

8/8/79

Sixteenth Supplement to Memorandum 79-29

Subject: Study D-300 - Enforcement of Judgments (Enforcement After Death of Party)

Sections 702.410 and 702.420 of the Commission's draft statute deal with enforcement of a judgment after the death of a party. We plan to renumber these sections and to move them when we redraft the statute. See Exhibit 1.

We have no particular problem with the sections as drafted. However, there are several matters in this area of the law that should be considered by the Commission.

Effect on Attachment of Death of Defendant

The death of the defendant destroys an attachment lien. A divided California Supreme Court reached this decision in 1866 based on a construction of the statutes in effect at that time. Since then, the cases have merely followed the Supreme Court decision.

The existing rule operates to change the priority given to creditors upon the death of the defendant. Take this example: Plaintiff A attaches real property in an action against Defendant. Plaintiff B then secures a judgment against Defendant and records an abstract of judgment. Defendant dies before Plaintiff B levies execution on the judgment and before Plaintiff A obtains judgment, but the action by Plaintiff A continues and judgment against the substituted personal representative of deceased Defendant is obtained. Both plaintiffs present claims against the estate. Plaintiff A (the attachment plaintiff) is treated as a general creditor; his attachment terminated when Defendant died. Plaintiff B is a priority creditor with respect to the real property covered by his judgment lien.

By way of contrast to the above example, had Defendant not died, Plaintiff A would have priority over Plaintiff B and could levy on the attached property to satisfy his judgment.

No policy reasons are advanced in the decisions why the death of the defendant should result in a change in the priorities afforded the two judgment creditors against the estate. The only justification given

for the existing case law rule is that there is no provision in the existing statutes that makes clear that the attachment continues after the death of the defendant.

The staff recommends that the law be changed to provide that the death of the defendant whose property is attached does not terminate the attachment. Attached as Exhibit 2 is a draft that includes various amendments that would effectuate this recommendation.

There is a technical problem to be dealt with if an attachment lien is to continue after the death of the defendant or judgment debtor. The ordinary way that a judgment creditor preserves his attachment lien (which can exist only for a maximum period of eight years) is to levy execution on the attached property. The levy of execution creates an execution lien on the attached property which has the same priority as the attachment lien. However, when the judgment debtor dies, levy of execution on property of the estate is prohibited; instead, claims must be presented in the estate proceedings. To provide a method of preserving the effect of the attachment lien after the death of the defendant, the staff recommends that the statute provide that the judgment shall be a lien on the attached property and have the same priority as the attachment lien if (1) the defendant dies after judgment is rendered but while the attachment lien is still in effect or (2) the defendant dies before judgment is rendered but the attachment lien is still in effect at the time of entry of the judgment. The draft attached as Exhibit 2 effectuates this recommendation.

Effect on Judgment Lien of Death of Judgment Debtor

The death of the judgment debtor does not affect a judgment lien on the real property of the decedent. However, a claim must be presented in the estate proceedings and the judgment is entitled to a priority to the extent it can be satisfied by the property subject to the judgment lien and, to the extent not so satisfied, the judgment is treated as other claims of general creditors against the estate. In addition, the judgment creditor can foreclose his judgment lien without presenting a claim against the estate if he waives in his complaint all right to payment from any other property of the estate. The staff recommends

that these rules be continued and be codified in the statute. The draft attached as Exhibit 2 would effectuate this recommendation.

Effect on Lien on Joint Tenancy Property When Joint Tenant Dies

This matter will be considered in Memorandum 79-38.

Submission of Separate Recommendation

The comprehensive recommendation relating to enforcement of judgments will be delayed until the 1981 session. The staff suggests that the Commission submit a recommendation to the 1980 session covering the subject matter of this supplement and Memorandum 79-38. Significant changes would be made in existing law if the staff proposed changes were adopted as proposed. We could prepare a separate tentative recommendation proposing these changes if they are adopted by the Commission, distribute the tentative recommendation to the State Bar Probate and Trust Law Section and other interested persons and organizations for review and comment, and submit the recommendation in 1980 if it is generally approved by interested persons and organizations.

Respectfully submitted,

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Executive Secretary

EXHIBIT 1

CHAPTER 6. DEATH OF JUDGMENT DEBTOR OR JUDGMENT CREDITOR

§ 686.010. Enforcement after death of judgment creditor

686.010. After the death of the judgment creditor, the judgment may be enforced as provided in this title by the judgment creditor's executor or administrator or successor in interest.

Comment. Section 686.010 continues the substance of subdivision 1 of former Section 686. The judgment is enforceable by the executor, administrator, or successor in interest in the same manner as by a judgment creditor. See Section _____ ("judgment creditor" includes the judgment creditor's executor or administrator or successor in interest).

405/789

§ 686.020. Enforcement after death of judgment debtor

686.020. After the death of the judgment debtor, enforcement of a judgment against the judgment debtor is governed by the provisions of the Probate Code.

Comment. Section 686.020 makes clear that, although various provisions of the Probate Code permit use of enforcement procedures provided in this title, the enforcement of a judgment against the judgment debtor after the death of the judgment debtor is governed by the Probate Code. See, e.g., Prob. Code §§ 716, 730, 732, 950.

EXHIBIT 2

Code of Civil Procedure § 488.510 (amended). Lien of attachment

SEC. ____ . Section 488.510 of the Code of Civil Procedure is amended to read:

488.510. (a) Unless sooner released or discharged, any attachment shall cease to be of any force or effect, and the property levied upon shall be released from the operation of such attachment , at the expiration of three years from the date of issuance of the writ of attachment under which such levy was made.

(b) Notwithstanding subdivision (a), upon motion of the plaintiff, made not less than 10 or more than 60 days before the expiration of the three-year period and upon notice of not less than five days to the defendant who property is attached, the court in which the action is pending may, by order filed prior to the expiration of the period and for good cause, extend the time of such attachment for a period not exceeding one year from the date on which the attachment would otherwise expire.

(c) The levying officer shall serve notice of such order upon any person holding property pursuant to an attachment and shall record or file such notice in any office where the writ and notice of attachment are recorded or filed prior to the expiration of the period described in subdivision (a) or any extension thereof. Where the attached property is real property, the plaintiff or his attorney, instead of the levying officer, may record the required notice.

(d) Any attachment may be extended from time to time in the manner herein prescribed, but the ~~aggregate~~ maximum period of the attachment, including such extensions , shall not exceed ~~five~~ eight years from the date of issuance of the writ of attachment under which the levy of attachment was made .

(e) The death of the defendant whose property is attached does not terminate the attachment.

Comment. The amendment of subdivision (d) of Section 488.510 makes no substantive change. Under subdivision (d), the total period for existence of an attachment may never exceed eight years. Subject to

this limitation, during the period the attachment lien continues, the plaintiff may preserve the effect of the attachment by levy of execution (after entry of judgment) on the attached property and thereby obtain an execution lien which has the same priority as the attachment lien. If the attached property is real property, the plaintiff may preserve the effect of the attachment by recording (after entry of judgment) an abstract of judgment to obtain a judgment lien which also has the same priority as the attachment lien. Where good cause exists, the court has authority under Section 488.510 to extend the period of the attachment lien, before or after entry of judgment, in order to allow the plaintiff time to levy on the attached property or to record an abstract of judgment.

Subdivision (e) is added to reverse the former case law rule that the death of the defendant destroyed the lien of an attachment on the defendant's property. *Meyers v. Mott*, 29 Cal. 359, 367 (1866); *Clary v. Rupert*, 93 Cal. App.2d 844, 210 P.2d 44 (1949). But see *Everett v. Hayes*, 94 Cal. App. 31, 270 P. 458 (1928) (when property does not fall into probate estate because it has been conveyed before death, the attachment lien continues and can be enforced after judgment by a suit in equity). Under Probate Code Section 732, if the defendant dies after judgment is entered but while the attachment lien is still in effect, or if the defendant dies before the judgment is entered but the attachment lien is still in effect at the time of entry of the judgment, the judgment becomes a lien on the property subject to the attachment lien for the purposes of Probate Code Sections 716 (foreclosure of judgment lien) and 950 (payment of claims against probate estate) and has the same priority as the attachment lien.

405/455

Code of Civil Procedure § 669 (amended). Death of party after submission of case or after verdict but before judgment

SEC. __. Section 669 of the Code of Civil Procedure is amended to read:

669. If a party dies after trial and submission of ~~his~~ the case to a judge sitting without a jury for decision or after a verdict upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. ~~Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.~~

Comment. Section 669 is amended to delete the second sentence. Enforcement of a judgment against a deceased party is governed by the Probate Code. See Section 686.020. See also Prob. Code §§ 730, 732 (enforcement of judgments after death).

Probate Code § 716 (amended). Action against estate; action to enforce lien

SEC. __. Section 716 of the Probate Code is amended to read:

716. ~~No~~ (a) Except as provided in subdivision (b), no holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator ~~; except in the following cases~~ .

(b) An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint . The action may be brought whether or not the claim was filed or presented as provided in subdivision (a) ; but no counsel fees shall be recovered in such the action unless the claim was so filed or presented as aforesaid .

(c) As used in this section, "lien" includes but is not limited to a judgment that is a lien.

Comment. Section 716 is amended to make nonsubstantive, technical changes and to add subdivision (c). Subdivision (c) codifies prior case law with respect to a judgment lien created by the recording of the abstract of judgment (Code Civ. Proc. §§ 674, 674.5, 674.7). *Corporation of America v. Marks*, 10 Cal.2d 218, 73 P.2d 1215 (1937). If a judgment debtor dies after the abstract of judgment is recorded, the judgment lien is not terminated. Execution cannot issue on the judgment after death (Prob. Code § 730), but the judgment creditor can present a claim against the estate and is entitled to priority to the extent of the judgment lien and to payment of any amount not thereby satisfied as a general creditor of the estate (Section 950). Or the judgment creditor may waive his claim against any other estate property and enforce the judgment lien under subdivision (b) of Section 716 through an equitable action to foreclose the lien. *Corporation of America v. Marks*, supra. As to a judgment which is made a lien by Section 732 (judgment becomes a lien on attached property), see the Comment to that section.

Probate Code § 730 (repealed)

SEC. __. Section 730 of the Probate Code is repealed.

~~730. A judgment rendered against an executor or administrator, upon any claim for money, against the estate of his testator or intestate, when it comes finally, conclusively establishes the validity of the~~

claim for the amount of the judgment, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment, if there is one, otherwise an abstract of the judgment must be filed in the administration proceedings. No execution shall issue upon the judgment, nor shall it create any lien upon the property of the estate, or give the judgment creditor any priority of payment.

Comment. The first sentence of former Section 730 is continued in Section 731. The substance of the second sentence is continued in Section 731, but the reference to the "certified transcript of the original docket of the judgment" has been omitted to conform to the 1927 amendment to Code of Civil Procedure Section 674 which substituted the filing of an abstract of judgment for the filing of a certified transcript of the docket of a judgment as a means of creating a judgment lien. The last sentence is superseded by Section 730 which provides that, after the death of the decedent, the judgment is not enforceable under the Code of Civil Procedure. The provision that the judgment does not create a lien or give the judgment creditor any priority of payment is not continued; this provision is unnecessary since the judgment does not become a lien upon property of the estate and hence has no priority except as provided in Section 732 (judgment becomes lien on property attached prior to decedent's death in action originally brought against decedent). See Section 950.

405/874

Probate Code § 730 (added). Enforcement of judgments after death of decedent

SEC. __. Section 730 is added to the Probate Code, to read:

730. (a) Except as provided in subdivision (c), after the death of the decedent, the following judgments are not enforceable under the Code of Civil Procedure but are payable in the due course of administration:

(1) A judgment upon a claim for money rendered against the decedent during the decedent's lifetime.

(2) A judgment upon a claim for money rendered against a decedent who died after trial and submission of the case to a judge sitting without a jury for decision or after a verdict.

(3) A judgment rendered against the executor or administrator, upon a claim for money, against the estate of the decedent.

(b) Except as provided in Section 731, a judgment referred to in subdivision (a) shall be filed or presented in the same manner as other claims.

(c) If execution is actually levied upon any property of the decedent before the decedent dies, the property levied upon may be sold to satisfy the judgment. The officer making the sale shall account to the executor or administrator for any surplus. To the extent the judgment is not so satisfied, the balance of the judgment remaining unsatisfied is payable in the due course of administration.

(d) Notwithstanding the death of the decedent, a judgment for the possession of property or a judgment that requires a sale of property may be enforced under the Code of Civil Procedure. Nothing in this subdivision authorizes enforcement under the Code of Civil Procedure against any property of the decedent other than the property described in the judgment for possession or sale. After the death of the decedent, any demand for money against the estate that is not satisfied from the property described in the judgment for possession or sale shall be filed or presented in the same manner as other claims and is payable in the due course of administration.

Comment. Section 730 collects in one section various provisions of former law relating to enforcement of judgments after the death of the decedent.

The provision of subdivision (a) that the judgment is payable in the due course of administration is drawn from portions of former Sections 730 and 731 and from the second sentence of former Section 732. The provision of subdivision (a) that the judgment is not enforceable under the Code of Civil Procedure is drawn from the last sentence of former Section 730 and the first sentence of former Section 732.

Paragraph (1) of subdivision (a) continues the substance of the first sentence of former Section 732; paragraph (2) continues the substance of former Section 731; paragraph (3) continues the substance of the last sentence of former Section 730.

Subdivision (b) is drawn from the second sentence of former Section 732.

Subdivision (c) continues the substance of the third sentence of former Section 732.

Subdivision (d) continues the substance of subdivision 2 of former Section 686 of the Code of Civil Procedure. The first sentence permits the use of the Code of Civil Procedure provisions for the enforcement of an order for sale in a judgment foreclosing a lien under Section 716 and for other judgments for possession or sale of property. The remainder of the subdivision recognizes, for example, that a judgment for possession of property may include damages and costs which ordinarily would be recovered by levy on other property of the judgment debtor. Also there may be accrued costs, interest, and the levying officer's costs in enforcing a judgment for possession that ordinarily would be recovered by the judgment creditor by levy on other property of the judgment

debtor. After the death of the judgment debtor, however, these claims for money cannot be enforced by levy against other property of the decedent; instead, a claim must be filed or presented in the same manner as other claims.

405/480

Probate Code § 731 (repealed)

SEC. __. Section 731 of the Probate Code is repealed.

~~731. A judgment against a person who dies after trial and submission of his case to a judge sitting without a jury for decision or after a verdict is not a lien on the real property of the decedent, but is payable in due course of administration.~~

Comment. Former Section 731 is superseded by Section 730. The reference to a lien on the real property of the decedent is not continued; a judgment does not become a lien on the property of the decedent except as provided in Section 732 (judgment becomes lien on attached property).

405/876

Probate Code § 731 (added). Judgment on claim against estate conclusive

SEC. __. Section 731 is added to the Probate Code, to read:

731. A judgment rendered against an executor or administrator, upon a claim for money, against the estate of the decedent, when it becomes final, conclusively establishes the validity of the claim for the amount of the judgment. The judgment shall provide that it is payable in the due course of administration. An abstract of the judgment shall be filed in the administration proceedings.

Comment. Section 731 continues the substance of the first two sentences of former Section 730.

405/486

Probate Code § 732 (repealed)

SEC. __. Section 732 of the Probate Code is repealed.

~~732. When a judgment has been rendered against the testator or intestate, no execution shall issue thereon after his death, except as provided in the Code of Civil Procedure. A judgment against the decedent for the recovery of money must be filed or presented in the same manner as other claims. If execution is actually levied upon any prop-~~

erty of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real property of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living.

Comment. Former Section 732 is superseded by Section 730. The last sentence (relating to the judgment creditor's right to redeem) has not been continued because the right of redemption no longer exists. See Code Civ. Proc. § _____ (sale of real property upon execution absolute).

405/481

Probate Code § 732 (added). When judgment becomes lien on attached property

SEC. _____. Section 732 is added to the Probate Code, to read:

732. (a) If a judgment is entered against the decedent during the decedent's lifetime in an action in which property was attached, at the time of the decedent's death the judgment becomes a lien upon the property of the estate subject to the attachment lien and has the same priority as the attachment lien. This subdivision applies only if the attachment lien is in effect at the time the decedent dies.

(b) If a judgment is entered after the death of the decedent in an action in which property was attached, at the time of entry the judgment becomes a lien on the property of the estate subject to the attachment lien and has the same priority as the attachment lien. This subdivision applies only if the attachment lien is in effect at the time of entry of the judgment.

Comment. Section 732 is a new provision which makes the judgment a lien on the attached property for the purpose of determining order of priority for payment of claims against the estate under Section 950 and for the purpose of permitting foreclosure of the lien under Section 716. Section 732 implements Code of Civil Procedure Section 488.510(e) which reversed the former case law rule that the death of the defendant destroyed the lien of an attachment on his property. See the Comment to Section 488.510. The judgment does not become a lien under Section 732 on property subject to the attachment lien that is not included in the decedent's estate because it was transferred by the decedent; the attachment lien continues on the property transferred and can be enforced after judgment by a suit in equity notwithstanding the death of the decedent. *Everett v. Hayes*, 94 Cal. App. 31, 270 P. 458 (1928).