#D-330 6/23/81

Memorandum 81-22

Subject: Study D-330 - Attachment

The staff plans to prepare a tentative recommendation to revise the Attachment Law. This tentative recommendation will propose substantive changes in the Attachment Law and will propose technical changes to conform the Attachment Law to the proposed enforcement of judgments law.

There are some basic policy issues that we present for Commission consideration in this memorandum. The resolution of these policy issues is desirable before we prepare the tentative recommendation.

Cases in Which Attachment Authorized

Section 483.010 of the Code of Civil Procedure provides that an attachment may be issued only in an action on a claim or claims for money based on contract where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than $500, exclusive of costs, interest, and attorney's fees. Should this amount be increased, for example, to $1,500? This increase would take into account the recent rate of inflation, the burden an attachment puts on the judicial system, the disruptive effect of an attachment on the defendant's business, and the problems created for a defendant when an attachment lien is placed on the defendant's real property. Moreover, a $1,500 minimum would conform to what is likely to be the jurisdictional limit for the small claims court. The $750 present small claims court jurisdictional limit would be raised to $1,500 by two bills now under legislative consideration (SB 160; SB 180).

Exemption of Defendant's Principal Dwelling From Attachment

Section 483.010 of the Code of Civil Procedure provides that if the action is against an individual, an attachment may be issued only on a claim which arises out of the conduct by the individual of a trade, business, or profession. Generally, the types of property that may be attached in an action against an individual are limited to business types of property. However, Section 487.010 of the Code of Civil Procedure permits the attachment of any interest in real property (except leasehold estates with unexpired terms of less than one year). This permits the

dwelling of the individual to be attached. However, under existing law, the declaration of a homestead before or after the attachment (but before entry of judgment) defeats the attachment. Becker v. Lindsay, 16 C.3d 188, 127 Cal. Rptr. 348, 545 P.2d 260 (1976) (declaration of homestead recorded before judgment defeated prior attachment lien). See also Johnson v. Brauner, 131 Cal. App.2d 713, 281 P.2d 50 (1955).

The Commission proposes to repeal the declared homestead. The staff would preserve the right to protect the dwelling against an attachment by permitting the defendant whose real property is attached to have the attachment released from the defendant's dwelling upon a claim of exemption and a showing that the property is the defendant's principal dwelling. This result can be accomplished now by recording a homestead declaration on the attached dwelling, but that right would not exist under the new enforcement of judgments statute. Another reason for the staff recommendation is that the dwelling clearly is not business property, and we believe that an individual's dwelling should not be subject to attachment on a business incurred debt.

An alternative method of dealing with the problem would be to permit the attachment lien to attach to the defendant's dwelling but to permit the defendant to claim the homestead exemption when the property is sought to be sold after the plaintiff obtains a judgment in the action in which the attachment was issued. The plaintiff would then receive the amount of the sale proceeds in excess of the dwelling exemption. We do not like this alternative because it will put a lien on the defendant's dwelling for many years (until judgment is entered and levy of execution made) and will cause serious problems if the defendant needs for some reason to change the place of his or her dwelling or needs to sell or encumber the dwelling. Also, we believe that whether the property is a dwelling should be determined upon an exemption claimed at the time the the attachment is sought rather than on a claim made many years later when the property attached is sought to be sold pursuant to an execution levied to enforce the judgment obtained in the action.

Recognition of Claims of Defendant That Would Diminish Plaintiff's Recovery

Various provisions of the attachment law (CCP §§ 484.020, 484.320, 484.520) provide in substance that the plaintiff's application for a right to attach order include:

> A statement of the amount the plaintiff seeks to recover from the defendant (the amount of the defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery). [Emphasis added.]

The underscored language creates uncertainty. The existing law contains no provision describing the types of claims and the standard (such as "probable validity" of the claim) for determining the extent to which "all claims which would diminish the amount of the plaintiff's recovery" should be taken into account in determining the amount to be secured by the attachment. For example, suppose the defendant claims tort damages as an offset to the plaintiff's claim for unpaid rent on the business premises? How is the court to determine the probable validity of the tort claim and the amount that the defendant will recover on the tort claim? Does it matter that the defendant's claim is not one on which an attachment would issue if the defendant had sought an attachment on his or her claim? Does it matter that the amount of the defendant's claim is not "a fixed or readily ascertainable amount" as is required for an attachment? If any claim--not just one on which an attachment would issue--is to be considered in determining the amount of the offset, the burden on the plaintiff and the court of the prejudging of the validity and of the amount of unliquidated claim would be substantial.

The language concerning the offset appears to have been included in the statute to make clear that the amount to be secured by the attachment is the net amount that the plaintiff would recover in the action. However, when the Attachment Law was drafted, the Commission included this language (which was drawn from the former statute) and did not consider the problems created by the statutory language.

The existing Attachment Law contains no provision governing the determination of the amount of the offset. The law provides that the defendant may object to a right to attach order and the defendant's notice of opposition shall state the grounds on which the defendant opposes the issuance of the order and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. See, e.g., CCP § 484.060. The law requires the court to issue a right to attach order, which shall state

the amount to be secured by the attachment, if the court finds, among other things, that the "plaintiff has established the probable validity of the claim upon which the attachment is based." Nothing is said in the statute about the court making any determination concerning "claims which would diminish the amount of the plaintiff's recovery."

The problem created by the existing law has been brought to the Commission's attention by Sanford M. Cipinko, a San Francisco attorney, with the suggestion that offsetting claims should either be ignored or limited to claims on which an attachment could be issued. See Exhibit 1 (attached). It has been pointed out that, as a practical matter, the defendant is motivated to make an unmeritorious claim based on tort or some other theory merely to defeat the attachment effort and that the effect of permitting such a claim is to require the production of evidence by both sides relating to the merits of defendant's claim and thus to require a trial of that claim in the attachment proceeding.

One method of dealing with this problem would be to revise the existing Attachment Law provision to provide in substance:

(1) The plaintiff's application must include "a statement of the amount to be secured by the attachment."

(2) The application shall be supported by an affidavit showing that the plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based for an amount not less than the amount to be secured by the attachment.

(3) An attachment is permitted only if the court determines that the plaintiff has established the probable validity of the claim upon which the attachment is based "and the plaintiff probably will obtain a judgment against the defendant for an amount not less than the amount to be secured by the attachment."

This scheme would give the court some discretion as to the amount to be secured by the attachment in a case where the defendant claims that the amount of the plaintiff's claim is excessive in light of the amount of the plaintiff's probable recovery in the action. On the other hand, it would eliminate from the statute the confusing language concerning "claims which would diminish the amount of the plaintiff's recovery." The staff proposal would not necessarily eliminate the possibility of the defendant objecting to the amount to be secured by the attachment on the basis of a claim based on tort.

The revised statute would be consistent with the Judicial Council form which ignores the language concerning the offset to the plaintiff's claim. The official form merely requires that the application state: "Plaintiff seeks to recover from Defendant the amount exclusive of interest of $." The form also requires the application to state the amount of included costs and estimated allowable attorney's fees that are included in the amount which is sought to be recovered.

An alternative to the proposal outlined above would be to revise the Attachment Law to require that the offset must be based on a claim on which an attachment could be issued and to require that the probable validity of the claimed offset be established. This would provide certainty, but it would permit an attachment in a case where the court could be persuaded that the defendant's recovery on a counterclaim based on a tort theory will preclude any recovery by the plaintiff.

Another alternative would be to give the court discretion to consider claimed offsets, but this alternative would not provide certainty to the law.

Opportunity of Defendant to Set Aside Right to Attach Order Obtained on Noticed Motion

The existing Attachment Law permits a defendant to have a right to attach order obtained ex parte set aside upon a showing that the plaintiff was not entitled to the order. However, where the right to attach order is obtained on noticed motion, the defendant does not have the another opportunity to have the court review whether the order was properly issued. It has been suggested by Lawrence Silver, a Beverly Hills attorney, that a second opportunity be provided. See letters attached as Exhibit 2. In support of this suggestion, it is stated that the defendant who is served with a notice of hearing on a plaintiff's application for a right to attach order may not be in a position to oppose the issuance of the right to attach order because the defendant does not have an adequate time within which to investigate and resort to discovery in an effort to determine the facts upon which the opposition is to be based.

A copy of the plaintiff's summons and complaint, a notice of application and hearing, and a copy of the application and of any affidavit in support of the plaintiff's application is required to be served upon the

defendant at least 20 days prior to the hearing and the defendant who desires to oppose the issuance of the order must file with the court and serve on the plaintiff a notice of opposition and supporting affidavit not later than five days prior to the date set for hearing. This gives the defendant 15 days within which to investigate the facts and file and serve the notice of opposition and supporting affidavit. However, the Attachment Law further provides: "The court may, in its discretion and for good cause shown, grant the defendant a continuance for a reasonable period to enable him to oppose the issuance of the right to attach order."

The staff recommends no change in the Attachment Law in response to this suggestion. We believe that there is adequate provision in the existing statute for the defendant who needs more time to investigate the plaintiff's claim. We believe that it would be poor policy to allow a defendant against whom a right to attach order has been issued after a noticed hearing to obtain another hearing on whether the order was properly issued. Moreover, the plaintiff who obtains a right to attach order must provide an undertaking to protect the defendant against a wrongful attachment. The defendant can obtain an increase in the undertaking upon a showing that it is not adequate to cover the amount of the probable recovery for wrongful attachment if it is ultimately determined that the attachment was wrongful. Adoption of the suggestion would place an unreasonable burden on the courts and would give defendants an opportunity to place additional expenses of a second hearing on a plaintiff who has already gone to the expense of one hearing on noticed motion.

Attachment of Inventory of Going Business

Ordinarily, under the Attachment Law, tangible personal property in the possession of the defendant is attached by the levying officer taking custody of the property. CCP § 488.330. However, the procedure for attachment of some property--such as equipment of a going business and farm products or inventory of a going business--is governed by special provisions. The procedure for attachment of inventory of a going business is complex and creates problems.

First, to attach inventory of a going business, if the defendant consents, the levying officer places a keeper in charge of such property

for a period not to exceed 10 days. The keeper takes custody of the proceeds of sales for the purposes of the levy unless otherwise authorized by the plaintiff. If the defendant does not consent to the keeper, or in any event after the end of the 10-day period, the levying officer takes exclusive custody of the inventory unless other disposition is made by the parties to the action.

The plaintiff has an optional method for attaching the inventory of a going business. If the plaintiff so instructs the levying officer, the attachment is made by filing a notice of the attachment lien with the office of the Secretary of State. The lien, where permitted by the writ of attachment or court order, extends to identifiable cash proceeds or after-acquired property, or both. A lien acquired by filing with the Secretary of State provides the plaintiff "with the same rights and priorities in the attached property as would be obtained by a secured party who perfects a security interest (other than a purchase money security interest) in such property by filing a financing statement at the same time and place."

The lien on inventory created by filing with the Secretary of State may be worthless and existence of the statutory procedure may create a trap for the unwary plaintiff who is unaware of the limited inventory to which the lien attaches. This is because a security interest attaches to the inventory of a retail merchant held for sale only to the extent that the inventory of the retail merchant consists of durable goods having a unit retail value of at least five hundred dollars. The effect is that the attachment lien on inventory of a retail merchant held for sale may be worthless, but the unwary plaintiff may be unaware of this limitation. It has been suggested by Professor Tevis of Loyola Law School that the Attachment Law provision be revised to provide that the lien attaches to <u>all</u> inventory, whether or not a security interest could be created in the inventory. See Exhibit 3 attached. The difficulty with this suggestion is that a person would not be expected to check with the Secretary of State to determine whether there is a lien on inventory in a case where a security interest could not be created with respect to the inventory. The statute might be amended to insert language that makes clear the limited extent of the lien. But this would make the statute much more complex than the existing statute which incorporates the Commercial Code provisions applicable to security interests.

The staff believes that the best alternative is to eliminate the provision for a filing with the Secretary of State with respect to inventory. This would leave the keeper alternative as the method of attachment of inventory.

Consideration might also be given to allowing the plaintiff the option of having the levying officer take exclusive custody of the inventory levied on pursuant to the writ of attachment rather than requiring a 10-day keeper even though the defendant consents to the keeper. The 10-day keeper provision is included in the existing statute to allow the defendant a short period of time to claim an exemption (in the case of a natural person who is entitled to a "hardship" exemption) and to allow all defendants time to work out some arrangement for payment or other arrangement for continuation of the going business before the business is put out of business by seizure of the inventory. This was considered appropriate in the case of attachment because the plaintiff has not yet obtained a judgment on his or her claim, merely a court determination that the claim is "probably valid." An alternative to eliminating the required 10-day keeper provision (where the defendant consents to the keeper) would be to require a 10-day keeper only in the case of an individual defendant. In the case of a corporate or partnership defendant, the defendant would not be entitled to claim any exemptions. The staff recommends this latter alternative, but it should be recognized that adoption of this recommendation will make attachment much more effective and disruptive of the business of the corporate or partnership defendant whose inventory is seized and who is put out of business.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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July 11, 1980

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Attn: Mr. DeMoully

Dear Mr. DeMoully:

It was a pleasure speaking with you. As I told you on the phone, I've been presented with a problem which the attachment statute fails to deal with clearly. The issue is whether or not the words "all claims" in CCP §484.202(b) encompasses a cross-claim for negligence. If it does, what is the standard? Inasmuch as the statute itself does not provide for a negligence claim to be used in seeking a writ of attachment, it seems questionable if it would allow a negligence claim to be interposed as a method to defeat an acknowledged provable debt.

I've researched this issue and have not found any cases which shed any light on the problem. Also, as you stated, the commission apparently overlooked this problem when revising the attachment statute as the commission was focusing on different problems within the attachment statute itself.

If or when you come across any memoranda addressing this issue, would you kindly forward them to me? In the meantime, I hope that the commission has some extra time to provide some input to the legislature concerning this problem.

Thank you very much for your cooperation.

Sincerely,

SANFORD M. CIPINKO

SMC:agt

cc: Theodore W. Rosenak

Memorandum 81-22

Exhibit 2

5/5/81

SEP 2 1980

#D-330

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August 28, 1980

Alister McAlister, State Representative
California House of Representatives
District Office
554 Valley Way
Milpitas, CA 95035

Re: The Attachment Law, CCP §482.010 et seq.

Dear Representative McAlister:

I write to you for assistance as the sponsor of the Attachment Law of 1974 (Assembly Bill 2948) in determining the legislative intent.

As I understand the concept of attachment law it is to grant, on a showing by the plaintiff of sufficient certainty that he may collect upon his cause of action, the right to pre-judgment attachment to secure the judgment upon such certain right.

Attachment is provisional relief, certainly with no greater sanctity than the relief accorded to a preliminary injunction, which likewise is usually granted at the beginning of a law suit. If a court, in its wisdom, grants the preliminary injunction, the party against whom the injunction has been imposed can, upon later discovery of facts, present them to the court for the dissolusion of the preliminary injunction.

I am trying to determine whether it was the Legislature's intent in granting the provisional relief of pre-judgment attachment to allow the party whose property has been attached, after a noticed hearing, to move the court to set aside the attachment on the grounds of the evidence subsequently presented.

I have such a case in which an attachment was granted in an amount in excess of a million dollars at the very beginning stages of the lawsuit. Although certain discovery was engaged in for purposes of the attachment hearing, evidence was not available for the attachment hearing which would have, without argument had it been available, precluded the issuance of the attachment.

I have brought a motion pursuant to 485.240 of the California Code of Civil Procedure which seems to grant the power to set aside the attachment under such circumstances. My opposing counsel has argued that that section has only special applicability and not generally available because of the language within that section that says "pursuant to a writ issued under this chapter..." The chapter involved, Chapter 5, which provides for the grant of attachments on an ex parte basis. My opposition argues that it was the intention of the Legislature only to provide for the vacation of an attachment which was granted ex parte and not one which was granted after a noticed hearing.

It seems to me that the Legislature's intent was otherwise. But because it was provisional relief the usual rules regarding provisional relief should apply and that an attachment which was either wrongfully issued at the outset or which can be demonstrated to have been wrongfully issued on the basis of evidence not proffered at the original hearing can be set aside. The court should be permitted to examine such evidence and determine to vacate the attachment. In support of this proposition I urged consideration of the Legislative Committee Comment--Senate which follows the section of the statute in the Printed Codes. It is quoted below:

> "Section 485.240 is similar in content and purpose to the last two sentences of former Section 538.5. Former Section 556 also provided a procedure for setting aside a writ that had been improperly or irregularly issued although former Section 558 specifically authorized amendments to be made to prevent discharge. The latter provision is unnecessary and is not continued by statute; the court has the inherent power to permit a plaintiff to amend his application or supplement his showing in support of the attachment at or prior to the hearing.
>
> Although in the situation provided for here, the defendant is the moving party, the plaintiff nevertheless continues to have the burden of proving (1) that his claim is one upon which an attachment may be issued and (2) the probable validity of such claim. Compare Section 484.090." [Emphasis added]

Two matters are apparent. The prior section under the old attachment law §556 provided for the setting aside of an attachment. Further, the underlined language contains a "negative pregnant" which implies the continued vitality of §556.

The trial court dismissed my motion to set aside the attachment on the ground that there was no basis which permitted the court to hear it. I have noticed an appeal.

I would appreciate any assistance you could be to me in determining the Legislature's intent. If I can be of any further assistance to you in this matter, providing you with additional research or more materials, I would be delighted to do so.

In any event, I would be indebted to your office if you could provide me with a copy of the bill as originally introduced in each house and any amendment(s) made thereto, together with any other materials which may be in your files regarding the legislative history, "official or unofficial".

Thank you in advance for your anticipated cooperation.

Sincerely,

Lawrence Silver

LS/ss

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October 9, 1980

Mr. Stan G. Ulrich
California Law Revision Commission
4000 Middlefield Road
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Palo Alto, CA 94306

Dear Mr. Ulrich:

I am in receipt of your letter of September 15, 1980. Although this letter is in response to the request that you have made in your last paragraph, dealing with my particular case, I would first like to address a practical problem in representing defendants in any attachment proceeding even upon a noticed hearing. As you are no doubt familiar, attachments are often sought at the beginning of litigation. At that time, usually plaintiff's lawyer has a great advantage in that his client has provided him with substantial facts which have been sorted out legally for the preparation of the complaint and the forms relating to attachment. Opposing counsel, under the time pressures of responding to a noticed motion, a complaint, examining the possibilities of a cross-complaint, and examining the possibilities of settlement is not able to muster facts which would go to the issue defeating the claim or establishing affirmative defenses thereto. Consequently, in terms of fact gathering, the parties are in an unequal position at the time of an attachment hearing to present the facts relating to the attachment.

In my particular case about which I wrote to Assemblyman Alister McAlister, the facts were both different from and similar to the general pattern that I have outlined above. In connection with that matter, I was able to take the deposition of nine of the officers above the plaintiff in the case seeking an attachment in the amount of $1,500,000.00. I should note that these depositions were "general" and related to defeating generally, rather than specifically, the causes of action asserted against my client. Due to an accident affecting the court reporter, some of the transcripts were not available until the day before my opposition papers were due. I requested my opposing counsel to

voluntarily consent to a continuance of the hearing to allow (1) plaintiff's deponents to read and sign their deposition transcripts and (2) to allow me to attach to my opposition papers, selected portions of the transcript seeking to defeat "generally" the causes of action asserted. My opposing counsel declined the request for a voluntary continuance of the hearing, but agreed that when the transcripts were produced that they would be deemed, for the purposes of the attachment hearing, as if read and signed. Further that, on the date of the hearing, he would raise no objection to my introducing portions of the transcript into evidence for consideration by the court. Given that assurance by my opposing counsel, I concluded that the attachment should go on as scheduled. In my opposition papers, to the extent that I was able, I made specific references to the deposition transcripts which were available and general references to the deposition transcripts which were tardily received. At the hearing, then Commissioner, now Judge Geernaert, refused to accept the Stipulation of Counsel and refused to consider any of the deposition testimony at all in consideration of whether or not to grant an attachment. Indeed the Commissioner took the view that I had presented "no evidence" in opposition to the attachment. The ruling of the Commissioner came to me as a surprise and consequently, at the hearing, I requested a continuance for the purpose of presenting the evidence contained in the depositions to the Commissioner in the fashion which he deemed appropriate. Parenthetically I might add, that in experiences before the Commissioner in the past, he had approved such Stipulations and had admitted into evidence at the time of the hearing, selected portions of depositions so long as there was no objection by opposing counsel. His refusal to follow this "practice" in my view was an abuse of discretion. Nonetheless, I viewed, upon my Motion to Set Aside the Attachment, the deposition transcript testimony as "newly discovered evidence" since it was evidence which I was unable to "produce" at the original hearing.

At the time of the Motion to Set Aside the Attachment, I was able to procure discovery defeating in specific, portions of plaintiff's claim to cause of action. Moreover, I was able to demonstrate by evidence subsequently discovered, that the computations by the plaintiff in terms of the claim of were wholly without foundation and inaccurate. I suppose I should note that plaintiff's claim consisted of alleged deficiencies upon the sale of approximately 5,000 motor vehicles and sought to recover upon an alleged guarantee made by my client to the plaintiff. During the intervening period of time I was able to demonstrate a number of additional facts: (1) that the deficiencies alleged were not as stated; (2) that the deficiencies as alleged had in

part been paid; (3) that the deficiencies alleged were miscomputed. Even since the time of the Motion to Set Aside the Attachment, a subsequent discovery would enable me to prove that the deficiencies alleged were not at the fault of my client, but the occurrence of the deficiencies were at least in part, and in my view wholly the fault of the plaintiff rather than the defendant. I was further able to demonstrate, at the time of the Motion to Set Aside the Attachment that there existed a security interest in properties of the alleged debtor and that the plaintiff had not released its security interest as it had claimed that it had. This may appear to be a subtle, but it is a vital point. It was only after the attachment hearing that I was able to secure from the Secretary of State a complete file of the alleged debtor's securities interest filings. Contrary to the representations of the plaintiff, it had not released security interest it had once claimed. Consequently, having determined that fact I was able to show that there was still property owned by the alleged debtor subject to the continued security interest of the plaintiff. I might add, at this point, that it was not until after the attachment hearing that my client became aware of some additional assets that it had including but not limited to refunds for overpayment of taxes and causes of action against third parties, as well as returns for the assignment of outstanding debts owed to the alleged debtor in the litigation. Although I believe I acted with due diligence to determine all of these matters prior to the attachment hearing, it was physically impossible for me to determine all of these before the hearing. The Commissioner, upon the Motion to Set Aside the Attachment, in his denial, apparently determined that these facts, although subsequently "discovered" may have been able to have been discovered prior to the first attachment hearing, and consequently declined to consider them as "newly discovered evidence". However, in addition, subsequent to the attachment hearing, the litigation, upon the claim of the alleged debtor, was commenced to secure a claim of approximately $1,700,000.00. Since the "security interest" of the plaintiff covered all "causes of actions and claims", this cause of action, constituting a matured claim, the filing of which occurred subsequent to the attachment hearing was appended to the motion to set aside the attachment. Apparently, the Commissioner, declined to consider this as well, even though it was a claim, which had become instituted litigation, after the attachment hearing.

In order to assist you further in this matter, which I consider to be of tremendous importance, I have enclosed, without exhibits, the Motion, which I filed, to set aside

the attachment. I have also enclosed the reporter's transcript of the initial attachment hearing as well as the reporter's transcript of the hearing of June 23, 1980.

I draw your attention to page two, line 18, in which Commissioner Levin states that an appeal from the grant of an attachment lay pursuant to Section 904.1(e). Of course, no reading of §904.1(e) provides for an appeal from the grant of an attachment. It is not an appealable order, although I believe that the statute should be amended to so provide.

I am in the process of appealing the denial of the Motion to Set Aside the Attachment pursuant to §904.1(e). If it would be of assistance to you I would be happy to send to you a copy of my Brief at that time.

I do believe that revision of the attachment law is appropriate. There are a number of areas where changes should be affected. First would be to allow an appeal or rehearing of the grant of an attachment with expedited handling by the Court of Appeals. Second, since an attachment is drastic and provisional relief, a provision should be made to have it set aside upon further evidence. I believe in my letter to Assemblyman McAlister I pointed out that the equity notion that a preliminary injunction, once granted, may be set aside at any time upon additional evidence. Obviously, this should apply to attachments.

I do not believe that there should be any limitation on the number of applications which may be made to set aside an attachment. The practicalities of preparing a motion and the expense involved thereto will be limitation enough upon the presentation of "spurious" motions to set aside an attachment. Further, in the event that a court determines that a motion to set aside an attachment is spurious, meritless and/or frivolous, the sanction, available to the court, of an award of attorneys fees should be sufficient dissuasion to preclude an abuse of such a right.

Because I feel this matter is of such importance, I am available at your discretion to provide you with further information, testimony, or thoughts upon this issue. Since I believe that the moving force should come from the Law Revision Commission, I would appreciate hearing from you,

from time to time, upon your determination as to the merits of my concern as well as the actions in which you intend to take.

Sincerely,

Lawrence Silver

LS/ss

LOYOLA LAW SCHOOL

May 20, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Gentlemen:

In an accompanying letter I have commented at length on Assembly Bill 707. This has motivated me to write concerning a matter related to the attachment law. Specifically I refer to CCP §488.360 which deals with the method of levy upon farm products and inventory of a going business.

§488.360(c) provides an alternative method of levy by filing a notice of lien with the Secretary of State. My concern is with the next to last sentence of this subsection. It provides that the lien acquired by filing provides the plaintiff with the same rights and priorities in the attached property as would be obtained by a secured party who perfects a security interest in such property by filing a financing statement at such time and place. If this is taken literally it could prove to be a trap for the unwary.

Under §9102(4) of the Comm. Code severe limitations are placed upon the inventory of a retail merchant that may be subject to a non-purchase money security interest. Essentially only big ticket items can become collateral. Thus it seems to me that if a plaintiff attempts to attach the inventory of a retail merchant consisting of "small ticket" items by this alternative method of levy that he or she will not obtain a lien. I suspect that §9102(4) is not so well known as to make this possibility apparent.

I think that consideration should be given to eliminating this risk by making it clear that the filing will create a lien on the inventory of a retail merchant, if that is, as I believe, the intent of this provision.

Very truly yours,

Lloyd Tevis

Lloyd Tevis
Professor of Law

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