

## **6-19/210.00 Seizure Levies in General**

Unless another method of levy is provided, to attach tangible property in the possession of the defendant the sheriff shall take it into custody. The sheriff can only seize property from the possession or control of the defendant. Seizure from the possession of a third party requires a writ of mandate.

The levying officer is not liable for damage to levied property unless the officer is negligent. The plaintiff must deposit costs for taking property into custody prior to levy. If additional fees are required to maintain the levy, the plaintiff must be given three business days notice. If the fees are not received timely, the levying officer shall release the property. (See 6-19/182.00 Fee Deposit)

If a keeper is installed at a going business, only cash proceeds and inventory (not the equipment) are under levy. The keeper must remain installed for two days, if the business is an artificial person defendant, or ten days, if the defendant is a natural person and the writ was issued ex parte. If the defendant objects to the keeper, the property must be taken into the exclusive custody of the levying officer. The property must be removed to safekeeping at the expiration of the keeper installation period. The keeper may remain beyond the maximum time period if both parties agree. A keeper may be installed to levy on cash proceeds only. In the case of a cash only keeper installation, the above time limits and the right to object to the keeper are inapplicable. The levying officer acquires a possessory lien on levied property. The levying officer takes property into custody by: (1) removing the property to a place of safekeeping, (2) installing a keeper, or (3) otherwise obtaining possession and control of the property.

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### **• 6-19/210.10 Taking Property Into Custody**

When the method requires or otherwise directed to take property into custody, the levying officer may do so by removing the property to a safe place, installing a keeper, or otherwise obtaining possession or control of the property. (CCP 488.090)

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### **• 6-19/210.20 Possession of Third Party**

Where the property is in the defendant's possession, and the defendant is present, the property should normally be seized, even though a third party is present and claiming title or right to possession. In this case, the officer is taking the property from the defendant, and the third party has the right to file a third party claim. It is not the officer's duty to decide the case in field. There may be situations where the levying deputy is convinced that the property is in the actual possession of a third party and not in the possession of the defendant, even though the defendant is physically present. In such a case, the deputy should not seize the property. Several California decisions, while not directly on point, indicate that the protection given an officer by requiring a third party claim does not apply when the officer or any other party goes out and takes possession of property not found in the

possession of the defendant. (Henrique v. Bank of Cottonwood, 97 CA 725) An officer has no authority to seize property in the hands of a third person; a garnishment is the only lawful method.

If plaintiff's attorney demands a levy of property in the possession of a third person be made by seizing the property, the officer should refuse such demand and direct the attorney to secure a writ of mandate or other court order directing the officer to seize the property from the third person's possession.

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## • 6-19/210.30 Joint Tenancy

In levying on the defendant's interest in personal property held in tenancy in common or joint tenancy by the defendant and another, the levying officer shall seize the whole, if the property be in the defendant's possession. The officer has no authority to partition the property; however, the officer may sell only the defendant's interest in the whole of the property. (Fonda v. Fidelity & Deposit Company, 40 CA APP 2<sup>nd</sup> 830- refers to Veach v. Adams, 51 CA 609 (1877); Conolley v. Power, 70 CA 70 (1924))

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## • 6-19/210.40 Liability of Levying Officer

The levying officer is not liable for neglect or misconduct if is directed by written and signed instructions from an attorney of record unless he has actual knowledge the information is incorrect or negligent in the care or handling of the property. (CCP 262, 488.140)

- **6-19/210.50 Inventory of Property**

In an attachment levy, CCP 488.130 requires the levying officer to make a full inventory of property attached and return the inventory with the writ. If a keeper is installed, the keeper shall immediately commence to take an inventory of all personal property subject to the levy. The inventory should be in detail as to such items as fixtures, furniture, equipment, and machinery, and may be general as to items such as stock in trade, supplies and manufactured products. If property is to be moved to storage or sold, a detailed inventory will be required of all items included. The inventory should be taken in triplicate, one copy for the plaintiff, one copy for the levying officer's file, and the original to be returned to court with the writ.

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- **6-19/210.60 Lien of Levying Officer**

The levying officer has a special lien, dependent upon possession, on personal property levied upon in the amount of the levying officer's costs for which an advance has not been made. (CCP 488.100)

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- **6-19/210.70 Private Place**

If the personal property sought to be seized is located in a private place of the defendant, the levying officer making the levy shall demand delivery of the property by the defendant and shall advise such person of potential liability for additional costs and attorney's fees that may be incurred in further proceedings to obtain delivery of the property. If the defendant does not deliver the property, the levying officer shall promptly notify the plaintiff of the failure to obtain custody of the property and shall make no further attempt to obtain custody of the property until a court order is delivered to the officer which states that there is probable cause to believe that the specific property sought to be levied upon is in a specific location described in the order. Upon receipt of the court order, the levying officer making the levy shall go to the location, announce the officer's identity, purpose, and authority pursuant to the order, and demand delivery of the property. If the property is not voluntarily delivered, the levying officer may cause the building or enclosure where the property is believed to be located to be broken open in such manner as the levying officer reasonably believes will cause the least damage, but if the officer reasonably believes that entry and seizure of the property will involve a substantial risk of serious injury to anyone, the officer shall not enter the location and shall promptly make a return to the court stating the reasons for believing that the risk exists. In such a case, the court shall make such orders as may be appropriate. (CCP 488.070, 699.030)

The provisions requiring a court order based on probable cause prior to levying on property in a private place should be complied with prior to levying on personal property physically on the person or held in the hands of a defendant.

Unless consent is freely, voluntarily and knowledgeably given, the levying officer is not authorized to enter any private place to seize property unless in possession of a writ or other order of court directing the officer to enter that specific private place.

Fourth Amendment protections against unreasonable searches and seizures extend to civil as well

as criminal matters. Intrusions into private places in execution of process are searches and seizures within meaning of Fourth Amendment, and a search is unreasonable unless supported by a warrant (order) issued by a magistrate upon a showing of probable cause. Where government officials rely on consent to justify the lawfulness of a search, the burden is on them to show by clear and positive evidence that consent was freely, voluntarily and knowledgeably given. The occupant of the premises is confronted not only by the intimidating presence of an officer of law, but also by the existence of legal process which appears to justify the intrusion. In such a situation, acquiescence in the intrusion generally cannot operate as a voluntary waiver of Fourth Amendment rights. Although it is established that one may waive the Fourth Amendment right to be free from unreasonable searches and seizures, the courts indulge every reasonable presumption against waiver of fundamental constitutional rights. Invitations to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. (Blair v. Pitchess, 5 Cal.3d 258)

The preceding paragraphs set forth objective standards to be followed by the levying officer in executing the officer's ministerial duties. These objective standards, however, are based upon the levying officer having knowledge of whether the property is located in a "private place," as such term is used in connection with the Fourth Amendment proscription against unreasonable searches and seizures. In this context the law, through the doctrine of stare decisis or case law, is continually changing. The situation is exacerbated by the fact that, although the courts look to objective factors to decide if the defendant exhibited an expectation of privacy in order to make a specific location a "private place," it is the defendant's subjective intent as demonstrated by these objective factors that are controlling. The following cases offer some insight into the uncertainty of what may or may not be found to be a "private place." In each and every case some independent judgment will be required based on the specific facts and circumstances. Each levy situation should be approached from the standpoint that if it is unclear whether the location is a "private place," the actions to be taken should be consistent with those that would be authorized if the location were a "private place."

Homes, offices and hotel rooms fall within the category of maximum protection from unreasonable searches. Certain places carry with them expectation of privacy which, although considerable, is less intense and insistent than in the case of homes, offices and hotel rooms; such places may be searched upon probable cause alone under circumstances of less demanding urgency, and include automobiles, and trunks consigned to common carrier. Some sites are regarded as so public in nature that searches are justifiable without any particular showing of cause or exigency, and include places which might be classified as open fields and places in which the defendant has not exhibited a subjective expectation of privacy or where such an expectation would be unreasonable. (People v. Dumas, 9 CA 3d 871)

A resident of a house may justifiably rely upon privacy of surrounding areas as protection from peering of officers, unless the resident is exposed to that intrusion by existence of public pathways or other invitations to the public to enter upon the property. (Lorenzana v. Superior Court, 9 CA 3d 626)

A fenced front yard does not necessarily show an expectation of privacy. The determining factor in considering whether an individual's yard is protected by the Fourth Amendment is what reasonable expectation of privacy was exhibited, not what the defendant subjectively claimed. There is no reasonable expectation of privacy in a front yard of a residence in the absence of a locked gate, high solid fence blocking the front yard from view, a written notice to keep out or beware of a dog, or perhaps a doorbell at the front gate. (People v. Mendoza, Super., 122 CA 3d Supp. 12)

In *People v. Moreno* (204 CA Rptr. 17), the court held that an attached garage, whether or not it has a common entry, is considered an integral part of the house and is simply one room of several which together compose the dwelling. Consequently, attached garages may not be entered to make a levy or for any other purpose unless the deputy has first obtained the occupant's consent or is in possession of a court order authorizing entry into the specified garage.

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