

Memorandum 80-36

Subject: Study D-300 - Enforcement of Judgments (Creditor's Suit)

Attached to this memorandum is a staff redraft of the provisions of the proposed enforcement of judgments recommendation relating to creditor's suit (see Exhibit 1). These provisions will go in Article 3 of Chapter 6 (miscellaneous creditors' remedies) of Division 2 (enforcement of money judgments). The sections have been renumbered since the tentative recommendation of March 1979. The changes included in this draft purport to incorporate commentators' suggestions we have previously distributed to the Commissioners, as well as staff revisions. Also attached to this memorandum (see Exhibit 2) is a staff redraft of proposed Section 708.180 relating to determination of third person's adverse claim in examination proceedings. This section is included because it should be conformed to similar provisions relating to creditor's suit (see proposed Section 708.240 in Exhibit 1).

The principal changes from the tentative recommendation of March 1979 are as follows:

CREDITOR'S SUIT (Exhibit 1)

§ 708.230. Time for bringing creditor's suit

This section is revised in response to a suggestion from Mr. Frederick Holden to make clear how the exceptions affect the basic statute of limitations rule that the judgment creditor may bring a creditor's suit against the third person at any time when the judgment debtor may bring an action against the third person concerning the disputed property or debt. If a lien is created on the property or debt, the time for commencing the action is extended until one year after creation of the lien, subject to the overriding rule that a creditor's suit may not be commenced after the period for enforcement of the judgment has expired. If the action is commenced within the time permitted, however, the action may be prosecuted to judgment notwithstanding that the period for enforcement of the judgment has expired. (This section was Section 705.230 in the March 1979 TR.)

§ 708.240. Order forbidding transfer of property or payment of debt

Under existing law, the court in which an examination proceeding of a third person is pending may forbid the third person from transferring the property or paying the debt until a creditor's suit may be commenced and prosecuted to judgment. See Code Civ. Proc. § 720. Because this order may be made without notice to the third person (*High v. Bank of Commerce*, 95 Cal. 386, 30 P. 556 (1892)), it is constitutionally suspect. In the March 1979 TR (Section 704.240), this provision was restricted in scope so that the order could forbid transfer or payment only to the judgment debtor. This, however, largely destroys the value of the provision.

Section 708.240 is redrafted to make clear that the judgment creditor may get a temporary restraining order, a preliminary injunction, or both, in the creditor's suit according to the usual rules of civil procedure. This ordinarily includes notice to the third person, hearing, and bond. See Code Civ. Proc. §§ 527, 528-529, 532, 535. The provision for an order forbidding transfer or payment to the judgment debtor is preserved in Section 708.240 since it may be done *ex parte*, and a provision is added that no undertaking shall be required for such an order.

Comparable revisions should be made to the provisions relating to examination proceedings so that an order may issue pending commencement of a creditor's suit and requiring notice and hearing if the order is to forbid transfer generally. See discussion under Section 708.180 *infra*.

§ 708.253. Judgment debtor's claim of exemption

Section 708.253 has been added by the staff to provide a procedure for the judgment debtor to make a claim that the property in the hands of the third person or the debt owed by the third person is exempt from execution. This section parallels Section 708.120 concerning the judgment debtor's claim of exemption in a proceeding for the examination of a third person.

§ 708.257. Jury trial

At the February 1980 meeting, the Commission decided to limit the court's power to adjudicate in supplementary proceedings a disputed claim of ownership of property between the judgment debtor and a third

person if the issue is one which the third person would be entitled to have tried before a jury in an independent civil action and the third person objects to the adjudication by the court in the supplementary proceeding. In the face of such an objection, the remedy of the judgment creditor would then be to commence a creditor's suit. However, traditionally there has been no right to jury in creditor's suits. See 21 Am. Jur.2d Creditors' Bills § 9, at 10 (1965); 21 C.J.S. Creditors' Suits § 73, at 1125 (1940). This creates an anomalous situation whereby the third person can forestall determination by the court in the supplementary proceeding by claiming a right to jury trial, and thus forcing the judgment creditor to commence a creditor's suit in which the third person is not entitled to jury trial.

The staff has therefore added Section 708.257 to provide such a right to jury trial in a creditor's suit. This section will no doubt be controversial. The argument in favor of the section is (1) to eliminate the anomaly referred to above and (2) to avoid unfairness to the third person by denying a right to jury trial in a creditor's suit when the third person would have such a right if the action were an ordinary civil action involving the judgment debtor and the third person.

The argument against the section is that it will increase the expense and difficulty of the judgment creditor collecting the judgment, and may make the creditor's suit virtually useless as a means of collection. If the section is disapproved, the provision approved at the February meeting, forestalling court adjudication of third-party property claims in supplementary proceedings when there would otherwise be a right to jury trial and objection is made, should probably be deleted. See discussion under Section 708.180 infra.

§ 708.260. Judgment in creditor's suit

Subdivision (c) has been revised in response to a comment from Professor Vern Countryman to make clear that the amount of the judgment against a third person who has transferred the property or paid the debt shall not exceed the unpaid amount of the underlying judgment against the judgment debtor. (This section was Section 705.260 in the March 1979 TR.)

§ 708.270. Costs

This section (Section 705.270 in the March 1979 TR) has been revised to make clearer its original purposes, i.e., to discourage the filing of a creditor's suit where there is no dispute over the ownership of the property or the existence of the debt and to prevent the judgment creditor's costs in the creditor's suit from being later recovered from the judgment debtor.

EXAMINATION PROCEEDINGS (Exhibit 2)

§ 708.180. Determination of third person's adverse claim

This section is located in the article relating to examination proceedings which was reviewed and approved by the Commission at the February 1980 meeting. The staff has revised the provisions of Section 708.180 which concern the court's power to restrain a third person having property alleged to be the judgment debtor's from disposing of the property until the question of ownership can be adjudicated. See subdivisions (c) and (d) of Section 708.180 in Exhibit 2 (attached).

As approved by the Commission in February, Section 708.180 provided for an order restraining transfer of the property only to the judgment debtor since the provision of existing law (Code Civ. Proc. § 720) which provides for an order restraining transfer to anyone without notice is constitutionally dubious.

In redrafting the provisions relating to restraining orders in creditors' suits (proposed Section 708.240, discussed above), the staff concluded that a general restraining order--made pendente lite but after notice and hearing--was necessary to preserve the usefulness of the creditor's suit, and Section 708.240 has been drafted accordingly.

The revisions to Section 708.180 conform this section to Section 708.240 as redrafted and provide for a limited restraining order (restraining transfer to the judgment debtor) made ex parte and a general restraining order (restraining transfer to anyone) made after notice and hearing. The noticed hearing requires the court to determine that the judgment creditor's claim that the judgment debtor has an interest in the property in the hands of the third person is "probably valid." This

is analogous to the determination required in the noticed hearing procedure in attachment proceedings. See Code Civ. Proc. §§ 484.050(b), 484.090(a)(2).

Section 708.180 also contains a provision that the court may not make a summary determination of the disputed ownership question in the examination proceeding if the issue is one which the third person would be entitled to have tried before a jury in an independent action and the third person objects to summary determination in the examination proceeding. See Section 708.180(b)(2). The staff is suggesting reconsideration of this provision. See discussion under Section 708.257 supra.

Respectfully submitted,

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EXHIBIT 1

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.¹ 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.² Although the reach of the writ of execution has been considerably expanded,³ 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.⁴

1. See Section 720; 5 B. Witkin, California Procedure Enforcement of Judgment § 143, at 3506-07 (2d ed. 1971).
2. See generally, G. Gilbert, The Law of Executions 1-58 (London 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).
3. 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.
4. 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 under existing law 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 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).

Creditors' suits, as a creation of the courts of equity, are subject to the doctrine requiring exhaustion of legal remedies before the action can be commenced.⁵ 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. The judgment creditor would be able to recover costs incurred in the creditor's suit, however, only if the third person actually claims an interest in the disputed property or denies the debt to the judgment debtor. This is to discourage the filing of a creditor's suit where there is no real issue.⁶

Unlike existing law,⁷ the proposed law would require that the judgment debtor be joined in the creditor's suit in order to permit a full adjudication of the issues. However, the proposed law provides that the judgment debtor is not an indispensable party, and that the judgment debtor's residence may not be considered in the determination of proper venue unless otherwise provided by 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 limitations⁸ and, at least in certain circumstances, that the time begins to run from the return of the

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5. 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).
 6. The proposed law also provides that the judgment creditor may not recover costs incurred in a creditor's suit from the judgment debtor as a cost of enforcing the judgment. The general procedure for recovering costs would be applicable. See Section 1033.7.
 7. 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).
 8. 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.⁹ 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 (subject to the time limit for enforcement of the judgment).¹⁰ 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.¹¹ The judgment in the creditor's suit would be independently enforceable against the third person.¹² 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.¹³

9. 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.

10. See the discussion under "Time for Enforcement of Judgments" supra.

11. See id.

12. 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.

13. 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).

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, the court may not order the property to be applied toward the satisfaction of the judgment, but may, with or without notice,¹⁴ forbid a transfer or other disposition of the property or debt until a creditor's suit can be commenced and prosecuted to judgment.¹⁵

Under the proposed law, the court in which the examination proceeding is pending may, with or without notice, forbid transfer of the property to the judgment debtor or payment of the debt to the judgment debtor until the ownership of the property or the existence of the debt is determined in that proceeding or in a creditor's suit.¹⁶ Once a creditor's suit is commenced, the judgment creditor may obtain an order, with or without notice and without bond, forbidding such transfer or payment to the judgment debtor, and may, after notice and hearing, obtain a temporary restraining order, a temporary injunction, or both, restraining the third person from transferring the property to any person.¹⁷ This is to prevent the third person from frustrating the purpose of the proceeding by collusive or evasive action.

Under existing law, a creditor's suit is an equitable proceeding.¹⁸ Although no reported California case has decided the question, it appears to be the rule in other United States jurisdictions that there is

14. See, e.g., *High v. Bank of Commerce*, 95 Cal. 386, 30 P. 556 (1892). Because notice to the third person is not required, this procedure 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).

15. Section 720.

16. See discussion in text accompanying note [182] supra.

17. If a preliminary injunction is issued, the judgment creditor must furnish an undertaking. See 2 B. Witkin, *California Procedure Provisional Remedies* § 47, at 1496-97 (2d ed. 1970). Under the proposed law, the authority for the judgment creditor to commence a creditor's suit is not conditioned on the third person claiming an interest in the property or denying the debt. However, if the third person does not do so, the judgment creditor will not be entitled to recover costs in the creditor's suit. See discussion in text accompanying note 6 supra.

18. See, e.g., *Woodcock v. Petrol Corp.*, 48 Cal. App.2d 652, 120 P.2d 889 (1942).

no right to jury trial in a creditor's suit.¹⁹ The proposed law creates a new right to jury trial in creditors' suits to the extent that the third person would be entitled to a jury trial in a civil action other than a creditor's suit. Although this may have the effect of increasing the time and expense of litigating the question of the ownership of the property or the existence of the debt, it avoids the unfairness to the third person under existing law which deprives the third person of a right to trial by jury in an action to which the third person is an unwilling party.

19. See 21 Am. Jur.2d Creditors' Bills § 9, at 10 (1965); 21 C.J.S. Creditors' Suits § 73, at 1125 (1940).

Article 3. Creditor's Suit

Comment. Article 3 (commencing with Section 708.210) 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 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 699.090 (duties of garnishee under levy of execution), where the court does not determine disputed ownership of the property or the existence of the debt under Section 708.180, or where for some other reason the judgment creditor believes that the third person will not cooperate. 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 5 (commencing with Section 706.010).

§ 708.210. Creditor's suit

708.210. If a third person has property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the judgment.

Comment. Section 708.210 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 rule under former law requiring the exhaustion of remedies at law 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 if inadequate or futile). See also Section 680.____ ("property" includes real and personal property and any interest therein).

§ 708.220. Joinder of judgment debtor

708.220. 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 may not be considered in the determination

of proper venue unless otherwise provided by contract between the judgment debtor and the third person.

Comment. Section 708.220 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

§ 708.230. Time for bringing creditor's suit

708.230. (a) Except as provided in subdivision (b), an action shall be commenced pursuant to this article before the expiration of the later of the following times:

(1) The time when the judgment debtor may bring an action against the third person concerning the property or debt.

(2) One year after creation of a lien on the property or debt pursuant to this title if the lien is created at the time when the judgment debtor may bring an action against the third person concerning the property or debt.

(b) An action may not be commenced pursuant to this article after the period for enforcement of the judgment has expired.

(c) Notwithstanding Section 683.010, if an action is commenced pursuant to this article within the time permitted in this section, the action may be prosecuted to judgment.

Comment. Section 708.230 is new and provides a statute of limitations for bringing a creditor's suit. 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, 545, 197 P. 799, 801, ____ (1921). Under Section 708.230, 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 708.210 and the Comment thereto.

The extension of time provided by paragraph (2) of subdivision (a) may be effectuated by the creation of an enforcement lien on the property, as, for example, the lien created by service of an order of examination on the third person. See Section 708.120.

A creditor's suit commenced within the period prescribed by this section may be pursued to judgment after the judgment is no longer

enforceable against the original judgment debtor notwithstanding Sections 683.010 and 683.020. The judgment in the creditor's suit may then be enforced as provided in Section 708.260, and the 10-year period of enforceability (subject to renewal) provided by Sections 683.010 and 683.020 applies to the judgment in the creditor's suit.

968/676

§ 708.240. Order forbidding transfer of property or payment of debt

708.240. The judgment creditor may apply to the court in which an action under this article is pending for either or both of the following:

(a) An order restraining the third person from transferring to the judgment debtor the property in which the judgment debtor is claimed to have an interest or from paying to the judgment debtor the alleged debt. The order may be made ex parte or, if the court so orders or the court rules so provide, upon noticed motion, and shall remain in effect until judgment is entered in the action or until such earlier time as the court may provide in the order. An undertaking may be required in the discretion of the court. The court may modify or vacate the order at any time with or without a hearing on such terms as are just.

(b) A temporary restraining order or a preliminary injunction or both, restraining the third person from transferring to any person or otherwise disposing of the property in which the judgment debtor is claimed to have an interest, pursuant to Chapter 3 (commencing with Section 525) of Title 7 and the court may make, dissolve, and modify such orders as provided therein.

Comment. Section 708.240 supersedes a portion of former Section 720. See also Section 708.180(c) (order in main action forbidding transfer or payment to judgment debtor). Although an order may be made under subdivision (a) without notice and of long duration, its effect is narrowly limited to orders forbidding transfer or payment to the judgment debtor. By incorporating Chapter 3 (commencing with Section 525) of Title 7, subdivision (b) provides the third person with procedural safeguards which were not present in former Section 720.

[Note. Should a referee be given power to make orders under subdivision (a)?]

§ 708.250. Lien of creditor's suit

708.250. Service of summons on the third person creates a lien on the interest of the judgment debtor in the property that is the subject of an action under this article.

Comment. Section 708.250 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). The lien may not be enforced beyond the time for enforcement of the judgment provided by Sections 683.010 and 683.020. See Section 697.____ (duration of liens). See also Sections 697.____ (relation back of liens), 697.____ (effect of liens).

045/119

§ 708.253. Judgment debtor's claim of exemption

708.253. (a) In an action brought pursuant to this article, the judgment debtor may claim that all or any portion of the property or debt is exempt from enforcement of a money judgment. The claim shall be made by application to the court on noticed motion, filed and served not later than 30 days before the date set for trial. The judgment debtor shall execute an affidavit in support of the application that includes all of the matters set forth in subdivision (b) of Section 703.520. No notice of opposition to the claim of exemption is required. If the judgment debtor has not been named as a party to the action, the judgment debtor may intervene pursuant to Section 387. Except as provided in subdivision (b), failure of the judgment debtor to make a claim of exemption constitutes a waiver of the claim.

(b) Failure of the judgment debtor to make a claim of exemption in an action brought pursuant to this article does not constitute a waiver of the claim if both of the following conditions are satisfied:

(1) The judgment debtor has not been served with process in the action which contains a description of the property or debt reasonably adequate to permit it to be identified.

(2) The judgment debtor does not have actual notice of the pendency of the action and the identity of the property or the nature of the debt in issue.

Comment. Section 708.253 is new and is comparable to subdivision (d) of Section 708.120 (exemption claim in proceeding for examination of third person). See also Section 708.260 (court determination of exemption claim).

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§ 708.257. Jury trial

708.257. Any party is entitled to trial by jury in an action under this article to the extent that the third person would be entitled to trial by jury if the issues were tried in a civil action other than an action under this article.

Comment. Section 708.257 is new. Although no California case has decided the issue, it appears to be the general rule in other jurisdictions that there is no right to trial by jury in a creditor's suit. See 21 Am. Jur.2d Creditors' Bills § 9, at 10 (1965); 21 C.J.S. Creditors' Suits § 73, at 1125 (1940).

045/207

§ 708.260. Judgment in creditor's suit

708.260. (a) The court shall determine any exemption claim made in the action and the court's determination is as conclusive as an exemption determination made pursuant to Chapter 4 (commencing with Section 703.____). If the judgment debtor establishes to the satisfaction of the court that the property or debt is exempt from enforcement of a money judgment, the court shall so adjudge and may not make the orders referred to in subdivisions (b), (c), and (d).

(b) 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.

(c) 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.

(d) If the court determines that the third person has transferred property which was subject to a lien in favor of the judgment creditor, or, contrary to court order of which the third person has notice, has paid the debt to the judgment debtor or has transferred the property, the court shall render judgment against the third person in an amount equal to the lesser of the following:

(1) The value of the judgment debtor's interest in the property or the amount of the debt.

(2) The amount of the judgment creditor's judgment against the judgment debtor remaining unsatisfied.

Comment. Section 708.260 is new. Subdivision (a) recognizes that only nonexempt property may be applied to the satisfaction of the judgment. See Section _____ (exemptions apply to all procedures for enforcement of money judgments). 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 708.205. 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 (c) 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.

08/946

§ 708.270. Costs

708.270. (a) The judgment creditor may not recover costs against the third person in an action under this article if the third person does not claim an interest in the property or does not deny the debt to the judgment debtor.

(b) Costs incurred by or taxed against the judgment creditor in an action under this article may not be recovered from the judgment debtor as a cost of enforcing the judgment.

Comment. Section 708.270 is new. Subdivision (a) is to discourage the filing of a creditor's suit where there is no real issue. Subdivision (b) makes clear that the cost of litigation under this article required through no fault of the judgment debtor may not ultimately be imposed on the judgment debtor.

EXHIBIT 2

EXAMINATION PROCEEDINGS

§ 708.180. Determination of third person's adverse claim

708.180. (a) Except as provided in subdivision (b), if a third person examined pursuant to Section 708.120 claims an interest in the property adverse to the judgment debtor or denies the debt, the court may determine the ownership of the property or the existence of the debt. Such a determination is conclusive as to the parties to the proceeding and the third person. The court may grant a continuance for a reasonable time for discovery proceedings, the production of evidence, or other preparation for the hearing.

(b) The court may not make the determination provided in subdivision (a) if the third person's claim is made in good faith and any one of the following conditions is satisfied:

(1) The court would not be a proper court for the trial of an independent civil action (including a creditor's suit) for the determination of the ownership of the property or the existence of the debt, and the third person objects to the determination of the matter pursuant to subdivision (a).

(2) The issue is one which the third person would be entitled to have tried before a jury in an independent action and the third person objects to the determination of the matter pursuant to subdivision (a).

(3) At the time an order for examination pursuant to Section 708.120 is served on the third person a civil action (including a creditor's suit) is pending with respect to the ownership of the property or the existence of the debt.

(4) The court determines that the ownership of the property or the existence of the debt should be determined in a creditor's suit.

(c) Upon application of the judgment creditor made ex parte, the court may make an order forbidding transfer of the property to the judgment debtor or payment of the debt to the judgment debtor until the ownership of the property or the existence of the debt is determined pursuant to subdivision (a) or until a creditor's suit may be commenced

and an order obtained pursuant to Section 708.240. An undertaking may be required in the discretion of the court. The court may modify or vacate the order at any time with or without a hearing on such terms as are just.

(d) Upon application of the judgment creditor upon noticed motion, the court may, if it determines that the judgment creditor's claim is probably valid, make an order forbidding the transfer or other disposition of the property to any person or forbidding payment of the debt until the ownership of the property or the existence of the debt is determined pursuant to subdivision (a) or until a creditor's suit may be commenced and an order obtained pursuant to Section 708.240. The court shall require the judgment creditor to furnish an undertaking as provided in Section 529. The court may modify or vacate the order at any time after notice and hearing on such terms as are just.

Comment. Subdivisions (a) and (b) of Section 708.180 are drawn from provisions in the Probate Code relating to the determination of certain claims in the course of estate administration or in guardianship or conservatorship proceedings. See Prob. Code §§ 851.5-853, 2520-2528. Under former Section 719, the court lacked the power to determine the ownership of property in the hands of a third person or whether the third person was indebted to the judgment debtor when the third person claimed an interest in the property adverse to the judgment debtor or denied the debt. The provision of subdivision (b) requiring the third person's claim to be in good faith codifies the rule of *Thomas v. Thomas*, 192 Cal. App.2d 771, 776, 13 Cal. Rptr. 872, ____ (1961).

Subdivisions (c) and (d) are analogous to Section 708.240 (order forbidding transfer of property or payment of debt in a creditor's suit).