

Memorandum 74-25

Subject: Study 39.120 - Execution (Third-Party Claims)

The purpose of this memorandum is to obtain some additional guidance as to the policies to be pursued in dealing with the rights of third persons in property levied upon pursuant to a writ of execution. Attached to this memorandum are Sections 689 and 689b--the present provisions dealing with third-party claims (Exhibit I). Also attached is a discussion of the rights and remedies of third persons taken from 5 B. Witkin, California Procedure Enforcement of Judgment §§ 103-115 at pages 3468-3482 (2d ed. 1971)(Exhibit II). Section 689 provides for the situation where the third person claims that the property levied upon is his--not the judgment debtor's. Section 689b provides for situations where the third person claims a security interest in the property levied upon. The procedures are generally parallel, but there are some significant differences.

Under both procedures, the third person files his claim with the levying officer who in turn serves a copy of the claim on the judgment creditor. If the creditor does nothing within five days after receipt of the claim, the property is released. Under Section 689, the creditor may maintain the levy simply by posting an undertaking with the levying officer which indemnifies the third person for any loss caused by the levy. If the creditor does post an undertaking, the third person may still obtain the release of the property by himself posting an undertaking. Procedures are also provided for objecting to the sufficiency of the amount of the undertaking and to the justification of the sureties. Whether or not any undertaking is posted, either the creditor or third person may (within 15 days after the filing of the claim) petition for a hearing to determine "title to the property in question." Pending such determination, the court may order the sale of perishables and may stay the sale, transfer, or other disposition of the property. An expeditious hearing

is provided and orders made according to the court's determinations. It seems to be assumed here that the property belongs either to the debtor or the third person--it is an all or nothing situation--and if the property does belong to the third person it is released from levy.

The thrust of Section 689b is rather different. Here the third person claims a security interest in the property and his claim is in the nature of a demand for payment of all sums due or to accrue to him under the security agreement (plus interest). The judgment creditor must either deposit the amount demanded or post an undertaking and file a statement contesting the existence of the third person's interest. Where the existence of the secured interest is placed in dispute, objections to the creditor's undertaking may be taken and the determination of the validity of the secured interest is made in the same manner as under Section 689. Whichever course is taken, the secured party's interest is accelerated and paid off, the property is sold free and clear of the third party's interest, and the creditor is subrogated to such interest in the proceeds from the sale. See Section 689c. It might be noted that the creditor can also demand that a claim be made and, if no claim is forthcoming, the property is sold free and clear of the third person's interest.

At the March 1974 meeting, the Commission directed the staff to redraft these procedures so that the judgment creditor would have an option to pay off or not pay off secured interest holders. This procedure would not affect any right that the secured person has pursuant to his agreement to accelerate payment of his obligation. However, in the absence of such acceleration or payment by the judgment creditor, the secured interest holder would not be paid, but the property (collateral) would be sold subject to such security interest. Assuming no change in this approach, there still remain certain questions. If the

judgment creditor elects to pay off the secured interest holder, what must he pay? That is, must he pay the same amount the debtor would be required to pay to cancel the agreement (including, for example, prepayment penalties) or may he pay some lesser amount, e.g., the outstanding balance on the principal?

We suspect that, in the overwhelming majority of cases, the security agreement will contain an acceleration clause, e.g., due on encumbrance or due on sale. However, where acceleration is not provided (or not permitted), we have been directed to provide for sale subject to the security interest. Our concern now turns to the purchaser. It might be argued that he has as much, if not more, opportunity to discover the state of the title to the property here as he would have in a private sale. On the other hand, you may wish to place a duty on someone to make this information available at the sale. For example, do you want every secured party to be required to file with the levying officer a statement setting forth his interest in the property prior to sale? And, if a statement is not filed, the purchaser at the sale takes free and clear of interests not so revealed? But query. Should a secured party whose interest is a matter of public record be required to file? Should a secured party who fails to file have an action over against the judgment creditor and/or judgment debtor if he loses his rights in his collateral.

Turning to third persons generally, Section 689 was intended originally to protect the levying officer from liability. Thus, if a third-party claim is made, the property is either released or the creditor posts an undertaking which in effect protects the officer. However, the third person is not required to file a claim, and the purchaser at the sale acquires no more than the debtor's interest in the property. If the debtor has no interest, the third person can bring a separate action for conversion or replevin. Here too a greater obligation could be placed on third persons to come forward and reveal their interest.

For example, the third party claim procedure could be made exclusive and the purchaser's rights superior to those of the third person, leaving the latter to an action against the creditor or debtor. Would this be desirable?

As noted above, Section 689 speaks in all or nothing terms. We do not know what happens when a single item, e.g., a car, is jointly owned by a debtor and some third person. Does the purchaser at the execution sale become a joint owner with the third person? Is the property then partitioned--by sale--if private arrangements cannot be worked out?

You will note that Sections 689 and 689b deal only with personal property. Where real property is involved, the third person must either move to enjoin the sale or bring an action to quiet title after sale. The lack of a more summary procedure has been criticized, see Exhibit III, and at least we believe that a distinction between real and personal property is difficult to justify. Do you wish to bring real property within the scope of whatever third-party procedures are provided?

The above sets forth some of the questions that the staff has on this subject, and we suspect these materials will suggest further problems to the Commission. These questions were of such a nature that it did not seem profitable to draft a statute without further policy directions. Hopefully the Commission will be able to provide such direction at the June meeting.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

EXHIBIT I

§ 888. Third party claims; release; undertaking by plaintiff; justification of sureties; sufficiency of undertaking; appraisal of property; liability of officer; hearing; notices; continuance; protective orders; jury trial; appeals

If tangible or intangible personal property levied on, whether or not it be in the actual possession of the levying officer, is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out the reasonable value thereof, his title and right to the possession thereof and delivered, together with a copy thereof, to the officer making the levy, such officer must release the property and the levy unless the plaintiff, or the person in whose favor the writ runs, within five days after written demand by such officer, made by registered or certified mail within five days after being served with such verified claim, gives such officer an undertaking executed by at least two good and sufficient sureties, in a sum equal to double the value of the property levied upon.

Such undertaking shall be made in favor of and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such levy or such seizing, taking, collecting, withholding, or sale of such property by such officer; provided, however, that where the property levied upon is required by law to be registered or recorded in the name of the owner and it appears that at the time of the levy the defendant or judgment debtor was the registered or record owner of such property and the plaintiff, or the person in whose favor the writ runs, caused the levy to be made and maintained in good faith, and in reliance upon such registered or record ownership, there shall be no liability thereunder to the third person by the plaintiff, or the person in whose favor the writ runs, or his sureties, or the levying officer.

Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment. If they, or others in their place, fail to justify at the time and place appointed, such officer must release the property and the levy; provided, however, that if no exception is taken within five days after notice of receipt of the undertaking, the third person shall be deemed to have waived any and all objections to the sufficiency of the sureties.

If objection be made to such undertaking, by such third person, on the ground that the amount thereof is not sufficient, or if for any reason it becomes necessary to ascertain the value of the property involved, the property involved may be appraised by one or more disinterested persons, appointed for that purpose by the court in which the action is pending or from which the writ issued, or by a judge thereof, or the court or judge may direct a hearing to determine the value of such property.

If, upon such appraisal or hearing, the court or judge finds that the undertaking given is not sufficient an order shall be made fixing the amount of such undertaking, and within five days thereafter an undertaking in the amount so fixed may be given in the same form and manner and with the same effect as the original.

The officer making the levy may demand and exact the undertaking herein provided for notwithstanding any defect, informality or insufficiency of the verified claim delivered to him. Such officer shall not be liable for damages to any such third person for the levy upon, or the collection, taking, keeping or sale of such property if no claim is delivered as herein provided, nor, in any event, shall such officer be liable for the levy upon, or the holding, release or other disposition of such property in accordance with the provisions of this section.

If such undertaking be given, the levy shall continue and such officer shall retain any property in his possession for the purposes of the levy under the writ; provided, however, that if an undertaking be given under the provisions of Section 7106 of this code, such property and the levy shall be released.

Whenever a verified third party claim is delivered to the officer as herein provided, upon levy of execution or attachment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining title to the property in question. Such hearing must be granted by the said court upon petition therefor, which must be filed within 15 days after the delivery of the third party claim to the officer. Such hearing must be had within 20 days from the filing of such petition, unless continued as herein provided. Ten days' notice of such hearing must be given to the officer, to the plaintiff or the person in whose favor the writ runs, and to the third party claimant, or their attorneys, which notice must specify that the hearing is for the purpose of determining title to the property in question; provided, that no such notice need to

be given to the party filing the petition. The court may continue the hearing beyond the said 20-day period, but good cause must be shown for any such continuance. Whenever the petition for such hearing is filed by the third party claimant, or by any one or more joint third party claimants, neither such petition nor proceedings pursuant thereto may be dismissed without consent of the plaintiff or the person in whose favor the writ runs. The court may order the sale of any perishable property held by such officer and direct the disposition of the proceeds of such sale. The court may, by order, stay execution sale, or forbid a transfer or other disposition of the property involved, until the proceedings for the determination of such title can be commenced and prosecuted to termination, and may require, as a condition of such order, such bond as the court may deem necessary. Such orders may be modified or vacated by the judge granting the same, or by the court in which the proceeding is pending, at any time prior to the termination of such proceedings, upon such terms as may be just. At the hearing had for the purpose of determining title, the third party claimant shall have the burden of the proof. The third party claim delivered to the officer shall be filed by him with the court and shall constitute the pleading of such third party claimant, subject to the power of the court to permit an amendment in the interest of justice, and it shall be deemed controverted by the plaintiff or other person in whose favor the writ runs. Nothing herein contained shall be construed to deprive anybody of the right to a jury trial in any case where, by the Constitution, such right is given, but a jury trial shall be waived in any such case in like manner as in the trial of an action. No findings shall be required in any proceedings under this section. At the conclusion of the hearing the court shall give judgment determining the title to the property in question, which shall be conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have said property levied upon, taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment. In such judgment the court may make all proper orders for the disposition of such property or the proceeds thereof. If the property or levy shall have been released by the officer for want of an undertaking, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake or levy upon the property on such writ if the writ is still in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take or otherwise levy upon such property. An appeal lies from any judgment determining title under this section, such appeal to be taken in the manner provided for appeals from the court in which such proceeding is had.

§ 603b. Personal property under purchase contract or mortgage; motor vehicles; claim of seller or mortgagee; tender and deposit; determining validity of contract or mortgage

(1) Vehicle or vessel; notice to legal owner.

(1) Where the property levied upon is a vehicle or a vessel required to be registered with the Department of Motor Vehicles * * *, the officer shall forthwith determine from such department * * * the name and address of the legal owner of the vehicle or vessel and shall notify any such legal owner who is not also the registered owner of such vehicle or vessel of the levy by registered mail or certified mail or personal service.

(2) Claim of seller or mortgagee.

(2) The seller or mortgagee may file with the officer levying on personal property a verified written claim, together with a copy thereof, containing a detailed statement of the sales contract or mortgage and the total amount of sums due or to accrue to him under the contract or mortgage, above setoffs, with interest to date of tender, and also stating therein his address within this state for the purpose of permitting service by mail upon him of any notice in connection with said claim. The officer making the levy may demand and exact the payment or undertaking herein provided for, notwithstanding any defect, informality or insufficiency of the verified claim delivered to him.

(3) Demand for claimed debt.

(3) Within five days after being served with such verified claim the officer levying on such property must make demand by registered mail or certified mail on the plaintiff or his attorney for the amount of the claimed debt and interest due to date of tender or the delivery to the officer of an undertaking and statement as hereinafter provided, which demand shall include the copy of such claim.

(4) Deposit or undertaking, release.

(4) Within five days after receipt by the plaintiff or his attorney of such officer's demand the plaintiff shall deposit with the officer the amount of such debt and interest or deliver the undertaking and statement hereinafter provided, or the levying officer must release the property.

(5) **Payment or tender.**

(5) Within five days after receipt by him of such deposit the officer must pay or tender same to the seller or mortgagee; provided, that should such deposit be made by check the officer shall be allowed a reasonable time for check to clear.

(6) **Tender accepted.**

(6) If the tender is accepted, all right, title, and interest of the seller or mortgagee in the property levied upon shall pass to the party to the action making the payment.

(7) **Tender refused.**

(7) If the tender is refused, the amount thereof shall be deposited with the county treasurer, payable to the order of the seller or mortgagee.

(8) **Sale, suspension, authorization.**

(8) Until such payment or deposit covering such claim is made, or the undertaking and statement herein provided delivered to the officer, the property cannot be sold under the levy; but when made (and also in case the seller or mortgagee fails to render his claim within 30 days after the personal service upon him of a written demand therefor; which service must be attested by the certificate of the serving officer, filed before the sale with the papers of the action wherein the attachment or execution was issued), then the officer must retain the property, and, in the case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee. Such written demand of the levying officer may be served by him, or for him by any sheriff, marshal, or constable whose office is closer to the place of service, and whose fees and mileage shall be paid out of the prepaid fees in the possession of the levying officer.

(9) **Statement of invalidity, undertaking, retention or sale.**

(9) When an attachment or execution creditor presents to the officer, within the time allowed from the officer's demand, a verified statement that the sales contract or mortgage is void or invalid for the reasons specified therein, and delivers to the officer a good and sufficient undertaking in double the amount of the indebtedness claimed by the seller or mortgagee or double the value of the personal property as the officer may determine and require, the officer shall retain the property and in case of an execution sell it in the manner provided by law, free of all liens or claims of the seller or mortgagee.

Undertaking.

The undertaking shall be made to the seller or mortgagee and shall indemnify him for the taking of the property against loss, liability, damages, costs and counsel fees. Exceptions to the sufficiency of the sureties and their justification may be had and taken in the same manner as upon an undertaking on attachment.

Liability of officer.

If such undertaking be given, such officer shall not be liable for damages to any such claimant for the taking, keeping, or sale of such property in accordance with the provisions of this code.

(10) **Hearing, judgment, jurisdiction.**

(10) Whenever a verified claim herein is delivered to the officer as herein provided, upon levy of execution or attachment (whether any undertaking hereinabove mentioned be given or not), the plaintiff, or the person in whose favor the writ runs, the claimant, or any one or more such joint claimants, shall be entitled to a hearing in the court in which the action is pending or from which the writ issued for the purpose of determining the validity of such sales contract or chattel mortgage. Such hearing may be had and taken, and stay of execution or other order made in the same manner as on third party claims under Section 630 of this code. At the conclusion of the hearing the court shall give judgment determining the validity of the claim under the sales contract or chattel mortgage which shall be conclusive between the claimant and the plaintiff, or other person in whose favor the writ runs. The court in which the action is pending, or which issued such writ, shall have original jurisdiction in all proceedings under this section.

Retaking of released property.

If the property shall have been released by the officer for want of an undertaking or payment, and final judgment shall go for the plaintiff or other person in whose favor the writ runs, the officer shall retake the property on such writ, if the writ shall still be in his hands, or if the writ shall have been returned, another writ may be issued on which the officer may take such property.

EXHIBIT II

[5 B. Witkin, California Procedure Enforcement of Judgment §§ 103-115 at pp. 3468-3482 (2d ed. 1971)]

5. Rights and Remedies of Third Persons.

(a) [§103] In General.

The judgment creditor may direct, or the officer may levy, execution on property in which the entire ownership or some interest is held by a third party, a stranger to the proceedings. What protection has he? He cannot move to recall the writ of execution, since the writ itself is proper—it is the levy which is improper. (See *Associated Oil Co. v. Mullin* (1930) 110 C.A. 385, 392, 294 P. 421.) But he has, nevertheless, the election of several remedies:

- (1) Special third party claim proceeding under C.C.P. 689, available to one claiming tangible personal property. (Infra, §104 et seq.)
- (2) Special third party claim proceeding under C.C.P. 689a et

seq., available to a chattel mortgagee or conditional seller. (Infra, §110 et seq.)

(3) Undertaking to release property under C.C.P. 710b et seq. (Infra, §114.)

(4) Action to quiet title, to enjoin sale, to recover personal property or for conversion. (Infra, §115.)

(b) Third Party Claim.

(1) [§104] Nature and Scope of Proceeding.

C.C.P. 689 provides for a *special proceeding, summary* in character, *incidental* to the main action, to determine *title or right to possession of personal property* held by an officer under *attachment* (C.C.P. 549; see *Provisional Remedies*, §215), *execution* (C.C.P. 689; see supra, §71), *claim and delivery* proceedings (C.C.P. 519; see *Provisional Remedies*, §35), or a *warrant for tax liability* owed to the state or a state agency (C.C.P. 689d; see supra, §2).

The proceeding came originally from the Practice Act, but continuous revision has completely changed its character. The numerous amendments make it necessary to scrutinize the older cases with great care to avoid serious misconceptions. (See generally, on the history and nature of the proceeding, *First Nat. Bank v. Kinslow* (1937) 8 C.2d 339, 65 P.2d 796; *Duncan v. Superior Court* (1930) 104 C.A. 218, 285 P. 732; *Arena v. Bank of Italy* (1924) 194 C. 195, 228 P. 441; *Cory v. Cooper* (1931) 117 C.A. 495, 4 P.2d 581; *Peterson v. Groesbeck* (1937) 20 C.A.2d Supp. 753, 64 P.2d 495 [court may determine title against third party claimant who is debtor's trustee in bankruptcy]; *McCoy v. Justice's Court* (1936) 23 C.A.2d 99, 71 P.2d 1115 [remedy available though debtor has transferred property to another]; *Retailers Credit Assn. v. Superior Court* (1937) 19 C.A.2d 457, 65 P.2d 937 [if main action transferred by order changing venue, incidental proceeding on third party claim likewise transferable]; *Nat. Auto. Ins. Co. v. Fraties* (1941) 46 C.A.2d 431, 115 P.2d 997; *Rubin v. Barasch* (1969) 275 C.A.2d 835, 836, 80 C.R. 337, infra, §107 [purpose is to give quick remedy where levy by mistake, and to protect officer]; 9 So. Cal. L. Rev. 348; 11 So. Cal. L. Rev. 16; C.E.B., Rem. Unsec. Cred., p. 263 et seq.; C.E.B., Debt Collection Practice, p. 529 et seq.; 7 Cal Practice 577 et seq.; 9 Am.Jur. P.P. Forms (Rev. ed.) 893 et seq.)

This *summary proceeding* permits a *stranger* to the litigation to have his claim of title determined. It is thus distinguishable from

C.C.P. 720, under which the *judgment creditor* may maintain an *action against a third person* who claims an interest in the debtor's property. (*Retailers' Credit Assn. v. Superior Court*, supra; see infra, §143.) It is also entirely different from the remedy of *release* of the property on bond, under C.C.P. 710b, without determination of title. (See infra, §114.) There are two important limitations on the scope of the proceeding under C.C.P. 689:

(1) By its nature and by express provision it is limited to *personal property*. In *First Nat. Bank v. Kinslow*, supra, 8 C.2d 345, the court pointed out that the remedy of a claimant where real property is sold under execution for another's debt is an action to *quiet title* against the purchaser. The claimant loses nothing by the execution sale itself, for the purchaser only acquires the interest of the judgment debtor, and possession does not change until the period of redemption ends. (See also *Yokohama Specie Bank v. Kitasaki* (1941) 47 C.A.2d 98, 117 P.2d 398.)

(2) The claimant must have title and right to possession; a mere attaching creditor cannot make the claim. (*Palmquist v. Palmquist* (1964) 228 C.A.2d 789, 793, 39 C.R. 871.)

It was formerly held that the remedy was limited to claims of personal property capable of manual delivery, and was unavailable where the levy of attachment or execution was on intangibles by the *garnishment* process. (*Bank of America v. Riggs* (1940) 39 C.A.2d 679, 684, 104 P.2d 125; *Ballagh v. Williams* (1942) 50 C.A.2d 303, 122 P.2d 919 [corporate stock]; *Sunset Realty Co. v. Dadmun* (1939) 34 C.A.2d Supp. 733, 88 P.2d 947.) This rule was abrogated by a 1957 amendment to C.C.P. 689, which makes the procedure available where the levy is on "tangible or intangible personal property . . . whether or not it be in the actual possession of the levying officer."

(2) Procedure.

(aa) [§105] Verified Claim.

The third party makes a *written* claim to the property, *verified* by himself or his agent, setting out its reasonable value and his title and right to possession. (C.C.P. 689; see C.E.B., Rem. Unsec. Cred., p. 264; C.E.B., Debt Collection Practice, p. 530; 7 Cal Practice 580; 9 Am.Jur. P.P. Forms (Rev. ed.) 894 et seq.) The original claim and a copy are *delivered* to the levying officer. (C.C.P. 689.)

No technical form is required, and a claim in the form of an affidavit will be sufficient. (*McCaffey Canning Co. v. Bank of America*

(1930) 109 C.A. 415, 420, 295 P. 45 ["Such a claim, however, is not a pleading, and may frequently have to be drawn by persons unfamiliar with legal jargon . . . in such matters technical niceties should not overshadow the rights of a claimant to legal possession"]; *Duncan v. Standard Acc. Ins. Co.* (1934) 1 C.2d 385, 388, 35 P.2d 523.)

Service on the levying officer may apparently be made at any time before he has sold the property or has otherwise placed himself in a position where it is impossible to deliver the property to the claimant or obtain an indemnity bond from the creditor. (*National Bank v. Finn* (1927) 81 C.A. 317, 337, 253 P. 757.)

(bb) [§106] Bond To Prevent Release.

On delivery of the verified claim to the levying officer (supra, §105) he must release the property and the levy unless the attaching or execution creditor, on demand, furnishes an undertaking to prevent release. (C.C.P. 689; see C.E.B., Rem. Unsec. Cred., p. 266; C.E.B., Debt Collection Practice, p. 532; 7 Cal Practice 582 et seq.; 9 Am.Jur. P.P. Forms (Rev. ed.) 907.) The procedure is as follows:

(1) The officer, within 5 days after being served with the verified claim, makes a written demand by registered or certified mail on such creditor (i.e., "the plaintiff, or the person in whose favor the writ runs"). (For form of demand, see C.E.B., Rem. Unsec. Cred., p. 266; 7 Cal Practice 584; 9 Am.Jur. P.P. Forms (Rev. ed.) 907.)

This provision is strictly construed to require a "written demand" in the ordinary meaning of "a command or authoritative request in written form"; a simple notification of a third party claim is insufficient. Thus, in *Johnston v. Cunningham* (1970) 12 C.A.3d 123, 127, 90 C.R. 487, the constable mailed a copy of the claim to an attaching creditor's attorney, with a covering letter informing the attorney that she was "hereby served" with the claim. Later the constable telephoned the attorney and asked if her client was going to furnish an undertaking, and she replied that none would be furnished because no written demand had been made. The trial judge made a finding of substantial compliance with C.C.P. 689 and ordered release of the attachment. *Held*, reversed; the theory of substantial compliance would abrogate an express statutory provision and give a ministerial officer discretion to deviate from its requirements.

The officer may demand the undertaking (and therefore release the property if it is not given) "notwithstanding any defect, informal-

ity or insufficiency of the verified claim delivered to him." (C.C.P. 689.) This last provision, enacted in 1925 and revised in 1929, changed the former law which made the officer's right to demand a bond dependent upon a substantial compliance with the formal requirements of the statute. (See *Arena v. Bank of Italy* (1925) 194 C. 195, 228 P. 441; *Cory v. Cooper* (1931) 117 C.A. 395, 502, 4 P.2d 581.)

(2) The creditor, within 5 days after such demand, gives the undertaking. It is in double the value of the property, with two sureties, and runs in favor of the *third party claimant*, indemnifying him against loss, liability, damages, costs and counsel fees by reason of acts of the levying officer. (For form of undertaking, see C.E.B., Rem. Unsec. Cred., p. 267; C.E.B., Debt Collection Practice, p. 533; 7 Cal Practice 586; 9 Am.Jur. P.P. Forms (Rev. ed.) 909; on deposit in lieu of bond, see *Provisional Remedies*, §4.) However, there is no liability on the undertaking where the property "is required by law to be registered or recorded in the name of the owner and it appears that at the time of the levy the defendant or judgment debtor was the registered or record owner," and the levy was made in good faith in reliance on such registered or record ownership.

Sureties may be compelled to justify as in an undertaking on attachment; but if no exception is taken within 5 days after notice of receipt of the undertaking, objections to them are waived. If objection is raised to the *amount*, or the value of the property is disputed, the court may appoint appraisers or hold a hearing, and, if it finds the amount insufficient, a new undertaking may be given in 5 days.

(3) When an undertaking is given, the officer must hold the property under the levy, unless it is released by undertaking under C.C.P. 710b (infra, §114). If he nevertheless releases the property, he is liable to the creditor. (*Cowsert v. Stewart* (1925) 72 C.A. 255, 236 P. 940.)

(4) If the undertaking is not given, the officer must release "the property and the levy" (i.e., must give up possession of tangible property and release a garnishment of intangible property), and deliver tangible property to the defendant. But if the officer is unable to find the defendant after 10 days' written notice to his last known address, he must return the property to the *third party claimant*. (C.C.P. 689.5.)

(cc) [§107] Hearing.

Delivery of the third party claim to the officer (supra, §105) entitles any of the following parties to a hearing to determine title to the property: "the plaintiff, or the person in whose favor the writ runs, the third party claimant, or any one or more joint third party claimants." The right exists regardless of whether or not an undertaking to obtain release (supra, §106) has been given. (C.C.P. 689; see C.E.B., Rem. Unsec. Cred., p. 269; C.E.B., Debt Collection Practice, p. 534; 7 Cal Practice 586 et seq.)

The procedure is set forth in C.C.P. 689 as follows:

(1) A petition must be filed by one of such parties in the court in which the action is pending or from which the writ issued, within 15 days after delivery of the claim to the officer. (See *Ballagh v. Williams* (1942) 50 C.A.2d 303, 122 P.2d 919 [time held jurisdictional]; for form of petition, see C.E.B., Rem. Unsec. Cred., p. 270; C.E.B., Debt Collection Practice, p. 535; 7 Cal Practice 589; 9 Am.Jur. P.P. Forms (Rev. ed.) 902.)

(2) The hearing must be had within 20 days from filing of the petition, unless continued by the court for good cause. Notice of hearing (10 days) must be given to the officer, creditor, and third party claimant, or their attorneys (except to the party filing the petition). The notice must specify that the hearing is to determine title. (See *Rubin v. Barasch* (1969) 275 C.A.2d 835, 837, 80 C.R. 337 [no notice to debtor required].)

Prior to 1961 there was some reason to believe that a third party claimant, by dismissing his petition on the eleventh day, could defeat the plaintiff's right to a hearing (hearing must be had within 20 days, and on 10 days' notice). A 1961 amendment protected the plaintiff by the following added provision: "Whenever the petition for such hearing is filed by the third party claimant, or by any one or more joint third party claimants, neither such petition nor proceedings pursuant thereto *may be dismissed without consent of the plaintiff or the person in whose favor the writ runs.*"

(3) The claim is filed with the court and constitutes the pleading of the third party claimant, subject to the court's power to permit amendment. It is deemed controverted by the creditor.

(4) "Nothing herein contained shall be construed to deprive anybody of the right to a *jury trial* in any case where, by the Constitution.

such right is given, but a jury trial shall be waived in any such case in like manner as in the trial of an action." (See 9 So. Cal. L. Rev. 349.)

(5) The claimant has the burden of proof. (See *Beverly Hills T. & L. v. Western D. etc. Co.* (1961) 190 C.A.2d 298, 302, 12 C.R. 107; 14 Hastings L.J. 69.)

These provisions require ample notice and hearing and fully comply with the constitutional requirement of procedural due process. (*McCoy v. Justice's Court* (1937) 23 C.A.2d 99, 101, 71 P.2d 1115.) But a summary decision without allowing the third party claimant an opportunity to present his case is a probable denial of due process and clearly reversible error. (*Nat. Auto. Ins. Co. v. Fraties* (1941) 46 C.A.2d 431, 115 P.2d 997 [trial judge, outraged at what he thought was a fraudulent transfer, denied claim after listening only to creditor and debtor]; *Johnston v. Cunningham* (1970) 12 C.A.3d 123, 128, 90 C.R. 487 [after levying officer had wrongfully released attachment (supra, §106), judge entered order "allowing" third party claim without taking or considering evidence of title].)

As pointed out above, the judgment debtor is neither a party to the proceedings nor entitled to notice. (*Rubin v. Barasch*, supra.) But he may have a sufficient interest to support *intervention*. Thus, in *Rubin v. Barasch*, supra, Rubin sued Mr. B for \$50,000 due on his promissory note, joining Mrs. B and others on a theory of conspiracy to conceal Mr. B's assets. Rubin attached 5 bank accounts in the names of Mr. and Mrs. B. He then dismissed Mrs. B and obtained summary judgment against Mr. B. Before the Rubin action, however, Mr. B sued for divorce and Mrs. B cross-complained; and before summary judgment Mrs. B filed a third party claim for half the attached funds as her separate property. The judge found in her favor, and the third party judgment directed that half be distributed to her and that Rubin's attachment or any future writ of execution would be valid only as to one half. Mr. B, having received no notice of the third party claim or hearing, moved for a new trial or modification, on the ground that the funds were community property and title was in issue in the divorce action. On denial of his motion he appealed. *Held*, order reversed. (a) Since the debtor is not entitled to notice the judgment is not *res judicata* as between him and the creditor or third party claimant. (b) Nevertheless, Mr. B had a right to intervene in proceedings in which a judgment purported to run against him. (275 C.A.2d 838.) Hence his motion for new trial should have

been granted and the judgment modified to eliminate any reference to the adjudication of claims between Mr. and Mrs. B.

(dd) [§108] **Judgment and Incidental Orders.**

C.C.P. 689 provides for judgment following the hearing, and for various kinds of orders pending the hearing or in the judgment.

(1) *No findings* are required; the court, at the conclusion of the hearing, renders a "judgment *determining the title* to the property in question, which shall be *conclusive* as to the right of the *plaintiff*, or *other person in whose favor the writ runs*, to have said property levied upon, taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment." (C.C.P. 689; see C.E.B., Civ. Proc. During Trial, p. 581; C.E.B., Civ. Proc. Forms, p. 389; C.E.B., Debt Collection Practice, p. 537; 7 Cal Practice 597; 9 Am.Jur. P.P. Forms (Rev. ed.) 904.)

(2) The successful party, claimant or creditor, is entitled to costs. (See *Exchange Nat. Bank v. Ransom* (1942) 52 C.A.2d 544, 126 P.2d 620 [claimant]; *Maguire v. Corbett* (1953) 119 C.A.2d 244, 252, 259 P.2d 507 [creditor; "Turn about is fair play"].)

(3) During the proceedings the court may make an order staying the execution sale or forbidding transfer or other disposition of the property, and may require a bond as a condition of the order. (See *O'Brien v. Thomas* (1937) 21 C.A.2d Supp. 765, 65 P.2d 1370; 7 Cal Practice 590.) And it may also order the sale of perishable property and direct disposition of the proceeds. (See 9 Am.Jur. P.P. Forms (Rev. ed.) 906.) Such orders may be modified or vacated "upon such terms as may be just" at any time prior to termination of the proceedings. (C.C.P. 689.)

(4) In the judgment the court "may make all proper orders for the disposition of such property or the proceeds thereof." (C.C.P. 689.)

Under the former law, if no undertaking was filed, a hearing was considered futile and could not be compelled. (See *Duncan v. Superior Court* (1930) 104 C.A. 218, 221, 285 P. 732; cf. *Citrus Pack. Co. v. Municipal Court* (1934) 137 C.A. 337, 30 P.2d 534.) Now the hearing may be had although no undertaking was filed (see *supra*, §107). And, if the creditor is successful but the property was previously released for failure to furnish an undertaking, the officer must *retake* the

property, either on the original writ, or, if it was returned, on an alias writ. (C.C.P. 689.)

(ee) [§109] Review.

It has been held that the statutory scheme ordinarily precludes a motion for new trial. (See *Wilson v. Dunbar* (1939) 36 C.A.2d 144, 97 P.2d 262; *Attack on Judgment in Trial Court*, §22; cf. *Rubin v. Barasch* (1969) 275 C.A.2d 835, 80 C.R. 337, supra, §107 [judgment debtor, not a party to proceeding, may seek intervention by motion for new trial].)

The appropriate method of review is an appeal from the judgment determining title. (C.C.P. 689.) (As to stay pending appeal, see *Fulton v. Webb* (1937) 9 C.2d 726, 72 P.2d 744; *Jensen v. Hugh Evans & Co.* (1939) 13 C.2d 401, 90 P.2d 72; *O'Brien v. Thomas* (1937) 21 C.A.2d Supp. 765, 65 P.2d 1370; *Appeal*, §178.)

(c) Claim of Conditional Seller or Chattel Mortgagee.

(1) [§110] Nature and Scope of Proceeding.

(a) *In General.* Personal property in the possession of the debtor, though subject to a chattel mortgage or the reserved title of a conditional seller, may nevertheless be reached by execution. (U.C.C. 9311; C.C.P. 689a ["notwithstanding any provision in the agreement or mortgage for default or forfeiture in case of levy or change of possession"].) If no *demand for claim* is served on the conditional seller or mortgagee (infra, §111), his rights are not affected when the property is sold on execution; the purchaser at the sale acquires only the debtor's interest in the property. (see infra, §116).

However, C.C.P. 689b establishes a special third party claim procedure (infra, §111 et seq.) which allows the conditional seller or mortgagee to assert his claim prior to the sale. The statute, like that governing ordinary third party claims (supra, §104 et seq.), has been continuously revised, and the older cases must be read with caution. (See, dealing with statute prior to 1953, *Casady v. Fry* (1931) 115 C.A. Supp. 777, 6 P.2d 1019; *Kuehn v. Don Carlos* (1935) 5 C.A.2d 25, 41 P.2d 585; *Missouri State Life Ins. Co. v. Gillette* (1932) 215 C. 709, 713, 12 P.2d 955; *Mercantile Acc. Corp. v. Pioneer Credit Ind. Co.* (1932) 124 C.A. 593, 596, 12 P.2d 988; *Security Nat. Bank v. Sartori* (1939) 34 C.A.2d 408, 411, 93 P.2d 863; 21 Cal. L. Rev. 51.)

(b) *Registered Vehicle or Vessel: Notice of Levy.* Ordinarily no notice of levy need be given a mortgagee or conditional seller. But if the property is a "vehicle or vessel required to be registered with the Department of Motor Vehicles," the *levying officer* must "forthwith determine" from the department the name and address of the *legal owner*, and notify any such legal owner (who is not also the registered owner) of the levy by registered or certified mail or personal service. (C.C.P. 689b(1); as to meaning of "legal owner," see Veh.C. 370; 1 *Summary, Sales*, §50; 1 *Summary, Security Transactions in Personal Property*, §50; on registration of vessels with Department of Motor Vehicles, see Veh.C. 9850 et seq.)

(2) **Procedure.**

(aa) **§111 Verified Claim by Seller or Mortgagee.**

(1) *Form and Contents.* The seller or mortgagee may file a verified claim and copy with the levying officer. This must contain "a detailed statement of the sales contract or mortgage and the total amount of sums due or to accrue to him under the contract or mortgage, above set-offs, with interest to date of tender." It must also give the seller's or mortgagee's address for mailed service of notice. (C.C.P. 689b(2); see C.E.B., *Rem. Unsec. Cred.*, p. 276; C.E.B., *Debt Collection Practice*, p. 540; 7 *Cal Practice* 357; on officer's right to demand and exact payment or undertaking despite defect in claim, see *infra*, §112; on third party claim under C.C.P. 689, see *supra*, §105.)

(2) *Creditor's Demand for Claim.* Although the mortgagee or conditional seller is not required to file a claim (see *supra*, §110), the judgment creditor can compel him to do so or forgo his interest in the property. Under C.C.P. 689b(8), the creditor may instruct the levying officer to *personally serve* the seller or mortgagee with a *written demand* for a claim. If the seller or mortgagee fails to file his claim within 30 days thereafter, the property may be sold on execution "free of all liens or claims of the seller or mortgagee." (See C.E.B., *Rem. Unsec. Cred.*, pp. 276, 278; C.E.B., *Debt Collection Practice*, pp. 541, 543; 7 *Cal Practice* 356; on fees for service of demand and mileage, see Govt.C. 26721, 26746.)

(bb) [§112] Payment or Undertaking by Plaintiff.

The plaintiff creditor may resist the third party claim either by challenging the validity of the sale contract or mortgage and bonding against it or by admitting its validity and paying the amount of the claimed debt and interest. (C.C.P. 689b; see C.E.B., Rem. Unsec. Cred., p. 278 et seq.; C.E.B., Debt Collection Practice, p. 543 et seq.)

(1) *Demand by Officer.* The levying officer, within 5 days after receipt of the claim, must make a *demand* (with copy of the claim) on the *plaintiff* or his attorney, by registered mail, for either *payment* of the amount due, or an *undertaking* to indemnify the seller or mortgagee for the taking of the property. (C.C.P. 689b(3); see C.E.B., Rem. Unsec. Cred., p. 278.) The officer may make the demand and exact the payment (or undertaking) "notwithstanding any defect, informality or insufficiency of the verified claim delivered to him." (C.C.P. 689b(2); on similar provision in C.C.P. 689, see *supra*, §106.)

(2) *Payment by Plaintiff.* (a) Within 5 days after receipt of the demand the plaintiff must deposit with the officer the amount of the debt and interest, or deliver the undertaking. (C.C.P. 689b(4).) (b) Within 5 days after receipt of the deposit (with reasonable additional time for check to clear) the officer must pay or tender it to the seller or mortgagee. (C.C.P. 689b(5).) (c) If the tender is accepted the interest of the seller or mortgagee passes to the plaintiff. (C.C.P. 689b(6).) (d) If the tender is refused the money is deposited with the county treasurer for the seller or mortgagee. (C.C.P. 689b(7).)

(3) *Statement and Undertaking by Plaintiff.* Instead of paying, the plaintiff creditor may present to the officer, within the 5-day period allowed for payment, a *verified statement* that the sales contract or mortgage "is void or invalid for the reasons specified therein." (C.C.P. 689b(9); see C.E.B., Debt Collection Practice, p. 544; 7 Cal Practice 355.) He must also deliver an *undertaking* in double the amount of the indebtedness claimed by the seller or mortgagee or double the value of the property (as the officer may determine and require). The undertaking is made to the seller or mortgagee, to indemnify him for the taking against loss, liability, damages, costs and counsel fees. Exceptions to the sureties are taken in the same manner as on an attachment bond. (C.C.P. 689b(9); see *Provisional Remedies*, §3.)

If the undertaking is given, the officer may take, retain or sell the property in accordance with the statute, without liability in damages to the third party claimant. (C.C.P. 689b(9).)

(4) *Release of Property Where No Payment or Undertaking.* If the plaintiff fails to pay or give the undertaking within 5 days after receipt of the officer's demand, the officer must release the property. (C.C.P. 689b(4); *Stoehr v. Superior Court* (1948) 87 C.A.2d 850, 197 P.2d 779; see C.C.P. 689.5 [if defendant cannot be found property may be returned to seller or mortgagee].)

(5) *Sale of Property.* After the plaintiff makes or gives the required payment, deposit or undertaking, or if no claim is filed within 30 days after a *demand for a claim* has been served on the seller or mortgagee (see *supra*, §111), the property is sold on execution in the usual manner, "free of all liens or claims of the seller or mortgagee." (C.C.P. 689b(8).)

(6) *Allocation of Proceeds of Sale.* When the property is sold the officer must apply the proceeds of the sale as follows: (1) repayment, with interest, of the sum paid to or deposited for the seller or mortgagee; (2) distribution of the balance, if any, in manner of proceeds of an ordinary execution sale. (C.C.P. 689c.)

**(cc) [§113] Hearing, Judgment and
Review.**

Delivery of the claim by the seller or mortgagee entitles the claimant or the plaintiff to a *hearing* to determine the validity of the sales contract or chattel mortgage, regardless of whether an undertaking is given. The hearing may be had in the court in which the action is pending or the court which issued the writ. The hearing, judgment, and power to make incidental orders follow the procedure under C.C.P. 689 (*supra*, §§107, 108). (C.C.P. 689b(10).) And if the plaintiff is successful but the property was previously released for lack of an undertaking or payment, the officer must retake the property on the original or an alias writ. (C.C.P. 689b(10); cf. C.C.P. 689, *supra*, §108.)

The judgment is appealable either as an order after final judgment or as a final judgment in a special proceeding. (See *Appeal*, §55.) The statement in C.C.P. 689b that the judgment "shall be conclusive between the claimant and the plaintiff" means only that it will be res judicata in any new proceeding. (*Embroe Uranium Co. v. Liebel* (1959) 169 C.A.2d 256, 337 P.2d 159.)

The failure of the parties to seek a hearing to determine title does not affect the liability of sureties on the plaintiff's undertaking. This point of first impression was decided in *Commercial Credit Plan v.*

Gamez (1968) 276 C.A.2d Supp. 831, 80 C.R. 534. A sued H and attached his automobile. C Credit, legal owner by virtue of its loan, filed a third party claim. A gave the undertaking under C.C.P. 689b(9), but failed to accompany it with the required verified statement (*supra*, §112). Neither party asked for a hearing, so the sheriff sold the car. On H's bankruptcy C Credit brought this action against the sureties on A's undertaking. Defendant sureties contended that the third party claimant's failure to seek a hearing to determine the issue of title discharged the sureties. *Held*, the sureties were not discharged. The court pointed out that the creditor (A) could himself have sought a hearing.

(d) [§114] Undertaking To Release Property.

C.C.P. 710b et seq. establish the following procedure by which a third party who claims ownership of personal property levied upon under *execution* may give an undertaking to secure its release:

(1) File an undertaking (serving a copy on the judgment creditor) in the court in which the execution issued, in double the value of the property (but not more than double the amount for which execution was levied). The condition is that, if the property is finally adjudged to belong to the debtor, the third party will pay the judgment creditor. (C.C.P. 710c, 711; see C.E.B., Rem. Unsec. Cred., p. 273, C.E.B., Debt Collection Practice, p. 538; 7 Cal Practice 585; 9 Am.Jur. P.P. Forms (Rev. ed.) 911.)

(2) The judgment creditor may object to the undertaking, and there may be a hearing to justify sureties (C.C.P. 711½, 712, 713) or to determine the value of the property (C.C.P. 712½). If the undertaking is disapproved, a new one may be given. (C.C.P. 712.)

(3) The undertaking becomes effective 10 days after service of the copy on the judgment creditor, or, if objected to, when a sufficient undertaking is given. (C.C.P. 713½.)

Although this proceeding and the third party claim statute (*supra*, §104) serve different purposes, they may in some instances operate together. Under C.C.P. 689 the third party may prevent a sale merely by filing his claim, unless the creditor gives an undertaking. If the creditor gives the undertaking under C.C.P. 689 in favor of the *third party claimant*, the officer will hold the property. To obtain its release the third party must give an undertaking under C.C.P. 710b et seq., in favor of the *creditor*, which provides for ultimate payment of his judgment.

(e) [§115] Actions by Third Party.

In addition to the special proceedings of third party claim and undertaking to protect his interest in personal property (*supra*, §§104, 110, 114), the third party may protect his interests or recover damages for invasion thereof, in several types of actions:

(1) *Action To Quiet Title.* Since the third party claim statute does not apply to real property (see *supra*, §104), the ordinary remedy where real property is wrongfully sold is an action to quiet title against the purchaser at the execution sale. (*First Nat. Bank v. Kinslow* (1937) 8 C.2d 339, 345, 65 P.2d 796; see *Pleading*, §522 et seq.)

(2) *Action To Enjoin Sale.* If the sale of real property would cast a cloud on the owner's title he is not limited to suit against the purchaser, but may enjoin the sale. This is the case, e.g., where the third party is the *grantee* of the judgment debtor. Since their titles are derived from a common source, sale on execution against his grantor clouds his title. (*Einstein v. Bank of California* (1902) 137 C. 47, 69 P. 616; *Austin v. Union Paving etc. Co.* (1906) 4 C.A. 610, 88 P. 731.)

(3) *Action for Specific Recovery of Personal Property.* The summary remedy under the third party claim statute does not preclude the conventional action for specific recovery (*replevin*) against the creditor and levying officer. (See *Taylor v. Bernheim* (1922) 58 C.A. 404, 408, 209 P. 55; *Pleading*, §554 et seq.)

(4) *Action for Damages for Conversion.* A levying officer and the sureties on his official bond may be liable in damages to the third party for wrongfully selling the property. (See, for earlier law, *Missouri State Life Ins. Co. v. Gillette* (1932) 215 C. 709, 713, 12 P.2d 955; *Carpenter v. Devitt* (1942) 49 C.A.2d 473, 122 P.2d 79; cf. *McCaffey Canning Co. v. Bank of America* (1930) 109 C.A. 415, 420, 294 P. 45.) However, the officer's situation has been greatly improved by the revised third party claim statutes:

(a) If no third party claim is filed, "Such officer shall not be liable for damages to any such third person for the taking, keeping or sale of such property. . . ." (C.C.P. 689.)

(b) If a claim is filed and an undertaking is given by the plaintiff, that undertaking in favor of the third party is a complete protection, given in lieu of any right of action against the officer for conversion. The third party's remedy is solely against the creditor and the sureties on the undertaking. (*Cory v. Cooper* (1931) 117 C.A. 495, 4 P.2d 581;

C.C.P. 689 ["nor, in any event, shall such officer be liable for the holding, release or other disposition of such property in accordance with the provisions of this section".])

6. Rights and Remedies of Purchaser.

(a) Title.

(1) [§116] In General.

The purchaser at a valid execution sale acquires "all the right, title and interest" of the debtor (and only that) from the time of *attachment, judgment lien or execution*. (C.C.P. 698, 699, 700; see *Noble v. Beach* (1942) 21 C.2d 91, 94, 130 P.2d 426 ["A sale by the sheriff has the same force and effect as a conveyance by the judgment debtor in the form of a quitclaim deed at the date of the sale . . . and it does not operate to convey any after-acquired title or interest of the judgment debtor"]; *Cook v. Huntley* (1941) 44 C.A.2d 635, 639, 112 P.2d 889; *Withington v. Shay* (1941) 47 C.A.2d 68, 75, 117 P.2d 415; 30 Am.Jur.2d 691 et seq.)

In the case of real property, this title is subject to redemption and the debtor's right of possession during the 12 months redemption period. (See *supra*, §98.) In other words the legal title of the purchaser, acquired at the time of purchase, is *defeasible* upon the happening of a condition subsequent—redemption. This legal title comes from the *sale*; the sheriff's deed, given at the expiration of the redemption period, does not create a new title, but merely evidences the fact that the title previously acquired has become absolute. (See *Leaver v. Smith* (1920) 47 C.A. 474, 477, 190 P. 1050; *Pollard v. Harlow* (1903) 138 C. 390, 71 P. 458, 648; *Bateman v. Kellogg* (1922) 59 C.A. 464, 472, 211 P. 46; *Allen v. McGee* (1942) 54 C.A.2d 476, 483, 129 P.2d 143; *Ritter v. Salsbery* (1956) 142 C.A.2d Supp. 847, 852, 298 P.2d 166; *Lawrence v. Maloof* (1967) 256 C.A.2d 600, 602, 64 C.R. 233, 2 *Summary, Real Property, Supp.*, §25.)

Even if the creditor executed directly on property of a debtor who fraudulently conveyed it to another, the purchaser gets a legal title. He does not have to bring an action to set aside the fraudulent conveyance but may clear up the record by a quiet title suit. (*Allen v. McGee, supra.*)

The officer sometimes has more than one writ to levy on the same property. If he sells under a *junior* execution, the property remains subject to prior liens. If, however, he sells under a *prior* execution,

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JOHN D. DETERMAN
C. GRAHAM TEBBE, JR.
ALAN BESAN
ELI CHERNOW
JOSEPH D. MANDEL

EXHIBIT III

TUTTLE & TAYLOR
INCORPORATED
ATTORNEYS AT LAW

THOMAS A. REYNOLDS
OF COUNSEL
ANTHONY J. VAN PATTEN
OF COUNSEL

PATRICK L. SHREVE
RAYMOND C. FISHER
C. STEPHEN HOWARD
N. HUNT DALLAS
MARK SCHAFFER
MICHAEL GLAZER
THOMAS C. ARMITAGE
ALAN E. FRIEDMAN

609 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90017
(213) 688-4500

December 22, 1971

Mr. Jack Horton
California Law Revision Committee
Stanford Law School
Stanford, California 94305

Re: Legislative Revision of California
Code of Civil Procedure Sections
537 et seq.

Dear Mr. Horton:

Earlier this fall, you and I had a phone conversation concerning a problem in connection with the legislative revision of California Code of Civil Procedure Sections 537 et seq. in the wake of the California Supreme Court's decision in Randone v. Appellate Department, 5 Cal. 3d 536 (1971). At your suggestion, I am setting forth my concern to you in this letter as a reminder. Also at your suggestion, I am sending copies of this letter to Professors Risenfeld and Warren.

Under C.C.P. §542(2) plaintiff may attach real property standing of record in the name of someone not involved in the lawsuit if plaintiff believes that the true beneficial owner of the property is the defendant in the lawsuit. Plaintiff is not required to allege the basis of his belief that the defendant owns the property either in the papers filed to secure the attachment or in his complaint in the main action.

Although attachments of this kind purport to reach only the interest of the defendant in the property, the practical effect of such an attachment is to totally cloud the title to the property of the record owner. No matter how strong the record owner's claim may be that he himself is the owner of the property, no title insurance company will issue a policy to a potential buyer without making an exception for the attachment. In turn, it is rare that a buyer will purchase the property with such an exception in his title policy. It is thus possible for an unscrupulous plaintiff to tie up the real property of someone not even involved in the action as a device to bring

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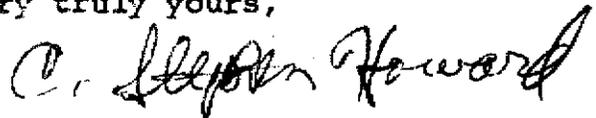
Mr. Jack Horton
December 22, 1971
page two

additional pressure upon the defendant to settle the lawsuit.

Under existing law the third party is helpless to obtain a prompt judicial hearing on his right to have his property free of the attachment. Where this kind of attachment occurs with respect to personal property, C.C.P. §689, governing third party claims, provides methods whereby the third party may obtain a prompt hearing for purposes of determining the real ownership of the property in question. However, C.C.P. §689 does not, by its own terms, apply to real property. Presumably, the legislature believed that an attachment of one's real property did not deprive him of use of such property in as severe a manner as the attachment of one's personal property. (However valid this rationale may be in the general case, it definitely does not apply where the owner of the real property wishes to sell his property to raise cash or for some other purpose.) The third party's only remedy under existing law is to intervene in the action, sue for wrongful attachment, and wait two or three years to get to trial. Meanwhile his property is completely tied up.

If the Legislature is revising C.C.P. Sections 537 et seq. to provide for prompt hearings in connection with attachments, one of the questions which the Legislature will have to decide is what issues should be determined upon the hearing. I would assume that such things as the probable merits of the plaintiff's claim and the likelihood that defendant would conceal or dissipate its assets would be appropriate subjects for determination at such hearings. This letter is to suggest that in the event of an attachment of property (real or personal) standing in the name of a third party, one of the issues which should be determined in the hearing is the true ownership of such property. That is, if a plaintiff is going to tie up the property of someone who is not even a party to the lawsuit, he should be put to the burden of proving in a hearing, by preponderance of the evidence, that the property is not in fact owned by such third party but actually owned by the defendant. Unless the plaintiff is put to such burden, he can, if he is unscrupulous, tie up the property of an innocent third party and bring improper pressure upon the defendant without ever having to be put to any judicial test of the propriety of his actions.

Very truly yours,



C. Stephen Howard

CSH:bl

cc: Professor Stefan A. Risenfeld
Professor William Warren