

## Memorandum 88-46

Subject: Study D-1000 - Miscellaneous Creditors' Remedies Matters

At the January 1988 meeting, the Commission decided to consider several creditors' remedies matters that have arisen since 1984 when we last worked in this area. This memorandum considers three of these matters.

Revival of Junior Liens Where Execution Sale Set Aside

When property is sold to enforce a money judgment, the sale is generally absolute and there is no right of redemption. See Code Civ. Proc. § 701.680. All liens on the property sold are extinguished. Code Civ. Proc. § 701.630. However, if the judgment creditor purchases the property at the sale held to satisfy its judgment, an improper sale may be set aside. This is a limited right, and an action to set the sale aside must be commenced within six months of the sale.

The statute does not deal with the question of what happens to the liens that are extinguished pursuant to Section 701.630 in a case where the sale is set aside. It has been suggested that junior lienholders should be restored to their positions as if the sale had not occurred. (See letter from David R. Frank, Deputy County Counsel, Shasta County, attached as Exhibit 1; the first problem mentioned in the letter was resolved in 1985.) The staff concurs in this view and recommends the amendment set out below:

§ 701.680. Sales absolute; exception

701.680. (a) Except as provided in paragraph (1) of subdivision (c), a sale of property pursuant to this article is absolute and may not be set aside for any reason.

(b) If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment.

(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject

to execution, or for any other reason:

(1) The judgment debtor, or the judgment debtor's successor in interest, may commence an action within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor. Subject to paragraph (2), if the sale is set aside, the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the judgment as so revived as if the sale had not been made. Any liens extinguished by the sale of the property are revived and reattach to the property with the same effect as if the sale had not been made.

(2) The judgment debtor, or the judgment debtor's successor in interest, may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. If damages are recovered against the levying officer, they shall be applied to the judgment to the extent the judgment is not satisfied.

(d) For the purposes of subdivision (c), the purchaser of the property at the sale is not a successor in interest.

Comment. Subdivision (c)(1) of Section 701.680 is revised to provide for the reattachment of liens on property sold at an execution sale that is later held to be improper. In this case, the liens that were extinguished by operation of Section 701.630, including the lien of the judgment creditor sought to be satisfied by the sale, are revived and reattach to the property as if the execution sale had not taken place. Other things being equal, revived liens attach in the amounts and with the priority that they would have had if not extinguished by the sale under the superior lien of the judgment creditor.

In light of the limited circumstances in which sales can be set aside, we do not foresee any problems. The staff would not recommend this amendment if it would result in resurrecting the procedural messes that occurred under the old redemption statute. Nor do we foresee that this limited right will conflict with the intent of the Enforcement of Judgments Law to increase participation in execution sales. The theory embodied in the absolute sale and lien extinguishment provisions is that junior lienholders are to be encouraged to bid at the sale or otherwise lose their security in the property.

### Jurisdictional Limits on Enforcement of Sister State Judgments

In 1985 the jurisdictional limit of the municipal court was raised from \$15,000 to \$25,000. See 1985 Cal. Stat. ch. 1383, § 1. The comparable limit in Code of Civil Procedure Section 1710.20 relating to enforcement of sister state money judgments was not raised, and the Commission had decided to look into the matter. However, this problem has been corrected in Assembly Bill 2560 which was recently enacted. See 1988 Cal. Stat. ch. 54. This bill conforms the jurisdictional amounts in Section 1710.20 to the amounts in Section 117. Consequently, there is no need for Commission action.

### Enforcement of Judgment Lien on Transferred Property After Death of Transferor-Debtor

Professor Stefan Riesenfeld, a Commission consultant on creditors' remedies, has suggested that the Enforcement of Judgments Law be revised to clarify the procedure for enforcing a judgment lien on real property that has been transferred subject to the lien and the transferor dies after the transfer. Professor Riesenfeld points out that there is a gap in the statute. The Enforcement of Judgments Law deals with enforcement of a judgment lien on property that has been transferred, but only while the debtor is still alive. Code of Civil Procedure Section 686.020 provides that enforcement of a judgment after the judgment debtor's death is governed by the Probate Code. The Probate Code deals only with enforcement against property "in the estate." Property transferred subject to a lien before the debtor's death is not property in the decedent's estate. Professor Riesenfeld's analysis of this problem is attached to this memorandum as Exhibit 2.

The law should be clarified. The options suggested by Professor Riesenfeld are to provide that the judgment creditor may bring a separate action to foreclose the lien on the transferred property or may enforce the lien by way of a writ of execution with enforcement stayed as to all other property. Professor Riesenfeld recommends that the statute be amended to make clear that both methods of enforcement are available.

The staff agrees in general with Professor Riesenfeld's

suggestions. However, we would solve the problem in a different manner. We would not limit the creditor to using a writ of execution, but would permit the creditor to use all remedies appropriate to enforcement against property under the control of a third person. In order to provide a comprehensive solution, we would also apply the same principles to personal property, although the case is most likely to arise with regard to real property.

The staff proposes amending the Enforcement of Judgments Law so that the Probate Code procedures apply only to property in the decedent's estate. Hence, the normally available enforcement procedures would continue to apply to property transferred subject to an enforcement lien. The staff recommends the following:

**§ 686.020 (amended). Enforcement of judgment after death of judgment debtor**

686.020. After the death of the judgment debtor, enforcement of a judgment against property in the judgment debtor's estate is governed by the Probate Code.

**Comment.** Section 686.020 is amended for conformity with the scope of the Probate Code provisions relating to enforcement of judgments. See Prob. Code §§ 9300-9304, 9391. As a consequence, property transferred subject to an enforcement lien before the death of the judgment debtor may be applied to the satisfaction of a money judgment as if the judgment debtor had not died. See Section 695.070 (enforcement of lien after transfer).

**§ 695.070 (amended). Property subject to lien after transfer**

695.070. (a) Notwithstanding the transfer or encumbrance of property subject to a lien created under this division, if the property remains subject to the lien after the transfer or encumbrance, the money judgment may be enforced against the property in the same manner and to the same extent as if it had not been transferred or encumbered, except that exemptions do not apply to transferred property.

(b) If the judgment debtor dies after the transfer of property that remains subject to a lien created under this division, the money judgment may be enforced against the property as provided in subdivision (a).

**Comment.** Section 695.070 is amended to clarify the manner of enforcement of a money judgment against property of a decedent in a situation where the property was transferred during the judgment debtor's lifetime subject to an enforcement lien. For provisions relating to continuation of liens after transfer, see Sections 697.390 (judgment lien on

real property), 697.610 (judgment lien on personal property), 697.720-697.750 (execution lien), 697.920 (other liens).

Under subdivision (b), the judgment creditor may enforce the money judgment against the transferred property after the judgment debtor's death using any appropriate procedure available before death. Thus, the death of the judgment debtor has no effect on the judgment creditor's remedies against property that was transferred subject to an enforcement lien. The judgment creditor may use a writ of execution, any other applicable enforcement procedure provided in this division, or an action against the owner of the property to foreclose the lien. Enforcement under this section may proceed only against the property subject to the lien and only in the amount of the lien on the transferred property, as is the case when enforcing a lien on transferred property while the judgment debtor is alive. See Sections 695.210 (amount required to satisfy judgment), 697.010 (amount of lien). See also Section 686.020 (enforcement against property in deceased judgment debtor's estate governed by Probate Code).

The provision relating to the unavailability of exemptions is added at the end of subdivision (a) to avoid any implication that the judgment debtor may claim an exemption for property that has been transferred.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

## OFFICE OF COUNTY COUNSEL

## COUNTY OF SHASTA

1558 West Street  
Redding, California 96001  
(916) 246-5711

DEPUTY COUNTY COUNSEL  
DAVID R. FRANK  
KAREN KEATING JAHR  
SUSANNA CUNEO

October 18, 1984

JOHN SULLIVAN KENNY  
COUNTY COUNSEL

John H. DeMouilly  
Executive Secretary  
California Law  
Revision Commission  
4000 Middlefield Road  
Suite D-2  
Palo Alto, CA 94306

Re: Action to Set Aside Sale of Real Property Made to Satisfy  
Judgment - CCP §§701.680 and 701.630

Dear Mr. DeMouilly:

Recently this office encountered an ambiguity regarding the above code sections, enacted as portions of the Enforcement of Judgments Law. The first sentence of paragraph (1) of subdivision (c) of section 701.680 states that an action may be commenced within six months after an execution sale to set aside that sale if the purchaser is the judgment creditor. The ambiguity is that the paragraph does not identify who may bring such an action.

Our problem arises from a civil case in San Mateo Superior Court in which defendant defaulted and plaintiff, represented by counsel, proceeded to compel the sale of the defendant's property in Shasta County. At the sale, plaintiff, as judgment creditor, bid an even \$43,000, about \$350 more than was required for the judgment creditor to break even. The judgment creditor credited all of the judgment against the purchase price, leaving the \$350 "overage" to be paid to the sheriff for transmission to the judgment debtor. Now, two months after the sale, the sheriff has been served with an order to show cause issued out of the San Mateo Superior Court as to why the sale should not be set aside because of irregularity in the sale proceedings. Note that the order to show cause was issued in the same action - in which the sheriff is not a party - and was obtained by the judgment creditor not the judgment debtor. The allegation in the application for the order to show cause is that the sheriff somehow misled the judgment creditor into believing that the judgment creditor had to bid some amount higher than the amount of his judgment.

It appears to us that the statute does not contemplate any such action by a judgment creditor. Rather, the provision appears to exist solely for the benefit of the judgment debtor. (The judgment creditor, having chosen to enforce his judgment by forced

sale, and having further chosen to bid in the judgment amount plus cash, is hardly in a position to complain about "irregularities". Moreover, an action to set aside a sale appears to be wholly separate from the action in which the judgment sought to be enforced was originally obtained. Hence, the use of the order to show cause procedure against the sheriff and the judgment debtor appears to be unauthorized by statute.) This reading of paragraph (1) is consistent with the provision of paragraph (2) of this subsection which permits only a judgment debtor to recover damages for impropriety in the sale.

Assuming that I'm not misunderstanding the Enforcement of Judgments Law, I suggest that this paragraph be amended to read:

"An action may be commenced by the judgment debtor within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor.  
....."

The second problem involves the construction of the second sentence of paragraph (1) of subdivision (c) of Section 701.680. It provides that if the sale is set aside, the judgment is revived to reflect the amount that was satisfied from the proceeds of the sale. The judgment creditor is entitled to interest on the amount of the judgment, as if there had been no sale. This sentence does not address the revival of any liens extinguished by operation of section 701.630. Unless I (again) misunderstand something in the Enforcement of Judgments Law, I would suggest that this sentence be amended to read:

~~"Subject to paragraph (2), if the sale is set aside, If~~  
the sale is set aside, (i) all liens extinguished by  
operation of Section 701.630 are revived as if the sale  
had not been made, and (ii) subject to paragraph (2), the  
judgment of the judgment creditor is revived to reflect  
the amount that was satisfied from the proceeds of the  
sale and the judgment creditor is entitled to interest on  
the amount of the revived judgment as so revived as if  
the sale had not been made."

The thoughts of you or your staff on these suggestions would be appreciated. Thank you for your time and consideration.

Very truly yours,

  
DAVID R. FRANK

Deputy County Counsel

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)  
BERKELEY, CALIFORNIA 94720-2499  
TELEPHONE (415) 642-

0330

22 February 1988

Mr. Stan G. Ulrich, Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto CA 94303-4739

Dear Stan,

In response to your letter of 12 February, 1988, I am sending you a memo concerning what to me appears to be a gap in the law resulting from amendments made in 1980 and my proposal for curing the defect.

Sincerely yours,

A handwritten signature in cursive script that reads "Steve".

Stefan A. Riesenfeld

SAR/ehs  
Enclosure



### Memorandum

A. Until its repeal in 1980 (Cal. Stats. 1980 c. 124 §3),  
Section 686 of the Cal. C.C.P. read:

"Notwithstanding the death of a party after the judgment,  
execution thereon may be issued, or it may be enforced, as  
follows:

1. ...

2. In the case of the death of the judgment debtor, if the  
judgment be for the recovery of real or personal property, or  
the enforcement of a lien thereon."

Until its repeal by the statute of 1980 (§11] Cal. Probate  
Code §732 read

"When a judgment has been rendered against the testator or  
intestate, no execution shall issue thereon after his death,  
except as provided in the Code of Civil Procedure . . ."

Since a money judgment, even though it created a judgment  
lien, was not a "judgment for the enforcement of a lien" within  
the meaning of CCP §686, the death of a judgment debtor barred  
the issuance of any writ of execution after his or her death. As  
a result of this situation a judgment lien attaching on real  
estate transferred thereafter by the decedent during his or her  
lifetime could no longer be enforced by writ of execution, as it  
could have been had the transferor not died before the issuance  
of the writ.

Because of this result the Supreme Court of California held that in the case of the death of the judgment debtor after transfer of real estate subject to the lien of a money judgment recovered against the judgment debtor, the judgment creditor could bring an action for the foreclosure of the judgment lien against the current owner of the property.

Hibernia Sav. & Loan Assn. v. Lancashire Fire Ins. Co., 138 Cal. 257, 259, 71 Pac. 334 (1903).

B. The amendments of 1980 changed the picture. The absolute bar against a writ of execution is no longer part of the California statutes. The prohibition now applies only with respect to property of the estate.

C.C.P. §686.020 now reads

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

Unfortunately the Probate Code does not govern the whole field of enforcement of a "judgment against the judgment debtor" after his death but only the enforcement of "judgments against the judgment debtor" against property of the estate.

This follows from the current wording of Section 730:

(a) Except as provided in subsection (c), after the death of the judgment debtor, the following judgments are not enforceable under the Code of Civil Procedure against the estate of the decedent. . .

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

(2) A judgment upon a claim for money rendered against a decedent who died after trial and submission to a judge. . . .

In other words, the issuance of a writ of execution to enforce a judgment lien created by a money judgment against decedent is no longer barred if it is for the enforcement of the judgment lien on property of an inter vivos transferee.

C. In the case that the judgment debtor is still alive, the situation is governed by Cal. C.C.P. §§697.390(a) and 695.070. §697.390(a) provides:

"If an interest in real property that is subject to a judgment lien is transferred or encumbered without satisfying or extinguishing the judgment lien:

a) The interest transferred or encumbered without satisfying remains subject to the judgment lien created pursuant to Section 697.310 in the same amount as if the interest had not been transferred or encumbered."

In such a case the judgment lien is enforced by a writ of execution issued on the judgment against the transferor, pursuant to §695.070:

"Notwithstanding the transfer or encumbrance of property subject to a lien created under this division, if the property remains subject to the lien after the transfer or encumbrance, the money judgment may be enforced

against the property in the same manner and to the same extent as if it had not been transferred or encumbered."

Accordingly, if real estate is transferred subject to judgment lien, that lien may be enforced during the lifetime of the transferor by the issuance of a writ of execution on a money judgment against the transferor and levy and sale pursuant to §§700.015 and 701.510. In other words in such a situation the lien is not enforced by action for the sale of the encumbered property.

D. If the judgment debtor dies after the transfer subject to a judgment lien, the situation at present is not governed by any statutory provision, since the revised §686.020 and the Probate Code no longer apply to this situation.

As a matter of general principle in the situation described, the enforcement of the judgment lien on the property of the inter vivos successor could be effectuated either by foreclosure action against the current owner or by issuance of a writ of execution on which levy and sale are stayed with respect to all property except the property subject to the judgment lien -- as in the former quasi-in-rem attachment cases -- or by both methods of enforcement at the option of the judgment creditor.

I recommend to give the judgment creditor the choice.

The new provision should be added to C.C.P. §695.070. That section should be amended to read:

§695.070

a. Notwithstanding the transfer or encumbrance subject to a lien created under this division if the property remains subject to the lien after the transfer or encumbrance, the money judgment may be enforced in the same manner and to the same extent as if it had not been transferred or encumbered.

b. If the judgment debtor dies after such transfer and before a writ of execution has been issued, the money judgment against the transferor may be enforced against the property of the transferee subject to the lien of a judgment against the transferor

(1) by an action against the owner of the property for the foreclosure of the lien, or

(2) by issuance of a writ of execution on which levy and sale is permanently stayed with respect to any property other than the property subject to the judgment lien.

A conforming amendment should be added to §686.020, by inserting the words:

Except as otherwise provided in §695.070b before "after the death". . . .