#39.70 12/1/71

Memorandum 71-86

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

We have just received what Professor Riesenfeld describes as "a first and very tentative draft of the first four sections of a proposed attachment statute." With the December meeting almost upon us, the staff believed it would be best to distribute these materials without delay and without review or analysis. Professor Riesenfeld will be with us in December and, thus, will be able to answer questions concerning his recommendations at that time.

Also attached are some materials of a general nature relating to prejudgment attachment which we thought would be of interest to you.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

UNIVERSITY OF CALIFORNIA, BERKELEY

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SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

November 29, 1971

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

Dear John:

Enclosed I am sending you a first and very tentative draft of the first four sections of a proposed attachment statute. Although the draft is quite rough and preliminary I hope it will constitute a valuable basis of a discussion by the Commission. Unfortunately, I was not able to write a supporting memorandum but I suppose that this can be furnished later or made unnecessary by my presence at the discussion. The draft is based on the assumption that the Commission will not accept my original proposal that the grounds for attachment should be substantially limited. I hope, however, that my original proposal might come before the Commission as a possible alternative. Minnesota, as a result of Sniadach, has restricted its grounds for attachment or garnishment in a way similar to that proposed by me in my original submission.

It should be understood that other parts of our attachment law also need revision, especially the sections dealing with the writ, the bond, and the methods of levy. I will propose that a levy upon the inventory of a business which furnishes the livelihood of a debtor can only be made by the appointment of a keeper who is required to pay over that much of the daily receipts to the debtor which are required for his and his family's support. If you or your staff have any questions prior to the meeting, please call me.

Sincerely yours,

Steve

Stefan A. Riesenfeld

SAR:cp
encl.

Proposed
California Attachment Law

§1. Attachment when issuable

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

2. A writ of attachment may be issued

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

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

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

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

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

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

§2. Necessities exempt from attachment

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

2. Necessities includes but is not limited to

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The affidavit shall state

a. the nature of the indebtedness claimed;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§4. Ex parte determination permitted in exceptional cases

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

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

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

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

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

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

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND

ROBERT HECHT
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November 12, 1971

California Law Revision Commission
School of Law - Stanford University
Stanford, California 94305

Attention: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

The use of the provisional remedies of Claim and Delivery and Attachment and other related practices have involved undertakings or bonds as you know.

This company has for many years been identified as a major surety in this field and because of Blair and Randone we are very much interested in considerations being given to any provisional legislation effort.

It is my understanding that this subject is very much under consideration by your commission and that currently considerable study is being made in the field of prejudgment attachment.

Because of our deep rooted concern, I would greatly appreciate information concerning current developments. I understand that on occasions your meetings are held and conducted at the State Bar offices in Los Angeles and San Francisco.

As a member of the bar, could permission be granted to me to attend these meetings as an observer. Thank you for your response in this matter.

Very truly yours,

Robert Hecht
Res. Vice-President

RH/rd

Attachments Discussed At Hollywood Bar Meet

By Marvin Finder

"We can expect a new attachment statute soon," Superior Court Judge Max Z. Wisot told the Hollywood Bar Association at its regular luncheon meeting on Friday.

"However," he continued, "simple efforts to overcome the effect of Randone (which declared CCP Sec. 537.1 unconstitutional), by requiring some sort of pre-judgment notice to a debtor prior to attachment, will be meaningless in a practical sense." Debtors who are so disposed will hardly wait on the order of a writ once they are forewarned. Something more sophisticated will be required.

Judge Wisot, sitting in Dept. 63-Discovery, discussed some of the difficulties being encountered in his court, with particular emphasis on cases involving outstanding writs upon which execution had been levied. All pending attachments, of course, were invalidated by Randone, and its retroactivity has been upheld by the U. S. District Court.

"Judicial Attack on Rights to Attach, Garnishee and to Claim and Delivery" came about first in Sniadach, then in Randone, because of the abuse of such process, and its unfairness, since in many cases attachment took away good defenses to unreasonable claims. We have not seen the end of this process, stated Judge Wisot, since it is anticipated that Sec. 537.2 of the CCP will suffer the same fate. This refers to a right to attach property of foreign residents.

Judge Wisot warned counsel that failure of creditors to quash outstanding attachments when noticed, may render them liable for debtors' attorney fees incurred to accomplish it. Quashing of attachments is by motion, not ex parte.

Creditors seem to have discovered that they are able to accomplish indirectly in Department 65 what cannot be done directly via attachment, Judge Wisot noted. Thus, a prima facie showing of equitable grounds for relief will provide a creditor with a temporary restraining order and the appointment of a receiver.

That recent judicial attack on creditors traditional remedies will affect creditor-debtor relationships seems probable, Judge Wisot agreed. In any case, it points up the fact that such creditor remedies, while available since 1871, are purely statutory and not inherently rights that existed under common law.

Consequence of Randone Decision On Real Titles Told Hollywood Bar

By Marvin Finder

"The ramifications of the Randone decision on real property titles are still ahead of us," Joseph G. Mascari told the Hollywood Bar Association at its last luncheon meeting. Mascari, as a vice-president and associate counsel of the Security Title Insurance Company, is an attorney who is well-known for his published articles on real estate transactions.

"While it is true that the Randone case involved only claims against personal property, the pre-hearing attachment of which was found to be prohibited as a lack of "due process", we must consider its implications when "mechanics liens", "bonded stop notices" and "notices of actions (lis pendens)" are involved," Mascari continued, "all of which directly affect real property transactions."

He further ventured the opinion that, despite the use of undertakings authorized by statute, "Mechanics liens", "stop notices" and "notices of action" will also be vulnerable to the same logic as that used in Randone and these may also possibly be found lacking in "due process."

To those unfamiliar with the parlance of real estate law, "stop notices" are generally those given by a mechanic lien claimant to a mortgagee or lender of a construction loan, thereby putting them on notice "not to pay out." "Notices of action" (lis pendens) refer to any recorded notice of an action in which plaintiff asserts rights or title to real property.

Mascari suggested that those desiring to expunge the effect on titles of "notices of action use CCP Sec. 409.2, with a bond or undertaking, since this section permits a purchaser or encumbrancer to deal with the property "free and clear of the effect of the action whether or not he has actual notice of the action." By contrast, CCP Sec. 409.1 merely results in the removal of "constructive notice" which has no effect if someone has "actual notice" of the action.

Counsel's attention was directed to a problem increasingly besetting property owners, namely: the possible establishment of common law easements and unintentional dedications of private property to public use. Mascari suggested that preservation of the safety of title requires a property owner to be able to prove (1) that users are licensees only, or (2) that bona fide attempts have been made to deny public use. This problem is not limited to beach property, although more attention has been focused on this area.

The holding of title to real property underwent a significant change in the law, effective November 22, 1970, Mascari pointed out. Section 21200 of the Corporation Code thereafter approved the right of "unincorporated associations," of many kinds, to hold title. Thereupon, real estate investment trusts, Massachusetts investment trusts, real estate syndicates, profit-sharing trusts, etc., were permitted to own and take title to real property. Partnerships already had this power, although the question as to whether or not "joint ventures" came within this category is still open to some question, he noted.

It is in the process of "recordation" of a statement under CC. Sec. 21201, identifying the officers of an "association", as well as those who are empowered to bind it, that safeguards others in their dealings with an association.

Mascari closed by indicating the numerous types of title insurance indorsements which are now available. So-called "extended coverage" insurance (aginst some off-record risks) is available to buyers upon request. "Standard policies" exclude from coverage "rights of parties in possession".

Marshall Glick introduced the speaker.

Edward Vandoren, bar vice-president, conducted the meeting.

#39 October 13, 1970

BACKGROUND STUDY

relating to

ATTACHMENT AND GARNISHMENT

(Revised October 22, 1970)

Prepared for

California Law Revision Commission

by

Professor Stefan A. Riesenfeld
Boalt Hall
University of California at Berkeley

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

CONTENTS

I

Historical Development of Attachment in California

The present law of attachment is the product of continuous patchwork which has given it a not always sensible and consistent form and caused all kinds of terminological inconsistencies and errors. Moreover, it has greatly expanded in scope, reflecting the needs of creditors to a larger extent than the interest of debtors.

Amendments designed to restore a sound balance of interests in the light of the constitutional requirements of due process and recent congressional policies should appear in sharper perspective, if viewed against their historical background.

A. Development Prior to the Code of Civil Procedure of 1872

The history of the California attachment law begins with the issuance in 1848 of the "Laws for the Better Government of California, The Preservation of Order and the Protection of the Rights of the Inhabitants", by Governor Mason. These laws, arranged in topical and alphabetical order, regulated attachments.[1] Attachment, following New England examples, was a form of original process[2] and was available in five types of cases:

1) When the debtor is not a resident of the territory,
2) When the debtor has concealed himself or absconded, so that the ordinary process of law cannot be served upon him,
3) When the debtor is about to remove his property or effects out of the territory, or has fraudulently concealed or disposed of his property.

4) When the debtor is about to fraudulently convey or conceal his property in fraud of his creditors.

5) When the debt was contracted out of the territory and the debtor has absconded, or secretly removed his property or effects into California, with the intent to hinder, delay and defraud his creditors.

Upon acquisition of statehood a new attachment act was passed in 1850.[3] Attachment was still the original process and was available in actions upon contract when the plaintiff had good reason to believe that the defendant

1) had or was about to abscond from the state or had concealed himself,

2) had or was about to remove his property out of the state with the intent to defraud his creditors,

3) had fraudulently contracted the debt sued upon,

4) was a non-resident,

5) had or was about to dispose of or conceal his property with the intent to defraud his creditors.

Attachment was converted into mesne process and a provisional remedy in a pending civil action by the Practice Act, passed on April 29, 1851. In its original form the Practice Act authorized attachments in actions upon a contract, express or implied, for the direct payment of money, which contract is made or is payable in this state and not secured by a mortgage upon defendant's real or personal property.[4] No requirements as to non-residence, concealment or abscondence were provided. The writ was issued by the Clerk of Court and was available at the time of issuing the summons or at any time afterwards. The attachment plaintiff was re-

quired to file an affidavit showing the amount in which defendant was indebted to him and to put up a bond in a sum not less than $200. The provisions were modeled after but not entirely copied from the proposed New York Code of Civil Procedure.[5] In the proposed New York Code attachment was available in all actions for the recovery of money but only against a non-resident or a defendant who had absconded or concealed himself.[6] The order of attachment was issued by the judge rather than the clerk.[7] Both under the proposed New York Code and under the California Code the earliest time at which attachment could issue was the time of issuing the summons. In New York, however, civil actions were commenced only by service of the summons,[8] while in California the commencement of an action dated from the filing of the complaint.[9]

The first reform of the attachment provisions of the Code occurred within two years. In its fourth session the California legislature amended the attachment provisions by adding attachments in actions upon a contract, express or implied, against non-residents.[10] Since that time, with the exception of a brief interval between 1858 and 1860, California has provided two types of attachments: the so-called "foreign attachment" against non-residents and the so-called "domestic attachment" against residents, gradually expanding the scope of both attachments but never making them co-extensive.

As already mentioned, in 1858 California again changed its attachment law, abolishing domestic attachment and permitting attachment only in actions against absconding, concealed or non-resident defendants or in cases of fraud.[11] In 1860, however, the state of affairs created in 1853 was restored. Attachment was authorized a) in an action upon a contract, express or implied, for the direct payment of money, where the contract was made or payable in

California and not secured by a mortgage, lien or pledge upon real or personal property or, if so secured, the security had been rendered migratory by an act of the defendant, and b) in an action upon a contract, express or implied, against a defendant not residing in this state.[12]

The required content of the affidavit was expanded, requiring in addition to a showing of the conditions required for the issuance of the writ an affirmation that the debt claimed was an actual, bona fide existing debt and that the attachment was not sought to defraud other creditors.[13] In that form the attachment provisions were transferred into the new Code of Civil Procedure of 1872.[14]

B. Development under the Code of Civil Procedure of 1872.

In 1874 sections 537 and 538 were subjected to some stylistic and minor substantive amendments.[15] It was clarified that the security which rendered attachment unavailable consisted either in a mortgage or lien upon real or personal property or a pledge of personal property and not of a "pledge upon real or personal property" as the original version implied. Moreover, it was no longer necessary for the availability of domestic attachment in the case of an existing security that had become valueless, that the cause of such occurrence was an act of the defendant. It was only required that the loss of value was not due to any act of plaintiff. Conforming changes were made in section 538. In addition the need of a statement in the affidavit that the sum for which the attachment was sought is an actual bona fide existing debt was deleted.

Section 539 was amended so as to increase the minimum amount of the required bond to $300.

In 1901 section 538 was amended so as to render it clear that in the case of non-resident attachment the affidavit had to contain a statement

that the indebtedness claimed was one upon a contract, express or implied.[16] Moreover, the scope of the liability on the bond under section 539 was redefined.[17] The statute, however, was declared to be unconstitutional.[18]

In 1905 the first major expansion of attachment was made, by extending foreign attachment to actions for damages, arising from an injury to property in this state caused by negligence, fraud or other wrongful act.[19] Sections 537 and 538 were amended accordingly.

Subsequently both domestic and foreign attachment were extended further with the result that California became one of the most "liberal" jurisdictions with respect to the availability of pre-judgment attachment.

Domestic or resident attachment was extended or clarified in 1929, 1933, 1961 and 1965. The first of these amendments[20] specified that actions for support, maintenance, care or necessaries furnished to a spouse or relative should be deemed to be actions upon an implied contract for purposes of attachment. The amendment of 1933 added deeds of trust to the list of securities barring an attachment and added two types of claims to the cases in which domestic attachment is available a) rent claims in proceedings for unlawful detainer and b) tax claims and other statutory liabilities owing to the State or its political subdivisions. In 1961 actions upon rescission were declared actions upon an implied contract for the purposes of attachment[22] and in 1965 claims exceeding $5000 upon contracts made outside the State and not payable in the State were added to the list of contract claims in which attachment is authorized.[23] In addition, amendments of 1961 added actions for recovery of funds expended in narcotics investigations to the catalogue of public actions in which attachment may be sought against residents.[24]

Non-resident attachment was likewise progressively enlarged by amendments made in 1927, 1957 and 1963. The first of these amendments[25] extended

the two classes of cases entitled "foreign attachments" to defendants who have departed from the state or after due diligence cannot be found within the state or conceal themselves for the purpose of avoiding summons, in addition to non-resident defendants.[26] The amendments of 1957 extended foreign attachment to personal injury claims and the amendments of 1963,[27] finally, included actions for wrongful death.

Of course, section 538 was amended so as to assure conformity with section 537. In 1927 section 538(1)-(3) was re-written so as to assure automatic conformity.[28] In 1933, because of the applicability of the statute to proceedings in justices' courts, it was provided that attachments were limited to actions claiming $15 or more.[29] The amount was subsequently increased several times.[30] Other amendments provided for the scope of the affidavit in the case that attachment of wages was sought for claims based on the furnishing of common necessaries of life[31] and the inclusion of a general affirmation that the defendant has not been adjudicated a bankrupt, with reference to the debt for which the writ is sought or that the defendant is subject to a wage-earner's plan.[32]

The other sections of the original attachment act (C.C.P. 1872, sections 539-556) likewise underwent numerous and extensive subsequent amendments and the insertion of supplementary sections. No detailed chronological or topical analysis of these amendments and additions, however, is needed in this part of the survey, since it focuses primarily upon the substantive prerequisites of the issuance of the writ and the showing that must be made to procure it. It should be noted, however, that the legislature provided for the secrecy of attachment proceedings in 1874 by amending the Political Code, section 1032,[33] which established the right to public inspection of official records, to the effect that in cases of attachment the filing of the complaint and the issuance

of the writ should not be made public until the filing of the return of the service of the writ.[34] Although most parts of the Political Code were repealed concurrently with the enactment of the Government Code in 1943,[35] Political Code section 1032 remained in force as such until 1951.[36] In that year the portion of section 1032 that governed the public character of official records was transferred into the Government Code as section 1227.[37] The portion of section 1032 that established the provisional secrecy of attachments was transferred to the Code of Civil Procedure as section 537.5.[38]

The continuous expansion of pre-judgment attachment did not fail to provoke a reaction. Especially resented was the pre-judgment attachment of wages. Siding with the proponents of limitations on the attachment process, the California legislature included a provision in the Unruh Act prohibiting wage attachments for a period of 60 days from the date of a default by the installment buyer in a payment owed under a retail installment contract or on retail installment account.[39] In addition, the affidavit required by C.C.P. section 538 must include certain additional affirmations as to the propriety of the venue.[40]

2.

Contemporary Utility of and Need for Attachment

In the light of the modern attacks on attachment it might be useful to analyze the legal or strategic advantages to the creditor furnished by the remedy. For practical as well as historic reasons it might be helpful to distinguish between foreign (non-resident) attachment and domestic attachment.

A. Foreign Attachment

The traditional main purpose of foreign attachment was the supply of

a means to the creditor to reach assets of a debtor located in the forum, despite the fact that, owing to the absence of the debtor from the state coupled with his non-residence, the forum had no personal jurisdiction over the debtor. It was recognized that jurisdiction for the purpose of collecting out of such assets was in conformity with the mandates of federal due process so long as sufficient steps were taken to bring the commencement of such proceedings to the notice of the debtor and as long as the collection of the judgment recovered was limited to satisfaction from those assets, the attachment of which formed the basis of jurisdiction.[41] This jurisdiction was called "quasi-in-rem" jurisdiction. The proper form of a quasi-in-rem judgment was that of an ordinary money judgment with the execution permanently stayed with respect to all assets other than the assets previously attached. Such judgment was not entitled to full faith and credit in sister states. Obviously this method was the shortest and surest way for a creditor to appropriate assets of a non-resident debtor to the payment of his claim. Whether the more circuitous route of obtaining a personal judgment against the debtor in a forum possessing personal jurisdiction over him, followed by supplementary proceedings to compel the debtor to apply his out-of-state assets to the payment of the judgment was a feasible alternative,was never seriously discussed.

Has the extension of personal jurisdiction over a non-resident defendant under the so-called long-arm statutes obliterated the need for quasi-in-rem jurisdiction based on non-resident attachment? The answer seems to have to be "no". To be sure, Professor Carrington has strenuously argued to the contrary. His noted article on the Modern Utility of Quasi-In-Rem Jurisdiction[42] started with the sentences:

"Now that the venerable concept of quasi-in-rem jurisdiction has largely outlived its utility, it is proposed at long last to make it available in the

federal courts. It must be conceded that the proposal of the Advisory Committee on Civil Rules to amend Rule 4 for this purpose would bring Federal courts into line with the practice in state courts and with long standing Anglo-American tradition. But greater justification than this should be required before such an antique device is appended to our modern apparatus."

Unfortunately, Professor Carrington did not tell clearly enough why the concept of quasi-in-rem jurisdiction had outlived its practical utility and neither the Rules Committee nor the Supreme Court were persuaded. Rule 4 has in fact been amended,[43] so as to grant quasi-in-rem jurisdiction to the Federal courts.

The reason for the vanishing utility of quasi-in-rem jurisdiction asserted by Professor Carrington could consist either a) in the gradual enlargement of personal jurisdiction over the non-resident defendant of the state where the assets are located or b) the gradual enlargement of personal jurisdiction over the defendant of sister states with the attendant greater choice of fora with personal jurisdiction in which plaintiff could sue.

Certainly the second alternative is hardly persuasive. Granted, that a plaintiff may have greater choice of fora with personal jurisdiction among sister states, he still runs the risk of resort to the doctrine of forum non conveniens. Most of all, even if the plaintiff succeeds in recovering a personal judgment, collection from out-of-state assets would be difficult at best. Obviously, the writ of execution of a sister state does not reach out-of-state assets. And as stated before, resort to supplementary proceedings to compel the debtor to apply out-of-state assets to the payment of the judgment would not be very effective and presents further jurisdictional difficulties.[44]

Hence the only valid argument for the diminished need for non-resident attachment and quasi-in-rem jurisdiction must rest in the expanded in personam jurisdiction of the state where the assets are located, caused by the so-called long-arm statutes.

In the first place, however, it is still true that mere presence of assets of a debtor in a state does not permit it to exercise jurisdiction over debts unrelated to such assets and without other contacts with the state.

True, the new California long-arm statute attributes jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States".[45] It is, however, highly questionable whether due process permits jurisdiction over absent and non-resident debtors merely on the ground that the debt may be collected from assets within the state. All the arguments against quasi-in-rem jurisdiction (hardship on the non-resident defendant because of the need to defend) would be magnified by such a reading of the due process clause and nothing in the more recent decisions of the Supreme Court expanding the scope of personal jurisdiction authorizes such extreme latitude. Personal jurisdiction is based on the existence of minimal contacts justifying the exercise of personal jurisdiction in the particular action. Presence of assets in itself does not seem to amount to the requisite contact justifying the neglect of territorial limitations on the adjudication of ordinary debts.[46] Modern long-arm statutes such as those of New York and Oregon grant personal jurisdiction on the basis of presence of assets only if a) the assets consist of real estate and b) the action arises from the ownership, use or possession of such property.[47]

Accordingly, it must be concluded that in many cases there is still a need for quasi-in-rem jurisdiction and for attachment based on jurisdictional needs. Conversely, in numerous cases of non-resident defendants, the former

jurisdictional need for attachment has been eliminated and in these cases the question of whether mere non-residency should still be a sufficient ground for the attachment of assets becomes a substantial new problem.

B. Resident Attachment

Resident attachment is not needed as the only direct road to reach assets, but it is a convenient remedy for the creditor to protect himself against, inter alia,

a) dissipation of assets by the debtor;

b) conversion of non-exempt assets into exempt assets;

c) acquisition of priorities by either creditors or purchasers;

d) insolvency and resulting equality of distribution, provided that bankruptcy petition is filed more than four months after the levy.

Considering that attachment before judgment is a harsh remedy, the question necessarily arises whether and under what conditions a creditor should be entitled to these benefits. Certainly the history of resident attachment shows that the benefits listed under c) and d) are by and in themselves not sufficient to justify an attachment. The benefit listed under b) is even less a justification for an attachment since a debtor is entitled to convert non-exempt property into exempt property even on the eve of an execution. However, the ground listed under a) furnishes a valid justification provided there is a real danger of such dissipation. The law of fraudulent conveyance affords no satisfactory protection. At any rate, it is more efficient to lock the barn than to recover the horse.

C. Strategic Benefits

Of course, in addition to the actual legal benefits afforded by the attachment, there are certain strategic advantages. Attachment may prompt the

debtor to pay a debt rather than to needlessly contest it. On the other hand, a debtor may be coerced into paying debts which otherwise he could and should reasonably and validly dispute. In fact, the coercive element is the main reason for the recent attacks against the remedy.

3.

Some Comparative Observations

A. England

It may be a surprise for most members of the American legal profession to learn that common law procedure never adopted pre-judgment attachment as a provisional remedy and that modern English procedure until today has not provided for pre-judgment attachment. To be sure, Foreign Attachment arose in the Major's Court of the City of London and was transplanted from there into other city courts under various borough customs.[48] It, however, never took a foothold in Westminster Hall, although it migrated with ease to the colonies.[49] Admiralty was the only high court which used the procedure of attachment as a provisional remedy, as its practice rooted in the civil law.[50]

In 1869 the Judicature Commissioners recommended that the Court should be given the power to order attachment of property of the defendant within its jurisdiction, if the plainitff established that he had a valid claim and that there was a need for restraint:

> "We think that a Judge should have power, at any time after writ issued, upon being satisfied that the plaintiff has a good cause of action or suit, and that defendant is about to leave, or is keeping out of, the jurisdiction to avoid process, to order an attachment to issue against any property of the defendant which may be shown to be within the

jurisdiction; such property to be released upon bail given, and in default of bail to be dealt with as the judge may direct. This power, which is analogous to that now vested in the Court of Admiralty, may make the use of writs of Capias and Ne Exeat Regno by the Courts of Common Law and Chancery (which are sometimes used oppressively) less frequent. It may also render the retention of the process of foreign attachment in The Lord Mayor's Court of the City of London unnecessary."[51]

This recommendation was not acted upon. In 1969 the Committee on the Enforcement of Judgment Debts (under the chairmanship of Mr. Justice Payne) revived this recommendation and proposed that the judge be given power to issue injunction to restrain disposition or transfer out of the jurisdiction of assets before judgment.[52] Such power should be subject to the following conditions:

1) The order should be made by a judge of the High Court or the county court, who should have an unfettered discretion so that he can prevent his wide power from being abused or used oppressively.
2) The creditor should satisfy the court by affidavit or oral evidence on oath that he has a good cause of action against the debtor.
3) He should satisfy the court by the same means that the debtor has property available to meet the judgment in due course, in full or in part, and that there is probable cause for believing that the debtor is about to dispose of the same, or to transfer it out of the jurisdiction or otherwise deal with the same so as to defeat the creditor's claim.

4) The order should only be made after the writ or summons has been issued, or alternatively on terms that the writ or summons should be issued on the next day on which the court office is open.

5) There should be power to order the attendance of the debtor at the court and, if need be, to detain him until he has disclosed the whereabouts of the property and lodged it in safe-keeping, or otherwise given security as approved by the court.[53]

B. Other American Jurisdictions

California is one of the most permissive jurisdictions in providing for attachment.

In New York attachment may issue in any action for eight statutory grounds,[54] viz. for the reason that

1) The defendant is a foreign corporation or not a resident or domiciliary of the state;

2) the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so;

3) the defendant, with the intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state or keeps himself concealed therein;

4) the defendant, with intent to defraud his creditors, has assigned, disposed or secreted his property, or removed it from the state, or is about to do any of these acts;

5) the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability;

6) the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof;

7) the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under C.P.L.R. art. 53;

8) there is a cause of action to recover damages for the conversion of personal property, or for fraud and deceit. The "order of attachment" is issued, upon motion, by the court.[55] The motion must show,[56] by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment that exist and the amount demanded from defendant above all counterclaims. The order may be granted without notice before or after service of summons at any time before judgment.[57] If attachment is ordered prior to the service of the summons, service of the summons or first publication thereof must be had within 60 days.[58]

New York law thus is noteworthy because of the fact that

1) attachments are judicial orders.

2) there is no attachment against resident debtors, unless there is some past or expected fraudulent or opprobrious conduct. The only exception relates to actions on foreign judgments, but in this case attachment is really a form of execution.

Of course, the fact that New York permits non-resident attachment without additional qualifications has created troublesome questions spelled out

in the concurring opinion of Justice Breitel and in the dissenting opinion of Justice Burke in Simpson v. Loehmann, 21 N.Y.2d 305, at 314 and 316, 234 N.E.2d 669, at 674 and 675 (1967).

In Pennsylvania likewise domestic attachment is abolished[59] and attachment is either "foreign attachment" (non-resident attachment)[60] or "fraudulent debtor's attachment".[61]

Foreign attachment is available in any action, other than an action ex delicto arising from acts committed outside the Commonwealth, in which the relief sought includes a judgment or decree for the payment of money.[62]

Fraudulent debtor's attachment may issue in four cases,[63] viz. when the defendant with intent to defraud the plaintiff

1) has removed or is about to remove property from the jurisdiction of the court;

2) has concealed or is about to conceal the property;

3) has transferred or is about to transfer property;

4) has concealed himself within, absconded, or absented himself from the Commonwealth.

Both foreign or fraudulent debtors attachment may be either original[64] or mesne process.[65] The writ of attachment, whether foreign attachment or fraudulent debtors attachment, is issued by the prothonotary upon filing with him a praecipe for the writ.[66] The praecipe in fraudulent debtor's attachment must be accompanied by a complaint and a bond,[67] while in foreign attachment no bond is required and the complaint may be filed within five days after the filing of the praecipe.[68]

Jurisdictions in which attachment and garnishment are separate remedies.

It should be noted that in a few jurisdictions attachment and pre-judgment garnishment are separate proceedings with different prerequisites and scope of applicability.

This, for example, is the case in Washington. In that state attachment and garnishment are regulated by two different chapters of the Revised Code.[69] A writ of attachment may be issued in 10 classes of cases.[70] Two of them are in effect foreign or non-resident attachment, seven others involve some type of fraudulent or opprobrious conduct. Resident or domestic attachment without such conduct is authorized in actions on a contract, express or implied. This expansion, however, was added only by an amendment of 1923.[71] Pre-judgment garnishment may issue in two cases: a) where an original attachment had been issued and b) where the plaintiff sues for a debt and makes an affidavit that the debt is just, due and unpaid, and the garnishment applied for is not sued out to injure either the defendant or garnishee.[72] Garnishment thus has a much broader scope than attachment and is authorized in any action, whether against a resident or non-resident, on an "indebtedness".[73]

In 1969, as a result of the Sniadach case, the Washington legislature reenacted the garnishment law limiting pre-judgment garnishment of earnings to non-resident and fraudulent debtors.[74]

A similar situation exists in Wisconsin. In Wisconsin attachment and garnishment are governed by different chapters of the Revised Statutes.[75] While attachment is limited to actions against non-resident, absent and fraudulent debtors, subject to additional qualifications,[76] garnishment may be resorted to in any action for damages founded on contract, express or implied, and in tort actions where a writ of attachment could issue.[77] In other words, while a writ of attachment cannot issue in actions of resident defendants subject to service upon a contract, a garnishment summons will issue in such case.

In 1969 the garnishment statute as relating to wages was amended to take

care of the mandates of the Sniadach case[78] and the Federal Consumer Credit Protection Act.[79] Prejudgment garnishment action affecting the earnings of the principal defendant were prohibited, except by authorization of a judge upon a showing that no personal service on defendant was possible. Even in that case no judgment is permitted unless the summons in the main action was received by the defendant from his employer.[80]

4.

The Sniadach Case and Its Aftermath.

The law of attachment of various jurisdictions has been the subject of occasional attacks on constitutional grounds but until Sniadach v. Family Finance Corporation[81] no fault had been found with it by the Courts, although public opinion did not always react so complacently. The most celebrated prior case of that type was Ownby v. Morgan.[82] In that case the foreign attachment law of Delaware was challenged as violative of due process, because it barred defendant from defending the suit without giving security in the amount of the property attached. The Supreme Court held that this procedure, because of its ancient origins, did not run afoul of the mandates of due process, despite the hardships it caused in the individual case. Counsel for the winning party (subsequently Chief Justice) Stone, however, nearly missed his appointment to the Court because of his role in the litigation.[83] Sniadach brought a new approach by the Court.

In Sniadach, the Wisconsin garnishment law, as applied to pre-judgment garnishment of wages, was attacked as unconstitutional and the Supreme Court sustained the attack. Unfortunately the case presented an accumulation of a long list of aggravating circumstances and the precise scope of the Supreme Court's mandate is much debated, both in subsequent decisions[84] and by

commentators.[85]

The principal opinion, written by Mr. Justice Douglas, listed a number of grounds which cumulatively rendered the garnishment violative of due process:

1) the Wisconsin statute permitted garnishment of assets without notice and hearing prior to the levy;

2) the levy deprived the debtor of this enjoyment of the assets;

3) even after the levy the debtor could not obtain release of the levy, unless trial on the merits was had and the debtor won;

4) the assets consisted in wages;

5) the state had a very paltry exemption statute;

6) the claim to be secured by garnishment included collection fees;

7) debtor was a resident of the forum and readily subject to in personam jurisdiction;

8) no situation calling for protection of the creditor was presented by the facts.[86]

Hence in view of the totality of those aggravating conditions the absence of notice and hearing prior to the taking was held to be fatal. To what extent absence of certain of these aggravating features might dispense with the need for prior hearing remains conjectural. If, for instance, the assets were land, no notice and hearing prior to an attachment thereof might be necessary, since attachment of land does not deprive the debtor of his enjoyment but only affects his power of disposition. It should be noted however, that the lack of notice and prior hearing in the case before the Court was held to be a violation of due process, even by the majority opinion, although the opinion stressed the fact that the Wisconsin act did not permit a hearing on defenses of fraud or other grounds even in the interim between garnishment and trial on the merits.[87]

Mr. Justice Harlan, in a concurring opinion, took pains to explain on what basis he joined in the majority opinion. He stated that "due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." He stated explicitly that the mere "fact that relief from the garnishment may have been available in the interim under less clear circumstances" did not suffice to meet his objections. Although the presence of special circumstances might dispense with the necessity of notice and a prior hearing, in the case before the Court such circumstances were not shown and the debtor was "deprived [of] the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit."[88]

It may be mentioned that Sniadach was to a certain extent foreshadowed by the dissents of Mr. Justice Douglas (joined by the Chief Justice and Mr. Justice Black) and by Mr. Justice Brennan in Hanner v. De Marcus.[89] In that case an execution sale was attacked as violative of due process because under applicable law no prior notice had been given to the judgment debtor. Under Endicott Johnson Corp. v. Encyclopedia Press[90] no such notice was constitutionally required. Certiorari was granted to determine whether Endicott should be overruled. After hearing on the merits the Court, by a per curiam opinion, dismissed the writ as improvidently granted. The dissenting Justices wrote opinions to the effect that the Court should have determined in the posture of the case before it whether Endicott should be overruled.

Mr. Justice Douglas stated that the continued validity of Endicott was squarely presented and that subsequent developments in the law of due process required a reconsideration of the rationale of Endicott.

"Since the Endicott decision, there has been not only an expansion of the scope of the notice requirement itself . . . but a new approach to the constitutional sufficiency of the means of giving notice in particular types of cases' . . ."[91] "The Endicott rationale that a party who has litigated a case and had a judgment taken against him is deemed, for purposes of due process, to be on notice of further proceedings in the same action was", as Mr. Justice Douglas stated,[92] "rejected in Griffin v. Griffin"[93] with respect to proceedings to obtain judgment and execution for alimony arrears. Hence he intimated that there was no more reason to still accept the Endicott fiction of constructive notice because of knowledge of the underlying judgment in ordinary execution proceedings, especially under state laws which afford the execution debtor the privilege of specifying the property to be seized on execution. Mr. Justice Brennan did not indicate why the Endicott rule was ripe for reconsideration but shared the other dissenters' view that it ought to have been reappraised.[94]

In view of the cumulative approach pursued by Mr. Justice Douglas in Sniadach, disagreement has arisen whether notice and hearing is required prior to any attachment, or only prior to any attachment against residents or only to any attachment of wages against residents. The Supreme Court of Arizona, in Termplan Inc. v. Superior Court of Maricopa County[95] held that an order by the court below which denied a writ of mandamus to compel the clerk

to issue a writ of garnishment (of the pre-judgment type) with respect to wages as well as property other than wages without prior notice and hearing "went beyond the scope of the Sniadach opinion" and vacated the denial of the writ of mandamus to the extent that it extended to property other than wages. The Court of Appeals of that state had come to the opposite result in a prior case involving a garnishment of an account receivable[96] which therefore to that extent seems to be overruled by the later Supreme Court judgment. Another Division of the Arizona Court of Appeals reached the latter conclusion.[97]

The opposite result was reached by the Supreme Court of Wisconsin. In Larson v. Fetherstone[98] that court held that the Sniadach rule also applied to the garnishment of property other than wages, especially bank deposits. The court buttressed its holding with the following line of reasoning:

> "Although the majority opinion in Sniadach makes considerable reference to the hardship of the unconstitutional procedure upon the wage-earner, we think that no valid distinction can be made between garnishment of wages and that of other property. Clearly, a due process violation should not depend upon the type of property being subjected to the procedure. Under the respondents' contention wages in the hand of the employer would be exempt from pre-judgment garnishment, but wages deposited in a bank or other financial institution would be subject to pre-judgment garnishment."[99]

In California the Supreme Court has held twice[100] that pre-judgment attachment of wages under the applicable statute was violative of due process, despite the requirement of an eight-day advance notice to defendant. On the other hand, the Court refused to rule on the validity of section 537 as

applied to attachment of property other than wages in an action brought by the Attorney General in a writ of mandate, resting this refusal on the ground that the proceedings were tantamount to a request for an advisory opinion.[101]

The lower courts of California have reached conflicting results as to the applicability of the Sniadach rule to property other than wages. In Western Bd. of Adjusters, Inc. v. Covina Publishing Co.[102] plaintiff in an action on a promissory note and on a contract, express or implied, attached certain residential property and personal property (equipment, merchandise and accounts receivable). It was argued, inter alia, in reliance on Sniadach, that the remedy of attachment in suits of this nature was unconstitutional. The D.C.A. (First Dist., Div. Four) rejected this contention: "The cited case is limited to wages. The situation in contracts such as sales of merchandise is not of constitutional dimension. If there is to be any change in the law, it should be implemented by the legislature." Although the statement is somewhat oblique, it seems to say that resident attachment of property other than wages does not require prior notice and hearing. The contrary result was reached in Leary v. Heard (Mun. Ct. of Alameda County, 1969),[103] a decision which extended Sniadach to attachment of assets other than wages.[104] In Washington the question was left open. In the District of Columbia it has been held that foreign attachment was not outlawed by Sniadach, but the opposite result was reached by the Superior Court of Delaware.[105]

Considering this conflict of judicial opinion about the scope of Sniadach it is, perhaps, illuminating to look at the treatment of McKay v. McInnes[106] by Justices Douglas and Harlan. In that case the Supreme Court

affirmed by a per curiam opinion a judgment of the Supreme Court of Maine upholding the constitutionality of the Maine attachment law in a case involving the attachment of defendant's realty and shares of stock.[107] The attachment had been issued as the original writ in the respective action and a separate summons had subsequently been served on defendant who apparently was a resident of Maine.[108] The procedure followed had been established in Maine at least since 1821.[109] Neither the state supreme court nor the U.S. Supreme Court found fault with the procedure. In Sniadach Mr. Justice Douglas did not challenge the continued validity of McKay v. McInnes, but merely observed that "a procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy due process in every case."[110] Mr. Justice Harlan, conversely, questioned the authority of the decision by articulating his unwillingness "to take the unexplicated per curiam in McKay v. McInnes (citation omitted) as vitiating or diluting of these essential elements of due process" (i.e. notice and hearing prior to measures depriving defendant of the unrestricted use of his property).[111]

In the light of these authorities it cannot be considered as settled that all attachment without notice and hearing is prohibited by due process, especially if the effect of the attachment does not interfere with the use of property, as with the attachment of realty.

5.

Policy Issues

1. The first determination to be made is the scope of the statutory revision. Although the revision is prompted by the holding in Sniadann it would not seem advisable to predicate the extent of the revision solely on the nebulous scope of the mandates of Sniadach. It appears to be preferable to reconsider the appropriate scope of attachment also in the light

a) of the jurisdictional changes brought about by the new long-arm statute (C.C.P. § 410.10 as amended by Cal. Laws 1969 ch. 1610 § 3)

b) of a new assessment of the relative weight of the creditor's needs or conveniences and the debtor's needs for, and legitimate interest in, an unabridged use of his property.

In my opinion both A.B. No. 1602 and A.B. No. 2240 fall short of a general re-appraisal of attachment in California. A.B. 2240 and A.B. 1602 are mainly based on different readings of Sniadach.

A.B. No. 2240 essentially eliminated attachability of wages before judgment and otherwise left the scope and procedure relating to the issuance of attachment unchanged.

A.B. No. 1602 likewise suppressed pre-judgment attachment of wages but, in addition, provided for notice and prior judicial hearing in cases

of resident attachment. The bill did not redefine the scope of non-resident attachment or resident attachment, although it expanded the scope of fraudulent debtor's attachment by adding the case of a fraudulent disposition of assets.

Apparently even Bill No. 1602 did not foresee any constitutional dangers from the authorization of attachment without notice or hearing against non-residents who are subject to in personam jurisdiction under C.C.P. § 410.10, as amended.

It is respectfully suggested that these bills do not meet the need for a re-appraisal of pre-judgment attachment and are subject to doubts as to their constitutionality.

No better support for the approach suggested here could be cited than the lament of Chief Justice Fuld of the Court of Appeals of New York in Simpson v. Loehmann [112] :

> "Almost half a century ago, Chief Judge Cardozo began his famous article, 'A Ministry of Justice' (35 Harv.L.Rev. 113), with the statement that 'the courts are not helped as they could and ought to be in the adaptation of law to justice'. Sometime thereafter, the New York Legislature created a Law Revision Commission, and more recently, the State's Judicial Conference appointed an Advisory Commission on Practice and Procedure to make studies and recommend changes in the rules and statutes governing our law. Revision of the bases for in personam jurisdiction has been the subject of recent major legislative changes. The bases for the exercise of in rem

jurisdiction, however, have been carried over into the CPLR from the Civil Practice Act with little change. Under the circumstances, it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of in rem jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally. In the course of such studies, consideration will undoubtedly be given to the relationship inter se of in rem jurisdiction, in personam jurisdiction, and forum non conveniens."

2. If such broad scope of the revision is approved, three major changes in the scope of attachment should be considered: 113

a) abolition of domestic (resident) attachment;

b) expansion of fraudulent debtors' attachment, whether in case of residency or non-residency;

c) restriction of foreign (non-resident) attachment to cases where the non-resident is not subject to personal jurisdiction, i.e., to cases of "jurisdictional" attachment.

A great deal can be said in support of such changes.

a) The abolition of domestic attachment would bring California in line with the laws of New York and Pennsylvania. Why should a creditor be able to attach goods of a resident debtor, unless there is a danger of fraud or dissipation of assets? Although the Court in Sniadach refused

to "sit as a superlegislative body" and focused on the demands of procedural due process in terms of notice and prior hearing, the Court in effect materially affected the scope of domestic attachment, since it failed to substantiate the requisite extent of the hearing. Obviously, if resident attachment must be predicated upon a prior full dress hearing, such determination would be tantamount to a determination on the merits, converting the attachment into an execution. Although as Justice Harlan intimated, the object of the hearing may be less comprehensive and aim only at the determination of the "probable validity of the claim," it still would seem that domestic attachment in the absence of actual badges of fraud would necessitate an undesirable duplication of judicial effort that is really not warranted by the needs of the creditor, who, of course, loses an avenue of securing priorities over competing creditors.[114]

Perhaps one type of claim might deserve protection by domestic attachment even in the absence of badges of fraud: claims for arrears in support and maintenance.

Short of this possible type of action C.C.P. 537(1) should be repealed in toto.

b) The restriction of foreign attachment to jurisdictional attachment, i.e., cases where no personal jurisdiction over the defendant exists, would likewise be a step towards bringing attachment back to its traditional scope. Until the twentieth century personal jurisdiction was

predicated on either residence or temporary presence. Jurisdiction over a non-resident who was not present could only be obtained by attachment of his assets found in the forum. Such jurisdiction was a limited or "quasi in rem" jurisdiction: The judgment, if in favor of plaintiff, was only valid and effective in the amount of the value of the property that was actually and validly attached. Any excess indebtedness could not be adjudicated with full faith and credit effect, neither was a judgment in favor of the defendant entitled to such recognition. Of course, a general appearance would convert quasi in rem jurisdiction into personal jurisdiction,[115] but without such submission a quasi in rem judgment (often a default judgment) was not entitled to full faith and credit and did not bar a second action. Hence the defendant was subject to multiple litigation for the same cause of action.

Recent developments have greatly expanded the scope of personal jurisdiction and this extension occurred with the sanction of the U.S. Supreme Court.[116] It would seem that whenever personal jurisdiction exists plaintiff should not be able to restrict it to quasi in rem jurisdiction by unilateral choice.[117] Hence in all these cases non-resident attachment has lost its jurisdictional character. The reason why, generally speaking, the availability of personal jurisdiction should bar resort to quasi in rem jurisdiction is the splitting of the cause of action that results from the limitation of the adjudication of monetary claims to the value of the attached assets.

There are apparently, however, still situations where no personal jurisdiction exists and attachment is necessary for the acquisition of in rem jurisdiction. These are the cases of causes of action where no minimum

contacts with the state exist except the presence of assets from which the judgment could be collected.[118] In these cases attachment based on non-residence alone still has a raison d' être and should be retained. This should even be the case where the presence of attachable assets is due to the presence of the defendant's debtor, i.e. the famous Harris v. Balk[119] situation. Despite the many attacks on the rule of that case, it is not recommended to bar attachment in such cases.

In all cases, however, where attachment is not a prerequisite to jurisdiction because of the availability of in personam jurisdiction, non-residence of the defendant should no longer remain a separate and independent ground of attachment. Attachment in such cases should only be authorized, if there is reasonable danger of fraudulent conduct. In other words, where in personam jurisdiction is obtainable resident and non-resident defendants should be on equal footing.

Special consideration must be given in this context to the new rule relating to authority of declining jurisdiction on the basis of the doctrine of forum non conveniens. C.C.P. § 410.30 empowers a court upon finding that the action should be heard in a forum outside the state to stay or dismiss the action in whole or in part on any condition that may be just. The court in the case of a stay or dismissal on the grounds specified in that section should be able to order that the assets of defendants situated in the state are subject to attachment and that the further proceedings thereon are stayed pending the disposition of the controversy in another forum. Although there might be no danger of fraudulent conduct on the part of the defendant, the mere delay caused by the necessity to initiate proceedings elsewhere might, in the discretion of the court, justify the granting of a writ of attachment. Although actually this power of the court is already implicit in section 410.30, it might be spelled out in the attachment statutes.

c) It is recommended that the grounds of so-called fraudulent debtor's attachment be retained and expanded.

At present the broad scope of attachment, i.e. attachments in any action upon a contract express and implied or in any action to recover a sum of money as damages arising from an injury to or death of a person or damage to property in this state in consequence of negligence, fraud or other wrongful act, is available in addition to cases of non-residence

1) if defendant has departed from the state

2) if defendant after due diligence cannot be found within the state

3) if defendant conceals himself to avoid service of summons.

A.B. No. 1602 qualifies ground 1) by adding "with the intention not to return" and adds a new ground 4) if defendant "with the intent to defraud creditors or defeat just demands has removed or is about to remove his property from the state or has assigned, secreted or disposed of his property or is about to do so."

It seems that the first change proposed by A.B. No. 1602 is ill-advised. A defendant who has departed from the state from the state "with the intention not to return" has ceased to be a resident. Hence this ground as changed in A.B. No. 1602 would only duplicate the ground of non-residence. It should be noted that departure from the state formerly was a ground for service by publication, C.C.P. § 412 (prior to its repeal). This ground is now deleted, C.C.P. § 415.50.

In New York departure from the state is a ground for attachment if the departure was "with intent to defraud his creditors or to avoid the service of the summons". In addition, imminent departure with such intent likewise suffices, C.P.L.R. § 6201 (3). A similar rule applies in Pennsylvania.

Fraudulent Debtor's Attachment may be issued "when the defendant with

the intent to defraud the plaintiff

1) has removed or is about to remove property from the jurisdiction of the court;

2) has concealed or is about to conceal property;

3) has transferred or is about to transfer property;

4) has concealed himself within, absconded or absented himself from the Commonwealth.

It is recommended that California adopt a statute similar to that of New York or Pennsylvania, with the modification that not actual "intent to defraud" is required, but merely that the transfer, concealment and departure occurs under circumstances which warrant the inference that the act was done with the intent to frustrate the collection of a claim or escape adjudication.

3. It is recommended that no pre-judgment garnishment of unpaid wages be authorized.

a) A rule of that type has been accepted both by A.B. No. 2240 and A.B. No. 1602. A.B. No. 2240 eliminates garnishability under a writ of attachment of "all earnings of the debtor due or owing for his personal services",[121] while A.B. No. 1602 excepts "wages or fees for personal services",[122] without distinguishing between unpaid or paid wages.

An exception of <u>paid</u> wages which might be traceable into a bank account presents special problems that need separate attention and separate policy decisions. The general exception should apply only to <u>unpaid</u> wages.

b) Even with respect to unpaid earnings from personal services it may be a question whether the exception should be a flat exception or one that is subject to limitations as to pay periods or amount. It is conceivable that without such qualification a large fee which is earned but not paid over escapes attachability even in cases of threatened fraud. Since the exception, however, applies only to pre-judgment garnishment, no specific statutory limitations seem to be advisable, leaving it to the equity power of the courts to make special orders in cases where there is no hardship on the debtor but danger for the creditor.

c) The exception should apply regardless of whether the defendant is a resident or a non-resident of the state. While Sniadach involved a resident wage-earner and the majority opinion laid stress on that fact, the hardship that prompted the ruling in Sniadach may exist with equal oppressiveness in cases of non-residents: If, for example, a New York resident is entitled to earned and unpaid wages with an employer who is also engaged in business in California, a plaintiff should not be able to resort to quasi in rem jurisdiction by garnishing the defendant's wages in California. Even where a debtor has earned wages with a local employer in California and is a resident in a neighboring state, a plaintiff should not be able to reach unpaid wages before judgment. There seems to be no reason why pre-judgment attachability of wages should depend on residence or non-residence. It should be recalled that state courts have split on the constitutionality

of wage attachments without notice and hearing in cases of non-residents; the constitutionality was rejected by the Superior Court of Delaware, while it was upheld by the Court of General Session in the District of Columbia.[123]

4. A writ of attachment should issue only upon an order of a judicial officer to that effect.

It is recommended that writs of attachment should no longer be issued by the clerk of court upon his own determination that the prerequisites of the issuance of a writ of attachment are complied with. The issuance of the writ should be ordered by a judicial officer (judge, justice or referee) if the requisite showing (see infra no. 5) has been made.

Since the proceedings are summary in nature, referees should be permitted to make the requisite determinations and orders in analogy to the provisions governing supplementary proceedings (C.C.P. §§ 717 et seq.)[124]

A similar procedure is prescribed in New York.[125] In that state orders of attachment are made by the court. According to the comments by Weinstein, Korn and Miller:

> "Whether or not an order of attachment will issue in a particular case has traditionally been a question addressed to the discretion of the trial court; even if the plaintiff's cause of action clearly falls within one of the classes of actions in which attachment is available, he is not entitled to an order as a matter of right ... The exercise of the trial court's discretion may be reviewed by the Appellate Term or the Appellate Division."

6. Prior notice and hearing

a) The motion for an order of attachment shall be accompanied by an affidavit of the kind heretofore required by C.C.P. section 538 (with certain amendments) and by an undertaking as heretofore required by section 539.

The judicial officer shall not issue an order of attachment unless he is satisfied that plaintiff has shown

1) that the court from which the order of attachment is sought has jurisdiction in the action either apart from the attachment (in personam jurisdiction) or on the basis of the attachment (quasi in rem jurisdiction);

2) that one or more of the grounds of attachment provided in section 537 (as proposed to be amended) exist;

3) that there is prima facie proof showing a) that plaintiff has a valid cause of action, b) that defendant is indebted to plaintiff over and above all legal setoffs or counterclaims in the amount for which the attachment is sought and that this amount exceeds $200, c) that the motion for attachment and the cause of action are not prosecuted to hinder, delay or defraud any creditor of defendant and, d) that the indebtedness claimed is neither discharged by a discharge granted in a prior bankruptcy proceeding nor the action thereon stayed in any proceeding under the National Bankruptcy Act.

b) Except in the case where the attachment is sought to obtain quasi in rem jurisdiction over a non-resident, the order of attachment shall issue only upon notice and opportunity of a prior hearing to defendant. The notice shall be served on defendant with a copy of the motion for an order of attachment and the affidavit. The notice shall specify

1) the title of the court in which the action is pending;
2) The name and parties to the action;
3) that one of the parties, as named, has filed a motion for attachment;
4) that a hearing is scheduled on the motion at the time and place indicated;
5) that the defendant may appear in person or by attorney to show any cause why the attachment shall not issue;
6) that in the absence of any showing as specified in 5) an order of attachment as requested may be granted.

c) In the case of an attachment sought for jurisdictional purposes the order shall specify that a hearing on the order will be held at a time and place indicated and that the writ will be vacated, if the defendant shows that it was issued <u>without sufficient cause</u>.
The party obtaining the order for the writ shall show within ten days from the issuance of the order that all reasonable efforts have been made to notify defendant of the order; otherwise the order shall be vacated for lack of sufficient cause.
Vacation of the writ for lack of sufficient cause is a ground of vacation different from vacation because of improper or irregular

issuance as envisaged by C.C.P. section 556, see Burke v. Superior Court.[126]

7. Authorization of preliminary restraining orders and other provisional relief

Since it is proposed that in all cases, except in cases of jurisdictional attachment, an order of attachment may issue only after prior notice and hearing, it is necessary to authorize the court to issue preliminary orders ex parte to prevent dissipation of assets where such provisional protection is needed in order to safeguard collectibility.

Such orders would prohibit the transfer or other disposition of assets or authorize measures less drastic than outright seizure of chattels or freezing of accounts. This recommendation is in accordance with that of the Committee on the Enforcement of Judgment Debts, discussed in the chapter dealing with the comparative aspects of attachment.

In a vast number of jurisdictions it has been held that the provisions governing attachment furnish an adequate remedy at law and that the courts have no power to enlarge or supplement the pre-judgment relief provided by the attachment statutes in actions for the recovery of money by issuing restraining orders or other equitable relief (so-called equitable attachment.[127] Although California apparently has never ruled squarely on that issue, the cases show a reluctance to grant equitable relief to prevent fraudulent dispositions in actions for the payment of money.[128] It is therefore recommended that the courts be expressly empowered to grant appropriate relief while the determination on the issuance of an order of attachment is pending.

8. Attachment, so far as authorized, should be available in any action for the recovery of money

At present the California statute authorizes attachment only in certain

actions. As has been discussed before, in the course of time the scope of non-resident and fraudulent debtors attachment has been expanded to such an extent as to include practically any action for the recovery of money, except actions for damage to property not within the state. California cases, however, have restricted the extent of that exception by holding, a) that it does not apply to cases where there is a waiver of the tort and the suit is in assumpsit and, b) that the requirement of "injury to property within this state" must be given a broad interpretation.[129]

Since the doctrine of forum non conveniens now affords sufficient protection against the necessity of defending a damage action based on injury to property not within the state in cases where otherwise personal jurisdiction or quasi in rem jurisdiction over such action exists, it would seem that conversely a plaintiff should be entitled to an attachment, if California is a proper forum and if there is either a danger that defendant may dissipate or fraudulently dispose of the assets or the attachment is a jurisdictional requirement.

1 Laws for the Better Government of California, The Preservation of Order and the Protection of the Rights of the Inhabitants (1848), at p. 5.

2 About attachment as original process and attachment as mesne process, see Riesenfeld, Creditors' Remedies and Debtors' Protection (1967), at p. 182.

3 Calif. Stats. 1849/1850, ch. 137, p. 412.

4 Calif. Stats. 1851, ch. 5, sec. 120.

5 Code of Civil Procedure of the State of New York, Reported Complete by the Commissioners on Practice and Pleadings (1850) §§ 723-743.

6 Id., § 723.

7 Id., § 724.

8 Id., §§ 621, 624.

9 Calif. Stats. 1851, ch. 5, sec. 22.

10 Calif. Stats. 1853, ch. 178, sec. 3.

11 Calif. Stats. 1858, ch. 192, sec. 1-6, p. 152. Apparently such attachment was permitted only in actions on a contract for the direct payment of money, made or payable in the state.

12 Calif. Stats. 1860, ch. 314, sec. 13.

13 Id., sec. 14.

14 Calif. Code of Civil Procedure, 1872, secs. 537-559.

15 Calif. Acts Amendatory of the Codes, 1873/74, ch. 383, secs. 68-70.

16 Calif. Stats. 1901, ch. 102, sec. 91.

17 Id., sec. 92.

18 Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901).

19 Calif. Stats. 1905, ch. 363.

20 Calif. Stats. 1929, ch. 401, sec. 1.

21 Calif. Stats. 1933, ch. 744.

22 Calif. Stats. 1961, ch. 589, sec. 9.

23 Calif. Stats. 1965, ch. 1375, sec. 1.

24 Calif. Stats. 1961, ch. 1164, sec. 2.

25 Calif. Stats. 1927, ch. 524, sec. 1.

26 Calif. Stats. 1957, ch. 1660, sec. 1.

27 Calif. Stats. 1963, ch. 50, sec. 1.

28 Calif. Stats. 1927, ch. 524, sec. 2.

29 Calif. Stats. 1933, ch. 744, sec. 67.

30 Calif. Stats. 1951, ch. 776, sec. 1 ($30); Calif. Stats. 1957, ch. 1090, sec. 1 ($50); Calif. Stats. 1959, ch. 1872, sec. 1 ($75); Calif. Stats. 1965, ch. 668, sec. 1 ($125).

31 Calif. Stats. 1931, ch. 916, sec. 1.

32 Calif. Stats. 1968, ch. 851, sec. 1.

33 Political Code of 1872, sec. 1032, as originally enacted.

34 Calif. Stats. 1874, ch. 610, sec. 27.

35 Calif. Stats. 1943, ch. 134.

36 Calif. Stats. 1943, ch. 134, sec. 500002.

37 Calif. Stats. 1951, ch. 655, sec. 23.

38 Id., sec. 20.

39 Cal. Civ. Code, sec. 1812.1.

40 Cal. Civ. Code, sec. 1812.

41. The leading case in that respect is, of course, Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1877); see Riesenfeld, Creditors' Remedies and Debtors' Protection at 130 and 312.

42 76 Harv. L. Rev. 303 (1962).

43 Rule 4e (1) and (2) as amended Jan. 21, 1963.

44 Would the entry of a judgment under long-arm jurisdiction give jurisdiction over a non-resident and absent defendant to compel him to apply out-of-state assets to the payment of the judgment debt?

45 Cal. C.C.P. § 410.10.

46 See the statements on requisite minimum contacts by former Chief Justice Warren in Hanson v. Denckla, 357 U.S. 235, at 251.

47 N.Y. C.P.L.R. § 302 (a) 3; Ore. Rev. Stat. § 14.035 (1) (c) and (3).

48 See Riesenfeld, Creditors' Remedies and Debtors' Protection. 177 (1967); Mussman and Riesenfeld, Garnishment and Bankruptcy, 27 Minn. L. Rev. 1 at 9 (1942).

49 See Riesenfeld op. cit. supra, and Mussman and Riesenfeld, op. cit. supra,

50 Under the Judicature Act of 1875 and the Rules of Court contained in the First Schedule thereto, the warrant for arrest would issue "at any time after the writ of summons has issued", Order V r. 11, Roscoe, A Treatise on the Jurisdiction and Practice of the Admiralty Division of the High Court of Justice (1878), at p. 109 and 110.

51 First Report of the Judicature Commissioners (1869), at p. 15.

52 Report of the Committee on the Enforcement of Judgment Debts (Cmnd. 3909) 323 (1969).

53 Id. 325.

54 N.Y. C.P.L.R. § 6201, as amended in 1970.

55 N.Y. C.P.L.R. §§ 6211, Rule 6212. The term "order of attachment" was employed because the "warrant of attachment" was "clearly an order of the court". Advisory Committee Notes to § 6201.

56 N.Y. C.P.L.R. Rule 6212.

57 N.Y. C.P.L.R. §6211.

58 N.Y. C.P.L.R. § 6213.

59 Pa. Rules of Civil Procedure, R. 1480 (1954).

60 Pa. R.C.P., R. 1251-1279, 1461 (1954).

61 Pa. R.C.P., R. 1285-1292, 1462 (1954).

62 Pa. R.C.P., R. 1286.

63 Pa. R.C.P., R. 1286.

64 Pa. R.C.P., R. 1251 and 1285.

65 Pa. R.C.P., R. 1256 and 1288.

66 Pa. R.C.P., R. 1255 and 1287.

67 Pa. R.C.P., R. 1287.

68 Pa. R.C.P., R. 1255 and 1265.

69 Attachment is regulated by Wash. Rev. Code, Ch. 7.12 and garnishment by Wash. Rev. Code, Ch. 7.32 as revised by Wash. Laws 1969, ch. 264 and Wash. Laws 1970, ch. 69.

70 Wash. Rev. Code, § 7.12.020.

71 Wash. Laws 1923, ch. 159.

72 Wash. Rev. Code, § 7.32.10 as revised by the Garnishment Law of 1969, sec. 1.

73 See Bassett v. McCarty, 3 Wash.2d 488, 101 P.2d 575 (1940).

74 Wash. Laws 1969, ch. 264, sec. 1(2).

75 Wis. Stat. Ann. ch. 266 (attachment) and ch. 267 (as amended in 1965) (garnishment).

76 Wis. Stat. Ann., § 266.01 (1) and (2).

77 Wis. Stat. Ann., § 267.01 as amended in 1965.

78 395 U.S. 337, 89 S.Ct. 1820, 23 L. Ed.2d 349 (1969).

79 15 U.S.C. § 1601-1677.

80 Wis. Stat. Ann., § 267.02 (2) (a)-(c).

81 Cit. supra note 78.

82 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921)

83 See Riesenfeld, Creditors' Remedies & Debtors' Protection, at 180

84 See Riesenfeld, Creditors' Remedies & Debtors' Protection, 1970 Case Supplement, at p. 18 note 3.

85 Id., note 4.

86 "Where the taking of one's property is so obvious it needs no extended argument to conclude that absent notice and a prior hearing (italics ours) this prejudgment garnishment procedure violates the fundamental principles of due process", 395 U.S. 337, at 342.

87 "But in the interim the wageearner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise", 395 U.S. 337, at 339.

88 395 U.S. 337, 342, at 342.

89 390 U.S. 736, at 736 and 742.

90 266 U.S. 285 (1924).

91 Hanner v. De Marcus, 390 U.S. 736, at 714

92 Id., at 741

93 327 U.S. 220

94 390 U.S. 736, at 742

95 105 Ariz. 270, 463 P.2d 68 (in banc, Dec. 29, 1969).

96 Arnold v. Knettle, 10 Ariz. App. 590, 460 P.2d 45 (Div. 2, Oct. 28, 1969).

97 11 Ariz. App. 571, 466, P.2d 790, at 791 (1970).

98 44 Wis.2d 712, 172 N.W.2d 20 (1969).

100 McCallop v. Carberry, I C 3 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); Cline v. Credit Bureau of Santa Clara Valley, I C 3 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970).

101 People ex rel. Lynch v. Superior Ct. of Los Angeles, I C 3 910, 464 P.2d 126, 83 Cal. Rptr. 670 (1970).

102 9 C.A.3d 659, 88 Cal. Rptr. 293 (1970).

103 2 Pov. L. Rptr. ¶ 11,199.

104 National Bank of Commerce of Seattle v. Green, 1 Wash. App. 713, 463 P.2d 187 (garnishment of joint bank account).

105 City Finance Co. of Mount Rainer, Inc. v. Williams, (D.C. Court of Gen. Sess. 1969) 2 Pov. L. Rep. ¶ 10,388. The court did not identify the property attached but the facts seem to indicate that it was wages. Contra, Mills v. Bartlett, (Del. Super. Ct. 1970) 2 Pov. L. Rep. ¶ 11,746.

106 279 U.S. 820 (1929).

107 127 Me 110 (1928).

108 Maine, Rev.Stat. 1916, ch. 86, secs. 2, 12, 17.

109 Maine, Laws of 1821 Ch. 59 Sec. 1. See also Blanchard v. Day, 31 Me. 494 (1850) for the procedure on original attachment.

110 395 U.S. at 340.

111 395 U.S. at 344.

112 21 N.Y.2d 305, 234 N.E.2d 669.

113 The terms domestic attachment, fraudulent debtor's attachment and non-resident attachment are used to describe different classes of grounds of attachment; domestic attachment permits attachment in action against residents on the sole ground that the cause of action belongs to a definite class of transactions or events. In California, for example, infliction of personal injury to plaintiff is not a recognized ground of domestic attachment. Fraudulent debtor's attachment is based on the ground that the defendant has allegedly engaged in conduct which warrants the substantial fear that defendant may obstruct the enforcement of the judgment, unless provisional protection is afforded. Foreign attachment is based on the sole ground that defendant is a non-resident.

114. The plaintiff would also lose some possibility of protecting himself against unperfected security interests, Cal. Commercial Code, § 9-30(1)(6); yet, if need be the Code could be amended by reverting to the traditional extension of credit rule, which may be preferable in any event, see A.L.I, Review Committee for Article 9 of the N.C.O., Preliminary Draft No. 2 at p. 34 and 35.

115. Farmers etc. Nat. Bank v. Superior Court, 25 C.2d 842, 846 155 P.2d 823, Raps v. Raps, 20 C.2d 382, 125 P.2d 826; Judicial Council Report (1969) Part 1, ch. 2, Revision of Title 5 (commencing with section 405) of the Code of Civil Procedure relating to Jurisdiction and Service of Process, 21 at 34.

116. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940); International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 Ed.2d 223. See the detailed discussion in Judicial Council Report (1969) Part 1, ch. 2, Revision of Title 5 (commencing with section 405) of the C.C.P. relating to Jurisdiction and Service of Process, Appendix II, 68-91.

117. Under the Code of Civil Procedure, prior to the amendments of 1969, it was impossible to obtain a personal judgment against a defendant who was not a resident of the state at any of the three

relevant times, specified in section 417. As a result only a limited or quasi in rem jurisdiction was available in such case even if personal service abroad was made pursuant to section 413. See Atkinson v. Superior Court, 49 C.2d 338, 316 P.2d 960 (1957). That case held that California possessed quasi in rem jurisdiction with respect to rights in a trust fund, although the trustee (who had been subjected to personal service in New York) had never been a resident of the state. In Atkinson the quasi in rem jurisdiction was not based on attachment but on the presence of multiple relevant contacts with the state. It should be noted that Atkinson did not give the plaintiff a choice between quasi in rem and personal jurisdiction, but held that despite the lack of in personam jurisdiction quasi in rem jurisdiction was available. The repeal of section 417 has eliminated the troublesome and unique distinction between "jurisdiction over a person" and "power to render a personal judgment". Hence a plaintiff should not have a choice between the two types of jurisdiction.

118. Accord, Judicial Council, op. cit. supra note 115 at p. 82.

119. 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905).

120 Pa. Rules of Court, 1970, Rule 1286.

121 A.B. No. 2240, sec. 19 (revising C.C.P. § 690.6).

122 A.B. No. 1602, sec. 1 and sec. 2, revising C.C.P. § 537 and adding a § 537.1.

123 Supra, note 105.

124 N.Y., C.P.L.R. § 6201.

125 7a Weinstein, Korn and Miller, New York Civil Practice ¶ 6201.13.

126 71 A.C. 292, at 295 (1969).

127 See Riesenfeld, Creditors' Remedies and Debtors' Protection, 213 cases collected in 116 A.L.R. 270 (1938).

128 See City & County of San Francisco v. Market Street Ry. Co., 95 C.A.2d 648, 213 P.2d 780 (1950).

129 Ponsonby v. Suburban Fruit Lands Co., 210 Cal. 229, Pac. (1930).

Draft of Amended Sections 537 and 538

§ 537

1. The plaintiff, at the time of issuing the summons or at any time afterward before judgment may have the property of defendant other than earnings for personal services due and owing attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided.

2. A writ of attachment may be issued in any action for the recovery of money regardless of whether other relief is also sought if

   a) the defendant is not residing in this State and apart from the attachment not subject to the jurisdiction of this State;

   b) the defendant under circumstances which permit the inference of his intent to hinder, delay or defraud his creditors

      (1) has removed or is about to remove property from this State;

      (2) has concealed or is about to conceal property;

      (3) has transferred or is about to transfer property;

      (4) has concealed himself within or absconded from this State;

   c) the action is prosecuted by the State of California or any political subdivision thereof for collection of taxes owing to said State or political subdivision or for the collection of any moneys due upon any obligation or penalty imposed by law;

d) the action is prosecuted by the State of California, or any political subdivision thereof for the recovery of funds pursuant to Section 11680.5 of the Health and Safety Code. In such cases, funds on the defendant's person at the time of his arrest which are retained in official custody shall also be subject to attachment;

e) the action is upon any liability, existing under the laws of this State, of a spouse, relative or kindred, for the support, maintenance or care or necessaries furnished to the other spouse.

3. If an action against a non-resident subject to the jurisdiction of this State, is stayed or dismissed by the Court pursuant to Section 410.30 of this Code the court may order that a writ of attachment be issued by the clerk or issue such writ if there is no clerk without existence of the groundsspecified in subsection 2b of this section.

§ 538 (subsections 3-6 all new)

1. A writ of attachment shall be issued by the clerk of the court or the justice where there is no clerk after a judge, justice or referee has made an order that the writ be issued upon motion by the plaintiff;

2. The motion shall be accompanied by an affidavit by or on behalf of the plaintiff, showing

a) the facts specified in Section 537 as prerequisites for the issuance of the writ;

b) the amount claimed as owed by the defendant above all legal setoffs or counterclaims or if an attachment is sought for only part thereof, such partial amount;

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

d) that the affiant has no information and belief that the claim for the enforcement of which the attachment is sought has been discharged by a discharge granted to defendant under the National Bankruptcy Act or that the prosecution of the action has been stayed in a proceeding under the National Bankrupt Act.

3. The judge, justice or referee may not issue an order of attachment unless he is satisfied that plaintiff has shown

a) that the court from which the writ of attachment is sought has jurisdiction in the action either apart from attachment or on the basis of the attachment;

b) that one or more of the grounds of attachment provided in Section 537 exist;

c) that there is prima facie proof to the effect

(1) that plaintiff has a valid cause of action;

(2) that defendant is indebted to plaintiff over and above all legal setoffs or counterclaims in the amount for which the attachment is sought and that this amount exceeds $200;

(3) that the motion for attachment and the cause of action are not prosecuted to hinder, delay or defraud any creditor of defendant; and

(4) that he has no information or belief that the claim is discharged by a discharge granted in a proceeding under the National Bankruptcy Act or that the action thereon is

enjoined or stayed in a proceeding under the National Bankruptcy Act.

4. If the attachment is sought on a ground provided in sec. 537(2)(b) and (e) the order of attachment may be made only upon notice and opportunity to be heard given to defendant.

The notice shall be served on defendant with a copy of the motion for an order of attachment and a copy of the affidavit. The notice shall specify

a) the title of the court in which the action is pending;

b) the name of the parties to the action;

c) that one of the parties, as named, has filed a motion for an order of attachment;

d) that a hearing is scheduled on the motion at the time and place indicated;

e) that the defendant may appear either in person or by attorney to show cause why the writ of attachment should not be issued;

f) that in the absence of any such showing an order of attachment as requested may be granted.

5. If the attachment is sought on a ground provided in sec. 537(2)(a) and (c) the order shall state that a hearing on the order will be held at a time and place specified in the order and that the order and the writ if issued will be vacated if defendant shows that the order was made without sufficient cause.

The party obtaining the order shall show within ten days from its issuance that a copy of the writ has been served on defendant or that all reasonable efforts have been made to do so.

If the party fails to make such showing the order and the writ if issued shall be vacated for lack of sufficient cause.

6. After the motion for attachment and prior to the hearing and determination thereon the judge, justice or referee may issue an order enjoining the defendant from transferring or otherwise disposing of his property or granting any other relief appropriate to protect the creditor against frustration of the enforcement of his claim.

§ 2713.22

Discharge—by surrender of defendant:
O-Jur2d: Bail § 65

§ 2713.26

Motion to vacate order of arrest; reduction of bail:
O-Jur2d: Bail § 62

§ 2713.27

[The amendment in HB 1 (129 o 582 [745]), eff 1-10-61, changed the asterisked section "2173.26" to "2713.26."]

Research Aids

Motion to vacate order of arrest; reduction of bail:
O-Jur2d: Bail § 62

§ 2713.28

Research Aids

Jail fees:
O-Jur2d: Costs § 39

§ 2713.42

Research Aids

Racial, religious, economic, social, or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in civil case. 72 ALR2d 905.

§ 2713.43

Research Aids

Racial, religious, economic, social, or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in civil case. 72 ALR2d 905.

[ATTACHMENT]

§ 2715.01 Grounds of attachment.

In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the following grounds:

(A) Excepting foreign corporations which by compliance with the law therefor are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

(B) That the defendant is not a resident of this state;

(C) That the defendant has absconded with the intent to defraud his creditors;

(D) That the defendant has left the county of his residence to avoid the service of a summons;

(E) That the defendant so conceals himself that a summons cannot be served upon him;

(F) That the defendant is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

(G) That the defendant is about to convert his property, in whole or part, into money, for the purpose of placing it beyond the reach of his creditors;

(H) That the defendant has property or rights in action, which he conceals;

(I) That the defendant has assigned, removed, disposed of, or is about to dispose of, his property, in whole or part, with the intent to defraud his creditors;

(J) That the defendant has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought;

(K) That the claim is for work or labor, or for necessaries;

(L) That the defendant has not complied with the provisions of sections 1306.01 to 1306.09, inclusive, of the Revised Code, relating to bulk transfers.

An attachment shall not be granted on the ground that the defendant is a foreign corporation or not a resident of this state for any claim, other than a debt or demand arising upon contract, judgment, or decree, or for causing damage to property or death or personal injury by negligent or wrongful act.

* HISTORY: 129 v 13 (178), § 1. Eff 7-1-62.

Forms

Order on motion to discharge attachment. Richards No.31-6; Petition. No.142-1.

Research Aids

Nature of remedy and parties:
O-Jur2d: Attachment § 1 et seq

Attachment and garnishment of funds in branch bank or main office of bank having branches. 12 ALR3d 1088.

Garnishment of salary, wages, or commissions where defendant debtor is indebted to garnishee-employer. 93 ALR2d 995.

What constitutes a fraudulently contracted debt or fraudulently incurred liability or obligation within purview of statute authorizing attachment on such grounds. 39 ALR2d 1265.

INDEX TO CASE NOTES

Law review article, 7
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Spendthrift trust, proceeds not subject to attachment, 1
Threats to dispose of property as ground, 2
Writ of attachment held void, when, 6

CASE NOTES

1. A provision in a trust instrument creating a spendthrift trust is valid as against persons to whom the spendthrift owes the duty of support and the proceeds of such funds in the hands of the trustee are not subject to attachment: McWilliams v. McWilliams, 74 OLA 535 (CP).

2. It is not necessary to show an overt act to sustain an order of attachment made on an affidavit that defendant is about to remove or conceal his property; proof of threats by debtor to dispose of his property so as to prevent the collection of the debt is sufficient

ARTICLE 62
ATTACHMENT

References: Who may grant order, 11 C-W2d § 75:9; construction of Civil Practice Law and Rules provisions relating to attachment, 11 C-W2d § 76:5.

§ 6201. Grounds for attachment.

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

History: Am, L 1970, ch 980, eff Sept 1, adding sub 7 and renumbering former sub 7 to be 8.

References: 11 C-W2d §§ 76:16–76:32; by and against whom attachment obtainable, 11 C-W2d §§ 76:7–76:12; actions in which attachment available, 11 C-W2d §§ 76:13, 76:15; statement of ground of contract liability fraudulently incurred, 11 C-W2d § 76:64; attachment in action for foreclosure of mortgage, 15 C-W2d § 92:183; provisional remedies in actions involving State, 21 C-W2d § 126:59.

CASE NOTES

New notes added:
Joinder, ¶ 16.1.

A. IN GENERAL

¶ 1. Generally.

Attachment serves a jurisdictional as well as a security purpose. Zeiberg v Robosonics, Inc. 43 Misc 2d 134, 250 NYS 2d 368.

¶ 2. Jurisdictional requirements.

Where trust property subject to attachment under subd 1 of CPLR § 6201 is sit-

FRAUDULENT DEBTOR'S ATTACHMENT

Rule 1285. Conformity to Foreign Attachment

Except as otherwise provided in this chapter, the procedure in an action commenced by a writ of fraudulent debtor's attachment shall be in accordance with the rules relating to foreign attachment. Adopted April 12, 1954. Eff. Oct. 1, 1954.

Rule 1286. Scope

A fraudulent debtor's attachment may be issued to attach personal property of the defendant within the Commonwealth and not exempt from execution, upon any cause of action at law or in equity in which the relief sought includes a judgment or decree for the payment of money, when the defendant with intent to defraud the plaintiff

(1) has removed or is about to remove property from the jurisdiction of the court;

(2) has concealed or is about to conceal property;

(3) has transferred or is about to transfer property; or

(4) has concealed himself within, absconded, or absented himself from the Commonwealth.

Adopted April 12, 1954. Eff. Oct. 1, 1954.

Note: Fraudulent debtor's attachment as distinguished from foreign attachment is not applicable to real property. The remedies available under the Fraudulent Conveyance Act of May 21, 1921, P.L. 1045, 39 P.S. §§ 350, 360 in regard to both real and personal property are not suspended or affected by these rules.

Rule 1287. Commencement

(a) A fraudulent debtor's attachment shall be commenced by filing with the prothonotary

(1) a praecipe for a writ, which shall direct the sheriff to attach such specific items of personal property of the defendant as are set forth in the praecipe, and all other personal property of the defendant,

(2) a bond or, in lieu thereof, security in the form of legal tender as hereinafter provided, and

(3) a complaint.