#39.70 4/18/74

Memorandum 74-16

Subject: Study 39.70 - Prejudgment Attachment

BACKGROUND

Attached to this memorandum are: (1) a copy of the Recommendation Relating to Prejudgment Attachment (printed pamphlet - December 1973), (2) AB 2948 (prejudgment attachment bill as introduced), (3) Exhibit I - a letter and report from the State Bar setting forth its position on the original bill, and (4) Exhibit II - a letter and memorandum setting forth the position of the California Credit Managers Associations. It should be noted that the State Bar had three points on which it was unalterably opposed to the original bill. See top of page 18 of their report. Two of these points have been satisfied by amendments made in the Assembly Judiciary Committee. One, Section 482.060 was deleted, and the bill is now silent as to the use of court commissioners. Two, the solvency factor (Section 488.360(b)(1)) was removed from the test for determining whether farm products and inventory of a going business can be released from attachment. Accordingly, the State Bar's active opposition will be based on the failure of the statute "to permit the court to balance equities before granting or refusing a right to attach order." However, the Bar raises a number of other points which will be discussed below, together with those of the Credit Associations.

The bill has passed the Assembly. (We have asked that the bill be set for hearing on May 21 by the Senate Judiciary Committee. If we need more time to prepare necessary amendments to the bill, we will schedule it for a later hearing date.) The Commission now should review the issues raised in this memorandum and direct us as to what action should be taken with regard to the amendments proposed. For the most part, the issues discussed are not entirely new; however, some new twists are introduced, and we urge you to reexamine each point with care. These materials will be discussed beginning Friday morning, May 3, 1974. Mr. Marsh, representing the Credit Associations, will attend that meeting, and perhaps someone will attend to represent the State Bar's position.

ANALYSIS

Section 483.010. This section describes the types of actions in which an attachment may be issued. The State Bar (p.4) notes that the section "precludes the granting of an attachment to a plaintiff who has any other form of security, including any 'statutory, common law or equitable' lien; and further declares that if a plaintiff had such security, but it has become valueless through an 'act' of the plaintiff, no attachment can issue." The Bar "assumes" that this provision was not intended to prevent a person who has given up a possessory lien from subsequently seeking an attachment. We believe that their assumption is directly contrary to the statute; hence, we do not believe that the matter can be clarified by Comment as they suggest. Moreover, the statute may say exactly what we intended it to say. If this is true, we suggest that the Comment be revised to reflect this aspect of the statute. For example, a statement could be added at the end of the last paragraph of the Comment to read as follows:

> The last sentence of subdivision (a) makes clear that attachment is not available where the claim sued upon is a secured claim unless the security has become valueless without the act of the plaintiff or person to whom the security was given. All types of secured claims are excluded. Moreover, the security cannot simply be waived. Hence, a person who has relinquished a possessory lien is barred as well as a person who held a more typical consensual security interest.

On the other hand, the staff is not sure whether this provision was considered in the light of the circumstances described by the Bar, and the Commission may believe that their point is well taken. In short, as a matter of policy, you may favor a change in the statute that accomplishes what the Bar seeks. If so, we ask that you consider revising the last sentence of subdivision (a) to provide as follows:

> The claim shall not be secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or where the claim was secured by a possessory lien but such lien has been relinquished by the redelivery of the property.

Which course should be taken?

Section 484.080. This section deals with the issue of continuances of the hearing on the application for a right to attach order. The Bar believes that a plaintiff should be entitled to a continuance on a showing of good cause, and they suggest that subdivision (a) be revised to provide:

> 484.080. (a) At the time set for the hearing, the plaintiff shall be ready to proceed. If the plaintiff is not ready, or if he has failed to comply with Section 484.040, the court may either deny the application for the order or, for good cause shown, grant the plaintiff a continuance for a reasonable period.

If such a continuance is not permitted, the Bar points out that nothing in the statute precludes the plaintiff from reapplying for a right to attach order. If the Commission wishes to put teeth into the denial of a continuance, present subdivision (a), which requires the court to deny the application for the order, could be supplemented by a proviso which precludes any further application (period) or requires any further application to be supported by a showing of good cause as to why the plaintiff was not ready to proceed earlier. We hasten to say that these are merely possible approaches. The staff would have no objection to the adoption of the Bar's suggestion. What action does the Commission wish to take?

The Credit Associations propose that, where the defendant obtains a continuance, any protective order shall (not may) be extended by the court during the period of such continuance. See Section 484.080(b). The staff prefers the present form, but we believe that Section 486.100 would in any case permit the defendant to apply to have the order vacated or modified upon a proper showing. Does the Commission wish to make any change?

Issuance of right to attach order. (Exhibit I - pp. 6-9). The State Bar here proposes that the statute be amended to permit the court to balance equities before granting or refusing a right to attach order. The staff has some sympathy for this view, but the matter has been discussed at great length before, and we have nothing new to add. However, we do note that this position is based on reasoning that is

diametrically opposed to the Credit Associations' proposal below) that a protective order be issued as a matter of right only upon a showing of probable validity of the plaintiff's claim. It appears obvious, therefore, that we cannot possibly completely satisfy both groups.

Section 484.320. The Bar proposes (Exhibit I - p. 10) that Section 484.320 include a provision similar to that in Section 484.020 whereby the plaintiff swears that his claim has not been discharged in bankruptcy. It should be noted that we are dealing here with additional writs after a right to attach order has been issued. Nevertheless, there may have been an intervening bankruptcy proceeding; hence, the statement may be appropriate and, at least, we do not see any harm in adding it. With your approval, we will amend Section 484.320 by adding the following:

> (d) A statement that the applicant has no information or belief that the claim has been discharged in a proceeding under the National Bankruptcy Act or that the prosecution of the action has been stayed in a proceeding under the National Bankruptcy Act.

Section 484.340. Here the Bar has caught an inadvertent omission. Subdivision (d) should be amended to add the underlined material:

> (d) If the defendant claims that the property specified in the application, or a portion thereof, is exempt from attachment, he shall file with the court a claim of exemption with respect to the property as provided in Section 484.350 not later than five days prior to the date set for hearing . If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

Sections 484.510-484.530. The Bar proposes (Exhibit I - pp. 9-10) the elimination of this procedure for issuance of additional writs on an ex parte application after a noticed hearing has resulted in the issuance of a right to attach order, i.e., they would always require a showing of great or irreparable injury before a writ may be issued ex parte. The staff opposes this proposal. The plaintiff here has already established the probable validity of his claim; hence, the only issue remaining under our scheme is whether the defendant has a claim of exemption. If the defendant is a corporation or a partnership, as a general rule there will be no claims of exemption. If the defendant is an individual, he

will have had an opportunity to claim his exemption at the prior hearing and, if he failed to do so, there is a relatively expeditious procedure for claiming an exemption after levy. Finally, the statute provides for liability for wrongful attachment where the plaintiff does levy on exempt property. In short, we believe that the defendant is adequately protected, and we do not want to impose any additional burdens on the plaintiff. Accordingly, we suggest that no changes be made here.

Chapter 5 (commencing with Section 485.010). The State Bar (Exhibit I - pp. 11-12) suggests that a provision be added here which insures that a copy of the summons and complaint is served on the defendant at a point in time no later than when he is first served with a writ of attachment. The staff does not think any change is really necessary. However, we see no objection to this suggestion, and we believe that it could be best implemented by adding the following subdivision to Section 488.030.

> (c) Where a copy of the summons and complaint has not previously been served on the defendant, the plaintiff, or his attorney of record, shall instruct the levying officer to make such service at the same time he serves the defendant with a copy of the writ of attachment.

Temporary protective order. Proposed amendments 2 through 6 (Exhibit II - p. 2) submitted by the Credit Associations would eliminate the prerequisite that a temporary protective order be issued only upon a showing of need therefor and would require the court in every case where an order is issued to prohibit any transfer of property (subject to attachment) otherwise than in the ordinary course of business and prohibit any payment by the defendant of any antecedent debt. The staff believes that these provisions would be unconstitutional. The impact of such an order on a business could be devastating, yet the order would be issued ex parte on no more than the plaintiff's showing of the probable validity of his claim. At best, this seems to us to be poor policy. See discussion on pages 726-727 of the Recommendation. As noted above, we are certain that the Bar would also oppose such changes. In short, we believe that the Commission should not accept these proposed amendments.

Section 486.090. The State Bar mistakenly suggests that we do not permit extension of a protective order where the defendant is granted a continuance of the hearing. Such an extension is permitted. See Section 484.080(b). However, the extension is granted only for the period of the continuance. It might be better if the extension were for the longer period suggested by the Bar. That is, the second sentence of subdivision (b) might better provide:

> The effective period of any protective order issued pursuant to Chapter 6 (commencing with Section 486.010) [may] [shall] be extended by the court for a period ending 10 days after the new hearing date.

What is the Commission's desire?

Section 487.010. The Credit Associations (Exhibit II - p.2 - amendment 7) propose two changes here. First, they ask that we specifically refer in subdivision (c) to "a partner who is individually liable for a partnership debt." The staff does not object to the policy desired; indeed, we think that the Comment to this section (see Recommendation, p. 794) makes this point clear. However, if we do make the change proposed, we think that there is some tendency to create an ambiguity concerning corporate property where a corporation is a partner. In short, we think the recommendation is better drafted the way it is to accomplish what the Credit Associations want; however, we have no strong objection to the change.

Second, they ask that subdivision (c) be revised to add the following underlined provision:

> 487.010. The following property is subject to attachment:
>
> * * * * *
>
> (c) Where the defendant is an individual engaged in a trade, business, or profession . . . all of his real property and all of his following property if it is used or held for use in the defendant's trade, business, or profession or if property of that type then owned was reflected in any financial statement furnished to the plaintiff for the purpose of obtaining credit : [then follows a list of mostly commercial-type assets].

The proposed amendment makes subject to attachment certain property not used or held for use in the defendant's business or profession. In some cases, this could substantially broaden the reach of the statute. It is a provision that is not found in existing law. Moreover, the amendment is not limited to property actually listed in the financial statement or property which was relied upon in extending credit. On the other hand, the types of property listed in paragraphs (1) through (10) of subdivision (c) tend to exclude property which might be considered a necessity. The staff has no very strong feelings on the subject. We think that it could be something of a trap for the defendant but, as noted, it would not subject consumer goods to attachment. We assume Mr. Marsh will state his case for this amendment, and the Commission can then take what action it thinks is best.

Section 488.100 (proposed). The Credit Associations propose that a new Section 488.100 be added. See Exhibit II - p. 3 - amendment 8. The staff believes that the proposed section is both unnecessary and undesirable. The statute now specifies exactly what is required to make a valid levy and what acts create a lien valid against subsequent transferees. At best, the proposed section would be redundant. At worst, the section would create a conflict with those provisions which limit the effectiveness of a levy in certain situations. See Sections 488.350 (levy on motor vehicle does not affect certain bona fide purchasers), 488.380 (levy on chattel paper does not affect account debtor until service of notice of attachment), 488.400 (obligor credited with good faith payments made on attached negotiable instrument). In short, the staff opposes the suggested change. Moreover, we are at a loss to suggest any alternative without knowing what has motivated the proposal. Perhaps something can be worked out at the meeting.

Section 488.350. The State Bar (Exhibit I - pp. 12-13) merely notes a disparity between the time for service on a legal owner of a motor vehicle and on other third persons. We cannot recall the reason, if any, for the disparity. However, we are not inclined to make any change here, especially since the Bar does not suggest that we do so.

Section 488.360. We have eliminated the solvency test (subdivision (b)(1)) which the Bar strongly opposed. See Exhibit I - pp. 13-14. They also suggest that the statute or Comment contain detail as to the method of collection on credit card purchases. The consensus of the sheriffs at an earlier meeting was that such detail was not needed by them and would be undesirable. Hence, we suggest no change be made.

Section 488.410. The Credit Associations (Exhibit II - p.3 - amendment 9) propose in substance that a security which is in the possession of a pledgee or pledgeholder be attached by service of a copy of the writ on such person. Such a provision once appeared in an earlier draft and was deleted by the Commission, in part because it conflicted with Commercial Code Section 8317. We thought that the matter was thoroughly argued out before, and we assume that the Commission will not wish to make this change.

Section 488.430. The State Bar (Exhibit I - pp. 14-15) proposes a change in the method of levy on an interest of a defendant in personal property belonging to the estate of a decedent. The change would in effect simply require the clerk of the court, instead of the sheriff, to serve the personal representative with a copy of the writ. Section 488.430 continues the existing law, and we are not persuaded that there is a very good reason to change it. Accordingly, we suggest no change be made. On the other hand, if you wish to accommodate the Bar here, we have no objection to the language set forth on page 15 of Exhibit I except that we would break the provision into two sentences on line 8 by deleting "and", inserting a period, and capitalizing "the".

Section 489.220. The Bar comments with regard to the plaintiff's undertaking were made before they were aware of what action the Commission took on this section in November 1973. The Bar's proposal (Exhibit I - p. 16) would be acceptable to the staff if we were starting over again; however, at this stage, we would prefer not to make any changes here since we seem to have a provision which is noncontroversial.

Section 490.010. The Credit Associations (Exhibit II - p. 3 - amendment 10) propose that we eliminate as an act constituting wrongful attachment "the levy of a writ of attachment on property possessing a value greatly in excess of the amount of the plaintiff's valid claim

except where the plaintiff shows that he reasonably believed that all other property of the defendant was exempt from attachment." The staff simply believes that there should be liability in this instance. Nevertheless, the provision does represent an extension of liability for wrongful attachment, and this provision is not essential to the bill since liability in such a case can often be based on an abuse of process theory. What is the Commission's desire?

Section 490.020. The Credit Associations (Exhibit II - p. 3 - amendments 11 and 12) propose two changes here. First, elimination of the modifying phrase "whether direct or consequential" from the provision which makes the plaintiff liable for all damages proximately caused to the defendant by a wrongful attachment. The staff would prefer to keep this phrase because it might help to avoid a judicial interpretation which would limit the defendant's damages. See Comment to Section 490.020, Recommendation, p. 841. On the other hand, this is a point which we do not believe is absolutely essential.

The second change proposed would limit the plaintiff's liability for wrongful attachment to the amount of his undertaking in all cases--not only where he proceeds by way of a noticed hearing. One purpose of the present distinction is to discourage the use of the ex parte procedure. On the other hand, you will recall that Section 489.220 permits the defendant to move to have the plaintiff's undertaking increased where he can show that the probable recovery for wrongful attachment exceeds the amount of the current undertaking. In short, here again we prefer what we have but believe that what we have is not absolutely essential.

Sections 490.030 and 490.050. The Credit Associations (Exhibit II - p. 3 - amendments 13 and 14) propose that we eliminate the noticed motion procedure for recovery of damages for wrongful attachment. The staff strongly suggests that this proposal be rejected. We see absolutely no reason to require a defendant to bear the expense and to await the outcome of another independent action to recover damages against the plaintiff where his property has been wrongfully attached. Such a procedure seems particularly anomalous when one realizes that the liability of the surety under existing law (Code Civ. Proc. § 1058a) can be enforced by motion. In most cases, we assume that the defendant will

simply pursue the surety; however, where the surety appears to have insufficient assets or the plaintiff's liability is greater than that of the surety, we believe that the defendant should have the same expeditious motion procedure available to him. In short, we hope that the Commission will resist any change here.

Nonresident attachment. The Bar (Exhibit I - pp. 16-17) makes two suggestions here. The first deals with service of the summons and complaint. If Section 488.030 is revised in the manner presented above, the problem will be taken care of. The second suggestion is that Sections 492.070(c) and 492.080 are redundant. We do not understand this comment although we readily concede that Section 492.080 is generally meaningless because Section 492.040 permits levy on just about any property. In short, we believe that no change is necessary; however, it is possible that the statute would be clearer if Section 492.080 were deleted and subdivision (c) of Section 492.070 were revised to provide:

> (c) A description of the property to be attached under the writ of attachment, and a statement that the plaintiff is informed and believes that such property is subject to attachment pursuant to Section 492.040. The description shall satisfy the requirements of Section 484.020.

What action, if any, does the Commission wish to take?

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

Memorandum 74-16 EXHIBIT I

THE STATE BAR OF CALIFORNIA

1210 K Street
Sacramento, California 95814
Telephone (916) 444-2762

Office of the Legislative Representative

March 11, 1974

Honorable Alister McAlister
Twenty-fifth Assembly District
4134 State Capitol
Sacramento, Ca. 95814

Re: Assembly Bill 2948

Dear Mr. McAlister:

The Board of Governors of the State Bar of California has reviewed your Assembly Bill 2948, relating to prejudgment attachment, and has determined that it must oppose the legislation unless it is amended in three particulars, and has determined to seek other amendments in the bill.

In doing so, the Board of Governors considered, and approved, a report from the State Bar's Ad hoc Committee on Attachments, a copy of which is enclosed. You will note that the report discusses two proposals of the California Law Revision Commission, but is primarily directed to the Commission's proposal regarding prejudgment attachment which is incorporated in your A.B. 2948.

The three areas of primary concern to the State Bar, which must be corrected in order to remove its opposition, relate to 1) Judicial Duties, discussed at page 2 of the committee's report, 2) Issuance of the Right to Attach Order, discussed at page 6, and 3) Release of Attached Property, discussed at page 13. I hope you will give consideration to the amendments suggested on these three points, as well as the other improvements suggested by our committee, and afford us an opportunity to work with you as well as the representatives of the Law Revision Commission, so that we might be in a position to endorse the legislation. As you will note from our committee's report, we have engaged in dialogue with the Law Revision Commission, and, although they have not yet seen fit to incorporate all of our suggestions, I am hopeful that these limited matters of disagreement can be resolved.

We will be pleased to discuss this legislation further, at your convenience.

Sincerely yours,

Harold F. Bradford
Legislative Representative

b
cc(w/enc.): Mr. Demoully

INTERIM REPORT OF AD HOC COMMITTEE ON

ATTACHMENTS

TO THE BOARD OF GOVERNORS

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INTRODUCTION

The Ad Hoc Committee on Attachments met in San Francisco on December 1, 1973. All members of the committee were present.

The major purpose of the meeting was to report on the recommendation that the Law Revision Commission (LRC) has recently made regarding "Prejudgment Attachment." The most recent draft of this recommendation is dated December, 1973. The LRC's proposal regarding "Enforcement of Sister State Money Judgments" was also discussed.

ACTIONS TAKEN

I. PREJUDGMENT ATTACHMENT.

While the LRC and this committee have been considering the attachment law for some time, we have not previously requested that the Board of Governors act on the proposed law, since the proposal was not complete.

However, in Exhibit A of this committee's report to the Board dated January 8, 1973 many areas of difficulty were outlined. The information regarding those areas was furnished to the LRC and many of the suggestions were adopted. Others were rejected for reasons that appear reasonable and satisfactory; but certain areas of concern are unresolved. As a result, this committee recommends that the LRC proposal be "opposed" unless three specific changes are made. These three critical areas are: Judicial Duties, Paragraph A (page 2) below; Issuance of the Right to Attach Order, Paragraph D (page 6) below; and Obtaining Release of Attached Property, Paragraph L (page 13) below.

In addition, other areas of concern are noted below, but they are not deemed to be serious enough to warrant opposition to the LRC proposal.

This appears to be an appropriate time for Board action,

since the work of the LRC seems to be virtually complete. It has suggested a statute of some length (138 sections, not including conforming changes), which appears to answer most questions that may be raised in the field of attachments. In general, the statute will only permit attachments when a contract arises out of "conduct of a trade, business or profession" by the defendant. See §483.010. (All section and chapter references are to the December, 1973 proposal, unless otherwise stated.) Procedures for noticed and ex parte issuance of orders regarding the "right to attach," and the "right to a writ of attachment" are provided (chapters 4 and 5), and a procedure for obtaining a protective order is also set forth (chapter 6). The type of property subject to attachment and the method of making the levy are also detailed (chapters 7 and 8.)

As implied above, the committee generally favors the LRC proposal, but feels that certain portions of that proposal should be changed. Those specific changes will now be discussed.

A. Judicial duties.--Section 482.060 declares that the duties to be performed under this proposal are "subordinate judicial duties within the meaning of §22 of Article VI of the California Constitution." As the LRC comment indicates, this allows the duties to be turned over to commissioners.

Your committee has consistently opposed this kind of provision. See, for example, this committee's report of January 8, 1973, regarding claim and delivery. It should be mentioned that the Board opposed this sort of provision in the claim and delivery law, but the legislature still adopted it for claim and delivery purposes. See, CCP §516.040.

The area of prejudgment remedies is extremely important

and serious. This is even more true in attachment than it is in claim and delivery, for in the former case the plaintiff is attempting to obtain security in property that is not his in the first instance, whereas in claim and delivery the plaintiff at least asserts an initial right to the property in question.

The attachment hearing will include many technical and important issues. In effect, it can be expected to be a mini-trial where the judicial officer must determine not only that the plaintiff has established a prima facie case, but also that, considering the "relative merits of the positions of the respective parties", the plaintiff will probably prevail. [See LRC Comment to §481.190.] Determinations as to exemptions must also be made. In short, while these hearings will not decide the merits of the case as a matter of law [Sections 484.100 and 484.110], they may well become the practical equivalent of that, especially since the seizure of the defendant's property will follow.

The only justification for calling these duties "subordinate" would seem to be economy in the use of judges, but this committee feels that such economy is more than outwieghed by the novelty of the questions that must be decided and by the importance of the judicial determinations involved.

Conclusion I.--Section 482.060 should be stricken, or redrafted to make it clear that the duties are not "subordinate judicial duties." The committee recommends that the State Bar oppose the enactment of the proposed statute, if this change is not made. It is noted that this change would not preclude the parties from stipulating to a hearing by an individual who is not

a judge.

B. Right to Attachment.--Section 483.010 describes the types of claims for which attachment is allowed. Basically, those are claims amounting to an aggregate of $500.00 or more and arising out of the conduct of a trade, business or profession. However, it also precludes the granting of an attachment to a plaintiff who has any other form of security, including any "statutory, common law or equitable" lien; and further declares that if a plaintiff had such security, but it has become valueless through an "act" of the plaintiff, no attachment can issue.

This committee assumes that the "valueless" provision is not intended to cover the situation where a person with a possessory lien (see, e.g., Civil Code §§3046 et seq) has permitted the defendant to take the goods in question with him. If that were the law, then every person with a possible lien of this type would be induced to keep physical possession of the goods rather than allowing removal upon the defendant's promises to pay, etc. [We do not at this point reflect on the question of whether such liens are constitutional.] This would not be in the best interest of the vast majority of people, who pay their bills regularly, but not necessarily on a C.O.D. basis. It is assumed that relinquishment of such a lien will not be deemed to be an act of the plaintiff that caused the security to become valueless.

However, it would be better if this were clarified by an appropriate comment, or otherwise.

Conclusion II.--The LRC should make it clear (by comment or otherwise) that mere relinquishment of these liens (particularly

the statutory possessory liens) under §483.010 will not be an "act" that caused the security to become valueless for purposes of that section.

C. Readiness for Hearing.--Section 484.080 requires the court to deny the plaintiff's application for a right to attach order, if he is not ready to proceed on the hearing date, or if he has not yet served the defendant.

The committee does not think this is justified. Pursuant to §484.060 the defendant may have served voluminous papers on the plaintiff just five days prior to the hearing date, and the plaintiff may have legitimate reasons to ask for a continuance. Furthermore, it is possible that he will not have been able to obtain service on the defendant by the date set for hearing. It is simply too harsh to require that his application be denied in those circumstances. It is also wasteful, since the plaintiff could, presumably, file a whole new application proceeding simply to obtain extra time. No harm will come to the defendant if a continuance is allowed, for this is simply the hearing to decide whether an attachment should issue.

Conclusion III.--Section 484.080(a) should be amended to read as follows:

> At the time set for the hearing, the plaintiff shall be ready to proceed. If the plaintiff is not ready, or if he has failed to comply with §484.040, the court may either deny the applica-tion for the order, or, for good cause

shown, grant the plaintiff a continuance for a reasonable period.

D. Issuance of Right to Attach Order.--Section 484.090 sets forth the determinations to be made by the judicial officer before a right to attach order is issued.

This committee has found it most unfortunate that despite judicial invitations to be innovative in the area of prejudgment remedies, a great deal of effort has been expended in resurrecting the remedies in a general form that is very similar to the old forms.

If nothing else, the court should be given authority to "balance the equities" whenever an attachment is sought. This is not very different from the requirement of "great and irreparable" harm that the LRC already suggests when an ex parte order is sought by the plaintiff. See, §§485.010 and 486.010. The following statement regarding claim and delivery, which appears at pages 8 to 9 of the committee's report of January 8, 1973, is also apposite here (even though attachment presents different problems):

> As suggested above, it is believed that equitable concepts could be of great benefit here. The court should be given authority to consider the relative effect on the parties, such as relative harm, the adequacy of damages as a remedy in the particular case, and all other factors bearing on the justice of issuing or withholding the order.
>
> It might be said that once "probable validity" is established all of these concepts are beside the point. That is not necessarily true. For example,

some have pointed out the difficulties involved where a creditor has obtained security from a debtor on account of a loan transaction, rather than in a purchase money transaction or the like. If the trend of cases continues, we can expect that almost all repossessions will have to be made after hearing, so that procedures in this particular statue are quite important. This gives rise to a dilemma. On the one hand, people ought to be generally able to deal with their property in any manner that they wish, including giving security interests in it. On the other hand, sophisticated creditors, who can be expected to have more economic power and legal help than many debtors, will always be able to shape transactions so that they take security in items that might otherwise even be exempt from execution. As a practical matter, debtors may not be able to resist this, and a whole new congeries of abuses could grow up.

If the courts are given the equitable power to decide these cases, by using such concepts as relative harm and justice to the parties, the remedy will have its own internal feedback system, which can adjust for abuses as they begin to arise.

Conclusion IV.--The committee recommends that the State Bar oppose enactment of the LRC proposal, unless the following changes are made:

1. Section 484.030 is amended to read substantially

as follows:

> The application shall be supported by an affidavit showing (a) that the plaintiff is entitled to a judgment on the claim upon which the attachment is based; and (b) facts bearing upon the relative injury to both plaintiff and defendant should the application be granted or denied, the ability of the defendant to respond in damages after judgment should the application be denied, and any other facts regarding the equity and justice of issuance of a right to attach order under the circumstances of the case.

2. Section 484.090(a) is amended to read substantially as follows:

> At the hearing, the court shall consider the showing made by the parties appearing and shall issue a right to attach order if it finds all of the following:
>
> (1) The claim upon which the attachment is based is one upon which an attachment may be issued.
>
> (2) The plaintiff has established the probable validity of the claim upon which the attachment is based, and after considering all of the circumstances including, but not limited to,

the relative injury to both plaintiff and defendant should the application be granted or denied, the ability of the defendant to respond in damages after judgment should the application be denied, and all other factors that bear on equity and justice under the circumstances of the case, the court finds that the right to attach order should be made.

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

E. Additional Writs.--Sections 484.310 et seq. provide a procedure whereby a plaintiff, on notice, can apply for additional writs of attachment.

Sections 485.510 et seq. provide a procedure whereby a plaintiff, without notice, can apply for additional writs of attachment, when "great or irreparable damage" would occur if the writs were not so issued.

Sections 484.510 et seq. provide a procedure whereby a plaintiff, without notice, can apply for additional writs of attachment, even if no great or irreparable damage is alleged.

The committee does not believe that the separate ex parte procedures of §§484.510 et seq. and 485.510 et seq. are necessary or

desirable. Indeed, all of such ex parte proceedings should require a showing of "great or irreparable damage." This can easily be accomplished by eliminating §§484.510 through 484.530 and amending §485.510.

Conclusion V.--Sections 484.010 through 484.530 should be stricken, and §485.510 should be amended to read as follows:

> At any time after a right to attach order has been issued under either Article 1 of Chapter 4 (commencing with §484.010) or Article 2 of Chapter 5 (commencing with §485.210), the plaintiff may apply for a writ of attachment under this Article by filing an application with the court in which the action is brought.

Conforming changes would be needed in §§485.520 and 485.540.

F. Contents of Application for Additional Writs of Attachment.--Section 484.320 provides the form of application for additional writs of attachment after the original right to attach order has been granted. However, it does not require that the plaintiff allege that his claim has not been discharged in bankruptcy at the time of the application. It should so provide.

Conclusion VI.--Section 484.320 should include a provision similar to that of §484.020(d), whereby the plaintiff will swear that his claim has not been discharged, etc., in bankruptcy.

G. Notice of Application and Hearing.--When a plaintiff initially applies for a writ of attachment, he must give a notice to the defendant that defendant must respond by five days prior to the hearing. See, §484.050(d).

This information is not provided in the notice of application

for additional writs. It should be.

Conclusion VII.--Section 484.340(d) should be amended to read as follows:

> If the defendant claims that the property specified in the application, or a portion thereof, is exempt from attachment, he shall file with the court a claim of exemption with respect to the property as provided in §484.350, not later than five days prior to the date set for hearing. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

H. Ex Parte Procedure for Obtaining a Writ of Attachment.--When a writ of attachment upon notice is sought, the plaintiff must serve the defendant with the summons and complaint. See, §484.040(a).

However, there is no provision for serving the defendant with the summons and complaint in the ex parte procedure sections.

The committee believes that the defendant is entitled to be served with these documents at the time he is served with the writ of attachment, if he is not served before that.

Conclusion VIII.--A section should be added to Chapter 5 of the proposal, containing the following language, but the committee does not undertake to fix the exact number of this section or its placement:

> At or before the date of service of the copy

of the writ of attachment on the defendant, the summons and complaint shall be served upon the defendant.

I. Expiration of Temporary Protective Order.--Section 486.090 provides the time of expiration of a temporary protective order, which has been granted under the provisions of Chapter 6.

The LRC, in an apparent attempt to protect defendants, has placed an absolute limit of forty days on the order. While protection of defendants is a worthwhile goal, this provision seems to go too far, particularly when one realizes that the defendant may cause the hearing on the right to attach order to be continued. See, §484.080.

Thus, the committee feels that the court ought to at least have discretion to extend the effect of the temporary order, when the defendant has obtained a continuance of the hearing.

Conclusion IX.--Section 486.090(a) ought to be amended to provide that the temporary protective order will expire:

> Forty days after the issuance of the order or, if an earlier date is prescribed by the court in the order, on such earlier date; provided, however, if the court grants the defendant a continuance of the hearing on plaintiff's application for a right to attach order and writ of attachment, the temporary protective order may be extended for a period ending ten days after the new hearing date.

J. Levies on Motor Vehicles and Vessels.--The committee merely notes that §488.350(b) provides forty-five days to serve a

copy of the writ of attachment on the defendant, but §488.350(c) provides thirty days to serve the copy on the legal owner of a motor vehicle or vessel. Other sections use the forty-five day period, even for third party service. See, e.g., §488.310(c). The reason for the different period in §488.350(c) is not clear.

Conclusion X.--The attention of the LRC should be invited to the disparity in the time limits provided in §488.350(c) and other sections.

K. Use of a Keeper.--Section 488.360(a) permits use of a keeper. Under the provisions of this section, the keeper is told that, "payment by check or by a credit card issued by a person other than the defendant shall be deemed the equivalent of a cash payment."

The LRC has indicated that this provision does not present any difficulties. However, it has provided a very detailed section to explain how checks are to be cashed [Section 488.520], while no provision explaining the method to be used for collecting credit card purchases is provided. Perhaps the right to payment should be treated as an account receivable. See, §481.030. In all events, an explanatory section or comment should be provided.

Conclusion XI.--A code section or explanatory comment should be provided to direct attention to the method of collecting on credit card purchases, which are made while a keeper is in possession of the defendant's business. See §488.360(a).

L. Obtaining Release of Attached Farm Products and Inventory.--Section 488.360(b) provides that property attached pursuant to §488.360(a) can be released if the defendant shows that it is "essential for the support of himself and his family," and that

he is solvent.

Nothing in the court decisionsimplies that a person may be deprived of assets essential for support, simply because he is not solvent. See, e.g., Randone v. Appellate Department, 5 Cal.3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971).

This point was raised at an earlier time and the LRC staff agreed with the committee. In Memo 73-5 of December 20, 1972, the LRC staff stated:

> The AHC expresses a concern that the staff also had, and has, with regard to this section. That is, "necessities" are "necessities" and Randone would seem to require the exemption from attachment of such property whether or not the defendant is solvent. However, this thought was rejected earlier, and we merely note the AHC's comment.

The State Bar should not lend its support to a provision that is unconstitutional on its face.

Conclusion XII.--The State Bar should oppose the LRC proposal, if the solvency test set forth in §488.360(b)(1) is not removed.

M. Attachment of Interest in Estate Property.--Section 488.430 provides a method for attaching the interest of a defendant in personal property belonging to an estate. It continues the substance of present CCP §561.

However, that section currently presents problems of service, that need not be carried over to the new law. There is

no reason to require service on the personal representative of the estate, when the method of filing creditor's claims set forth in California Probate Code §710 would work as well. That procedure should be used here.

Conclusion XIII.--Section 488.430(a) should be changed to read as follows:

> To attach the interest of a defendant in personal property belonging to the estate of a decedent, whether by testate or intestate succession, the levying officer shall file two copies of the writ and the notice in the office of the clerk of the court in which the estate is being administered and the clerk shall immediately deliver, personally or by mail, to the personal representative, or his attorney, a copy of the writ and the notice of attachment.

N. Amount of Undertaking.--The LRC is working with various possibilities in the area of fixing the undertaking in attachment matters. See, §489.220 and page 5 of LRC Memo 73-95, dated October 25, 1973. The competing considerations are protection of the defendant's right to damages for wrongful attachment, and avoidance of the requirement of a bond that is arbitrarily and excessively high. There are many ways to balance these considerations, and the committee proposes the one set forth in the following conclusion.

Conclusion XIV.--Section 489.220 should read as follows:

(a) Except as provided in subdivisions (b) and (c), the amount of an undertaking filed pursuant to this Article shall be $2,000.00.

(b) The court, upon application of the plaintiff, may order filing of an undertaking in an amount less than the amount provided in subdivision (a), which undertaking shall not, in any event, be less than the value of the property sought to be attached.

(c) If, upon objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, it shall order the amount of the undertaking increased to the amount it determines to be the probable recovery for wrongful attachment if it is ultimately determined that there was a wrongful attachment.

O. Non-Resident Attachment.--Chapter 12 (§§492.010 et seq.) provides for the attachment of property of a non-resident for the purpose of obtaining quasi in rem jurisdiction. The committee fully supports the adoption of this chapter, and only suggests two changes: (1) a provision requiring service of the summons and complaint on the defendant should be provided (see, e.g., Conclusion VIII above); and (2) §§492.070(c) and 492.080 are redundant.

Conclusion XV.--The following changes should be made in the proposal as it relates to non-resident attachment:

(1) A section should be added, which section should contain the following language:

> At or before the date of service of the copy of the writ of attachment on the defendant, the summons and complaint shall be served upon the defendant.

(2) Section 492.070(c) should be changed to read as follows, which will eliminate its redundancy with §492.080:

> (c) A description of the property to be attached under the writ of attachment, including plaintiff's estimate of its fair market value.

II. ENFORCEMENT OF SISTER STATE MONEY JUDGMENTS

The LRC has proposed a simple alternative method for registering and enforcing money judgments entered in sister states. This will correct our present "traditional process for enforcing sister state judgments [which] has been criticized as time consuming and inefficient." See page 1 of the LRC Recommendation of November, 1973.

Conclusion XVI.--The State Bar should support the LRC proposal for enforcement of sister state money judgments.

SUMMARY OF CONCLUSIONS

The committee recommends that the Board of Governors take the following actions regarding the following matters:

I. Prejudgment attachment:

A. The State Bar should indicate its opposition to adoption of the statute, unless the following changes are made:

(1) The statute is amended to make it clear that the duties are not subordinate judicial duties. (Section 482.060; Conclusion I, page 3.)

(2) The statute is amended to permit the court to balance equities before granting or refusing a right to attach order. (Sections 484.030 and 484.090(a); Conclusion IV, page 7.)

(3) The solvency factor is removed from the test for determining whether farm products and inventory of a going business can be released from attachment. (Section 488.360(b)(1); Conclusion XII, page 14.)

B. The following changes should be recommended to the LRC and the State Bar should seek amendment of the statute if the LRC does not; but these changes should not be grounds for opposition to the statute as a whole:

(1) Relinquishment of a lien (particularly a statutory possessory lien) should not be an "act" of plaintiff that precludes attachment. (Section 483.010; Conclusion II, page 4.)

(2) The court should have discretion to grant plaintiff a continuance of the right to attach hearing. (Section 484.080(a); Conclusion III, page 5.)

(3) The plaintiff should only be granted an ex parte writ of attachment when great or irreparable damage would occur if such writ were not granted. (Sections 484.010 et seq. and 485.510; Conclusion V, page 10.)

(4) Additional writs should only be granted if

the plaintiff swears that the claim has not been discharged in bankruptcy. (Section 484.320; Conclusion VI, page 10.)

(5) When plaintiff applies for additional writs of attachment, the notice should tell the defendant that he must respond by five days prior to the hearing. (Section 484.340(d); Conclusion VII, page 11.)

(6) The summons and complaint should be served upon the defendant at or before the service of the writ of attachment, even if the writ is issued ex parte. (Chapter 5; Conclusion VIII, page 11.)

(7) The court ought to have discretion to continue a temporary protective order in effect beyond forty days, when the defendant has obtained continuance of the right to attach hearing. (Section 486.090(a); Conclusion IX, page 12.)

(8) The attention of the LRC should be invited to the difference in time limits set forth in §488.350(c) and other sections. (Conclusion X, page 13.)

(9) The method of collecting on credit card purchases, when a keeper is running a defendant's business, should be clarified. (Section 488.360(a); Conclusion XI, page 13.)

(10) The method of attaching a defendant's interest in personal property of an estate should be simplified. (Section 488.430; Conclusion XIII, page 15.)

(11) A proposed section for determining the amount of an attaching plaintiff's undertaking should be forwarded to the LRC. (Section 489.220; Conclusion XIV, page 16.)

(12) The summons and complaint should be served on the defendant at or before the service of the writ of attachment,

even if the writ is issued to obtain quasi in rem jurisdiction; and a redundancy should be eliminated from the quasi in rem jurisdiction chapter. (Chapter 12; Conclusion XV, page 17.)

II. The State Bar should support the LRC proposal regarding Enforcement of Sister State Money Judgments.

Dated: Dec. 24, 1973.

Respectfully submitted

AD HOC COMMITTEE ON ATTACHMENTS

Nathan Frankel
Edward N. Jackson
Andrea S. Ordin
Ronald N. Paul
William W. Vaughn
Ferdinand F. Fernandez, Chairman

Memorandum 74-16

EXHIBIT II

LAW OFFICES

NOSSAMAN, WATERS, SCOTT, KRUEGER & RIORDAN

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April 12, 1974

REFER TO FILE NUMBER

3-156-1

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

Re: A. B. 2948

Dear John:

I understand from Bill Kumli that the Law Revision Commission plans to meet on May 3, 1974 in Los Angeles, at which time it will further consider the Attachment Bill, and the California Credit Associations have requested that I attend that meeting to discuss with the Commission the objections which the Credit Associations have to the Bill in its present form. These objections relate primarily to three areas: The restrictions upon the right to obtain a protective order, the restrictions upon the property of an individual debtor which may be subject to levy and the expansion of the liability of a defendant for wrongful attachment.

In order that you and the members of the Commission may have an opportunity to examine the specific changes which the Credit Associations would propose in this Bill to meet their objections, I am enclosing herewith fifteen copies of a memorandum setting forth the amendments to the Bill which would be necessary in order for the Credit Associations to be able to support it.

I assume that there is no intention to bring this Bill to a vote on the floor of the Assembly prior to the discussion on May 3, 1974 and that we will be given ample notice of any such scheduled vote.

Sincerely yours,

Harold Marsh, Jr.
of NOSSAMAN, WATERS,
SCOTT, KRUEGER & RIORDAN

HM:de
Enclosures
cc: Members of the Legislative Committee
Credit Managers Associations of
California

April 11, 1974

PROPOSED AMENDMENTS TO A.B. NO. 2948
(as introduced January 29, 1974)

1. In line 5, p. 13, change "may" to "shall."

2. Delete subdivision (b) of Section 486.010, lines 26 through 30, p. 28.

3. Delete subdivision (d) of Section 486.020, lines 4 through 6, p. 29.

4. Change "(e)" to "(d)" in line 7, p. 29.

5. Delete Section 486.040, lines 32 through 37, p. 29.

6. Amend Section 486.050, line 38, p. 29 through line 8, p. 30 to read as follows:

"486.050. (a) Except as otherwise provided in Section 486.060, the temporary protective order shall prohibit any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment otherwise than in the ordinary course of business and any payment by the defendant of any antecedent debt.

(b) The order may impose appropriate restrictions on the disposition of the proceeds from any transfer in the ordinary course of business."

7. Amend the introductory portion of subdivision (c) of Section 487.010, p. 32, lines 2 through 5, to read as follows:

"(c) Where the defendant is an individual engaged in a trade, business, or profession (including a partner who is individually liable for the partnership debt) all of his real property and all of his following property if it is used or held for use in the defendant's trade, business, or profession or if property of that type [illegible] financial statement furnished to the plaintiff for the purpose of obtaining credit:"

8. Add a new Section 488.100 at line 28, p. 35, to read as follows:

"488.100. The failure of the levying officer to give any of the notices required by this Chapter but which are not required for the effectiveness of the levy by subdivisions (a) through (n) of Section 488.500 shall not affect the validity of the levy."

9. Amend line 35, p. 42, to read:

"Law or (2) has been surrendered to the issuer or (3) is in the possession of a pledgee or pledgeholder, the"

10. Delete subdivision (c) of Section 490.010, lines 12 through 16, p. 56.

11. Delete line 39, p. 56, and change the comma to a period at the end of line 38.

12. In subdivision (b) of Section 490.020, put a period after the word "undertaking" in line 4, p. 57, and delete the remainder of that subdivision (lines 4-7, p. 57).

13. Delete Section 490.030, lines 8 through 27, p. 57.

14. Delete lines 1 and 2, p. 58, and change the comma to a period at the end of line 40, p. 57.