#39.70 3/2/72

Memorandum 72-21

Subject: Study 39.70 - Prejudgment Attachment Procedure (Wrongful Attachment)

Summary

This memorandum discusses the present law relating to wrongful attachment and then presents a series of policy questions relating to wrongful attachment that should be resolved for the new attachment scheme.

Present Law Relating to Wrongful Attachment

The body of case law relating to the liability of a plaintiff for wrongful attachment is quite well developed. Rather than presenting a full discussion of the cases here, a synopsis of the law relating to wrongful attachment is given. This synopsis is drawn primarily from the following sources which also list the cases:

Conners, California Surety and Fidelity Bond Practice §§ 24.4-24.17 (Cal. Cont. Ed. Bar 1969)

Riesenfeld, Torts Involving Use of Legal Process, in Debt Collection Tort Practice (Cal. Cont. Ed. Bar 1971)

2 B. Witkin, California Procedure 2d at 1606-1613 (1970)

"Wrongful attachment" is a generic term for three distinct theories of liability. These three theories are malicious prosecution, abuse of process, and statutory liability. Each theory has its own elements and its own measure of damages. Malicious prosecution and abuse of process are common law or case law tort theories based on fault; statutory liability is based on a theory of liability without fault. A defendant may sue a plaintiff on any or all of these theories of liability for wrongful attachment although a determination of damages on one theory is res judicata as to the others.

A detailed analysis of each theory of liability follows.

Malicious attachment. Malicious attachment is merely a special case of malicious prosecution. Where a plaintiff has obtained an attachment in an action

which he has prosecuted maliciously and without probable cause, he may be liable for malicious attachment. The condition for liability, in addition to the defendant's proof of malice and absence of probable cause, is that the case has been terminated in favor of the defendant.

Because the case must have been terminated, the defendant cannot allege the malicious attachment by cross-complaint in the original action but must initiate a second action following the termination of the original action. There is old case law to the effect that the cause of action accrues at the time of attachment; hence, the statute of limitations may have run by the time the original case has terminated. In one recent case, however, the Supreme Court indicated that the cause of action does not accrue, nor does the statute of limitations commence to run, until the termination of the action. Babb v. Superior Court, 3 Cal.3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971). It is not clear whether the one-year statute of Code of Civil Procedure Section 340(3), the two-year statute of Code of Civil Procedure Section 339(1), or the three-year statute of Code of Civil Procedure Section 338(3) applies.

Damages available in a malicious prosecution case include all compensatory damages suffered because of the attachment, including attorney's fees; business losses; general harm to reputation, social standing, and credit; and mental and bodily harm. Punitive damages are also available. An assignor of a claim may be held liable for the damages caused by a malicious attachment of his assignee if he had knowledge of or approved or ratified the malicious acts.

Abuse of process. Wrongful attachment as an abuse of process differs from malicious attachment in one major aspect. The gist of the action is that the attachment plaintiff has used attachment for an ulterior purpose (usually coercion) and has committed a willful act in using the attachment that is not proper in the regular conduct of attachment proceedings. Examples of such

acts are where the plaintiff has maliciously procured an attachment in an action not of the type authorized by statute for attachment, where the plaintiff has attached property that is exempt from attachment, or where the plaintiff has attached property of a value greatly in excess of the amount of the claim. The characteristic of all these cases--as distinguished from malicious attachment cases--is that they may well be based on a valid claim rather than on a claim that is maliciously prosecuted without probable cause.

There are several important consequences of this distinction. A cause of action for abuse of process arises immediately upon the wrongful attachment. The reason for this is stated in White Lighting Co. v. Wolfson, 68 Cal.2d 336, 350-351, 438 P.2d 345, , 66 Cal. Rptr. 697, (1968):

> In cases such as the instant one in which the alleged wrongfulness of the attachment does not depend upon an alleged lack of probable cause and malice in instituting the action in which the attachment issues [reference] a termination of that action in favor of the attachment defendant has no bearing upon the determination whether the attachment writ was maliciously procured or improperly used. The attachment defendant should therefore not be forced to wait until the termination of the creditor's primary action to seek damages for the alleged wrongful attachment. [Footnote.]

The statute of limitations (apparently one year--Code of Civil Procedure Section 340(3)) commences to run at the time of attachment. The defendant may allege the abuse of process immediately by way of cross-complaint in the main action.

The damages available in an abuse of process action include compensatory damages for all injuries suffered as a result of the tort and punitive damages where malice has also been pleaded and proved.

Statutory liability. While malicious attachment and abuse of process are common law torts, there is a third form of wrongful attachment liability imposed by statute. Code of Civil Procedure Section 1239 makes as a prerequisite to attachment that the plaintiff file an undertaking to compensate the defendant for all damages sustained as a result of the attachment if the attachment

is discharged on the ground that the plaintiff was not entitled to it or if the defendant recovers judgment in the main action. The damages thus awarded may not exceed the value of the undertaking, which is generally one-half the amount of the plaintiff's claim. Recovery is on an absolute liability basis regardless of any fault on the part of the plaintiff.

The purpose of the statutory liability is to protect the owner of the property against seizure at the instance of a plaintiff who has no valid claim. Regardless whether the plaintiff has committed a wrongful act, attachment is an extraordinary remedy with harsh and coercive consequences. The undertaking acts as insurance that the plaintiff will utilize attachment only in appropriate cases.

> The remedy on the attachment undertaking is sustained by allegation and proof that the writ was wrongfully procured--that there was no debt due from the attachment defendant when it was issued and levied. It is not there necessary to aver malice and want of probable cause for the issuance of the attachment, but simply that the attachment was wrongfully procured and levied. [Vesper v. Crane Co., 165 Cal. 36, 41, 130 P. 876, (1913).]

Code of Civil Procedure Section 539 provides rather restricted limits for liability. It provides for liability where the attachment is discharged because it was not available in the type of case that the plaintiff was suing on even though attachments may be discharged for other reasons such as a defective affidavit or undertaking. Section 539 also provides that the defendant is entitled to damages if he "recovers judgment" which means that, if the plaintiff prevails on only a small fraction of his claim, the defendant is without statutory remedy. In the latter situation, the defendant may have a tort action for excessive attachment under a theory of abuse of process, provided the statute of limitations has not run by the time the litigation is resolved.

The defendant may invoke statutory liability after the attachment is discharged or after he prevails in obtaining a final judgment (including appeals). If the plaintiff fails to make good on the undertaking, the sureties

become liable to the defendant. The defendant may prosecute in a single action his statutory remedy as well as any tortious cause of action he may have against the plaintiff for damages in excess of the bond.

Although the plaintiff's undertaking must provide for compensation of all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, the cases have operated to limit somewhat the damages recoverable. Where the damages claimed are remote and speculative, there may be no recovery. Thus, for example, loss or injuries to credit and business may or may not be compensable, depending upon the facts of the particular case. Listed below are measures of recovery for items commonly attached.

(1) Personal property. The basic measure of compensation for personal property is the reasonable use value of the property. Natural depreciation or decline in market value may also be recoverable although case law is split on this point. If the property was being held for sale, the measure is the depreciation in its market value. Where money is attached, only the legal rate of interest (7%) is recoverable for the period of detention.

(2) Real property. The amount of depreciation in value of real property during the period of attachment may be recoverable in damages.

(3) Attorney's fees. Attorney's fees incurred in disposing of the attachment are recoverable as damages. Whether attorney's fees in defending the main action are recoverable is a question over which there is precedent going both ways. The evolving rule appears to be that fees incurred solely in defense of the main action are not damages sustained by reason of the attachment and are therefore not recoverable. However, where the attachment is valid and regular on its face so that an attempt to discharge the attachment would be futile and the only way the defendant can establish its wrongfulness is to

win the main action by a trial on the merits, attorney's fees and other costs of trial are compensable. The reasoning is explained in Byard v. Nat'l Auto. & Cas. Ins. Co., 218 Cal. App.2d 622, 626, 32 Cal. Rptr. 613, (1963):

> The ultimate resolution of all actions, including the purest contract right calling for the payment of a sum certain, is an unknown factor prior to final judicial determination. Therefore it appears entirely reasonable to require one who contemplates availing himself of this "predetermination" right to weigh carefully the probabilities, the risks, the advantages and disadvantages thereof. It must be assumed that he is fully informed as to the merits of his cause and his ability to establish it, and, if he entertains serious doubts on either point, he need only restrict himself to the position of the usual plaintiff who must await trial on the merits before seizing upon the assets of the defendant. Certainly this appears preferable to an arbitrary refusal fairly to compensate an alleged debtor for the monies he has expended in freeing his property of the encumbrance placed upon it by invoking the only procedure available to him.

(4) Punitive damages. There is a split of authority whether a surety may be held liable for punitive damages against the attaching plaintiff where the attachment is wrongful and malicious (assuming the damages do not exceed the amount of the bond). The more recent cases hold that punitive damages are not available on the ground that the statutory liability extends only to those damages that the defendant sustains by reason of the attachment:

> The attachee does not sustain punitive or exemplary damages. Those are imposed on the attachor as punishment for his malice. We believe damages sustained by the attachee mean those suffered by him, his actual damages, to compensate him for the losses he has endured. By definition, punitive damages are in addition to actual damages. [Carter v. Agricultural Ins. Co., 266 Cal. App.2d 805, 807, 72 Cal. Rptr. 462, (1968).]

Policy Questions Relating to Wrongful Attachment

The role of wrongful attachment in the newly-developed attachment scheme remains to be determined. For purposes of this discussion, we will assume that the plaintiff will continue to be liable at common law for any abuses of process or malicious attachments he undertakes. The focus of this discussion will be the extent of the plaintiff's liability imposed by statute for attachments that are "wrongful" to the extent that they may reach property exempt from attachment by statute, to the extent that they are obtained in a case in which attachment is not authorized, to the extent that they are obtained in a case where the plaintiff does not prevail on his claim, and to the extent that they may reach property greatly in excess of the plaintiff's claim. Whether an attachment bond should cover any or all of this liability is reserved for later discussion in a subsequent memorandum.

(1) Attaching exempt property. Although the Supreme Court in White Lighting Co. v. Wolfson, supra, stated that liability may be imposed on a plaintiff for "attaching property which is exempt from attachment" under a theory of abuse of process, the cases are far from clear on this point.

Regardless what prior law may have been as to liability for attaching exempt property, Randone appears to put a new light on the subject by declaring that: "[T]he hardship imposed on a debtor by the attachment of his 'necessities of life' is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and a hearing on the validity of the creditor's claim." The court later explains that this means a defendant may not be deprived of necessities before "an impartial confirmation of the actual, as opposed to probable, validity of the creditor's claim after a hearing on that issue." A burden may not be placed on a defendant to seek the exemption--"Instead, due process requires that all 'necessities' be exempt from pre-judgment attachment as an initial

matter." The court finally concludes, "We do not doubt that a constitutionally valid prejudgment attachment statute, which exempts 'necessities' from its operation, can be drafted by the Legislature to permit attachment generally after notice and a hearing on the probable validity of a creditor's claim."

It is evident, then, that a valid prejudgment attachment statute must exempt necessities from its operation and should provide liability for damages to a defendant that result from such an attachment.

In the staff's tentative draft of the issuance of the writ of attachment in Memorandum 72-20, there are two separate procedures, both of which involve court review of the property that is to be attached and a finding that it is not a necessity. Under Section 541.060, the judicial officer issues the writ of attachment on an ex parte determination that the property sought is subject to attachment. This determination is based solely on affidavits submitted by the plaintiff. If property is attached that the defendant claims is exempt, he must file the exemption claiming procedure provided in Section 690.50. See Section 541.010. Should the plaintiff be liable for the defendant's damages if the defendant shows the property is exempt? The staff believes the plaintiff should be liable in this case, for he should be discouraged from seizing what really are necessities. The judicial officer has no sound way to make an accurate determination of necessities based on information supplied by the plaintiff alone. Should the damages in such a case include the attorney's fees required to release the exempt property? The staff believes they should since the cost to release the attachment is part of the actual out of pocket damage suffered by the defendant as a consequence of the wrongful attachment of necessities.

Under Section 542.090, the judicial officer issues the writ of attachment following a notice to the defendant and an opportunity to be heard on the

question whether specific property is subject to attachment. If the defendant does not avail himself of the opportunity for a hearing, his right to subsequently claim an exemption is waived, and the determination of the exemption is made by the judicial officer based on information submitted to him by the plaintiff alone. In this situation, there are no necessities attached before the defendant has had an opportunity to make his claim, and, therefore, it may be appropriate to preclude any liability for attaching a "necessity" in this situation. It is true that there will be a burden upon the defendant to make his claim but, if the plaintiff were to take advantage of this burden by requesting numerous hearings, he would undoubtedly be subject to liability on an abuse of process basis.

The staff is also developing a procedure whereby the plaintiff may be able to obtain ex parte a temporary protective order. Under such a scheme, if the defendant is restrained from using or disposing of necessities, he perhaps should be entitled to damages. It is assumed, however, that any deprivation under a protective order will be minimal and damages, therefore, nominal. This concept will have to be further developed when the restraining order concept is refined.

(2) Attachment in an improper case. At present, the plaintiff is liable by statute for all damages caused by an attachment in a case not authorized by statute for attachment. Damages include the attorney's fees incurred by the defendant in obtaining a discharge of the attachment.

Under the staff draft of the procedure whereby a plaintiff obtains an order authorizing the issuance of the writ of attachment, the defendant is offered the opportunity to be heard on the issue whether the case is a proper case for attachment. As a consequence, if he forgoes his opportunity to contest the issue, he should not be later heard to complain that the attachment was issued in an improper case and should recover no damages therefore.

The staff is also developing a procedure whereby the plaintiff may be able to obtain ex parte a writ of attachment in "extraordinary circumstances." In such a case, the plaintiff should be held liable for damages caused if the case were not a proper case for attachment. This concept will have to be further developed when the ex parte writ concept is refined.

It should also be noted that, under present law, the plaintiff is liable if the attachment is dissolved only on the ground that the case was an improper case for attachment. Professor Riesenfeld has pointed out that this basis of liability is unduly narrow, for there may be other reasons for dissolution of the attachment that should legitimately entitle the defendant to recover damages.

> From the wording and history of CCP § 539 it would seem, however, that the sureties on the attachment bond are not liable if the attachment was discharged under § 556 as "improperly or irregularly" issued and the discharge was ordered for reasons other than issuance in an action in which plaintiff is not entitled to the writ.
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> Such other reasons for discharge under CCP § 556 are issuance of the writ either on a complaint which suffers from an incurable failure to state a cause of action or on a defective affidavit or undertaking. See Burke v Superior Court (1969) 71 C2d 276, 279, n3, 78 CR 481, 486, n3; Kohler v Agassiz (1893) 99 C 9, 13, 33 P 741, 742. While on policy reasons the sureties should protect the attachment defendant against damages also if an attachment was issued and levied under such circumstances, the present wording of § 539 seems to foreclose liability in cases of that type. [Debt Collection Tort Practice § 5.36 (Cal. Cont. Ed. Bar 1971).]

This defect can easily be remedied by appropriate draftsmanship.

(3) Attachment on an invalid claim. At present, the plaintiff is liable by statute for all damages caused to the defendant by an attachment in any case in which the defendant ultimately recovers judgment.

Under the staff draft of the new attachment scheme, the defendant will be afforded a notice and opportunity to be heard on the probable validity of the plaintiff's claim against him. Should the existence of this opportunity immunize the plaintiff from liability where it ultimately appears that his

claim was not valid, whether or not the defendant takes advantage of the opportunity for a hearing?

The staff believes the plaintiff should be liable. The reason existing law places a burden of absolute liability on the plaintiff is so that the plaintiff will resort to the extraordinary remedy of attachment only in clearly appropriate cases. An innocent defendant who has suffered because of an attachment in a case in which the plaintiff had no valid claim should be compensated for his damages. This is one of the conditions on which plaintiffs are allowed the use of the extraordinary remedy.

It can be argued that the provision for a probable validity hearing serves the same function--it assures that attachments are brought only in cases where it is likely that the plaintiff will prevail. However, the defendant may not wish to try his case at an early time; perhaps he cannot afford it; or he may not be able to develop his case adequately in the time allotted for a hearing on probable validity (10 days from service of notice). Moreover, the concept that a plaintiff should not be able to tie up the property of an innocent defendant except at his own risk remains valid even in the presence of an impartial determination of "probable" validity.

In the other areas where the staff is developing new procedures enabling the plaintiff to obtain a temporary protective order or a writ of attachment on ex parte motion, the policies stated above apply with even greater force. The plaintiff should be liable for damages caused to an innocent defendant if the ultimate determination of the case is that the plaintiff is not entitled to recover judgment.

Assuming that the plaintiff will be liable in some cases for attaching property of an innocent defendant, what should be the scope of his liability? Presently, the plaintiff must file an undertaking to compensate the defendant for all costs that may be awarded to the defendant and all damages that he

may suffer as a result of the attachment. However, as pointed out above, the plaintiff's liability is limited in several significant ways. The plaintiff is not liable in an amount greater than the sum specified in his undertaking. That sum is one-half of the plaintiff's total claim. Moreover, the actual damages are computed by applying only rough rules of value that do not necessarily measure accurately the actual damages suffered by the defendant. For example, damages caused by an attachment of money are limited to the interest value of the money rather than to real business or credit losses that may have occurred because of the seizure.

The staff recommends that, where the defendant has been wrongfully attached, he be afforded a measure of full indemnity by the plaintiff. This may mean that the attachment undertaking will have to be altered in some substantial ways. This is a matter that will be considered later once the basic concepts of liability have been established.

There exists one other more controversial aspect of the plaintiff's liability--whether he should be required to pay the defendant's attorney's fees and costs in defeating the main action. As pointed out above, the rule that has evolved is that, if the only way the defendant is able to discharge the attachment is by defeating the main case, he may get his attorney's fees. However, under the staff draft of the attachment scheme, there will be another opportunity to discharge the attachment--that is by showing lack of probable validity. Because this opportunity is available to the defendant, he should not get his attorney's fees for the main action. Should he get them if he shows no probable validity? Perhaps not. Should he get them if he shows no probable validity, but then the plaintiff goes ahead to a trial on the merits? That might be a good policy to discourage trials on claims that are probably not valid.

The present procedure for recovery of these damages requires the defendant to await favorable termination of the action and then to bring an independent action for damages. At least one commentator has argued that this procedure generally denies adequate recovery to the defendant and has urged the adoption of a new procedure whereby the defendant can assert his claim for damages in the original action with safeguards to prevent prejudice to the plaintiff. See Alexander, Wrongful Attachment Damages Must Be Fixed in the Original Suit, 4 U.S.F. L. Rev. 38 (1969), a brief article appended as Exhibit I. The article also contains some interesting background on bonds and recovery on the bond.

(4) Attaching property greatly in excess of claim. On many occasions, the amount the plaintiff actually recovers in a case is but a small fraction of the value of the property seized. In fact, this appears to be the normal situation: "The attaching creditor typically prevails on his claim, but for a much smaller amount than the value of the property attached." White Lighting Co. v. Wolfson, 68 Cal.2d at 350. In a grievous case, the defendant may be entitled to recover damages for abuse of process. White Lighting Co., for example, involved a suit by the plaintiff on an $850 claim and an attachment of $19,500 worth of property (including a car used in the defendant's work). The precise limits of this type of liability for excessive attachment as an abuse of process are not clear, however.

Since a judicial officer reviews the application for a writ of attachment, it may be advisable to also have him make certain that the amount attached is not greatly in excess of the amount claimed or, for that matter, not greatly in excess of the amount that probably will be recovered. The staff draft of the procedural provisions requires the plaintiff to make an estimate of the

value of the property for which the attachment is requested as well as a statement of the amount of the claim. No specific limitations for the judicial officer to apply are provided, however.

If such limitations are provided, provision must be made for the defendant to offer evidence on the value of the property to be seized, at least in the case where there is a noticed hearing. And such limitations may also present problems where, for example, the only property that the defendant has that is subject to attachment is a piece of land of a value greatly in excess of the plaintiff's claim.

If such limitations are adopted, should the plaintiff remain liable for an excessive attachment? The inclination of the staff is to not provide any statutory rules on liability but to allow the defendant to pursue any remedies available to him under a theory of abuse of process. The only function of the judicial review of the amount, then, would be to prevent an abuse before it occurred. But the fact of a judicial review would not immunize the plaintiff from liability if an abuse of process could be nonetheless shown.

Respectfully submitted,

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Memorandum 72-21

EXHIBIT I

Wrongful Attachment Damages Must Be Fixed in the Original Suit

*by Leon J. Alexander**

INTRODUCTION

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

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

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

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

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

I

THE ATTACHMENT LIEN

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

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

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

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

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

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

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

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

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

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

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[8] CAL. CODE CIV. PROC. §539.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

NEW PROCEDURE

A better way exists to handle these matters.

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

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

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

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

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

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

A. Liability

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

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

B. Damages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III

CLAIM AGAINST PLAINTIFF

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

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

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

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

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

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

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

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

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

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

[34] Cal. Code Civ. Proc. §439.

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

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

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

IV

CONCLUSION

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

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

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

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

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

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

[37] It is well recognized that proper use of procedures in one context may be abuse in another. In some cases this may constitute "abuse of process" and recovery allowed. Such claims are hard to prove, and force the issue onto moral grounds. *Compare* Fairfield v. Hamilton, 206 Cal.App.2d 594, 24 Cal.Rptr. 73 (1962), *with* Spellens v. Spellens, 49 Cal.2d 210, 317 P.2d 613 (1967). A bonded, non-fault system is far better, less subject to variations and less amendable to abuse.

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