#39.70 9/28/73

Memorandum 73-83

Subject: Study 39.70 - Prejudgment Attachment

Attached to this memorandum are copies of the comments received to date regarding the tentative prejudgment attachment recommendation. Mr. Harold Marsh has advised us that he has been retained to review the recommendation and that he will attempt to send his comments to each of the Commissioners individually prior to the October meeting. Although the "deadline" for comments has passed, we anticipate that others will also be responding to the recommendation in the next few months, and we will supplement this memorandum as the need arises. See Exhibit V. The very limited response we have received so far offers little indication of either general approval or rejection. However, we do especially urge you to read the first twelve pages of Exhibit I (a letter from Paul L. Freese of Kindel & Anderson, an attorney) which contains a very thoughtful plea for a more comprehensive revision of provisional remedies generally--a suggestion which echoes that previously made by the special committee of the State Bar. See also Exhibit VI. Inasmuch as the issue has been raised and discussed previously, we will not belabor it here. We do, however, believe that it merits your careful consideration. The remainder of the comments can be reviewed in the context of a specific section(s), and there follows a section-by-section analysis of these comments.

Analysis

Definitions. There were no specific comments regarding the existing definitions. However, Exhibit I, page 21, comment 6 indicates that we may have created some confusion when we define "security" (Section 481.210) and

"security agreement" (Section 481.220) but then use, without defining, the term "security interest" in Section 483.010 (top page 562). This point will be discussed in more detail below in connection with Section 483.010, but we merely note here that it may be desirable to add a definition of "security interest" at this point in the recommendation.

Section 482.040. Exhibit I, pages 21-22, comment 7 makes several comments regarding this section. The writer implies that it would be desirable to make clear that "the provisions of Code of Civil Procedure Section 2015.5 apply to make declarations under penalty of perjury acceptable substitutes for affidavits." We do not really believe that clarification is necessary, but the point has been raised before--people seem to be disturbed by the word "affidavit"--hence, we suggest adding the following cross-reference after the third sentence of the Comment to Section 482.040: "See also Section 2015.5 (use of declaration under penalty of perjury)."

The Comment to Section 482.040 already states that a verified complaint that satisfies the requirements of this section may be used in lieu of or in addition to an affidavit. The claim and delivery statute had a similar statement in the Comment to Section 516.030 which we were urged, when the bill was before the Legislature, to place in the statute itself. We complied with the request there and should perhaps conform Section 482.040 in the same way. What is the Commission's desire?

Exhibit I also suggests that Section 482.040 is too restrictive and that greater latitude should be permitted concerning conclusory statements. Given the potential impact of an attachment upon the defendant, we do not think too much is required by Section 482.040, but we present the issue for your consideration.

Section 482.060. Exhibit IV asks that the Commission reconsider as a matter of policy its decision to authorize court commissioners to perform the

judicial duties performed under the attachment law. The State Bar Committee raised the same objection earlier in connection with both this recommendation and the claim and delivery statute to no avail. The staff has nothing new to offer here but presents the issue for your consideration.

Section 482.070. Without referring to this section specifically, both Exhibit I, page 23, comment 11 and Exhibit II urge that inexpensive and simple methods of service be authorized by the attachment law. Where the person to be served has appeared in the action, we do not believe there is any complaint with the mail service authorized by Section 1010 et seq. Where the person has not appeared, we do not believe that the methods required for the service of summons are too onerous or difficult to be complied with. Moreover, we note that generally service is required only upon (1) a person in possession of property--in which case personal service would seem to be relatively easy to accomplish as well as desirable as a matter of policy--or (2) the defendant. Where the defendant has appeared in the action, service will be simple to effect; where he has not appeared, e.g., where a writ is issued ex parte, we think service should be accomplished in a manner likely to insure actual notice of the levy and the action generally. We note that the sheriffs raised similar questions regarding service under the claim and delivery statute, but a provision identical to Section 482.070 was approved by the Legislature. In short, the staff recommends no change in Section 482.070.

Section 483.010. A variety of issues are raised with respect to this section. Exhibit III (Credit Managers Associations) asks that the aggregation of claims be permitted and that the total sum claimed be reduced to $250. The staff believes that $500 is a satisfactory minimum; indeed, if anything, it might be too low. However, present Section 537.1 permits claims to be

aggregated as apparently did the pre-1972 law. Exhibit III makes the point that to prohibit aggregation has some tendency to promote a multiplicity of actions. The staff accordingly would have no objection to preserving the existing law permitting aggregation. What is the Commission's desire?

Exhibit I, pages 13-14, urges in essence that the words "and arising out of the conduct by the defendant of a trade, business, or profession" be deleted from the first sentence of Section 483.010. It is argued that the $500-limit and the property exemptions provide sufficient protection for consumers and that civil litigators generally need this provisional remedy. The State Bar Committee made a similar pitch although their suggestion would have incorporated a $10,000-minimum in actions generally. The staff does not believe that attachment should be available as a matter of right in contract actions generally. Moreover, we are persuaded that it be impractical to authorize such relief in the court's discretion. We believe that either discretion would not be exercised in a meaningful way or the court would be overburdened by the task of careful review and judicious decision. In short, we are not really happy with what we have, and we are sympathetic with the commentator's position; however, we believe that the solution suggested would be a change for the worse, and we have no better solution to offer.

Exhibit I, pages 15 and 21, comment 6 suggests that we reexamine both the wording and the policy behind the third sentence of subdivision (a) of Section 483.010 which provides:

> The contract upon which the claim is based shall not be secured by a security interest upon real or personal property or, if originally so secured, such security interest shall have become valueless without act of the plaintiff.

You will note that we use the term "security interest." This was picked up from present Section 537.1. However, this may work an inadvertent change

in the pre-1972 law and may also create some ambiguities. The pre-1972 law referred to "any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property." As noted in Exhibit I, under prior law, reservation of title was not considered a lien and, hence, was not a bar to attachment. Under Commercial Code Section 2401, "any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." However, the rights and remedies afforded a seller by the Commercial Code are generally not dependent upon title. See Com. Code § 2401. Moreover, the security interest obtained by reservation of title alone is generally valueless; hence, as a practical matter, it seems that reservation of title would not often be a bar to attachment in any event. In short, Exhibit I merely notes the possible change but does not seem to be critical of the change, and we do not think there is a significant practical change. Perhaps a greater problem is whether "security interest" refers to certain statutory and common law liens. Under pre-1972 law, such liens were a bar to attachment. See McCall v. Superior Court, 1 Cal.2d 527 (1934). See also Civil Code § 3152 (page 548)(special exception for mechanic's liens). Here again, we do not believe the change is of much practical significance. Assuming that statutory liens would no longer be a bar to attachment, so what? We do not think that plaintiffs generally will seek attachment without a need therefor, and the liability for wrongful attachment should discourage those tempted to attach without such need.

The last point made by Exhibit I with respect to the security provision is that "if a claimant has inadequate security the court should, within discretionary boundaries, be free to fashion additional provisional protection." In short, the court should examine the entire situation and be authorized to fashion appropriate relief based on the plaintiff's need and the impact on the

defendant. This is appealing in theory, but similar approaches have been rejected because of the burden on the courts that such an approach would entail. The Commission has turned instead to more certain, less flexible standards here and elsewhere.

Chapter 6 (Section 486.010 et seq.). Exhibit I, page 16, comment 1 questions whether it is desirable to add "a new and relatively untried mechanism where it seems an innovation is not necessary." It is suggested that the general procedure for securing a temporary restraining order could be revised to do all that is necessary. The staff disagrees. We believe that Chapter 6 duplicates very little of what is in the chapter dealing with injunctions generally and that the special provisions of Chapter 6 are necessary and conveniently located.

Section 486.090. Exhibit I, pages 16-17, comment 2 critizes the 40-day maximum time limit on the temporary protective order. Section 486.100 provides for the modification or vacation of an order on the defendant's application, and Section 486.110 states that the lien created by service of the order is not valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business. See also Section 489.320 (defendant's undertaking to secure termination of protective order). Hence, it could be argued that greater flexibility should be permitted, e.g., subdivision (a) could be revised to provide for expiration on whatever date is specified by the court in the order. This in essence is what the State Bar Committee suggested earlier. What is the Commission's desire?

Section 487.010. Exhibit III, pages 2-3, comment III urges that we not restrict attachment to "business" property. The point is made that credit is granted "to an individual in business . . . usually [as] the result of an analysis of his total net worth"; hence, all nonexempt property should be

subject to attachment. On the same reasoning, it is also urged that a plaintiff suing a partnership be permitted to attach the nonexempt personal assets of the individual partners as well as partnership property. It could also be argued that difficult factual questions can arise where property is transferred out of the business and into personal assets. Again, the staff is sympathetic to the position of the commentator, but we point out that, if we make all property subject to attachment and then require the defendant to claim any exemptions, we run directly counter to Randone. One partial solution might be to have two classes of property: one subject to ex parte attachment, the other subject to attachment after opportunity for a hearing. The first class could be very narrow thereby excluding necessities. The second could be very broad if the defendant was always permitted to claim any exemption in advance of levy. Unfortunately, we believe, such a scheme would not be easy to draft and might greatly increase the number of hearings required. In short, the disadvantages could easily outweigh the advantages.

Section 488.010. Exhibit I, pages 17-19, comment 3 objects to the basic procedure which makes the issue of what property may be attached subject to prior judicial review. It is suggested that the general right to attachment be declared after the preliminary hearing and then, as under prior law, the plaintiff can locate and levy upon whatever assets he can find. At the preliminary hearing, the court could proscribe attachment of specified property (necessities). In essence, it is suggested that the court determine not what property can be levied upon but what property cannot be levied upon. The staff does not see this as an improvement. We think it would cause an increase in contested hearings to the advantage of no one. We believe that the basic procedure with a protective order to prevent prehearing transfers is adequate. The Commission might, however, consider adding a provision

comparable to Section 512.070 to the claim and delivery statute which authorizes issuance of a turnover order. Such an order seems to be within the inherent powers of the court, but clarification might be helpful. Also, we believe that a clarifying revision in several sections are needed (see First Supplement to Memorandum 73-83).

Chapter 8 (Section 488.010 et seq.). Exhibit II (sheriff's association) contains a number of comments relating to the method of levy. These were written based on an analysis of Assembly Bill 998 (the bill we introduced in 1973 incorporating the statute contained in the tentative recommendation). Apparently, because our explanatory Comments to the sections were not available to the sheriffs, some errors were made in interpreting the effect of certain sections. Accordingly, we discuss below only those sections which we believe were properly interpreted.

Section 488.310. Exhibit II asks how will the recorder know whether real property is standing in the name of a third person. Present law (Section 542(2)) requires the notice of attachment to name such third persons. The staff suggests that Section 488.010 be revised to include a similar requirement, i.e., where real property stands in the name of a third person, either alone or together with the defendant, that such third person be identified in the writ of attachment.

In subdivision (d), we require service on an occupant 10 days after the date of recording. The sheriffs correctly point out that the present law allows 15 days. We think 10 days is ample time, but the change, we think, was inadvertent and, accordingly, we suggest returning to 15 days.

Section 488.350. The sheriffs suggest that the Department of Motor Vehicles should not permit transfers until an attachment levy is released. We purposely did not give the DMV such enforcement duties, and subdivision (d) permits the

bona fide purchaser to acquire free of the attachment levy. We have not yet heard from the DMV, but we suspect that the sheriffs' suggestion would not be acceptable to them.

Section 488.360. The sheriffs ask that sales by the keeper be limited to cash sales. We do not understand why the keeper could not collect on credit card transactions with relative ease. If there is a real problem, we would be sympathetic to the sheriffs' position; however, at this point, we are not inclined to change this provision without further explanation of why there is a problem.

Section 488.370. The sheriffs state here that, because they are required to serve persons identified by the account debtor or insurer as an obligee, they may be exposed to liability for such action (or inaction). No change is suggested, and the staff is not sure what the point of this comment is. We would have no objection to providing that such obligees must be identified by the account debtor in writing and that the levying officer is not liable for making service pursuant to this section, but we do not know if that is even what is wanted by the sheriffs.

Wrongful attachment. Exhibit I, pages 19-20, comment 4 contains some general observations on liability for wrongful attachment; however, no changes are suggested. Exhibit IV, comment 4 objects to the motion procedure provided by Section 490.030 for determining liability for wrongful attachment. Adoption of this procedure was based in part on the reasons given in the law review article attached as Exhibit VIII. The staff merely notes that this procedure is the same as that provided by Section 1058a for recovery on undertakings generally. We did not see how the liability of the surety can be fixed independently of his principle, and we believe that the procedures provided

by Section 1058a (which include time for discovery and trial of issues) are adequate for this purpose.

Finally, Exhibit V from the Franchise Tax Board asks that the provisions for wrongful attachment be resolved with Government Code Section 860.2 which grants immunity for instituting an action to collect a tax.

> 860.2. Neither a public entity nor a public employee is liable for an injury caused by:
>
> (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax.

The staff does not believe that there is necessarily a conflict between these provisions. The immunity for discretionary acts could be limited to institution of suit. Use of the provisional remedy could be at the agencies peril. However, we suspect that implicit in the board's comment is a suggestion that they not be liable for wrongful attachment in any circumstances. What action does the Commission wish to take in this regard?

Chapter 12 (Section 492.010 et seq.). Exhibit I, pages 21-22, comment 5 questions the need for any provisions relating to nonresident attachment. The staff, you will recall, concurs in these views, but the matter has been discussed at length, nothing new is presented, and we accordingly suggest no changes be made at this point.

As noted above, this memorandum deals only with the comments received to date. More are expected and, accordingly, we make no general recommendation for further Commission action.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

Memorandum 73-83 EXHIBIT I

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REFER TO FILE NO.

September 20, 1973

California Law Revision Commission
School of Law
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Gentlemen:

I am pleased to respond to your invitation to comment on the "Tentative Recommendations Relating to Prejudgment Attachment." Unfortunately, because of regular professional demands, part-time status as a member of a local law school faculty and other commitments, the time wanted for study and comment has been unavailable and frequently the quality of this critique will probably be less than that which is worthy of your regard.

However, I consider your endeavors very important and hope that even a crude and diffuse statement may have some value to your sincere efforts to improve the law and method of law.

My commentary concerning the proposed legislation will be in three parts. First, I will urge for your consideration the desirability of a much broader revision of the procedure concerning provisional remedies and interim protection of litigants to include attachment or garnishment as just one of several remedies or protective measures to be granted or denied through a preliminary hearing specially fashioned for this purpose. Generally, the suggested model of due process is the preliminary injunction procedure of Code of Civil Procedure Section 527 which has maturity and validity as an acceptable and usable legal method suitable for the more urgent needs of litigants.

In the second part, I will assume that your current revision of law must be confined to attachment and garnishment procedures. In this section I will urge the Commission to be sure that the remedy will be available to protect claimants who have been unlawfully deprived of money, property or value and who need a provisional remedy to guard against unjust enrichment; that the range of enfranchised creditors be definitely broader than those dealing with a trade or business entity. Finally, in a third part, I will offer a commentary on specific terms and features of the proposed revision as set forth in the Commission's Tentative Recommendations.

PART I

THE NEED FOR A GENERAL PRELIMINARY HEARING PROCEDURE DESIGNED TO PROVIDE PROVISIONAL RELIEF OR PROTECTION PENDING THE TRIAL AND FINAL JUDGMENT IN A CIVIL CASE.

A. INTRODUCTORY COMMENTS.

The full sweep of the Sniadach decision on provisional remedies and similar protective features previously granted by statute to secure the ultimate rights of litigants and efficacy of adjudication has not yet been measured. Many types of provisional relief have already been found constitutionally defective and forms of self-help previously legitimatized by statute may be invalid. In addition to prejudgment replevin and attachment, the remedy of civil arrest, the preliminary writ of possession in unlawful detainer cases, the lis pendens procedure,* the stop notice and various statutory liens** have been either invalidated in certain statutory formats or placed

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* Judge Rittenband of the Los Angeles Superior Court in Santa Monica reportedly has held the lis pendens procedure unconstitutional. See, contra, Empfield v. Superior Court, 33 Cal. App. 3d 105 (1973).

** Reportedly, a recent law review article takes the position that nonjudicial foreclosures should be subject to the same restrictions of due process as provisional remedies. See "California's Nonjudicial Foreclosure Notice Requirements and 'The Sniadach Progeny';

in the shadow of questionable validity. (See, e.g., Miller, Validity of the Stop Notice as a Summary Remedy, 48 Calif. State Bar J. 44 (January-February 1973). There is a much broader legislative reform task, therefore, in prospect.

While past legislative methods may properly be criticized by reference to due process standards and the common belief that property or other rights or positions should not be altered without notice and an opportunity to be heard, the many legislative provisions for interim relief developed over many decades reflect human experience of a recurring nature calling persuasively for adequate interim protection of the general subject matter of a civil suit or of the litigant's ability to obtain an actual remedy after the trial court and perhaps appellate court proceedings have been exhausted. The special rights and problems of the commercial collection agency and the consumer-debtor's plight may have been given insufficient attention by previous legislators. But balancing the rights of such litigants should not cause overreaction and inadvertent displacement of other parties' procedural protection. Reform should serve the total class of potential litigants. Indeed, the commercial creditor who has the power to contract for security rights may be the least deserving of litigants asking for provisional protection. And, as the Commission's recommendations implicitly recognize, the oppressed consumer can be specially assisted by improved exemption laws, exclusion of the small claims action and other more substantive and direct means of protection.

The desirability of interim or provisional forms of relief or protection for all valid claimants having substantial economic interests at stake is more compelling in our current circumstances of congested court administration and of many tribunals applying diverse and proliferated civil procedure. These circumstances have engendered uncertainty, expense and other tensions that should and can be relieved significantly if a just, speedy and inexpensive method of interim protection is designed.

An Evaluation," 9 California Western L. Rev., Vol. 9, p. 290 (Winter 1973). Statutory lien rights are definitely under attack. See, e.g., Kruger v. Wells Fargo Bank, 31 Cal. App. 3d 202 (1973), and recent cases, out of state, noted at 42 Law Week 2006.

Although presiding judges in various counties may quarrel with any specific time estimate and are doing their best to eliminate the problems of court congestion, there is a general consensus of opinion among lawyers that the time interval between the preparation of a complaint and the actual hearing on the merits of the complaint is much too long and commonly is more than two or three years. As nearly any defense attorney will acknowledge, delay is an effective enemy of a meritorious position. Frequent lack of procedural competence on the part of plaintiff's counsel and the multifarious dilatory devices available to unscrupulous defense counsel are increasing factors adding to the problem. From a point of view of public reaction, the more meritorious the claim, the more obnoxious become procedures which promote delay and expense.* With current discovery and other overlapping pretrial procedures, more and more meritorious claims are refused representation by counsel because of the economic aspects of litigation and the inability to project a net benefit. In the criminal sector, public tolerance for procedural refinement, expense and delay is appropriate to the interests of life and liberty involved. Moreover, the government attorney has investigative resources and evidently less budgetary concerns giving him more staying power than the private attorney. But the civil suit typically does not entail more than the question of which one of two private parties has an economic entitlement. The private claimant bears individually the expensive burden of prosecution. The liable but sophisticated defendant may succeed in taking property by "due process". True, in some instances the civil controversy will involve or affect necessaries. Certainly, both procedural and substantive laws must be designed to protect citizens against the economic oppression of seizure process especially if economic vulnerability may be exploited to reduce or eliminate legitimate claims or defenses. However, the reformative goal ought to be accomplished within a comprehensive approach that protects such interests without complicating excessively the rights of others who are vulnerable to different methods of the unscrupulous and insensitive and who may become contemptuous of general legal inadequacies.

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* The judiciary joins many frustrated attorneys in crying out in the wilderness. Note the recent expression of disgust by Justice Otto M. Kaus in Ernest W. Hahn, Inc. v. North-CET Corporation, 2nd Civ. No. 40,739 (filed September 5, 1973), reported in the Metropolitan News (Los Angeles), September 19, 1973.

Consider, for instance, the "creditor" aggrieved by the conduct of a fraudulent person. A stock promoter secures money for worthless stock; a real estate developer misleads an investor and secures funds; a treasurer of a company embezzles receipts and is squandering the money at Las Vegas or the race track; a confidence man, under pretense of religious, political or other civic activities, solicits and obtains large sums from the senile or gullible; the representatives of organized crime secure management of a company and proceed to loot it by methods which are not quite clear enough for criminal prosecution, but constitute unmistakeable civil fraud; an entrepreneur sets up an impressive but temporary appearance of credit to set the stage for securing delivery of large orders of valuable merchandise with the intention of not paying and of going through bankruptcy after a fire sale of the merchandise. These and many other actual situations illustrate cases in which there is no merit to any defense and where the need for inexpensive and prompt provisional protection may be vital. These cases also will more likely involve the unscrupulous defense practitioner or party in propria persona who prey on the other weaknesses of our procedures, indulging in dilatory demurrers, sham answers, unnecessary interrogatory practice, sham third party cross-complaints, spurious opposition to summary judgment motions, trial continuances and other abuses destructive of basic judicial effectiveness. The existence of hypertechnical pleading and evidentiary showings plays into their hands. It often is easy to identify the "crook" but it is another, expensive proposition to secure affidavits conforming to Code of Civil Procedure Section 437c without discovery. By the time that plaintiff secures discovery, it may be too late to obtain effective provisional protection.

Moreover, in the more conventional creditor or contract relations, there are many claimants who need the protection of a stop notice, a lis pendens or other protective measures because of the delays, costs and risks of our system. Unless the defendant is an insurance company or other large corporation, there is often a serious risk that the defendant will go bankrupt or leave the jurisdiction with his assets. Also, unless discouraged by attachment risks, the commercial debtor knows that a spurious answer to legitimate claims can provide him with two or three years of judicially provided credit at seven percent which may, simply by reference to current interest rates, be an attractive matter.

The increasing unavailability of counsel because of procedural fees and expenses is a factor that ought to be prominent in shaping provisional as well as ultimate remedies and procedure in general. At the risk of belaboring the obvious, let me urge that you assess the problem of "bailiwick" or provincial procedures as an increasingly acute cause of concern for the general lawyer. Variations in basic procedures are costly and discouraging.* There has been a tendency to fashion different detailed methods for each tribunal, judicial or quasi-judicial, and for each remedy established or revised by the legislature. Cumulatively, the impact on the competence of lawyers, secretaries and other administrative agencies of the law is reaching a crisis stage. The general lawyer sorely needs some simplicity and uniformity in matters of basic judicial method to offset the demands for attention to substantive or more significant procedural changes. Stated otherwise, the level of general competence of attorneys is being reduced by the absence of standard procedural yardsticks. It is as basic a problem for efficiency as the absence of a system of weights and measures.

As a simple illustration, I would wager a large sum that probably not one in a hundred lawyers can, at a reasonable cost or for a reasonable fee, cause a valid subpoena duces tecum to issue and be served on a California resident calling for the production of a material document at more than two of the following tribunals:

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* Variations in basic mechanical procedures concerning preliminary petitions and motion practice such as service requirements, time required for notice, time for filing affidavits and points and authorities, agencies involved (sheriff or clerk), and other variables invite confusion and cause considerable expense because of the extensive learning process involved. To the extent basic mechanical procedures can be made uniform, the general system is better served and the attorney, in particular, can make paralegal delegations and spend more time in analyzing the merits of a position. Increasingly because of the variable detail of procedure, the attorney must spend inordinate amounts of time supervising administrative matters and personnel and reviewing procedural manuals, court rules and procedural code sections, with little time left within any budget for more significant research and advocacy work.

Los Angeles Superior Court, W.C.A.B., U. S. Tax Court, State Board of Accountancy, N.L.R.B., U. S. District Court In Los Angeles. Most general attorneys who hope to serve clients before many tribunals within a reasonable fee structure will not know offhand the notice requirements for a motion for summary judgment (Code of Civil Procedure § 437c), a motion to determine class questions in Los Angeles (Class Action Manual), or a motion to dismiss for lack of prosecution under the two-year rule (Judicial Council Rules, Rule 203.5). Yet, these notice questions should be ABC type problems especially when posed only with respect to just one bailiwick of justice, namely, the Los Angeles Superior Court.

The diversity of basic method and showing cannot be explained in terms of the complexity of the issues or the gravity of the result. (Compare, for example, summary judgment with dismissals for lack of prosecution.) There is validity in the criticism that procedural reform is "knee jerk", "ad hoc" and shaped too often without awareness of the growing and massive diversity of bureaucratic, briar patch detail that is being generated by piecemeal attention.

The foregoing is a discursive but perhaps necessary preface to the request that the Commission give more weight to the more common interests of justice by procedural reform that is addressed, in this instance, to the general range of provisional remedies. It is prompted by the neutral desire for a just, speedy and inexpensive method of adjudicating availability and scope questions for all litigants who have probable rights and who may suffer significant loss of property, contract or other economic benefits if not assured and protected in their belief that the attritional effects of our pretrial and trial procedures will be worth enduring because eventually there will be an effective final judgment.

The following discussion will outline technical recommendations prompted by the general concerns already mentioned.

B. GENERAL FEATURES OF A PRELIMINARY HEARING CONCERNING PROVISIONAL REMEDIES.

Repossession, lis pendens, stop notices, statutory liens and attachment and garnishment as well as preliminary injunction procedures and receivers serve a common need and ought to be generally allowed or denied by general methods of application and proof. The particular remedy, if allowable at all, and the bonding requirements or other protective conditions require variable treatment which can be tailored by a court after the parties have shown their infinitely variable circumstances and needs. Thus the unimproved lot, title to which was conveyed in a transaction which should be rescinded, may be protected by a simple lis pendens. If the lot is improved with a motel, for instance, having valuable moveable fixtures or personal property, an injunction against transfer or perhaps a receiver may be appropriate; if the legal problem involves recovery or protection of personal property, then a writ of possession may be appropriate; if there is a general claim of indebtedness, then the writ of attachment or garnishment may be suitable; if it appears that the defendant has money or valuable negotiable instruments on his person or within the privacy of his home, or has deposited funds outside the state, then the writ of attachment or garnishment may need further implementation through a specific turnover order. In all instances, the temporary restraining order should be available according to standards of proof and procedure already existing under Code of Civil Procedure Section 527.

The following is an outline of the basic structure of a "provisional remedy procedure" designed to introduce uniformity of basic judicial method within a flexible framework. While the special problems of all the remedies have not been assessed fully, it seems likely that at least some of the following can be incorporated into a common preliminary hearing procedure: receivers, claim and delivery, attachment, lis pendens, enforcement of statutory liens, stop notices, turnover orders.

1. Notice Mechanism. Notice of motion or Order to Show Cause;

2. Amount of Notice. The ordinary 10 days if by a notice of motion (CCP § 1005), or less if good cause shown by the plaintiff justifies an order shortening time. If a temporary restraining order is obtained, then the

hearing will be set by the order to show cause and further time and presentation requirements will be governed by the provisions of CCP § 527. Otherwise, general rules of local practice concerning motion procedures will apply.

Commentary: The exigencies of the situation may require a temporary restraining order or at least a hearing on short notice. The requirements for accelerating the hearing or securing special temporary relief ought to be left to the discretion of the court based on standards and methods already quite fully developed through injunction practice. For example, if the defendant wrongfully withholds and neglects perishable property, a mere injunction against transfer will be meaningless and an early hearing on a writ of possession (perhaps within a day or two) may be vital. The threat that a husband will transfer all of his bank accounts out of state while making preparations to flee the jurisdiction in a domestic dispute and many other frequently encountered jeopardy situations will suggest a variety of critical needs which the court with sound discretion and power may handle and which the most elaborate statutes cannot anticipate.

3. Basic Showing: A Verified Complaint Supplemented by Affidavits or Declarations (With Oral Testimony to be Discouraged but Left to the Discretion of the Court Where Unusual Circumstances May Make it Essential).

Here again the matter of procedure, it is suggested, should be the basic injunction method of CCP § 527 which has been tested and is familiar to most practitioners. Special requirements for affidavits based on summary judgment law may be too strict for an applicant who has not had the benefit of any discovery procedures and who may be dealing with a defendant having control over the basic information. The experience of many judges with injunctions and the general requirements concerning competent evidence in an affidavit or declaration form should be sufficient to satisfy any constitutional concerns. The scope of revision ought not embody novel and unnecessarily variable formal requirements.

4. Standards of Decision. The applicant should justify his right to apply for interim relief by reference to repossession rights, attachment and lis pendens

statutes, etc., and bear the burden of showing reasonable probability that he will eventually secure judgment. The judge's discretion should be influenced by the absence of opposition or lack of merit concerning the underlying claim. All circumstances generally indicating the appropriateness of provisional relief should be relevant and the circumstances of the defendant ought to affect the judicial decision as to the type of interim protection, if any, that should be granted. If, for instance, the defendant chooses to show that he has regular employment, is the owner of a residence, has family and other significant ties within the jurisdiction, then the burden on the plaintiff should be greater to justify any request for interim relief. Perhaps a limited injunction or no protection will be ordered. It should be recognized, however, that questions of solvency, of intention to remove oneself or property from the jurisdiction, or intention to transfer assets or otherwise improperly frustrate legal procedures are matters within the special knowledge and control of the defendant. From the plaintiff's standpoint, these circumstances of financial condition and subjective attitude cannot be readily shown, particularly when discovery has not yet become available. Often there can be clear proof only when irreparable action has been taken. In short, when the plaintiff has shown a meritorious claim, the burden should shift to the defendant to assure the court by appropriate declarations that he should not be burdened by the interim remedy. Based on the assessment of the merits and the circumstances of the subject matter of the action and of the defendant, as made known at the preliminary hearing, the court should be able to do any one or more of the following:

(a) Deny relief based on an inadequate showing of merit;

(b) Deny relief without prejudice because of the need for discovery or more complete development of basic facts pertinent to the provisional remedy;

(c) Grant a continuance of the hearing to a date certain with specific orders concerning depositions, interrogatories and other discovery methods that may be pertinent to the provisional remedy;

(d) Grant an order allowing a lis pendens, a keeper for a going business, a receiver, a writ of possession, enforcement of a statutory lien or the issuance of writs of attachment or garnishment;

(e) Grant a preliminary injunction, prohibitory or mandatory, shaped to the special needs and merits;

(f) Grant any of the provisional remedies noted above unless the defendant posts a satisfactory bond or undertaking promptly and in an amount that will secure the probable rights of the plaintiff;

(g) Fix a bond or undertaking to protect the defendant in the event the writ of possession, attachment, receiver or other protective measure ultimately proves to have been unwarranted;

(h) If the defendant is willing and able to convince the court that he has no criminal record, has never been held in contempt and is generally responsive to legal procedures, then perhaps his offer of a stipulated injunction may be considered in lieu of or in addition to any of the previous protective measures.

5. Continuance of Hearing. Consistent with injunction policy, if a restraining order has been issued prior to the hearing of the request for a provisional remedy the defendant should be entitled to one continuance as a matter of course. The plaintiff should be ready to proceed at the order to show cause hearing, also as injunction practice dictates. In general, the filing of affidavits, memos of points and authorities and other supporting documents by either side should conform to CCP § 527, or local standards of motion practice if a motion is the procedure initiating the request.

6. Sanctions. A frivolous request for a preliminary hearing or a sham defense to the request ought to provide a summary basis for allowing attorney's fees to the prevailing party concerning the expense of the preliminary hearing.

7. Standards of Availability. Study by the Commission resulting from Sniadach's demands obviously has suggested improvements in the general tests of availability. For instance, the pre-Sniadach requirement that a contract be made or payable in this state appeared to have no substantial rational basis. The distinction between the reserved title of a conditional sale and ordinary liens also had no substance. (Hougham v. Rowland, 33 Cal. App. 2d 11 (1939).)

However, the special requirements for claim and delivery, lis pendens, receivers, attachment, etc. as given mature dimensions by many decades of judicial and legislative attention ought to be preserved as a general matter in the interests of legal certainty and understanding. As to cases where attachment requests will be entertained, Part II of this commentary suggests certain specific refinements of pre-Sniadach law. Claim and delivery, receivers, lis pendens, statutory liens and other remedies perhaps should be preserved in the pre-Sniadach measures of availability with, of course, adequate constitutional notice and preliminary hearing procedures as commanded by Sniadach, Randone, etc.

To clarify the injunctive support for the preliminary hearing concerning a provisional remedy, it is suggested that subdivision 3 of Code of Civil Procedure Section 526 be amended to allow injunctions in the following cases:

> "3 When it appears at the time of the commencement of an action or during the litigation that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, which tends to render the judgment ineffectual or threatens the court's power to grant provisional relief or lien enforcement rights; . . . ."

Case Reference and Commentary. In the case of Lenard v. Edmonds, 151 Cal. App. 2d 764, 312 P. 2d 308 (1957), the court recognized the power to grant provisional relief in the form of an injunction as necessary to the court's power to make its orders or judgments effective in the sense of ensuring that property would be available for satisfaction of a money judgment. Perhaps under Lenard v. Edmonds an amendment of § 526 is not strictly necessary but to avoid doubt in this regard the above revision is suggested.

PART II

AVAILABILITY OF PREJUDGMENT ATTACHMENT AND GARNISHMENT IN CASES INVOLVING CLAIMS OF UNJUST ENRICHMENT WHERE IT IS PROBABLE THAT THE PLAINTIFF HAS A CLAIM REASONABLY ASCERTAINABLE FOR A SUM EXCEEDING $500.00.

Unjust enrichment is threatened whenever someone fails to pay for property or services or obtains value through fraud or conversion. The commercial creditor has significant concerns of a recurring nature but is not alone in his need for provisional remedies.

The judicial decisions under Section 537 of the Code of Civil Procedure during a century of experience in the pre-Sniadach era recognized this. Prejudgment attachment and garnishment has been a reasonably fair and effective prejudgment remedy designed to prevent unjust enrichment and has been one of the few effective emergency devices made available to the civil litigator. The exclusion of claims where the amount reasonably recoverable is less than $500.00 together with more broad exemption provisions should significantly limit the risk that collection agencies or others will take advantage of the indigent or family providers.

Specifically and technically, it is recommended that Code of Civil Procedure Section 537 be amended to incorporate a preattachment hearing scheduled by a motion or order to show cause. Where a showing of urgency complies with the injunction method of Code of Civil Procedure Section 527, a specific order of seizure of specific non-exempt assets could be ordered to be reviewed at the time of the order to show cause scheduled under Code of Civil Procedure Section 527. The standard of availability, stated in the style of pre-Sniadach Code of Civil Procedure Section 537 is suggested as follows:

> "The plaintiff may have the property of the defendant attached, except as exempted by statute or specific court determination, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as in this chapter provided, in the following cases:

> 1. In an action upon a contract, express or implied, where it appears probable that the plaintiff has a right to recover a sum in excess of $500.00, exclusive of costs, interest and attorney's fees, over and above the value of any security interest or lien rights securing the claim asserted."

Reportedly the interim legislation now in effect was enacted to satisfy the requests of credit associations for some form of provisional legislation while the implications of Sniadach were being explored by law revision agencies. In any event the Tentative Recommendations threaten to curtail the beneficial effect of pre-Sniadach law which assisted the civil lawyer in fraud cases.

Proposed Section 483.010 would require that the claim arise out "of the conduct by the defendant of a trade, business, or profession." The pre-Sniadach law fully developed the right of a litigant to obtain an attachment where tortious activity threatened unjust enrichment. Fraud justifying rescission and setting up an implied promise to pay reasonable value, breach of fiduciary responsibility leading to unjust enrichment, and conversion of another's property could, through the useful fiction of implying a promise in law, give the aggrieved person a basis for attachment. (See, e.g., Philpott v. Superior Court, 1 Cal. 2d 512 (1934); Arcturus Mfg. Corp. v. Rork, 198 Cal. App. 2d 208 (1961); and Los Angeles Drug v. Superior Court, 8 Cal. 2d 71 (1936).) While sometimes such tortious activities may be sufficiently connected to the trade, business or profession of the wrongdoer to qualify for relief, there should be no possible loophole for such "debtors".

Other language in proposed Section 483.010 tends, perhaps unintentionally, to increase the risk that previous interpretations of implied contract based on unjust enrichment will no longer be a sound basis for attachment. Thus, the phrase "in a fixed or reasonably ascertainable amount" appears to modify the type of action whereas it should modify the extent of probable recovery (the remedy) in an action for attachment. The wording of Section 537 as stated above at least tries to clarify the influence of the dollar amount upon the standards of availability.

The influence of a security interest is worthy of special attention. Evidently, the Commission seeks to overcome the effect of Hougham v. Rowland, 33 Cal. App. 2d 11 (1939), which allowed a conditional vendor the right of attachment on the basis that a reservation of title is not a lien and therefore was not a barrier to attachment in the pre-Sniadach era. The statutory liens allowed by various code sections (see, e.g., Civil Code, Chapter 6, Section 3046, et seq.) may not be within the definition of "security" interests and therefore the suggestion stated above includes reference to the lien as a disabling factor.

In my experience and analysis, the provision of former law (evidently carried forward by the interim post-Sniadach revisions) that the security shall not have "become valueless without act of the plaintiff" is a troublesome peculiarity that should be carefully reexamined. For a period of time, it appeared that any effort contractually to waive or make "valueless" the security held by a plaintiff would be ineffectual. See Lencioni v. Dan, 128 Cal. App. 2d 105, 275 P. 2d 101 (1954). However, in Engelman v. Bookasta, 264 Cal. App. 2d 915 (1968), it was indicated that a waiver of security by contract could be legal. The commercial creditor who bargains for his rights and realizes to some extent that he is extending credit in connection with the sale of goods or services, may bargain also for waiver provisions to the extent that he obtains a security interest under the Commercial Code or by statutory lien rights. But frequently the contract creditor will not stipulate and security interests may be identifiable which are relatively valueless but become an absolute barrier to securing provisional relief in the form of prejudgment attachment or garnishment. As an illustration, a foundryman who has a substantial claim for unpaid services may have patterns given by his customer, the value of which in any sale would be quite negligible in terms of the overall right to recover. The security requirement precludes return of the patterns and disables the claimant from securing adequate provisional relief. The main point is that if a claimant has inadequate security the court should, within discretionary boundaries, be free to fashion additional provisional protection.

PART III

COMMENTARY: SPECIFIC PROVISIONS

1. "Temporary Protective Order".

The "temporary protective order" is an innovation which may be undesirable in adding a new and relatively untried mechanism where it seems an innovation is not necessary.

The general procedure for securing a temporary restraining order, its appealability and the procedure for enforcing its terms through contempt hearings are familiar matters to most practitioners. The temporary restraining order provides a tested and flexible protective method sufficient for the auxiliary needs of other provisional remedies. Moreover, its constitutional validity has been approved recently. See, e.g., Chrysler Credit Corporation v. Waegele, 29 Cal. App. 3d 681 (1972). It is suggested that it be amplified.

2. "Forty Day Order".

While arbitrary statutory time periods often cannot be avoided as a starting point for certainty of procedure, it is submitted that unnecessary rigidity and complication often result when time periods are specified that are not clearly correlated with the functions of other procedures. Section 486.090 prescribes an arbitrary 40-day limitation of the temporary protective order. The existence of a 40-day deadline undoubtedly will encourage the plaintiff to be diligent in processing whatever writs he has in mind. However, from a defense standpoint it will encourage evasive and obstructionistic tactics because apparently the plaintiff's attachment efforts can be seriously impeded if not completely frustrated if his timing can be upset. A demurrer, motion to strike, evasion of process and many dilatory methods come to mind which may disrupt the expected timetable.

Again, existing preliminary injunction notice and duration controls suggest a model of more desirable flexibility. Thus, if at the time of the hearing on an order to show cause the party who has obtained the temporary restraining order is not ready to proceed, the temporary restraining order will be dissolved. "[T]he party . . .

must be ready to proceed. . . ." Code of Civil Procedure § 527. The burden of prosecution is exacting and well designed to protect a defendant against surprise or undeserving interference with his rights. See, e.g., Kelsey v. Superior Court, 40 Cal. App. 229 (1919); Green v. Superior Court, 65 Cal. App. 237 (1924); Northcutt v. Superior Court, 66 Cal. App. 350 (1924). This burden of procedure is relaxed where the respondent is not ready to proceed. The respondent is entitled to a continuance as a matter of right (Code of Civil Procedure § 527), but the temporary restraining order then remains in effect pending the hearing as continued. The court has the necessary flexibility of granting continuances within time periods appropriate to the variables of the case.

3. Requirement that Specific Assets be Identified at the Time the Writ is Sought.

If the circumstances of a particular case indicate that a writ of attachment or garnishment should issue because of the probable validity of the plaintiff's claim and the uncertainty as to whether the defendant will be responsive when a judgment is rendered, then it is suggested that the general right to have the writ be declared rather than require the plaintiff to make preliminary showings concerning the nature, location and value of various assets.

Those experienced in trying to locate assets for the purpose of a writ of attachment should confirm that it is an expensive investigative task to both find an asset, identify its legal characteristics, and be reasonably sure that it will be there when the sheriff makes a levy. While the Penal Code makes it a misdemeanor to make a fraudulent conveyance, transfers to frustrate claimants appear to be a nearly defensive reflex reaction when it becomes known that an attachment is in prospect. It is a relatively simple matter to change the form of property holding to thwart legal seizures.

For instance, if a husband is a defendant and the wife is not joined, he may have a bank account in his own name which, at least under prior law, he could readily place beyond the reach of process by the simple expedient of making the account a joint account. Under Code of Civil Procedure Section 539a, if the bank account happens to stand in the name of a person in addition to the defendant, then a levy would not be effectual unless a special bond "in an

amount not less than twice the amount of the plaintiff's claim" is provided. Thus, attachment proceedings based on a promissory note in the amount of $100,000 would require a $200,000 bond even though the joint account held only $500 or perhaps $5,000 of funds. Also, the placement of negotiable instruments, securities and other documents of value in a safe deposit vault or box having the name of another person, real or fictitious, can also practically frustrate a writ of attachment. (See Code of Civil Procedure § 539a and double-claim bond requirement.) In less sophisticated ways, it can be expected that the defendant will not allow his bank accounts to be attached or other assets to be exposed. For instance, if the attaching plaintiff must announce his knowledge and intention concerning a particular vehicle, a particular bank account, and a particular stock certificate in the absence of a restraining order, the defendant may well convert the stocks into bonds, remove the bank account to an out-of-state or other concealed location, trade in the vehicle and obtain a leased car, etc. The previous law, now discarded, reduced the many defense possibilities through the element of surprise. Moreover, if there is no proper basis for an attachment, the asset investigation and identification becomes a worthless expense.

Accordingly, at the time of the preliminary hearing, if no other remedy is considered appropriate and if seizure of non-exempt property does appear appropriate, then it is strongly urged that the court at that juncture be allowed to generally indicate the right to a writ of attachment and allow the party and his attorney to work with the sheriff on the locational and seizure problems that undoubtedly will exist and have new form and continuously changing form in the game that develops between the attaching creditor and the evasive debtor. Certainly from a constitutional standpoint if a hearing has been granted concerning probable right to a judgment, then (setting aside necessaries and any other specified exemptions) a plaintiff's hands should not be tied by unduly complicated procedures associated with the attachment itself. Indeed, the court should have jurisdiction following the preliminary hearing to issue turnover orders and other specific orders that may be necessary or appropriate to implement the writ of attachment and prevent fraudulent conveyances. As noted elsewhere, if the debtor converts assets to cash in his pocket or to stock certificates or notes held in his closet, the writ of attachment will, practically speaking, be valueless because of the limitations on the sheriff's ability to invade privacy for seizure purposes.

The concern for abuse of process can better be satisfied by statutory clarity concerning exempt property amplified by specific orders to the attaching creditor proscribing attachment of assets shown by the defendant to be needed for basic living needs.

4. Liability for Wrongful Attachment.

The Commission at page 539 of the Tentative Recommendations has stated:

> "California law currently provides a very limited statutory remedy for wrongful attachment. Persons seeking to recover for damages brought about by the plaintiff's use of prejudgment attachment are generally required to proceed by way of the common law actions of malicious prosecution and abuse of process."

The Commission further urges that the remedy of wrongful attachment be supplemented by additional legislation.

There are many forms of procedural abuse including frivolous claims and sham defenses which cause unjust expense to citizens and contempt for legal method. To the trained defense attorney, abuse of process in the area of attachment has not posed any extraordinary problem. Indeed, the experience of many cases where imprudent attachments were initiated indicates that wrongful attachment presents a threatened abuse quite readily checked or limited. Unlike many other areas where abuse of civil procedure must await final termination (e.g. simple malicious prosecution cases), the pre-Sniadach law offered many summary procedures to counterbalance the apparent advantage of the plaintiff. In addition to more than one bonding procedure (Code of Civil Procedure §§ 540 and 554) and exemption procedure, the defendant might be able to secure a discharge through a motion showing that the claim was secured or that the nature of the action did not justify the writ. Excessive attachments also could be remedied by motion procedure. Barceloux v. Dow, 174 Cal. App. 2d 170 (1959). More recently, it was recognized that excessive attachments are actionable as an abuse of process. White Lighting Co. v. Wolfson, 68 Cal. 2d 336 (1968).

The possibility of election of remedies had an inhibiting influence. See Steiner v. Rowley, 35 Cal. 2d 713 (1950). However, the key to resisting an attachment based on a weak claim has been the liability risks indicated by Reachi v. National Auto & Casualty Ins. Co. of Los Angeles, 37 Cal. 2d 808, 236 P. 2d 151 (1951), Stiner v. Travelers Indemn. Co., 226 Cal. App. 2d 128 (1964), and Schneider v. Zoller, 175 Cal. App. 2d 354 (1959).

Under these cases, the party who unwisely invoked attachment procedures on a weak claim could be quickly admonished that his bond or undertaking would be exposed to all of the costs of defense of the complete trial of the merits including attorneys' fees, expert witness fees and other charges not normally recognized as court costs.

With this law as a starting reference, defense counsel could through a telegram, letter or even telephone warning cause a plaintiff's counsel to desist. If the initial warning was not enough, the threat that the defense would promptly and extensively invoke its special deposition and other discovery rights, probably at the eventual expense of the plaintiff's bonding company or sureties, tended to terminate oppressive impulses. The prospect of a significant liability served as a potent deterrent and also induced defense counsel to provide services to the less affluent.

While the objective of further protection against the possibility of abuse of process should not be criticized, there is a danger of overkill or at least disproportionate attention to only one species of possible procedural abuse. For instance, in contrast and anomalously, the party aggrieved by a wrongful seizure under claim and delivery procedure is not entitled to recover fees and other similar damages on the bond. See Lafeve v. Dimond, 46 Cal. 2d 868 (1956).

5. Quasi in Rem Function.

The expansion of state procedure to obtain personal jurisdiction which occurred at or about the time of Sniadach seems to make unnecessary many of the special features of the Tentative Recommendations. In addition to the general long-arm and process improvements of the Code of Civil Procedure, the Insurance Code and Motor Vehicle

Code tend to make attachment an anachronistic approach to jurisdiction. The elimination of quasi-in-rem provisions may improve the simplicity and value of the general structure. Indeed, in view of the long-arm statutes, it is difficult to see any compelling state interest justifying attachment as a means of securing jurisdiction. But see, Property Research Financial Corporation v. Superior Court, 23 Cal. App. 3d 413 (1972).

6. The Meaning of "Security".

Among other new terms, the word "security" is used apparently in lieu of "lien" references in the older version of Code of Civil Procedure Section 537. "Security" has a statutory definition in the Commercial Code.

However, one of the problems of the old law concerned such interests as possessory or statutory liens. See, e.g., McCall v. Superior Court, 1 Cal. 2d 527 (1934), and Civil Code §§ 3046, et seq. (The mechanic's lien was specially treated, see Civil Code § 3152.) Do the terms "security" and "security agreement" comprehend statutory liens? The definitions of the Commercial Code, incorporated by reference in the Tentative Recommendations at Sections 481.210 and 481.220 do not appear to cover such lien rights.

7. "Affidavits".

a. As to form, presumably the provisions of Code of Civil Procedure Section 2015.5 apply to make declarations under penalty of perjury acceptable substitutes for affidavits. The interim claim and delivery law makes express reference to the alternative form which may suggest a parallel method. See Code of Civil Procedure § 510.

b. As to substance, Section 482.040 notes that statements of the affiant's competence must be included with various exceptions. The evident model for this provision is Section 437c concerning summary judgment where, because ultimate adjudication is proposed, there appears to be need for more exacting standards and formalities.

As recognized implicitly by the exception in the comment at page 560 of the Tentative Recommendations, the party may have only hearsay information upon which to relate his knowledge concerning the debtor's assets. He cannot be

expected to obtain an affidavit from his respondent and discovery proceedings, if available at all concerning matters of financial responsibility, are not immediately available. See 20-day rule re commencement of depositions and 10-day rule re interrogatories, Code of Civil Procedure §§ 2016 and 2030. Moreover, there ought to be more latitude for conclusory statements concerning the contracts or elements of the contract claim inasmuch as the merit of the claim frequently will never be questioned, and if challenged the burden will be on the plaintiff to be more precise in formal detail. Moreover, the likelihood of default judgments and the risks of attachment, noted elsewhere, ought to reduce the strictness of the affidavit practice.

In any event, the standards of affidavit practice ought to be established under general rules of evidence, rather than specially fashioned for different remedies or procedures.

8. Seizure Problems and the Need for Supplemental Procedures.

One of the special difficulties of prejudgment attachment concerns assets which may be held by the debtor on his person or within his home. Large sums of cash, promissory notes, securities, etc. can be kept beyond the reach of the writ of attachment simply by refusing to respond to service of the writ of attachment. The Los Angeles Sheriff's Office, at least, properly takes the position that it cannot invade the privacy of the person by searching pockets or removing personal effects, and its attitude quite naturally extends to the home or other private regions maintained by the debtor.

The method of solving this particular problem post-judgment is through supplemental proceedings in which perhaps a turnover order will compel release of the assets. See Code of Civil Procedure §§ 715 and 719.

9. Section 488.410 - Seizure of Securities.

Subdivision (c) of proposed § 488.410 appears to supercede Section 8317 of the Commercial Code to the extent that Section 8317 seems to justify injunctive or other relief to prevent transfers of securities owned by the

debtor. The reference in subdivision (c) to "cases not provided for by subdivisions (a) . . ." suggests, by implication, that such relief will no longer be available. As noted above, securities as well as other documents that may be on the person or in the residence of the defendant may not be subject to seizure in the practical sense that the sheriff will not violate rights of privacy and without injunctive or other protective relief there may be no effective protection of the creditor. Preservation of injunctive rights is therefore very important.

The same observations should apply to negotiable instruments which can be placed in the hands of a holder in due course.

10. The 45-Day Notice Provision.

Inasmuch as both legal and practical procedures should advise the defendant of specific property which the plaintiff has or will attach, it seems procedurally excessive to require a special 45-day notice in certain instances. See, e.g., § 488.370(b) concerning accounts receivable; § 488.390 concerning deposit accounts; and § 488.410(b) concerning securities. The statute suggests that the validity of the attachment may be affected by the 45-day notice. This threatens other complications. Suppose, for instance, a default judgment is entered. Will it be necessary for the attaching creditor to still give notice before being able to perfect a levy pursuant to a writ of execution? If competing creditors are involved which often is the case, the special notice requirement may be troublesome in terms of priority, bankruptcy law and other areas of concern.

11. Notice and Service Problems.

The expense of personal service can be very great, particularly if one is dealing with an evasive defendant. In many cases, hundreds and even thousands of dollars may be spent on stakeout and other procedures trying to comply with jurisdictional notice requirements. This may be reasonably appropriate in the first instance of securing personal jurisdiction over a defendant. But the procedure tends to be extravagant when other notice provisions are involved.

Under Code of Civil Procedure Sections 1010, et seq., service by mail upon an attorney and other less expensive procedures, reasonable in nature, become proper. It is not clear that the 45-day notice concerning attachment of certain assets or that other notices and writs can utilize the less expensive methods. It is suggested that the less expensive but reasonably reliable forms of service be considered for most notices, writs, etc.

12. Extensive Detail of Revisions.

Sometime ago the decimal point wwas introduced as a means of expanding sub-sections of civil procedure statutes. It has been noted, with substantial accuracy, that the Code of Civil Procedure is taking on the appearance as well as the complexity of the Internal Revenue Code.

The form and detail of the Tentative Recommendations gives basis for concern that our procedural law in this and other areas will soon become the province of specialists. It seems likely that only the commercial credit agencies will be able to make effective use of the procedural methods involved. Only such agencies, or attorneys having a very high volume of collection cases, can be expected to develop the knowhow and training of supporting staff to cope with the variable and special procedural nuances. Unless Sniadach clearly requires the new "wrinkles", it is urged that simplicity, amplified by standards of discretion, be the guide rather than code elaborations of procedural detail which often promote pettifoggery rather than justice.

13. Bonds and Undertakings - Justification of Sureties.

Please consider the possibility of general provisions of civil procedure concerning the many bonding possibilities applicable to slander, stockholder and other actions as well as to provisional statutory remedies, stays, etc. Bonding requirements for enforcement of liens undoubtedly will be suggested soon. Uniformity of procedure here ought to be a more simple matter than in most areas.

14. Asset Seizure Methods.

Many questions come to mind about the proposed extensive revision of settled law affecting the definition and disabilities of property or rights subject to attachment. If additional time for further comment is allowed by the Commission, I will be pleased to formulate criticisms which are now beyond my time limits.

Respectfully submitted,

Paul L. Freese
of KINDEL & ANDERSON

PLF/mcb

Memorandum 73-83 EXHIBIT II

California State Sheriffs' Association

Organization Founded by the Sheriffs in 1894

September 17, 1973

California Law Revision Commission
School of Law
Stanford University
Stanford, Calif. 94305

Attn: John H. DeMoully
Executive Secretary

RE: Prejudgment Attachment

Dear Mr. DeMoully:

I have recently received a copy of the Commission's Tentative Recommendation relating to Prejudgment Attachment, published March 1973. It appears to be, in its pertinent parts, the same as the proposed legislation which came before the California Legislature under Assembly Bill 998 (Warren).

The proposed legislation has been exhaustively reviewed by the California State Sheriffs' Association, Civil Procedural Committee and the Committee's comments have been incorporated in one report. As chairman of the above Committee, I am enclosing these comments for your review, along with a copy of AB 998.

You will note there are several areas which appear to subject Sheriffs and other levying officers to unwelcome liability. Sec. 488.020 (c) and (d); Sec. 488.360 (a) and Sec. 488.370 (b) are important in this regard. Also the method of "service" upon a defendant is another area of concern.

The Committee is aware of the deadline you face in proposing further legislation before the present Attachment Procedures expire and offers these comments with a desire to accomplish a smooth transition from present law to the proposed law.

Very truly yours,

Carl M. Olsen

Carl M. Olsen
Chairman, Civil Procedural
Committee

cc: Sheriff Douglas James
Sheriff Michael N. Canlis
Richard C. Dinkelspiel

AB 998 - Warren "The Attachment Law"

This bill revises several statutes.

Problems which affect Sheriffs and other levying officers follow:

Sections 1 through 9 are preliminary provisions. They do not affect Sheriffs.

Chapter 1. Definitions. Does not affect Sheriffs.

Chapter 2. General provisions. Does not affect Sheriffs.

Sec. 482.070 Page 12, line 40, the word "may" should be substituted for "shall".

Chapters 3. and 4. Actions in Which Attachment Authorized and Noticed Hearing Procedure. Do not affect Sheriffs.

Chapter 5. Ex Parte Hearing Procedure. Does not affect Sheriffs.

Chapter 6. Temporary Protective Orders. Does not affect Sheriffs.

Chapter 7. Property Subject to Attachment. Affects Sheriffs. Provisions are o.k.

Chapter 8. Levy Procedures, etc. Affects Sheriffs!

Sec. 488.020 (c) and (d). These items require the levying officer to inform the defendant of his "rights" and "duties" under the levy. As presently written, the officer is placed in the position of giving legal advice to:

> Defendants; County Recorders; Record owners of Real Property; Occupants of Real Property; Secretary of State; Legal owners of vehicles and vessels; Obligees identified by garnishees; Garnishees; Third Parties in deposit accounts; Escrow holders; Issuers to whom securities have been surrendered; Courts wherein the defendant has a judgment in his favor; Judgment debtors of defendant; Estate administrators; Transferee or auctioneer in bulk sales.

The advice given would involve claims of exemption; third party claims; exceptions to undertakings; filing of an undertaking; perishable sales; termination of temporary protective orders; right to file motions to set writ aside, etc. Since the Sheriff is a ministerial officer his duties must be clearly spelled out. It is suggested that this may be done as in C.C.P. 682.1 which requires the officer to mail a copy of the writ of execution to the judgment debtor at the address appearing on the writ. The writ contains a "Notice to the Judgment-Debtor" which informs him of his right to file an exemption claim.

Sec. 488.040 (b) Lines 15, 16 and 17. This should be clarified to allow service upon "a person in charge" of the office of the garnishee as provided by Sec. 415.20, C.C.P.

Sec. 488.310 (b) Page 35, Lines 2 through 6. This should be clarified to indicate how the Recorder is to know the property stands in a name other than the defendant. (See present Sec. 542 (2) C.C.P.)

(c) Page 35, Lines 7 through 11. This should be clarified as to how the officer is to "serve" the defendant and any third person. Very often they are out of the county in which the property is located. (Refer to Sec. 542 (2) C.C.P.)

(d) Page 35, Line 13. Provides for service of an occupant within 10 days after recording. The present method allows 15 days which is more realistic considering that some counties consist of large rural areas, which are not always easily accessible and could require a survey to locate the property being levied upon. (Refer to Sec. 542a C.C.P.)

Sec. 488.320 (b); 488.330 (c); 488.340 (b); 488.350 (b); 488.360 (c); 488.370 (b); 488.380 (b); 488.390 (b); 488.400 (b); 488.410 (b); 488.420 (b); 488.430 (b). These sections all provide for the Sheriff to "serve" the defendant with a copy of the writ of attachment and notice. Unless the service allows mailing (as in Execution Section 682.1 C.C.P.) levies may not be completed since there are many instances where the defendant is not physically present in the county in which the levy is being made.

Sec. 488.350 (a) Page 37, Lines 16 through 21. Since an attachment levy does not contemplate taking defendant's property from him, the notice should provide that no transfer of the defendant's interest in the motor vehicle should be made by the Department of Motor Vehicles until the attachment levy has been released.

(c) Page 37, Lines 26 through 31. A method of service must be provided to allow service by mail since in many cases the legal owner is not located in the county of levy and in some cases, the legal owner is located outside of the State of California.

Sec. 488.360 (a) Page 38, Lines 2 through 6. The wording here should be limited to cash sales only. Untold problems could occur regarding the method of redemption if credit card sales are allowed. Who would be responsible for converting credit card slips into cash when the card issuer doesn't have local outlets for this purpose?

Sec. 488.370 (b) Page 39, Lines 30 through 35. "the levying officer shall serve the dependant and any other person identified by the account debtor or insurer as an obligee". Here the officer is expected to take instructions from some one who is not the plaintiff, nor the plaintiff's attorney, and therefore the officer may expose himself to liability for such action. (See Sec. 262 C.C.P. regarding instructions to the officer).

Sec. 488.380 (c) Page 40, Lines 7 through 9. It is unclear why the plaintiff is to serve the account debtor when the officer serves the person in possession of the chattel paper under subdivision (a) on page 39.

Sec. 488.420 (a) Page 41, Lines 39 and 40. Service by the officer must allow provision for service by mail, when the judgment debtor is not located in the county in which the judgment is entered.

Sec. 488.430 (a) Page 42, Lines 9 through 16. This procedure reverses the procedure now employed under Sec. 561 C.C.P. where the personal representative is served first, however no objection is made to the new procedure except to clarify the method to be used in serving the personal representative when he is not located in the county where the levy is being made. Presently even under Sec. 561 C.C.P. and under Sec. 26735 Govt Code, there is no clear method spelled out. The officers have been using service by mail to comply with the court ruling in Re: Bennett Estate (1939) 13 Cal 2d 354. This case required both service on the personal representative and on the clerk of the court to be made by the same officer.

Sec. 488.530 Page 45 Lines 35 through 38. Since this section appears to be based on Sec. 547a C.C.P., which relates solely to receivers, references to the levying officer and the use of keepers should be deleted.

If an officer is to make a levy, there should be some provision provided for on the writ of attachment allowing the officer to sell perishables. The court should consider this issue before issuing such a writ rather than after a levy has been made.

Sec. 488.550 (b) Page 46, Line 26. There appears to be an omission or misprint here.

Sec. 489.240 Page 51, Lines 17 through 38. This section should specify how the undertaking is to reach the bank (see this bill, Sec. 14, Page 62, Lines 31 and 32, under Sec. 682a).

Sec. 489.310 Page 52. This bill provides for an undertaking to be furnished by the defendant after a court hearing. It should be pointed out that present law provides for a release of property under levy, by the defendant furnishing an undertaking without notice to the plaintiff. (See Sec. 540 C.C.P.)

Sec. 682a Page 63, Line 27. The last word should be "sooner" (instead of soon) Line 36. The second word should read "by" (instead of be).

Memorandum 73-83 EXHIBIT III

CALIFORNIA STATE LEGISLATIVE COMMITTEE
CREDIT MANAGERS ASSOCIATIONS

BOARD OF TRADE OF SAN FRANCISCO
San Francisco, California
Paul Ryan, Exec. Vice-Pres. & Secretary

CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA
Los Angeles, California
Lee J. Fortner, Exec. Vice-Pres.

NATIONAL ASSOCIATION OF CREDIT MANAGEMENT
Northern & Central California
San Francisco, Fresno, Stockton, Sacramento,
San Jose, California
Carroll Swanson, Exec. Vice-Pres.-Secretary

SAN DIEGO WHOLESALE CREDIT MEN'S ASSOCIATION
San Diego, California
Larry Holzman, Exec Sec.-Mgr.

WHOLESALERS CREDIT ASSOCIATION
Oakland, California
Henry J. Salvo, Secretary-Manager

PLEASE REPLY TO

1581 Mission Street
San Francisco, Ca 94103

September 19, 1973

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford, Ca 94505

Dear Mr. DeMoully:

Following a preliminary consideration of the Commission's tentative recommendation relating to pre-judgment attachment, the following comments are offered with respect to the maintaining and clarifying the rights of attaching creditors without unnecessarily diminishing the right of business debtors.

1.

The proposed Section 483.010, concerning actions in which attachment is authorized, requires, among other things, that the amount of Plaintiff's claim be not less than $500. In this respect it represents no substantial change from the 1972 Act; however, it specifically appears to preclude the aggregation of claims as compared with present C.C.P. 537.1 which authorizes attachment where the "total sum claimed" by Plaintiff is $500.00 or more.

(a)

The consensus of this Committee is that the $500.00 minimum as proposed in Section 483.010 should be revised so as to authorize attachment rights where the amount of claim is not less than $250.00. Since the remedy is limited to defendants engaged in business it should, so far as practical, be available regardless of the nature or size of the defendant's trade or business. The nature of the trade or business engaged in by many defendants is such that the average obligation incurred is substantially less than the proposed $500.00 minimum. To retain this basic amount would, in effect, exclude such business defendants from the operation of the Statute. It is felt that a reduction to $250.00 would not prejudice those defenses available to such defendants since it would in no way impair or limit the exercise of such rights designed to insure their exemption and family support rights.

(b)

The Commission's comments to this Section (p. 562) suggest that the preclusion of the right to aggregate claims is of little importance since an expeditious remedy will be available

for lesser amounts under the Small Claims procedure. It appears to this Committee that shifting such claims to the Small Claims Court would be unsatisfactory, both from the standpoint of the debtor as well as creditors. Under present law the monetary jurisdiction of Municipal and Superior Courts is determined by the total claim of a Plaintiff whether such claim is based on one cause of action or several assigned causes. Denial of aggregation of claims in one suit very possibly would have the effect of subjecting the debtor to a multiplicity of Small Claim Actions where, although the remedy of attachment is not available, the proceedings are sufficiently expeditious to reduce a small claim to judgment in a shorter time. In addition, the Defendant would be required to appear personally in each of such actions.

The Creditor Associations represented by this Committee often accept assignments of creditor claims against a common debtor, some of which individual claims may exceed $500.00 while others may be substantially less. To seek a right to attach or temporary protective order under the proposed recommendation will presumably require the exclusion of individual claims of less than $500.00., and the resort by such individual claimants to the Small Claims Court for separate actions. In view of the constitutional safeguards available to a Defendant, this Committee would recommend that the tentative draft of the proposed pre-judgment attachment law be amended to authorize, as present, attachment where the "total sum claimed" by Plaintiff is $250.00 or more. From the standpoint of assignee-Plaintiff's this would eliminate the necessity of separate actions while, at the same time, affording a Defendant the opportunity to assert all of his rights against all of the creditors included in such single action.

II.

The Committee also notes that Section 485.010 specifies that, for issuance of an ex-parte writ, it must be shown by Affidavit that denial of the writ will result in great or irreparable harm to Plaintiff. The present law (C.C.P. 538.5a)requires a showing only of "substantial danger" that the property will be transferred, removed or concealed, etc. The Committee feels that the requirement of a showing of "great or irreparable injury" constitutes, for all practical purposes, an insurmountable obstacle and would recommend that this requirement be reduced in degree to a showing of only immediate or substantial danger.

III.

Section 487.010 of the tentative recommendation, which defines property subject to attachment, is similar to the present law with one substantial exception which may not have been intended. C.C.P. 537.3(b) of the present law, with respect to individuals engaged in business, authorizes a writ to subject all of the Defendant's assets, "excepting such as are exempt, etc." The proposed recommendation, however, appears to allow such writ to be levied only on all of such assets "used or held for use in the Defendant's trade, business or profession". Under such proposal it would appear that real property, for example, not directly used in the Defendant's trade or business would not be subject to attachment. The same would appear to be true of any business asset such as cash, removed from the Defendant's business and placed in a personal bank account. Since the granting of credit to an individual in business is usually the result of an analysis of his total net worth, it would seem not unfair that, in such instances, all of the Defendant's non-exempt property should be subject to attachment without a technical requirement that the same be used or held for use in his particular business. What has been noted with respect to non-business assets of an individual defendant appears equally true where the defendant is a partnership. Since all partners of a partnership are jointly liable for partnership obligations it seems an unwarranted restriction to limit the right of attachment to partnership property as Section 487.010(b) appears to do. The Committee recommends that the right of attachment of a partnership creditor be extended to non-exempt personal assets of the individual partners as well as the partnership property itself. Such right, of course, would

Memorandum 73-83 EXHIBIT IV

KIPPERMAN, SHAWN & KEKER
ATTORNEYS AT LAW
407 SANSOME STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

STEVEN M. KIPPERMAN
JOEL A. SHAWN
JOHN W. KEKER

TELEPHONE: (415) 788-2200

August 22, 1973

California Law Revision Commission
School of Law
Stanford, California 94305

RE: TENTATIVE RECOMMENDATION RELATING TO PREJUDGMENT ATTACHMENT (March 1973)

Gentlemen:

While in the context of the specific recommendation being made, the point about which I would like to comment is relatively insignificant, I think that in the greater context of California civil procedure the issue is much more significant than drafters of legislation might appreciate. The point about which I am concerned is the use of court commissioners in the judicial process. Although you do indicate that you are going to reconsider the recommendation that court commissioners be used with reference to the attachment law (page 540 n. 81), I presume you intend to reexamine it only from a constitutional standpoint should the California Supreme Court question the constitutionality or cast doubt upon it. I think you should reexamine the question from a policy standpoint.

Although it is admittedly true that the California constitution creates the notion of "subordinate judicial duties", I think it is particularly unwise to perpetuate or implement a concept which does create a somewhat artificial hierarchy of rights and procedures. The notion that some judicial acts are not very important can lead to very questionable distinctions and policy decisions. What probably is the real basis of my concern is the generally exceedingly low opinion many, if not most, San Francisco lawyers have of the court commissioner process in San Francisco, as it is extensively used for most discovery proceedings. In San Francisco, in a typical case, it is virtually impossible -- as a practical matter -- to get a judge to consider and rule upon discovery

matters. The court commissioner process is all the more troublesome because -- again as a practical matter -- it is difficult if not impossible to have a reporter's transcript made of any such proceedings to show the manner in which the very broad discretion is being exercised by some persons.

While my general feeling is that the use of court commissioners might well be abolished and should most certainly be reduced, I think that in a matter so important as attachment, that the broad discretion that is going to repose with the judicial officer under your proposed legislation should not be vested in a court commissioner, who operates under a system such as that in San Francisco. Perhaps this is not so much a comment upon your attachment recommendation as it is a suggestion that a more uniform procedure be adopted for court commissioners, which will afford litigants a more formalized procedure which will include the making of a record which will protect the right to review a court commissioner's determination in a meaningful way before a judge in those situations where a court commissioner is going to be used. The Federal system has for some time more broadly used the concept of "special masters", and, more recently, United States magistrates to perform many duties in the Federal judicial process. Perhaps a study could be undertaken to determine just what the realities are in various areas in California of the court commissioner system, compare it to the Federal system, and make such recommendations as are indicated. I, and many other lawyers, feel that many changes are in order.

Very truly yours,

STEVEN M. KIPPERMAN

SMK/jm

Memorandum 73-83 EXHIBIT V

STATE OF CALIFORNIA

FRANCHISE TAX BOARD
SACRAMENTO, CALIFORNIA 95867

In reply refer to:

September 19, 1973
HC:RDP:rjw

John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, CA 94305

Subject: Prejudgment Attachment

Because of the relatively short time since the receipt of the Commission's Tentative Recommendation Relating to Prejudgment Attachment, the other taxing agencies have not had an opportunity to review the material. We have just completed our review of it at the Franchise Tax Board and have forwarded the text, with our analysis, to Deputy Attorney General Mark Jorden, who is the chairman of the Interagency Sub-committee on Tax Collection. He will write you at length after he and the other taxing agencies have had an opportunity to study the matter.

I wanted to give you a preliminary indication of two problems noted here: (1) Your recommendation on garnishment embodied in Assembly Bill 101 contains a provision (Section 723.076(f)) providing a temporary earnings holding order which requires an employer to withhold and retain in his possession earnings in excess of the amount which would be reached by a withholding order for taxes; and (2) the provisions for liability for wrongful attachment (Chapter 10, Section 490.010 et seq) require resolution with the general exemptions from liability provided by Part 3.5 of the Government Code. Specific exemption for taxing agencies is provided by Section 860.2.

Supervisor, Special Procedures
Collections

cc: Mark Jordan

Memorandum 73-83 Exhibit V

STATE OF CALIFORNIA

FRANCHISE TAX BOARD

SACRAMENTO, CALIFORNIA 95867

In reply refer to:

September 19, 1973
HC:RDP:rjw

John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, CA 94305

Subject: Prejudgment Attachment

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Supervisor, Special Procedures
Collections

cc: Mark Jordan

remain subject to those other provisions insuring to all defendants their exemption and family support rights.

IV.

Section 490.010 et. seq., relating to liability of Plaintiff for wrongful attachment appears, in at least one respect, to diminish a Plaintiff's rights and enlarge those of a Defendant. Specifically, Section 490.030 appears to allow recovery for damages by motion made in the trial court without the necessity of an independent action. (See comments to proposed law, p. 540.) While statutory liability of a surety might be enforceable in this manner, it appears that an action for substantial damages which might well involve substantial and controverted factual issues with rights of full hearing and jury, should be limited to an independent or plenary action rather than a simple motion in the original trial court.

The undersigned Committee has not had an opportunity to conduct an exhaustive or complete analysis of the tentative recommendation of the Commission and would appreciate the opportunity of submitting additional comments as soon as possible. Your consideration of those comments expressed in this letter is earnestly sought and this Committee believes that amendments to the tentative recommendation incorporating the same would not remove any substantial protective provisions otherwise accorded to a Defendant.

The Committee does appreciate the opportunity of presenting the foregoing and would be pleased to discuss these matters at greater length if the Commission feels that the same would be productive.

Yours very truly,

W. J. Kumli
Chairman

Memorandum 73-83

EXHIBIT VI

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JERROLD A. FADEM
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TELEPHONE
651-3372
AREA CODE 213

September 7, 1973

John DeMoully, Esq.
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Prejudgment Attachment

Dear John:

I received the printed tentative recommendation on the above subject, and like a good trooper offer the comments you requested.

Since I claim no expertise in this area, I will not attempt to analyze the recommendation in detail. Let me only express a general reaction.

The recommendation appears to be the same sort of thing that Mike Berger criticized in his most recent article: the courts clobbered a monster, and the Commission is trying to revive it in a modified form.

Where somebody enters into a transaction in which he chooses to leave his interest unsecured, I don't see any justification for a law which at his option converts that interest into a secured one, against the wishes of the other party to the transaction. The exceptions, of course, are the urgency situations in which the defendant is about to head south or otherwise frustrate ordinary legal proceedings, but the proposed statutes cover more than just such situations.

You now have the dubious benefit of my concededly inexpert views.

Best regards.

Sincerely,

Gideon

GIDEON KANNER

GK:cl

Memorandum 73-83 EXHIBIT VII

SAN DIEGO GAS & ELECTRIC COMPANY

September 18, 1973

File No --

California Law Revision Commission
Stanford University
School of Law
Stanford, California 94305

Re: Tentative Recommendation Relating to
Prejudgment Attachment

Gentlemen:

We have reviewed the tentative recommendations and find them substantively and procedurally satisfactory.

We have no recommendations or criticisms to offer.

Very truly yours,

Guenter S. Cohn
Attorney

/gc

Memorandum 73-83

EXHIBIT VIII

Wrongful Attachment Damages Must Be Fixed in the Original Suit

*by Leon J. Alexander**

INTRODUCTION

Most civil lawsuits are for money. Each side marshals reasons for its cause, as plausible as skillful counsel can devise. Certainty is never realized, and the outcome is "an unknown factor prior to final judicial determination."[1] Nevertheless, someone must be allowed to keep the disputed sums throughout the intervening time. Abstractly, it is no more "just" to let the defendant retain them during the lawsuit than it would be to let the plaintiff have them until the fight is over, or even to impound them in the County Treasury. It is not logic that decides such matters, however, but social history.[2] Our practice leaves the defendant in unimpeded possession of the funds pending trial, no matter how recently or by what improper means the money first came into his hands. An ancient remedy now plays its role to equalize this situation. Attachment permits a plaintiff in certain cases to impound (but not obtain for himself) contested sums pending trial, provided he posts a bond to pay all damages caused by the attachment if he does not win.[3] Unfortunately, the procedures in effect today deny adequate recovery on the bond for the successful defendant. They must, therefore, be changed.[4]

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* A.B., 1947, Brooklyn College. LL.B., 1950, Yale University. Senior partner, Alexander, Inman & Fine, Beverly Hills. Member, Los Angeles Bar, California Bar.

[1] Byard v. National Automobile and Casualty Insurance Co., 218 Cal.App.2d 622, 32 Cal.Rptr. 613 (1963).

[2] Claim and Delivery is a comparable procedure that delivers chattels in dispute to the plaintiff. In interpleader actions, funds may be impounded with the court. Almost anything might happen through a receivership or injunction. Such dispositions are not less "just" than leaving property with the defendant; they are merely less familiar.

[3] CAL. CODE CIV. PROC. §539. Throughout the text, reference to "plaintiff" means the party seeking affirmative relief, even though the party might be a defendant, cross-complainant, appellant or intervenor who has posted a judicial bond. The word "defendant" means the other party. *See* Allers v. Beverly Hills Laundry, 98 Cal.App. 580, 277 Pac. 337 (1929).

[4] It is recognized that extensive reform of the procedures for procuring attachment bonds and also the items of damages that are recoverable in wrongful attachment are long overdue. Such matters are outside the scope of this article, which is limited to procedural aspects of bond litigation.

I

THE ATTACHMENT LIEN

Attachments may work great hardship on the defendant. They are frequently "legal blackmail," invoked deliberately for that very purpose. As stated recently, "Even though the attachment lien apparently had no real economic value . . . it was technically valid and had strategic value or bargaining value . . . . The law gives . . . no economically feasible remedy except to press the nuisance value of his attachment."[5] It is because of this unfairness that there must be rapid and effective relief on the undertaking in those relatively rare cases when the defendant prevails. In the words of a widely used treatise, the bond "is actually an insurance that the defendant in an attachment action will be paid" his damages, provided only that he wins his suit.[6] In fact, this is not true. Bonds do not "insure" payment to the injured defendant. Meaningful relief is often mere illusion. That is because recovery on the bond requires extensive litigation. A second suit against the bonding company must take its place with other newly filed actions and carry on through the laborious processes of our civil courts. It would be much better to include damages arising from an improper attachment as an issue in the trial and appeal of the first case. Then the bond would be of real value to a wronged defendant.

Remember how lawsuits really work. Plaintiffs rarely make moderate demands. Uncertainties and offsets are usually ignored in the complaint, and every doubt resolved there in plaintiff's favor. Attachment issues, therefore, in an inflated amount.[7] Any claimant in a permitted case

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[5] Imperial Metal Finishing Co. v. Luminous Ceilings West, Inc., 270 Adv.Cal.App. 420, 75 Cal.Rptr. 661 (1969). We are not concerned with the social problems involving garnishment of wages. Even in standard business transactions, attachments are often used as pressure tactics.

[6] 5 CAL. JUR.2D, REV., 948. The remedies legally available upon the undertaking have led the author elsewhere to propose the use of bonds in related fields where procedures now in use are quasi-attachments, but where there is at present no effective remedy available for a successful defendant. *See* Alexander, *Lis Pendens Reform By Land Attachment*, 43 L. A. BAR B. 419 (1968); Alexander, *Claims in Interpleader—Abuse and Remedy*, 44 CAL. S. BAR J. 210 (1969).

[7] Recognizing possible liability if the plaintiff loses, attorneys sometimes attach for less than the amount permitted by the pleadings. This does not change the principles involved. Fear of wrongful attachment suits is in practice rarely a deterrent to the use of that remedy. It is the author's belief that deliberate over-attachment is much more common than deliberate under-attachment.

may obtain one easily, if he makes an affidavit and files an undertaking. There are few problems in posting plaintiffs' bonds. The face amount is merely "one-half of the principal amount of the total indebtedness or damages claimed, . . . excluding attorney's fees,"[8] and even this sum may be reduced on application to the Court. The premium for such a bond is low, a modest 1% a year, and bonds are readily available to plaintiffs who will indemnify the bonding company[9] and whose net worth is 10 times the obligation on the bond. On bonds below $5000.00, no net worth inquiry is generally made.

Release bonds are more difficult to obtain. Although the premium is also 1%, the practice calls for liquid collateral posted with the bonding company in the face amount of the bond. Few defendants have the means to give security, and even those who can, may not use a release bond because property would be impounded either way, and the enforced collateral of the attachment proceedings is often preferable to finding new security, acceptable to the surety. Thus, most attachments remain in force until the trial is over.

Trials take time even when all parties want a swift decision. If either side seeks to delay, he generally can do so easily. Then, when the trial is finally over, the losing plaintiff may appeal, prompted at least in part by fear of liability on the attachment bond.[10]

More time goes by. Few civil cases creep from complaint to trial to judgment to appeal to final resolution in under four years.

The law now is that the judgment must be final before the successful

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[8] CAL. CODE CIV. PROC. §539.

[9] Bonding companies regularly require indemnities. *See* Anchor Casualty Company v. Strube, 221 Cal.App.2d 29, 34 Cal.Rptr. 205 (1963); United States Fidelity & Guaranty Co. v. More, 155 Cal. 415, 101 Pac. 302 (1909).

[10] Despite the express language of CAL. CODE CIV. PROC. §539 (". . . the plaintiff must file, . . . a written undertaking . . . that plaintiff will pay all costs . . . and all damages"), the unsuccessful plaintiff is not liable in wrongful attachment, although he is liable for malicious attachment. It is a minor legal mystery why this should be in the rule. It is based on the claim that permitting liability would discourage litigation and be contrary to public policy. *See* Asévado v. Orr, 100 Cal. 293, 34 Pac. 777 (1893). The rule was first applied to attachments in Vesper v. Crane Co., 165 Cal. 36, 130 Pac. 876 (1913), and has been followed blindly ever since. Finn v. Witherbee, 126 Cal.App.2d 45, 271 P.2d 606 (1954); Bailey v. McDougal, 196 Cal.App.2d 178, 16 Cal.Rptr. 204 (1961). The statute in Claim and Delivery (CAL. CODE CIV. PROC. §512) differs from that contained in the statutes on attachment or injunction bonds, and does not say that the plaintiff will pay the damages. However, since the plaintiff indemnifies the bonding company, this is not a practical problem, unless personal sureties are used.

defendant may file suit on the attachment bond to recover the damages that he has suffered.[11] His new complaint proceeds as other lawsuits do. The amounts involved, however, are relatively small. This second suit is only for the actual damages caused by the attachment; punitive damages are not allowed, even though still within the limits of the bond.[12] This second suit therefore must seek less money than the first one (the statutory bond amount is half the original principal claimed) and may involve only a small fraction of that amount.[13] Reducing the amount in dispute, however, does not reduce the cost of the second trial. Bond litigation is a complex field; one may assume bonding companies will use any available technicality to increase the burdens on the claimant.

The surety should not be wholly blamed for this. It is inherent in our legal system. We insist that everyone be fully heard in order to achieve "justice." This means, in practice, interminable full-dress debates. The reported cases in this field illustrate the problems facing the successful defendant in the second suit. All sorts of technical issues must be proved and pleaded to the satisfaction of the Court. Questions may be raised about the propriety of the original attachment proceedings,[14] the existence of security,[15] the ownership of the attached property,[16] the nature of the cause of action under which the original plaintiff attached and failed to prevail,[17] the apportionment and necessity of attorney's fees or other damages[18] that are claimed, the meaning of the conduct of the parties[19] or of the attachment undertaking and even the parties who are protected thereby.[20] The list seems endless of the matters raised by sophisticated

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[11] Smith v. Hill, 237 Cal.App.2d 374, 47 Cal.Rptr. 49 (1965).

[12] Carter v. Agricultural Insurance Company, 266 Adv.Cal.App. 886, 72 Cal.Rptr. 462 (1968). The Supreme Court has not yet ruled on this point, and there is dicta to the contrary. A strong policy argument could be made against any limit in wrongful attachment on the surety's liability, except the actual damages to the defendant. An even stronger one could be made to hold the plaintiff liable for all damages, as though he had converted the property.

[13] In *Carter*, *supra* note 12, for example, the face amount of the attachment bond was $24,500.00 and damages sustained by defendant proved to be under $700.00.

[14] Clark v. Andrews, 109 Cal.App.2d 193, 240 P.2d 330 (1952).

[15] Goldman v. Plater, 142 Cal. 358, 76 Pac. 58 (1904).

[16] Ramirez v. Hartford Accident & Indemnity Co., 29 Cal.App.2d 193, 84 P.2d 172 (1938).

[17] Michelin Tire Co. v. Bentel, 184 Cal. 315, 193 Pac. 770 (1920). *But see* Koehler v. Serr, 216 Cal. 143, 13 P.2d 673 (1932).

[18] Reachi v. National Auto. & Cas. Ins. Co. of Los Angeles, 37 Cal.2d 808, 236 P.2d 151 (1951).

[19] Faye v. Feldman, 128 Cal.App.2d 319, 275 P.2d 121 (1954).

[20] White v. Indemnity Insurance Company of North America, 246 Cal.App.2d 160, 54 Cal.Rptr. 630 (1966).

litigants who understand the settlement value of protracted fights. Each issue must be heard, decided and, perhaps, appealed. The wearying prosesses of litigation drag on.

The cost, the time and the uncertainty that result all induce settlements of the attachment bond dispute, and this necessarily means that the parties compromise. There is nothing wrong in compromise, of course. It is, and ought to be, the outcome of almost every legal contest. But it should not have to happen here. The legal rules we use now give but little relief; recovery should not be further whittled down by pressured settlements. The possible wrongful attachment claim should be one of the settlement considerations in the first lawsuit, not the second. If trial of the first case is needed, whether because of the intransigence of one party or his reliance on the merits of his cause, that should end all litigation. If that suit is won, the defendant should receive his damages. He should not be forced to compromise an absolute debt then due, because the tools required to enforce his claim are too expensive. When he must start afresh and sue to get his money, he is not protected. The bond given so that "the owner of property shall be protected against seizure of his property at the instance of a plaintiff who has sued without a valid claim"[21] proves of diminished worth to him.

II

NEW PROCEDURE

A better way exists to handle these matters.

Our procedures should be promptly reformed. In the future, the undertaking would be filed in the same way as under the existing practice. The defendant would have the same right he has now to object to the sureties, to question the amount of the undertaking, to provide a release bond, and so forth.[22] At this point changes in existing practice are proposed.

The surety, merely by filing its undertaking, would submit itself to the jurisdiction of the Court in which the action lies, similar to the present law on appeal bonds.[23] It would not be a general appearance for all purposes, but it would support a judgment against the surety for the damages caused

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[21] Woodruff v. Maryland Casualty Co., 140 Cal.App. 642, 35 P.2d 623 (1934).

[22] The defendant's rights in these regards are now far too limited. This is an area long overdue for reform.

[23] Cal. Code Civ. Proc. §942 provides for judgment by motion against an appeal bond surety. Of course, the situations are not fully comparable because the appeal bond obligation is definite and fixed. In some states, a non-resident defendant appears generally upon "the

by the attachment, should the defendant win. No pleadings would be required other than the undertaking itself, and the surety would not be involved in the trial or pretrial maneuverings. This does no injustice to the bonding company, since that is its business and it can protect itself by indemnities and higher premiums. Besides, the suit for attachment damages will eventually occur. There is no harm to the surety and great benefit to the injured party in having the issues decided earlier.

A. Liability

The trial court's judgment must include a determination of whether the surety is liable on the undertaking, although not the damages in fact sustained by the successful defendant. Just as a judgment must now include a statement allowing a party his costs of suit, so it would necessarily state that the defendant recover (or not recover) his attachment bond damages, not to exceed the bond amount, against the named surety.

This liability decision would be made by the judge alone, without a jury. This is to induce speed and simplicity since discussion before the jury of attachments is too likely to prejudice it on the main issue. This phase of the case should be over quickly. Most matters relating to liability (as distinguished from damages) can easily be determined from the courtroom files or by the stipulation of the parties. All that would be left for later determination is whether the attachment was wrongful (i.e. does the defendant win?) and the extent of the resulting damages. Additional evidence on liability would rarely be needed, but if required would be taken at any appropriate point during the court trial or while the jury is in recess. In any event, it must be heard before the decision on the case's merits is known. This will further tend to minimize technical disputes now often raised on the liability issues.

B. Damages

After the fact of the surety's liability has been fixed by the trial judgment, the subject of damages must arise.

Within 10 days after the entry of judgment, the successful defendant would file in the trial court a statement of damages claimed against the

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filing of the document . . . not signed by the defendant but by an attorney-in-fact for a surety company not a party to the action" which, in fact, was defective and held by the court to be "of no value" because the "document was filed and in it the defendant asked the court to do something that the court could not do unless it had jurisdiction." Ashmus v. Donohoe, 272 Wis. 234, 75 N.W.2d 303 (1956). The principle suggested is not a great extension of existing theories. CAL. CODE CIV. PROC. §533, adopted by the 1969 Legislature, provides a somewhat similar procedure in the cases of temporary restraining orders and preliminary injunctions.

surety. The "attachment bond damage bill" would be comparable to the cost bill now in use.[24] It could even be combined with costs within a single document. The defendant must specify in the bill, under oath, the amount of damages he seeks. Claims would be itemized; so much for interest, so much for loss of use, so much for attorneys' fees, so much for release bond premiums, and so forth. As with a cost bill, the defendant's verified claim is *prima facie* evidence of the validity of the item, and the burden of proof is on the bonding company.[25] The sureties would have 5 days thereafter to file their motion taxing damages, and must state therein the specific items thought to be excessive.

Since substantial funds may be involved, the bonding company may wish discovery. That is its right.[26] The trial court would supervise the procedure. The issues would be limited, of course, since only damages are now unsettled. Many items are demonstrable and not subject to dispute. Thus, money impounded is entitled to interest at the legal rate.[27] Specific items of expense, such as bond premiums, can easily be proven. Some matters, of course, are indefinite, such as attorneys' fees, value of the loss of use, collateral expenses and problems of allocation. The hearing will concentrate on these.

When discovery is completed, the motion to tax surety damages would be heard before, if possible, the judge who presided at the trial. As with attorneys' fees in contract cases, "the determination of the award is best left to the discretion of the trial judge, who was intimately familiar with all facets of the case."[28]

The hearing would be similar to one on a motion to tax costs. Affidavits would usually be enough, but oral testimony could be presented. There is no fixed rule. As with cost bills, "any evidence, oral or written, in its nature competent to prove or disprove a material fact in a court of justice . . . is competent upon the hearing of such motion."[29] In due course, the trial court will give its damage ruling. It would automatically be inserted in the judgment in the case, just as costs are now, for purposes of abstracts, execution and appeal.

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[24] Cal. Code Civ. Proc. §1033 et seq.

[25] Von Goerlitz v. Turner, 65 Cal.App.2d 425, 150 P.2d 278 (1944). *But see* Stenzel v. Leon, 130 Cal.App.2d 729, 279 P.2d 803 (1955).

[26] This is similar to the right of discovery now available in relation to cost bills. Oak Grove School District v. City Title Insurance Co., 217 Cal.App.2d 678, 32 Cal.Rptr. 288 (1963).

[27] Schneider v. Zoeller, 175 Cal.App.2d 354, 346 P.2d 515 (1959).

[28] Shannon v. Northern Counties Title Insurance Co., 270 Adv.Cal.App. 756, 75 Cal.Rptr. 7 (1969).

[29] Senior v. Anderson, 130 Cal. 290, 62 Pac. 563 (1900).

An appeal by the defeated plaintiff would automatically seek review of the judgment against the surety. The bonding company could, but need not, participate in the appeal. Maybe the only appeal will be by the bonding company on the undertaking damages, as sometimes now appeals are solely from awards of costs. But whether or not the surety acts, the court on appeal must consider the judgment against the bonding company among the matters brought before it. If the judgment is affirmed, the surety's liability is final. If the judgment is reversed or modified, the liability of the surety will be likewise affected. In any event, that decision is made without an extra trial.

If the attachment has remained in effect during the appeal, further attachment damages will have accrued. These will be treated like costs or attorneys' fees on present appeals.[30] The appellate court must state in its opinion whether the defendant may recover attachment damages on appeal, as it now provides recovery for costs. The successful party will eventually file his appellate damage bill. These will be like cost bills on appeal, and heard before the trial court, as appeal cost bills are heard, and perhaps incorporated with them.

This method is cheap, fast and convenient. It is fair to every party. It meets, therefore, every policy consideration that we may demand, and makes the attachment bond a better security for the successful defendant. It therefore should be adopted.

III

CLAIM AGAINST PLAINTIFF

One troublesome subject remains. In addition to the claim against the surety on the attachment bond, the defendant now has a claim against the plaintiff in malicious attachment. Sometimes these claims are warranted, as where harassment clearly was the purpose of the original attachment. Often, however, such claims are in themselves harassment of an honest, albeit defeated, plaintiff.[31] The proposed damage bill system should not operate against the bonding company under a system that also permits bringing a malicious attachment suit against the plaintiff. One cannot bring two separate lawsuits under the existing law;[32] there is no reason to permit a second suit after attachment damage claims are heard.

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[30] California Viking Sprinkler Company v. Cheney, 182 Cal.App.2d 564, 6 Cal.Rptr. 197 (1960).

[31] *Compare* Owens v. McManus, 108 Cal.App.2d 557, 239 P.2d 72 (1952) *with* Bailey v. McDougal, *supra* note 10.

[32] Clinell v. Shirey, 223 Cal.App.2d 239, 35 Cal.Rptr. 901 (1963).

The policy that forbids a suit in malicious attachment after a prior suit against the surety also would work here. Plaintiff typically has indemnified the bonding company and has, thereby, paid the original claim on the attachment bond. The items of actual damage are the same, although the limits of the bond restrict recovery against the surety. Avoidance of litigation remains our goal. We have eliminated the second suit in one context; let us not restore it in another. In addition, separate suits would countenance litigation as a means of pressure. Once the defendant has been paid his damages in wrongful attachment, it would encourage strike suits to let him go forth in tort on a *malicious* attachment claim as well. We must have an end to the dispute. Nevertheless, when a plaintiff has acted wrongfully, there must be some forum for redress. The proper time is during the first trial.

The field of malicious attachment has aptly been described as "complicated and confused." The courts, depending on the facts involved, treat such cases either as a type of malicious prosecution or as a type of abuse of process. When the action itself is prosecuted maliciously and without probable cause it is the former. In all other cases it is the latter.[33]

The defendant is now permitted to bring a cross-complaint for abuse of process by attachment (but not for malicious prosecution) in the suit in which the process issued. This right, by court decision, should become a compulsory counter-claim, rather than merely a permissive one. Then, unless it is brought in the main action, it would be lost.[34] This would eliminate much subsequent litigation.

Next, the existing law should be expanded. The cross-complaint should cover malicious prosecution attachment cases, as well as abuse of process ones. This seems a fairly modest forward step. The additional issues in such a suit are merely whether the main action terminated favorably to the defendant and whether the lawsuit was begun without probable cause. Until the case is over, of course, these issues cannot be decided; but evidence on them can be presented and considered, and the merits of the cross-complaint, whether in malicious prosecution or in abuse of process, can be determined, all as part of the first trial judgment. After all, the issues of abuse of process and malicious prosecution are intimately related, and proof of one overlaps evidence offered on the other.

It is no drawback to our plan that matters essential to recovery for

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[33] White Lighting Company v. Wolfson, 68 Cal.2d 336, 66 Cal.Rptr. 697 (1968). A cross-complaint in Declaratory Relief for malicious attachment may provide a better technical answer. We have adopted that method in indemnity cases. It might work as well here.

[34] Cal. Code Civ. Proc. §439.

malicious prosecution cannot be shown until the trial court's decision has been made. It would not be decided earlier, only considered. Many similar matters are now heard at trial as a matter of course. It is commonplace, for example, for the trial court to consider attorneys' fees in contract cases, or hear evidence of wealth when punitive damages are claimed, before the main decision is reached. It would be no different here.

The judgment on the cross-complaint, however, would not duplicate the items of damage bill recovery, nor would the details of damages be litigated. Only liability should be involved. If the cross-complainant loses, he might still have his rights against the surety under the damage bill, should plaintiff also lose his case.[35] In winning, however, the determination should be only one of liability, announced by the trial court together with its ruling on the surety liability. Thus the court would state whether or not there is liability on the surety's part for wrongful attachment and also whether the plaintiff is liable for malicious attachment. There could be many combinations here. The surety would often be liable when the plaintiff has no responsibility. Sometimes, however, there might be cross-complaint damages though no bond damage exists, as when the claim is for malicious over-attachment. All liability would be set at trial. Damages on both types of claim would still be set in the post trial damage bill procedure above described, and inserted into the judgment after it is made.

This program would mean all issues of damages arising from an attachment would be decided once and for all, before the judge who heard the trial and is most able to evaluate and apportion the several claims. More important, it would remove all need for a second lawsuit, with the heavy burdens on all the parties and society that every such action entails. Legitimate disputes would get their hearing. No one proposes anything else. It is hard, however, to see how justice is better served by separate suits than by a single trial for these interlocking fights. The courts do not exist so that private vendettas may be maintained, nor as instruments of economic pressure.

IV

CONCLUSION

It may well be that the proposals here involved will inhibit attachments, and cause more sparing usage of that remedy. Certainly, plaintiffs should be cautious and ever fearful of the consequences of misuse of an attach-

[35] A judgment that neither party take anything in the suit supports a wrongful attachment action by the defendant. Woodruff v. Maryland Casualty Co., 140 Cal.App. 642, 35 P.2d 623 (1934).

ment. But this would not end employment of the writ. Suits too often arise from a callous disregard of a plaintiff's rights by a more wealthy or less scrupulous defendant. Attachment plaintiffs are entitled to the security the writ affords in order "to prevent the debtor's sequestration of funds or fraudulent transfer of assets in an attempt to hinder or defeat the payment of just claims."[36] In a proper situation an attachment would still be used. Of course, as so often proves to be the case, a remedy proper in one context and for one purpose may be used by skillful advocates in some other setting, to obtain a tactical advantage in the conflict.[37] Attachments are prone to misuse of this nature. Every effort must be made to give a plaintiff the right to a legitimate attachment and at the same time preclude its use for oppressive purposes. These proposed methods achieve these goals. Speedy relief is provided for defendants entitled to damages. If it also results in fewer questionable attachments, so much the better.

This program could be easily adopted. Simple amendments to the Code of Civil Procedure should suffice. Perhaps the courts could even imply a right of action against the surety by motion in the principal case. Although no case has been found that holds the bonding company is liable merely by motion in the trial court, yet it is not an unthinkable ruling, under all the circumstances. Certainly the courts could force malicious attachment suits into the original case.

No set of rules can be safeguarded from all abuse. Procedural reform, therefore, is a never ending task. One must constantly realign the road, to always turn it towards our proper goals. No change can be devised to solve all problems instantly. It is only gradually by piecemeal methods that meaningful improvements come.[38]

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[36] American Industrial Sales Corp. v. Airscope, Inc., 44 Cal.2d 393, 282 P.2d 504 (1955).

[37] It is well recognized that proper use of procedures in one context may be abuse in another. In some cases this may constitute "abuse of process" and recovery allowed. Such claims are hard to prove, and force the issue onto moral grounds. *Compare* Fairfield v. Hamilton, 206 Cal.App.2d 594, 24 Cal.Rptr. 23 (1962), *with* Spellens v. Spellens, 49 Cal.2d 210, 317 P.2d 613 (1957). A bonded, non-fault system is far better, less subject to variations and less amendable to abuse.

[38] *See* KARL R. POPPER, THE POVERTY OF HISTORICISM, (1957), pp. 66–67: "The characteristic approach of the piecemeal engineer is this. Even though he may perhaps cherish some ideals which concern society 'as a whole' . . . he does not believe in the method of redesigning it as a whole. Whatever his ends, he tries to achieve them by small adjustments and readjustments which can be continually improved upon. . . . The piecemeal engineer knows, like Socrates, how little he knows. He knows that he can learn only from our mistakes. Accordingly, he will make his way, step by step, carefully comparing the results expected with the results achieved, and always on the lookout for the unavoidable unwanted consequences of any reform; and he will avoid undertaking reforms of a complexity and scope which makes it impossible for him to disentangle causes and effects, and to know what he is really doing."