

Memorandum 80-62

Subject: Study D-300 - Enforcement of Judgments (Miscellaneous Creditors' Remedies)

The following portions of the enforcement of judgments recommendation are attached to this memorandum:

Chapter 6 (of Division 2). Miscellaneous Creditors' Remedies

Article 1. Written interrogatories to Judgment Debtor  
(\$ 708.010)

Article 2. Examination Proceedings (\$ 708.110)

Article 3. Creditor's Suit (\$ 708.210)

Article 4. Charging Order (\$ 708.310

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Article 7. Receiver to Enforce Judgment (\$ 708.610)

....

Article 9. Enforcement Against Franchise (\$ 708.910)

Article 10. Other Enforcement Procedures (\$ 709.010)

The substance of this material has been approved by the Commission.  
We have no new policy issues to raise.

Respectfully submitted,

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## Miscellaneous Creditors' Remedies

### Introduction

Levy under a writ of execution is not a complete remedy for enforcement of a money judgment. 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. In addition, there are types of property which for historical or 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 proceedings<sup>1</sup>--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 money 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 months<sup>2</sup> or more frequently where a writ of execution has been issued and the judgment creditor shows that there is property that the judgment debtor "unjustly refuses" to apply toward the satisfaction of the judgment.<sup>3</sup> The four-month limitation should be retained since it is designed to prevent harassment of the judgment debtor.<sup>4</sup> However, the requirement that in

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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 obtain issuance of a writ of execution should be eliminated.<sup>5</sup> The requirement that the judgment creditor show that the judgment debtor's refusal to apply property has been "unjust" should be replaced with a requirement that the judgment creditor show good cause for a more frequent examination.<sup>6</sup> The proposed law adds an express provision that the judgment debtor shall be served with the order of examination not less than 10 days prior to the date set for the examination.

5. Originally, California adopted the system provided in the Field draft of a Code of Civil Procedure for New York under which issuance of a writ and its return unsatisfied were required before the judgment debtor could be examined, but only 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 the California provision for judgment debtor examinations where no special showing is made. See 1957 Cal. Stats. ch. 1194, § 1. An amendment of Section 714 in 1955 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.
6. 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.

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.<sup>7</sup> The prerequisite of the issuance or return of a writ of execution should be eliminated as an outmoded historical relic.<sup>8</sup> The judgment 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 1851,<sup>9</sup> 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. If the judgment creditor describes in the application for the order the property of the judgment debtor in the hands of the third person or the debt owed to the judgment debtor by the third person and the judgment debtor receives at least 10 days' notice of the examination, the judgment debtor must make any applicable exemption claim at the hearing or the exemption will be deemed waived. Notice of this requirement is to be included in the order which is served on the judgment debtor.

As an added incentive to the judgment debtor or the third person served with an order of examination to appear as directed in the order, the proposed law provides for an award of reasonable attorneys' fees in favor of the judgment creditor if the person has been served by an authorized person,<sup>10</sup> fails to appear for the examination, and the

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7. Section 717.

8. See note 5 supra.

9. 1851 Cal. Stats. ch. 5, § 241.

10. The proposed law continues existing provisions that require service of an order of examination to be made by a sheriff, constable, marshal, a person specially appointed by the court in the order, or a registered process server before the judgment debtor or a third person may be brought before the court pursuant to a warrant. See Sections 714, 717. Under the proposed law, service must be similarly made before the attorney's fee sanction may be invoked.

failure is without good cause. The order will contain a notice to the person served that, in addition to the contempt sanction for nonappearance, attorneys' fees may be awarded.

Under existing law, if the third person being examined claims an interest in the property or denies the debt, the court may not adjudicate the dispute and may not order the property to be applied toward the satisfaction of the judgment.<sup>11</sup> The judgment creditor must resort instead to a creditor's suit in which the interest of the third person may be determined.<sup>12</sup> The proposed law relaxes this restrictive rule so that the court in which the examination proceeding is pending may adjudicate a dispute between the judgment debtor and the third person concerning ownership of the property or the existence of the debt unless any one of the following conditions exist: (1) if the court in which the examination proceeding is pending would not be a proper court for the trial of an independent civil action to resolve the dispute and the third person objects to the dispute being resolved in the examination proceeding; (2) if there is a civil action pending concerning the dispute at the time the order of examination is served on the third person; or (3) if the court in its discretion determines that the dispute should be determined in an independent civil action.<sup>13</sup> The provision of existing law which authorizes the court to forbid the third person from transferring or otherwise disposing of the property pending resolution of the dispute<sup>14</sup> is limited to authorizing the court to forbid a transfer to the judgment debtor.

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11. 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).

12. See Section 720 and the discussion under "Creditors' Suits" infra.

13. The provision in the proposed law for summary adjudication in examination proceedings of disputed ownership of property or a disputed debt is comparable to provisions in the Probate Code for determination of some kinds of claims in the course of estate administration or in guardianship or conservatorship proceedings. See Prob. Code §§ 851.5-853, 2520-2828.

14. See Section 720 and the discussion under "Creditors' Suits" infra.

The proposed law codifies the case law concerning the lien created by service of an order of examination.<sup>15</sup> Service on the judgment debtor creates a lien on the judgment debtor's personal 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 if the property or debt is described in the judgment creditor's affidavit or application for the order.<sup>16</sup> The proposed law also makes clear that a lien is created by a court order that the third person apply such property or debt to the satisfaction of the judgment. This provision would be useful where the property or debt was not described in the judgment creditor's affidavit or application for the order.

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 that the judgment debtor will abscond and providing for the imprisonment of the judgment debtor unless an undertaking is given<sup>17</sup> should be repealed since it conflicts with the policies supporting the repeal of the civil arrest provisions.<sup>18</sup> The provision of existing law which grants a privilege to the spouse of the judgment debtor to refuse to be examined as a debtor of the judgment debtor<sup>19</sup> is not continued, and the proposed law expressly provides that the marital privilege<sup>20</sup> is not applicable in

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15. 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).

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

17. Section 715.

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

19. Section 717.

20. Evid. Code §§ 970-971. The proposed law does not affect the privilege which protects confidential marital communications. See Evid. Code § 980.

examination proceedings. This is to prevent the privilege from being used as a collusive device for the spouse to conceal assets liable for the satisfaction of the judgment. Mileage fees for third persons attending examination proceedings should be the same as for witnesses generally.<sup>21</sup> The proposed law authorizes the court to permit a nonparty who claims an interest in the property or debt sought by the judgment creditor to intervene in the proceeding and to determine the person's rights in the property or debt. The proposed law adds express authority for the court to make such protective order as justice may require, comparable to the court's authority in civil discovery proceedings.<sup>22</sup> 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.<sup>23</sup> The proposed law would require only that a referee be a member of the State Bar of California.

#### 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.<sup>24</sup> The form of, answer to, and enforcement of the interrogatories is the same as that provided for interrogatories in a civil action.<sup>25</sup> The proposed law continues this procedure but permits the use of interrogatories whether or not the debtor is represented by counsel. This will make the use of post-judgment interrogatories consistent with interrogatories used in civil discovery.<sup>26</sup> In order to prevent harassment, the proposed

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21. 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.

22. See Sections 2019(b)(1), 2030(g)(1).

23. Section 723.

24. Section 714.5.

25. See Sections 714.5, 2030.

26. See Section 2030.

law provides that interrogatories may not be served if, within the preceding 120 days, the judgment debtor has responded to post-judgment interrogatories or an examination has been conducted.<sup>27</sup> Under this provision, judgment creditors would be able to use the order obtainable in an examination proceeding to apply property that is described in the answer to the interrogatories toward 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.<sup>28</sup>

### 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.<sup>1</sup> The remedy of the creditor's suit developed when the types of property reachable by the writs that were predecessors of the writ of execution were fairly limited.<sup>2</sup> Although the reach of the writ of

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27. 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.

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

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).



execution has been considerably expanded,<sup>3</sup> the creditor's suit has persisted and is continued in the proposed law in order to reach certain types of property that 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

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).
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.

Unlike existing law,<sup>7</sup> 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 limitations<sup>8</sup> and, at least in certain circumstances, that the time begins to run from the return of the writ of execution unsatisfied.<sup>9</sup> Under the proposed law, the creditor's suit may 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).<sup>10</sup> This provision would have the effect of extending the liability of the third person for up to an additional year after the judgment debtor may no longer sue, in order to prevent the third person from avoiding liability by delaying tactics. Once commenced, the creditor's suit may be pursued to judgment, even

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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).

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.

though the judgment creditor could no longer enforce the original judgment against the judgment debtor.<sup>11</sup> The judgment in the creditor's suit is independently enforceable against the third person.<sup>12</sup> 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.<sup>13</sup>

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,<sup>14</sup> forbid a transfer or other disposition of the property or debt until a creditor's suit can be commenced and prosecuted to judgment.<sup>15</sup>

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.<sup>16</sup> Once a

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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).

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 [14, p. 4] supra.

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.<sup>17</sup> This is to prevent the third person from frustrating the purpose of the proceeding by collusive or evasive action.

The proposed law makes clear that there is no right to trial by jury in a creditor's suit.<sup>18</sup>

#### Charging Orders

A charging order is the usual means to reach the judgment debtor's interest in a partnership and apply it to the satisfaction of a money judgment where the partner, but not the partnership, is liable under the judgment.<sup>1</sup> This procedure is continued in the proposed law. Existing case law recognizes that a lien arises from a charging order but is unclear as to the time of its creation and its effect.<sup>2</sup> The proposed law provides for creation of the lien at the time the notice of motion

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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. Under existing law, a creditor's suit is an equitable proceeding. See, e.g., Woodcock v. Petrol Corp., 48 Cal. App.2d 652, 120 P.2d 889 (1942). Thus there appears to be no right to jury trial in a creditor's suit under existing law. See Misrach v. Liederman, 14 Cal. App.2d Supp. 757, 762, 58 P.2d 746, 748 (1936). See generally 21 Am. Jur.2d Creditors' Bills § 9, at 10 (1965); 21 C.J.S. Creditors' Suits § 73, at 1125 (1940).

1. 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); Gose, The Charging Order Under the Uniform Partnership Act, 28 Wash. L. Rev. 1 (1953).

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

for a charging order is served on the judgment debtor and on the other partners or the partnership and contains general provisions governing the effect of liens.<sup>3</sup>

### Receivers

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.<sup>1</sup> Appointment of a receiver may also enable the judgment creditor to reach and apply types of property that cannot be reached by levy under a writ of execution.<sup>2</sup> Generally, receivers are appointed in examination proceedings where the requisite showing is made,<sup>3</sup> but a receiver may also be appointed in independent proceedings on noticed motion.<sup>4</sup> Receivership is considered a drastic remedy, and the courts are reluctant to appoint a receiver unless it is shown that other remedies are inadequate.<sup>5</sup>

Under the proposed law, the appointment of a receiver to enforce a money judgment continues as a remedy requiring a special showing, but a new standard is provided. The judgment creditor should be able to

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3. 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.

1. Section 564, subd. 4.

2. See Habenicht v. Lissak, 78 Cal. 351, 357, 20 P. 874, 877 (1889) (seat on stock exchange); Pacific Bank v. Robinson, 57 Cal. 520, 524 (1881) (patent); Medical Fin. Ass'n v. Short, 36 Cal. App.2d Supp. 745, 747, 92 P.2d 961 (1935) (federal wages).

3. 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).

4. Olsan v. Comora, 73 Cal. App.3d 642, 647-49, 140 Cal. Rptr. 835 (1977).

5. Jackson v. Jackson, 253 Cal. App.2d 1026, 1040-41, 62 Cal. Rptr. 121 (1967); Olsan v. Comora, 73 Cal. App.3d 642, 646-47, 140 Cal. Rptr. 835 (1977).

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.<sup>6</sup> The law concerning the appointment, qualification, powers, and duties of receivers should remain unchanged.<sup>7</sup>

The proposed law also specifically provides for the appointment of a receiver to transfer the judgment debtor's interest in a liquor license which, under existing law, may not be forceably applied to the satisfaction of a money judgment.<sup>8</sup>

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6. 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 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 4.05 (1978) (modern practice). If so instructed, the levying officer will return the writ unsatisfied and will not attempt to levy under the writ. Obviously, this procedure should not result in a presumption that there is no property subject to levy and sale.

7. See Sections 564-571.

8. 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 according 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.

## Trusts

Existing California law permits execution against the judgment debtor's equitable interest in a trust.<sup>1</sup> However, it is not clear whether the purchaser at the execution sale acquires the right to receive the income or principal of the trust and if so what the measure of the income or principal will be. The Commission has concluded that trust instruments vary so widely in their character that automatic execution and sale is inadvisable. Under the proposed law, the judgment creditor may apply to the court for application of the judgment debtor's trust interest to the judgment, and the court may permit application by such means as are appropriate in the circumstances of the case, such as imposition of a lien, sale of the interest, collection of income, or liquidation and transfer of trust assets. The proposed law does not affect the law relating to spendthrift trusts<sup>2</sup> or Totten trusts.<sup>3</sup>

## Property in Guardianship or Conservatorship Estate

If the judgment debtor is a ward or conservatee, the judgment debtor's property that is part of the guardianship or conservatorship estate is not subject to enforcement processes, whether or not held in the name of the guardian or conservator.<sup>4</sup> The property may be applied to the satisfaction of a judgment only by order of the probate court having jurisdiction of the estate.<sup>5</sup> The proposed law codifies this rule.

## Contingent Interests

A future interest that is contingent is not subject to enforcement in California.<sup>6</sup> The proposed law changes this rule since there are

1. See, e.g., Houghton v. Pacific Southwest T. & S. Bank, 111 Cal. App. 509, 295 P. 1079 (1931).

2. See, e.g., Canfield v. Security-First Nat'l Bank, 13 Cal.2d 1, 87 P.2d 830 (1939).

3. See Recommendation Relating to Bank Accounts in Trust Form, 15 Cal. L. Revision Comm'n Reports \_\_\_\_ (1980).

4. McCracken v. Lott, 3 Cal.2d 164, 44 P.2d 355 (1935).

5. Prob. Code § 2404.

6. See, e.g., Anglo California Nat'l Bank v. Kidd, 58 Cal. App.2d 651, 137 P.2d 460 (1943).

appropriate means of applying contingent interests to the satisfaction of a money judgment.<sup>7</sup> Under the proposed law, the court, upon application of the judgment creditor, may apply a contingent interest to the satisfaction of a judgment by such means as are appropriate under the circumstances of the case, such as imposition of a lien or sale of the interest.

#### Franchises

At common law, a governmental franchise<sup>8</sup> was not subject to enforcement of a money judgment. The common law rule is abrogated by statute in California, which permits levy of execution on and sale of a franchise.<sup>9</sup>

The California rule creates a number of problems. Levy on the franchise may be impractical and sale may not be the most satisfactory means of reaching the value of the franchise. Moreover, the franchise may not be transferable or transfer may be subject to approval by a regulatory agency such as the Public Utilities Commission.

For these reasons, the proposed law repeals the provisions for levy upon and sale of a franchise. Under the proposed law, a creditor may apply a franchise to satisfy a money judgment only upon court order, taking into consideration factors such as the nature of the franchise and its transferability. The court may prescribe the most appropriate means of applying the franchise<sup>10</sup> and the application is subject to all applicable statutory and administrative regulations.

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7. See Halbach, Creditors' Rights in Future Interests, 43 Minn. L. Rev. 217 (1958).

8. A franchise is a special privilege or right in the nature of a license granted by a governmental entity to a private person. Examples of franchises are the right granted to a public utility to place facilities in a public street, a right to operate a parking lot on publicly-owned property, and a right to provide cable television or community antenna service.

9. Code Civ. Proc. §§ 724a-724e.

10. E.g., sale, collection of proceeds, appointment of a receiver.



## CHAPTER 6. MISCELLANEOUS CREDITORS' REMEDIES

Article 1. Written Interrogatories to Judgment Debtor§ 708.010. Application of article

708.010. (a) Except as provided in this section and in subdivision (b) of Section 708.020, the provisions of this article may be used at any time a money judgment is enforceable.

(b) Whenever enforcement of the money judgment is stayed, all proceedings under this article are stayed.

Comment. Subdivision (a) of Section 708.010 is consistent with former Section 714.5 which provided that interrogatories may be served "any time after execution . . . may properly be issued." See also Sections 683.010-683.220 (period for enforcement of judgment).

Subdivision (b) makes clear that when a statute or court order provides for a stay of the "enforcement of the judgment," the stay applies to the use of written interrogatories under this article.

## CROSS REFERENCES

Defined terms

Money judgment § 680.\_\_\_\_

Stay of enforcement § 918

29196

§ 708.020. Written interrogatories to judgment debtor

708.020. (a) The judgment creditor may propound written interrogatories to the judgment debtor in the manner provided in Section 2030 requesting information designed to aid in enforcement of the money judgment. The judgment debtor shall answer the interrogatories in the manner and within the time provided by Section 2030.

(b) The judgment creditor may not serve interrogatories pursuant to this section within 120 days after the judgment debtor has responded to interrogatories previously served pursuant to this section or within 120 days after the judgment debtor has been examined pursuant to Article 2 (commencing with Section 708.110), and the judgment debtor is not required to respond to any interrogatories so served.

(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 708.020 is the same in substance as the first sentence of former Section 714.5, except that the limitation of former Section 714.5 that interrogatories could be propounded only to a judgment debtor represented by counsel is not continued. This change is consistent with Section 2030 (interrogatories in civil actions generally). The provision that the interrogatories request information designed to aid in enforcement of the judgment is new, and is consistent with Section 2016 (examination regarding matter relevant to subject matter of the action). The provision of former Section 714.5 that written interrogatories to the judgment debtor are cumulative and in addition to the examination procedure is omitted as unnecessary. Section 708.010 makes clear that written interrogatories may be used at any time the money judgment is enforceable if there has been no stay and the judgment debtor has not responded to interrogatories or been examined within the preceding 120 days.

Subdivision (b) is the same in substance as the last sentence of former Section 714.5.

Subdivision (c) continues the substance of the third sentence of former Section 714.5. Under subdivision (c), if the judgment debtor fails to answer interrogatories without substantial justification, sanctions may include an award of attorney's fees. Section 2034(a). If the court orders the judgment debtor to answer and the judgment debtor refuses to do so, the refusal is punishable as a contempt. Section 2034(b); *MacDonald v. Superior Court*, 75 Cal. App.3d 692, 696, 141 Cal. Rptr. 667, \_\_\_ (1977). The court is also authorized to make such protective orders for the benefit of the judgment debtor as justice may require. Section 2030(g)(1).

#### CROSS-REFERENCES

##### Defined terms

Judgment creditor § 680.\_\_\_\_  
 Judgment debtor § 680.\_\_\_\_  
 Money judgment § 680.\_\_\_\_

31782

#### Article 2. Examination Proceedings

##### § 708.110. Examination of judgment debtor

708.110. (a) The judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information designed to aid in enforcement of the money judgment.

(b) If the judgment creditor has not caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order upon ex parte application of the judgment creditor.

(c) If the judgment creditor has caused the judgment debtor to be examined under this section during the preceding 120 days, the court shall make the order if the judgment creditor by affidavit or otherwise shows good cause for the order. The application shall be ex parte or upon such notice as the court requires.

(d) The judgment creditor shall cause a copy of the order to be personally served on the judgment debtor not less than 10 days prior to the date set for the examination. Service of the order creates a lien on the personal property of the judgment debtor.

(e) The order shall contain the following statement in boldface type: "NOTICE TO JUDGMENT DEBTOR. If you fail to appear at the time and place specified in this order, you may be punished for contempt of court and the court may make an order requiring you to pay the reasonable attorney's fee incurred by the judgment creditor in this proceeding."

Comment. Subdivision (a) of Section 708.110 supersedes the first sentences of former Sections 714 and 715. The former language requiring the judgment debtor to answer concerning his property has been revised to require the judgment debtor to furnish information designed to aid in enforcement of the judgment. This might include, for example, information concerning future employment prospects. The proper court for an examination under this section is prescribed in Section 708.160. The judgment debtor may not be ordered to appear when the judgment is no longer enforceable. See Section 683.020.

Under subdivision (b), the judgment creditor may obtain an order of examination if the judgment creditor has not caused the judgment debtor to be examined within the preceding 120 days. This is the case even though the judgment debtor may have been required to respond to written interrogatories under Section 708.020 within the 120-day period. The provision in subdivision (b) that the order of examination is made upon ex parte application codifies case law. See *Lewis v. Neblett*, 188 Cal. App.2d 290, 297, 10 Cal. Rptr. 441 (1961).

The good cause requirement of subdivision (c) for examination more frequently than every 120 days supersedes the requirement of former Section 715 that the judgment debtor have property that the judgment debtor "unjustly refuses" to apply toward the satisfaction of the judgment.

The first sentence of subdivision (d) is new. The second sentence of 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 683.020 and 683.030. See also Sections 697.\_\_\_\_ (relation back of liens), 697.\_\_\_\_ (effect of liens).

Subdivision (e) continues the substance of the third paragraph of former Section 714 and adds the requirement that the notice advise the judgment debtor that failure to appear may result in attorney's fees being imposed. See Section 708.170.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.\_\_\_\_  
Judgment debtor § 680.\_\_\_\_  
Money judgment § 680.\_\_\_\_  
Effect of liens § 697.010 et seq.  
Manner of service §§ 684.010-684.080  
Period for enforcement of judgment §§ 683.010-683.220

31784

§ 708.120. Examination of third person

708.120. (a) Upon ex parte application and proof by the judgment creditor by affidavit or otherwise to the satisfaction of the proper court that a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor in an amount exceeding two hundred fifty dollars (\$250), the court shall make an order directing the third person to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to answer concerning such property or debt. The affidavit in support of the judgment creditor's application may be based on the affiant's information and belief.

(b) Not less than 10 days prior to the date set for the examination, a copy of the order shall be:

- (1) Served personally on the third person.
- (2) Served personally or by mail on the judgment debtor.

(c) If the property in the third person's possession or control in which the judgment debtor has an interest or the debt owed by the third person to the judgment debtor is described in the affidavit or application for an order under subdivision (a) in a manner reasonably adequate to permit it to be identified, service of the order on the third person creates a lien on the judgment debtor's interest in the property or on the debt for a period of one year from the date of the order unless extended or sooner terminated by the court.

(d) The judgment debtor may claim that all or any portion of the property or debt is exempt from enforcement of a money judgment by application to the court on noticed motion, filed and served not later than three days before the date set for the examination. 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. When a claim of exemption is made pursuant to this section, a notice of opposition to the claim of exemption is not required. The court shall determine any claim of exemption made pursuant to this section and the court's determination is as conclusive as an exemption determination made pursuant to Chapter 4 (commencing with Section 703.000). Failure of the judgment debtor to make a claim of exemption does not preclude the judgment debtor from later claiming the exemption unless the property or debt is described in the order in a manner reasonably adequate to permit it to be identified and the judgment debtor receives notice of the examination proceeding at least 10 days before the date set for the examination.

(e) An order made pursuant to subdivision (a) shall contain the following statements in boldface type:

(1) "NOTICE TO PERSON SERVED. If you fail to appear you may be subject to arrest and punishment for contempt of court and the court may make an order requiring you to pay the reasonable attorney's fee incurred by the judgment creditor in this proceeding."

(2) "NOTICE TO JUDGMENT DEBTOR. The person in whose favor the judgment was entered in this action claims that the person to be examined pursuant to this order has possession or control of property which is yours or owes you a debt and has described the property or debt as follows:

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If you claim that all or any portion of the property or debt described above is exempt from execution, you must file your claim in writing with the court not later than three days before the date set for the examination and you must appear at the time and place set for this examination to establish your claim of exemption or your claim will be waived."

(f) 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 fees for the mileage necessary to be traveled from the third person's residence to the place of examination. The fees shall be in the same amount generally provided for witnesses when legally required to attend civil proceedings in the court where the examination proceeding is to be conducted.

Comment. Subdivision (a) of Section 708.120 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 indebtedness required before an examination order may issue has been raised from an amount exceeding \$50 to an amount exceeding \$250 to compensate for the change in the value of the dollar since this procedure was originally enacted in 1851. See 1851 Cal. Stats. ch. 123, § 241. 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 is not continued. The third person may not be ordered to appear when the judgment is no longer enforceable. See Section 683.020. 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). The proper court for an examination under this section is prescribed in Section 708.160.

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. The requirement that the judgment debtor be given notice changes the rule announced in *High v. Bank of Commerce*, 95 Cal. 386, 388, 30 P. 556 (1892). See also Section 684.040 (longer period of mailed notice if judgment debtor outside California).

Subdivision (c) is comparable to subdivision (e) of Section 708.110 and the second sentence of subdivision (a) of Section 708.205. If the property or debt is described in the judgment creditor's application for an order for examination of a third person and the court ultimately orders the property or debt applied to the satisfaction of the judgment, the lien under subdivision (c) will merge with the lien under Section 708.205 and will continue to date from the service of the order on the third person. See also Section 697.\_\_\_\_ (effect of lien).

Subdivision (d) is drawn from comparable provisions in the Attachment Law. See Sections 482.100, 484.020(e), and 484.070. It 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 satisfaction of the judgment. See Section 703.010 (exemptions apply to all procedures for enforcement of money judgments).

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, 524 (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 Bowie 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). If the judgment debtor fails to claim the exemption at the hearing when required to do so under subdivision (d), the exemption is waived, subject to the authority of the court to relieve the judgment debtor from the failure pursuant to Section 473. See Section 703.030 and Comment thereto (manner of claiming exemptions).

Paragraph (1) of subdivision (e) continues the substance of the third paragraph of former Section 717 and adds the requirement that the notice advise the third person that failure to appear may result in attorney's fees being imposed. See Section 708.170. Paragraph (2) is new and is necessitated by the requirement in subdivision (d) that when the property in the hands of the third person or the debt is described in the application for an order of examination, a judgment debtor with at least 10 days' notice of the examination proceeding shall claim any exemption at the hearing. See also Section 703.030 (waiver by failure to claim exemption).

Subdivision (f) continues the second sentence of former Section 717.1, except that the former provision for mileage fees of fifteen cents per mile has been revised to incorporate the mileage fees for witnesses in civil proceedings in the court where the examination proceeding is pending. See Gov't Code § 68093 (twenty cents per mile one way). Mileage fees are recoverable costs under Section 685.040.

Where a corporation is indebted to or holds property of a judgment debtor, the manner of appearance of the corporation is prescribed in Section 708.150. Where the debtor of the judgment debtor is a public entity, the judgment creditor must follow the procedures set forth in Article 8 (commencing with Section 708.710).

#### CROSS-REFERENCES

##### Defined terms

Judgment creditor § 680.

Judgment debtor § 680.

Effect of property liens § 697.010 et seq.

Manner of service §§ 684.010-684.080

Period for enforcement of judgment §§ 683.010-683.220

§ 708.130. Witnesses; privilege of spouse of judgment debtor

708.130. (a) Witnesses may be required to appear and testify before the court or referee in an examination proceeding under this article in the same manner as upon the trial of an issue.

(b) The privilege prescribed by Article 4 (commencing with Section 970) of Chapter 4 of Division 8 of the Evidence Code does not apply in an examination proceeding under this article.

Comment. Subdivision (a) of Section 708.130 continues former Section 718. Subdivision (b) is new and changes the rule set forth in the second sentence of former Section 717 (marital privilege applicable in proceedings to examine debtor of judgment debtor in the absence of a waiver).

§ 708.140. Powers and qualifications of referee

708.140. (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 708.205, may make a protective order authorized by Section 708.200, and may issue a warrant authorized by Section 708.170, and has the same power 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 do the following:

- (1) Punish for contempt for disobeying an order of the referee.
- (2) Make an award of attorneys' fees pursuant to Section 708.170.

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

Comment. Subdivision (a) of Section 708.140 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 paragraph (1) of subdivision (a) continues the substance of former Section 721. Paragraph (2) of subdivision (a) is new.

Subdivision (b) supersedes the portion of former Section 723 that required referees to have been members of the State Bar for at least



five years. Former Section 723 was applicable to referees appointed by a superior court in a county or city and county having a population of one million or more.

31799

§ 708.150. Appearance at examination by representatives of organizations

708.150. (a) If a corporation, partnership, association, trust, or other organization is served with an order to appear for an examination, 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.

(b) If the order to appear for an examination requires the appearance of a specified individual, the specified individual shall appear for the examination and may be accompanied by one or more officers, directors, managing agents, or other persons familiar with the property and debts of the corporation, partnership, association, trust, or other organization.

(c) If the examination is to be conducted pursuant to Section 708.120 and the order to appear for the examination does not require the appearance of a specified individual, the order shall advise the corporation, partnership, association, trust, or other organization of its duty to make a designation under subdivision (a).

Comment. Subdivision (a) of Section 708.150 is derived from Rule 30(b)(6) of the Federal Rules of Civil Procedure and from Section 2019(a)(6). Former Section 717 provided for the appearance of a "corporation, or any officer or member thereof." Subdivision (b) permits the order to specify that a designated person appear for the examination. Subdivision (c) is comparable to the third sentence of Section 2019(a)(6).

If an organization described in subdivision (a) is served with an order to appear for an examination and no specified individual is required to appear by the order, the organization itself may nonetheless be held in contempt of court for its failure to appear. See Section 1209 (disobedience of lawful order is a contempt); 14 Cal. Jur.3d Contempt § 30 (1974) (corporations and other organizations may be held in contempt). If a specified individual is designated to appear in the order under subdivision (b), the designated individual is subject to the contempt sanction. See also Section 708.170 (reasonable attorneys' fees may be awarded for failure to appear).

§ 708.160. Place of examination; examination outside county where judgment entered

708.160. (a) Except as otherwise provided in this section, the proper court for examination of a person under this article is the court in which the money judgment is entered.

(b) A person 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.

(c) If a person sought to be examined does not reside or have a place of business in the county where the judgment is entered, a court of similar jurisdiction in the county where the person resides or has a place of business is a proper court for examination of the person. If there is no court of similar jurisdiction in the county, a court of higher jurisdiction is a proper court.

(d) If the judgment creditor seeks an examination of a person before a court other than the court in which the judgment is entered, the judgment creditor shall do all of the following:

(1) File with the court from which the order is sought an abstract of judgment in the form prescribed by Section 674.

(2) Present to the court an affidavit in support of the application for the order stating the place of residence or place of business of the person sought to be examined. A copy of the abstract of judgment shall be attached to the affidavit.

(3) Make any necessary affidavit or showing for the examination as required by Section 708.110 or 708.120.

Comment. Subdivision (a) of Section 708.160 is new and makes clear what was implicit under former law. Subdivision (b) continues the substance of the first sentence of former Section 717.1. Subdivisions (c) and (d) continue the substance of the first sentence of former Section 722. Paragraph (2) of subdivision (d) sets forth the required contents of the affidavit in greater detail than did former Section 722. The requirement that a copy of the abstract of judgment be attached to the affidavit is new.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.\_\_\_\_

Money judgment § 680.\_\_\_\_

31798

§ 708.170. Failure to appear for examination; penalty for unjustified arrest

708.170. (a) If an order requiring a person to appear for an examination was served by a sheriff, marshal, constable, a person specially appointed by the court in the order, or a registered process server, and the person fails to appear:

(1) The court may, pursuant to a warrant, have the person brought before the court to answer for the failure to appear.

(2) If the person's failure to appear is without good cause, the judgment creditor shall be awarded reasonable attorney's fees incurred in the examination proceeding. Attorney's fees awarded against the judgment debtor shall be added to and become part of the judgment.

(b) 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)(1) of Section 708.170 continues the substance of the second paragraph of former Section 714 and the second paragraph of former Section 717. Subdivision (a)(2) is new. Subdivision (a)(2) does not affect any right to attorney's fees the parties may have under a contract or statute.

Subdivision (b) continues the substance of the last paragraphs of former Sections 714 and 717, respectively. The authority provided by former Section 715 for arresting the judgment debtor 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, consistent with the repeal of the civil arrest provisions. See 1973 Cal. Stats. ch. 20. Section 708.170 does not limit the contempt power of the court under Sections 1209-1222.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.\_\_\_\_

Judgment debtor § 680.\_\_\_\_

Registered process server § 680.\_\_\_\_

§ 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) 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.

(3) 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).

#### CROSS-REFERENCES

Creditor's suit §§ 708.210-708.290

Defined terms

Judgment creditor § 680.\_\_\_\_

Judgment debtor § 680.\_\_\_\_

31797

#### § 708.190. Intervention by third party

708.190. The court may permit a person claiming an interest in the property or debt sought to be applied in an examination proceeding to intervene in the proceeding and may determine the person's rights in the property or debt pursuant to Section 708.180.

Comment. Section 708.190 is new. In a proper case, this section permits the early resolution of a third-party claim to property that is the subject of an examination proceeding. For the procedure applicable to third-party claims after levy, see Chapter 5 (commencing with Section 706.010).

§ 708.200. Protective order

708.200. In any proceeding under this article, the court may, on motion of the person to be examined or on its own motion, make such protective orders as justice may require.

Comment. Section 708.200 is new and is comparable to the court's authority under Section 708.020 (which incorporates Section 2030) to make a protective order with respect to written interrogatories to the judgment debtor. Under Section 708.200, the court is authorized to make the order on its own motion as well as on motion of the person to be examined.

§ 708.205. Order applying property to satisfaction of judgment

708.205. (a) Except as provided in subdivision (b), at the conclusion of a proceeding pursuant to this article, the court may order the judgment debtor's interest in the property in the possession or under the control of the judgment debtor or the third person or a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of the money judgment, if the property is not exempt from enforcement of a money judgment. Such an order creates a lien on the property or debt.

(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 and the court does not determine the matter as provided in Section 708.180, the court may not order the property or debt to be applied toward the satisfaction of the money judgment, but may make an order pursuant to Section 708.180 forbidding transfer or payment to the judgment debtor.

Comment. Subdivision (a) of Section 708.205 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, 295, 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,

### Article 3

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, 357-58, 20 P. 874, 877 (1889) (seat on stock exchange); *Pacific Bank v. Robinson*, 57 Cal. 520, 524 (1881) (patent rights); *Hathaway v. Brady*, 26 Cal. 581, 593-94 (1864) (note); *Tucker v. Fontes*, 70 Cal. App.2d 768, 771-72, 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) supersedes the portion of former Section 719 that precludes a court order applying property in every case where the third person claimed an adverse interest in the property or denied the debt. Under subdivision (b), this rule applies only if the interest of the third person has not been determined pursuant to Section 708.180. The judgment creditor may then proceed by way of a creditor's suit pursuant to Article 3 (commencing with Section 708.210) or an independent civil action.

#### CROSS-REFERENCES

##### Defined terms

Judgment debtor § 680.\_\_\_\_

Money judgment § 680.\_\_\_\_

Property § 680.\_\_\_\_

Effect of liens § 697.010 et seq.

Exemptions § 703.000 et seq.

968/681

#### 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 possession or control of 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 money 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).

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.\_\_\_\_  
 Judgment debtor § 680.\_\_\_\_  
 Money judgment § 680.\_\_\_\_  
 Property § 680.\_\_\_\_

4438

§ 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). The second sentence is an exception to the general rules of venue which apply in a creditor's suit. See *Holstein v. Superior Court*, 275 Cal. App.2d 708, 710, 80 Cal. Rptr. 301, 302 (1969).

CROSS-REFERENCES

Defined terms

Judgment debtor § 680.\_\_\_\_



§ 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 money 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, an execution lien (see Section 699.010), a judgment lien on personal property (see Sections 697.510-697.\_\_\_\_), or a 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 money judgment is no longer enforceable against the original judgment debtor notwithstanding Section 683.020. The judgment in the creditor's suit may then be enforced as provided in Section 708.280, and the 10-year period of enforceability (subject to renewal) provided by Section 683.020 applies to the judgment in the creditor's suit.

CROSS-REFERENCES

Defined terms

Judgment debtor § 680.\_\_\_\_

Money judgment § 680.\_\_\_\_

Property § 680.\_\_\_\_

Period for enforcement of judgment §§ 683.010-683.220

§ 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 examination proceedings 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.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.\_\_\_\_

Judgment debtor § 680.\_\_\_\_

§ 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 or on the debt owed to the judgment debtor 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 Section 683.020.

#### CROSS-REFERENCES

Defined terms

Judgment debtor § 680.\_\_\_\_

Property § 680.\_\_\_\_

Effect of liens § 697.010 et seq.

045/119

#### § 708.260. Judgment debtor's claim of exemption

708.260. (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 708.260 is new and is comparable to subdivision (d) of Section 708.120 (exemption claim in proceeding for examination of third person). See also Section 708.280 (court determination of exemption claim).

#### CROSS-REFERENCES

##### Defined terms

Judgment debtor § 680.\_\_\_\_

Property § 680.\_\_\_\_

07427

#### § 708.270. No right to jury trial

708.270. There is no right to a jury trial in an action under this article.

Comment. Section 708.270 is new and codifies what appears to be California law. See *Misrach v. Liederman*, 14 Cal. App.2d Supp. 757, 762, 58 P.2d 746, 748 (1936). See generally 21 Am. Jur.2d Creditors' Bills § 9, at 10 (1965); 21 C.J.S. Creditors' Suits § 73, at 1125 (1940).

045/207

#### § 708.280. Judgment in creditor's suit

708.280. (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 703.000). 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 that 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 708.280 is new. Subdivision (a) recognizes that only nonexempt property may be applied to the satisfaction of the judgment. See Section 703.010 (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.

#### CROSS-REFERENCES

##### Defined terms

Judgment creditor § 680.\_\_\_\_  
Judgment debtor § 680.\_\_\_\_  
Money judgment § 680.\_\_\_\_  
Property § 680.\_\_\_\_

08/946

#### § 708.290. Costs

708.290. (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 708.290 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.

#### CROSS-REFERENCES

##### Defined terms

Judgment creditor § 680.\_\_\_\_  
Judgment debtor § 680.\_\_\_\_  
Property § 680.\_\_\_\_

29/625

#### Article 4. Charging Orders

##### § 708.310. Enforcement by charging order

708.310. If a money judgment is rendered against a partner but not against the partnership, the judgment debtor's interest in the partnership may be applied toward the satisfaction of the judgment by an order charging the judgment debtor's interest pursuant to Section 15028 or 15522 of the Corporations Code.

Comment. Section 708.310 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 usual manner for applying the interest of a partner in the partnership to the satisfaction of a judgment against a judgment debtor who is a partner. See Section 699.720(b) (property not subject to execution); *Evans v. Galardi*, 16 Cal.3d 300, 310, 546 P.2d 313, 128 Cal. Rptr. 25 (1976); *Baum v. Baum*, 51 Cal.2d 610, 335 P.2d 481 (1959). Enforcement pursuant to this section is subject to the general rules concerning the time within which judgments may be enforced. See Chapter 3 (commencing with Section 683.010) of Division 1.

#### CROSS-REFERENCES

##### Defined terms

Judgment debtor § 680.\_\_\_\_  
Money judgment § 680.\_\_\_\_

968/693

##### § 708.320. Lien of charging order

708.320. (a) Service on the judgment debtor of notice of motion for a charging order on the judgment debtor and on the other partners or the partnership creates a lien on the judgment debtor's interest in the partnership.

(b) If a charging order is issued, the lien created pursuant to subdivision (a) continues under the terms of the order. If issuance of the charging order is denied, the lien is extinguished.

Comment. Section 708.320 is new. Former statutory law did not explicitly provide for a lien of a charging order. The lien of a charging order was recognized in case law, 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 708.320 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 2 (commencing with Section 708.110) by service of the order of examination. See also Section 416.40 (service on partnership).

#### CROSS-REFERENCES

Defined terms

Judgment debtor § 680.

Effect of liens § 697.010 et seq.

999/321

### Article 7. Receiver to Enforce Judgment

#### § 708.610. Application of general provisions

708.610. 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 708.610 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 Chapter 3 (commencing with Section 683.010) of Division 1.

045/191

#### § 708.620. Appointment of receiver

708.620. 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 708.620 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 a 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 *Olsan v. Comora*, 73 Cal. App.3d 642, 647-49, 140 Cal. Rptr. 835 (1977).

Under Section 708.620, 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 2 (commencing with Section 708.110) 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 708.310 (charging orders).

A receiver may also be appointed to enforce a judgment for the possession of personal property (see Section 714.\_\_\_\_), for the possession of real property (see Section 715.\_\_\_\_), or for the sale of real or personal property (see Section 716.\_\_\_\_).

#### CROSS-REFERENCES

##### Defined terms

Court § 680.\_\_\_\_  
 Judgment § 680.\_\_\_\_  
 Judgment creditor § 680.\_\_\_\_  
 Judgment debtor § 680.\_\_\_\_

045/206

#### § 708.630. Receiver to transfer alcoholic beverage license

708.630. (a) The judgment debtor's interest in an alcoholic beverage license may be applied to the satisfaction of a money judgment only as provided in this section.

(b) The court may appoint a receiver for the purpose of transferring the judgment debtor's interest in an alcoholic beverage license that is transferable under Article 5 (commencing with Section 24070) of Chapter 6 of Division 9 of the Business and Professions Code, unless the judgment debtor shows in the proceeding to appoint a receiver that claims of creditors with priority over the judgment creditor pursuant to 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 in exercising such powers shall comply with the applicable provisions of Division 9 (commencing with Section 23000) of the Business and Professions Code and applicable regulations of the Department of Alcoholic Beverage Control.

Comment. Section 708.630 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 Ops. Cal. Att'y Gen. 4 (1961). Alcoholic beverage licenses are not subject to levy under a writ of execution. See Section 699.720(a). 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 also 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 its procedures and the regulations of the Department of Alcoholic Beverage Control.

#### CROSS-REFERENCES

##### Defined terms

Court § 680.\_\_\_\_  
Judgment debtor § 680.\_\_\_\_  
Money judgment § 680.\_\_\_\_

32177

#### Article 9. Enforcement Against Franchise

##### § 708.910. Franchise defined

708.910. As used in this article, "franchise" means a franchise granted by a public entity and all the rights and privileges thereof, other than the franchise of being a corporation.

Comment. Section 708.910 makes clear that this article applies only to franchises from public entities. Private franchises are governed by the general rules relating to application of property to satisfaction of a money judgment.

32178

§ 708.920. Court order for enforcement

708.920. (a) The court may, in its discretion, order a franchise applied to the satisfaction of a money judgment upon motion by the judgment creditor and notice to the judgment debtor and the public entity that granted the franchise. In exercising its discretion, the court shall determine whether application of the franchise to the satisfaction of the judgment is proper taking into account all the circumstances of the case, including but not limited to the nature of the franchise, whether the franchise is by its terms transferable, and the likelihood that application of the franchise to the satisfaction of the judgment will yield a substantial amount.

(b) If the court orders application of the franchise to the satisfaction of the judgment, application shall be by such means as appears proper to the court, including but not limited to sale of the franchise, assignment of the franchise or proceeds of the franchise, or appointment of a receiver. The court may include in its order, or make additional orders containing, provisions to effectuate the application of the franchise to the satisfaction of the judgment, including but not limited to provisions relating to the place of sale of the franchise, possession of the property of the judgment debtor necessary for the exercise of the franchise, receipt of proceeds of the franchise, recovery of penalties imposed by law and recoverable for injury to the franchise or for damages or other cause, and the judgment debtor's powers and duties and liability for penalties and forfeitures.

Comment. Subdivision (a) of Section 708.920 supersedes former Section 724a. A franchise is no longer subject to levy and sale under execution but may only be applied to the satisfaction of a judgment pursuant to court order made in the court's discretion. See Section 699.010 and Comment thereto (property subject to execution); see also Cal. Const. art. XX, § 4 (franchise may not be relieved from liability).

Subdivision (b) supersedes former Sections 724b-724d.

CROSS-REFERENCES

Defined terms

Court § 680.\_\_\_\_  
 Judgment creditor § 680.\_\_\_\_  
 Judgment debtor § 680.\_\_\_\_  
 Money judgment § 680.\_\_\_\_

32180

§ 708.930. Limitations on enforcement

708.930. Notwithstanding any other provision of this article, an order for application of a franchise to the satisfaction of a money judgment is subject to all applicable laws governing sale, transfer, or other actions concerning the franchise, including but not limited to any necessary approvals by the Public Utilities Commission or local public entities and compliance with statutory or administrative regulations.

Comment. Section 708.930 incorporates limitations on sale and other actions affecting franchises. See, e.g., South Pasadena v. Pasadena Land and Water Co., 152 Cal. 579, 93 P. 490 (1908) (franchise not transferrable unless transferee continues exercise of franchise).

CROSS-REFERENCES

Defined terms

Money judgment § 680.\_\_\_\_

8380

Article 10. Other Enforcement Procedures

§ 709.010. Trusts

709.010. (a) As used in this section, "trust" has the meaning provided in Section 1138 of the Probate Code.

(b) The judgment debtor's interest as a beneficiary of a trust is subject to enforcement of a money judgment upon petition by the judgment creditor to the court and pursuant to the procedure prescribed in Chapter 19 (commencing with Section 1120) of Division 3 of the Probate Code (administration of trusts). Application of the judgment debtor's interest in the trust to the satisfaction of the judgment shall be by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust assets by the trustee.

(c) Nothing in this section affects the law relating to enforcement of a money judgment against the judgment debtor's interest in a spendthrift trust.

Comment. Subdivision (a) of Section 709.010 incorporates provisions that make clear that this section applies only to written, voluntary, express trusts (testamentary or inter vivos) and not to such trusts as Totten trusts, investment trusts, and deeds of trust.

Subdivision (b) reverses the case law rule that the judgment debtor's beneficial interest in a trust is subject to execution. See, e.g., Houghton v. Pacific Southwest T. & S. Bank, 111 Cal. App. 509, 295 P. 1079 (1931). Enforcement processes may not reach specific trust assets or the judgment debtor's interest in the trust (see, e.g., Poindexter v. Los Angeles Stone Co., 60 Cal. App. 686, 214 P. 241 (1923) (judgment lien)) except pursuant to court order applying the interest or assets to satisfaction of the judgment.

Subdivision (c) makes clear that this section does not affect a spendthrift provision in a trust instrument. See Section 695.020 and Comment thereto.

#### CROSS-REFERENCES

##### Defined terms

Court § 680.\_\_\_\_

Judgment debtor § 680.\_\_\_\_

Money judgment § 680.\_\_\_\_

8389

#### § 709.020. Contingent interests

709.020. A contingent remainder, executory interest, or other interest of the judgment debtor in property that is not vested in the judgment debtor is subject to enforcement of a money judgment upon application by the judgment creditor to the court. Application of the interest of the judgment debtor to the satisfaction of the judgment shall be by such means as the court, in its discretion, determines are proper to protect the interests of both the judgment debtor and judgment creditor, including but not limited to imposition of a lien on or sale of the judgment debtor's interest.

Comment. Section 709.020 reverses the rule of such cases as Anglo California Nat'l Bank v. Kidd, 58 Cal. App.2d 651, 137 P.2d 460 (1943), which held that contingent interests are not subject to enforcement, by execution or otherwise. Section 709.020 is intended to permit the court, in an examination or creditors' suit or otherwise, to fashion a suitable remedy through its equitable powers in order to prevent a sacrifice sale of the judgment debtor's interest while preserving the rights of the judgment creditor.

CROSS-REFERENCES

Defined terms

Court § 680.\_\_\_\_

Judgment debtor § 680.\_\_\_\_

Money judgment § 680.\_\_\_\_

9938

§ 709.030. Guardianship or conservatorship estates

709.030. Property in a guardianship or conservatorship estate is not subject to enforcement of a money judgment pursuant to this title but the judgment creditor may apply to the court in which the guardianship or conservatorship proceeding is pending under Division 4 (commencing with Section 1400) of the Probate Code for an order requiring payment of the judgment.

Comment. Section 709.030 codifies the rule of *McCracken v. Lott*, 3 Cal.2d 164, 44 P.2d 355 (1935). If the guardian or conservator fails, neglects, or refuses to pay the judgment, the judgment creditor may apply to the court having jurisdiction of the guardianship or conservatorship proceeding pursuant to Probate Code Section 2404.

CROSS-REFERENCES

Defined terms

Judgment creditor § 680.\_\_\_\_

Money judgment § 680.\_\_\_\_