#39 12/8/69

Memorandum 69-146

Subject: Study 39 - Attachment, Garnishment, and Exemption From Execution

This memorandum, and Memorandum 69-126 at page 6, provides background information on the status of Study 39 (Attachment, Garnishment, and Exemption From Execution)--a topic not under active consideration. Exhibit I sets forth the 1957 statement requesting authority to study this topic. Exhibit II, an extract from a 1957 memorandum, states the nature of the research study contracted for in 1961.

Origin of Topic and Work Completed to Date

From time to time, during the early 1950's, the State Bar considered various piecemeal revisions of the law relating to attachment, garnishment, and property exempt from execution. Finally in 1955, the Conference of Delegates passed a resolution that a comprehensive study should be made of this entire topic. After due consideration of this resolution, the Bankruptcy Committee of the State Bar and the Board of Governors requested the Commission to include this subject on its agenda. Resolution Chapter 202 (1957) authorized the Commission to study this topic.

In 1958, the Commission retained Professor Stefan Riesenfeld to prepare a background study on this topic (see Exhibit II). This contract was renogiated in 1961. However, no pressure was put on Professor Riesenfeld to begin work on the background study because of the press of other matters (Governmental Liability and Evidence).

Several years later, Professor Riesenfeld asked to be relieved of his obligations under the contract and the contract was terminated.

Disposition of Topic

A quick review of the law relating to attachment, garnishment, and the like, indicates that there has been considerable activity in this field during recent years.

The State Bar--the source of the suggestion that the Commission study this topic--has not maintained a hands-off policy with respect to this topic merely because it has been assigned to the Commission. In fact, the State Bar has maintained an active legislative program on this topic. Nearly every year since 1957, the State Bar legislative program has included one or more provisions relating to attachment, garnishment, and the like.

Further, Mr. Cook reports that a review of the problems discussed in the statement requesting authority to study this topic reveals that most of the problems recently have been eliminated or have been the subject of bills that were not enacted. This topic has received careful consideration by the Legislature as is manifest from the numerous bills introduced last session and the 1964 interim study of this topic by the Assembly Interim Committee on Judiciary.

In light of the strong interests that would be affected by any meaningful revision, chances for enactment of a comprehensive reform bill do not appear to be good. For example, Assemblyman Braithwaite's bill revising exemption law (which passed both houses in 1968 and was vetoed by the Governor) was held in committee in 1969. Nevertheless, there appears to be a need for comprehensive legislation in this area. Basic defects in the law apparently exist. See, for example, Exhibit III (law review article suggesting basic change in attachment procedure--forwarded by its author for Commission consideration). Comprehensive legislation would

require a thorough study of this topic. The Commission and its staff presently is engaged in work on a number of other topics that require all of their resources. Moreover, we do not have funds to finance such a study by an outside consultant and our budget for the fiscal year beginning July 1, 1970, will have only a modest amount of funds for research studies. Accordingly, the staff suggests that this topic simply be retained on our agenda and that we attempt to obtain funds to finance the research study during the 1971-72 fiscal year.

What, if anything, does the Commission wish to do with respect to the letter and law review article attached as Exhibit III.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 69-146

EXHIBIT I

Statement requesting authority to study topic 39.

Topic No. 2: A study to determine whether the law relating to attachment, garnishment, and property exempt from execution should be revised.

The commission has received several communications bringing to its attention anachronisms, ambiguities, and other defects in the law of this State relating to attachment, garnishment, and property exempt from execution. These communications have raised such questions as: (1) whether the law with respect to farmers' property exempt from execution should be modernized; (2) whether a procedure should be established to determine disputes as to whether particular earnings of judgment debtors are exempt from execution; (3) whether Code of Civil Procedure Section 690.26 should be amended to conform to the 1955 amendments of Sections 682, 688 and 690.11, thus making it clear that one-half, rather than only one-quarter, of a judgment debtor's earnings are subject to execution; (4) whether an attaching officer should be required or empowered to release an attachment when the plaintiff appeals but does not put up a bond to continue the attachment in effect; and (5) whether a provision should be enacted empowering a defendant against whom a writ of attachment may be issued or has been issued to prevent service of the writ by depositing in court the amount demanded in the complaint plus 10% or 15% to cover possible costs.

The State Bar has had various related problems under consideration from time to time. In a report to the Board of Governors of the State Bar on 1955 Conference Resolution No. 28, the Bankruptcy Committee of the State Bar recommended that a complete study be made of attachment, garnishment, and property exempt from execution, preferably by the Law Revision Commission. In a communication to the commission dated June 4, 1956 the Board of Governors reported that it approved this recommendation and requested the commission to include this subject on its calendar of topics selected for study.

Memorandum 69-146

EXHIBIT II

Original Research Proposal for Study 39

12/12/57

Memorandum No. 2

Subject: Study No. 39: Attachment, Garnishment and Property Exempt from Execution - Proposal for Research Consultant Study by Professor Riesenfeld.

* * * * *

1. The subject of the study should be the California law relating to attachment, garnishment, execution, property exempt from garnishment attachment and execution, and supplemental proceedings. Generally, this is the subject matter covered by Sections 537 through 570 and Sections 681 through 723 of the Code of Civil Procedure.

2. The study should be carried forward in two main phases. The first phase should consist of the preparation of a full written study by the research consultant similar in form to studies prepared by consultants on other subjects - i.e., pointing up the various problems involved, discussing the existing statutes and cases bearing on those problems, exposing questions both as to existing gaps, ambiguities and conflicts and as to policy problems involved which require legislative answers, and suggesting possible solutions for the problems. When this study has been received, considered and accepted by the Commission the second phase of the study will be reached. This might be described loosely as a kind of field study, the object being to ascertain what the existing practices in the field are and to obtain the reaction of the law enforcement officers, banks, and other interested persons to proposed legislation under consideration by the Commission.

* * * * *

Memo 69-146

EXHIBIT III

LAW OFFICES

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PLEASE REPLY IN DUPLICATE

AND REFER TO FILE NO. _____

Mr. John H. DeMoully
School of Law
Stanford University
Palo Alto 94305

Dear Mr. DeMoully:

There is enclosed a reprint of an Article published in a recent issue of the University of San Francisco Law Review relating to wrongful attachment litigation and contains proposals for reform of our existing procedure.

It is forwarded to you in the belief that this is a subject in which you have a substantial interest.

Your thoughts and comments will be appreciated.

Very truly yours,

LEON J. ALEXANDER

LJA/meg
encl.

Wrongful Attachment Damages Must Be Fixed in the Original Suit

by Leon J. Alexander

Reprinted from UNIVERSITY OF SAN FRANCISCO LAW REVIEW, Vol. IV., No. 1, October 1969

Wrongful Attachment Damages Must Be Fixed in the Original Suit

*by Leon J. Alexander**

INTRODUCTION

Most civil lawsuits are for money. Each side marshals reasons for its cause, as plausible as skillful counsel can devise. Certainty is never realized, and the outcome is "an unknown factor prior to final judicial determination."[1] Nevertheless, someone must be allowed to keep the disputed sums throughout the intervening time. Abstractly, it is no more "just" to let the defendant retain them during the lawsuit than it would be to let the plaintiff have them until the fight is over, or even to impound them in the County Treasury. It is not logic that decides such matters, however, but social history.[2] Our practice leaves the defendant in unimpeded possession of the funds pending trial, no matter how recently or by what improper means the money first came into his hands. An ancient remedy now plays its role to equalize this situation. Attachment permits a plaintiff in certain cases to impound (but not obtain for himself) contested sums pending trial, provided he posts a bond to pay all damages caused by the attachment if he does not win.[3] Unfortunately, the procedures in effect today deny adequate recovery on the bond for the successful defendant. They must, therefore, be changed.[4]

* A.B., 1947, Brooklyn College. LL.B., 1950, Yale University. Senior partner, Alexander, Inman & Fine, Beverly Hills. Member, Los Angeles Bar, California Bar.

[1] Byard v. National Automobile and Casualty Insurance Co., 218 Cal.App.2d 622, 32 Cal.Rptr. 613 (1963).

[2] Claim and Delivery is a comparable procedure that delivers chattels in dispute to the plaintiff. In interpleader actions, funds may be impounded with the court. Almost anything might happen through a receivership or injunction. Such dispositions are not less "just" than leaving property with the defendant; they are merely less familiar.

[3] CAL. CODE CIV. PROC. §539. Throughout the text, reference to "plaintiff" means the party seeking affirmative relief, even though the party might be a defendant, cross-complainant, appellant or intervenor who has posted a judicial bond. The word "defendant" means the other party. *See* Allers v. Beverly Hills Laundry, 98 Cal.App. 580, 277 Pac. 337 (1929).

[4] It is recognized that extensive reform of the procedures for procuring attachment bonds and also the items of damages that are recoverable in wrongful attachment are long overdue. Such matters are outside the scope of this article, which is limited to procedural aspects of bond litigation.

I

THE ATTACHMENT LIEN

Attachments may work great hardship on the defendant. They are frequently "legal blackmail," invoked deliberately for that very purpose. As stated recently, "Even though the attachment lien apparently had no real economic value . . . it was technically valid and had strategic value or bargaining value . . . . The law gives . . . no economically feasible remedy except to press the nuisance value of his attachment."[5] It is because of this unfairness that there must be rapid and effective relief on the undertaking in those relatively rare cases when the defendant prevails. In the words of a widely used treatise, the bond "is actually an insurance that the defendant in an attachment action will be paid" his damages, provided only that he wins his suit.[6] In fact, this is not true. Bonds do not "insure" payment to the injured defendant. Meaningful relief is often mere illusion. That is because recovery on the bond requires extensive litigation. A second suit against the bonding company must take its place with other newly filed actions and carry on through the laborious processes of our civil courts. It would be much better to include damages arising from an improper attachment as an issue in the trial and appeal of the first case. Then the bond would be of real value to a wronged defendant.

Remember how lawsuits really work. Plaintiffs rarely make moderate demands. Uncertainties and offsets are usually ignored in the complaint, and every doubt resolved there in plaintiff's favor. Attachment issues, therefore, in an inflated amount.[7] Any claimant in a permitted case

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[5] Imperial Metal Finishing Co. v. Luminous Ceilings West, Inc., 270 Adv.Cal.App. 420, 75 Cal.Rptr. 661 (1969). We are not concerned with the social problems involving garnishment of wages. Even in standard business transactions, attachments are often used as pressure tactics.

[6] 5 CAL. JUR.2D, REV., 948. The remedies legally available upon the undertaking have led the author elsewhere to propose the use of bonds in related fields where procedures now in use are quasi-attachments, but where there is at present no effective remedy available for a successful defendant. *See* Alexander, *Lis Pendens Reform By Land Attachment*, 43 L. A. BAR B. 419 (1968); Alexander, *Claims in Interpleader—Abuse and Remedy*, 44 CAL. S. BAR J. 210 (1969).

[7] Recognizing possible liability if the plaintiff loses, attorneys sometimes attach for less than the amount permitted by the pleadings. This does not change the principles involved. Fear of wrongful attachment suits is in practice rarely a deterrent to the use of that remedy. It is the author's belief that deliberate over-attachment is much more common than deliberate under-attachment.

may obtain one easily, if he makes an affidavit and files an undertaking. There are few problems in posting plaintiffs' bonds. The face amount is merely "one-half of the principal amount of the total indebtedness or damages claimed, . . . excluding attorney's fees,"[8] and even this sum may be reduced on application to the Court. The premium for such a bond is low, a modest 1% a year, and bonds are readily available to plaintiffs who will indemnify the bonding company[9] and whose net worth is 10 times the obligation on the bond. On bonds below $5000.00, no net worth inquiry is generally made.

Release bonds are more difficult to obtain. Although the premium is also 1%, the practice calls for liquid collateral posted with the bonding company in the face amount of the bond. Few defendants have the means to give security, and even those who can, may not use a release bond because property would be impounded either way, and the enforced collateral of the attachment proceedings is often preferable to finding new security, acceptable to the surety. Thus, most attachments remain in force until the trial is over.

Trials take time even when all parties want a swift decision. If either side seeks to delay, he generally can do so easily. Then, when the trial is finally over, the losing plaintiff may appeal, prompted at least in part by fear of liability on the attachment bond.[10]

More time goes by. Few civil cases creep from complaint to trial to judgment to appeal to final resolution in under four years.

The law now is that the judgment must be final before the successful

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[8] CAL. CODE CIV. PROC. §539.

[9] Bonding companies regularly require indemnities. *See* Anchor Casualty Company v. Strube, 221 Cal.App.2d 29, 34 Cal.Rptr. 295 (1963); United States Fidelity & Guaranty Co. v. More, 155 Cal. 415, 101 Pac. 302 (1909).

[10] Despite the express language of CAL. CODE CIV. PROC. §539 (". . . the plaintiff must file, . . . a written undertaking . . . that plaintiff will pay all costs . . . and all damages"), the unsuccessful plaintiff is not liable in wrongful attachment, although he is liable for malicious attachment. It is a minor legal mystery why this should be in the rule. It is based on the claim that permitting liability would discourage litigation and be contrary to public policy. *See* Asevado v. Orr, 100 Cal. 293, 34 Pac. 777 (1893). The rule was first applied to attachments in Vesper v. Crane Co., 165 Cal. 36, 130 Pac. 876 (1913), and has been followed blindly ever since. Finn v. Witherbee, 126 Cal.App.2d 45, 271 P.2d 606 (1954); Bailey v. McDougal, 196 Cal.App.2d 178, 16 Cal.Rptr. 204 (1961). The statute in Claim and Delivery (CAL. CODE CIV. PROC. §512) differs from that contained in the statutes on attachment or injunction bonds, and does not say that the plaintiff will pay the damages. However, since the plaintiff indemnifies the bonding company, this is not a practical problem, unless personal sureties are used.

defendant may file suit on the attachment bond to recover the damages that he has suffered.[11] His new complaint proceeds as other lawsuits do. The amounts involved, however, are relatively small. This second suit is only for the actual damages caused by the attachment; punitive damages are not allowed, even though still within the limits of the bond.[12] This second suit therefore must seek less money than the first one (the statutory bond amount is half the original principal claimed) and may involve only a small fraction of that amount.[13] Reducing the amount in dispute, however, does not reduce the cost of the second trial. Bond litigation is a complex field; one may assume bonding companies will use any available technicality to increase the burdens on the claimant.

The surety should not be wholly blamed for this. It is inherent in our legal system. We insist that everyone be fully heard in order to achieve "justice." This means, in practice, interminable full-dress debates. The reported cases in this field illustrate the problems facing the successful defendant in the second suit. All sorts of technical issues must be proved and pleaded to the satisfaction of the Court. Questions may be raised about the propriety of the original attachment proceedings,[14] the existence of security,[15] the ownership of the attached property,[16] the nature of the cause of action under which the original plaintiff attached and failed to prevail,[17] the apportionment and necessity of attorney's fees or other damages[18] that are claimed, the meaning of the conduct of the parties[19] or of the attachment undertaking and even the parties who are protected thereby.[20] The list seems endless of the matters raised by sophisticated

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[11] Smith v. Hill, 237 Cal.App.2d 374, 47 Cal.Rptr. 49 (1965).

[12] Carter v. Agricultural Insurance Company, 266 Adv.Cal.App. 886, 72 Cal.Rptr. 462 (1968). The Supreme Court has not yet ruled on this point, and there is dicta to the contrary. A strong policy argument could be made against any limit in wrongful attachment on the surety's liability, except the actual damages to the defendant. An even stronger one could be made to hold the plaintiff liable for all damages, as though he had converted the property.

[13] In *Carter, supra* note 12, for example, the face amount of the attachment bond was $24,500.00 and damages sustained by defendant proved to be under $700.00.

[14] Clark v. Andrews, 109 Cal.App.2d 193, 240 P.2d 330 (1952).

[15] Goldman v. Floter, 142 Cal. 388, 76 Pac. 58 (1904).

[16] Ramirez v. Hartford Accident & Indemnity Co., 29 Cal.App.2d 193, 84 P.2d 172 (1938).

[17] Michelin Tire Co. v. Bentel, 184 Cal. 315, 193 Pac. 770 (1920). *But see* Knehler v. Serr, 216 Cal. 143, 13 P.2d 673 (1932).

[18] Reachi v. National Auto. & Cas. Ins. Co. of Los Angeles, 37 Cal.2d 808, 236 P.2d 151 (1951).

[19] Faye v. Feldman, 128 Cal.App.2d 319, 275 P.2d 121 (1954).

[20] White v. Indemnity Insurance Company of North America, 246 Cal.App.2d 160, 54 Cal.Rptr. 630 (1966).

litigants who understand the settlement value of protracted fights. Each issue must be heard, decided and, perhaps, appealed. The wearying prosesses of litigation drag on.

The cost, the time and the uncertainty that result all induce settlements of the attachment bond dispute, and this necessarily means that the parties compromise. There is nothing wrong in compromise, of course. It is, and ought to be, the outcome of almost every legal contest. But it should not have to happen here. The legal rules we use now give but little relief; recovery should not be further whittled down by pressured settlements. The possible wrongful attachment claim should be one of the settlement considerations in the first lawsuit, not the second. If trial of the first case is needed, whether because of the intransigence of one party or his reliance on the merits of his cause, that should end all litigation. If that suit is won, the defendant should receive his damages. He should not be forced to compromise an absolute debt then due, because the tools required to enforce his claim are too expensive. When he must start afresh and sue to get his money, he is not protected. The bond given so that "the owner of property shall be protected against seizure of his property at the instance of a plaintiff who has sued without a valid claim"[21] proves of diminished worth to him.

II

NEW PROCEDURE

A better way exists to handle these matters.

Our procedures should be promptly reformed. In the future, the undertaking would be filed in the same way as under the existing practice. The defendant would have the same right he has now to object to the sureties, to question the amount of the undertaking, to provide a release bond, and so forth.[22] At this point changes in existing practice are proposed.

The surety, merely by filing its undertaking, would submit itself to the jurisdiction of the Court in which the action lies, similar to the present law on appeal bonds.[23] It would not be a general appearance for all purposes, but it would support a judgment against the surety for the damages caused

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[21] Woodruff v. Maryland Casualty Co., 140 Cal.App. 642, 35 P.2d 623 (1934).

[22] The defendant's rights in these regards are now far too limited. This is an area long overdue for reform.

[23] CAL. CODE CIV. PROC. §942 provides for judgment by motion against an appeal bond surety. Of course, the situations are not fully comparable because the appeal bond obligation is definite and fixed. In some states, a non-resident defendant appears generally upon "the

by the attachment, should the defendant win. No pleadings would be required other than the undertaking itself, and the surety would not be involved in the trial or pretrial maneuverings. This does no injustice to the bonding company, since that is its business and it can protect itself by indemnities and higher premiums. Besides, the suit for attachment damages will eventually occur. There is no harm to the surety and great benefit to the injured party in having the issues decided earlier.

A. Liability

The trial court's judgment must include a determination of whether the surety is liable on the undertaking, although not the damages in fact sustained by the successful defendant. Just as a judgment must now include a statement allowing a party his costs of suit, so it would necessarily state that the defendant recover (or not recover) his attachment bond damages, not to exceed the bond amount, against the named surety.

This liability decision would be made by the judge alone, without a jury. This is to induce speed and simplicity since discussion before the jury of attachments is too likely to prejudice it on the main issue. This phase of the case should be over quickly. Most matters relating to liability (as distinguished from damages) can easily be determined from the courtroom files or by the stipulation of the parties. All that would be left for later determination is whether the attachment was wrongful (i.e. does the defendant win?) and the extent of the resulting damages. Additional evidence on liability would rarely be needed, but if required would be taken at any appropriate point during the court trial or while the jury is in recess. In any event, it must be heard before the decision on the case's merits is known. This will further tend to minimize technical disputes now often raised on the liability issues.

B. Damages

After the fact of the surety's liability has been fixed by the trial judgment, the subject of damages must arise.

Within 10 days after the entry of judgment, the successful defendant would file in the trial court a statement of damages claimed against the

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filing of the document . . . not signed by the defendant but by an attorney-in-fact for a surety company not a party to the action" which, in fact, was defective and held by the court to be "of no value" because the "document was filed and in it the defendant asked the court to do something that the court could not do unless it had jurisdiction." Ashmus v. Donohoe, 272 Wis. 234, 75 N.W.2d 303 (1956). The principle suggested is not a great extension of existing theories. CAL. CODE CIV. PROC. §533, adopted by the 1969 Legislature, provides a somewhat similar procedure in the cases of temporary restraining orders and preliminary injunctions.

surety. The "attachment bond damage bill" would be comparable to the cost bill now in use.[24] It could even be combined with costs within a single document. The defendant must specify in the bill, under oath, the amount of damages he seeks. Claims would be itemized; so much for interest, so much for loss of use, so much for attorneys' fees, so much for release bond premiums, and so forth. As with a cost bill, the defendant's verified claim is *prima facie* evidence of the validity of the item, and the burden of proof is on the bonding company.[25] The sureties would have 5 days thereafter to file their motion taxing damages, and must state therein the specific items thought to be excessive.

Since substantial funds may be involved, the bonding company may wish discovery. That is its right.[26] The trial court would supervise the procedure. The issues would be limited, of course, since only damages are now unsettled. Many items are demonstrable and not subject to dispute. Thus, money impounded is entitled to interest at the legal rate.[27] Specific items of expense, such as bond premiums, can easily be proven. Some matters, of course, are indefinite, such as attorneys' fees, value of the loss of use, collateral expenses and problems of allocation. The hearing will concentrate on these.

When discovery is completed, the motion to tax surety damages would be heard before, if possible, the judge who presided at the trial. As with attorneys' fees in contract cases, "the determination of the award is best left to the discretion of the trial judge, who was intimately familiar with all facets of the case."[28]

The hearing would be similar to one on a motion to tax costs. Affidavits would usually be enough, but oral testimony could be presented. There is no fixed rule. As with cost bills, "any evidence, oral or written, in its nature competent to prove or disprove a material fact in a court of justice . . . is competent upon the hearing of such motion."[29] In due course, the trial court will give its damage ruling. It would automatically be inserted in the judgment in the case, just as costs are now, for purposes of abstracts, execution and appeal.

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[24] CAL. CODE CIV. PROC. §1033 et seq.

[25] Von Goerlitz v. Turner, 65 Cal.App.2d 425, 150 P.2d 278 (1944). *But see* Stenzor v. Leon, 130 Cal.App.2d 729, 279 P.2d 802 (1955).

[26] This is similar to the right of discovery now available in relation to cost bills. Oak Grove School District v. City Title Insurance Co., 217 Cal.App.2d 678, 32 Cal.Rptr. 288 (1963).

[27] Schneider v. Zoeller, 175 Cal.App.2d 354, 346 P.2d 515 (1959).

[28] Shannon v. Northern Counties Title Insurance Co., 270 Adv.Cal.App. 756, 76 Cal.Rptr. 7 (1969).

[29] Senior v. Anderson, 130 Cal. 290, 62 Pac. 563 (1900).

An appeal by the defeated plaintiff would automatically seek review of the judgment against the surety. The bonding company could, but need not, participate in the appeal. Maybe the only appeal will be by the bonding company on the undertaking damages, as sometimes now appeals are solely from awards of costs. But whether or not the surety acts, the court on appeal must consider the judgment against the bonding company among the matters brought before it. If the judgment is affirmed, the surety's liability is final. If the judgment is reversed or modified, the liability of the surety will be likewise affected. In any event, that decision is made without an extra trial.

If the attachment has remained in effect during the appeal, further attachment damages will have accrued. These will be treated like costs or attorneys' fees on present appeals.[30] The appellate court must state in its opinion whether the defendant may recover attachment damages on appeal, as it now provides recovery for costs. The successful party will eventually file his appellate damage bill. These will be like cost bills on appeal, and heard before the trial court, as appeal cost bills are heard, and perhaps incorporated with them.

This method is cheap, fast and convenient. It is fair to every party. It meets, therefore, every policy consideration that we may demand, and makes the attachment bond a better security for the successful defendant. It therefore should be adopted.

III

CLAIM AGAINST PLAINTIFF

One troublesome subject remains. In addition to the claim against the surety on the attachment bond, the defendant now has a claim against the plaintiff in malicious attachment. Sometimes these claims are warranted, as where harassment clearly was the purpose of the original attachment. Often, however, such claims are in themselves harassment of an honest, albeit defeated, plaintiff.[31] The proposed damage bill system should not operate against the bonding company under a system that also permits bringing a malicious attachment suit against the plaintiff. One cannot bring two separate lawsuits under the existing law;[32] there is no reason to permit a second suit after attachment damage claims are heard.

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[30] California Viking Sprinkler Company v. Cheney, 182 Cal.App.2d 564, 6 Cal.Rptr. 197 (1960).

[31] *Compare* Owens v. McManus, 108 Cal.App.2d 557, 239 P.2d 72 (1952) *with* Bailey v. McDougal, *supra* note 10.

[32] Clinell v. Shirey, 223 Cal.App.2d 239, 35 Cal.Rptr. 901 (1963).

The policy that forbids a suit in malicious attachment after a prior suit against the surety also would work here. Plaintiff typically has indemnified the bonding company and has, thereby, paid the original claim on the attachment bond. The items of actual damage are the same, although the limits of the bond restrict recovery against the surety. Avoidance of litigation remains our goal. We have eliminated the second suit in one context; let us not restore it in another. In addition, separate suits would countenance litigation as a means of pressure. Once the defendant has been paid his damages in wrongful attachment, it would encourage strike suits to let him go forth in tort on a *malicious* attachment claim as well. We must have an end to the dispute. Nevertheless, when a plaintiff has acted wrongfully, there must be some forum for redress. The proper time is during the first trial.

The field of malicious attachment has aptly been described as "complicated and confused." The courts, depending on the facts involved, treat such cases either as a type of malicious prosecution or as a type of abuse of process. When the action itself is prosecuted maliciously and without probable cause it is the former. In all other cases it is the latter.[33]

The defendant is now permitted to bring a cross-complaint for abuse of process by attachment (but not for malicious prosecution) in the suit in which the process issued. This right, by court decision, should become a compulsory counter-claim, rather than merely a permissive one. Then, unless it is brought in the main action, it would be lost.[34] This would eliminate much subsequent litigation.

Next, the existing law should be expanded. The cross-complaint should cover malicious prosecution attachment cases, as well as abuse of process ones. This seems a fairly modest forward step. The additional issues in such a suit are merely whether the main action terminated favorably to the defendant and whether the lawsuit was begun without probable cause. Until the case is over, of course, these issues cannot be decided; but evidence on them can be presented and considered, and the merits of the cross-complaint, whether in malicious prosecution or in abuse of process, can be determined, all as part of the first trial judgment. After all, the issues of abuse of process and malicious prosecution are intimately related, and proof of one overlaps evidence offered on the other.

It is no drawback to our plan that matters essential to recovery for

[33] White Lighting Company v. Wolfson, 68 Cal.2d 336, 66 Cal.Rptr. 697 (1968). A cross-complaint in Declaratory Relief for malicious attachment may provide a better technical answer. We have adopted that method in indemnity cases. It might work as well here.

[34] CAL. CODE CIV. PROC. §439.

malicious prosecution cannot be shown until the trial court's decision has been made. It would not be decided earlier, only considered. Many similar matters are now heard at trial as a matter of course. It is commonplace, for example, for the trial court to consider attorneys' fees in contract cases, or hear evidence of wealth when punitive damages are claimed, before the main decision is reached. It would be no different here.

The judgment on the cross-complaint, however, would not duplicate the items of damage bill recovery, nor would the details of damages be litigated. Only liability should be involved. If the cross-complainant loses, he might still have his rights against the surety under the damage bill, should plaintiff also lose his case.[35] In winning, however, the determination should be only one of liability, announced by the trial court together with its ruling on the surety liability. Thus the court would state whether or not there is liability on the surety's part for wrongful attachment and also whether the plaintiff is liable for malicious attachment. There could be many combinations here. The surety would often be liable when the plaintiff has no responsibility. Sometimes, however, there might be cross-complaint damages though no bond damage exists, as when the claim is for malicious over-attachment. All liability would be set at trial. Damages on both types of claim would still be set in the post trial damage bill procedure above described, and inserted into the judgment after it is made.

This program would mean all issues of damages arising from an attachment would be decided once and for all, before the judge who heard the trial and is most able to evaluate and apportion the several claims. More important, it would remove all need for a second lawsuit, with the heavy burdens on all the parties and society that every such action entails. Legitimate disputes would get their hearing. No one proposes anything else. It is hard, however, to see how justice is better served by separate suits than by a single trial for these interlocking fights. The courts do not exist so that private vendettas may be maintained, nor as instruments of economic pressure.

IV

CONCLUSION

It may well be that the proposals here involved will inhibit attachments, and cause more sparing usage of that remedy. Certainly, plaintiffs should be cautious and ever fearful of the consequences of misuse of an attach-

[35] A judgment that neither party take anything in the suit supports a wrongful attachment action by the defendant. Woodruff v. Maryland Casualty Co., 140 Cal.App. 642, 35 P.2d 623 (1934).

ment. But this would not end employment of the writ. Suits too often arise from a callous disregard of a plaintiff's rights by a more wealthy or less scrupulous defendant. Attachment plaintiffs are entitled to the security the writ affords in order "to prevent the debtor's sequestration of funds or fraudulent transfer of assets in an attempt to hinder or defeat the payment of just claims."[36] In a proper situation an attachment would still be used. Of course, as so often proves to be the case, a remedy proper in one context and for one purpose may be used by skillful advocates in some other setting, to obtain a tactical advantage in the conflict.[37] Attachments are prone to misuse of this nature. Every effort must be made to give a plaintiff the right to a legitimate attachment and at the same time preclude its use for oppressive purposes. These proposed methods achieve these goals. Speedy relief is provided for defendants entitled to damages. If it also results in fewer questionable attachments, so much the better.

This program could be easily adopted. Simple amendments to the Code of Civil Procedure should suffice. Perhaps the courts could even imply a right of action against the surety by motion in the principal case. Although no case has been found that holds the bonding company is liable merely by motion in the trial court, yet it is not an unthinkable ruling, under all the circumstances. Certainly the courts could force malicious attachment suits into the original case.

No set of rules can be safeguarded from all abuse. Procedural reform, therefore, is a never ending task. One must constantly realign the road, to always turn it towards our proper goals. No change can be devised to solve all problems instantly. It is only gradually by piecemeal methods that meaningful improvements come.[38]

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[36] American Industrial Sales Corp. v. Airscope, Inc., 44 Cal.2d 393, 282 P.2d 504 (1955).

[37] It is well recognized that proper use of procedures in one context may be abuse in another. In some cases this may constitute "abuse of process" and recovery allowed. Such claims are hard to prove, and force the issue onto moral grounds. *Compare* Fairfield v. Hamilton, 206 Cal.App.2d 594, 24 Cal.Rptr. 73 (1962), *with* Spellens v. Spellens, 49 Cal.2d 210, 317 P.2d 613 (1957). A bonded, non-fault system is far better, less subject to variations and less amendable to abuse.

[38] *See* KARL R. POPPER, THE POVERTY OF HISTORICISM, (1957), pp. 66-67: "The Characteristic approach of the piecemeal engineer is this. Even though he may perhaps cherish some ideals which concern society 'as a whole' . . . he does not believe in the method of redesigning it as a whole. Whatever his ends, he tries to achieve them by small adjustments and readjustments which can be continually improved upon. . . . The piecemeal engineer knows, like Socrates, how little he knows. He knows that he can learn only from our mistakes. Accordingly, he will make his way, step by step, carefully comparing the results expected with the results achieved, and always on the lookout for the unavoidable unwanted consequences of any reform; and he will avoid undertaking reforms of a complexity and scope which makes it impossible for him to disentangle causes and effects, and to know what he is really doing."