#39

11/25/70

Memorandum 70-119

Subject: Study 39 - Attachment, Garnishment, Execution (Schedule and Financing)

The Commission has now considered preliminarily the background studies and recommendations of its consultants, Professors Riesenfeld and Warren. It is difficult at this early stage to schedule the remaining work on attachment, garnishment, and exemptions from execution. Moreover, the scheduling of the work will depend to some extent upon the funds available to the Commission. Nevertheless, this memorandum presents a staff recommended schedule.

Reasons why study undertaken

You will recall that three major occurrences have prompted this study: (1) the Sniadach decision and the aftermath of conflicting cases, (2) the Federal Consumer Credit Protection Act (the so-called Truth in Lending Act), and (3) the passage of the new California Jurisdiction and Service of Process Act (the so-called Long-arm Statute).

Scope of study

The study is a four-part study: (1) attachment proceedings (provisional remedies before judgment)(Professor Riesenfeld has submitted a study on this aspect), (2) wage execution (Professor Warren has submitted a study on this aspect), (3) the exemption laws, and (4) technical improvements (which may involve substantial changes in existing law).

Recommendations to 1971 Legislature

There appears to be one problem that is so acute that it must be dealt with at the 1971 legislative session. That probelm is garnishment of "paid"

wages--to what extent can wages paid into a bank account or deposited in a bank account be attached before judgment? Perhaps our consultants are aware of other problems in need of immediate attention.

Recommendations to 1972 Legislature

Execution on earnings procedure. The Commission considered Professor Warren's proposal for an "Earnings Protection Act" at the November meeting. The Commission's reaction was generally favorable. A revised draft of the statute will be ready for the Commission at the December meeting. After the December meeting, the staff would hope that the draft statute could be revised and a tentative recommendation drafted for consideration at the January meeting. After the January meeting, the tentative recommendation could be distributed for comment. This schedule would permit submission of a recommendation on execution on earnings to the 1972 Legislature.

Attachment procedure before judgment. The Commission discussed Professor Riesenfeld's recommendations concerning attachment procedure before judgment at the October meeting. No decisions were made, and concern was expressed because of the far-reaching nature of his proposals. Nevertheless, the staff believes that it is most unlikely that Sniadach will be limited to wages; we believe it will be extended even, for example, to a keeper in the commercial setting (see Stanford Law Review article previously distributed). Accordingly, the staff recommends that we give the matter of attachment procedure before judgment a top priority. In developing the procedure, the staff believes that we must assume that resident garnishment will no longer be permitted under the theory of Sniadach. The staff believes that Professor Riesenfeld's recommendations are generally sound and represent a good starting point in developing legislation. After the Commission has made decisions

at the December meeting, the staff plans to prepare a draft statute for consideration at the January meeting. We would hope to be able to distribute a tentative recommendation not later than April 1971.

Technical improvements. Professor Riesenfeld advises that many technical improvements are needed in attachment and garnishment law. Assuming that we can work out a satisfactory financial arrangement with Professor Riesenfeld, the staff would anticipate that the Commission would receive background research studies from Professor Riesenfeld from time to time on particular technical defects and that the staff, using those studies, would draft appropriate legislation, working in cooperation with Professor Riesenfeld. Some of these technical improvements might be presented to the 1972 Legislature if we receive the background studies in time.

Recommendations to 1973 Legislature

Assuming that our consultants provide us with research studies on a schedule that has all research material in our hands by December 1971, the staff believes that a comprehensive revision of the law relating to attachment, garnishment, and exemptions from execution could be presented to the 1973 Legislature. We would hope that our work on this topic would not unduly delay the condemnation-inverse condemnation study. We do believe that attachment is in acute need of revision.

Financing of further research

Our research contracts with Professors Riesenfeld and Warren cover the work immediately needed on the California statutes to meet constitutional requirements and the preparation of a comprehensive outline of the problems that must be dealt with in a comprehensive revision of the law in this field.

Unfortunately, our consultants have discovered that a "bandaid" approach to the constitutional problems is not possible. They have prepared more comprehensive studies than the contract anticipated because the problems--to the extent they could be dealt with by a "bandaid" approach--were "solved" by legislation enacted by the 1970 Legislature.

It appears that the studies cover two aspects of the four-part study: (1) attachment proceedings (provisional remedies before judgment)(Professor Riesenfeld's study) and (2) wage execution (Professor Warren's study). The studies we have received do not cover the two remaining parts of the study: (1) the exemption laws and (2) technical improvements. The existing contracts would cover our consultants' continuing service on the first two parts of the study upon which we already have received studies. However, we hope that the staff can soon take over the substantial work on these parts so that the consultants will be less burdened with it and can instead provide consultation to the staff and the Commission at meetings and can work on the remaining two parts of the study.

Our existing contracts with our consultants did not contemplate their preparing studies on exemptions and technical improvements. However, the Commission should deal with these two aspects of the topic in its comprehensive statute. Accordingly, the staff recommends that we discuss with our consultants what arrangements we can make for contracting with them to do the two remaining parts and what schedule they believe they can meet.

You are aware that the research funds provided in our budget have been substantially reduced over former years. However, savings in salaries and other personnel expenses will be realized because we filled high level legal positions at the entry level. These savings amount to approximately $7,500

which, when added to the funds already available for research, gives us approximately $9,500 for research. Of this amount, the Commission already has allocated $2,750 to the study on the problem of how to dispose of the lessee's property when a lease is terminated. We have asked several consultants whether they would be interested in the study but have been turned down; we are now awating a decision from Professor Friedenthal of Stanford whether he will do the study. This leaves approximately $6,750 for additional research. The staff suggests that we allocate $5,000 of this (plus an amount for travel expenses to the study on attachment, garnishment, and exemptions from execution. We will need to provide additional funds for travel for Mr. Kanner to continue to come to our meetings when we consider condemnation so we suggest that a small amount of funds be reserved for this purpose.

Professor Riesenfeld believes we need a factual study of the extent and purposes for which attachment is used. He is working out the procedures. How can we finance the actual work on the factual study, and who will do it, and how will it be done.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Attachment in California: A New Look at an Old Writ*

Recent events have focused attention on the constitutionality of pretrial remedies. In June 1969, the United States Supreme Court held Wisconsin's wage-attachment statute unconstitutional on due process grounds in *Sniadach v. Family Finance Corp.*[1] The decision cast doubt on the constitutionality of similar remedies in other states.[2] A number of California courts, relying on the *Sniadach* opinion, proceeded immediately to enjoin sheriffs from exercising prejudgment writs against wages.[3] A variety of assets other than wages are still subject to seizure—including vehicles, bank accounts, the receivables of a business, growing crops, debts owed to the defendant by third parties and real estate. The constitutionality of these pretrial seizures was also subjected to attack: The Attorney General of California filed suit in the California supreme court, asking the court to invalidate California's attachment law in its entirety on the basis of *Sniadach*. The court left matters largely unresolved: It dismissed the Attorney General's suit on procedural grounds,[4] while holding California's wage-attachment procedure unconstitutional in a companion case.[5]

Attacks on California's attachment procedures are bound to continue. Other prejudgment remedies in California have recently been declared unconstitutional,[6] and the growing official sensitivity to consumer protection and debtor's rights makes attachment a likely candidate for reform. There is considerable confusion over the specific form such changes should take, however, for although the Supreme Court in *Sniadach* placed great emphasis on the necessity of notice and a hearing before the taking of wages,[7] the effectiveness of the remedy—which depends in part on the element of surprise—would often be destroyed by requiring such procedures.

It is the purpose of this Note to propose a framework for the consideration of alternatives to California's present attachment laws. Constitutional

* This Note would not have been possible without the much appreciated cooperation of the Civil Division of the Santa Clara County Sheriff's Department. Of particular value was the advice and aid of Captain Martin LeFevre, chief officer of the Division, whose efforts to achieve an impartial and smoothly operating procedure were mentioned favorably by attorneys representing collection and debtor interests alike.

1. 395 U.S. 337 (1969).

2. *See, e.g.*, Termplan Inc. v. Superior Ct., — Ariz. —, 463 P.2d 68 (1969).

3. *E.g.*, McCallop v. Universal Acceptance Corp., No. 605,038 (Super. Ct. Cal., San Francisco County, July 11, 1969).

4. People *ex rel.* Lynch v. Superior Ct., 1 Cal. 3d 910, 464 P.2d 126, 83 Cal. Rptr. 670 (1970).

5. McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

6. *See In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968) (provisional remedy of arrest and bail); Mihans v. Municipal Ct., 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1st Dist. 1970) (unlawful detainer).

7. *See* text accompanying notes 77–78 *infra*.

requirements and Federal statutes[8] limit state discretion in the design of attachment procedures. Within these limits, a principal consideration should be the needs of the parties involved; thus this Note will emphasize the uses to which creditors put the remedy, and its effects on debtors and third parties. As the empirical data collected in the preparation of the Note will indicate, the specifics of attachment procedure, as well as the uses and effects of the remedy, vary significantly according to the type of asset concerned. This Note will focus on five classes of assets: wages, assets on the premises of going businesses, bank accounts, real estate, and vehicles. These have been chosen because they are the assets most commonly attached;[9] the choice proves to be convenient for the purpose of documenting the point that general attachment procedures that are constitutional with respect to one class of assets may be unconstitutional as applied to others. The analysis adopted in the Note can be applied to assets of other types as well.

The conclusions of this Note rest in part on empirical data collected from interviews with 24 attorneys and from a study of the files of the Santa Clara County Sheriff's office. Twelve of the attorneys were chosen because of their affiliations with the collection business, and 12 were selected from among the Santa Clara County attorneys whose names appeared in the Sheriff's files.[10] In addition, data were assembled on 172 cases selected in a random manner from the Sheriff's office.[11] Pertinent data from

8. The Consumer Credit Protection Act limits the amount that can be confiscated by a wage garnishment (whether before or after judgment) in any given week to the lesser of (1) 25% of the debtor's "disposable earnings for that week, or (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . ." 15 U.S.C. § 1673(a) (Supp. IV 1969).

9. For a comparison, based on 100 municipal court cases, of the relative frequency with which various types of property are attached see Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1253 (1965). *See also* note 11 *infra*.

10. The attorneys selected because of their connections with the collection business were interviewed in person. Those chosen from names appearing in the Sheriff's files were interviewed by telephone.

11. The cases were selected from those received by the Sheriff in the months of January, April, July, and October 1969. The filing system made it easy to identify levies involving going businesses, real estate, and vehicles. For those 4 months, the total number of cases for these classes of property were: going businesses, 158; real estate, 83; and vehicles, 135. The vehicle figures have been adjusted to account for seizures made under tax warrants, and the going-business levies have been adjusted to account for claim-and-delivery actions. These seizures were filed in such a manner that they would ordinarily be counted as vehicle or going-business levies made under a writ of attachment or execution. The sample revealed that 40%, 75%, 20%, and 11% of the vehicle seizures in the months of January, April, July, and October 1969, respectively, were made under tax warrants, and that 18% and 27% of the going-business levies in the respective months of January and October 1969 were claim-and-delivery actions.

Cases to be studied were chosen by selecting every fourth file in a given month in the case of going-business and vehicle levies and every second file in the case of real-estate levies. This process yielded 110 cases, of which 38 involved going businesses, 40 involved real estate, and 32 involved vehicles. Two cases were discarded from among each of the going-business and real-estate levies because the data they contained were insufficient to determine whether the levies were attachments or executions.

Files on wage and bank-account garnishments were less easily identified. Because there were a large number of cases in the files, every 1000th case in the months of January, April, July, and October 1969 was examined. If the case did not involve a levy on a vehicle, real estate, or a going business, that file was selected for the study; otherwise, the first subsequent case that did not involve one of those

these files documenting statements made in text and in footnotes are set forth in an Appendix.

The format of this Note is as follows: Part I is devoted to an outline of California's present statutory procedures. The uses to which attachment is put by creditors, the interests of debtors and third parties, and certain economic ramifications of the remedy are treated in Part II. The third Part deals with constitutional problems inherent in attachment procedures. The system is described in operation with respect to five different types of property in Part IV. The concluding section discusses the merits of various alternative procedures.

I. The Statutory Framework

Attachment in California is a purely statutory remedy.[12] It is initiated by a writ, issued by the clerk of the court in which a plaintiff has filed suit, commanding the sheriff[13] of a county in which assets of the defendant are located to take custody of those assets. The act of the sheriff in taking custody over the property is commonly referred to as a "levy;" a levy on an asset held by a person other than the defendant, such as wages held by an employer or a deposit in a bank, is generally referred to as a "garnishment."

The writ is available only after suit has been filed and only to plaintiffs suing on certain enumerated causes of action[14] for an amount greater than $125.[15] The plaintiff must file both a declaration stating that his cause of action entitles him to have a writ issued[16] and an undertaking with the

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assets was chosen. In this way 77 cases were selected, of which 54 were wage garnishments, 15 bank-account garnishments, and 8 levies on miscellaneous assets such as debts owed to landlords by tenants.

Data collected from the survey of going-business levies are reproduced in the Appendix. *See* Table 5 *infra*. Data collected from the other surveys are on file at the Stanford Law Review. Because the information obtained from the attorneys interviewed as to the uses they make of attachment is confidential, it can be made available only by those attorneys; their names are on file at the Stanford Law Review.

12. Cal. Code Civ. Pro. §§ 537–61 (West 1954 & Supp. 1969). The statutory provisions governing attachment vary greatly from state to state, with regard both to the procedures followed in exercising a levy and to the type of assets made subject to seizure. For example, some states exempt a debtor's wages entirely from levy, *see, e.g.*, Pa. Stat. Ann. tit. 42, § 886 (1966), while others exempt a certain percent or a flat amount, *see, e.g.*, N.Y. Civ. Prac. Law § 5231 (McKinney 1963) (90% exemption); Me. Rev. Stat. Ann. tit. 14, § 2602(6) (Supp. 1970) ($40 per week exempt). For a short general history of attachment see R. Millar, Civil Procedure of the Trial Court in Historical Perspective 481–515 (1952).

13. Cal. Code Civ. Pro. § 540 (West Supp. 1969). Marshals and constables also exercise writs in some counties. In Santa Clara County the Sheriff is the only peace officer who is empowered to do so.

14. Attachment is allowed generally in suits based on unsecured contracts made or payable in California that are "for the direct payment of money." Cal. Code Civ. Pro. § 537(1) (West Supp. 1969). If the defendant is a nonresident, the requirement that the contract be unsecured is dropped. *Id.* § 537(2). The remedy is also available in suits for damages "arising from an injury to or death of a person, or damage to property in this state, in consequence of negligence" if the defendant is a nonresident or "has departed from the state, or . . . cannot after due diligence be found within the state, or . . . conceals himself to avoid service of summons . . . ." *Id.* § 537(3). For other classes of suits in which attachment is available see *id.* § 537.

15. *Id.* § 538.

16. *Id.*

clerk of the court in which suit is brought.[17] The writ is forwarded to the sheriff of the county in which the property to be seized is located, together with a detailed description of the property[18] and a deposit to cover the sheriff's fees.[19] If the papers are in order, the sheriff will attempt a levy and will notify the court that issued the writ of the results.[20] Property seized by a levy is held in the custody of the sheriff for 3 years[21] from the date of issuance of the writ or until earlier released. During this period, unless the property attached is real estate, the defendant is denied all right to its use; defendants may sell attached property subject to the lien. An attachment may be terminated prior to its expiration date in at least six ways: (1) If the plaintiff obtains a judgment in his favor, he will often release the property upon satisfaction of the award by the defendant or levy on the seized property under a writ of execution.[22] (2) More commonly, a plaintiff will release the property or a defendant will authorize the property to be turned over to the plaintiff pursuant to an out-of-court settlement between the parties. (3) If personal property is owned by a person other than the defendant, the third party is entitled to protect his interest by filing a third-party claim with the sheriff. The property is then released to the defendant unless the plaintiff posts an additional bond equal to twice the value of the property claimed.[23] Often the defendant's interest in the property is not worth this expense. (4) The law exempts various types of property from attachment.[24] An exemption may be claimed only *after* the property has been levied upon.[25] Property held under a writ of attachment will be released when the defendant files a claim of exemption with the sheriff unless the plaintiff contests the claim. A hearing is held on contested claims.[26] (5) An attachment made within 4 months preceding the filing of a petition in bankruptcy may be invalidated by a bankruptcy court if the defendant was insolvent at the time of the levy or if fraud was involved.[27]

17. *Id.* § 539. An undertaking is a means by which some company becomes or some persons become bound to guarantee a designated party against loss under a specified contingency. Although an undertaking is generally similar to a bond, the filing party must sign a bond and need not sign an undertaking. *See* Alexander v. Superior Ct., 91 Cal. App. 312, 315, 266 P. 993, 994 (2d Dist. 1928).

18. *See, e.g.*, CALIFORNIA STATE SHERIFFS' ASS'N, CIVIL PROCEDURAL MANUAL § 7.60(a) (1969) [hereinafter cited as SHERIFFS' MANUAL].

19. *See* SHERIFFS' MANUAL, *supra* note 18, § 4.1 (citing CAL. GOV'T CODE §§ 6100, 6110 (West 1966); *id.* § 24,350.5 (West 1968)).

20. CAL. CODE CIV. PRO. § 559 (West Supp. 1969).

21. Real property is held for 3 years from the date of the levy. *Id.* § 542a (West 1954). Personal property is held for 3 years from the date of issuance of the writ. *Id.* § 542b. Property is not released automatically upon the termination of the lien, however, and it may be necessary for the defendant to get a court order to retrieve it. Interview with Captain Martin LeFevre, Mar. 24, 1970, San Jose, California; *see* E. JACKSON, CALIFORNIA DEBT COLLECTION PRACTICE § 9.114 (1968).

22. CAL. CODE CIV. PRO. § 688 (West Supp. 1969).

23. *Id.* § 549 (West 1954); *id.* § 689 (West Supp. 1969).

24. *See id.* §§ 690–.25 (West 1955 & Supp. 1969).

25. *See id.* § 690.26 (West Supp. 1969).

26. *Id.*; *see* McCallop v. Carberry, 1 Cal. 3d 903, 906–07 n.7, 464 P.2d 122, 124–25 n.7, 83 Cal. Rptr. 666, 668–69 n.7 (1969).

27. Bankruptcy Act § 67(a)(1), 11 U.S.C. § 107(a)(1) (1964).

(6) The defendant can obtain release of the property by posting a bond or filing an undertaking,[28] or by paying the amount of the demand plus costs to the sheriff.[29]

Although attachment liens are usually terminated before judgment, attachment is structured to preserve assets for the satisfaction of judgment. It takes 30 days to obtain a default judgment in California.[30] After judgment has issued in a civil case, several forms of enforcement process are available to the judgment creditor. The most commonly used is the writ of execution, which operates much like the writ of attachment.[31] The writ of execution orders the sheriff to satisfy a judgment out of the defendant's property;[32] the sheriff seizes the property and either transfers it directly to the judgment creditor (if it is cash) or sells it at auction and applies the proceeds to satisfaction of the judgment.[33] Except for wages, which are now subject only to execution,[34] the writs of attachment and execution apply to the same classes of property,[35] and the procedure followed by the sheriff in seizing an asset is the same whether he is proceeding under a writ of attachment or a writ of execution.[36]

II. Competing Interests

Many factors must be taken into account in evaluating a set of attachment procedures. Individuals directly involved in the process—plaintiffs, defendants, and third parties affected by a levy—often have important interests to protect. In addition the general economic repercussions of the remedy must also be considered. This section will consider the problems raised by these competing concerns.

A. *Plaintiffs' Interests*

This section will focus on the three principal ways in which attachment has served creditors: to secure assets for satisfaction of judgment; to gain leverage over the defendant in settlement negotiations; and to permit the court in which a plaintiff wishes to sue to assume jurisdiction.

28. The undertaking may be given to the sheriff so long as he retains the writ; the undertaking, however, must first be approved by the court. Cal. Code Civ. Pro. § 540 (West Supp. 1969). Once the writ has been returned to the court issuing it, the undertaking must be filed with the court. *Id.* §§ 554–55 (West 1954).

29. *Id.* § 540 (West Supp. 1969). Payment must be made before the writ is returned to the court which issued it. *See* E. Jackson, *supra* note 21, § 9.143.

30. Cal. Code Civ. Pro. §§ 412.20, 585 (West Supp. 1969) (operative July 1, 1970).

31. For a discussion of another postjudgment remedy, the abstract of judgment, see text accompanying note 127 *infra*.

32. Cal. Code Civ. Pro. § 682 (West Supp. 1969).

33. *Id.* § 684 (West 1955).

34. *See* text accompanying note 5 *supra*.

35. Cal. Code Civ. Pro. § 541 (West 1954); *id.* § 688 (West Supp. 1969).

36. *Id.* § 688 (West Supp. 1969).

1. *Security.*

Money judgments in California may be satisfied by means of a levy on the judgment debtor's nonexempt property under a writ of execution.[37] Although an award may be satisfied in this manner at any time within 10 years after the judgment date,[38] and property acquired by the debtor subsequent to judgment is subject to levy, plaintiffs obviously find it desirable to have property on hand available for execution at the time the judgment is awarded. This not only ensures a speedy satisfaction of the judgment, but also avoids the expenses involved in keeping track of the debtor. If property is not secured in the period preceding judgment, a plaintiff runs the risk that it will not be available for an execution levy. A defendant, when notified of the suit by service of process, can make himself judgment-proof by concealing, encumbering, or disposing of his assets. In addition, satisfaction of a judgment can be frustrated by the levies of other creditors or the initiation of bankruptcy proceedings. In some cases, the law of fraudulent conveyances may protect the creditor;[39] but the expense of litigating this side issue considerably dilutes that protection.

Attachment gives a plaintiff a means of securing assets of the defendant against these contingencies. Attachment liens remain in force for 3 years,[40] a period sufficient to ensure that the assets will be available for satisfaction of judgment. The absence of a notice requirement provides security against evasion by a defendant.[41] The plaintiff is secured against the intervening claims of other creditors by a provision in the law that relates back the title of an execution purchaser to the time of the commencement of the attachment.[42]

The value of an attachment as a security device varies greatly with the type of property involved. For example, bank-account garnishments are often useful for this purpose, but wage attachments generally are not.[43] The creditor's security need depends not only on the ease with which the asset can be concealed or transferred, but also on the value of the defendant's interest in it. A totally mortgaged vehicle, for example, can be transferred easily but would be useless to a plaintiff as security for judgment. These variations in security value will be important in Part V's discussion of potential modifications in California's present attachment law.

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37. *Id.*
38. *Id.* § 681. This period may be extended by leave of court. *Id.* § 685.
39. *See* CAL. CIV. CODE § 3439.07 (West 1954).
40. *See* note 21 *supra.*
41. A plaintiff may request the clerk of the court issuing the writ not to "make public the fact of the filing of the complaint, or of the issuance of the attachment, until after the filing of the filing of the return of service of the writ . . . ." CAL. CODE CIV. PRO. § 537.5 (West Supp. 1969).
42. *Id.* § 700 (West 1954). *See also* Balzano v. Traeger, 93 Cal. App. 640, 270 P. 249 (2d Dist. 1928).
43. *Compare* text preceding note 114 *infra with* text accompanying note 96 *infra.*

2. *Leverage.*

Nobody likes to have his property attached. Deprivation of its use is only one of the undesirable consequences of a levy; attachment may cost a defendant his customers,[44] a chance for a profitable sale,[45] or even his job.[46] Because defendants often desire to have attachments lifted as quickly as possible, a levy may place a plaintiff in a highly advantageous bargaining position.

Although in some cases plaintiff's leverage will be used to induce the defendant to settle promptly a claim that he would never have disputed in court, in other cases valid defenses and counterclaims will be sacrificed by defendants under great pressure to get the lien released, and claims will be settled for an amount higher than that which the plaintiff could expect to get at trial.[47] Numerous instances of such settlements came to light during the attorney interviews. One attorney stated that he had represented a client claiming to be owed $11,000, the debtor maintaining that only $4000 was due. The attorney attached the defendant's business and the dispute was settled for $9000, a sum the attorney said he could "never have gotten in court."[48]

The procedural safeguards established to protect a defendant in situations such as this are generally ineffective. For example, an attachment may be released by giving the levying officer an undertaking or cash deposit,[49] but a defendant in financial difficulty may be unable to do so.[50] The law permits attachments to be made without a prior determination as to whether the property is exempt, and puts the defendant to the expense of having

44. *See* text accompanying note 106 *infra*.

45. *See* note 131 *infra*.

46. *See* text accompanying note 93 *infra*.

47. This use of attachment is particularly significant because parties to a dispute are apt to make demands in excess of the sum they expect to receive. This practice was described in a recent article by a practicing attorney: "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." Alexander, *Wrongful Attachment Damages Must Be Fixed in the Original Suit*, 4 U.S.F.L. Rev. 38, 39 (1969). An example of this process in action can be found in *Imperial Metal Finishing Co. v. Luminous Ceilings West, Inc.*, 270 Cal. App. 2d 390, 75 Cal. Rptr. 661 (2d Dist. 1969).

48. The value of the leverage derived from an attachment has been judicially recognized. In a case involving an attachment of a going business whose principal assets were heavily mortgaged, a lower court stated: "Even though the attachment lien apparently had no real economic value, (as the mortgage balance apparently exceeded the value of the property of the debtor by a wide margin) it was technically valid and had strategic value or bargaining value . . . ." Imperial Metal Finishing Co. v. Luminous Ceilings West, Inc., 270 Cal. App. 2d 390, 399, 75 Cal. Rptr. 661, 667 (2d Dist. 1969).

49. Cal. Code Civ. Pro. §§ 540, 1054a (West Supp. 1969).

50. A member of the California Bar recently compared the ease with which plaintiffs are able to procure the bonds necessary to obtain a writ of attachment with the problems defendants have in procuring release bonds: "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." Alexander, *supra* note 47, at 40.

exempt property released.[51] Other safeguards, such as requiring the plaintiff to post a bond,[52] do not protect the defendant when the amount (but not the existence) of a debt is under dispute, for recovery on the bond requires the defendant to obtain judgment in his favor in the case;[53] thus a creditor with a valid debt of disputed size can gain significant leverage in dealing with a debtor with little fear of reprisal.

3. *Jurisdiction.*

Attachment of property has historically played a role in allowing a plaintiff to choose the court in which he wishes to sue. The traditional rule, as stated by the Supreme Court in 1877 in *Pennoyer v. Neff*,[54] was that "process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them."[55] Strict application of that rule foreclosed state courts from assuming jurisdiction over suits against persons not present in the state. The Supreme Court in *Pennoyer* upheld as constitutional an important exception to the rule: State courts could take jurisdiction over suits involving nonresident defendants who had property within the state, if that property was brought within the court's jurisdiction by attachment and if substituted service (such as service by publication) was made.[56] Such jurisdiction, called quasi-in-rem jurisdiction, is generally less valuable to plaintiffs than personal jurisdiction: A judgment quasi in rem binds only the parties to the action and not the entire world, and it imposes no personal liability on the defendant, the award being limited to the property seized.[57]

The importance of quasi-in-rem jurisdiction—and hence of attachment as a jurisdictional mechanism—has declined over the years as the strictures on personal jurisdiction over nonresident defendants have gradually been removed. Although the California laws have reflected the general trend, the state has not been a leader in the liberalizing process.[58] The law in effect through June 30, 1970, provided that personal jurisdiction over an individual who is outside of the state might be obtained by publication only if he is also *personally* served with a copy of the summons and complaint "and was a resident of this State (a) at the time of the commencement of the

51. CAL. CODE CIV. PRO. § 690.26 (West Supp. 1969).
52. *See id.* § 539.
53. *Id.* Even if the defendant is awarded judgment, it is not easy for him to recover on the bond. A separate suit must be filed against the bonding company in which the original defendant must be able to prove actual damages from the levy. Punitive damages are not allowed. *See* Alexander, *supra* note 47, at 39.
54. 95 U.S. 714 (1877).
55. *Id.* at 727.
56. *Id.*
57. *See, e.g.*, Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 308, 88 P. 356, 359 (1906).
58. *See* Horowitz, *Bases of Jurisdiction of California Courts to Render Judgments Against Foreign Corporations and Non-Resident Individuals*, 31 S. CAL. L. REV. 339 (1958).

action, or (b) at the time that the cause of action arose, or (c) at the time of service."[59] New jurisdictional statutes that take effect in July 1, 1970, relax these requirements drastically. These statutes permit California courts to assume jurisdiction over nonresident defendants "on any basis not inconsistent with the Constitution of this state or of the United States."[60] Notice requirements may be met either by personal service or by service through the mail.[61] Although quasi-in-rem jurisdiction may still be needed with respect to "a defendant whose whereabouts are unknown and who has no known fixed location,"[62] the need for attachments to obtain jurisdiction will probably not be great.

B. *Defendants' Interests*

The days of imprisonment for debt are gone in California;[63] the principal remedy now available to creditors is seizure of a debtor's property. Arguably the scope of this remedy should be limited to accommodating two interests of a defendant: (1) his interest in maintaining a basic livelihood for himself and his dependents; and (2) his interest in paying no more on a claim than a court would find him to owe.

The first problem is dealt with in the laws exempting certain property from attachment and execution.[64] There has been a trend in recent years toward expanding the list of exempt property, a trend due in part to increased concern for debtors' rights. As one might expect, the legislature is under constant pressure from both creditors and debtors to revise the exemption list.[65]

The second debtor's interest—that of assuring that he pays no more on a claim than a court would find him to owe—is more complex. This interest would be best protected by limiting the leverage a creditor can obtain from a levy. The fact that a defendant may have valid defenses that attachment will impel him to forego raises both constitutional and equitable problems. The constitutional problem stems from the confiscatory nature of attachment; hardships are imposed on the defendant without notice or an opportunity to be heard.[66] Even when due process constraints

59. CAL. CODE CIV. PRO. § 417 (West Supp. 1969).

60. *Id.* § 410.10. The Comment of the Judicial Council to this new section lists 11 possible bases of jurisdiction over individuals: presence, domicile, residence, citizenship, consent, appearance, doing business in the state, doing an act in the state, causing an effect in the state by act or omission elsewhere, ownership, use or possession of a thing in the state, and "other relationships." The last category is explained as encompassing "other situations where the individual has such a relationship to the state that it is reasonable for the state to exercise such jurisdiction." *Id.*, Comment.

61. *Id.* § 415.40.

62. *Id.* § 415.50, Comment.

63. *See In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968).

64. CAL. CODE CIV. PRO. §§ 690–.25 (West 1955 & Supp. 1969).

65. For example, in 1968 the California legislature passed a bill to exempt all wages automatically. Cal. Assembly Bill No. 1208, 1968 Reg. Sess. (introduced Mar. 26, 1968, CAL. ASSEMBLY J. 1406 (1968)). The bill was vetoed by Governor Reagan. 1 CAL. DIGEST 83 (1968).

66. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); text accompanying notes 74–82 *infra*.

have been satisfied, there may be reason to limit further the potential leverage gain to plaintiffs. It may seem equitable, in balancing a particular plaintiff's interest in attachment against the degree of hardship to the defendant, that a seizure be limited or modified. For example: the plaintiff, who has the power to select the assets to be seized, may choose assets the seizure of which will maximize his leverage. The defendant in such a case will have a strong interest in substituting other assets as security—an interest that is surely worth protecting.

C. *Third-Party Interests*

The final set of interests to be considered are those of third parties. Important among these are nonattaching creditors, garnishees, and owners or co-owners of property levied on while in the debtor's hands.

Attachment by one creditor almost invariably affects the interests of the debtor's other creditors. In those cases involving comfortably solvent debtors, the effects may not be important; but often, however, an attachment seriously reduces the debtor's capacity to satisfy his other outstanding obligations. The first creditor to attach gains considerable bargaining power in any negotiation toward a composition with other general creditors. Other creditors can, in some cases, nullify an attachment by filing a petition in bankruptcy within 4 months;[67] but bankruptcy procedures are expensive for all concerned, and a potentially viable business may not survive the process.

Creditors are not the only third parties whose rights may be adversely affected by attachment. An early form of attachment allowed seizure of property belonging to residents of the debtor's town in order to compel, by community pressure, the debtor's appearance in court.[68] Levies today still create hardships on third parties, though not in such a blatant form. Garnishments are often costly and inconvenient to the persons on whom they are served, and personal property belonging to third parties may be seized while in the defendant's possession.[69] Levies that put pressure on a debtor by inflicting inconvenience and hardships on third parties would seem to require special justification.

D. *General Economic Considerations*

Any procedure for collecting valid debts and adjudicating disputed claims consumes resources. Both plaintiffs and defendants incur direct and court-imposed costs in adjudication; the public also subsidizes the process to some extent. Implementation of such prejudgment remedies as attach-

67. Bankruptcy Act § 67(a)(1), 11 U.S.C. § 107(a)(1) (1964); *see* text accompanying note 27 *supra*.

68. W. Brandon, The Customary Law of Foreign Attachment 5 (1861).

69. *See* text accompanying notes 92 & 106 *infra*.

ment generates additional costs. Some portions of these too are borne by the tax-paying public; some are borne by the parties to the suit, who must pay sheriff's fees, storage costs, and so on; and some are incurred by third parties—garnishees, and owners of attached property who must file third-party claims after their property has been seized.

Cost factors play an important part in creditor decisions regarding attachment. As Part IV will indicate, levies requiring a high deposit are used more cautiously than are their less expensive counterparts.[70] The cost to creditors of attachment procedures may well be reflected in the prices they charge their customers and in the general cost of credit.

Laws that freely allow attachment may precipitate bankruptcies, with attendant social costs. One recent study disclosed a correlation between state bankruptcy rates and the amount of wages exempted from garnishment.[71] Federal bankruptcy law permits the nullification of some attachments made within 4 months of the initiation of bankruptcy proceedings;[72] thus the creditor who attaches a substantial portion of the assets of an insolvent debtor virtually invites competing creditors to file a petition in bankruptcy as a means of preserving their rights. The result may be to force into bankruptcy going concerns that might otherwise have developed into solvent businesses.

A system that neglects creditor interests by making collection unduly expensive and difficult to achieve will generate costs of a different kind. A creditor who is not permitted prior to trial to secure assets sufficient to satisfy his claim may find himself with no assets to levy on after judgment. This may lead to an increase in the cost of credit[73] and a denial of credit altogether to certain groups. Such competing economic considerations are not readily quantifiable. This Note will focus more particularly on the costs of the use of the writ to the parties involved.

III. Due Process Requirements

Flexibility in the design of a state attachment statute is limited by the due process requirements of the fourteenth amendment. These requirements have recently been redefined by the United States Supreme Court in *Sniadach v. Family Finance Corp.*,[74] in which the Court struck down the

70. *Compare* text accompanying note 113 *infra with* text accompanying note 135 *infra*.

71. Myers, *Non-Business Bankruptcies*, in Proceedings of the Tenth Annual Conference, Council of Consumer Information 11 (1964). *See also* Brunn, *supra* note 9, at 1236. For a discussion of alternative explanations for this correlation see Note, *Wage Garnishment in Washington—An Empirical Study*, 43 Wash. L. Rev. 743, 766–69 (1968).

72. *See* note 27 *supra* and accompanying text.

73. *See, e.g.*, California Assembly Interim Committee on the Judiciary, Transcript of Proceedings on Attachments—Exemption of Personal Property 30, June 23, 1964. *But see* Note, *supra* note 71, at 772 n.160.

74. 395 U.S. 337 (1969).

Wisconsin wage garnishment law. This statute gave the plaintiff 10 days to serve a copy of the summons and complaint on the defendant after service of the writ of attachment on the garnishee, thus making it possible for a defendant's wages to be seized before he knew of the underlying suit.[75] The defendant in *Sniadach* challenged this procedure on the ground that the taking of wages without prior notice and without a hearing constituted a deprivation of property without due process of law in violation of the fourteenth amendment. The Supreme Court upheld the challenge. Justice Douglas wrote for the majority:

> Such summary procedure may well meet the requirements of due process in extraordinary situations. . . . But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable.[76]

After determining that no extraordinary creditor interest had been shown to exist in the case before it, the Court strongly emphasized the unique consequences of wage garnishments. Noting that wages are "a specialized type of property presenting distinct problems in our economic system," the opinion stressed the "tremendous hardship" often resulting from a levy, citing possible loss of employment, the "easy credit nightmare," the leverage gained by creditors through wage garnishment, and the harsh consequences that often follow from loss of income.[77] The opinion concludes that

> a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process.[78]

Although the opinion leaves many questions unanswered, it is clear about the following: The garnishment of Christine Sniadach's wages was unconstitutional because it effected, without notice to her or an opportunity for her to be heard, an "obvious taking" without a showing of an "extraordinary situation . . . requiring special protection to a state or creditor interest." Though the holding is restricted to wage garnishments, the

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75. California law, by contrast, required that wage attachments be preceded by notice to the defendant. *See* CAL. CODE CIV. PRO. § 690.11 (West Supp. 1969). The California supreme court took note of this provision in *McCallop*, but held that it was not a sufficient safeguard to keep California's procedure from falling "within the rationale of *Sniadach*." McCallop v. Carberry, 1 Cal. 3d 903, 907, 464 P.2d 122, 125, 83 Cal. Rptr. 666, 669 (1970).

76. 395 U.S. at 339 (citations omitted).

77. *Id.* at 340–41.

78. *Id.* at 341–42 (citation omitted).

Court's analysis obviously can be applied to attachment of other types of property. Under such an analysis, the constitutionality of an attachment law principally depends on the following factors: hardship, the existence of an extraordinary situation, and provision made in the statute for notice and a hearing. On these three points, the *Sniadach* opinion leaves important issues unresolved.

A. *Attachment as a Taking*

The Court clearly indicated that a crucial factor in determining the constitutionality of a given attachment is the hardship it works on the defendant. As Part IV of this Note will show, the degree of hardship involved depends in turn not only on the defendant's financial circumstances, but also on the type of property attached. Not every attachment drives the defendant "to the wall."

The majority in *Sniadach* does not discuss procedures for reducing the hardships attendant to an attachment. The opinion focuses on preattachment notice-and-hearing procedures as a means of satisfying the requirements of due process. Though it does not specifically address the question whether procedures that reduce the resultant hardships of a levy would be equally acceptable, its emphasis on the role of hardship suggests that such a reform would satisfy due process constraints. One method for reducing hardship (alluded to in the dissent[79]) is to provide the defendant with procedures permitting him to modify or lift an onerous attachment prior to judgment without having to sacrifice valid defenses or counterclaims. The extent to which constitutional defects in an attachment statute can be cured by means of postattachment remedial procedures remains unclear.

Another open question is whether a statute would be constitutional that provided for attachment of certain types of property prior to notice and hearing, even absent an "extraordinary situation," on grounds that most attachment levies on such assets do not cause significant hardship. The answer might depend on the balance among the importance of the creditor need being served by the levy, the severity of the hardship in the cases in which it is produced, and the availability of alternative procedures that would produce less hardship while protecting the legitimate creditor interests involved.

B. *Extraordinary Situations*

The *Sniadach* opinion suggests that the presence of a "situation requiring special protection to a state or creditor interest" may justify prehearing attachment and implies that such a situation may exist when a

79. *Id.* at 346–47 (Black, J., dissenting).

plaintiff must attach in order for the court in which he wishes to sue to have jurisdiction. The opinion strongly suggests, however, that a creditor's leverage gain from attachment cannot by itself justify a taking without notice and hearing. In striking down Wisconsin's wage-attachment procedure, the Court noted disapprovingly that "[t]he leverage of the creditor on the wage earner is enormous."[80] The leverage gains of a plaintiff depend on hardship to the defendant, and hardship in attachment is the source of the due process problem; a "leverage" exception to the *Sniadach* notice-and-hearing requirement would swallow up the rule.

In California, obtaining jurisdiction no longer plays a central role in creditor use of attachment;[81] thus, if any creditor interest justifies prehearing attachment, it must be the interest in security. The "surprise" element in prehearing attachment is most important to the creditor, who reasonably fears that the stock of defendant's assets on which he can levy in execution will diminish in value prior to judgment. Unless attachment precedes notice and hearing, a defendant determined to frustrate execution can render himself judgment-proof before the attachment hearing takes place.

It is not clear from a reading of the *Sniadach* opinion whether the Court would find security needs adequate to justify a prehearing levy. The Court made no direct reference to this interest, and none of the cases it cited to illustrate "extraordinary situations" involved the security needs of ordinary creditors.[82] Even if the need for security is accepted as an extraordinary creditor need, several problems still arise. First, in some cases a creditor's security gain from attachment will be slight in relation to his gain from leverage. Will a harsh attachment be justified in such situations? Second, some creditor security interests warrant protection more than others. For example, the law might reasonably give more weight to a creditor's interest in protecting himself against a defendant's attempt to strip himself of leviable assets than to his interest in obtaining priority over other creditors.

C. *Notice and Hearing*

The notice requirement in *Sniadach* presents no significant problems of interpretation, but the details of the hearing requirement are left ambiguous. Justice Harlan, concurring specially in the decision, deals explicitly with what should be accomplished at the hearing:

> Apart from special situations . . . I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity,

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80. *Id.* at 341.

81. *See* text accompanying notes 54–62 *supra*.

82. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598–600 (1949); Fahey v. Mallonee, 332 U.S. 245, 253–54 (1947); Coffin Bros. v. Bennett, 277 U.S. 29, 31 (1928); Ownbey v. Morgan, 256 U.S. 94, 110–12 (1921). A synopsis of the holdings of these cases can be found in *McCallop v. Carberry*, 1 Cal. 3d 903, 905 n.3, 464 P.2d 122, 123 n.3, 83 Cal. Rptr. 666, 667 n.3 (1970).

> or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this court.[83]

The majority is much less emphatic on this issue, however. It observes that Wisconsin's wage-attachment procedure did not provide the defendant with an "opportunity . . . to tender any defense he may have, whether it be fraud or otherwise,"[84] but does not elaborate.

If the hearing is to deal with the merits of the plaintiff's claim, complex procedural questions are raised. How, if at all, is the hearing to differ from a full trial? An analogy to the preliminary hearing in a criminal proceeding apparently will not hold; the opinion's emphasis on the debtor's defenses implies that the tribunal cannot confine itself to the plaintiff's evidence. What kind of tribunal is required? How will the costs of the hearing be allocated? If the tribunal finds for the plaintiff, must the defendant be allowed interlocutory appeal, and must exercise of the writ of attachment be stayed pending outcome on appeal? One thing seems clear: A special pretrial tribunal will be costly, and if its costs are allocated to plaintiffs, the result will be to discourage substantially the use of attachment.

The *Sniadach* opinion thus leaves the answers to many questions in doubt. In dealing with the levies described in the next part, however, this Note will adopt the following interpretation of the opinion: The key factors in measuring the constitutionality of an attachment provision are the hardship which a levy produces, the creditor need which the remedy serves, and the protection afforded to debtors' rights. The plaintiff's interest in leverage does not present an "extraordinary circumstance"—that is, does not justify a harsh levy, absent substantial procedural safeguards for defendants. The plaintiff's security need may present an "extraordinary circumstance," depending on such factors as the value of defendant's interest in the asset, the likelihood that he will dispose of it prior to execution, and the extent of the hardship induced by the levy. A procedure that is found to be unconstitutional (either in general or with respect to a particular class of assets) may be saved in two ways: by modifications which grant defendants greater safeguards, or by amendments limiting its use to instances in which the creditor need is sufficient to justify the hardship which the levy produces.

IV. Attachment in Operation

In the following sections, attachment will be discussed as it operates in California, and more particularly in Santa Clara County, with respect to five types of property—wages, going businesses, bank accounts, real prop-

83. 395 U.S. at 343 (Harlan, J., concurring; citations omitted).
84. *Id.* at 339.

erty, and automobiles. The discussion will draw on the analysis developed in the two preceding parts of the Note.

A. *Wages*

In *McCallop v. Carberry*[85] the California supreme court struck down California's wage-attachment procedure on the strength of the Supreme Court's opinion in *Sniadach v. Family Finance Corp.*[86] The California legislature must now decide on what basis, if any, wage attachments should be revived.

California law required that wage attachments in California be preceded by some form of notice to the defendant. A plaintiff was given his choice of either serving the defendant with a copy of the summons and complaint or sending him a notice that his wages were subject to garnishment at any time after 8 days from the date of the notice.[87] All but one of the eight attorneys interviewed who used wage attachment sent 8-day notices, and most reported that responses from debtors after their receipt obviated the need for a levy in a large percent of their cases.[88] Four of the attorneys, in fact, took advantage of debtor reaction to the notice by sending it whether or not they planned to file suit and attach.

The attorneys interviewed who had used wage attachments reported considerable success with them. Sheriff's fees were low,[89] the asset easily located,[90] and the levy exerted considerable pressure on the debtor to meet the creditor's demand. The wage-earner could defend against garnishments by claiming an exemption of that portion of his wages not automatically exempt, but the exemption could only be claimed after the levy

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85. 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

86. 395 U.S. 337 (1969).

87. CAL. CODE CIV. PRO. § 690.11 (West Supp. 1969).

88. Almost any type of active response from a debtor is considered desirable, for it enables a creditor to size up the situation and perhaps make arrangements with a debtor for extending the payments. A recent study of collection practices in Los Angeles County surveyed collection agencies about their use of the 8-day notice and reported that "[o]ver half of the agencies report having more than 50% success rate from the use of the eight-day notices to arrange with the debtor settlement of his debt without additional legal action." NEUMEYER FOUNDATION, WAGE GARNISHMENT—IMPACT AND EXTENT IN LOS ANGELES COUNTY 26 (1968). The three attorneys interviewed in the survey conducted for this Note who estimated their response rates to 8-day notices set them at 50%, 90%, and 33%.

Joseph L. Weissman, appearing on behalf of the California Association of Collectors before the Assembly Interim Committee on the Judiciary in 1964, stated that the statute requiring notice before a wage attachment was "an excellent piece of legislation . . . ." He added that although it was too early to judge its effects conclusively, "it would appear that a substantial number of wage attachments have been eliminated by virtue of this notice. The debtor will communicate with the creditor and make arrangements to pay when he realizes from the notice that . . . eight days later his wages will be attached." California Assembly Interim Committee on the Judiciary, Transcript of Proceedings on Attachments—Exemption of Personal Property 43, June 23, 1964.

89. *See* Table 2 *infra*.

90. A significant percentage of wage garnishments, however, is unsuccessful. In the sample, 15 of the 50 levies attempted (including both attachments and executions) resulted in returns such as "Not employed," and six employers reported that although the defendant was currently employed, no money was due. A total of 25 levies failed to garnish any funds.

and involved a time-consuming procedure—including, in some cases, a court appearance.[91]

Wage garnishments do not depend for their effectiveness solely on the money actually confiscated, for their indirect repercussions on debtors are great. The procedure is very expensive for debtors' employers: They must calculate the moneys due to the defendant as of the moment the deputy serves the papers, issue separate checks to the sheriff and the employee, and assume full liability for errors. The cost of a levy to an employer has been estimated as between $15.00 and $35.00.[92] The displeasure that employers feel over incurring these costs is often reflected in their employment practices. Many companies dismiss employees after their wages have been garnished two or three times and refuse to hire persons who have been fired elsewhere for this cause.[93] Because California law placed no limit on the number of successive levies a creditor could order, a creditor could levy week after week.[94] Thus a debtor who had his wages garnished had a real incentive to make immediate arrangements with the plaintiff after the first levy. A collection attorney who reported having from "75 to 100 percent success" with wage garnishments and whose practice it was to request 3 successive payroll levies said, "If they don't call in, I let the levies run. Either way, I get the money."[95]

Although wage attachments are valuable to creditors for leverage purposes, a requirement that they postpone wage garnishment until after judgment has been obtained would cost them little in terms of security. The creditor would rarely lose more than the possibility of seizing those wages that the defendant earns in the period before judgment; although a wage-earner determined to frustrate execution might do so by quitting his job or assigning his wages, creditor experience suggests that instances of this kind are rare. Most attorneys interviewed routinely served notice of the

91. *Cf.* CAL. CODE CIV. PRO. § 690.26 (West Supp. 1969).

92. Wall Street Journal, Mar. 15, 1966, at 14, col. 3. *See also* Note, *supra* note 71, at 754–56.

93. *See* Note, *supra* note 71, at 756–58.

94. In only 35 of the 51 wage garnishments attempted was it possible to discern from the file how many levies the plaintiff had requested. The distribution was as follows:

No. of Levies Requested	*No. of Cases*
1	6
2	16
3	6
4–5	2
"Until satisfied"	5

On instructions to levy "until satisfied," the sheriff garnishes at the intervals specified by the plaintiff until the demand or judgment is satisfied.

95. Attorneys interviewed reported varying rates of response by defendants to levies on wages. *See* note 88 *supra*. One stated that a levy "rarely" induced a response, explaining that since his suits were generally for nonsupport he dealt primarily with "irresponsible" defendants. The attorney quoted in the text above reported that, of the defendants whose wages he had garnished, "more than 75 percent let the writs run." The other three attorneys who estimated their response rates to wage garnishments had better luck; they reported rates of 65%, 75%, and 80% after the first levy.

impending levy on defendants at least 8 days prior to attachment of their wages, and creditors' representatives spoke highly of the 8-day notice procedure before a California legislative committee.[96] When the attorneys surveyed were asked whether the lack of availability of attachment had hampered their ability to execute against wages, several stated that they missed the remedy for such reasons as "it takes longer to collect now," but none expressed a feeling that the effectiveness of execution levies was endangered.

The loss to creditors resulting from the abolishment of wage attachment is thus primarily a loss of leverage. In light of the numerous hardships to debtors and employers and the undesirable economic consequences of the levy, it is highly questionable whether a restructuring of wage attachment to bring it within the requirements of due process as indicated by *Sniadach* is desirable. In an important analysis of wage garnishment in California, George Brunn has summarized the case for exempting wages from levy as follows:

> Wage garnishment is costly. Its immediate costs include official fees—chargeable to debtors—expense to employers, and the community's subsidy of the garnishment process. There are other costs in terms of distress and economic hardship when the family whose earnings are garnished spirals into bankruptcy or unemployment. And there are losses to creditors from garnishment-triggered no-asset bankruptcies. Hardship is not limited to bankruptcy and unemployment; a debtor who avoids both is faced with a fifty per cent wage exemption, an amount that in the great bulk of cases is grossly inadequate.
>
> Wage garnishment does not produce benefits to match these disadvantages.[97]

Brunn concludes that wage garnishments, whether levied before or after judgment, ought to be abolished completely.[98] The California legislature—in passing a bill abolishing the remedy[99]—has espoused a similar viewpoint. The new federal law[100] will further restrict wage attachment in those states in which it is still available. A weighing of the competing interests discussed in Part II of this Note casts doubt on the wisdom of resuscitating California's wage-attachment procedure in any form.

B. *The Going Business*

Personal property capable of manual delivery is generally seized by removing it to a warehouse. The deprivation of use that the levy entails can often cause serious hardships. If the property belongs to a going business, the effect is particularly severe, for removal of its stock-in-trade and equip-

96. *See* note 88 *supra*.
97. Brunn, *supra* note 9, at 1246.
98. *Id.* at 1248.
99. *See* note 65 *supra*.
100. *See* note 8 *supra*.

ment is tantamount to closing it down. Prior to 1965, the law provided that all personal property attached was to be taken immediately into custody; no exception was made for assets essential to the running of a business. A proprietor was thus put under immense pressure to make arrangements to avoid the completion of a levy, and because the levying officer "must not linger longer than reasonably necessary to carefully pack up and prepare the goods for removal,"[101] the arrangements had to be made almost immediately. The defendant's principal alternatives in this situation were to post security,[102] pay the sheriff the amount demanded by the plaintiff, or settle with the plaintiff over the telephone. Because obtaining security was usually difficult for a defendant with financial problems, the plaintiff was easily able to place himself in a powerful bargaining position.

Since 1965, the law has given the defendant whose business assets are attached the opportunity to operate under the sheriff's supervision for 2 days.[103] If he chooses this alternative, a "keeper" (an assistant to the deputy sheriff) is placed in charge of the premises. The keeper's principal duties are to collect and hold all money as soon as it is received, take inventory, and see that no goods are removed from the premises unless they are paid for in cash.[104] At the end of the 2-day period, unless the parties agree to operate for a longer period under this procedure, the goods are removed to a storage area.[105]

The attorneys interviewed who had used this remedy described it variously as a "terrific weapon," "a good way to induce cooperation," and a creator of "immense pressure." Operating under the keeper is apt to be very awkward and embarrassing to the defendant. If the business is a retail store, the manager must explain to customers why they cannot charge or pay by check. The owner of a laundry or repair shop is in a still more embarrassing situation, for his customers must either file third-party claims with the sheriff or pay for the full value of their goods if they want to retrieve

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101. Stevenson Bros. Co. v. Robertson, 21 Cal. App. 224, 228, 131 P. 326, 328 (2d Dist. 1913).

102. *See* notes 28–29 *supra* and accompanying text.

103. CAL. CODE CIV. PRO. § 542(3) (West Supp. 1969).

104. The following "terms and conditions" governing operation of a business under levy were prepared by the Sheriff of Los Angeles County and are given to the proprietor of a business at the time a levy is exercised:

"1. All monies collected, as well as monies now on hand, shall be turned over to the Deputy Sheriff. He will issue receipts for all monies collected.

"2. Keys to the premises shall be retained by the Deputy Sheriff, and will be returned when the attachment is released.

"3. All sales shall be for *cash* only. No credit sales.

"4. Checks shall not be cashed or accepted.

"5. All payments received by mail will be turned over to the Deputy Sheriff.

"6. No monies shall be paid out for operating expenses.

"7. Property shall not be taken from the premises unless paid for in cash.

"8. A Deputy Sheriff shall remain on the premises twenty-four hours per day until the attachment is released." E. JACKSON, *supra* note 21, § 9.56.

105. *See* CAL. CODE CIV. PRO. § 542(3) (West Supp. 1969).

them.[106] The proprietor of a restaurant or tavern is likely to find that the presence of a keeper dampens his customers' spirits. A keeper installed in a construction firm will keep all trucks from leaving the yard, thus halting operations for the day.[107]

In situations such as these, the defendant is apt to want the keeper removed as quickly as possible, and the cases sampled reveal that this is generally what occurs. Although the minimum charge for a levy is for an 8-hour shift, in 20 of the 25 cases sampled in which going-business levies were actually put into effect, the keeper was withdrawn in less than 8 hours.[108] In eight of the 25 cases, the deputy recovered the full amount of the demand, either from the seizure of cash available on the premises or through payment by the defendant from funds procured from outside sources. In 11 cases the levy was terminated by telephoned instructions from the plaintiff or his attorney. Several of these levies were obviously terminated because of their ineffectiveness, as when a storage company closed early for the day, or when the keeper found himself all alone in a bar. The results of these interviews suggest, however, that most early terminations are due to arrangements made between plaintiff and defendant. One attorney stated that "80 to 90 percent of the levies result in a panic call" from the defendant. Another observed that unless there is a "real financial problem," the usual response is that the keeper is "out of there in 10 minutes."

A going-business levy is thus well suited to aid a creditor in obtaining leverage in his dealings with a debtor. Its role in obtaining security for judgment is more complex. Theoretically, the principal functions of the keeper are to guard the assets of the business so that they will be available for removal after a 2-day waiting period and to seize any cash and other liquid assets that are on hand or received during the period that the lien is in force. In fact, creditors are not much interested in the former function,[109] for it is expensive to have the assets stored and not beneficial on balance to either party. The cash-on-hand of a going business will ordinarily be avail-

106. "[A]ll property on the premises shall remain under the power of the writ unless released by legal process, such as by written release or third party claim proceedings, etc. The sheriff has no authority to let property under attachment go out of his hands, except in due course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the action for the amount of the debt." SHERIFFS' MANUAL, *supra* note 18, § 7.58(13)(d). *See* Sparks v. Buckner, 14 Cal. App. 2d 213, 57 P.2d 1395 (4th Dist. 1936).

107. At the defendant's option, vehicles belonging to a going business may be left on the business premises under the care of a keeper for two days before being removed to a storage area. CAL. CODE CIV. PRO. § 542(3) (West Supp. 1969); *see* E. JACKSON, *supra* note 21, § 9.57. If several vehicles are involved, the latter procedure is, of course, far less expensive.

108. Fourteen of these levies were released within 3 hours. *See* Table 5 *infra*.

109. This fact is reflected in the case survey. In only one of the 36 cases involving going-business levies was any property actually removed from the premises; in 20 cases the plaintiff did not request the sheriff to attach the property for the entire 2 days required before the assets could be removed. In five cases a continuous levy for 2 days was requested; in 11 cases the length of time the plaintiff requested the keeper to remain on the premises was unclear from a reading of the files.

able for execution. A debtor, forewarned of a levy, who does arrange to keep less cash on hand and request his customers to withhold payment, can only pursue such a course for a short time without seriously restructuring the operations of the business. Of course, a plaintiff who had reason to believe that the defendant was planning to sell or close down the business or encumber its assets might have a strong need for an immediate levy, but the consensus among the attorneys interviewed was that the number of true "deadbeats" who would go out of their way to avoid levies was small. One attorney summed up this attitude when he said that immediate security was not needed "except against a very small percent of debtors."

Several attorneys mentioned another sort of benefit that can be derived from going-business levies—the establishment of priorities in case of bankruptcy. For a creditor whose debtor is verging on insolvency, the time lost in waiting for a judgment and an execution levy can be critical. An attachment levied when a business is in a shaky financial condition can have extremely damaging consequences. Since the pressure induced by the levy is often sufficient to compel an immediate payment to the attaching creditor of a sum larger than the business can actually afford to pay, other creditors who learn about the levy are likely to become increasingly concerned about the financial well-being of the business, and anxious to establish priorities for themselves. One attorney interviewed stated that he disliked attaching the assets of a going business, but felt compelled to do so anyway because he had lost out too often to other attorneys who levied while he was giving the debtor a chance to work out his problems.

The result of such attachments can be a series of levies so crippling to the business that they force it into the very bankruptcy the creditors feared. An attorney interviewed in person related that he had just received a case against a debtor he knew was in deep financial trouble and paying off his creditors at "5 percent a month." The attorney stated that he would not attach because it would surely send the debtor into bankruptcy, but added that some attorneys "don't care what happens." Another attorney characterized the going-business levy as "a killer. . . . It is almost impossible to save a business in trouble when it is hit by a series of levies."

The foregoing analysis suggests that a procedure permitting prehearing attachment of the assets of a going business raises due process problems similar to those discussed in the *Sniadach* opinion. Such attachments are certainly "takings"; the alacrity with which defendants move to get them lifted indicates that they work substantial hardship. The plaintiff rarely stands in real need of security against evasive action by the defendant; his interest in priority over other creditors is far from compelling. The attachment and bankruptcy laws encourage a levy at an early stage of a debtor's delinquency, where the consequences of permitting such a

seizure may be to force a potentially viable concern into bankruptcy. Since California's present law does not limit prehearing attachment of the assets of a going business to "extraordinary situations," its constitutionality is cast into doubt by the *Sniadach* opinion.

The adverse economic consequences of a going-business levy cast doubt on its overall desirability even if the law were remodeled to bring it within the due process requirements as set forth by *Sniadach*. The levy does, however, serve some creditor interests besides leverage and security against the claims of other creditors: It facilitates collection against debtors who might otherwise put up sham defenses in court or be evasive in other ways, secures assets for creditors dealing with "deadbeats," and reduces the costs of collection. It might therefore be desirable to make the remedy available to creditors when these interests are present. The Note will discuss in Part V methods of modifying the present attachment procedure to make it consistent with the requirements of due process while preserving its usefulness to creditors in these exceptional situations.

C. *Bank Accounts*

A levy upon a bank account is effected when the deputy serves a copy of the writ on an officer of a branch in which the defendant has an account.[110] The bank will deduct any money owed to it,[111] and place the remaining funds (up to the amount of the creditor's demand) in a special account over which the defendant has no control. The defendant is then notified. If the writ is an execution, the funds are forwarded to the sheriff; money seized under an attachment is generally held by the bank.[112]

Bank-account levies were popular with a large number of the attorneys interviewed. Sheriff's fees are low,[113] and, though sometimes there is little or no money left after the bank has set off the amount owed it, occasionally a plaintiff will be able to garnish an amount sufficient to satisfy his entire demand.[114]

Use of bank-account levies is restricted by the difficulty most attorneys have in locating accounts. Although large-volume creditors generally record the name and branch of all checks they receive, thus giving them ready references in case a levy is desired, several of the attorneys stated that they had great difficulty in finding accounts. Even the better organized

110. CAL. CODE CIV. PRO. § 542(5) (West Supp. 1969).

111. *See* Smith v. Crocker First Nat'l Bank, 152 Cal. App. 2d 832, 834, 314 P.2d 237, 239 (1st Dist. 1957); CAL. CIV. CODE § 3054 (West 1954).

112. Telephone conversation with Captain Martin LeFevre, Apr. 15, 1970.

113. The fees of the 15 cases sampled ranged from $4 to $22, the median fee being $7. *See* Table 2 *infra*.

114. Of the 14 bank-account levies in the sample in which the amount demanded or the judgment obtained was discernible from the file, four resulted in the seizure of an amount large enough to satisfy completely the demand or judgment. One of these cases involved a demand of $6986. By contrast, wage garnishments rarely result in seizure of sufficient funds to satisfy the demand; the largest amount seized in any series of wage garnishments in the sample was $236, after two successive levies.

creditors can be easily foiled by the wary debtor who frequently switches banks, and the fact that 6 of the 13 levies in the sample resulted in returns of "account closed" and "account overdrawn" indicates that quite a few attorneys are misled by defendants into levying at the wrong time or place.

Since a bank deposit is an asset that a wary debtor can easily move, one might expect security to be an important factor in creditor use of this form of prejudgment attachment. Several of the attorneys interviewed did state that they felt a need for a prejudgment seizure, one adding that he had had a "bad experience" when a debtor withdrew funds from an account. Other attorneys expressed a preference for putting off bank-account levies to the postjudgment stage.[115] Their reasons varied: fear of suits for wrongful attachment; experience suggesting that levies attempted several months after judgment were apt to be more successful than attachments because "the debtor is less wary then;" and a confidence that many debtors, secure in the belief that their accounts are not known, will not bother to shift banks repeatedly, thus reducing the creditor's need for security.

Bank-account levies are generally less desirable as a means of obtaining leverage than are wage garnishments or going-business levies. Their side effects on the debtor are less severe, for the levy generally does not adversely affect third parties whose goodwill is important to the debtor, and, unless the debtor has an immediate need for the funds, it does not impose a hardship on him. Should the defendant happen to need the money, however, the plaintiff will be in a position to exchange a favorable settlement for release of all or part of the frozen funds. The plaintiff who happens to levy shortly after the defendant has deposited his wages is in a particularly strong position in this respect, for although half of a debtor's wages are safe from garnishment while in the hands of his employer,[116] the entire paycheck can be seized through a bank-account levy.

Bank-account attachments present less serious constitutional problems than levies against wages and going businesses. The amount of hardship entailed is generally minimal, and the ease with which bank deposits can be disposed of creates a strong creditor security need. As the character of the asset requires that the defendant be completely deprived of its use in order to protect the plaintiff, the procedure followed in seizing the bank account appears appropriate. Thus due process requirements are probably satisfied under the present system.

Even assuming that the current procedure meets due process requirements, limited modifications may be called for in certain types of cases. Seizure of recently deposited wages can produce great hardship in particu-

115. Of the 15 bank-account levies sampled, 7 were attachments. None of the 8 executions was levied on deposits previously held under an attachment.

116. CAL. CODE CIV. PRO. § 690.11 (West Supp. 1969).

lar cases,[117] and may defeat the purposes of the wage exemption statute.[118] Although it is undoubtedly within the equitable power of a court to modify a bank-account levy upon a showing that it seized recently deposited wages, the problem might be better handled through a modification in the exemption statutes.

D. *Real Property*

Levying upon real property is simple: The sheriff records a copy of the writ with the county recorder and either posts a copy in a conspicuous location on the land or serves a copy on its occupants.[119] Levies on real property are considerably less common than levies on going businesses or automobiles;[120] only one of the 24 lawyers interviewed levied upon real estate more than occasionally. Attorneys interviewed emphasized the expense involved. While the median sheriff's fee for real estate attachment in the cases sampled was $19,[121] the plaintiff must often incur much larger expenses in locating the property and ascertaining the defendant's title or interest in it. One attorney interviewed reported having spent over $500 on a "name search," only to come up with a negative result. His client was not happy with the procedure.

Although a creditor's security gain from real estate attachments may be substantial, his leverage gain is typically small. Unless the defendant intends to sell the land, the levy creates little disturbance in his life, for he is permitted by law to retain full possession of the land levied upon, and his possession may continue for one year after sale of the property under an execution.[122] This lack of pressure is revealed in the results of the cases sampled: 26 of the 34 real estate levies made during the 15 months preceding date of the sample were still in effect at the time of the survey.[123]

Levies in execution on real property are cumbersome and costly. A homestead exemption of $15,000 can be claimed by a defendant at any time before judgment is entered,[124] and the bidding at the sale must start at a sum equal to the debtor's homestead allowance plus all liens and encumbrances.[125] If this sum approaches the value of the property, there may not

117. *See* text accompanying note 116 *supra*.

118. "[T]he fundamental reason for the enactment of exemption laws is to protect a person . . . from being reduced by financial misfortune to abject poverty . . . ." Bertozzi v. Swisher, 27 Cal. App. 2d 739, 742, 81 P.2d 1016, 1017 (1st Dist. 1938).

119. CAL. CODE CIV. PRO. § 542(1) (West Supp. 1969).

120. *See* note 11 *supra*.

121. *See* Table 2 *infra*.

122. CAL. CODE CIV. PRO. § 706 (West 1955).

123. This is particularly impressive in light of the fact that all of the automobile levies and all but one of the going-business levies made over a comparable period had been terminated by the time of the survey.

124. Yager v. Yager, 7 Cal. 2d 213, 217, 60 P.2d 422, 424 (1936); *see* CAL. CIV. CODE §§ 1241, 1260 (West Supp. 1969).

125. CAL. CIV. CODE § 1255 (West 1954).

be much value for the plaintiff to draw upon. Even if the land is unencumbered and a homestead exemption not filed, the sale procedure is slow and unwieldy.[126]

A judgment creditor has available a much more practical device for dealing with real estate: the abstract of judgment. The law allows a judgment creditor to file with the recorder of any county an abstract of the judgment obtained against the debtor; such filing creates a lien for 10 years on all real property within the county owned by the judgment debtor at the time of the filing or acquired by him during the life of the lien.[127] The filing of an abstract of judgment was popular with almost all the attorneys interviewed[128] because it is inexpensive and can be an effective collection device if the debtor desires to sell or borrow on his real property.

The writ of attachment serves well as security for both abstract-of-judgment and execution procedures. Not only does an attachment lien take precedence over all the subsequent liens of other creditors,[129] but both types of postjudgment liens take the priority date of the prior attachment.[130] Thus an attachment protects the plaintiff against transfers by the defendant and gives him priority over other creditors who may file abstracts before he is able to obtain judgment.

The constitutional problems raised by real estate levies are less troublesome than those posed by going-business or wage attachments. The deprivation involved is generally minimal; the defendant is not deprived of the use of his property. In addition, the need of creditors for security is often great, particularly if the dispute involves the land.[131]

The current procedure seems reasonable from the standpoint of costs and equities. The costs to creditors and debtors in the form of sheriff's fees are larger than those resulting from bank-account levies, but they do not seem inordinate in light of the larger demands involved.[132] Unlike automobile seizures, real estate levies do not tie up assets by depriving all parties of their use: Crops can still be grown, and tenants are not disturbed. In

126. The judgment debtor has one year in which to redeem the property by paying the purchaser the price bid at the sale. CAL. CODE CIV. PRO. § 702 (West Supp. 1969). If the land is sold for less than its market value, therefore, the judgment debtor is very likely to redeem. Thus the plaintiff who desires complete satisfaction of his judgment must make certain that the bidding reaches at least the value of the judgment. The result is that his bid is apt to be the high bid at the auction. (This is in fact what happened in the only one of the 37 real estate levies in the sample in which a sale occurred—the judgment creditor's bid of the value of his award plus sheriff fees was the high bid of the sale.)

127. CAL. CODE CIV. PRO. § 674 (West Supp. 1969).

128. Several attorneys said that they always or "routinely" filed abstracts. The author of a book designed for practicing attorneys recommends that they consider filing abstracts "not only in the county of the judgment debtor's residence but also in surrounding counties where the debtor may own or acquire real property." E. JACKSON, *supra* note 21, § 15.19.

129. CAL. CIV. CODE § 2897 (West 1954).

130. CAL. CODE CIV. PRO. § 700 (West 1955).

131. One attorney interviewed stated that real estate attachments were often used by real estate brokers who were fearful of not being paid their commission in a sale of the land seized. Few buyers are willing to go ahead with a sale when there is an attachment lien on the property.

132. *See* Table 2 *infra*.

addition, real estate holdings (other than homesteads) seem a particularly appropriate class of asset for seizure, because their seizure does not generally threaten the economic survival of the debtor. Since the hardship to debtors and third parties is generally slight, the creditor need genuine, and the procedure efficient, real property attachments might be taken as the model of an equitable prejudgment seizure.

E. *Automobiles*

The procedure for levying upon real estate is simple in comparison with that for levying on an automobile. To levy on an automobile, the plaintiff must supply the sheriff with the license number, general description, and location of the vehicle. If the car is kept in a residential area, the deputy[133] will attempt to locate it in the early morning, when most people are at home. After he finds the car, the keeper who accompanies him effects the seizure by sitting on its hood while the deputy attempts to notify the owner. If the owner is contacted, he is given the option of immediately paying off the demand, driving the car to a storage area (accompanied by the keeper), or having the car towed away. If the owner cannot be located, a copy of the writ and notice of the seizure is left in a conspicuous location at the place of seizure, and the car is towed to storage.

This procedure can be a highly effective means of collecting claims, for many individuals depend on their automobiles for transportation and are reluctant to see them confiscated even for a short period. Thus it is not particularly surprising to find that 10 of the 22 levies completed in the sample resulted in an immediate payment to the deputy. In spite of this high rate of immediate success, few of the attorneys interviewed expressed any fondness for the levy; most complained about high fees[134] and inadequate returns.

The comparatively high sheriff's fees represent only a part of the cost of using the levy. A large deposit[135] is required, and the attorney must incur costs in locating the vehicle and checking its title. The likelihood of having to pay for an unsuccessful levy is high; one-third of the 33 levies attempted in the survey resulted in a return of "not found," the largest percent of unsuccessful attempts in any class of property studied.[136] If the automobile is located and the defendant does not pay the deputy immediately, the car must be stored and the plaintiff must pay all costs incurred.[137] When the

133. The procedure here described is that followed by the Sheriff's Department of Santa Clara County. Interview with Deputy Sheriff Edward Nissen, a levying officer, in San Jose, California, Oct. 21, 1969.

134. The median fee of the automobile levies sampled was $24. *See* Table 2 *infra*.

135. The deposit demanded varies from county to county; the *Sheriffs' Manual* recommends a deposit of $75 per vehicle. SHERIFFS' MANUAL, *supra* note 18, § 4.21.

136. *See* Table 3 *infra*.

137. *See* CAL. CODE CIV. PRO. § 542(4) (West Supp. 1969).

storage costs approach the amount of the original deposit, the sheriff will request additional deposits and will release the car if these are not promptly made.[138] If the levy is an attachment and the defendant asserts a defense, the necessity of storing the automobile for an extended period will compel the plaintiff to advance large deposits.

Levies on automobiles owned free and clear by the defendant may be an effective device. Most of the automobiles in the sample were actually owned by lending institutions that had financed their purchases.[139] The law requires the sheriff to notify the legal owner soon after the vehicle is seized.[140] If the legal owner files a third-party claim with the sheriff to protect his interest, the vehicle will be released to the defendant unless the plaintiff posts a bond or deposits cash equal to twice the value of the property claimed.[141] An attempt to realize in execution the unencumbered value of a mortgaged car is usually speculative and can be risky. There may be little value in the automobile over and above the lien and the statutory exemption,[142] and if the car, when sold at a sheriff's auction,[143] brings less than the sum of the value of the lien plus the exemption, the plaintiff must pay the difference. A plaintiff who has seized a mortgaged vehicle and is confronted with a third-party claim may thus have no alternative but to release the car and take the storage and towing fees as a loss.

Levies on unencumbered automobiles may be more effective. The plaintiff will not be easily pressured into releasing the vehicle,[144] for if judgment is obtained, the costs of storage can be added to the judgment award and paid for out of proceeds from the sale.[145] The substantial likelihood that a debtor in financial trouble will have a lien on his car was mentioned by a large number of the attorneys interviewed as the reason they avoided this type of levy. Some said that they were not even interested in the seizure of unmortgaged vehicles, and no longer bothered to check on the ownership status of a defendant's car.

Automobile attachments frequently create hardship sufficient to bring into question the constitutionality of the remedy under *Sniadach* criteria. The uses and issues involved in an automobile seizure vary greatly ac-

138. *Id.*

139. Of the 32 vehicle levies in the sample, 19 (59%) involved automobiles encumbered by liens.

140. CAL. CODE CIV. PRO. § 689b(1) (West Supp. 1969).

141. *Id.* § 549 (West 1954); *id.* § 689 (West Supp. 1969).

142. The exemption is stated as follows: "One motor vehicle of a value not exceeding three hundred fifty dollars ($350), over and above all liens and encumbrances on that motor vehicle, provided that the value of such motor vehicle shall not exceed one thousand dollars ($1,000)." *Id.* § 690.24 (West Supp. 1969).

143. *Id.* § 550 (West 1954); *id.* § 691 (West 1955).

144. This result is substantiated by the survey, which revealed that plaintiffs are more likely to release from storage mortgaged vehicles than unmortgaged vehicles. As is also to be expected, unencumbered vehicles are more apt to be sold at auction, and the owner of an unencumbered vehicle is more apt to pay the deputy before storage than is the owner of an encumbered vehicle. *See* Table 4 *infra.*

145. CAL. CODE CIV. PRO. § 682.2 (West Supp. 1969).

cording to whether or not the vehicle is encumbered. An unencumbered vehicle may be valuable as security.[146] The seizure of an encumbered vehicle, however, is normally worth no more than the leverage it can produce, and the potential for leverage gains does not create an "extraordinary situation" justifying prehearing attachment under *Sniadach*.[147] The California attachment statute, which allows seizure of vehicles regardless of their ownership status, may well be too broad under the criteria set forth by the Supreme Court in *Sniadach*.

An automobile attachment that satisfies the *Sniadach* requirements will probably be justifiable on equitable grounds as well. The creditor's interests are surely more compelling if the automobile is unencumbered. In such cases, insofar as the $350 exemption[148] is adequate to ensure the debtor of the availability of an automobile for transportation purposes, California's procedure seems reasonably fair.

V. Modification of Present Law

The preceding discussion suggests that modification of California's present attachment procedure is desirable. The constitutionality of several of the levies is in question. Others create undue hardship or expense. It is clear from the description of attachment in operation that the uses to which attachment is put, its effects on defendants and third parties, and its constitutionality varies considerably with the type of property involved. The following discussion will suggest methods of dealing with the five types of property considered in this Note.

A. *Wage Garnishments*

Wages are not currently subject to attachment, and the considerations of Part IV indicate that a restructuring of attachment to provide for wage seizures is undesirable. Any consideration of such a revision would have to take into account the *Sniadach* and *McCallop* holdings, which virtually compel an adversary-type hearing. A reformed law, instituting a requirement for such a hearing, seems less necessary in light of the ease with which creditors are able to obtain default judgments[149] and subsequent writs of execution, the delay that would have to precede an attachment under a notice-and-hearing system, and the small amount of money that can generally be seized in such a garnishment.[150] In addition, the harsh effects of

146. The sample revealed that creditor use of vehicle seizures for security purposes is not great. Among the 32 vehicle seizures in the survey, only four were attachments, and only one of these involved the seizure of an unmortgaged vehicle, a 1963 Cadillac.

147. *See* text accompanying notes 80–82 *supra*.

148. Cal. Code Civ. Pro. § 690.24 (West Supp. 1969).

149. *See id.* §§ 412.20, 585 (effective July 1, 1970).

150. *See* note 8 *supra*.

the levy on both debtors and third parties make revitalization of the remedy seem undesirable.

B. *Going-Business Levies*

California's procedure for attachment of the assets of going businesses is clearly subject to challenge on due process grounds. Takings are permitted in situations that are far from "extraordinary," for, under ordinary circumstances, the security risk is marginal. The levy thus presents a powerful tool for dealing with a rather weak security need, and some reform is clearly called for by the *Sniadach* holding.

A possible approach to reform is the establishment of greater procedural safeguards. It is unlikely, however, in view of the hardship and minimal creditor security interests generally involved in the levy, that anything less than the pre-attachment adversary hearing specified in *Sniadach* would be satisfactory. If such a procedure were instituted, attachment would be useful to a plaintiff only when he expects the defendant to contest the underlying suit, for a plaintiff in an uncontested case could obtain a default judgment and writ of execution in almost the same time that an attachment hearing would provide a levy. A problem, then, is posed as to the character of the rights that a defendant should be accorded at the hearing, for the discussion of going-business levies in Part II indicates that defendants in a majority of cases find the levy so burdensome that they are willing to settle with the plaintiff in order to have the attachment lifted. In such cases, the issuing of a writ of attachment is effectively equivalent to a judgment against the defendant. If a pretrial hearing on whether or not an attachment should issue withholds from the defendant any rights he would have at a trial, he will be deprived of the safeguards afforded by a trial, yet subjected to a procedure equivalent in effects to a postjudgment remedy. If, on the other hand, the defendant is granted extensive rights, the hearing and the trial would be largely redundant, resulting in a waste of the parties' money and the court's time.

An alternative to requiring a pre-attachment hearing might be to satisfy the *Sniadach* due process requirement through "narrow draftsmanship" of the attachment statutes. If statutes could be drafted to exempt from seizure all assets of a given type except those whose seizure increases the plaintiff's security without so burdening the defendant that he is compelled to forego his right to trial, then the pre-attachment hearing would be unnecessary. Going-business levies, as a class, are not amenable to this approach, however; their effect is virtually always so severe that to allow any such levy without notice and a hearing would be questionable under *Sniadach*.[151]

151. A limited going-business levy could be effected without the onerous installation of a keeper. Such a levy would be restricted to the seizure of the cash on hand (a procedure commonly referred to

Total exemption from seizure of the assets of a going business would provide maximum protection to debtors and third parties and would be less costly to the legal system than the institution of an adversary hearing. A going-business levy will virtually never be needed for jurisdictional purposes, since the plaintiff will always have a local address at which he can serve a summons. Thus the main loss to plaintiffs from exempting going businesses would be the loss of the ability to force a defendant to make a speedy settlement and a loss of security in the minority of cases in which this is a genuine interest. Whether an adversary hearing is worth establishing depends to a large degree on the weight to be given these creditor interests.

C. *Bank-Account Levies*

Prenotice levies on bank accounts are not so difficult to reconcile with the *Sniadach* decision. Although hardship may result from such a levy, a plaintiff always has a potentially important security interest. Furthermore, it is doubtful whether the present procedure can be altered to increase the protection afforded defendants without effectively destroying the levy. Requiring a two-party hearing on the issuance of attachment would almost certainly moot the issue, for it would be a rare debtor who would leave his funds in the account pending determination of the issue. Requiring an affidavit or an *ex parte* hearing before issuance of the writ would be pointless, since the plaintiff could always reasonably claim need for a seizure on security grounds.

Altering the exemption law seems a more appropriate method of protecting defendants' interests. The establishment of an exemption of a base amount in each bank account would ensure that a defendant was not deprived of his ability to sustain himself during the period before judgment. Beyond this, the present procedures seem necessary and reasonable.

D. *Real Estate Levies*

Real property attachments also seem appropriate in their present form. The amount of hardship produced by a seizure is generally minimal, and a potential security risk often exists. As with bank-account levies, the imposition of more restrictive procedures does not seem appropriate; a two-party hearing would be expensive and would increase tremendously the likelihood that the debtor would encumber or transfer the assets and an *ex parte* hearing could not effectively ascertain the genuineness of the creditor's need. Other methods of protecting the debtor, such as permitting

as a "till tap"). The use of this remedy often produces severe hardship, particularly if a creditor orders a series of such levies. Since the security value of the cash on hand is ordinarily minimal, even this limited levy would appear to go against *Sniadach* if permitted without notice to the defendant and opportunity for a hearing.

him to obtain the release of property by posting security, are already provided for by statute. Thus there does not appear to be a compelling need for modifications.

E. *Automobile Levies*

A different type of problem is posed by automobile seizures, for the due process and equitable implications of the levy vary with the ownership status and worth of the vehicle. The main benefit to a plaintiff in seizing a heavily mortgaged vehicle or one worth less than the defendant's statutory exemption derives from the leverage that the seizure produces. A vehicle owned free and clear by a defendant may warrant seizure for security purposes, but there is evidence that plaintiffs rarely find a need for security in this form. Serious thought should thus be given to abolishing automobile attachments altogether.

If the levy is retained, its operation could be confined more closely to cases in which attachment is legitimately needed for security purposes by an amendment limiting attachment to the seizure of vehicles legally owned by the defendant. Such a law would not create new procedural problems, for under current procedure the sheriff must check the ownership status of the vehicle before the writ is exercised.[152] It would not solve the problem of levies on virtually worthless vehicles wholly owned by defendants, however, and would work an unfair result in instances in which a lien is for a small fraction of a vehicle's actual worth. These problems could be dealt with by limiting attachment to the seizure of vehicles whose value exceeds the amount of the lien plus the defendant's exemption, either by restricting the levy to relatively new, lien-free vehicles or by requiring the plaintiff to file an affidavit attesting to a reasonable belief in the existence of such excess value. Although there is probably no method—short of complete exemption of vehicles from attachment—of ensuring that the levy's use will be entirely restricted to instances in which security value is present, some effort at restricting the levy's availability should be made.

This Note has sought to indicate that a constitutional and equitable attachment law would differentiate among various types of property. The present statute, which subjects to attachment all assets subject to execution, ignores both the differences in the functions of the two types of levy and the unique characteristics of each type of leviable asset. Although an attachment statute allowing plaintiffs to seize a broad range of property might have been appropriate when the writ was often needed for jurisdictional purposes, the uses to which it is put today call for a more selective approach.

152. SHERIFFS' MANUAL, *supra* note 18, § 7.60.

It is important, therefore, to acquire as much information as possible about the functioning of the present statute and its application with respect to various classes of assets. Further study of the levies—as they operate in other parts of the state and with regard to assets other than those discussed in this Note—would be a prerequisite to the drafting of a sound attachment statute.

Paul F. Albert

APPENDIX

TABLE 1

RELATIVE PERCENT OF ATTACHMENTS AND EXECUTIONS

Asset	Number of Levies Sampled	Number of Attachments	Percent of Attachments	Number of Executions	Percent of Executions
Wages	51	5	9.6	47	90.4
Going-business	36	15	41.7	21	58.3
Bank accounts	15	7	46.7	8	53.3
Real estate	38	28	73.7	10	26.3
Vehicles	32[a]	4	12.5	28	87.5

[a] Does not include 1 airplane seizure.

TABLE 2

DEMANDS OR JUDGMENTS AND SHERIFF FEES FOR EACH CLASS OF PROPERTY

	Demands/Judgments			Sheriff's Fees		
Property	Number of Levies Counted[a]	Range ($)	Median ($)	Number of Levies Counted[a]	Range ($)	Median ($)
Wages	51	22–4766	231	49	4–34	10
Going-business[b]						
Attachment	14	214–6679	971	15	10–430	35
Execution	20	36–5703	354	20	4–194	30
Bank account	15	55–6986	305	14	4–22	7
Real estate[b]						
Attachment	24	133–20,000	1506	28	12–47	19
Execution	10	248–12,277	2298	9	7–188	78
Automobiles	31	181–3214	369	31	3–132	24

[a] A levy in the sample was not counted if the file contained insufficient data to determine the relevant statistics. Thus, for example, it was possible to determine the demand or judgment of each of the 15 bank-account levies sampled, while in only 14 cases was the sheriff's fee ascertainable.

[b] Going-business and real estate levies are broken down into attachment and execution because there are significant differences between the results of the writs with respect to these assets. Cases involving other assets were not broken down because there was insufficient data for one or the other of the writs. It appeared, however, that there was little difference between them.

TABLE 3

OUTCOME WITH RESPECT TO THE TYPE OF PROPERTY LEVIED UPON

Outcome	Wages		Going-Business		Bank Accounts		Real Estate		Vehicles	
	Number of cases[a]	% of Levies Attempted	Number of cases[a]	% of Levies Attempted	Number of cases[a]	% of Levies Attempted	Number of cases[a]	% of Levies Attempted	Number of cases[a]	% of Levies Attempted
Levies attempted	50	100.0	35	100.0	14	100.0	37	100.0	31	100.0
Levies exercised	50	100.0	29	82.9	14	100.0	36	97.3	20	64.5
Some funds collected	25	50.0	17	48.6	7	50.0	1	2.7	13	41.9
Entire demand/judgment collected	7	14.0	8	22.9	4	28.6	1	2.7	10	32.0

[a] Refers to the number of cases in which one or more levies were attempted or exercised. A case involving two or more garnishments, for example, would be counted as one case.

TABLE 4

OUTCOME IN RELATIONSHIP TO VEHICLE OWNERSHIP STATUS

Outcome	Mortgaged Vehicles		Unmortgaged Vehicles	
	Number of Vehicles	Percent	Number of Vehicles	Percent
Deputy paid entire amount: storage avoided	4	21.1	4	33.3
Sheriff paid entire amount after storage	2	10.5	1	8.3
Vehicle released from storage by plaintiff[a]	6	31.6	1	8.3
Vehicle sold at auction	0	0.0	2	16.7
Vehicle not located	7	36.8	4	33.3
Total	19	100.0	12	99.9

[a] Does not include 1 airplane.

TABLE 5

Going-Business Levies

Type of Levy	Amount of Demand or Judgment[a]	Amount Obtained by Sheriff	Sheriff Fees	Number of Hours Keeper Requested[a]	Number of Hours Keeper Remained on Premises	Type of Business[a]
Ex.	$247	$247	$29	8	2	Fence company
Ex.	155	50	49	8	3	Lounge
Att.	2219	0	10	Continuous	—[c]	Furniture store
Att.	550	0	30	8	4	Publisher
Ex.	1185	138	194	—[b]	38	Women's clothing store
Ex.	351	45	26	8	4	Tamale shop
Att.	6679	0	430	—	180	Manufacturer
Ex.	36	0	4	—	—[c]	Automobile painter
Att.	214	282	27	8	1	—
Att.	1429	1000	38	8	3	Glass company
Ex.	2495	0	50	8	—[d]	Tavern
Ex.	474	0	4	8	—[d]	Coffee shop
Ex.	429	459	30	48	2	Sheet metal company
Att.	1907	0	14	—	—[c]	Furniture company
Ex.	393	423	30	8	1	Aluminum fabrication company
Att.	871	0	66	4	24	Carpet store
Ex.	—	200	26	8	2	Tire service
Att.	238	0	38	8	3[e]	Sheet metal company
Ex.	212	0	0[f]	—	—[f]	—
Ex.	354	414	61	24	3+5	Tavern
Att.	4216	0	16	—	—[g]	Carpet bag interiors
Ex.	51	0	27	—	—[d]	Restaurant
Ex.	64	89	25	8	1	Restaurant
Ex.	115	0	30	8	—[d]	Gas station
Att.	505	603	34	—	1	Moving company
Att.	971	191	30	—	6	Liquor store
Ex.	2520	480	161	—	—[h]	—
Ex.	5703	30	84	—	5+6+5[i]	Two doctors and 1 pharmacy
Ex.	263	0	27	8	4[j]	Trucking company
Att.	—	0	32	8	8	Engineering company
Ex.	321	355	33	8	1	Garage
Att.	5564	0	24	—	1[j]	Storage company
Ex.	1182	300	30	8	2	Immigration consultant
Att.	5310	0	79	48	28	Auto parts manufacturer
Ex.	933	0	26	48	3	Warehouse
Att.	4426	0	36	—	—[k]	Flight education

[a] It was not always possible to tell from the titles the size of the demand, the number of hours the plaintiff requested a keeper to remain on the premises, or the type of business.
[b] In this case the plaintiff requested that a keeper remain on the business premises for portions of 6 days. The amount of money collected daily by the keeper ranged from $8 to $43.
[c] The business was not located by the deputy.
[d] The defendant was no longer the owner of the designated business.
[e] A bond was posted by the defendant.
[f] The plaintiff made an insufficient deposit; no levy was attempted.
[g] The business was closed.
[h] The property was seized and sold.
[i] Three keepers were used.
[j] The business closed for the day.
[k] The business was a corporation, which was not the defendant.

THE CONSTITUTIONAL VALIDITY OF ATTACHMENT IN LIGHT OF *SNIADACH V. FAMILY FINANCE CORP.*

I. INTRODUCTION

Due process demands that notice and hearing be afforded a person before his property may be taken.[1] Nonetheless, courts have for years assumed attachments without a prior hearing valid, relying on three basic justifications: attachments involve only a temporary loss of property;[2] a hearing is in fact afforded before the "seizure" becomes final;[3] and the value of the property is not harmed by the attachment.[4] Pre-trial wage garnishment, a subcategory of attachment,[5] was likewise assumed to be valid. In *Sniadach v. Family Finance Corp.*,[6] however, the Supreme Court found a Wisconsin statute allowing pre-trial wage garnishment unconstitutional for violating due process.[7] The effect that this decision will have on other forms of attachment is not clear. This comment will

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[1] U.S. Const. amend. XIV, § 1. Since attachment is governed by state laws, Rothschild v. Knight, 184 U.S. 334, 341 (1902), the Due Process Clause of the Fourteenth Amendment is at issue; the analogous clause of the Fifth Amendment does not come into play. Chicago B.&Q.R.R. v. Chicago, 166 U.S. 226 (1897). *See* Schroeder v. City of New York, 371 U.S. 208, 212 (1962); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Coe v. Armour Fertilizer Corp., 237 U.S. 413 (1915); Sokol v. Public Util. Comm., 65 Cal. 2d 247, 253-56, 418 P.2d 265, 270-71, 53 Cal. Rptr. 673, 678-79 (1966).

[2] Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 167, 154 N.W.2d 259, 262 (1968); McInnes v. McKay, 127 Me. 110, 116, 141 A. 699, 702-03 (1928).

[3] Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1968). These two justifications are similar. A taking of property is not "temporary" unless hearing in fact takes place at some point in the process. *See also* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414 (1944); Phillips v. Commissioner, 283 U.S. 589 (1931).

[4] McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928).

[5] "Attachment" and "execution" refer to seizure of a debtor's property by legal process. Attachment takes place before judgment "as security for the satisfaction of any judgment that may be recovered," *see* Cal. Code Civ. Pro. § 537 (West Supp. 1970), while execution takes place after judgment for its enforcement. *See* Cal. Code Civ. Pro. § 681 (West Supp. 1970). "Garnishment" refers to either attachment or execution reaching property belonging to the debtor in the hands of a third person, *e.g.*, wages in the hands of an employer currently due an employee-debtor. Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 Calif. L. Rev. 1214, 1215 (1965) [hereinafter cited as Brunn].

[6] 395 U.S. 337 (1969).

[7] California's pre-trial wage garnishment procedure has been ruled invalid by the California Supreme Court on the grounds that the procedure fell within the purview of *Sniadach*. McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Cline v. Credit Bureau of Santa Clara Valley, 1 Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970).

attempt to analyze the probable constitutional validity of other pre-trial remedies.

II. Validity of Wage Garnishment

Family Finance Corp. instituted a garnishment action against Mrs. Sniadach as defendant and her employer as garnishee. The complaint alleged a claim of $420 on a promissory note. The garnishee answered that it had wages earned by Mrs. Sniadach under its control and that it would hold part of those wages subject to the order of the court. Mrs. Sniadach moved to dismiss the garnishment proceedings because notice and an opportunity to be heard were not given before the *in rem* seizure of her wages,[8] in violation of due process requirements.

It is impossible to define rigidly what constitutes procedural due process. The base requirement is that at some point the victim of a seizure be given the opportunity to dispute the validity of the claim at issue. The requisite hearing allows the debtor to raise any defense and assures that a just claim exists. Normally, the hearing takes place before any seizure is made, before the victim's possessory right to his property is violated.[9] However, the time and nature of the hearing has been allowed to fluctuate in various factual situations between judicial adversary hearing *before* seizure[10] and a non-judicial administrative hearing at some indeterminate time *after* seizure.[11] What due process requires in a given instance is determined by weighing the competing interests involved. If societal needs[12] demand that there be a sudden and immediate seizure of

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[8] Mrs. Sniadach received notice of the garnishment of her wages on the same day they were seized, although such prompt notice is not required by Wisconsin law. The applicable statute allows notice anytime within the ten days following the attachment. Wis. Stat. Ann. § 267.07(1) (Supp. 1969).

[9] *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 342, 343 (1969) (Harlan, J., concurring); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941).

[10] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[11] Phillips v. Commissioner, 283 U.S. 589 (1931). *See also* Schroeder v. City of New York, 371 U.S. 208, 212 (1962); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 893 (1961); Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1921).

[12] This term implies action taken for the general welfare. It is variously "defined" as involving the "health, safety or well-being of many individuals," Kelly v. Wyman, 294 F. Supp. 893, 895 (S.D.N.Y. 1968); as a "subordinating interest which is compelling," Bates v. Little Rock, 361 U.S. 516, 524 (1960); as a "legitimate and substantial state interest," Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (White, J., concurring).

This "societal need" for summary process must be a "state interest." This is not to say, however, that only a governmental body may use such process validly. Rather, the law may allow seizure before hearing by any plaintiff if his use of the process promotes the well-being of many individuals. Justice Douglas recognized this in *Sniadach* by noting that special protection to a "state or creditor interest" may necessitate summary procedure. 395 U.S. at 339. *See* Ownbey v. Morgan, 256 U.S. 94, 110, 112 (1921).

property, and the seizure does not destroy a vital interest of the victim of the seizure, the hearing which is required probably can be delayed until after seizure.[13]

The respondents in *Sniadach* argued the existence of a state interest in facile debt collection—a societal need for the use of summary process by general creditors[14]—to justify pre-trial wage garnishment. However, Justice Douglas focused on the abuses of and hardship caused by wage garnishment in determining that damage to the individual debtor in cases involving unjustified or fraudulent claims was overwhelming and clearly outweighed any state interest in allowing creditors to attach.

Wages are a specialized form of property,[15] the value of which is immediate use. This value is lost if wages are taken even temporarily. Low income debtors are most severely injured by a wage garnishment because wages are their sole liquid asset. Such debtors consume 85 to 90 percent of their wages immediately for the necessities of food and housing.[16] Thus, if the flow of wages is interrupted, the flow of goods essential to day-to-day living is interrupted.[17] In addition, the temporary loss of wages may be the cause of permanent loss of employment, since employers often fire employees whose wages have been garnished (many times after the first garnishment)

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[13] While such a balancing approach was harshly criticized by Justice Black as extra-constitutional and depending only on the whim of the particular judge who applies it, 395 U.S. at 350-51, it does seem to be the basis of the due process decisions discussed in the text accompanying notes 29-54 *infra*. Balancing also serves to define the scope of the hearing, whether it need be judicial or administrative, ex parte or adversary. *See* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961). *See also* Moyer v. Peabody, 212 U.S. 78, 84 (1909).

[14] Douglas' opinion characteristically omits prolonged discussion of this point. *Cf.* Cohen, *Introduction: Mr. Justice Douglas' Three Decades of Service*, 16 U.C.L.A. L. Rev. 701 (1969).

[15] Douglas took specific note of the unique nature of wages. 395 U.S. at 340.

[16] Dep't of Labor, Bureau of Labor Statistics, Consumer Expenditures and Income 1 (Rep. No. 237-93, 1965). *See* Note, *Wage Garnishment as a Collection Device*, 1967 Wis. L. Rev. 759, 762.

[17] In all states allowing wage garnishment, some portion of the wage is exempt from attachment or execution. In Wisconsin, Mrs. Sniadach could have received a $40 per week subsistence allowance. Wis. Stat. Ann. § 267.18(2)(a) (Supp. 1970). In California, half of the wage is generally exempt, although by special filing a debtor can retain in some instances all of his wage. Cal. Code Civ. Pro. §§ 690.11-690.26 (West Supp. 1970). These exemptions, however, hardly alleviate the harsh effects of the wage attachment. *See generally* Brunn, *supra* note 5; Seid, *Necessaries—Common or Otherwise*, 14 Hast. L.J. 28 (1962).

Other protections are available to the debtor to combat unjust garnishments. For example, if a summons to the underlying action has not been given to the debtor, notice of garnishment must precede the seizure by at least eight days. Cal. Code Civ. Pro. § 690.11 (West Supp. 1970). A hearing is also provided in order to challenge a writ of attachment "irregularly issued," Cal. Code Civ. Pro. § 556 (West 1954), although such a hearing may not touch upon the validity of the underlying debt.

in order to avoid the high administrative costs of processing the garnished funds.[18]

With consequences such as these at stake, the debtor cannot afford to await a hearing. Rather than lose his wage or, what is worse, the job that is his sole means of supporting his family, he will accede to the creditor's demand for a new, more costly repayment schedule, or resort to personal bankruptcy.[19] Thus, if a hearing does not occur before garnishment is allowed, it will probably never occur, and fraudulent claims will not be contested. The overwhelming factual probability that a pre-trial garnishment will not be subject to judicial scrutiny was demonstrated by a recent empirical study in Los Angeles County; 97 percent of the cases in which garnishment was used never went to trial.[20] "Temporary" seizures are in this manner changed to permanent takings without a judicial determination of the validity of the claim which is the basis of the taking.

Justice Harlan did not sign the opinion of the court in *Sniadach* because he would have applied a stricter due process formula than Justice Douglas. Douglas focused on the type of property taken and the type of debtor involved. If attachment touches property vital to an indigent debtor, it is *per se* a taking, needing "no extended argument to conclude that . . . [this procedure] violates the fundamental principles of due process."[21] If it takes a less vital type of property from a less vulnerable debtor, a less strict "economic regulation" standard may be applied.[22] Douglas thus puts property

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[18] *See* Brunn, *supra* note 5, at 1234; Comment, *Wage Garnishment in Washington, an Empirical Study*, 43 WASH. L. REV. 743, 757-59 (1968); Note, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759, 760-61.

Title III of the Consumer Credit Protection Act, 15 U.S.C. §§ 1671-77 (Supp. IV, 1969), will make it illegal for an employer to fire an employee for any garnishment resulting from just one indebtedness, as well as standardize the exempt portion of an employee's wages at 75% in most cases. Title III goes into effect in mid-1970.

[19] *See* Brunn, *supra* note 5, at 1234-38. Personal bankruptcy figures in the various states have been shown to vary directly with the strictness of garnishment laws in an apparently causal relationship. H.R. REP. No. 1040, 90th Cong., 1st Sess. 20-21 (1967). *See also* Statement of Congressman Gonzales, 114 CONG. REC. 1833-34 (1968).

[20] WESTERN CENTER ON LAW AND POVERTY: IMPACT AND EXTENT OF WAGE GARNISHMENT IN LOS ANGELES COUNTY 39 (1968). This 97% figure of course includes many instances where lack of hearing is not the result of the rigors of wage garnishment. The survey indicates, however, that less than one fourth of those served with pre-trial garnishments in a one year period failed to appear because they felt they had no defense. Most considered the garnishment a final action about which they could do nothing. *Id.* at 114.

[21] 395 U.S. at 342.

[22] The Court has since the forties held valid any economic regulation with a "rational basis." *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

on a continuum, making "suspect" any seizure of property vital to life.[23] Harlan's concurring opinion says, however, that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity . . . of the underlying claim . . . *before* [a person] can be deprived of his property or its unrestricted use."[24] Rather than have a stricter standard for some types of property, he would demand notice and hearing before *any* property is taken from any debtor, in any case not *de minimus*.[25]

Both Douglas and Harlan agreed in *Sniadach* that summary process can be valid in certain instances. Douglas characterizes these instances as those "requiring special protection to a state or creditor interest,"[26] while Harlan holds to his strict due process formulation "apart from special situations."[27] Both refer to the same cases to illustrate these "special" or "extraordinary" situations. The two justices are apparently, therefore, in basic agreement as to when such a situation will arise, despite their different doctrinal approaches.[28]

III. Valid Attachments

Justice Douglas recognized extraordinary cases in which "summary procedure may well meet the requirements of due process."[29] These cases suggest how other creditor attachments might fare in relation to due process standards. In each there existed a strong public need for immediate seizure. Use of the attachment power was limited by statute to cases where such need existed, and in each case an opportunity to raise a valid defense at a hearing on the merits was available. Most of the cases also involved the actions of a public administrative agency.[30]

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[23] This is the same approach used in recent equal protection cases. In instances in which interests of great importance to the individual are involved—*e.g.*, voting rights, the right to a fair criminal trial, the right to free access to education, to marry, to travel interstate—discrimination against a particular class is invalid, absent a showing of compelling justification. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956); Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. Rev. 716, 718-20, 732-46 (1969).

[24] 395 U.S. at 343.

[25] *See* note 74 *infra*.

[26] 395 U.S. at 339.

[27] *Id.* at 343.

[28] *See, e.g.*, the opinions of Douglas and Harlan in Griswold v. Connecticut, 381 U.S. 479 (1965). *See generally* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. Rev. 716 (1969).

[29] 395 U.S. at 339.

[30] *See* Cal. Code Civ. Pro. §§ 537-38 (West Supp. 1970). These statutes are typical of attachment statutes in general, and will be referred to as illustrations for the remainder of this comment.

In *Phillips v. Commissioner*,[31] for example, the Supreme Court upheld enforcement of a federal tax liability by attachment of taxpayer's previously conveyed property before the transferee could obtain any hearing. This pre-trial seizure by the Internal Revenue Service was approved on the basis of a showing of need for prompt performance of government pecuniary obligations. It was reasoned that if tax contests were allowed to delay the government's revenue intake, government obligations could not be met, and fiscal soundness could thereby be imperiled. Such a result, it was recognized, would be to the detriment of everyone. The Court considered such consequences to outweigh any harm to the tax debtor resulting from the delayed but available hearing.[32]

In *Ewing v. Mytinger & Casselberry, Inc.*,[33] the Supreme Court upheld a federal statute which allowed the Administrator of the Federal Food, Drug and Cosmetic Act to order seizure without prior hearing of misbranded drugs if he determined they were adulterated or advertised in a manner likely to mislead the consumer as to their value.[34] If seizures of such articles were delayed until after a hearing on the merits, the Court reasoned, many people could be injured by consumption of the product. Moreover, a hearing was available at a later stage.

The nature and importance of financial institutions weighs heavily in favor of allowing regulatory agencies to move summarily to take over a bank or savings institution in certain instances. Hence, the power of the Federal Home Loan Bank to vest in a conservator operation of a savings and loan association whose operation it deemed injurious to the interests of depositors, creditors and the public prior to any hearing was upheld in *Fahey v. Mallonee*.[35] Were a hearing to precede takeover, public confidence in the institution might be shaken, causing a run on its funds. Credit would then be impossible to preserve during the period of a hearing.[36]

The decision of the Supreme Court in *Coffin Brothers & Co. v. Bennett*[37] can be supported on similar grounds. In that case the

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[31] 283 U.S. 589 (1931). *See also* Springer v. United States, 102 U.S. 586 (1880); Ochs v. United States, 305 F.2d 844, 848 (Ct. Cl. 1962).

State statutes giving state and local governments power to attach in tax collection suits have also been upheld. CAL. CODE CIV. PRO. § 537(5) (West Supp. 1970). *See* People v. Skinner, 18 Cal. 2d 349, 115 P.2d 488 (1941).

[32] 283 U.S. at 597.

[33] 339 U.S. 594 (1950). *See also* North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908), which upheld seizure before hearing of suspected adulterated food stored in plaintiff's facility.

[34] Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, § 304(a), 52 Stat. 1044, *as amended*, 21 U.S.C. § 334(a) (Supp. IV, 1965-69).

[35] 332 U.S. 245 (1947).

[36] *Id.* at 253-54.

[37] 277 U.S. 29 (1928).

Court allowed a commissioner[38] to attach in order to satisfy stockholder liability assessments due a failed bank. Not only was prompt claims payment necessary to uphold public confidence in the banking system,[39] but stockholders were aware of their special liability beforehand.[40]

Two factors probably influenced the approval of summary process in each of the above cases. First, the process was used by an officer or agency of the state for the welfare of the general public. A "compelling state interest" was relatively easy to find in such cases. Secondly, in none of the cases was there pressure on the victim of the attachment to forego his opportunity for hearing. The property attached was not crucial to day-to-day living, and the parties attached were not likely to be poor, uneducated, or lacking legal counsel. They owned property, held stock, or ran commercial enterprises, and generally were the kind of people who were likely to press any available defense to have their property returned.

While most of the "extraordinary situations" demanding seizure before hearing mentioned by Douglas and Harlan were cases of administrative action by an agency of the state,[41] both justices also referred to *Ownbey v. Morgan*,[42] which concerned attachment of property of a non-resident debtor by a resident creditor. Such seizure, commonly allowed,[43] has its roots in the need for a state to protect the interests of its own citizens in obligations owed them by non-residents.[44] *Ownbey* held that the state's right to ensure that interest outweighed the interests of the debtor and was sufficient to justify the temporary seizure of property.[45]

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[38] This officer is a state bank official assigned to liquidate and pay claims of a failed bank.

[39] This decision was made during the depression period when maintenance of confidence in the banking system was a primary policy of the government.

[40] California has a similar statutory provision for attachment in cases of bank failure. CAL. FIN. CODE § 3144 (West 1968).

[41] For a discussion of the due process issues in these and similar cases, see Comment, *Withdrawal of Public Welfare: The Right to Prior Hearing*, 76 YALE L.J. 1234, 1240-41 & nn.26-35 (1967); Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirement of a Prior Hearing*, 68 MICH. L. REV. 112, 121-28 (1969).

[42] 256 U.S. 94 (1921).

[43] *See, e.g.*, CAL. CODE CIV. PRO. § 537(2)-(3) (West Supp. 1970).

[44] *See* Harris v. Balk, 198 U.S. 215 (1905); Pennoyer v. Neff, 95 U.S. 714 (1878). *See also* Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932), a case similarly involving attachment of property of a non-resident, relied on as a general approval of all attachments by Justice Black in his dissent in *Sniadach* and by the majority in the Wisconsin Court below. Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1968).

[45] The use of attachment to obtain jurisdiction could, however, be questioned. The attachment of a debtor's property places on him the burden of traveling to the jurisdiction where the property is located, and may subject him to personal jurisdiction there. Moreover, the costs of defending may cause him to abandon his hearing, and

Douglas also referred to *McKay v. McInnes*,[46] the only case in which the Supreme Court has dealt with the grant to ordinary creditors of the power to attach. However, the case is not cited with approval[47] and it is questionable whether it has any vitality at all after *Sniadach*.[48] The opinion itself, which appeared to approve all creditor attachments, is not entirely inconsistent with the reasoning of *Sniadach*. *McKay* was a *per curiam* decision, which merely cited two other cases as authority for upholding the *decision* of the Maine Supreme Court.[49] While the state court allowed attachment by any creditor,[50] the precedents relied on by the Supreme Court did not. One case cited was *Coffin Brothers*.[51] That case spoke in the same terms as the state court in *McKay*,[52] but the holding was only that a state officer can, without a hearing, attach shareholders' assets after a bank failure. The second case cited was *Ownbey v. Morgan*,[53] which also contained dicta to support the state court,[54] but whose holding was limited to an approval of attachment of a non-resident's property to obtain jurisdiction. The precedential value of *McKay* after *Sniadach* ought to be limited to the cases on which it relies, and those cases do not allow general creditor attachment.

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thus lose his property, even where the claim against him is non-meritorious. Further, it could be argued that the need for *in rem* attachment is less today than when *Ownbey* was decided. Most states now have broad foreign service available through long-arm statutes. *See* Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 CORNELL L.Q. 196 (1957).

However, the type of property seized from a non-resident is unlikely to be essential to him in the same sense as a resident's wages. A non-resident will not draw local wages, and in all probability will not have "essential shelter" on the attached property. This fact makes attachment of property of non-residents self-limiting in a way that attachment of a resident's property cannot be.

[46] 279 U.S. 820 (1929).

[47] "A procedural rule that may satisfy due process for attachments in general [citing *McKay*] does not necessarily satisfy procedural due process in every case." 395 U.S. at 340.

[48] *See* opinion of Justice Harlan in *Sniadach*, 395 U.S. at 343-44.

[49] The entire reported opinion follows:

No. 332 McKAY v. McINNES ET AL. Appeal from the Supreme Judicial Court of Maine, 127 Me. 110. Submitted April 8, 1929. Decided April 15, 1929. *Per Curiam:* Affirmed on the authority of *Ownbey v. Morgan*, 256 U.S. 94, 109; *Coffin Bros. v. Bennett*, 277 U.S. 29, 31.

279 U.S. 820 (1929).

[50] *McKay* held *all* creditor attachment valid. *Sniadach* invalidated one form of creditor attachment, wage garnishment. *McKay*'s rule, therefore, no longer has universal validity; some creditor attachments are invalid.

[51] Coffin Bros. v. Bennett, 277 U.S. 29 (1928). *See* text accompanying note 37 *supra*.

[52] 277 U.S. at 31.

[53] 256 U.S. 94 (1921). *See* text accompanying note 42 *supra*.

[54] 256 U.S. at 110-11.

IV. General Creditor Attachment

The basic question is whether, in light of *Sniadach*, general creditor attachment[55] is constitutional. The general creditor believes that his need for attachment makes such a grant of attachment power valid. It is argued that attachment is necessary to secure possible judgments,[56] and that the loss of the attachment power will force the general creditor to restrict credit to the detriment of the community's economic growth. This "state interest" in the economic welfare of the general community is said to outweigh impairment of the interests of the attached debtor.

This argument fails, however, to stand up to the scrutiny demanded by *Sniadach*. Attachment is based on the assumption that there is a need to secure creditor's possible judgments before trial begins. Such an immediate seizure (attachment)[57] is necessary if, during the time between notice of hearing and execution after the hearing, the person attached is likely to hide his assets, leave the jurisdiction, or in any way defeat the execution. While it may be admitted that some debtors will try to defeat judgment in this way, it does not appear that attachment security is necessary in all circumstances where it is allowed. The probability of the debtor eluding judgment is greater in some types of fact situations than in others, and the need for easy attachment in those cases greater.[58] The critical question is thus whether this is a general justification sufficient to allow *all* attachments.

Attachment is used primarily as a step in the collection process by retail merchants against wage-earning, low income credit customers.[59] Profiles of the average debtor subject to attachment indicate that he has lived in the same area for a long time and has a steady record of employment; payment on his obligations has generally lapsed because of illness, loss of work, pressure of other debts,

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[55] The term "general creditor attachment" is used to indicate the power to attach in any "action upon a contract for the direct payment of money," granted in California to all unsecured creditors under Cal. Code Civ. Pro. § 537(1) (West Supp. 1970).

[56] This is the reason given in the statute. Cal. Code Civ. Pro. § 537 (West Supp. 1970).

[57] This is not to say seizure after hearing. That is an execution. *See* note 5 *supra*.

[58] *See* note 70 *infra*, and accompanying text.

[59] *See* Brunn, *supra* note 5; Comment, *Resort to the Legal Process in Collecting Debts from High Risk Buyers in Los Angeles—Alternative Methods of Allocating Present Costs*, 14 U.C.L.A. L. Rev. 879 (1966); Comment, *Wage Garnishment as a Collection Device*, 1967 Wis. L. Rev. 759. Although creditors are no longer able to garnish wages before trial, it is reasonable to assume that they will continue to attach as a matter of course in the collection of delinquent accounts because of the pressure to settle which such action brings to bear on the debtor. *See* text accompanying note 66 *infra*.

or a belief in creditor fraud.[80] Thus, available information indicates that these debtors are not the kind of people who are likely to attempt to frustrate judgment on notice of suit. Consequently, attachment should be unnecessary.

There is also no reason to believe that attachment has any necessary effect on the availability of credit.[81] Available credit would be restricted only if the creditor granted or denied a loan on the basis of the availability of attachment. But in the general consumer debt case, ultimate collectibility does not depend on attachment, but on execution levies.[82] The law makes obtaining a judgment easy, and most collection suits are quickly reduced to judgment. Often no more than the statutory ten days elapse between summons and judgment.[83] In addition, the stability of the average debtor makes him amenable to execution levy. Depriving the general creditor of the right to attach, absent special circumstances, thus takes from him a means of coercing payment,[84] but it does not impair ultimate and speedy collectibility of a debt.[85]

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[80] The average debtor attached has lived in the same city for over 20 years. 80% of such debtors attend church regularly. Nearly two-thirds voted in the *last* presidential election. 61% of payment lapses were attributed to illness, loss of work, pressure of other debts; 16% were based on a belief in creditor fraud. WESTERN CENTER ON LAW AND POVERTY: IMPACT AND EXTENT OF WAGE GARNISHMENT IN LOS ANGELES COUNTY 11 (1968). *See also* Brunn, *supra* note 5, at 1245 n.114; Comment, *Wage Garnishment in Washington, an Empirical Study*, 43 WASH. L. REV. 743, 769-70 (1968). *See generally* D. CAPLOVITZ, THE POOR PAY MORE (1963).

[81] Empirical studies have examined the effect which the elimination of wage garnishment—both before and after judgment—has on credit availability, but not the effect which purely pre-trial remedies have. Elimination of wage garnishment in Texas apparently did affect credit adversely, while restriction of garnishment through higher exemption in New York did not. *See* Brunn, *supra* note 5, at 1239-43; Comment, *Wage Garnishment in Washington, an Empirical Study*, 43 WASH. L. REV. 743, 760-61 (1968).

[82] *See generally* the debate on Title III of the Consumer Credit Protection Act, 114 CONG. REC. 1831 (1968).

[83] This short period often results from default judgment. Clerk-issued default judgments, preceded by abusive collection practice, defective service of summons, and lack of adequate legal advice to the debtor, are frequent instruments of oppression used against the low-income debtor. *See* Brunn, *supra* note 5, at 1221; Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A. L. REV. 883, 925 (1969); Comment, *Effectively Regulating Extra-Judicial Collection of Debts*, 20 MAINE L. REV. 261, 263-64 (1968).

[84] It is indisputable that attachments force debt settlement and expedite creditor collection. However, attachment is not a collection device by design, but a security device. *Sniadach* rejects the argument that the role of attachment as a collection device can justify the hardships which it occasions. Attachment is only properly used to secure property for possible judgment, and can only be justified in this light.

[85] Many collection agencies recognize this fact. One credit manager has testified: "We don't attach. We sue and get a judgment and then execute . . . . I think that you will find that there are very, very many collection agencies that follow the same procedures. We just don't attach. We don't feel it is fair . . . . Perhaps once a year would be the only time we would attach, and that would be where somebody is trying to skip out and we have to get him in a hurry. . . ." CAL. ASSEMBLY INTERIM

Creditors also believe that the rationale of *Sniadach* should not apply in circumstances other than the wage attachment case because of the inherently unique nature of wages. Wages are liquid, and immediately necessary to the day-to-day sustenance of the wage-earner's family. No other property is as critical. But while wage garnishment was the primary form of attachment and an extremely harsh device because of the critical importance of wages, the differences between wages and other types of property would not seem sufficient to justify completely different treatment. Attachment of any asset critical to the debtor's immediate well-being exerts the same type of pressure as does wage garnishment. Attachment of a bank account (conceivably the depository of a debtor's entire weekly wage), of a sole automobile, receipts of a small business, or any similar item can still force accession to creditor demands, and eliminate the opportunity to contest the validity of a creditor's claim.[66]

Even if the property attached is not immediately as critical as are wages, a debtor ought not as a matter of course to have his property seized before hearing unless a clear need exists, an "extraordinary situation." In the past this clear need has been found only where there is a relatively high degree of harm to the individual creditor and thus to the economic welfare of the entire community. The general creditor cannot point to such a situation here.

V. A Limited Attachment Power

The rejection of general creditor attachment does not deny the need for attachment in some instances. A few situations are clear: attachment for tax purposes,[67] attachment to meet specific governmental ends on the public's behalf,[68] attachment to institute *quasi in rem* suits against foreign residents.[69] And while a general com-

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Committee on the Judiciary, Proceedings on Attachment and Exemption of Personal Property 16 (1969).

Figures on the use of pre-trial garnishment of wages belie the accuracy of this statement, but it at least articulates the proposition that only where a judgment's security is in jeopardy is attachment in fact necessary to collection.

[66] Some types of property are exempt from attachment and execution levies. Generally, these include food, clothing, some few items of furniture and tools of trade—the basic necessities. Cal. Code Civ. Pro. §§ 690.1-690.25 (West Supp. 1970). However, the exemptions do not adequately protect the debtor from oppressive seizures. Further, the exemption must be claimed by affidavit or it is deemed waived, Boot v. Boyd, 37 Cal. App. 545, 174 P. 352 (1918), and most debtors lack the acumen to protect themselves in this manner.

[67] *See* note 51 *supra*, and accompanying text.

[68] *See* notes 31-40 *supra*, and accompanying text.

[69] *See* note 42 *supra*, and accompanying text.

mercial need cannot be demonstrated, there is a state interest in allowing attachment by creditors in particular types of cases in which harm to the debtor is minimal.[70] The problem is to limit attachment to such cases.[71]

Attachment might be restricted to cases where the debt in question exceeds some specific amount, such as $5,000.[72] This figure would exclude most retail purchase debts, but still allow attachment in most business transactions. The realization that a law common to both consumer transactions and transactions between commercial enterprises cannot fairly meet the needs of both is becoming widespread.[73] Businessmen are generally better informed than consumers and less susceptible to economic coercion. Moreover, the property seized from them is usually not vital to day-to-day sustenance, as wages or property of similar import are to the con-

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[70] For example, a commercial or corporate debtor (as opposed to the consumer debtor discussed above) may be in a position to defeat judgment levies through conversion of his assets or dissipation of funds by virtue of a more sophisticated knowledge of the statutory collection system, or because of the nature of his debt. *See* Brief of the California Bankers Association as Intervenors in Opposition to the Writ of Mandate at 3, 24, People *ex rel.* Lynch v. Superior Court, 1 Cal. 3d 910, 464 P.2d 126, 83 Cal. Rptr. 670 (1970). Were attachment not allowed in these instances, unsecured commercial credit might be restricted, with a consequent slowing of economic growth, to the detriment of the general public. *Id.*

Present attachment statutes are too broadly stated, allowing attachments in many circumstances in which the need is small. This fact, coupled with Justice Douglas' criticism of the Wisconsin garnishment statute as "not narrowly drawn" to meet the needs for attachment which he mentions, 395 U.S. at 339, suggests analogy to the familiar "overbreadth" doctrine. *Cf.* Brown v. Louisiana, 383 U.S. 131 (1966) (Brennan, J., concurring); Cox v. Louisiana, 379 U.S. 536 (1965).

[71] The California Supreme Court had this issue before it in People *ex rel.* Lynch v. Superior Court, 1 Cal. 3d 910, 464 P.2d 126, 83 Cal. Rptr. 670 (1970). In that action the Attorney General asked for a writ of mandate restraining all California courts and peace officers from issuing or serving writs of attachment under Code of Civil Procedure § 537, on grounds of unconstitutionality established by *Sniadach*. The Court felt that a decision in the case would be an advisory opinion, outside its jurisdiction, however, since no wage earner or creditor was in fact involved in the suit. The issue of the validity of all portions of § 537 must thus await future decision.

[72] This sum is arbitrarily chosen, but seems to reflect a workable dividing line above which very few consumer debts would rise. Commercial debts below this size, in the rare case that they become uncollectible or partially worthless because attachment is unavailable, are unlikely to do creditors great harm.

This solution is legislative rather than judicial in nature, inasmuch as a court cannot write a new clause for a statute, *In re* Blaney, 30 Cal. 2d 643, 655-57, 184 P.2d 892, 901-02 (1947), but can only reform it by eliminating unconstitutional portions. Hammer v. Town of Ross, 59 Cal. 2d 776, 778, 382 P.2d 375, 383-84, 31 Cal. Rptr. 335, 343-44 (1963); City of Los Angeles v. Riley, 6 Cal. 2d 625, 628, 59 P.2d 139, 141 (1947). However, judicial reformation of the California attachment statute, CAL. CODE CIV. PRO. § 537 (West Supp. 1970), is possible without declaring it unconstitutional in its entirety. General creditor attachment is covered in one subdivision and this paragraph could be stricken without impairing the constitutionally valid attachments allowed in the rest of the statute.

[73] *See* Jordan and Warren, *A Proposed Uniform Code for Consumer Credit*, 8 B.C. IND. & COM. L. REV. 441 (1967).

sumer. The businessman also has more access to legal advice. As a result, the probability that a hearing will be held to determine the merits of the claim is great.[74] The problem with this monetary standard is that it does not make attachment available in all cases where it may be needed. Commercial cases in which attachment is appropriate may involve debt size below the standard sum. Attachment may likewise be appropriate in some consumer transactions. The attachment remedy would be unavailable in these cases if a fixed sum was used.

An alternative solution might be to have a judicial determination of the need for creditor attachment in each case as it arises. While the need for secrecy and immediate action to secure property available for possible judgment might preclude adversary hearing before the writ of attachment issues,[75] an *ex parte* proceeding could still be used. The creditor would have to demonstrate to a judge the existence of facts which endanger the security of his judgment. A copy of the affidavit containing these facts might be given to the debtor along with the writ. The debtor would then be in a position to contest the seizure in a hearing immediately after the seizure if he felt the alleged need did not exist.[76] This subsequent hearing could allow claims of exemption by the debtor if the property levied upon were essential to him, and supplement the current application for exemption by affidavit of the debtor.[77]

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[74] The analysis of interests involved in the case of commercial attachment assumes the validity of the Douglas view of due process discussed in the text accompanying notes 21-25 *supra*. Since commercial attachment has few of the deleterious effects of the consumer attachment, the justifications for it may be less weighty and still outweigh any harm to the debtor. "Economic regulation" and nothing more is involved.

Justice Harlan might not find the commercial attachment as easily justifiable, however. His strict standard might demand a "compelling state interest" before any pre-trial seizure, regardless of the type of property involved or the debtor concerned. *See* text accompanying notes 21-28 *supra*.

[75] The need for secrecy in provisional procedures is currently recognized, for example, in issuing ex parte temporary restraining orders. *See* CAL. CODE CIV. PRO. § 527 (West Supp. 1970).

[76] CAL. CODE CIV. PRO. § 556 (West 1954), allows the debtor to challenge an attachment, but strictly on grounds that it was improperly issued (with incorrect formalities) or the amount of the attachment was excessive. *See* Republic Truck Sales Co. v. Peak, 194 Cal. 492, 503-04, 234 P. 881, 889-90 (1924). The proposed procedure would expand the scope of this hearing.

[77] This method, might, however, be burdensome to the courts, involving much time and administrative expense. This difficulty could be eased by a combination of the above solutions, allowing attachment routinely in cases involving a debt of a large minimum size, but demanding case-by-case scrutiny in all other instances. The difficulty to the creditor of obtaining an attachment in consumer credit cases would discourage its use as an instrument of coercion. The process would retain attachments, though, in those few consumer debt cases where collection does in fact depend on immediate pre-trial seizure.

The need for ex parte hearing before issuance of the writ might be avoided by