#39.70 6/22/72

Memorandum 72-45

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

At the June 1972 meeting, the Commission determined that it should pause at this point in its study of prejudgment attachment and reexamine the need and desirability of this type of provisional remedy. The purpose of this memorandum is to present certain miscellaneous materials which the staff believes would be relevant and helpful in making this examination. The memorandum first summarizes certain possible alternative remedies or procedures and then notes Professor Riesenfeld's original recommendations.

ALTERNATE REMEDIES

Bankruptcy. We may be accused of raising a strawman but we believe that it has been suggested that an unsecured creditor could obtain some measure of relief against a debtor through use of involuntary bankruptcy. When an alleged bankrupt has 12 or more creditors, three or more of them having claims in the aggregate amount of $500 or more (in excess of any security held by them) may file a petition for involuntary bankruptcy. If the debtor has less than 12 creditors, one or more of them may file but the $500 limit still applies. Generally, the petitioner must allege and prove that, within the four months preceeding his filing, the debtor has committed an act of bankruptcy (e.g., made a fraudulent conveyance, preferential transfer, or general assignment, or admitted an inability to pay debts) at a point in time when he was insolvent. (If the act of bankruptcy is a fraudulent conveyance, solvency at the time of filing is a complete defense, but must be proved by the debtor.) CEB, California Debt Collection Practice, cautions

that an involuntary petition should not be filed in haste because, should the petition be dismissed, the petitioning creditors are liable for costs, counsel fees, expenses, and damages occasioned by the taking of property in the bankruptcy proceeding. Thus, on the one hand, the unsecured creditor must be very careful because he is subject to extended liability if he has made a mistake. On the other hand, what may he expect to realize if the proceeding is "successfully" concluded? It might be noted first that California is said to have the most liberal exemption statute of any state, and the debtor is entitled to these state exemptions under the Bankruptcy Act. Secondly, CEB, California Debt Collection Practice (p. 515), summarizes some past nationwide statistics as follows:

> The practitioner should have a general idea of what assets come into the bankruptcy proceedings . . . . [N]o asset cases account for three-fourths of the straight bankruptcy cases terminated other than by dismissal. Cases in which there is something for administrative expenses (including attorney's fees) but nothing for creditors constitute another 12 percent. Only 13 percent of the straight bankruptcy cases leave some assets for creditors. Of this 13 percent . . ., about 30 percent goes to pay for administrative and other expenses and 70 percent goes to creditors, sufficient to pay approximately 18 percent of the total claims.
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> Secured creditors realize an average recovery of two-thirds of their claims. The priority creditors realize an average of one-third recovery. <u>General creditors recover only eight cents on the dollar in the 13 percent of the cases in which creditors receive anything.</u>

In short, as a remedy for general creditors, bankruptcy seems to be generally valueless. From the point of view of the alleged debtor, if the creditor has made a mistake, the proceeding could be a disaster notwithstanding the creditor's liability where the petition is dismissed. From the point of view of the administration of justice, it would scarcely be an improvement if the lack of an attachment remedy simply shifted the dispute from the state to the federal forum.

Equitable relief (TRO and preliminary injunction). Traditionally, equitable relief has been denied where an attachment would issue, on the theory that the plaintiff has available to him an adequate remedy at law. We are advised that, following the Randone decision, some courts in the state, including the Superior Court for the County of Los Angeles, are now giving equitable relief in certain cases. The granting of such relief is, however, governed by the same general principles applicable in other cases. These are well summarized in the following excerpt from the Manual of Policy and Procedure for the Writs and Receivers Department of the Superior Court for the County of Los Angeles (pp. 39-41):

> 1. To obtain a temporary restraining order or a preliminary injunction, the party seeking such relief must pleand and prove (a) irreparable injury and (b) inadequacy of legal remedies. . . .
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> 2. It should be remembered that a temporary restraining order or preliminary injunction, at most, is to preserve the status quo pending the trial. It is not intended to, and should not, give all of the relief sought by the action.
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> 3. An injunction pendente lite, being a summary and an extraordinary remedy, should not be granted unless there is a clear showing of irreparable damage under circumstances indicating that the party seeking the injunction is deserving of injunctive relief and has offered to do equity. . . .
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> 4. There must be a clear showing of irreparable and imminent injury for which there is no other adequate remedy. . . .
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> 5. Mere possibility, or any thing short of a reasonable probability of injury, is insufficient to warrant injunctive relief against any proposed use of property by its owner. . . .
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> 7. The concept of "irreparable injury" authorizing interposition of a court of equity by way of an injunction, does not concern itself entirely with injury beyond possibility of repair, or beyond possible compensation in damages. An injunction will property issue in a case in which it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief. . . .
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> 8. The essential features marking injury as irreparable are:

(1) The injury complained of constitutes an act which has caused a serious change in the condition of property or property rights, or is destructive to the property or property right it affects, either physically or in the character in which it has been held and enjoyed, and

(2) The property or property right has some peculiar quality or use so that pecuniary damages will not fairly recompense the owner for its loss. . . .

9. The granting of an injunction requires caution and discretion and restraint. Discretion should be exercised in favor of the party most likely to be injured. This discretion is not arbitrary but must be exercised in accordance with fixed principles and precedents of equity jurisprudence. Judicial restraint must be exercied in doubtful cases, with a full consideration of all the equities.

The right to equitable relief must be clear, with injury impending and threatened, so as to be averted only by the protective process of injunction. . . .

There is a balancing of the equities and the interests. The court will consider whether greater injury will result from granting an injunction than in refusing it.

The court should also consider the amount of injury which may be inflicted on strangers to the suit and third parties. . . .

Despite proper showing in other respects of right to injunctive aid, if plaintiff is merely seeking to protect a technical and insubstantial right, or the tort has been completed and issuance of an injunction will bring no actual advantage, it may be properly refused where to do otherwise would result in unusual hardship to defendant or public. . . .

10. . . . In general, specific performance of a contract will not be compelled when: (a) continuing performance of the terms of the contract requires protracted supervision and direction, (b) it is doubtful that the party seeking the preliminary injunction will ultimately prevail in the lawsuit, and (c) an adequate remedy at law exists, i.e., monetary damages which are not extremely difficult to ascertain.

Equitable relief in the form of restraints on the disposition of property and perhaps directions to furnish statements of account and to sequester proceeds may be useful in certain cases; however, as a general substitute for attachment, it does not offer the same security to the creditor and is not available under present standards in the same category cases as was attachment previously. Its use (or attempted use) could cause the same administrative burdens that have been foreseen if a constitutional attachment procedure is provided. There would seem to be the same need to establish the probable validity of the claim

and the amount of the undertaking and, in addition, there is the special problem of framing the order issued--an injunction must clearly inform the parties restrained what the order forbids. To be effective, it must not be too narrowly drawn; to satisfy due process, it must not be too vague; to be fair and reasonable, it must not be too broadly drawn. In short, equitable relief would seem to be best restricted to exceptional circumstances; if relief in a much broader range of cases is needed, it seems that a different approach must be taken.

Claim and delivery (judicial repossession). The present claim and delivery statute has, of course, been held unconstitutional. The statute formerly permitted a plaintiff to obtain possession of a specific item of personal property after making a showing of a right to its possession and furnishing a bond. The property was seized by the levying officer and after a short period of time (to allow third-party claims or the defendant to post a redelivery or release bond) delivered to the plaintiff. The plaintiff was required to hold the property pending a final determination of the right to possession. We have asked Professor Warren to provide us in the Fall with background and a proposal for a constitutional claim and delivery statute. We would assume, however, that any statute would be restricted to the relatively limited circumstances described, i.e., it would provide a means of obtaining possession of specific personal property to which the plaintiff had some right. It would not therefore be a substitute for a general attachment statute.

Commercial Code remedies. We hope that,at the July meeting, Professor Warren will be able to review the nature and scope of the remedies available to a secured seller of goods under the Commercial Code, the extent to which these remedies provide a satisfactory alternative to prejudgment attachment, and

how these procedures might be best adapted to solve our present problem. At this time, we do not plan to send out any materials on this subject; however, if you have the opportunity, we believe it would be helpful to you to examine 3 CEB, California Commercial Law (1966), especially Chapters 1 (Coverage of Division 9) and 6 (Default), both of which were prepared by Professor Warren.

PROFESSOR RIESENFELD'S INITIAL RECOMMENDATIONS

We have sent Professor Riesenfeld (who is in New Zealand) a copy of the June Minutes and a transcript of the proceedings on Saturday, June 10th and asked him to comment, if he wished, on these materials. Whether we will hear from him at all, or at least before the July meeting, we do not know. We do, however, believe that you might be interested at this point in reexamining Professor Riesenfeld's original recommendations. We have set forth below what we believe to be the most pertinent of these recommendations, but you may find it worthwhile to reread all of his study. (The study is dated October 13, 1970 (Revised October 22, 1970) and was distribued at the October 1970 meeting.) As you will note, these original recommendations suggested that attachment (except for jurisdictional purposes) be limited to "fraudulent debtor's" attachment. Our recollection is that this approach was abandoned at least in part because of the difficulty in prescribing the proper scope of situations in which relief would be granted. We do note, however, that other jurisdictions apparently have surmounted this difficulty, and our own courts are capable of dealing with an analogous problem in determining whether equitable relief should be granted. We would not want to see "fraudulent debtor's" attachment expanded to provide relief in all cases but it may be that the concept could be used to limit the granting of relief to those cases where it is most desperately needed.

The first determination to be made is the scope of the statutory revision. Although the revision is prompted by the holding in Sniadach 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 . . . 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. . . .

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

(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.

The abolition of domestic attachment would bring California in line with the laws of New York and Pennsylvania [and Ohio]. 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.

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. . . .

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:

(a) if defendant has departed from the state

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

(c) if defendant conceals himself to avoid service of summons.

A.B. No. 1602 [1970] qualifies ground a) by adding "with the intention not to return" and adds a new ground d) 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 "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. A similar rule applies in Pennsylvania. Fraudulent Debtor's Attachment may be issued "when the defendant with the intent to defraud the plaintiff

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

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

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

(d) 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.

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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 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.)

A similar procedure is prescribed in New York. 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."

The motion for an order of attachment should 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 should not issue an order of attachment unless he is satisfied that plaintiff has shown

(a) 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);

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

(c) that there is prima facie proof showing (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 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.

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

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

(b) the name and parties to the action;

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

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

(e) that the defendant may appear in person or by attorney to show any cause why the attachment shall not issue;

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

* * * * *

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. . . .

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). 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. 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.

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We hope the above materials will be of use to the Commission.

Respectfully submitted,

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