#39.70 12/27/71

Memorandum 72-6

Subject: Study 39.70 - Attachment, Garnishment, Execution (Prejudgment Attachment Procedure)

At the January meeting, we will continue to examine possible ways to provide adequate provisional (prejudgment) remedies to unsecured creditors. Professor Riesenfeld has written us as follows:

> As I see it, the Commission ought to choose between four options:
>
> (1) Abolish attachment and rely solely on equitable remedies such as injunctions and perhaps in particularly risky situations the appointment of receivers;
>
> (2) Limit attachment so that it is issuable only by a magistrate in exceptional situations, such as an absconding debtor or fraudulent concealment. A model is offered by Minnesota Revised Statutes Sections 570.01 and 570.02, or Section 571.41 [See attached Exhibit I];
>
> (3) Reduce the scope of attachment but still leave cases where notice and hearing of the probable validity of the claim may be necessary, but revise the methods of levy;
>
> (4) Change all methods of levy so that there are <u>never</u> any "use" restrictions placed on the debtor and therefore no notice and hearing may be required.

Professor Riesenfeld adds that

> in making the choice the Commission must consider that any restrictions on pre-judgment procedures will result in an increased utilization of (a) security interests in the debtor's property (including exempt assets--"necessities") and (b) confessions of judgment. [See Code of Civil Procedure Sections 1132-1135. Attached Exhibit II.] Moreover, in creating new procedures and methods of levy, we must be certain to protect the bona fide purchaser.

Professor Riesenfeld (and Professor Warren) will be with us in Los Angeles for two full days, and we have asked Professor Riesenfeld to be prepared to outline the full range of remedies available to various classes of creditors so that we may know where attachment fits in this scheme. The staff will furnish

further background materials prior to the January meeting. However, for your preliminary consideration, we have attached a copy of the Randone decision (Exhibit III), another copy of Professor Riesenfeld"s "Proposed California Attachment Law" (Exhibit IV) and Professor Warren's comments on this proposal together with some excellent suggestions of his own (Exhibit V).

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

EXHIBIT I

570.01 Allowance of writ

In an action for the recovery of money, other than for libel, slander, seduction, breach of promise of marriage, false imprisonment, malicious prosecution, or assault and battery, the plaintiff, at the time of issuing the summons or at any time thereafter, may have the property of the defendant attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover. A writ of attachment shall be allowed by a judge of the court in which the action is brought, or a court commissioner of the county. The action must be begun as provided by law not later than 60 days after issuance of the writ. As amended Laws 1965, c. 51, § 82.

570.02 Contents of affidavit

To obtain such writ, the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof, and alleging:

(1) That the debt was fraudulently contracted; or

(2) That defendant is a foreign corporation, or not a resident of this state; or

(3) That he has departed from the state, as affiant verily believes, with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; or

(4) That he has assigned, secreted, or disposed of his property, or is about to do so, with intent to delay or defraud his creditors.

571.41 Garnishee summons; exceptions

Subdivision 1. In any action in a court of record or justice court for the recovery of money, at any time after default following service of the pleadings upon a party to the main action, unless an answer or reply has been interposed or after the judgment therein against the defendant, a garnishee summons may be issued against any third person as provided in this chapter. The judgment creditor and judgment debtor shall be so designated and the person against whom the summons issues shall be designated garnishee. Any individual, partnership or corporation within the state having property subject to garnishment may be named as garnishee. Notwithstanding anything to the contrary herein contained, a plaintiff in any action in a court of record or justice court for the recovery of money may issue a garnishee summons before judgment therein if, upon application to the court, it shall appear that defendant is about to take property out of the state which might be necessary to satisfy any judgment awarded plaintiff and if the court shall order the issuance of such summons. If such an order shall issue such summons and attendant documents shall designate the parties plaintiff and defendant, respectively.

Subd. 2 Garnishment shall be permitted before judgment in the following instances only:

(1) For the purpose of establishing quasi in rem jurisdiction

(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or

(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association.

(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action.

EXHIBIT II

§ 1132. Entry of judgment; obligations for which judgment may be confessed

JUDGMENT MAY BE CONFESSED FOR DEBT DUE OR CONTINGENT LIABILITY. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this Chapter. Such judgment may be entered in any Court having jurisdiction for like amounts.

§ 1133. Defendant's written statement; form

STATEMENT IN WRITING AND FORM THEREOF. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;
2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;
3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

§ 1134. Defendant's written statement; filing; entry of judgment; costs; judgment roll

In courts other than justice courts, the statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judgment of such court for the amount confessed with the costs hereinafter set forth. At the time of filing, the plaintiff shall pay as court costs which shall become a part of the judgment the following fees: in superior courts ten dollars ($10) and in municipal courts nine dollars ($9). No fee shall be collected from the defendant. No fee shall be paid by the clerk of the court in which said confession of judgment is filed for the law library fund nor for services of any court reporter. The statement and affidavit, with the judgment endorsed thereon, becomes the judgment roll.

§ 1135. Defendant's written statement; filing in justice court; entry of judgment; costs; transcript of judgment

In a justice court, where the court has authority to enter the judgment, the statement may be filed with the judge, or with the clerk if there be a clerk, who must thereupon enter in the docket a judgment of the court for the amount confessed and at the time of filing, the plaintiff shall pay as court costs which shall become a part of the judgment five dollars ($5). No fee shall be collected from the defendant. No fee shall be paid by the clerk of the court in which said confession of judgment is filed for the law library fund nor for services of any court reporter. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.

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 <u>any</u> 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. (<u>Id</u>., § 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 <u>without notice to the debtor</u> 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 <u>three years</u>, 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. <u>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</u>.

The agency's primary contention before this court is that the United States Supreme Court decision in <u>Sniadach</u> is limited to prejudgment wage garnishment. Relying on the <u>Sniadach</u> 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 <u>Sniadach</u> 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 <u>due process requires that no person shall be deprived of a substantial right without notice or hearing</u>. [Citations.]"

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[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 <u>private</u> 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 <u>Toboada</u> explained: "It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights 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. <u>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."</u>

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 prehearing 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.

EXHIBIT IV

Proposed
California Attachment Law

§1. Attachment when issuable

1. The plaintiff, after filing of the complaint and at any time before final judgment, may have the property of defendant other than necessities as defined in §2 attached as security for the satisfaction of any judgment that may be recovered unless the defendant gives security to pay such judgment, in the manner and under the conditions provided in this chapter.

2. A writ of attachment may be issued

a. in an action for the recovery of money upon a contract express or implied, including an action pursuant to Section 1692 of the Civil Code, where the contract is not secured by a security interest upon real or personal property or, if originally so secured, such security interest has been lost or the collateral become valueless without act of the plaintiff;

b. in any action for the recovery of money against a defendant if the attachment is necessary for the exercise of jurisdiction by the court;

c. in an action by the State of California or any political subdivision thereof for the collection of taxes due to said State or political subdivision or for the collection of any money due upon any obligation or penalty imposed by law;

d. in an action by the State of California or any subdivision thereof for the recovery of funds pursuant to Section 11680.5 of the Health and Safety Code, in which case the attachment may be levied also upon funds on the defendant's person at the time of his arrest which are retained in official custody.

3. An action shall be deemed an action for the recovery of money if the relief demanded includes the payment of money even though in addition to other forms of relief.

4. No attachment may be issued in any action if the sum claimed, exclusive of interest and attorney's fees, is less than two hundred dollars.

§2. <u>Necessities exempt from attachment</u>

1. Necessities means money and other property necessary to defendant's life in the light of contemporary needs or constituting the defendant's principal source of support or livelihood.

2. Necessities includes but is not limited to

a. all property by rule of law exempt from execution,

b. to the extent not already covered by subsection a.

(i) all the earnings of the defendant due or owing for his personal services;

(ii) accounts receivable and payments in cash or other means of payment derived from defendant's self-employment to the extent that their collection or receipt constitutes defendant's principal source of support;

(iii) bank accounts standing in defendant's individual name either as sole or joint account in the amount of 100 times the minimum hourly wage, unless a greater amount is exempt as derived from wages or under any other provision of the law;

(iv) ordinary household furnishings, appliances and wearing apparel used by the defendant or members of his household, including musical instruments, one television receiver and one radio, as well as provisions and fuel procured for the use by the debtor and the members of his household;

(v) one motor vehicle in the personal use of the defendant or a member of his household;

(vi) one housetrailer, mobilehome or houseboat used as residence by the debtor or members of his household;

(vii) tools, implements, instruments, uniforms, furnishings, books and other equipment, including one fishing boat and net, one tractor, and one commercial motor vehicle, used in and reasonably necessary to defendant's self-employment.

3. Self-employment means the exercise of a trade, business, calling, profession, or agricultural pursuit by which defendant earns his livelihood, either in his individual name, as a partner or in corporate form, if the defendant personally participates in and controls the conduct of the corporate activities.

§3. Issuance of writ upon judicial order after notice and hearing

1. A writ of attachment shall be issued by the clerk of the court upon a judicial order to that effect after notice and hearing as hereinafter provided. The order may be made by a judge of the court, justice, or referee appointed by the judge. In a case where there is no clerk, the writ may be issued by the justice after the required notice and hearing.

2. Application for an order directing the issuance of a writ of attachment, or for issuance of the writ of attachment as prescribed in paragraph one, shall be made by motion which shall be supported by an affidavit showing the grounds upon which the attachment is requested.

3. The affidavit shall state

a. the nature of the indebtedness claimed;

b. the amount claimed as owed by the defendant over and above all legal set-offs and counterclaims; or, if an attachment is sought for only part thereof, such partial amount;

c. that the attachment is not sought and the action is not prosecuted, to hinder, delay or defraud any creditor of the defendant;

d. that the affiant has no information and belief that the indebtedness for the recovery of which the attachment is sought has been discharged in a proceeding under the National Bankruptcy Act or that a prosecution of an action for its recovery has been stayed in such a proceeding; and

e. that the attachment is not sought for a purpose other than the recovery of the indebtedness stated.

4. Except in the cases specified in section 4, the plaintiff shall serve on the defendant a notice informing the defendant that

a. plaintiff in the action instituted by him against defendant has applied for the issuance of a writ of attachment;

b. a hearing will be held on the specified date and at the specified place;

c. such hearing has the purpose of determining whether plaintiff has shown the probable validity of his claim and whether the property which he seeks to be attached is subject to attachment or exempt therefrom as necessities;

d. the hearing is not held for the purpose of a determination on the merits of the actual validity of plaintiff's claim;

e. the defendant may be present at such hearing in person or represented by attorney.

5. The notice set forth in subsection 4 shall be served upon the defendant not less than 15 days prior to the hearing unless, for good cause shown, the court orders otherwise. The notice shall be accompanied by a copy of the affidavit and, if a copy of the complaint has not been

previously served upon the defendant, it shall be served at the time the copy of the notice is served.

6. The judge, justice or referee at the hearing shall determine whether plaintiff has made a showing of the probable validity of his claim and that the property which he requests to be attached is not exempt from attachment as necessities. If the judge, justice or referee finds that the plaintiff has shown the probable validity of his claim and that the property sought to be attached is not exempt as necessities he shall make an order that a writ of attachment be issued, or if there is no clerk issue a writ of attachment, specifying the amount to be secured by the attachment and the property to be levied upon.

7. Failure of the defendant to be present or represented at the hearing shall not bar a finding on the probable validity of plaintiff's claim or that the property sought to be attached appears not to be exempt from attachment. Failure to be present or represented at the hearing shall not constitute a default in the main action or bar the defendant from claiming that the property attached is exempt from attachment as necessities.

§4. <u>Ex parte determination permitted in exceptional cases</u>

1. An order for the issuance of a writ of attachment or the issuance of the writ may be made by the judge, justice or referee without prior notice and hearing as prescribed in §3 if the judge, justice or referee is satisfied that plaintiff has shown that

a. an actual risk has arisen that the debtor will conceal property sought to be attached or will abscond, or

b. the attachment is necessary for the exercise of jurisdiction by the court and that plaintiff was unable to give notice to defendant of the attachment sought.

2. An order for the writ of attachment shall be made or a writ of attachment issued only if the judge, justice or referee is satisfied that plaintiff has shown the probable validity of his claim and that the property sought to be attached is not to be exempt as necessities.

3. In the cases specified in paragraph 1-a of this section the plaintiff shall within two days after the making of an order for the issuance of the writ by the judge, justice or referee or after the issuance of the writ by the justice serve notice on defendant that a hearing will be held to determine the probable validity of his claim and whether or not the property attached is necessities. The notice shall state the date and place of the hearing as set at the earliest possible date.

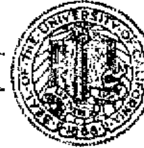
4. The writ of attachment shall be quashed and any levy thereunder shall be set aside, unless the plaintiff shows within five days after the making of the order for attachment or the issuance of the writ by the justice that the notice specified in subsection 3 has been served on defendant.

Memorandum 72-6

EXHIBIT V

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO



SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

December 10, 1971

Mr. John H. DeMoully
California Law Revision Commission
Stanford, California

Dear John:

These are my comments on the "Proposed California Attachment Law".

On the whole, this strikes me as a very well-conceived statute. The "necessities of life" matter introduces enormous problems for drafting a workable attachment statute, and I think Steve has dealt with those problems ably. So long as an adversary pre-judgment hearing is provided for (as in Section 2), then the issue of the "necessities of life" can be heard at the time the probable validity of the claim is determined (Section 3(4)). Difficulties arise, however, in the "unusual circumstances" cases under Section (4). In these cases the writ must be issued only after an ex parte hearing on the existence of the unusual circumstances (Section 4(1)) and the probable validity of the claim (Section 4(2)), and this leaves the question of whether the property taken is a necessity of life to be decided, at least preliminarily, at the ex parte hearing. Since there is no other feasible way to deal with the necessity of life issue in the unusual circumstances cases, I assume that Steve's manner of handling the problem (determining the existence of the necessity of life ex parte, subject to a quick adversary hearing on the issue) does not violate Randone. In short, I think Steve has dealt with the troublesome problem of necessities of life in the most sensible manner. His definition of necessities of life in Section 2 as, in effect, providing for one set of exemptions (CCP 690 et seq.) after judgment and an additional set before judgment seems sound to me, as well. Cramming everything that would qualify under Randone as a necessity of life into the category of post-judment exemptions would probably not be legislatively feasible or, for that matter, desirable.

My criticisms are these: (1) Should not the additional risks of transfer or destruction of the collateral be added to Section 4(1)(a)? I am thinking of the case in which the debtor makes a bulk sale within Article 6 of the UCC and notice is given to existing creditors. A creditor must attach immediately if he is to stop the bulk transfer from being consummated. This seems to me to be a legitimate case for an "unusual circumstance" kind of attachment. With respect to the risk of destruction, I doubt that this is a common risk, but if a creditor can show that a vengeful debtor is about to destroy his property he ought to be able to attach.

(2) I don't understand why Section 2 exempts the small businessman's accounts in (2)(b)(ii) and apparently his equipment in (2)(b)(vii), but not his inventory. Perhaps Steve's suggestions on the keeper problem will answer this question.

(3) I think I tend to agree with what I understand Steve's opinion to be about ending the general contract grounds for attachment under Section 1(2)(a). I am sure the Commission has debated this in detail, but the more one considers the problem the more unlikely it seems to me that attachments will be brought on these grounds, given the hearing requirement. Maybe Section 1(2)(a) will make the bill more acceptable to the Legislature, but I think it is likely to be a dead letter.

(4) My basic problem with this statute is that it sets up a well-conceived structure for attachment -- but there usually isn't going to be anything for a creditor to attach because of the necessities of life concept being applied to commercial cases (and it is clear that Randone requires this). In the consumer or "retail" case this doesn't trouble me; Randone has pretty well ended pre-judgment seizure of property in consumer cases and I don't think creditors will suffer from this development. However, in commercial cases, at least when the requisite unusual circumstances are present, I would favor a method of attachment by which creditors could stake out a priority in property against other creditors and, in cases not falling within Bankruptcy Act Section 67(a), against a trustee in bankruptcy, so long as this method of attachment gives adequate weight to Tobriner's view that businessmen should not be put out of business prior to judgment because of being deprived of necessary property.

What I would propose for discussion is that in the category of commercial cases (this could be defined by a dollar amount test or a business purpose test or a combination of the two), the creditor could obtain a writ of attachment at an ex parte hearing (upon showing the existence of unusual circumstances and the probable validity of his claim) which would describe the property attached and its location. Upon recording a copy of the writ, the creditor would then have a valid attachment lien on the described property. A copy of the writ would be served on the debtor and would order him not to deal with this property in other than the ordinary course of his business. No seizure of the property would be allowed pending a hearing. At the hearing the issues of the probable validity of the creditor's claim, the existence of unusual circumstances, and whether the property attached was a necessity of life would be determined. If it were determined that the property was not a necessity of life, the property could be seized in the usual way or, at the option of the creditor, left in the debtor's possession under injunction to deal with it as he would other property of this kind in the ordinary course of his business. If it were determined that the property was a necessity of life, the creditor could not seize it, but the injuction not to deal with the property in other

than the ordinary course of the debtor's business would still obtain and the creditor would still have a lien on the property good as against other creditors and against an eventual trustee in bankruptcy. This would leave the debtor-businessman in possession of his necessary property with the right to use it, but the creditor would at least be protected as against other creditors and would have established an interest valid in bankruptcy. He would, of course, be vulnerable to the debtor's violating the court order and selling off the property to good faith purchasers or disposing of it to other innocent parties. In short, such an attaching creditor would have rights not dissimilar to those of a consensual secured creditor under the UCC; he would have rights valid against other creditors and good in bankruptcy but he can be deprived of these rights if the debtor is dishonest. Thus the injunction-type procedure that I propose is a compromise position that would give the creditor some rights to obtain a priority in the property of a commercial debtor but which would give the debtor the right to use the property to keep afloat.

I am under no illusions about the problems this injunction-type attachment procedure raises (particularly with respect to an asset like a bank account which can only be used by withdrawals), but I think I would be remiss in not at least calling the matter to the attention of the Commission.

Sincerely,

Bill

William D. Warren