts advanced to the judgment debtor or owed by the judgment debtor to the state, as will satisfy in full or to the greatest extent the amount unpaid on the money judgment and pay the balance thereof, if any, to the judgment debtor.

Comment. Section 705.730 continues the substance of paragraph 1 of subdivision (a) of former Section 710.

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§ 705.740. Collection where judgment debtor is creditor of local public entity

705.740. (a) If money is owing and unpaid to the judgment debtor by a local public entity, the judgment creditor shall file the abstract or transcript and the affidavit with the auditor of the local public entity or, if there is no auditor, with the official whose duty corresponds to that of auditor.

(b) The auditor or other official, to discharge the debt to the judgment debtor, shall deposit with the court which issued the abstract or transcript, by a warrant or check payable to the court, the whole or such portion of the amount due the judgment debtor, after deducting an amount sufficient to reimburse the local public entity for any amounts advanced to the judgment debtor or owed by the judgment debtor to the public entity, as will satisfy in full or to the greatest extent the amount unpaid on the judgment and pay the balance thereof, if any, to the judgment debtor.

Comment. Section 705.740 continues the substance of paragraph 2 of subdivision (a) of former Section 710. The reference in subdivision (b) to deductions for advances to, or amounts owed by, the judgment debtor did not appear in the former law applicable to local public entities, but has been included in subdivision (b) to make it parallel to Section 705.730(c), applicable to the state.

30/195

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

705.750. (a) Where the judgment debtor named in an abstract or transcript filed pursuant to this article is a contractor upon a public work, the cost of which is to be paid out of public moneys voted, appropriated, or otherwise set apart for the purpose of paying therefor, only so much of the contract price shall be deemed owing and unpaid to the contractor, within the meaning of Section 705.730 or 705.740, as may remain payable under the terms of the contractor's contract, upon the completion thereof, after the sums severally due and to become due to all persons who perform labor upon such work or who bestow skill or other necessary services or furnish materials, appliances, teams, or power used or consumed in the performance of such work have been ascertained and paid. In ascertaining the sums due or to become due to such persons, only claims which are filed against the moneys due or to become due to the judgment debtor in accordance with the provisions of Chapter 4 (commencing with Section 3179) of Title 15 of Part 4 of Division 3 of the Civil Code shall be considered.

(b) The controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract shall not deposit payments with the court which issued the abstract or transcript until the contract is completed and the payments specified in subdivision (a) are made and then only for the excess, if any, of the contract price over the aggregate of the sums so paid.

Comment. Section 705.750 continues the substance of former Section 710a.

§ 705.760. Notice of deposit with court; exemption claim

705.760. (a) Promptly after deposit with the court by the public entity, the court clerk shall mail a notice of deposit to the judgment debtor.

(b) An exemption shall be claimed in the manner provided by subdivision (b) of Section 707.215 within 10 days after notice is mailed pursuant to subdivision (a).

Comment. Subdivision (a) of Section 705.760 requires the court clerk to mail notice of deposit pursuant to Section 705.730 or 705.740 to the judgment debtor. This notice enables the judgment debtor to make a claim of exemption before the money is paid over to the judgment creditor.

The limitation on the time for claiming an exemption provided by subdivision (b) is the same as the period applicable to exemption claims under a writ of execution. See Section 707.220.

§ 705.770. Distribution of money

705.770. After the expiration of 10 days from the date notice of deposit with the court was mailed to the judgment debtor, the court shall pay the nonexempt portion of the money received to the judgment creditor and the balance thereof, if any, to the judgment debtor unless some other disposition is required by law.

Comment. Subdivision (a) of Section 705.770 continues the substance of subdivision (c) of former Section 710. This subdivision recognizes that the judgment debtor may not be entitled to the excess, such as, for example, where a second judgment creditor has a lien subordinate to that of the first judgment creditor.

§ 705.780. Lien

705.780. Filing pursuant to this article creates a lien on the money owing and unpaid by the public entity to the judgment debtor, in an amount equal to that which may properly be applied toward the satisfaction of the judgment.

Comment. Section 705.780 provides for the creation of a lien as of the filing with the public entity by the judgment creditor under Sections 705.430 and 705.440. This principle is consistent with decisions under former law which equated filing with levy and determined priority as of the time of filing. See *Department of Water & Power v. Inyo Chem. Co.*, 16 Cal.2d 744, ___, 108 P.2d 410, ___ (1940); *Ott Hardware Co. v. Davis*, 165 Cal. 795, 800, 134 P. 973, ___ (1913). No duration of the lien is specified; however, it may not be enforced beyond the time for enforcement of the judgment provided by Sections 702.120 and 702.130.

§ 705.785. Filing fee; deposit of fees collected by state

705.785. (a) The judgment creditor upon filing the abstract or transcript and the affidavit shall pay a fee of six dollars (\$6) to the public entity with which it is filed.

(b) Fees received by a state agency under this article shall be deposited to the credit of the fund from which payments were, or would be, made on account of collection under this article.

Comment. Subdivision (a) of Section 705.785 continues the substance of subdivision (b) of former Section 710. Subdivision (b) continues the substance of subdivision (g) of former Section 710.

§ 705.790. Liability of public officer

705.790. No public officer or employee is liable for failure to perform a duty imposed by this article unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable the officer or employee in the exercise of reasonable diligence to ascertain the identity of the judgment debtor therefrom and from the papers and records on file in the office in which the officer or employee works. The word "office" as used in this section does not include any branch or subordinate office located in a different city.

Comment. Section 705.790 continues the substance of the last two sentences of subdivision (e) of former Section 710. See Section 705.720(a) (judgment creditor may state additional information in affidavit to establish identity of judgment debtor).

§ 705.795. Limitations on procedure of this article

705.795. Nothing in this article authorizes the filing of an abstract or transcript and affidavit against an overpayment of tax, penalty, or interest, or interest allowable with respect to an overpayment, under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code.

Comment. Section 705.795 continues the substance of subdivision (f) of former Section 710.