#39 8/31/71

Memorandum 71-66

Subject: Study 39 - Attachment, Garnishment, Execution (Recent Developments)

We recently sent you a copy of the opinion of the California Supreme Court in Blair v. Pitchess, 5 Cal.3d 258 (July 1, 1971) (claim and delivery statute unconstitutional) and a copy of Senate Bill 1620 (revising the law relating to retaking possession of personal property).

Attached is a copy of the opinion of the California Supreme Court in Randone v. Superior Court (August 26, 1971) (prejudgment attachment statute unconstitutional).

Also, the Commission should know that the Assembly has passed bills that would provide for a continuing levy on wages (90 days) and for mail service of wage levies. We do not know what chance these bills have to pass the Senate.

The Commission must now decide whether to devote all its time and resources to the problem of prejudgment attachment in an effort to develop a statute that will permit prejudgment attachment in those "extraordinary circumstances" (not clearly defined by the court) where prejudgment attachment is permitted.

You will recall that Professor Riesenfeld prepared a background study based on his judgment that the courts would hold unconstitutional prejudgment attachment. The Commission considered Professor Riesenfeld's study and determined to defer further consideration of the study pending a study of court and sheriff's records in Alameda County and resolution of the disputed constitutional issue by the courts.

The staff believes that it is safe to assume that the representatives of creditors will prepare legislation to take care of the problems presented by

the Randone case. Note the two bills presented this session dealing with wage garnishments (these bills deal with the two basic problems dealt with in the Commission's recommendation on the Employees' Earnings Protection Law) and the bill presented this session on repossession of personal property. Accordingly, if the Commission is to deal with the law relating to prejudgment attachment, it is essential--I believe--that a recommendation be submitted to the 1972 session. It is possible, though far from certain, that something could be prepared for the 1972 session if substantially all the Commission's time and resources were devoted to this subject. We have Professor Riesenfeld's study and have contracted with him and Professor Warren for additional research in this area of the law.

If the Commission decides to give this subject a top priority, the staff suggests that we again take up Professor Riesenfeld's basic study at the October meeting and that he and Professor Warren be requested to supplement the study for the October meeting by providing any additional materials they conclude would be helpful in light of their examination of the opinion in the Randone case. It might, for example, be possible to devise a hearing procedure of some type so that attachment might be permitted prior to judgment. The Commission has rejected this alternative, but there may be some types of assets or some circumstances where prejudgment attachment might be desirable if a hearing prior to attachment were required or where attachment (of real property, for example) followed by a hearing might be sufficient.

It should be recognized that, if the Commission decides to devote substantially all its time to prejudgment attachment, the work on the comprehensive eminent domain statute will be delayed for at least a year.

Respectfully submitted,

John H. DeMoully
Executive Secretary

[L.A. No. 29848. In Bank. July 1, 1971.]

CLEVE BLAIR et al., Plaintiffs and Respondents, v.
PETER PITCHESS, as Sheriff, etc., et al., Defendants and Appellants.

SUMMARY

Plaintiffs, as county residents, brought an action to enjoin officers from executing the provisions of the claim and delivery law, on the ground that the law is unconstitutional and that in enforcing it defendants were illegally expending county funds. On plaintiffs' motion, summary judgment was entered restraining defendants and their employees from taking any personal property under color of claim and delivery law without a hearing on the merits, and also restraining them from entering any private place to search for and seize any personal property under color of claim and delivery law without first establishing probable cause before a magistrate. (Superior Court of Los Angeles County, No. 942966. Jerry Pacht, Judge.)

The Supreme Court affirmed, holding that the Claim and Delivery Law violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and section 13 of article I of the California Constitution, and that execution of the claim and delivery process violates the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and sections 13 and 19 of article I of the California Constitution. (Opinion by Sullivan, J., expressing the unanimous view of the Court.)

HEADNOTES

Classified to McKinney's Digest

(1) **Injunctions § 19.5 — Matters Controllable — Expenditure of Public Funds.**—The primary purpose of Code Civ. Proc., § 526a, authorizing the issuance of an injunction to prevent illegal expenditure of public funds, is to enable a large body of the citizenry to challenge govern-

mental action that would otherwise go unchallenged in the courts because of the standing requirement.

(2) **Injunctions § 19.5 — Matters Controllable — Expenditure of Public Funds.**—An injunction will issue under Code Civ. Proc., § 526a, to restrain county, town or city officials from implementing provisions of an unconstitutional statute or provisions of the state constitution that violate the federal constitution.

(3) **Injunctions § 19.5 — Matters Controllable — Expenditure of Public Funds.**—An action that meets the requirements of Code Civ. Proc., § 526a, thereby presents a true case of controversy, so as to be properly cognizable by a trial court, regardless of whether the plaintiff and defendant each have a special, personal interest in the outcome of the action.

(4) **Searches and Seizures § 5—Constitutional and Statutory Provisions—Scope of Operation—Applicability to Civil Matters.**—Fourth Amendment protections extend to civil, as well as criminal, matters.

(5) **Searches and Seizures § 5—Constitutional and Statutory Provisions—Scope of Operation—Applicability to Civil Matters—Where Entry Does Not Constitute Search.**—An entry into a person's home is not a search, with respect to the Fourth Amendment's application to civil matters, where, for a large part, the entry is made for his benefit, and where he may refuse to allow the entry without fear of criminal sanctions.

(6) **Searches and Seizures § 5—Constitutional and Statutory Provisions—Scope of Operation—Applicability to Civil Matters—Balancing Governmental Interests Against Private Rights.** — In determining under what circumstances a particular search involving only civil matters will be allowed by the Fourth Amendment, governmental interests must be weighed against the citizen's right to privacy, since the amendment prohibits only unreasonable searches and seizures.

(7) **Searches and Seizures § 20 — Without Warrant — What Constitutes Unreasonable Search—Search Authorized by Claim and Delivery Law.** —Official intrusions authorized by Code Civ. Proc., § 517, a part of the Claim and Delivery Law, are unreasonable searches and seizures unless probable cause first be shown.

(8) **Searches and Seizures § 2 — Definitions — Intrusion Authorized by Claim and Delivery Law as Search Within Fourth Amendment.**—The sort of intrusion authorized by Code Civ. Proc., § 517, is a search within the meaning of the Fourth Amendment.

(9) **Searches and Seizures § 2—Definitions—Intrusions in Execution of Claim and Delivery Process as Within Fourth Amendment.**—Intrusions into private places in execution of claim and delivery process are searches and seizures within the meaning of the Fourth Amendment.

(10) **Searches and Seizures § 5—Constitutional and Statutory Provisions—Scope of Operation—Applicability to Civil Matters—Balancing Governmental Interests Against Private Rights.**—The only governmental interests that are furthered by the intrusions incident to execution of claim and delivery process are the promotion of commerce, particularly the extension of credit, and the assurance that valid debts will be paid.

(11) **Searches and Seizures § 20 — Without Warrant — What Constitutes Unreasonable Search—Search Incident to Claim and Delivery Process.**—A search incident to the execution of claim and delivery process is unreasonable, unless it is supported by a warrant issued by a magistrate on a showing of probable cause.

(12) **Searches and Seizures § 21—Without Warrant—Reasonable or Probable Cause—Claim and Delivery Affidavit as Probable Cause.**—Affidavits ordinarily required of persons initiating claim and delivery procedures do not satisfy the probable cause standard contemplated by the rule that official intrusions authorized by Code Civ. Proc., § 517, are unreasonable unless probable cause first be shown.

(13) **Searches and Seizures § 22—Without Warrant—Voluntary Submission—Waiver of Fourth Amendment Rights.**—A person may waive his Fourth Amendment right to be free from unreasonable searches and seizures.

(14) **Searches and Seizures § 3—Constitutional and Statutory Provisions—Fourth Amendment Protections—Construction.**—Fourth Amendment protections are so fundamental that they are to be jealously guarded and liberally construed.

(15) **Waiver § 4 — Requisites — Knowledge and Intent — Constitutional Rights—Presumptions as to Waiver.**—Courts indulge every reason-

able presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of such rights.

(16) Waiver § 1—Definitions.—Ordinarily, a waiver is an intentional relinquishment or abandonment of a known right or privilege.

(17) Searches and Seizures § 22—Without Warrant—Voluntary Submission—Burden of Proof.—Where government officials rely on consent to justify the lawfulness of a search, the burden is on them to show, by clear and positive evidence, that the consent was freely, voluntarily and knowledgeably given.

(18) Searches and Seizures § 22—Without Warrant—Voluntary Submission—Waiver of Fourth Amendment Rights.—An occupant's acquiescence to an intrusion of his premises on being confronted by the intimidating presence of an officer of the law and the existence of legal process that appears to justify the intrusion in enforcing the Claim and Delivery Law does not operate as a voluntary waiver of Fourth Amendment rights.

(19) Searches and Seizures § 22—Without Warrant—Voluntary Submission—Waiver of Fourth Amendment Rights.—An occupant of premises, by granting permission to enter his premises to one person, does not waive Fourth Amendment rights as to intrusions by all other persons.

(20) Searches and Seizures § 22—Without Warrant—Voluntary Submission—Consent Obtained in Contract of Adhesion.—A consent obtained in a contract of adhesion is not effective to waive constitutional protections against unreasonable searches and seizures.

(21) Injunction § 19.5 — Matters Controllable — Expenditure of Public Funds.—In an action under Code Civ. Proc., § 526a, the court did not err in enjoining public officers from entering private places to make searches and seizures under color of the Claim and Delivery Law unless probable cause is first established before a magistrate, where it appeared that to permit such entry without a showing of probable cause would constitute an expenditure of public funds in the enforcement of an invalid statute.

(22a-22c) Claim and Delivery § 1.5 — Constitutionality of Statute. — Although there may be extraordinary situations in which the summary remedy afforded by the Claim and Delivery Law is justified by a

sufficient state or creditor interest, the present law (Code Civ. Proc., §§ 509-521) is not narrowly drawn to cover only such extraordinary situations and is, therefore, invalid in its entirety, as violating the due process clauses of U. S. Const., Amends. 5, 14 and Cal. Const. art. I, § 13.

(23) **Courts § 106(1)—Relationship of Courts—Lower Federal Court Decisions as Not Binding on State Supreme Court.**—The Supreme Court of California is not bound by decisions of the lower federal courts.

(24) **Claim and Delivery § 1.5 — Constitutionality of Statute — Effect of Consent Clauses in Retained Title Sales Contracts.**—The mere fact that many retained title sales contracts include a clause purporting to entitle the seller to enter and repossess on default does not render the Claim and Delivery Law constitutional.

(25) **Searches and Seizures § 21—Without Warrant—Reasonable or Probable Cause for Search—Entry Under Color of Claim and Delivery Law.**—The possible existence of exceptional situations in which creditor or state interests may justify claim and delivery procedure, or in which consent to such procedure is validly obtained, will not preclude the Supreme Court from affirming a trial court's decision enjoining public officers from entering private places to make searches and seizures under color of the Claim and Delivery Law unless probable cause is first established before a magistrate.

(26) **Constitutional Law § 38—Construction of Statutes—Power and Duty To Nullify Statutes—Obligatory Duty of Courts.**—The fact that a particular situation to which a statute applies may not involve objections giving rise to its invalidity will not avoid a declaration of its unconstitutionality, where such a declaration cannot be reasonably avoided by application of the rule that reviewing courts will limit the operation of a statute by construction or severance of the language to avoid unconstitutionality.

(27) **Constitutional Law § 38—Construction of Statutes—Power and Duty To Nullify Statutes—Obligatory Duty of Courts.**—Where the scope of a statute cannot be limited to situations to which it may constitutionally apply except by reading into it numerous qualifications and exceptions amounting to wholesale rewriting of the provision, the statute cannot be saved by judicial construction, but must be declared invalid.

(28) **Constitutional Law § 36—Constitutionality of Statutes—Effect of Invalidity in Certain Situations.**—A statute that is invalid in certain situations will not be enforced in others, where such enforcement entails the danger of an uncertain or vague future application.

(29) **Claim and Delivery § 1.5 — Constitutionality of Statute — Need for Provision for Determination of Probable Cause.**—In order to create a constitutional prejudgment replevin remedy, there must be provision for a determination of probable cause by a magistrate, and for a hearing prior to any seizure, except in those few instances in which important state or creditor interests justify summary process.

(30) **Judgments § 8a(1)—Summary Judgments—Purpose.**—The purpose of summary judgment is to determine whether or not a genuine factual controversy exists between the litigants and, if not, to resolve the dispute without a full-scale trial, the avoidance of which is a matter of judicial economy and sound social policy.

(31) **Judgments § 8a(1) — Summary Judgments — Purpose of Summary Judgment Procedure.**—The aim of the summary judgment procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial.

(32) **Judgments § 8a(5)(a)—Summary Judgments—Issues Precluding Summary Judgment.**—If, on a motion for summary judgment, a single issue of fact is found, the trial court may not proceed, but must allow such issue to be tried.

(33) **Judgments § 8a(4)—Summary Judgments—When Permitted or Allowable.**—Summary judgment is appropriate only where the facts on which the motion therefor is based are sufficient to sustain judgment in favor of the moving party, and the opposing party does not, by affidavit, show facts sufficient to raise a triable issue.

(34) **Judgments § 8a(8)(d)—Summary Judgments—Affidavits—Construction.**—In examining the sufficiency of affidavits filed in connection with a motion for a summary judgment, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and, furthermore, doubts as to the propriety of granting the motion should be resolved in favor of the opposing party.

(35) **Injunctions § 19.5—Matters Controllable—Expenditure of Public Funds—Propriety of Summary Judgment.**—In an action under Code

Civ. Proc., § 526a, the court did not err in rendering a summary judgment enjoining public officers from enforcing the Claim and Delivery Law, where no triable issue of fact appeared, and declarations and pleadings disclosed that plaintiffs were qualified to bring the action under the statute, and that defendants' activities were directed to the enforcement and execution of an unconstitutional law.

(36) **Claim and Delivery § 1.5—Constitutionality of Statute—Execution of Invalid Statute.**—Execution of the claim and delivery process violates U.S. Const. Amends. IV, V, XIV, and Cal. Const. art. I, §§ 13, 19, relating to due process and unreasonable searches and seizures.

COUNSEL

John D. Maharg, County Counsel, and Robert C. Lynch, Assistant County Counsel, for Defendants and Appellants.

Gibson, Dunn & Crutcher, John L. Endicott, Leland, Hoffman, Kali, & Goldstein, N. Stanley Leland, Robert D. Raven, Paul E. Homrighausen, Morrison, Foerster, Holloway, Clinton & Clark, Severson, Werson, Berke & Melchior, James B. Werson, Bernardus J. Smit, Styskal, Wiese & Colman, Alvin O. Wiese, Jr., O'Melveny & Myers, Homer I. Mitchell, Girard E. Boudreau, Jr., Stanley H. Williams, Ross L. Malone, James M. Conners and Vernon D. Stokes as Amici Curiae on behalf of Defendants and Appellants.

Charles E. Jones, Michael Henry Shapiro, Stanton J. Price, Ronald L. Sievers and William T. Rintala for Plaintiffs and Respondents.

OPINION

SULLIVAN, J.—In this case we are called upon to determine whether California's claim and delivery law (Code Civ. Proc., §§ 509-521)[1] violates the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and sections 13 and 19 of article I of the Constitution of the State of California.

Originally enacted in 1872, the claim and delivery law establishes a

[1]Hereafter, unless otherwise indicated, all section references are to the Code of Civil Procedure.

procedure by which the "plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer" require the sheriff, constable or marshal of a county to take the property from the defendant. (§§ 509, 511.) To initiate the procedure, the plaintiff must file his complaint, obtain the issuance of a summons, and file an affidavit stating that he owns or is entitled to possession of the property, that the defendant is wrongfully detaining the property and that the property has not been taken for a tax, assessment or fine, or been seized under an attachment or execution. The affidavit must also set forth the alleged cause of the wrongful detention of the property and the actual value of the property. (§ 510.) In addition, the plaintiff must file an undertaking of two or more sufficient sureties for double the value of the property. (§ 512.)

The defendant may except to the plaintiff's sureties (§ 513) or require return of the property by filing an undertaking similar to that required of the plaintiff. (§§ 514, 515.) After the sheriff seizes the property, he must deliver it to the plaintiff upon payment of his fees and necessary expenses (§§ 518, 521), and he must file the undertaking, affidavit and other relevant documents with the clerk of the court in which the action is pending (§ 520). Finally if the property is within a building or inclosure the sheriff must publicly demand its delivery, and if it is not voluntarily delivered "he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county." (§ 517.)

Plaintiffs, who are residents and taxpayers of the County of Los Angeles,[2] brought this action against the county and its sheriff, marshal, and deputy sheriff, and against the constable of the Malibu Justice Court to secure an injunction restraining defendants from executing the provisions of the claim and delivery law. Plaintiffs contend that the claim and delivery law is unconstitutional and that, by expending the time of county officials in executing its provisions, defendants are illegally expending county funds.

After defendants had filed an answer to plaintiffs' first amended complaint[3] and had responded to plaintiffs' interrogatories and requests for

[2]The affidavits of plaintiffs in support of their motion for summary judgment establish that they each reside in the City of Compton which is within the County of Los Angeles and that each of them, within one year prior to the commencement of this action, was assessed and paid a real property tax to the county.

[3]Plaintiffs' first amended complaint set forth four causes of action. The first cause alleged that the claim and delivery law insofar as it purports to authorize the entry into and search of private premises and the seizure of personal property without the issuance of a warrant by a magistrate upon probable cause "is, on its face and as applied, in violation of Amendments IV and XIV of the United States Constitution, and Article I, § 19 of the California Constitution." The second cause

admissions, plaintiffs moved for summary judgment and, in support of their motion, filed two declarations showing that they are residents and taxpayers of the County of Los Angeles. (See fn. 2, *ante*.) In opposition to the motion, defendants filed 11 declarations of county officials and employees of retail credit merchants. These declarations and the answers to interrogatories and requests for admissions establish the facts set forth below.

When a plaintiff files claim and delivery papers with the county sheriff's or marshall's departments, the clerical personnel of the department process the documents and check whether they comply with the statutory requirements. After a proper undertaking has been filed and the appropriate fees have been paid, the claim and delivery process is given to an officer for execution.

Upon arrival at the location designated in the process, the officer executing it informs the persons present that he is an officer of the court and has come to seize certain property at that location. If the defendant is present, the officer serves him with the summons and complaint. The officer then demands permission to enter and remove the designated items; in most cases, permission is given. After proper identification of the property, it is taken from the premises by a professional mover or other qualified person. If no one is present when the process is executed, a copy of the process is posted on the premises and another copy is mailed to the defendant.

Claim and delivery process is executed only during normal business hours except when no one is present at the location during those hours. Entry is normally achieved by gaining consent of those present; only on rare occasions do officials enter through open windows or use a locksmith to open the door. No force is used by the officials except when necessary to overcome the physical resistance of an occupant of the premises.

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alleged that said law insofar as it authorizes such entry and seizure without prior timely notice and opportunity to be heard on the merits of the claim "is, on its face and as applied, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution, and of California Constitution, Article I, Section 13." The third cause alleged that the law by requiring an undertaking by the defendant in order to secure the return of the seized property "invidiously discriminates against those who are too poor to provide such an undertaking, and thus contravenes the equal protection clause of the Fourteenth Amendment of the United States Constitution, and Article I, Sections 11 and 21 of the California Constitution." The fourth cause alleged that an actual controversy existed between plaintiffs and defendants because of their contrary claims of the invalidity and validity of the law.

Defendants' demurrers to the third and four causes of action were sustained without leave to amend; defendants' demurrers to the first and second causes were overruled.

The fees charged for executing the process include a mileage fee of 70¢ per mile and a flat service charge of $5 for each seizure of property. In addition, fees are charged for the expenses of moving and storing the property and for the costs of any locksmiths or keepers employed. Except for keepers' charges, all fees are paid to the county treasurer. Of the $5 service fee, $3 is paid into the county general fund and $2 into the county property tax reduction fund.

The declarations of employees of retail credit merchants show that such firms make their credit sales on the basis of form contracts which contain provisions purporting to give the seller authority, with or without legal process, to enter and repossess the property upon default. These declarations also reveal that the firms use claim and delivery process only as a last resort after having failed to collect the debt by other means including form notices, telephone calls, personal letters and visits, and negotiations.

After considering the declarations, the points and authorities and arguments of counsel, the trial court granted plaintiffs' motion for summary judgment. Judgment was entered in favor of plaintiffs and the court issued a permanent injunction restraining defendants and their employees from (1) taking any personal property under color of claim and delivery law unless the defendant is first given a hearing on the merits of the case, and (2) entering any private place to search for and seize any personal property under color of claim and delivery law unless prior thereto probable cause is established before a magistrate. Defendants appeal from the judgment.

We first consider defendants' contention that plaintiffs had no standing to maintain the action and that consequently the trial court's judgment was advisory in nature. As we noted above, plaintiffs bring their suit under section 526a, which authorizes actions by a resident taxpayer against officers of a county, town, city, or city and county to obtain an injunction restraining and preventing the illegal expenditure of public funds.[4] (1) The primary purpose of this statute, originally enacted in 1909, is to "enable a large body of the citizenry to challenge governmental action

[4]Section 526a provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

"An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law."

which would otherwise go unchallenged in the courts because of the standing requirement." (Comment, *Taxpayers' Suits: A Survey and Summary* (1960) 69 Yale L.J. 895, 904.)

California courts have consistently construed section 526a liberally to achieve this remedial purpose. Upholding the issuance of an injunction, we have declared that it "is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." (*Wirin* v. *Parker* (1957) 48 Cal.2d 890, 894 [313 P.2d 844].) Nor have we required that the unlawfully spent funds come from tax revenues; they may be derived from the operation of a public utility or from gas revenues. (*Mines* v. *Del Valle* (1927) 201 Cal. 273, 279-280 [257 P. 530]; *Trickey* v. *City of Long Beach* (1951) 101 Cal.App.2d 871, 881 [226 P.2d 694].) A unanimous court in *Wirin* v. *Horrall* (1948) 85 Cal.App.2d 497, 504-505 [193 P.2d 470], held that the mere "expending [of] the time of the paid police officers of the city of Los Angeles in performing illegal and unauthorized acts" constituted an unlawful use of funds which could be enjoined under section 526a. (See also *Vogel* v. *County of Los Angeles* (1967) 68 Cal.2d 18 [64 Cal.Rptr. 409, 434 P.2d 961].)

We have even extended section 526a to include actions brought by nonresident taxpayers (*Irwin* v. *City of Manhattan Beach* (1966) 65 Cal.2d 13, 18-20 [51 Cal.Rptr. 881, 415 P.2d 769). In *Crowe* v. *Boyle* (1920) 184 Cal. 117, 152 [193 P. 111], we stated: "In this state we have been very liberal in the application of the rule permitting taxpayers to bring a suit to prevent the illegal conduct of city officials, and no showing of special damage to the particular taxpayer has been held necessary."

Moreover, we have not limited suits under section 526a to challenges of policies or ordinances adopted by the county, city or town. **(2)** If county, town or city officials implement a state statute or even the provisions of the state Constitution, an injunction under section 526a will issue to restrain such enforcement if the provison is unconstitutional. (*Lundberg* v. *County of Alameda* (1956) 46 Cal.2d 644 [298 P.2d 1], app. dism. (1956) 352 U.S. 921 [1 L.Ed.2d 157, 77 S.Ct. 224]; *Vogel* v. *County of Los Angeles*, *supra*, 68 Cal.2d 18.) Indeed, it has been held that taxpayers may sue *state* officials to enjoin such officials from illegally expending state funds. (*Ahlgren* v. *Carr* (1926) 209 Cal.App.2d 248, 252-254 [25 Cal. Rptr. 887]; *California State Employees' Assn.* v. *Williams* (1970) 7 Cal. App.3d 390, 395 [86 Cal.Rptr. 305].) We have even permitted taxpayers to sue on behalf of a city or county to recover funds illegally expended. (*Osburn* v. *Stone* (1915) 170 Cal. 480, 482 [150 P. 367].)

It is clear that the present action was properly brought under section

526a. Plaintiffs have alleged, and by their affidavits have established, that they are residents and taxpayers of the County of Los Angeles. (See fn. 2, *ante.*) It appears from the complaint that plaintiffs seek to enjoin defendants, who admittedly are county officials, from expending their own time and the time of other county officials in executing claim and delivery process. If the claim and delivery law is unconstitutional, then county officials may be enjoined from spending their time carrying out its provisions (*Wirin* v. *Horrall, supra,* 85 Cal.App.2d 497, 504-505) even though by the collection of fees from those invoking the provisional remedy the procedures actually effect a saving of tax funds. (*Wirin* v. *Parker, supra,* 48 Cal.2d 890, 894.)

Defendants argue nevertheless that, even if the instant action fulfills the requirements of section 526a, it was not properly cognizable by the trial court because it does not present a true case or controversy. They point out that there "is no allegation that the plaintiffs were or may be parties to a claim and delivery action."[5] Defendants also contend that as sheriff and marshal, respectively, they merely carry out ministerial functions in executing claim and delivery process and have, therefore, no real interest adverse to plaintiffs. They cite our recent statement that, "[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court. [Citations.]" (*People* ex rel. *Lynch* v. *Superior Court* (1970) 1 Cal.3d 910, 912 [83 Cal.Rptr. 670, 464 P.2d 126].) They also draw our attention to the long series of United States Supreme Court decisions which have elaborated on the case or controversy requirement.

(3) We do not find those cases applicable here, for we conclude that if an action meets the requirements of section 526a, it presents a true case or controversy. As we noted before, the primary purpose of section 526a was to give a large body of citizens standing to challenge governmental actions. If we were to hold that such suits did not present a true case or controversy unless the plaintiff and the defendant each had a special, personal interest in the outcome, we would drastically curtail their usefulness as a check on illegal government activity. Few indeed are the government officers who have a personal interest in the continued validity of their officials acts.

Furthermore, it has never been the rule in this state that the parties in suits under section 526a must have a personal interest in the litigation. We specifically stated in *Crowe* v. *Boyle, supra,* 184 Cal. 117, 152 that

[5]Plaintiffs did file declarations by Sandra Daniels, Mrs. Mamie Daniels, Roberta Jackson and Gladys McMickle each describing the seizure of their property under claim and delivery process. However, none of the declarants were made parties to the action.

"no showing of special damage to the particular taxpayer has been held necessary." In *Wirin* v. *Parker, supra,* 48 Cal.2d 890, the plaintiff had no more immediate interest in enjoining the illegal wiretaps conducted by the police department than his status as a resident taxpayer. Similarly, in *Vogel* v. *County of Los Angeles, supra,* 68 Cal.2d 18, the defendant county officials who administered the loyalty oath to new county officials and employees certainly had no personal interest in the continued use of that oath. In both *Wirin* and *Vogel* the plaintiff prevailed, and no suggestion is found in either opinion that the cases failed to present a true case or controversy.

As the extensive briefs in this case demonstrate, taxpayers have a sufficiently personal interest in the illegal expenditure of funds by county officials to become dedicated adversaries. In the same manner, the interest of government officials in continuing their programs is sufficient to guarantee a spirited opposition. There is no danger in such circumstances that the court will be misled by the failure of the parties adequately to explore and argue the issues. We are satisfied that an action meeting the requirements of section 526a thereby presents a true case or controversy.

Having so concluded, we now turn to the substantive issues which we consider in the order presented by defendants. Defendants first attack the second paragraph of the injunction which enjoins them from entering any private dwelling, commercial establishment, private vehicle or other location for the purpose of searching for or seizing personal property under color of the claim and delivery law "*unless* prior *to* such entry, search or seizure, the alleged creditor seeking to invoke the claim and delivery procedure and/or defendants PETER PITCHESS and LESSLIE R. KEAYS, established before a magistrate that there is probable cause to believe that the property which is the subject of the claim and delivery procedure is on the premises or in the locaton, place or object to be entered, and that said alleged creditor has a right to the immediate possession of said property." (Original italics.) Contraray to the position taken by the trial court, defendants assert that the federal and state constitutional protections against unreasonable searches and seizures do not apply to civil matters, but are confined "to cases or public prosecutions instituted and pursued for the suppression of crime or the detection and punishment of criminals."[6]

[6]The summary judgment and ensuing injunction rested on the basis that the claim and delivery law violated provisions of both the federal and state Constitutions. Defendants argue that it violates neither Constitution. Since sections 19 and 13 of article I of the California Constitution are substantially equivalent to the Fourth Amendment and to the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution respectively, our analysis of the validity of the

(4) We are convinced, however, that recent decisions of the United States Supreme Court clearly recognize that the protection of the Fourth Amendment extend to civil as well as criminal matters. In *Camara* v. *Municipal Court* (1967) 387 U.S. 523 [18 L.Ed.2d 930, 87 S.Ct. 1727], the Supreme Court overturned its prior decision in *Frank* v. *Maryland* (1959) 359 U.S. 360 [3 L.Ed.2d 877, 79 S.Ct. 804] and held that the Fourth Amendment forbade inspections without warrants of private dwellings to assure compliance with the housing code, even though the inspections were essentially civil in nature. The Supreme Court stated that "[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (387 U.S. at p. 528 [18 L.Ed.2d at p. 935].) The decision went on to reject the claim that merely because building inspections by government officers constitute intrusions less "hostile" than searches in criminal cases, the Fourth Amendment did not apply to such inspections. The high court said: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." (Fn. omitted.) (387 U.S. at p. 530 [18 L.Ed.2d at p. 936].)

In the companion case, *See* v. *City of Seattle* (1967) 387 U.S. 541 [18 L.Ed.2d 943, 87 S.Ct. 1737], the Supreme Court expanded the *Camara* rationale and held that inspections of commercial buildings could not be made without warrants. "As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." (387 U.S. at p. 543 [18 L.Ed.2d at p. 946].)

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claim and delivery law in respect to the above provisions of the federal Constitution is applicable in respect to the above sections of the state Constitution.

In support of their first argument defendants cite *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 277 [15 L.Ed. 372, 374]; *Boyd* v. *United States* (1886) 116 U.S. 616, 624 [29 L.Ed. 746, 748-749, 6 S.Ct. 524]; *Camden County Beverage Co.* v. *Blair* (D.N.J. 1930) 46 F.2d 648; and *United States* v. *Eighteen Cases of Tuna Fish* (W.D.Va. 1925) 5 F.2d 979. While dicta in the above two Supreme Court cases, which were followed in the other cases cited, appear to support defendants' argument, we find it unnecessary to discuss these cases as their interpretation of the Fourth Amendment has been superseded by the more recent decisions of the United States Supreme Court which we discuss below.

Defendants also argue that the framers of the Constitution could not have intended the Fourth Amendment to apply to claim and delivery cases since such replevin remedies long predated the Constitution and were in general use at the time of its adoption. Even if we believed that this argument had merit, we would, of course, still be compelled to follow the recent decisions of the United States Supreme Court which appear to dictate the result in this case.

The Supreme Court again considered the applicability of Fourth Amendment protections to civil matters in *Wyman* v. *James* (1971) 400 U.S. 309 [27 L.Ed.2d 408, 91 S.Ct. 381]. There, the court was confronted with the question of whether a state could require a potential recipient of aid to families with dependent children to allow a social worker to visit his home as a condition of receiving the aid. Although it was held that such a requirement did not violate the Fourth Amendment, the court nevertheless observed that: "When a case involves a home and some type of official intrusion into that home, as this case appears to do, an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford. Its emphasis indeed is upon one of the most precious aspects of personal security in the home." (*Id.* at p. 316 [27 L.Ed.2d at p. 413].) The court also reiterated the holding of *Camara* "that one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior." (*Id.* at p. 317 [27 L.Ed.2d at p. 413].)

Five members of the Supreme Court found that the caseworker's visit was "both rehabilitative and investigative," but concluded that the visit was not a search within the Fourth Amendment because the investigative aspect of the visit "is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context." (*Id.* at p. 317 [27 L.Ed.2d at p. 414].) They deemed significant the fact that the recipient of aid could refuse to allow the intrusion into his home without fear of criminal sanction. His refusal merely rendered him ineligible for aid. The court went on to hold that even if the caseworker's visit were a search, it was not unreasonable and therefore did not violate the Fourth Amendment.

The teaching of these cases is that the Fourth Amendment applies to civil as well as criminal matters. However, not every official intrusion into the sanctity of the home will be deemed a search within the meaning of the Fourth Amendment. **(5)** As we read the majority opinion in *Wyman*, if the entry is, in large part, for the benefit of those whose homes are invaded, and if such persons may refuse to allow the intrusion without fear of criminal sanctions, then it is not a search within the Fourth Amendment. **(6)** Furthermore, since the Fourth Amendment prohibits only *unreasonable* searches and seizures, the governmental interests must be weighed against the citizen's right to privacy to determine under what circumstances a particular type of search will be allowed. (*Camara* v. *Superior Court, supra,* 387 U.S. 523, 534-539 [18 L.Ed.2d 930, 938-941]; *Wyman* v. *James, supra,* 400 U.S. 309, 318-324 [27 L.Ed.2d 408, —— - ——].)

(7) Applying these principles to the present case, we find that the

official intrusions authorized by section 517 are unreasonable searches and seizures unless probable cause first be shown.

(8) In contrast to the visit of a caseworker, the sort of intrusion authorized by section 517 is clearly a search within the meaning of the Fourth Amendment. As with a search in a criminal case, the sheriff executing claim and delivery process enters homes with the full force of the law to seize property on the premises. There can be no pretension that the sheriff enters for a rehabilitative purpose; his only aim is to seize property. Nor can the occupant refuse to allow such entry; indeed, the sheriff may "call to his aid the power of his county" to overcome any resistance which the occupant may offer. (§ 517.) **(9)** Therefore, we conclude that intrusions into private places in execution of claim and delivery process are searches and seizures within the meaning of the Fourth Amendment.

We also hold that such searches are unreasonable unless made upon probable cause. **(10)** The only governmental interests which are furthered by the intrusions incident to execution of claim and delivery process are the promotion of commerce, particularly the extension of credit, and the assurance that valid debts will be paid. (Note (1970) 68 Mich.L.Rev. 986, 996-997.) On the other hand, as already pointed out, the citizen's right to privacy is infringed almost as much by such civil intrusions as by searches in the traditional criminal context. **(11)** Balancing these important individual rights against the less compelling state interests (which, as we note *infra*, are only slightly promoted by execution of claim and delivery process), we find that a search incident to the execution of claim and delivery process is unreasonable unless it is supported by a warrant issued by a magistrate upon a showing of probable cause. (See Note (1967) 3 Harv.Civ. Lib.—Civ. Rights L.Rev. 209, 213-215.) "If the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed." (*Laprease* v. *Raymours Furniture Company* (N.D.N.Y. 1970) 315 F.Supp. 716, 722.)[7]

(12) Obviously, the affidavits customarily required of these initiating claim and delivery procedures do not satisfy the probable cause standard. Such affidavits need allege only that the plaintiff owns property which the

[7]The mere fact that the intrusions of defendants in execution of claim and delivery process are of a civilized nature, not involving violence or stealth, does not make them compatible with the Fourth Amendment. The primary concern of the Fourth Amendment is the privacy of citizens, and that privacy is shattered by "gentlemanly" efforts such as unlocking doors and entering through open windows as well as by more violent means.

defendant is wrongfully detaining. The affiants are not obligated to set forth facts showing probable cause to believe such allegations to be true, nor must they show probable cause to believe that the property is at the location specified in the process. Finally, such affidavits fail to comply with the probable cause standard because they are not passed upon by a magistrate, but are examined only by the clerical staff of the sheriff's or marshall's department, and then merely for their regularity in form.

Defendants contend that even if the Fourth Amendment does apply to their intrusions into private areas in execution of claim and delivery process, in the vast majority of cases the owner or occupant of the private area has consented to the intrusion and has, thus, waived his Fourth Amendment rights.

(13) It is well established, of course, that one may waive his Fourth Amendment right to be free from unreasonable searches and seizures. (*People* v. *Davis* (1957) 48 Cal.2d 241, 249 [309 P.2d 1] and cases cited therein; Witkin, Cal. Evidence (2d ed. 1966) § 77, pp. 73-74.) **(14, 15, 16)** However, it "cannot be overly stressed that the protections embodied in the Fourth Amendment are so fundamental that they are to be jealously guarded and liberally construed." (Fn. omitted.) (Note (1970) 6 Cal. Western L.Rev. 316, 318.) "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (Fns. omitted.) (*Johnson* v. *Zerbst* (1938) 304 U.S. 458, 464 [82 L.Ed. 1461, 1466, 58 S.Ct. 1019].) **(17)** Where government officials rely on consent to justify the lawfulness of a search, the burden is on them to show by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given. (*Bumper* v. *North Carolina* (1968) 391 U.S. 543, 548 [20 L.Ed.2d 797, 802, 88 S.Ct. 1788]; *People* v. *Shelton* (1964) 60 Cal.2d 740, 744 [36 Cal.Rptr. 433, 388 P.2d 665]; *Channel* v. *United States* (9th Cir. 1960) 285 F.2d 217, 219-220.)

Defendants argue that consent to the search is given in two ways. First, they assert that those present on the premises when the executing officer arrives usually agree to his entry. The declarations filed in opposition to the motion for summary judgment indicate that such permission is granted after the officer has identified himself, shown the claim and delivery process to those present, explained its meaning to them and then has requested permission to enter. Under such circumstances, the permission granted constitutes "no more than acquiescence to a claim of lawful authority." (Fn. omitted.) (*Bumper* v. *North Carolina*, *supra*, 391 U.S. 543, 549 [20

L.Ed.2d 797, 802].) " '[I]nvitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. [Citation.] A like view has been taken where an officer displays his badge and declares that he has come to make a search [citation], even where the householder replies 'All Right.' [Citation.]" (*Judd* v. *United States* (1951) 190 F.2d 649, 651 [89 App. D.C. 64]; quoted with approval in *Parrish* v. *Civil Service Commission* (1967) 66 Cal.2d 260, 269 [57 Cal.Rptr. 623, 425 P.2d 223].) **(18)** In claim and delivery cases the occupant of the premises is confronted not only by the intimidating presence of an officer of the law, but also by the existence of legal process which appears to justify the intrusion. In such a situation acquiescence to the intrusion cannot operate as a voluntary waiver of Fourth Amendment rights. (*Bumper* v. *North Carolina, supra,* 391 U.S. 543, 548-550 [20 L.Ed.2d 797, 802-803]; *Parrish* v. *Civil Service Commission, supra,* 66 Cal.2d 260, 268-270.)[8]

Defendants also contend that waiver of Fourth Amendment rights arises from the terms of the retained title sales agreements and collateral security agreements normally involved in claim and delivery cases. Numerous examples of such contracts were attached as exhibits to the declarations in opposition to the motion for summary judgment. The majority of these contracts contain a clause which purports to give the seller or creditor authority to enter any premises and repossess the goods sold.

Such provisions, however, cannot be used to justify defendants' actions. In the first place, under the wording of such clauses, consent is given only to entry by the seller or creditor—not to entry by government officials.[9] **(19)** By granting one person permission to enter his house, the occupant does not waive his Fourth Amendment rights as to intrusions by all others. Secondly, while we need not pass upon the validity of the consent purportedly obtained under the contracts filed in this case, we cannot refrain from observing that most of those contracts appear to be adhesion contracts, the terms of which are specified by the seller or lender. "The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of

[8]Obviously, the executing officers make no attempt to warn those present of any right to refuse to permit the search, for the statute forbids such refusal. Moreover, while California courts have held that absence of a warning as to Fourth Amendment rights will not per se make consent to a search ineffective (*People* v. *Bustamonte* (1969) 270 Cal.App.2d 648, 653 [76 Cal.Rptr. 17] and cases collected therein), nevertheless, the failure of officers to give such warnings is a factor to be taken into account in determining whether consent was freely given. (*People* v. *MacIntosh* (1968) 264 Cal.App.2d 701, 705 [70 Cal.Rptr. 667].)

[9]Only one of the contracts attached as exhibits to the declarations in opposition to the motion for summary judgment contains a clause purporting to give consent to intrusions by government officials.

the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party; terms whose consequences are often understood only in a vague way, if at all." (Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract* (1943) 43 Colum.L.Rev. 629, 632.)

(20) For substantially the same reason that consent is ineffective to waive Fourth Amendment rights if made under the intimidation implicit in the presence of a uniformed officer of the law (*Bumper* v. *North Carolina, supra,* 391 U.S. 543, 548-550) or explicit in threats of reprisal (*Parrish* v. *Civil Service Commission, supra,* 66 Cal.2d 260, 268-270), a consent obtained in such a contract of adhesion is ineffective to waive the constitutional protections against unreasonable searches and seizures.

(21) For the reasons stated above, we conclude that the trial court did not err in enjoining defendants from entering private places to make searches and seizures under color of the claim and delivery law unless probable cause is first established before a magistrate.

We next consider defendants' objection to the first paragraph of the injunction, which restrains them from taking personal property under color of the claim and delivery law "unless the alleged debtor has first been afforded an opportunity to be heard in a judicial proceeding, upon prior notice duly given, on the merits of said action, and to contest the claimant's right to possession of such property in said proceeding." It is argued that the trial court erred in concluding that the execution of claim and delivery process without such a hearing would violate the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and section 13 of article I of the California Constitution.

In determining the proper application to the present case of the due process requirements of the Fourteenth Amendment of the United States Constitution and section 13 of article I of the California Constitution, we are necessarily guided in large part by the recent decision of the United States Supreme Court in *Sniadach* v. *Family Finance Corp.* (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820]. That case held that Wisconsin's statute permitting prejudgment wage garnishments was unconstitutional because it authorized "a taking of property without that procedural due process that is required by the Fourteenth Amendment." (*Id.* at p. 339 [23 L.Ed.2d at p. 352].) While the court recognized that summary procedures "may well meet the requirements of due process in extraordinary situations. [Citations]" (*id.*) (see *McCallop* v. *Carberry* (1970) 1 Cal.3d 903, 905, fn. 3 [83 Cal.Rptr. 666, 464 P.2d 122]) it found that the case before it presented "no situation requiring special

protection to a state or creditor interest" and that the Wisconsin statute was not "narrowly drawn to meet any such unusual condition." (*Id.*) The court pointed out that wage garnishments "may impose tremendous hardship on wage earners with families to support" (*id.* at p. 340 [23 L.Ed.2d at p. 353]) and that by garnishing his alleged debtor's wages, the creditor gains enormous and unwarranted leverage. Since wage garnishments are obviously a taking of property, and since there is no state or creditor interest sufficient to justify such a taking prior to judgment, the Supreme Court struck down the Wisconsin statute as a violation of due process.[10]

(22a) Applying the reasoning of the *Sniadach* decision to the present case, we conclude that the seizure of property under the claim and delivery law constitutes a taking without due process of law. Although there may be extraordinary situations in which the summary remedy afforded by the claim and delivery law is justified by a sufficient state or creditor interest, that law, like the Wisconsin wage garnishment statute, is not narrowly drawn to cover only such extraordinary situations. Therefore, in light of *Sniadach*, we must hold the claim and delivery law to be unconstitutional.

Like wage garnishments, the execution of claim and delivery process involves a taking of property. Indeed, in claim and delivery cases, the taking is the obvious physical removal of personal property. This deprivation of property is a taking even though the defendant may later recover his property if he prevails at the ultimate trial on the merits and even though the plaintiff must post a bond. In his concurring opinion in *Sniadach*, Justice Harlan clearly pointed out that the " 'property' of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit." (395 U.S. at p. 342 [23 L.Ed.2d at p. 354]; compare the opinion of the court, 395 U.S. at pp. 338-339 [23 L.Ed.2d at pp. 351-352].) Similarly, the "property" of which a defendant is de-

[10]Recently in *Boddie* v. *Connecticut* (1971) 401 U.S. 371 [28 L.Ed.2d 113, 91 S.Ct. 780], the Supreme Court, adverting to *Sniadach* and the many other "due process decisions, representing over a hundred years of effort by this Court to give concrete embodiment to this concept" declared: "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." (*Id.* at p. 377 [28 L.Ed.2d at p. 118, 91 S.Ct. at p. 785].) "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (Fns. omitted.) (*Id.* at pp. 378-379 [28 L.Ed.2d at p. 119, 91 S.Ct. at p. 786].)

prived by execution of claim and delivery process is the use of the disputed goods between their seizure and the final judgment.[11] Neither the eventual recovery of the property nor the posting of a bond remedies this loss of the use of the property pending final judgment.

Under the reasoning of *Sniadach* a taking such as that involved in claim and delivery procedure violates due process if it occurs prior to a hearing on the merits unless justified by weighty state or creditor interests. Defendants assert that there is such a creditor interest which justifies claim and delivery procedure. Were it not for the claim and delivery law, they argue, debtors threatened with suit would abscond with the property. Such a contention is contradicted by the very declarations filed by defendants in this case. Those declarations, made on behalf of merchants selling on credit—probably the class of creditors most frequently using this provisional remedy—clearly show that legal action and claim and delivery are utilized only as a last resort. Before turning to such expensive procedures, a merchant normally employs other collection devices such as form notices, telephone calls, personal letters and visits, and negotiations. If the debtor wishes to abscond with the property, he will have had more than ample opportunity to do so long before the claim and delivery process is initiated. Affording alleged debtors a hearing on the merits prior to seizure of their property will not substantially increase the risk that they "Shall fold their tents, like Arabs, And as silently steal away."* In short, we believe the asserted creditor interest insufficient to justify the summary procedure authorized by the claim and delivery law.[12]

We recognize that in some instances a very real danger may exist that the debtor may abscond with the property or that the property will be destroyed. In such situations a summary procedure may be consonant with constitutional principles. For example, in 1921, the United States Supreme

[11]Defendants claim there is no taking because the property belongs to the creditor and is merely wrongfully detained by the debtor. Defendants' bootstrap argument must fail on its own weight. Of course, ownership and right to possession of the goods are the central issues of the main action, and are not determined until final judgment in the case. The mere unproven claim of the creditor does not make the property his nor make the seizure of it any less a taking.

*Longfellow, The Day Is Done (1845).

[12]Defendants also argue that the creditor must be able to repossess the goods prior to trial because if the debtor, who is normally so impecunious as to be essentially judgment proof, is allowed to use the property until judgment the creditor's ultimate victory will be pyrrhic. By the time judgment is entered, so the argument goes, the property will have depreciated sufficiently so that repossession of it will be essentially worthless, and by hypothesis no other recovery against the debtor will be possible. While there may be some substance to this argument, the answer to it is not to deprive the debtor of a hearing but to provide him with an expeditious one so that the property may be quickly recovered.

Court upheld a Delaware statute which authorized the attachment of property located within the state but belonging to nonresidents. (*Ownby* v. *Morgan* (1921) 256 U.S. 94, 110-112 [65 L.Ed. 837, 845-846, 41 S.Ct. 433]; cited in *Sniadach* v. *Family Finance Corp., supra,* 395 U.S. 337, 339 [23 L.Ed.2d 349, 352].) In that case the interest of the creditor in preserving the claimed property and the interest of the state in preserving its jurisdiction were viewed as justifying the special protection afforded by a summary remedy. (But see Note, *supra,* 68 Mich.L.Rev. 986, 1003-1004.) The California claim and delivery law, however, is not limited to such extraordinary situations; indeed, from the declarations on file in this case it is apparent that claim and delivery process is normally used in cases where no such sensitive problems are involved.

However substantially claim and delivery procedure may protect the creditor's interest and indirectly promote the state's interest in business and commerce, it seems to us that such advantages are far outweighed by its detrimental effect upon those whose goods are seized. The removal of personal property, like the garnishment of wages, in many cases imposes tremendous hardship on the defendant and his family and gives the plaintiff unwarranted leverage. The declaration of one of the deputy sheriffs of the County of Los Angeles discloses that the "great majority of items repossessed at residential locations are appliances such as television sets, refrigerators, stoves, and sewing machines, and furniture of all kinds." The seizure of such goods "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 [citation] this [claim and delivery procedure] violates the fundamental principles of due process." (Fns. omitted.) (*Sniadach* v. *Family Finance Corp., supra,* 395 U.S. 337, 341-342 [23 L.Ed.2d 349, 353-354].)[18]

Our conclusion that seizure of property under color of the claim and delivery law is a denial of due process is supported by the recent case of

[18]Defendants' contention that the Fifth Amendment could not have been intended to invalidate a remedy which was in common use at the time that amendment was adopted and which had its roots in the Statute of Marlbridge, 52 Henry III, ch. 21 (1267) is also answered by Justice Douglas, writing for the court in *Sniadach:* "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." (395 U.S. 337, 340 [23 L.Ed.2d 349, 353]; see also fn. 5, ante.) Garnishment also had origins in medieval England and was in use in colonial America (Note (1969) 22 Vand.L.Rev. 1400, 1401); yet as the sentence quoted above indicates, the Supreme Court found that the long history of that remedy did not ensure its present compliance with due process requirement.

Laprease v. *Raymours Furniture Company, supra,* 315 F.Supp. 716.[14] In that case, a three-judge federal court, in a carefully reasoned opinion, held that a New York statute similar to California's claim and delivery law was unconstitutional for the reasons mentioned above. Two other cases have reached a contrary conclusion. (*Brunswick Corporation* v. *J & P, Inc.* (10th Cir. 1970) 424 F.2d 100, 105; *Fuentes* v. *Faircloth* (S.D.Fla. 1970) 317 F.Supp. 954, jurisdiction noted (1971) 401 U.S. 906 [27 L.Ed.2d 804, —— S.Ct. ——].) However, neither of the latter opinions discusses the issue at great length and both appear to rely heavily upon a waiver of Fifth Amendment rights in the particular case. **(23)** We are not bound by any of the above decisions (*In re Whitehorn* (1969) 1 Cal.3d 504, 511, fn. 2 [82 Cal.Rptr. 609, 462 P.2d 361]); we are persuaded, however, that *Laprease* represents a sounder resolution of the question.

We also note that, contrary to defendants' assertion that *Sniadach* is limited to wage garnishments, many recent decisions have liberally applied the principles of that case to invalidate other prejudgment remedies. In *Goldberg* v. *Kelley* (1970) 397 U.S. 254 [25 L.Ed.2d 287, 90 S.Ct. 1011], the United States Supreme Court held that welfare aid could not be terminated without a hearing. (See also *Goliday* v. *Robinson* (N.D.Ill. 1969) 305 F.Supp. 1224, vacated and remanded, *sub nom. Daniel* v. *Goliday* (1970) 398 U.S. 73 [26 L.Ed.2d 57, 90 S.Ct. 1722]; *Java* v. *California Department of Human Resources Dev.* (N.D.Cal. 1970) 317 F.Supp. 875, affd. (1971) —— U.S. —— [—— L.Ed.2d ——, —— S.Ct. ——].) The three-judge court in *Swarb* v. *Lennox* (E.D.Pa. 1970) 314 F.Supp. 1091 concluded that Pennsylvania's confession of judgment procedure violates due process, at least where Fifth Amendment protections had not effectively been waived by contract. In *Larson* v. *Fetherston* (1969) 44 Wis.2d 712, 717-719 [172 N.W.2d 20], the Wisconsin Supreme Court held that all prejudgment garnishments are unconstitutional under the *Sniadach* rationale, whatever the nature of the garnished funds. In California *Sniadach* has been applied to void California's wage garnishment statute (*McCallop* v. *Carberry, supra,* 1 Cal.3d 903), to strike down section 1166a insofar as it authorizes the issuance of a writ of immediate possession prior to a hearing on the merits of an unlawful detainer action

[14]We also find support for our conclusion in Note, *supra,* 68 Mich.L.Rev. 986, 1000-1001.

In *Lawson* v. *Mantell* (1969) 62 Misc.2d 307 [306 N.Y.S.2d 317], the Supreme Court of New York, without finally determining the issue, found that the application of *Sniadach* was sufficiently doubtful so that it deemed it inappropriate to issue a preliminary injunction restraining a creditor from exercising the prejudgment replevin remedies later found unconstitutional in *Laprease* v. *Raymours Furniture Company, supra,* 315 F.Supp. 716.

(*Mihans* v. *Municipal Court* (1970) 7 Cal.App.3d 479 [87 Cal.Rptr. 17];[15] cf. *Hutcherson* v. *Lehtin* (N.D.Cal. 1970) 313 F.Supp. 1324, 1329-1330, vacated and remanded (1970) 400 U.S. 923 [27 L.Ed.2d 182, 91 S.Ct. 182]; *Bell* v. *Tsintolas Realty Company* (D.C. Cir. 1970) 430 F.2d 474, 479), and to invalidate certain portions of section 1174 which allow a landlord to assert a lien upon his tenant's furniture for amounts due under a lease (*Gray* v. *Whitmore* *(Cal.App.) 92 Cal.Rptr. 505; cf. *Hall* v. *Garson* (5th Cir. 1970) 430 F.2d 430, 440-441; *Klim* v. *Jones* (N.D.Cal. 1970) 315 F.Supp. 109.).[16]

(22b) While the cases cited above obviously are distinguishable from the present facts, we find in their liberal application of *Sniadach* support for our decision that California's claim and delivery law violates the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and section 13 of article I of the California Constitution.

We are faced again, however, with the contention that in most cases the alleged debtor has contractually waived his constitutional protections. Defendants claim that the clause, adverted to before, which is contained in most retained title sales contracts[17] and which purports to give the seller authority to enter and repossess upon default operates to waive the buyer's due process rights. (See *Brunswick Corporation* v. *J & P, Inc.*, *supra*, 424 F.2d 100, 105; *Fuentes* v. *Faircloth*, *supra*, 317 F.Supp. 954.) **(24)** For the reasons stated previously in our consideration of whether such clauses operate to waive the alleged debtors' Fourth Amendment rights, we hold that the mere fact that such clauses are exacted in many cases cannot render constitutional the claim and delivery law, which deprives alleged debtors of their right to due process whether or not such a purported waiver has been signed. (See *Swarb* v. *Lennox*, *supra*, 314 F.Supp. 1091.)

[15]Since the *Mihans* decision, section 1166a has been amended.

*A rehearing was granted on February 25, 1971. The final opinion is reported in 17 Cal.App.3d 1 [94 Cal.Rptr. 904].

[16]Although some recent lower court decisions have upheld the constitutionality of California's attachment statute (*Western Bd. of Adjusters, Inc.* v. *Covina Pub., Inc.* (1970) 9 Cal.App.3d 659, 674 [88 Cal.Rptr. 293]; *Northern California Collection Service, Inc.* v. *Randone*, Sacramento Superior Court No. 203519 (App.Dept. 1970)), on March 16, 1971, we issued an alternative writ of mandate in *Randone* v. *Superior Court*, Sac. 7885, in order to give more thorough consideration to the question.

[17]In one of the contracts attached to a declaration in opposition to the motion for summary judgment, we find the following example of such a clause: "Should Buyer fail to pay said indebtedness or any part thereof when due, or breach this contract . . . Seller, at his option, and without notice to Buyer, may declare the whole amount unpaid immediately due and payable, or Seller may, without notice or demand, by process of law or otherwise, take possession of said chattels wherever located."

Defendants next contend that no injunction whatever should issue in this case because in some instances the execution of claim and delivery process does not violate either the Fourth or the Fifth Amendment protections. **(25)** We concede that there may be exceptional situations in which creditor or state interests justify claim and delivery procedure or in which consent to such procedure is validly obtained. However, we cannot agree that this possibility prevents us from affirming the trial court's issuance of the injunction.

(26) It is, of course, an accepted principle of judicial review that "courts will limit the operation of a statute by construction or severance of the language to avoid unconstitutionality. Where, however, unconstitutionality cannot reasonably be avoided in this way, a statute cannot be upheld merely because a particular factual situation to which it is applicable may not involve the objections giving rise to its invalidity. [Citations.] If the rule were otherwise, the determination of constitutionality would be a piecemeal and unpredictable process." (*People* v. *Stevenson* (1962) 58 Cal.2d 794, 798 [26 Cal.Rptr. 297, 376 P.2d 297].)

(27) If the scope of a statute cannot be limited to situations to which it may constitutionally apply except "by reading into it numerous qualifications and exceptions" amounting "to a wholesale rewriting of the provision," the statute cannot be saved by judicial construction but must be declared invalid. (*Fort* v. *Civil Service Commission* (1964) 61 Cal.2d 331, 340 [38 Cal.Rptr. 625, 392 P.2d 385].) "This court cannot, as already pointed out, in the exercise of its power to interpret, rewrite the statute. If this court were to insert in the statute all or any of the above qualifying provisions, it would in no sense be interpreting the statute as written, but would be rewriting the statute in accord with the presumed legislative intent. That is a legislative and not a judicial function." (*Seaboard Acceptance Corp.* v. *Shay* (1931) 214 Cal. 361, 369 [5 P.2d 882]; see *In re King* (1970) 3 Cal.3d 226, 237 [90 Cal.Rptr. 15, 474 P.2d 983].) **(28)** Furthermore, as we have repeatedly stated: "when the application of the statute is invalid in certain situations we cannot enforce it in other situations if such enforcement entails the danger of an uncertain or vague future application of the statute . . . . We have been particularly aware of fomenting such danger of uncertainty in the application of a statute which would inhibit the exercise of a constitutional right . . . ." (*Franklin Life Ins. Co.* v. *State Board of Equalization* (1965) 63 Cal.2d 222, 227-228 [45 Cal.Rptr. 869, 404 P.2d 477], quoted in *Mulkey* v. *Reitman* (1966) 64 Cal.2d 529, 543-544 [50 Cal.Rptr. 881, 413 P.2d 825], affd. *sub nom. Reitman* v. *Mulkey* (1967) 387 U.S. 369 [18 L.Ed.2d 830, 87 S.Ct. 1627]; *San Francisco Unified School Dist.* v. *Johnson* (1971) 3 Cal.3d 937, 955-956 [92 Cal.Rptr. 309, 479 P.2d

669], cert. den. (1971) —— U.S. —— [—— L.Ed.2d ——, —— S.Ct. ——].)

As our previous discussion indicates, the claim and delivery law is unconstitutional in many of its applications. It is not possible for us to narrow its scope solely to constitutional applications without completely redrafting its provisions nor can we eliminate its unconstitutional features merely by excising certain clauses or sections. **(29)** Instead, in order to create a constitutional prejudgment replevin remedy, there must be provision for a determination of probable cause by a magistrate and for a hearing prior to any seizure, except in those few instances where important state or creditor interests justify summary process. No such safeguards can by any reasonable construction be found in sections 509 through 521; nor do those sections provide any clue as to which state or creditor interests are sufficiently important to warrant summary procedures. **(22c)** Consequently, we are compelled to invalidate the statute in its entirety and await a legislative redrafting.

County of Los Angeles v. *Superior Court* (1967) 253 Cal.App.2d 670, 679-680, 683-684 [62 Cal.Rptr. 435] does contain language which, if taken out of context, may appear to support defendants' position that an injunction should not issue because claim and delivery process may be constitutionally invoked in some instances. Nevertheless, that case is clearly distinguishable. There the Court of Appeal issued a writ of prohibition to interdict the issuance of an injunction which would have restrained the police from publishing all but the briefest pretrial statements in criminal cases. The court noted the fine line that must be drawn between the freedom of speech and the right to a fair trial, and it concluded that in some cases more extensive pretrial publicity is warranted. Since the injunction would have forbidden even such proper pretrial publicity, the Court of Appeal struck it down. The case stands for the proposition that in areas where two vital constitutional rights are in conflict, the problems cannot be solved on a wholesale basis by an injunction but must be resolved on a case-by-case basis.

The present case involves no such delicate balancing of constitutional rights; hence, *County of Los Angeles* v. *Superior Court* is inapplicable. Most laws or governmental programs may conceivably be applied constitutionally in some cases; therefore, if we were to hold that no injunction could issue unless every conceivable application of the statute or activity were unconstitutional, we would greatly diminish the remedial effect of section 526a.

An injunction is particularly appropriate in this case for no other remedy would give effective relief to the majority of persons whose property was

illegally seized. In most cases, the defendant would be unable to obtain any relief prior to the seizure of his property. But as we have seen the removal of his goods often occasions irreparable harm. No judicial remedy can restore the privacy shattered by an illegal search. Nor can the subsequent return of property compensate for or repair the suffering caused a family by temporary loss of appliances indispensable to its day to day living. A post-seizure remedy in such cases grants no effective relief; hence, the preventive remedy afforded by the instant injunction is particularly appropriate.

Of course, by our decision we do not foreclose the Legislature from enacting new prejudgment replevin remedies in conformity with the constitutional principles discussed herein. As we have indicated above, claim and delivery may be limited to those cases where the state or creditor interests outweigh the due process rights of those from whom the property is seized. Or the Legislature may choose to expedite the hearing procedure to assure that the defendant is afforded his day in court before the property is seized. The Legislature may provide for the issuance of appropriate process on probable cause to enable public officials to seize property without violating Fourth Amendment rights. Obviously, it is not within our judicial province to prescribe which of the multitude of possible, constitutional procedures for prejudgment claim and delivery relief should be adopted; that is a proper task for the Legislature.

Finally, having in mind the legal principles already discussed and the conclusions we have reached, we consider whether summary judgment was properly granted in this case. **(30)** The purpose of summary judgment is to determine whether or not a genuine factual controversy exists between the litigants and if not, to resolve the dispute without a full-scale trial, the avoidance of which is "a matter of judicial economy and sound social policy." (Fn. omitted.) (Bauman, *California Summary Judgment: A Search for a Standard* (1963) 10 U.C.L.A. L.Rev. 347, 349.) **(31)** "The aim of the procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing procedures of a trial." (*Stationers Corp.* v. *Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].) The court, of course, may not decide the factual issue itself. (*R. D. Reeder Lathing Co.* v. *Allen* (1967) 66 Cal.2d 373, 376 [57 Cal.Rptr. 841, 425 P.2d 785].) **(32)** Thus, if on a motion for summary judgment a single issue of fact is found, the trial court may not proceed but must allow such issue to be tried. (*Walsh* v. *Walsh* (1941) 18 Cal.2d 439, 441 [116 P.2d 62].)

Well-settled principles ensure that this summary procedure is confined to its proper role and does not become a "substitute for the open trial

method of determining facts." (*Stationers Corp. v. Dun & Bradstreet, Inc., supra,* 62 Cal.2d 412, 417.) **(33)** Thus, summary judgment is appropriate only if the facts upon which the motion is based are sufficient to sustain a judgment in favor of the moving party and if the party opposing the motion does not, by affidavit, show facts sufficient to raise a triable issue. **(34)** "In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion." (*Stationers Corp.* v. *Dun & Bradstreet, Inc., supra,* at p. 417.)

(35, 36) Applying these principles to the present case, we conclude that the trial court did not err in rendering summary judgment because there is no triable issue of fact. Plaintiffs' declarations in support of their motion for summary judgment establish that they are citizens[18] and that they reside in the County of Los Angeles.[19] Such declarations also show that within one year prior to the commencement of this action plaintiffs were assessed and paid real property taxes to the County of Los Angeles.[20] Defendants have in their answer to the first amended complaint admitted that they are county officers and that they and their deputies execute claim and delivery process. As the preceding discussion has shown, the execution of claim and delivery process violates the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of sections 13 and 19 of article I of the California Constitution. Since defendants' activities[21] are directed to the enforcement and execution of

[18]Defendants contend that plaintiffs' averment of their citizenship is defective because it is "purely conclusionary." However, it is difficult to conceive how one might within a reasonable compass set forth the specific facts which entitle him to claim citizenship in the United States or California. In a case such as this where the issue of citizenship is neither hotly contested nor of crucial importance, the allegation made by plaintiffs suffices to establish citizenship for purposes of summary judgment. (See Bauman, *supra,* 10 U.C.L.A. L.Rev. 347, 353.)

[19]Defendants contend that plaintiffs fail to establish that they were residents of the County of Los Angeles at the commencement of this action. No such fact need be established to entitle plaintiffs to relief under section 526a. (*Irwin* v. *City of Manhattan Beach, supra,* 65 Cal.2d 13, 18-20.)

[20]Defendants contend that the tax collector certificates attached as exhibits to the declarations are not certified and therefore are not admissible. Plaintiffs have, however, sufficiently averred in the body of the declarations that they have been assessed and paid real property taxes to the county. Whether or not the tax collector certificates are admissible, the declarations are sufficient to establish that plaintiffs are taxpayers.

[21]As we have shown above, the mere expenditure of the time of county officers is a sufficient expenditure of public funds to be subject to injunction under section 526a. (*Wirin* v. *Horrall, supra,* 85 Cal.App.2d 497, 504-505.) It is therefore unnecessary to establish the amount of county funds expended on execution of claim

claim and delivery process which has been shown to be violative of both the United States and California Constitutions, plaintiffs were entitled to summary judgment and to the issuance of an injunction under section 526b.[22]

The judgment is affirmed.

Wright, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

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and delivery process or the amount of such costs defrayed by fees charged those who initiate claim and delivery procedure. (*Wirin* v. *Parker, supra,* 48 Cal.2d 890, 894.)

[22]As previously pointed out, the judgment enjoins defendants from (1) taking or seizing personal property under color of the claim and delivery law unless after prior notice and judicial hearing; and (2) entering any private dwelling, commercial establishment, private vehicle or other location not otherwise enterable without a search warrant for the purpose of searching for or seizing any personal property pursuant to said law unless first establishing before a magistrate probable cause to believe that the property is on the premises and that the alleged creditor has a right to its immediate possession. While such provisions of the injunction are internally consistent and in harmony with the trial judge's rationale, as a practical matter there are no saving procedures available to defendants dealing with prior notice and judicial hearing or with the showing of probable cause prior to entry. The claim and delivery law contains no such procedures. Since no other statutes appear to be utilizable, the saving procedures contemplated by the injunction must await further action by the Legislature. In view of these circumstances and of the fact that plaintiffs have not appealed, we do not modify the judgment.

Administrative Office of the Courts
4200 State Building
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Randone v. Superior Court

FOR SIMULTANEOUS RELEASE:
ON THURSDAY, AUGUST 26 at 11:00 a.m.
IN SAN FRANCISCO, LOS ANGELES AND
SACRAMENTO

NEWS RELEASE # 108

"ATTACHMENT" LAW INVALIDATED BY STATE SUPREME COURT

The California Supreme Court unanimously ruled today that property, including bank accounts, cannot be attached by a creditor, before judgment, without a prior hearing.

Holding that the 99-year-old California attachment statute violated both the California and Federal Constitutions, the Court stated that it did no more than follow the 1969 Supreme Court decision in Sniadach v. Family Finance Corporation, which struck down a Wisconsin statute permitting garnishment of wages without prior notice and hearing. The Court pointed out likewise that its previous decisions, which followed Sniadach and voided California's garnishment procedure as well as its claim and delivery statute, compelled the same ruling on the attachment statute. The decision was written by Justice Mathew O. Tobriner.

In striking down the statute, the Court explained that legislation which would exempt "necessities of life" but permit attachment of other property "after notice and hearing on the probable validity of a creditor's claim" would be constitutional. Further, the Court explained that attachment without notice might be permissible "in exceptional cases where, for example, the creditor can demonstrate before a magistrate that an actual risk has arisen that assets will be concealed or that the debtor will abscond."

The checking account of Mr. and Mrs. Joseph A. Randone of Sacramento was attached by a collection agency for an alleged overdue $490 bill for legal services, plus $130 in accumulated interest. The Randones, who

said they were on unemployment insurance, contended they needed the $176 which was in the account, and attempted to have the attachment dissolved.

The lower courts, following the existing statute, refused to order the account released. The Randones then petitioned the Supreme Court for review.

Under the challenged law any property--except earnings which were excluded in 1970--could be attached by a creditor upon filing an affidavit that money was owed under a contract, and upon posting an undertaking for at least one-half the amount sought. Any property named by the creditor could then be attached and held by the sheriff for up to three years. Although the debtor could regain certain exempt items, the Court pointed out that the exemptions were insufficient, most debtors did not know about the procedure, and that in any event there could still be a 25-day delay. Depriving a debtor of checking and savings accounts, home furnishings, tools of trade, automobiles, accounts receivable and even the home puts him under severe pressure to settle the claim quickly whether or not it is valid, the Court observed.

The Court concluded that "California's attachment statute violates procedural due process by sanctioning in substantially all contract actions attachment of a debtor's property, without notice and hearing. Nor is the overbroad statute narrowly drawn to confine attachments to extraordinary circumstances which require special protection to a state or creditor interest."

The Court also held that attachment by a creditor of "necessities of life" could never be permitted before judgment. It stated that "the hardship imposed on a debtor by the attachment of his 'necessities of life' is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and a hearing on the validity of the creditor's claim."

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C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FILED

AUG 26 1971

G. E. BISHEL, Clerk

S. F. Deputy

JOSEPH A. RANDONE et al.,

Petitioners,

v.

THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent;

NORTHERN CALIFORNIA COLLECTION SERVICE INC. OF SACRAMENTO,

Real Party in Interest.

Sac. 7885

For more than a century California creditors have enjoyed the benefits of a variety of summary prejudgment remedies, and, until recently, the propriety of such procedures had gone largely unchallenged. In June 1969, however, the United States Supreme Court in Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, concluded that a Wisconsin prejudgment wage garnishment statute violated a debtor's right to procedural due process, by sanctioning the "taking" of his property without affording him prior notice and

hearing. The force of the constitutional principles underlying the Sniadach decision has brought the validity of many of our state's summary prejudgment remedies into serious question.

In McCallop v. Carberry (1970) 1 Cal.3d 903 and Cline v. Credit Bureau of Santa Clara Valley (1970) 1 Cal. 3d 908, we examined the California wage garnishment statutes in light of Sniadach and, although the California provisions differed from the Wisconsin statute in several respects (see 1 Cal.3d at p. 906, fn. 7), we concluded that the California procedure exhibited the same fundamental, constitutional vice as the statute invalidated in Sniadach. More recently, our court has determined in Blair v. Pitchess (1971) 5 Cal.3d ____ that California's present claim and delivery procedures, permitting prejudgment replevin prior to notice or hearing, cannot withstand the constitutional scrutiny dictated by Sniadach. In the instant proceeding we are faced with a similar challenge to one segment of California's prejudgment attachment procedure, section 537, subdivision 1, of the Code of Civil Procedure, which, in general, permits the attachment of any property of the defendant-debtor, without prior notice or hearing, upon the filing of an action on an express or implied contract for the payment of

money.[1/]

For the reasons discussed below, we have concluded that in light of the constitutional precepts embodied by Sniadach and this court's subsequent decisions in McCallop, Cline and Blair, the prejudgment attachment procedure sanctioned by subdivision 1 of section 537 violates procedural

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1/ Section 537, subdivision 1 provides in full: "The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, except earnings of the defendant as provided in Section 690.6, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, (a) where the contract is made or is payable in this state; or (b) where the contract is made outside this state and is not payable in this state and the amount of the claim based upon such contract exceeds five thousand dollars ($5,000); and where the contract described in either (a) or (b) is not secured by any mortgage, deed of trust, or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless. An action upon any liability existing under the laws of this state, of a spouse, relative, or kindred, for the support, maintenance, care, or necessaries furnished to the other spouse, or other relatives or kindred, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section. An action brought pursuant to Section 1692 of the Civil Code shall be deemed an action upon an implied contract within the meaning of that term as used in this section."

All section references are to the Code of Civil Procedure, unless otherwise indicated.

due process as guaranteed by article 1, section 13 of the California Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. In reaching this conclusion we note that the Supreme Courts of Minnesota and Wisconsin have recently arrived at similar determinations, invalidating general prejudgment garnishment statutes on the authority of Sniadach. (Jones Press Inc. v. Motor Travel Service, Inc. (1970) 286 Minn. 205 [176 N.W.2d 87]; Larson v. Fetherston (1969) 44 Wis.2d 712 [172 N.W.2d 20].)

The recent line of cases, commencing with Sniadach, reaffirms the principle that an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest, and that exceptions to this principle can only be justified in "extraordinary circumstances." Section 537, subdivision 1, drafted long before the decision in Sniadach, does not narrowly draw into focus those "extraordinary circumstances" in which summary seizure may be actually required. Instead, the provision sweeps broadly, approving attachment over the entire range of "contract actions," a classification which has no rational relation to either the public's or creditors' need for extraordinary prejudgment relief. Moreover, the subdivision at issue fails to take into account the varying degrees of

deprivation which result from the attachment of different kinds of property. Consequently, the section improperly permits a writ of attachment to issue without notice or hearing even in situations in which the attachment deprives a debtor of "necessities of life;" this wide overbreadth of the statute condemns it. In light of these substantial constitutional infirmities inherent in the provision, we find that the lower court abused its discretion in refusing to release the attachment of defendants' bank account and thus we conclude that a writ of mandate should issue.

1. The facts of the instant case.

This constitutional challenge arises out of the attachment of a bank account of Mr. and Mrs. Joseph Randone by the Thunderbird Collection Services, Inc., a licensed collection agency registered under the name of Northern California Collection Service, Inc. of Sacramento. On February 16, 1970, the collection agency filed an action against the Randones, as individuals and doing business as Randone Trucking, alleging (1) that the Randones had failed to pay a bill for $490 for services rendered to them by the Sacramento law firm of Cohen, Cooper and Ziloff, (2) that the collection agency was the assignee of that debt, and thus (3) that the Randones were indebted to the collection agency for the $490 principal, plus $130 in accumulated interest.

On March 17, 1970, the collection agency secured a writ of attachment from the Clerk of the Sacramento County Municipal Court and levied that attachment upon the defendants' checking account at a branch of the Crocker-Citizens Bank in Fair Oaks, California. At the time the bank account contained $176.20 and, pursuant to the attachment, that amount continues to be withheld from the Randones by their bank pending receipt of a court order releasing the attachment.

On March 31, 1970, the Randones filed a motion to dissolve the attachment on the ground that the issuance of the writ prior to judgment constituted a violation of due process; they cited the Sniadach, McCallop and Cline cases as authority for their contention. At the same time they also filed an affidavit attesting that their sole source of income was unemployment insurance; in light of the hardship caused by the attachment of their bank accounts, they requested that the court shorten the time before the hearing of their motion. Pursuant to this request, the court noticed the motion to dissolve the attachment for argument on April 3, 1970.

On April 3 the municipal court heard the motion and denied it. The Randones filed a timely notice of appeal to the Appellate Department of the Superior Court of Sacra-

mento County, again contending that the rationale of Sniadach and its California progeny required that a debtor be afforded notice and a hearing prior to the attachment of his bank account. On October 29, 1970, the appellate department affirmed the municipal court decision without written opinion. The Randones thereafter requested that in light of the general importance of the issues presented, the case be certified to the Court of Appeal, but on November 5, 1970, the appellate department denied this petition as well.

Having exhausted all the available procedural measures on appeal, the Randones petitioned this court for an original writ to review the lower court decision maintaining the attachment. Recognizing that defendants' challenge to the constitutionality of section 537, subdivision 1, involved a question of general importance, over which a considerable conflict had emerged in our lower courts,[2/] and that the issue would often arise in municipal court pro-

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2/ Compare Western Board of Adjusters, Inc. v. Covina Publishing Co. (1970) 9 Cal.App.3d 659, 674, and Johnston v. Cunningham (1970) 12 Cal.App.3d 123, 128-129 with Mihans v. Municipal Court (1970) 7 Cal.App.3d 479, 486, 488; cf. Klim v. Jones (N.D.Cal. 1970) 315 F.Supp. 109; Java v. California Dept. of Human Resources (N.D.Cal. 1970) 317 F.Supp. 875, 878 (three-judge court), affd., (1971) 91 S. Ct. 1347.

ceedings from which no appeal to our court would be possible without a certification by the superior court, we exercised our discretion and issued an alternative writ of mandamus to determine whether the lower court abused its discretion in refusing to dissolve the attachment at issue. "[B]y so doing, 'we have necessarily determined that there is no adequate remedy in the ordinary course of law and that [this] case is a proper one for the exercise of our original jurisdiction.' (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 773.)" (San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937, 945; see also Schweiger v. Superior Court (1970) 3 Cal.3d 507, 517-518.)

2. Section 537, subdivision 1, permits the initial attachment of all of a debtor's property without affording the individual either notice of the attachment or a prior hearing to contest the attachment.

Our review of the constitutionality of the attachment provision at issue necessarily begins with an examination of the actual operation of the attachment procedure under existing law and a comparison of this procedure with the procedures found inadequate in Sniadach, McCallop, Cline and Blair.

In California "attachment" is a purely statutory remedy (Ponsonby v. Sacramento Suburban Fruit Lands Co. (1930) 210 Cal. 229, 232) activated by a plaintiff, under

which the property of a defendant is "seized" by legal process in advance of trial and judgment.[3/] Under section 537 and the succeeding sections of the Code of Civil Procedure dealing with attachments (Code Civ. Proc., §§ 537-561, 690-690.52), an attachment is initiated by a writ issued by the clerk of the court in which a plaintiff has filed suit; the writ commands the sheriff of a county in which assets of a defendant are located to take custody of that property. The writ is available only in those classes of action enumerated in section 537; the subdivision at issue in this proceeding permits the issuance of a writ at any time after the plaintiff has filed an action "upon a[n unsecured] contract, express or implied, for the direct payment of money."

With the exception of a new exclusion of earnings of a defendant, enacted in 1970 (Stats. 1970, ch. 1523, § 2), subdivision 1 does not limit its operation to specific categories of property owned by a defendant, e.g., to non-

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3/ "Garnishment" constitutes a sub-category of "attachment," referring to the seizure or attachment of property belonging to or owing to the debtor, but which is presently in the possession of a third party. (See Black's Law Dictionary (4th ed. 1957) p. 810; Frank F. Fasi Supply Co. v. Wigwam Investment Co. (D.Hawaii 1969) 308 F.Supp. 59, 61.) Thus the "attachment" of the Randone bank account in the instant case is technically a "garnishment" of their funds, since their assets were in the hands of a third party, the bank, when they were seized by legal process.

necessities or to real estate, but instead permits the attachment of any property of a defendant, allowing the creditor to select which assets of the defendant should be subjected to attachment. Moreover, this subdivision does not require a creditor to prove, or indeed even allege, any special circumstances requiring the immediate attachment of the defendant's property in the specific case; so long as the creditor's complaint alleges a cause of action in contract for the direct payment of money, subdivision 1 authorizes the issuance of a writ against all debtors alike.

To obtain the writ of attachment under subdivision 1, the plaintiff must file a declaration with the clerk of the court stating that his cause of action is in contract and qualifies under the subdivision (Code Civ. Proc., § 538); he must at the same time file an undertaking for not less than one-half of the total indebtedness claimed or one-half of the value of the property sought to be attached. (Id., § 539.) Once the clerk receives these written declarations, he is authorized to issue the writ of attachment immediately. No judicial officer scrutinizes the papers. Neither notice of the proposed attachment nor opportunity to contest the attachment before its issuance is afforded to the debtor. Indeed, the right to attach any

asset without notice to the debtor is specifically granted to the creditor by section 537.5, which provides that, upon the request of the creditor, the clerk "shall not make public the fact of the filing of the complaint, or of the issuance of the attachment, until after the filing of the return of service of the writ of attachment. . . ."

Upon issuance, the clerk forwards the writ to the appropriate sheriff, together with a detailed description of the property to be attached. After receiving the writ the sheriff attempts to levy on the property; the actual form assumed by the levy turns upon the nature of the property (see id., §§ 541, 542), but, unless the property attached consists of real estate,[4/] the levy necessarily deprives the

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4/ Because the attachment of real estate does not generally deprive an owner of the use of his property, but merely constitutes a lien on the property, the "taking" generated by such attachment is frequently less severe than that arising from other attachments. In view of this basic difference in the effect of such attachment, it has been suggested that a statute which dealt solely with the attachment of real estate might possibly involve constitutional considerations of a different magnitude than those discussed hereafter. (Cf. Young v. Ridley (D.D.C. 1970) 309 F.Supp. 1308, 1312. See generally Note, Attachment in California: A New Look at an Old Writ (1970) 22 Stan. L.Rev. 1254, 1277-1279.) The instant statute is not so limited, however, and the great majority of cases arising under it do involve the deprivation of an owner's use of his property; thus we have no occasion in this proceeding to speculate as to the constitutionality of a prejudgment attachment provision which does not significantly impair such use.

defendant of any right to the use of the property while the attachment remains in force. Thus, in the instant case, although the bank deposits attached were not removed from the bank, defendants were still prevented from using the funds. Property seized by levy is held pursuant to the attachment provisions for three years, unless released earlier pursuant to an order obtained by the defendant (id., §§ 542a, 542b).[5/]

The summary procedure outlined above empowers a creditor to obtain an attachment of any property of a debtor (excluding wages) without affording the debtor notice or hearing and without proving a special need for such a drastic remedy. Recognizing the resultant hardship to the debtor, the present statutory scheme permits him to move for release of the property on the grounds that it is exempt from attachment under one or more of the provisions of sections 690-690.29.[6/]

5/ In general a debtor may secure the release of an attachment (1) by posting a bond, filing an undertaking or paying the amount of the creditor's demand plus costs to the sheriff (Code Civ. Proc., §§ 540, 554, 555), (2) prevailing on the underlying action and obtaining a court order for release, or (3) prevailing on a claim that the seized property is exempt from attachment (Code Civ. Proc., §§ 690-690.29.)

6/ As noted above, in 1970 the Legislature responded to our decisions in McCallop and Cline by completely excluding earnings from prejudgment attachment. At the same time the Legislature also revised several sections of the statutory exemption provision by providing that as to certain limited categories of property, primarily unpaid governmental benefits (e.g., workmen's compensation award (Code

The exemption statutes cover a wide range of property, and disclose a general legislative intent to permit a debtor to secure the release of assets particularly vital to him and his family for life and livelihood. Despite this salutary policy,[7] the scope of the specific exemptions has frequently proven insufficient, necessitating numerous amendments (see Note (1941) 15 So. Cal.L.Rev. 1, 20); as a consequence, over the years the exemptions provisions have taken on the contrasting colors of a Fauve painting. Their inequity and inadequacy have at times engendered serious criticism. (See, e.g., Rifkind, Archaic Exemption Laws (1964) 39 State Bar J. 370; Seid, Necessaries - Common or Otherwise (1962) 14 Hastings L.J. 28; Note (1935) 23 Cal.L.Rev. 414.) Moreover, as we noted in McCallop v. Carberry (1970) 1 Cal.

Civ. Proc., § 690.15), unemployment compensation benefits (id., § 690.175) and welfare benefits (id., § 690.19)), the property would be exempt from attachment or execution without the filing of a claim for exemption by the debtor. This new procedure, however, applies to only a very small proportion of the "exempted" property; the bulk of a debtor's necessities, even as defined by the exemption provisions, remains subject to immediate attachment by the creditor.

7/ "The basic theory of such exemption is that a debtor and his family, regardless of the debtor's imprudence, will retain enough money to maintain a basic standard of living in order that the debtor may have a fair chance to remain a productive member of the community. [Citations.] The statute should be liberally construed in order to effectuate this purpose." (Perfection Paints Prod. v. Johnson (1958) 164 Cal.App.2d 739, 741.)

3d 903, 907, under the procedures afforded for establishing the exempt nature of attached property, a debtor before obtaining a release of the attachment, may be forced to wait a period of 25 days.

From this brief review of the statutory provisions, the broad outline of the prejudgment attachment procedure becomes clear. Under section 537, subdivision 1, an unsecured contract creditor can, as a matter of course, obtain an attachment of almost any of the debtor's property, without notice to the debtor and without an opportunity for a hearing. Although the statutory scheme affords some relief to the debtor by virtue of the varied exemption provisions, these sections impose the burden of going forward on the defendant, and, even if pursued with vigor, these procedures result in an inevitable delay during which the debtor will be effectively deprived of the use of his property.

The procedure for attachment reviewed above finds a marked parallel in the statutory procedures held unconstitutional in Sniadach and in the decisions following that case. The Wisconsin wage garnishment statute invalidated in Sniadach, like section 537, subdivision 1, permitted the "attachment" of a debtor's property without notice to the debtor and without affording the debtor an opportunity to

be heard. Although the Wisconsin statute apparently did not contain exemption provisions as generous as those provided by California law, such exemptions, generally available only after attachment, were found in McCallop and Cline insufficient to cure the procedure's constitutional defects. Moreover, the attachment procedure here operates even more harshly than the procedure invalidated in McCallop and Cline, for the wage garnishment provision at issue in those cases at least provided for prior notice to the debtor. (See McCallop v. Carberry (1970) 1 Cal.3d 903, 906 fn. 7.)

Despite the marked similarities between the procedure challenged here and the procedures overturned by the above authorities, the creditor contends that Sniadach does not invalidate the instant statute. First, the collection agency contends that the constitutional holding in Sniadach largely rested upon the "peculiar" nature of wages and the unique dangers imposed by prejudgment wage garnishment, and, since section 537 does not permit attachment of wages, it suggests that Sniadach does not apply. Second, the creditor claims that even if it does, the deprivations imposed on debtors by this general attachment statute are not as serious as those incident to wage garnishment, and do not require prior notice or hearing. Finally, the agency argues that the interests served by affording creditors the prenotice attachment remedy are

sufficient to justify the current procedure.

As discussed more fully below, we have concluded that all of these contentions pale before the procedural "due process" rights of debtors elucidated in Sniadach. Initially, we shall explain that rather than creating a special constitutional rule for wages, the Sniadach opinion returned the entire domain of prejudgment remedies to the long-standing procedural due process principle which dictates that, except in extraordinary circumstances, an individual may not be deprived of his life, liberty or property without notice and hearing. Thereafter, we shall point out that subdivision 1 is not carefully tailored to limit its effect to such "extraordinary" situations. Finally, we indicate that since the provision is drafted so broadly that it permits the attachment of a debtor's "necessities of life" prior to a hearing upon the validity of the creditor's claim, it, in any event, violates due process.

Prejudgment attachment can constitutionally be sanctioned only under a much more narrowly drafted statute, one which is cognizant of, and sensitive to, the constitutional interests exposed by Sniadach and the subsequent cases.

3. The constitutional principles underlying Sniadach are not confined to wage garnishment; the decision instead embodies the general "due process" precept that, except in "extraordinary circumstances," an individual is guaranteed a right to notice and hearing before he is deprived of a significant interest.

The agency's primary contention before this court is that the United States Supreme Court decision in Sniadach is limited to prejudgment wage garnishment. Relying on the Sniadach majority's emphasis of the particular hazards emanating from the garnishment of wages (395 U.S. at pp. 340-341) and the opinion's characterization of wages as "a specialized type of property presenting distinct problems in our economic system," (395 U.S. at p. 340) the collection agency argues that this court's earlier decisions in McCallop v. Carberry (1970) 1 Cal.3d 903, and Cline v. Credit Bureau (1970) 1 Cal.3d 908, invalidating California garnishment procedures insofar as they apply to wages, exhaust the constitutional reach of the Sniadach decision.

We recently confronted an identical argument in Blair v. Pitchess (1971) 5 Cal.3d ____, ____,* in the context of a challenge to the California claim and delivery procedure. Because the property subject to seizure under the questioned prejudgment replevin provisions consisted of tangible personal property rather than an employee's wages,

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*Typed opn., p. 34

defendants in Blair claimed that the Sniadach decision did not apply. This court, however, unequivocally rejected such an attempt to confine Sniadach's rationale to the facts of the case. Noting the liberal application that had been accorded the Sniadach principle in a wide variety of contexts outside of wage garnishment,[8] we concluded that by permitting the seizing and holding of a debtor's personal property without prior notice or hearing, "California's claim and delivery law violates the due process clauses of

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8/ The decisions cited in Blair vividly illuminate the broad scope of Sniadach outside of the wage garnishment context. (See, e.g., Goldberg v. Kelly (1970) 397 U.S. 254 (termination of welfare payments); Klim v. Jones (N.D. Cal. 1970) 315 F.Supp. 109 (seizure by innkeeper); Swarb v. Lennox (E.D. Pa. 1970) 314 F.Supp. 1091, prob. juris. noted (1971) 91 S.Ct. 1220 (confession judgment); Mihans v. Municipal Court (1970) 7 Cal.App.3d 479 (repossession of residence).)

Other recent decisions have continued this far-reaching trend. (See Santiago v. McElroy (E.D. Pa. 1970) 319 F.Supp. 284 (three-judge court) (levy on tenant's possessions by landlord); McConaghley v. City of New York (Civ. Ct. 1969) 60 Misc.2d 825 [304 N.Y.S.2d 136] (seizure by hospital); Desmond v. Hachey (D. Me. 1970) 315 F.Supp. 328 (three-judge court) (imprisonment of debtor); Amanuensis Ltd. v. Brown (Civ. Ct. 1971) 318 N.Y.S.2d 16, 20-21 (tenant's prior payment of rent prerequisite to proffer of defense); Ricucci v. United States (Ct. Clms. 1970) 425 F.2d 1252, 1256-1257 (Skelton, J. concurring) (termination of employment); cf. Dale v. Hahn (S.D.N.Y. 1970) 311 F.Supp. 1293 (appointment of committee to manage incompetent's property); Downs v. Jacob (Del. 1970) 272 A.2d 706, 708-709 (seizure by landlord).)

the Fifth and Fourteenth Amendments of the United States Constitution and section 13 of article 1 of the California Constitution." (Blair v. Pitchess (1971) 5 Cal.3d ____, ____*.)[9/]

Our conclusion in Blair fully recognized that the Sniadach decision did not establish a new constitutional rule for wages but, on the contrary, simply brought the traditional procedural due process analysis, worked out over many decades of constitutional litigation,[10/] to bear upon

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9/ One amicus suggests that the attachment procedure at issue in this case can be distinguished from the claim and delivery procedures examined in Blair on the grounds that a plaintiff utilizing the claim and delivery procedure may obtain possession of the seized goods whereas an "attaching" plaintiff cannot. In focusing attention on the possessory interest of the plaintiff in these procedures rather than on that of the defendant, however, this amicus misses the entire constitutional thrust of Sniadach as well as Blair. Blair holds that the fundamental vice of the claim and delivery provisions, for due process purposes, is that the procedure deprives a defendant of the use of his property prior to notice or hearing. The instant attachment procedure clearly shares this constitutional flaw.

10/ See, e.g., Bell v. Burson (U.S. May 24, 1971) 39 U.S.L. Week 4607 (suspension of driver's license); Wisconsin v. Constantineau (1971) 400 U.S. 433 (public "posting" of individual as "excessive drinker"); Goldberg v. Kelly (1970) 397 U.S. 254 (withdrawal of welfare benefits); Armstrong v. Manzo (1965) 380 U.S. 545 (termination of parental rights); Willner v. Committee on Character and Fitness (1963) 373 U.S. 96 (exclusion from practice of legal profession); Joint Anti-Fascist Refugee Comm. v. McGrath (1951) 341 U.S. 123 (inclusion on list of subversive organizations); Mullane v. Central Hanover Bank and Trust Co.

*Typed opinion at p. 36

the question of the validity of summary prejudgment remedies. (See Klim v. Jones (N.D. Cal. 1970) 315 F.Supp. 109, 122.) Justice Douglas, writing for the court in Sniadach, expressly revealed this continuity with past constitutional doctrine: "In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes 'the right to be heard' [citation] within the meaning of procedural due process. . . . In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process." (395 U.S. at pp. 339-340; emphasis added.)

Our view of the Sniadach decision, as founded upon a generally applicable due process "right to be heard," is reinforced by two opinions of the United States Supreme Court rendered subsequent to Sniadach, Goldberg v. Kelly (1970)

(1950) 339 U.S. 306, 313 (termination of beneficiary's interest in trust fund); Opp Cotton Mills, Inc. v. Administrator (1941) 312 U.S. 126, 152-153 (establishment of industry-wide minimum wage); Goldsmith v. United States Board of Tax Appeals (1926) 270 U.S. 117, 123 (rejection of accountant for practice before Board of Tax Appeals); Coe v. Armour Fertilizer works (1915) 237 U.S. 413, 423 (execution upon property of alleged shareholder of debtor corporation).

397 U.S. 254 and Boddie v. Connecticut (1971) 401 U.S. 371. In Goldberg, as in Sniadach, the court faced the question whether procedural due process required an opportunity for some hearing before an individual suffered the deprivation of an important, indeed vital, interest. In resolving that issue the court drew upon past constitutional "right to hearing" cases, and then, most significantly, relied on the Sniadach decision as direct support for its ultimate conclusion that due process required that a welfare recipient be afforded an opportunity to be heard before his welfare payments could be terminated. (397 U.S. at p. 264.)

More recently Justice Harlan, writing for the court in Boddie, undertook a general review of the cases recognizing that, "absent a countervailing state interest of overriding significance" (401 U.S. at p. 377), due process requires, at a minimum, that an individual be given a meaningful opportunity to be heard prior to being subjected by force of law to a significant deprivation. After noting that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings," the Boddie court continued: "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given

an opportunity for a hearing before he is deprived of any significant property interest . . . ." (Original emphasis; 401 U.S. at pp. 378-379.) Again the court cited Sniadach as authority for the latter, general proposition. (See also Bell v. Burson (U.S. May 24, 1971) 39 U.S.L. Week 4607, 4609-4610.)

Thus Sniadach does not mark a radical departure in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court.

Similarly, our own court has frequently recognized that the most fundamental ingredient of the "due process" guaranteed by our state Constitution is "a meaningful opportunity to be heard." In this century alone we have applied this principle to such varied governmental action as the commitment of an individual to a mental institution (In re Lambert (1901) 134 Cal. 626, 632-633), the civil forfeiture of property (People v. Broad (1932) 216 Cal. 1, 3-8), the dispossession of a tenant from his residence (Mendoza v. Small Claims Court (1958) 49 Cal.2d 668, 672-673), the exclusion of an individual from a field of private employment (Endler v. Schutzbank (1968) 68 Cal.2d 162, 172-173) and the imprisonment of a debtor under mesne civil arrest. (In re Harris (1968) 69 Cal.2d 486, 489-490.) (See also Brandenstein

v. Hoke (1894) 101 Cal. 131, 133 (establishment of reclamation district); Sokol v. Public Utilities Com. (1966) 65 Cal.2d 247, 254-256 (curtailment of telephone service); Estate of Buchman (1954) 123 Cal.App.2d 546, 559-561 (removal of executor).)[11] Justice Traynor, writing for a unanimous court in Mendoza v. Small Claims Court (1958) 49 Cal.2d 668, 672, stated the constitutional principle most succinctly: "When public necessity demands, there may be action followed by a hearing. [Citations.] Otherwise due process requires that no person shall be deprived of a substantial right without notice or hearing. [Citations.]"

11/ Indeed, California courts have long preserved the individual's right to notice and a meaningful hearing in instances in which a significant deprivation is threatened by a private entity, as well as by a governmental body. (See Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal.3d 160, 165-166 (exclusion from professional association); Cason v. Glass Bottle Blowers Assn. (1951) 37 Cal.2d 134, 143 (expulsion from union); Toboada v. Sociedad Espanola etc. Mutua (1923) 191 Cal. 187, 191-192 (removal from fraternal society); Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 314-315 (expulsion from union); Curl v. Pacific Home (1952) 108 Cal.App.2d 655, 659-660 (expulsion from old-age home).) As the court in Toboada explained: "It is a fundamental principle of justice that no man may be condemned or prejudiced in his rightw without an opportunity to make his defense. This rule is not confined alone to courts of justice and strictly legal tribunals, but is applicable to every tribunal which has the power and authority to adjudicate questions involving legal consequences." (Toboada v. Sociedad Espanola etc. Mutua (1923) 191 Cal. 187, 191; cf. P. Selznick, Law, Society, and Industrial Justice (1969) pp. 252-259.)

(Emphasis added.)[12] The decisions in McCallop, Cline and Blair, as well as in Sniadach, lie at the heart of this due process tradition.

To be sure, the result reached in Sniadach constituted a departure from earlier decisions which had upheld summary prejudgment attachment and garnishment; the change, however, resulted not from an alteration of principles of due process but instead from a reevaluation of the potential and actual effect of prejudgment seizure upon debtors. Prior courts had facilely reasoned that prejudgment remedies did not amount to a "taking" of property since the attachment or garnishment was only a "temporary" measure (see McInnes v. McKay (1928) 127 Me. 110, 116 [141 A. 699, 702], affd. per curiam sub nom McKay v. McInnes (1929) 279 U.S. 820),[13] and consequently had concluded that general due

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12/ "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." (Mullane v. Central Hanover Bank and Trust Co. (1950) 339 U.S. 306, 313.)

13/ Plaintiff places substantial reliance on McKay v. McInnes (1929) 279 U.S. 820, a 1929 per curiam affirmance of a decision by the Maine Supreme Court upholding a general prejudgment attachment statute in the face of a constitutional attack. Although the majority in Sniadach acknowledged the existence of this prior decision, a substantial number of courts have found the vitality of McKay substantially impaired by the holding of Sniadach (see, e.g.,

process standards were not applicable. The Sniadach court, in contrast, recognized that realistically such procedures did deprive the debtor of the use of the attached property[14] and that such deprivation was indeed a "taking" of a significant property interest, which often resulted in serious hardship. Thus the majority concluded: "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing [citation] this prejudgment garnishment procedure violates the fundamental principles of due process." (395 U.S. at p. 342.)

Jones Press, Inc. v. Motor Travel Service, Inc. (1970) 286 Minn. 205, 208-209 [176 N.W.2d 87, 90]; Laprese v. Raymours Furniture Co. (N.D.N.Y. 1970) 315 F.Supp. 716, 724) and Justice Harlan, in his concurrence in Sniadach, rather explicitly indicated that McKay could not survive the Sniadach decision. (395 U.S. at pp. 343-344.) In view of (1) the unexplicated nature of the McKay opinion, (2) the carefully limited authority on which the decision was directly based (see Note, The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp. (1970) 17 U.C.L.A. L. Rev. 837, 844) and (3) the irreconcilable conflict between the principles underlying Sniadach and McKay's purported holding, we believe this 40-year-old per curiam opinion is too thin a reed to support the reliance plaintiff has cast upon it.

14/ Justice Harlan, concurring in Sniadach, declared that "[t]he 'property' of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit." (Original emphasis; 395 U.S. at p. 342.)

Although wages may in the terminology of Sniadach constitute a "specialized type of property," the withholding of which clearly constitutes an extremely severe deprivation to the wage earner, California's prejudgment attachment procedure sanctions a prenotice and prehearing deprivation of a debtor's use of his property with an even greater devastating effect and a wider sweep. Although the deprivation is not a permanent one, the attachment, by statute, remains in effect for three years unless the debtor secures an earlier release. The loss of the use of one's property over such a lengthy period of time cannot generally be dismissed as merely a "de minimus" (cf. Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 342 (Harlan, J. concurring))or an "insubstantial" (cf. Mendoza v. Small Claims Court (1958) 49 Cal.2d 668, 672) deprivation. Under the constitutional precepts reviewed above, we believe that in order for California to authorize this general deprivation of a debtor's use of his property before notice and hearing, it must demonstrate that the attachment provision serves some "state or creditor interest" (Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 339) "of overriding significance," (Boddie v. Connecticut (1971) 401 U.S. 371, 377) which requires the procedure, and that the statute restricts attachments to those extraordinary situations.

4. Section 537, subdivision 1, is not narrowly drawn to confine attachments to those "extraordinary situations" which require "special protection to a state or creditor interest."

In reaffirming the general due process principle of prior notice and hearing, the Sniadach court declared that although the "summary procedure [established by the Wisconsin statute] "may well meet the requirements of due process in extraordinary situations [citations] . . . in the instant case no situation requiring special protection to a state or creditor interest is presented . . .; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition." (395 U.S. at p. 339; emphasis added.) In our view, subdivision 1 of section 537 plainly suffers from the same constitutional infirmity.

Although the kind of "extraordinary situation" that may justify summary deprivation cannot be precisely defined, three decisions involving such situations cited by the majority in Sniadach give some indication of the type of countervailing interests that have been found sufficient in past cases. Both Fahey v. Mallonee (1947) 332 U.S. 245, and Coffin Bros. v. Bennett (1928) 277 U.S. 29 entailed the validity of summary procedures permitting specialized governmental officers to react immediately to serious financial difficulties of a banking institution by seizing operational

control of the bank's assets.[15] Given this nation's considerable experience with the public danger that can flow directly and precipitously from bank failures,[16] and the closely regulated nature of the banking industry, the court determined in both cases that the challenged procedures were sufficiently focused to meet an exceptional problem and thus that the procedures were constitutional.

In Ewing v. Mytinger & Casselberry, Inc. (1950) 339 U.S. 594, the general public interest at stake was even more compelling than in the banking cases, for the challenged

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15/ In Fahey the designated public official was the Federal Home Loan Bank Administrator. Upon determining that a federal savings and loan association was conducting its affairs in an "unlawful, unauthorized and unsafe" manner and was thus jeopardizing the interests of its members, its creditors and the public, the administrator was authorized to appoint a conservator who would immediately, without notice or hearing, take control of the association's operations.

In Coffin, "a Georgia statute authorized the state superintendent of banks to issue a notice of assessment to the stockholders of an insolvent bank, and then to issue and levy an execution against any stockholder who neglected to pay, thereby creating a lien before any judgment proceeding; the stockholders were allowed to thereafter raise and try any defense claimed by them." (McCallop v. Carberry (1970) 1 Cal.3d 903, 905 fn. 3.)

16/ The Coffin decision was rendered at about the time of the Great Depression, "when maintenance of confidence in the banking system was a primary policy of government." (Comment, The Constitutional Validity of Attachments in Light of Sniadach v. Family Finance Corp. (1970) 17 U.C.L.A. L. Rev. 837, 843 fn. 39.)

procedure permitted the federal Food and Drug Administrator summarily to seize misbranded drugs which the administrator had probable cause to believe endangered health or would mislead consumers. The government's authority to protect the public health is of course of paramount importance. Because many individuals might be injured by unwholesome or improperly labeled drugs before a hearing could be held, the court found summary seizure of misbranded drugs to be a justifiable exception to the general rule of prior notice and hearing. (See also North American Cold Storage Co. v. City of Chicago (1908) 211 U.S. 306, 315.)

In each of these three cases a number of factors coalesced, justifying the resort to summary procedures. First, the seizures were undertaken to benefit the general public rather than to serve the interests of a private individual or a single class of individuals. Second, the procedures could only be initiated by an authorized governmental official, charged with a public responsibility, who might reasonably be expected to proceed only to serve the general welfare and not to secure private advantage. Third, in each case the nature of the risks required immediate action, and any delay occasioned by a prior hearing could potentially have caused serious harm to the public. Fourth, the property appropriated did not vitally touch an individual's

life or livelihood. Finally, the "takings" were conducted under narrowly drawn statutes that sanctioned the summary procedure only when great necessity actually arose.

Although we believe these characteristics are generally relevant in determining the validity of summary procedures, the Sniadach court did cite, apparently with approval, one other case, Ownbey v. Morgan (1921) 256 U.S. 94, which involved neither the extreme public urgency nor the built-in governmental protections noted above. In Ownbey the court found constitutional a state statute permitting the prejudgment attachment of property of a nonresident by a resident creditor. Although the "public interest" served by such "quasi-in-rem" attachment does not appear as strong as that involved in the cases discussed above, the prejudgment attachment of a nonresident's assets, under the notions of jurisdictional authority controlling at the time of the Ownbey decision, frequently provided the only basis by which a state could afford its citizens an effective remedy for injuries inflicted by nonresidents. (Cf. Code Civ. Proc., § 410.10.) Moreover, because the assets subject to attachment consisted of only those items located outside of the debtor's home state, there was less possibility that such property would include "necessities" required for day-to-day living; consequently

the resulting hardship to the debtor would frequently be minimal.

Fahey, Coffin, Ewing and Ownbey all involved statutes which carefully confined the operation of their summary procedures to the "extraordinary" situation in which a governmental interest necessitated such measures. Section 537, subdivision 1, by contrast, permits prenotice and pre-hearing attachment of a debtor's property in almost all contract actions as a matter of course, and in no way limits its application to meet special needs. The purpose served by this unusually broad attachment scheme [17] is, as the section itself relates, simply to provide unsecured creditors with "security for the satisfaction of any judgment that may be recovered." (Code Civ. Proc., § 537; see American Industrial Sales Corp. v. Airscope, Inc. (1955) 44 Cal.2d 393, 398.) As a three-judge federal court recently observed in a similar context in Laprese v. Raymours Furniture Co.

17/ One commentator recently noted that although attachment provisions vary considerably from state to state, most jurisdictions specifically limit the remedy to situations in which "the defendant is a nonresident, has absconded from the state or secreted himself therein, or is about to make a fraudulent conveyance or deplete his assets." (Note, Some Implications of Sniadach (1970) 70 Colum. L. Rev. 942, 946-947; see, e.g., Ill. Rev. Stat. 1969, ch. 11, §§ 1-2; Mich. Stat. Ann. §§ 27A. 4001, 7401; New York Cons. Laws, Civ. Pract. Laws & Rules, §§ 6201, 6211, 6212; Pa. Stat. 12 Rules of Civ. Proc., §§ 1285, 1286.)

(N.D.N.Y. 1970) 315 F. Supp. 716, 723-724, "[w]hile it is not hard to find that the interests of the . . . creditor . . . might be promoted by [this truncated procedure], the governmental interest supposedly advanced is much more elusive. The governmental interest should encompass the welfare of the alleged debtors and consumers, as well as creditors."

The agency contends, however, that the availability of a general summary attachment procedure does serve a broader purpose than merely aiding creditors. Without a generally available summary attachment remedy, plaintiff urges, creditors will find it more difficult and more expensive to collect their debts; consequently they will be obligated to raise credit rates and to terminate the extension of credit to certain higher credit risk individuals. Such a consequence, plaintiff argues, will work to the detriment of the public interest in liberalized credit.

We cannot accept the creditor's argument for several reasons. First, although the agency maintains quite steadfastly that the withdrawal of a general remedy of attachment will contract the credit market, this contention rests on nothing more solid than the agency's own assertion. While this allegation may claim some surface plausibility, several legal commentators who have undertaken empirical studies on

the subject have concluded that there is "no reason to believe that attachment has any necessary effect on the availability of credit." (Comment, The Constitutional Validity of Attachments in Light of Sniadach v. Family Finance Corp. (1970) 17 U.C.L.A. L.Rev. 837, 846; see, e.g., Brunn, Wage Garnishment in California: A Study and Recommendations (1965) 53 Cal. L. Rev. 1214, 1240-1242.) On the present record, we are in no position to accept plaintiff's unproven assertion.

Second, even if we were to assume that a general attachment remedy is essential to the preservation of current policies of credit extension, plaintiff has not demonstrated that such credit practices serve the "general public interest." An argument can as easily be urged that the current, generally available, summary attachment procedure, by affording creditors an unusually inexpensive and expeditious legal tool, actually encourages creditors to extend credit too freely to individuals whom creditors can reasonably expect will not be able to meet future payments. (See Note (1970) 68 Mich. L.Rev. 986, 997.)[18/]

18/ Commentators have also noted that in view of the prevailing federal bankruptcy provisions "[l]aws that freely allow attachment may precipitate bankruptcies, with attendant social costs." (Note, Attachment in California: A New

Finally, and most fundamentally, this "public interest in liberalized credit," which plaintiff brandishes in the face of Sniadach, might equally as well have been proffered in support of Wisconsin's wage garnishment scheme; the Supreme Court's decision in Sniadach implicitly rejects such an interest as insufficient. Clearly, if the public does have an interest in preserving present credit policies, that interest should be pursued by methods which do not deprive a substantial proportion of debtors of their procedural due process rights. (Cf. Shapiro v. Thompson (1969) 394 U.S. 618, 633.)

Plaintiff and several amici curiae also suggest that the challenged attachment procedures may alternatively be justified by the interest in preventing a debtor from absconding with, or concealing, all his property as soon as he is notified of a pending action. A similar contention

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Look at an Old Writ (1970) 22 Stan. L.Rev. 1254, 1264.) The governing statutes permit a bankruptcy court, in determining priorities, to disregard certain attachments made within four months of the initiation of bankruptcy proceedings (see Bankruptcy Act, § 67(a)(1), 11 U.S.C. § 107(a)(1) (1964)). 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." (Note, Attachment in California: A New Look at an Old Writ (1970) 22 Stan. L.Rev. 1254, 1264.)

was raised by defendants in Blair v. Pitchess (1971) 5 Cal.3d ____ in defense of California's claim and delivery procedures. We recognize that in the attachment context, as in claim and delivery, "in some instances a very real danger may exist that the debtor may abscond with the property . . . [and] [i]n such situations a summary procedure may be consonant with constitutional principles." (Blair v. Pitchess, (1971) 5 Cal.3d ____, ____.)*[19/] The attachment procedure of section 537, subdivision 1, however, like the claim and delivery law at issue in Blair, "is not limited to such extraordinary situations" (5 Cal.3d at p. _____).** The section does not require a creditor to point to special facts which demonstrate an actual and significant danger that the debtor, if notified of the suit or potential attachment, will flee from the jurisdiction with his assets or will conceal his property to prevent future execution. Indeed, from the instant record it appears that

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19/ As discussed hereinafter in section 5, however, we have concluded that a creditor's interest, even in these "special circumstances," is not sufficient to justify depriving a debtor of "necessities of life" prior to a hearing on the merits of the creditor's claim.

*Typed opinion at p. 31.

**Typed opinion at p. 32.

this action typifies the vast majority of cases arising under subdivision 1, in which absolutely no exigent circumstances have been demonstrated which would warrant an exceptional prenotice remedy of this nature.[20/]

In sum, the instant attachment provision authorizes the deprivation of a debtor's property without prior notice or hearing; it has not been narrowly drawn to confine such deprivation to those "extraordinary circumstances" in which a state or creditor interest of overriding significance might justify summary procedures. As such, we find that section 537, subdivision 1, constitutes a denial of procedural due process and violates article 1, section 13 of the California Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. As noted above, the Supreme Courts of Wisconsin and Minnesota have recently found that general prejudgment garnishment statutes of their respective states exhibited similar constitutional defici-

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20/ We recognize, of course, that bank deposits, by their very nature, are highly mobile and thus that a general risk may arise that such assets will be removed to avoid future execution. We do not believe, however, that the mere potential mobility of an asset suffices, in itself, to justify depriving all owners of the use of such property on a general basis. Instead, in balancing the competing interests of all parties, we believe a more particularized showing of an actual danger of absconding or concealing in the individual case must be required.

encies. (Larson v. Fetherston (1969) 44 Wis.2d 712 [172 N.W.2d 20]; Jones Press Inc. v. Motor Travel Service, Inc. (1970) 286 Minn. 205 [176 N.W.2d 87].)[21]

5. Since section 537, subdivision 1, is drafted so broadly that it permits the attachment of a debtor's "necessities of life" prior to a hearing upon the validity of the creditor's claim, it, in any event, violates due process.

Although we have recognized above that in certain limited circumstances a creditor's interest in a summary attachment procedure may generally justify such attachment, the hardship imposed on a debtor by the attachment of his "necessities of life" is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and a hearing on the validity of the creditor's claim. The present broadly phrased attachment provision covers an

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21/ One amicus has suggested that the invalidation of subdivision 1 of section 537 may have substantial inequitable collateral effects on pending bankruptcy proceedings, in which the priority of creditors' liens frequently turn on the date a valid attachment was secured. In the present case, however, we hold no more than that the prejudgment attachment procedure of section 537 subdivision 1 violates due process insofar as it sanctions the taking of a debtor's property without notice and hearing. We perceive no constitutional impediment to utilizing the date on which an attachment was secured as determinative of the respective rights of competing creditors. Of course, the problems raised by amicus can only definitively be adjudicated in federal bankruptcy proceedings.

enormous variety of property, however, sweeping widely to permit prejudgment attachment of non-necessities and necessities alike. This overbreadth constitutes a further constitutional deficiency.

This court has pointed out on numerous occasions that: "What is due process depends on circumstances. It varies with the subject matter and the necessities of the situation. [Citation.] Its content is a function of many variables, including the nature of the right affected . . ." (Sokol v. Public Util. Com. (1966) 65 Cal.2d 247, 254.) The United States Supreme Court recently reiterated this theme in Goldberg v. Kelly (1970) 397 U.S. 254, 262-263: "The extent to which procedural due process must be afforded [an individual] is influenced by the extent to which he may be 'condemned to suffer grievous loss' [citation] and depends upon whether the [individual's]interest in avoiding that loss outweighs the governmental interest in summary adjudication." (Emphasis added.) Thus, the greater the deprivation an individual will suffer by the attachment of property, the greater the public urgency must be to justify the imposition of that loss on an individual before notice and a hearing, and the more substantial the procedural safeguards that must be afforded when such notice and hearing are required. (Compare Goldberg v. Kelly (1970) 397 U.S.

254, 270-271 with Gideon v. Wainwright (1963) 372 U.S. 335, 344-345; and Sokol v. Public Util. Com. (1966) 65 Cal.2d 247, 256 with Mendoza v. Small Claims Court (1958) 49 Cal. 2d 668, 672-673.) In permitting a creditor to deprive a debtor of the "necessities of life" prior to a judicial determination of the validity of the creditor's claim, section 537 subdivision 1 thereby violates due process.

In Sniadach the majority dwelled on the considerable hardships that were imposed on a wage earner by the garnishment of wages, emphasizing that "as a practical matter" the summary remedy often enabled a creditor to "drive [a debtor and his] family to the wall." (395 U.S. at pp. 341-342.) Although the instant attachment provision does not permit the attachment of wages, it does enable a creditor to deprive a debtor of the use of much property at least equally vital to the debtor's sustenance. Perhaps the most obvious example of the type of hardship condemned in Sniadach is the attachment of the proceeds of a bank account composed of the earnings of the debtor; surely there can be no rational distinction drawn between the freezing of such wages in the hands of an employer, which was struck down in Sniadach, and the attachment of such moneys as soon as they have been received from the employer and deposited in a bank.

In both instances the attachments serve to deprive the debtor of assets that he expects to use for everyday expenses, thus subjecting him to enormous pressure to settle the underlying claim without litigation, even when he may have a meritorious defense.[22/] (See Larson v. Fetherston

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22/ Although several amici suggest that under LeFont v. Rankin (1959) 167 Cal.App.2d 433 and Carter v. Carter (1942) 55 Cal.App.2d 13, all wages in bank accounts are in fact presently exempt from attachment, we believe amici greatly exaggerate the reach of these decisions. Former Code of Civil Procedure section 690.11, repealed in 1970, provided that "earnings of the defendant . . . received for his personal services rendered at any time within 30 days next preceding the levy of attachment" (emphasis added) were subject to release upon claim of exemption, and the LeFont and Carter cases do indicate that under the former section a defendant was entitled to trace exempt wages into bank accounts to obtain their release from attachment. These decisions, however, do not intimate that all wages in bank accounts were subject to release from attachment, as amici suggest, but instead hold that only those wages which the debtor could prove were paid for personal services rendered within the 30 days preceding the levy qualified for the exemption. Indeed, in both the LeFont and Carter cases themselves the courts refused to release attachments on the ground that the defendant had failed to show that the attached funds were not in fact savings out of wages earned more than 30 days before the levy.

Moreover, the terms of newly enacted section 690.6, which replaced former section 690.11, appear to eliminate even the limited "tracing" exemption available under the prior provision. Section 690.6 declares: "All the earnings of the debtor due or owing for his personal services shall be exempt from levy of attachment without filing a claim of exemption . . ." (emphasis added). In restricting the new statutory exemption to wages "due or owing", rather than to wages "received" by the employee, the Legislature appears to have indicated an intention to withdraw the exempt status from wages once they are paid to the wage earner, and thereby

(1969) 44 Wis.2d 712, 718 [172 N.W.2d 20, 23]; cf. McConaghley v. City of New York (Civ. Ct. 1969) 60 Misc.2d 825 [304 N.Y.2d 136] (summary taking of cash savings). See also Note, Some Implications of Sniadach (1970) 70 Colum. L. Rev. 942, 949-950; Note, The Supreme Court 1970 Term (1969) 83 Harv. L. Rev. 7, 117.) Of course such hardship is not limited simply to the attachment of accounts containing wages, for if a debtor is unemployed, as are the Randones, or is not presently earning enough money to support his family, the freezing of all of his bank account assets will impose equally harsh deprivations upon the debtor and his family.[23/]

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to preclude any "tracing" at all. A number of other provisions added to section 690 in 1970 draw an analogous distinction between paid and unpaid benefits. (See, e.g., Code Civ. Proc., §§ 690.15, 690.175, 690.19.)

23/ Even if a debtor's current income is sufficient to support his family's immediate needs of food and shelter, once he is deprived of the assets in his bank accounts, a debtor will frequently face the hazards of having his car repossessed or defaulting on mortgage payments on his home. And even those individuals who have adequate assets in securities or other accounts to avoid these dire consequences, will not avoid the substantial embarrassment and damaged credit rating that inevitably flow from "bouncing" checks.

Moreover,"[a]ttachment of any asset critical to the debtor's immediate well-being exerts the same type of pressure as does wage garnishment." (Comment, The Constitutionality of Attachment in Light of Sniadach v. Family Finance Corp. (1970) 17 U.C.L.A. L. Rev. 837, 847.) As we explained in our recent decision in Blair, extreme hardship arises not only from the attachment of liquid assets, such as wages or bank account proceeds, but also from the summary seizure of such items of personal property as "'television sets, refrigerators, stoves, sewing machines and furniture of all kinds'" (Blair v. Pitchess, 5 Cal.3d ____, ____),* items that might loosely be described as "necessities" in our modern society.[24/]

In Jones Press, Inc. v. Motor Travel Services, Inc. (1970) 286 Minn. 205 [176 N.W.2d 87], the Minnesota Supreme Court observed that the attachment of accounts receivable would often involve comparable consequences. "The hardship

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24/ "Beds, stoves, mattresses, dishes, tables and other necessaries for ordinary day-to-day living are, like wages in Sniadach, a 'specialized type of property presenting distinct problems in our economic system,' the taking of which on the unilateral command of an adverse party 'may impose tremendous hardships' on purchasers of these essentials." (Laprese v. Raymours Furniture Co. (N.D.N.Y. 1970) 315 F. Supp. 716, 722.)

*Typed opinion at p. 32.

and the injustice stressed . . . in Sniadach are equally applicable to the laborer, artisan or merchant whose livelihood depends on selling customers his services or his goods. . . . If the wage earner is entitled to prior notice and an opportunity to be heard, no reason occurs to us why the corner grocer, the self-employed mechanic, or the neighborhood shopkeeper should have his income frozen by the garnishment of his accounts receivable prior to the time his liability is established." (286 Minn. at p. 210 [176 N.W.2d at pp. 90-91]; see Note, Attachment in California: A New Look at an Old Writ (1970) 22 Stan. L. Rev. 1254, 1271-1275.) Similarly, other courts have recently concluded that the summary repossession of a debtor's dwelling (Mihans v. Municipal Court (1970) 7 Cal.App.3d 479, 486) and the seizing of his clothing and other personal possessions (Klim v. Jones (N.D. Cal. 1970) 315 F. Supp. 109, 111, 123) impose like hardships.

Whereas several of the foregoing cases primarily involved the deprivation of only one kind of necessity, such as "household furnishings," the broad attachment statute before the court today combines the vices of nearly all of the invalidated procedures, since it permits the attachment of any and all property of a debtor other than

wages.[25/] Thus, under section 537, subdivision 1, checking and savings accounts, home furnishings, tools of the debtor's trade, automobiles, accounts receivable, and even the debtor's residence (see Code Civ. Proc., § 542, subd. 3) are initially subject to attachment without notice and hearing. Moreover, unlike the claim and delivery statute invalidated in Blair under which a creditor could only compel the seizure of property to which he claimed title, the instant provision initially grants unlimited discretion to the creditor to choose which property of the debtor he wishes to have attached. A creditor seeking to gain leverage in order to compel a settlement could exercise this choice so as to place a debtor under the most severe deprivation.

25/ In striking down California's "innkeeper's lien" statute in Klim v. Jones (N.D. Cal. 1970) 315 F.Supp. 109, the federal district court observed: "[W]age garnishment applies only to wages and only to a portion thereof, thus leaving the debtor's other property unencumbered. Under [the innkeeper lien statute], however, all of the boarder's possessions may be denied him if such possessions are all kept in his lodgings. With the probable exceptions of motels and inns, in each of the other rooming establishments covered by [the provision] it is altogether likely that the occupant thereof keeps all his worldly goods there." (Original emphasis; 315 F.Supp. at p. 123.)

The hardships imposed by the instant attachment provision are, of course, potentially greater than those discerned in Klim, since pursuant to section 537, subdivision 1, a creditor can reach all property of the defendant, whether or not that property is kept at the debtor's residence.

The court in Sniadach recognized that a prejudgment remedy which permits a creditor to deprive a debtor of those necessities essential for ordinary day-to-day living gives the creditor "enormous" leverage over the debtor. (395 U.S. at p. 341.) Because of the extreme hardships imposed by such deprivation, a debtor is under severe pressure to settle the creditor's claim quickly, whether or not the claim is valid.[26/] Thus sanction of such prenotice and prehearing attachments of necessities will in many cases effectively deprive the debtor of any hearing on the merits of the creditor's claim. Because, at a minimum, the Constitution requires that a defendant be afforded a meaningful opportunity to be heard on the merits of a plaintiff's claim (see Boddie v. Connecticut (1971) 401 U.S. 371, 377), the

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26/ The Sniadach court quoted the conclusions of Congressman Sullivan, Chairman of the House Subcommittee on Consumer Affairs, with respect to the use of summary procedures in coercing the payment of fraudulent claims: "'What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up a pound of flesh. . . .' 114 Cong. Rec. 1832." (395 U.S. at p. 341.) (See also Project, Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles - Alternative Methods for Allocating Present Costs (1967) 14 U.C.L.A. L. Rev. 879, 898-901.)

state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action, before an impartial confirmation of the actual, as opposed to probable, validity of the creditor's claim after a hearing on that issue. (See Goldberg v. Kelly (1970) 397 U.S. 254, 267.)[27/] The private interest of a creditor, even in the special circumstances of "absconding" or "concealing assets" suggested above, does not rise to the level of an "overwhelming consideration" (Goldberg v. Kelly (1970) 397 U.S. 254, 261) so as to justify a deprivation of such "brutal" (id.) dimensions without a prior hearing on the merits.

Although the present attachment provision falls short of constitutional requirements, we note that our constitutional determination does not conflict with present legislative policy but, on the contrary, gives practical

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27/ The United States Supreme Court's description of the consequences of the withdrawal of welfare payments in Goldberg v. Kelly (1970) 397 U.S. 254, 264, is also pertinent to the attachment of necessities. ". . . [T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, affects his ability to seek redress from the welfare bureaucracy." (Original emphasis.)

and uniform effect to the protection afforded a debtor's necessities by current exemption statutes. As explained earlier, under existing law once property has been attached a debtor is afforded an opportunity to secure the release of an attachment by demonstrating that the property being withheld is exempt from attachment under any one of the numerous statutory exemption provisions. Thus, even at present, if a debtor is aware of his legal rights and can afford to do without the attached necessity until he is able to secure its release through the courts, a creditor generally cannot gain the undue leverage afforded by the attachment of such property. Debtors are frequently unaware of available legal remedies, however, and, as we recently recognized in McCallop, even if they were, "while awaiting hearing upon . . . [their] claim[s] of exemption . . ., defendant[s] . . . with famil[ies] to support could undergo the extreme hardship emphasized in Sniadach." (McCallop v. Carberry (1970) 1 Cal.3d 903, 907.)

Because of these problems, the post-attachment operation of the present exemption procedure, placing the burden on the debtor to seek exemption, does not satisfy the constitutional requirements discussed above. Instead, due process requires that all "necessities" be exempt from pre-

judgment attachment as an initial matter.[28]

We recognize, of course, that not all attachments under the present subdivision involve deprivation of such magnitude. We do not doubt that a constitutionally valid prejudgment attachment statute, which exempts "necessities" from its operation, can be drafted by the Legislature to permit attachment generally after notice and a hearing on the probable validity of a creditor's claim (cf. Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 343 (Harlan, J. concurring); Bell v. Burson (U.S. May 24, 1971) 39 U.S.L. Week 4607, 4609-4610), and even to permit attachment before notice in exceptional cases where, for example, the creditor can additionally demonstrate before a magistrate that an actual risk has arisen that assets will be concealed or that the debtor will abscond. (Cf. Sokol v. Public Utilities Com. (1966) 65 Cal.2d 247, 256.)[29] The subdivision at issue,

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28/ Although, as we have noted earlier, objections have been raised to the adequacy of several of the present exemption provisions in light of contemporary needs, we of course have no occasion in the instant case to evaluate the sufficiency of the coverage of current statutes. (Cf. Santiago v. McElroy (E.D. Pa. 1970) 319 F.Supp. 284, 294 three-judge court).) We note in passing, however, that on the basis of the present record the $176.20 in the Randone's bank account attached in the present case would apparently not be exempted from attachment under section 690, even if it constituted defendants' sole source of support. (See fn. 22, supra.)

29/ In those cases in which attachments are auth-

however, draws none of these relevant distinctions and provides none of the necessary procedural safeguards and, for the reasons discussed at some length in Blair (5 Cal.3d at pp. ____),* this court cannot properly undertake the wholesale redrafting of the provision which is required. We therefore conclude that this provision, like the wage garnishment procedure at issue in McCallop and Cline and the claim and delivery procedure considered in Blair, is unconstitutional on its face.

6. Conclusion

We do no more here than follow the principle of Sniadach, as later expressed in our own cases of McCallop, Cline and Blair. In Sniadach the U.S. Supreme Court applied to modern conditions the authority of traditional procedural due process, and in so doing reaffirmed the general guarantee of notice and hearing prior to the deprivation of one's property. The particular significance of these decisions lies in their common recognition of the application of this principle to those especially in need of the protection

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orized before notice and hearing, the debtor "must be promptly afforded the opportunity to challenge the allegations of the [creditor] and to secure the restoration of the [attached property.]" (Accord Sokol v. Public Utilities Com. (1966) 65 Cal.2d 247, 256.)

*Typed opinion at pp. 38-43.

afforded by such process; in the instant case, it includes those whose very necessities of life could be taken from them without a prior opportunity to show the invalidity of the creditor's claim.

California's attachment statute violates this procedural due process precept by sanctioning in substantially all contract actions attachment of a debtor's property, without notice and hearing. Nor is the overbroad statute narrowly drawn to confine attachments to extraordinary circumstances which require special protection to a state or creditor interest. Given the statute's fundamental constitutional infirmity, the attachment of the Randone's bank account cannot stand, and the lower court erred in refusing to release such attachment.

Let a peremptory writ of mandamus issue directing the appellate department to issue an order directing the trial court to dissolve the challenged attachment.

TOBRINER, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
PETERS, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.