October 13, 1970

Time	Place
October 22 - 7:00 p.m. - 10:00 p.m.	Board of Bar Examiners Office
October 23 - 9:00 a.m. - 5:00 p.m.	540 Van Ness Avenue
October 24 - 9:00 a.m. - 1:00 p.m.	San Francisco 94102

TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco — October 22-24, 1970

October 22 and 23

1. Minutes of October 8-9 Meeting (to be sent)

2. Administrative Matters

3. Study 39 - Attachment, Garnishment, Execution

   Memorandum 70-109 (to be sent)
   Research Study - Parts I and II (consolidated)(to be sent)
   Remaining parts (to be sent)

October 24

4. Study 71 - Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions

   Memorandum 70-110 (to be sent)
   Recommendation (as sent to Printer)(attached to Memorandum)
   1st Supplement 70-110

5. Study 36.20(2) - Condemnation (Comprehensive Statute)

   Memorandum 70-111 (to be sent)
   Memorandum 70-112 (to be sent)
   Memorandum 70-113 (to be sent)
   Comprehensive Statute (to be sent)

6. Study 36.35 - Condemnation (Use of Credit of State to Finance Relocation)

   Memorandum 70-114 (to be sent)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

OCTOBER 22 AND 23, 1970

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on October 22 and 23, 1970.

Present: Thomas E. Stanton, Jr., Chairman
John D. Miller, Vice Chairman
G. Bruce Gourley
Noble K. Gregory
John N. McLaurin
Marc W. Sandstrom (October 23)
Joseph T. Sneed (October 22)

Absent: Alfred H. Song, Member of Senate
Carlos J. Moorhead, Member of Assembly
George H. Murphy, ex officio

Messrs. John H. DeMoully, Jack I. Horton, E. Craig Smay, and Nathaniel Sterling, members of the Commission's staff, also were present. Professors William D. Warren, U.C.L.A. Law School, and Stefan A. Riesenfeld, Boalt Hall Law School, consultants on the study on attachment, garnishment, and exemptions from execution, also were present.

The following observers were present:

John D. Bessey, Sacramento Attorney
Charles Cowett, U.C. Davis Law Review
Loren S. Dahl, Sacramento Attorney
Harvey M. Freed, San Francisco Neighborhood Legal Assistance Foundation
George H. Hauck, Research Assistant, Boalt Hall (October 22 only)
E. N. Jackson, San Francisco Attorney (October 23 only)
Frederick Pownall, San Francisco Attorney

Sitting with the Commission during consideration of Study 39 (attachment, garnishment, and exemptions from execution) was Charles A. Legge, Chairman of the Special State Bar Committee on Attachment and Garnishment. Garrett H. Elmore, State Bar, also was present during a portion of the time Study 39 was discussed.

ADMINISTRATIVE MATTERS

Approval of Minutes of October 8-9, 1970, Meeting. The Minutes of the October 8-9, 1970, meeting were approved with the following changes:

(1) On page 3, the third sentence of the discussion of the "Annual Report (Unconstitutional Statutes)" was revised to read: "The staff was instructed to revise the report to indicate that petitions for certiorari and an appeal to the United States Supreme Court have been filed in the cases holding unconstitutional the requirement of more than a simple majority in municipal and school district bond elections."

(2) On page 7, the last two lines were revised to read: "requirement of adhering to the unambiguous terms of a writing, a requirement that apparently has been largely dispensed with under the case law interpretation of the California statutes."

Invitation to Former Commissioners to Attend Lunch. It was suggested that the Chairman extend an invitation to former Commissioners Sato, Wolford, Arnebergh, and Uhler to attend lunch with the Commission at an appropriate time so that a suitable recognition of their service with the Commission can be presented to them.

Publication of Inverse Condemnation Studies. The Executive Secretary reported that he had discussed with the Continuing Education of the Bar the possibility of jointly publishing the studies on inverse condemnation. CEB indicated that it would be willing to announce the availability of the publication in connection with the March 1971 course in condemnation and to handle the distribution of the publication to persons who wish to buy copies.

The Commission suggested that the Executive Secretary continue to work with CEB in an effort to work out the details. When an arrangement is worked out with CEB, the Commission will determine if it is satisfactory. The Commission was strongly of the view that the publication should include a Table of Statutes Cited and a Table of Cases. These were considered the minimum tools needed to make the publication useful, especially if an index is not included. An index also would be desirable.

The Executive Secretary is to work out the details and to report to the Commission at a subsequent meeting.

Nonprofit Corporation Study. Professor Sneed reported that his efforts to interest an out-of-state law professor in supervising the nonprofit corporation study was unsuccessful. He indicated that he would continue his efforts to obtain a consultant.

Minutes
October 22 and 23, 1970

STUDY 39 - ATTACHMENT, GARNISHMENT, EXECUTION

The Commission heard a presentation by Professor Riesenfeld, one of its consultants on Study 39, and discussed his background study and other related matters. Sitting with the Commission were Charles Legge, Chairman of the Special State Bar Committee on Attachment and Garnishment, and the Commission's research consultants, Professor Stefan A. Riesenfeld and Professor William D. Warren. Also present during all or a portion of the discussion were:

John D. Bessey	--	Dahl, Hafner, Stark, Marius & James (Sacramento)
Charles Cowett	--	UC Davis Law Review
Harvey M. Freed	--	San Francisco Neighborhood Legal Assistance Foundation
George H. Hauck	--	Research Assistant to Professor Riesenfeld
E. N. Jackson	--	San Francisco Attorney
Frederick Pownall	--	Landels, Ripley, & Diamond (San Francisco)

An edited transcript of Professor Riesenfeld's presentation is attached to these Minutes as an Exhibit. The major points he made are indicated below:

(1) The study will be a four-part study: attachment proceedings (provisional remedies before judgment), wage execution, the exemption laws, and technical improvements.

(2) There are three major occurrences that have prompted this study: the Sniadach decision and the aftermath conflicting cases, the Federal Consumer Credit Protection Act (the so-called Truth-in-Lending Act), and the passage of the new California long-arm statute.

(3) There are many different constructions that can be given to the Sniadach case. The decisions in various states since Sniadach are not consistent. One California Court of Appeals has stated (in a brief paragraph) that Sniadach applies to wage garnishments only; but courts in other states--like Wisconsin--have given Sniadach a broad application to all resident attachment. Professor Riesenfeld is of the opinion that Sniadach will be

given a broader application than just wage garnishments. He also is concerned that the 1970 California attachment statute may be unconstitutional since it merely abolishes wage garnishment but does not provide for notice and hearing in other attachment cases.

(4) An important recommendation of Professor Riesenfeld is his suggestion that the court be authorized to grant any appropriate form of equitable relief where necessary to protect the interest of the creditor pending notice and hearing. This would permit the court to design a decree that would protect the creditor but would not be as harsh to the debtor as attachment. The decree would be issued on ex parte motion. See Professor Riesenfeld's proposed statute--Section 538(6). The relief to be provided under subdivision (6) of Section 538 (as revised) would include seizure of the property of the debtor where that would be appropriate.

(5) Professor Riesenfeld also was of the opinion that it was essential that the order for attachment be issued by the judge rather than the clerk.

(6) An important policy question is when the notice and hearing must be before attachment and when it is sufficient if the notice and hearing is after the attachment is issued.

(7) Nonresident attachment should be revised in light of the new California long-arm statute: attachment because a person is a nonresident should be limited to cases where there is no personal jurisdiction over the nonresident. Nevertheless, because some cases will involve quasi in rem jurisdiction where personal jurisdiction cannot be obtained over a nonresident, it is necessary to retain nonresident attachment. Possibly, the suggested Section 537(2)(a) could be revised to say "a writ of attachment may be issued in any action . . . if

(a) the defendant is not residing in the state and apart from the attachment is not subject to the jurisdiction of this state or if there is any reasonable doubt that the defendant is subject to the jurisdiction of this state ." Where attachment is used as a basis for quasi in rem jurisdiction, the hearing should be subsequent to the attachment.

(8) In any case where there is not a prior notice and hearing, there should be a subsequent notice and hearing. For example, there is no reason why the state should have an attachment for taxes without any notice and hearing. However, such notice and hearing could be after rather than before the attachment. Sniadach, in Professor Riesenfeld's opinion, does not hold that prior notice and hearing is required in every type of case, but this does not mean that a subsequent hearing is not required. In order to forestall the possibility of unconstitutionality, he suggests that, in the cases where no prior notice and hearing are provided, a subsequent notice and hearing be required.

(9) If it is true that Sniadach requires a prior notice and hearing in all resident debtor attachment cases--and there is a good chance that Sniadach does have to be read that way, and there is an enormous amount of case law since Sniadach on that point--you would have in every resident debtor attachment case two hearings: (1) an ex parte summary hearing and (2) a plenary hearing after the debtor is there. That, in Professor Riesenfeld's opinion, would be a complete waste of judicial time. Accordingly, he recommends that the reasons for fraudulent debtor's attachment, where there is a prior notice and hearing, be expanded and that resident attachment as such be abolished. The reasons are: (1) the remedy is harsh, (2) the remedy is not really necessary absent something other than mere residence plus a particular type of cause of action,

and (3) the dual hearing would be a waste of judicial time. And, to Professor Riesenfeld, the third reason is the most persuasive.

(10) The so-called fraudulent debtor's attachment should be expanded so that it would permit attachment, whether or not the defendant is a nonresident, if the defendant does any of the following under circumstances which permit the inference of an intent to hinder, delay, or defraud his creditors:

(a) He has removed or is about to remove property from the state.

(b) He has concealed or is about to conceal property.

(c) He has transferred or is about to transfer property.

(d) He has concealed himself within or absconded from the state.

(11) The writ of attachment should be issued by judicial order, not by the clerk as a matter of course.

(12) The phase 4--technical part of the study--should be commenced immediately (the Commission agreed) rather than waiting until work is completed on phase 1 through 3. Technical matters that should be considered in phase 4 include:

(a) Relationship between paragraphs (4), (5), and (6) of Section 542 of the Code of Civil Procedure.

(b) What is the effect of the Commercial Code on the whole attachment procedure?

(c) How do you garnish pledged stock?

(d) Can nonpossessory security interests be reached and, if so, how?

(e) Reaching current income.

(f) Section 691--when do you sell things in action and when do you collect them?

(g) Why should you examine a third person under Section 719; why can't you proceed immediately under Section 720?

(13) The most important question for consideration is whether the attachment is to be issued by a judge or by a clerk.

(14) Wages of nonresidents should be protected to the same extent as wages of residents.

(15) The problem of application of the attachment procedure to personal injury actions needs further consideration.

(16) As a matter of practice, most commercial creditors do not obtain a security interest under the Commercial Code because things just move too fast (information provided by observers at meeting).

(17) A problem in need of immediate attention and one that should be a proposal to the 1971 Legislature is the extent to which wages paid into a bank account or deposited in a bank account can be attached.

(18) The provision of Section 538 relating to the effect of bankruptcy proceedings upon availability of attachment should be clarified. Professor Riesenfeld is going to investigate whether the revisions to the bankruptcy act result in an automatic stay of all proceedings.

(19) A provision should be included in the proposed legislation to cover the effect of a stay or dismissal on the basis of forum non conveniens. In effect, the provision should convert the in personam proceeding to a quasi in rem proceeding when there is a stay on the basis of forum non conveniens.

The Commission determined that the study would be an overall study, including technical changes to improve existing law. The technical changes would not necessarily be minor nonsubstantive changes but would include important substantive changes. Professor Riesenfeld indicated that he believed, subject to checking with Professor Warren, that a report covering all the technical changes needed could be prepared in approximately a year. During

the year, portions covering particular problems would be available for consideration by the Commission.

Professor Riesenfeld was asked to review his recommendations and determine whether it was essential that his report be revised before it is sent out for comment. Unless he concludes that the report needs to be revised, the report is to be sent out for comment; the letter sending the report out is to indicate that it is a report of the Commission's consultant, not a Commission report. The comments received as a result of this distribution should be presented to the Commission at the December meeting when the Commission determines how it will proceed with the study.

STUDY 71 - COUNTERCLAIMS AND CROSS-COMPLAINTS, JOINDER OF CAUSES OF ACTION, AND RELATED MATTERS

The Commission considered the recommendation and the following materials: Memorandum 70-110 describing the alterations made in the recommendation, First Supplement to Memorandum 70-110 relating to the effect of compulsory joinder of causes on anticipatory repudiation, and revised versions of Code of Civil Procedure Sections 117h, 426.40, 426.60, and 1048 handed out at the meeting. The following action was taken:

Recommendation, preliminary portion. The Commission's recommendation was approved as revised, after noting rewording of those portions dealing with separate statement of causes of action, severance or consolidation of causes and issues for trial, and miscellaneous revisions.

Recommendation, proposed legislation.

Section 117h. This section was approved in the form set out below:

Code of Civil Procedure Section 117h (Conforming Amendment)

Sec. 2. Section 117h of the Code of Civil Procedure is amended to read:

117h. No formal pleading, other than the said claim and notice, shall be necessary and the hearing and disposition of all such actions shall be informal, with the sole object of dispensing speedy justice between the parties. ~~The~~ If the defendant in any such action has a claim against the plaintiff which is for an amount within the jurisdiction of the small claims court as set forth in Section 117, he may file ~~a verified answer~~ an affidavit stating ~~any new matter which shall constitute a counterclaim~~ such claim ; a copy of ~~such answer~~ the affidavit shall be delivered to the plaintiff in person not later than 48 hours prior to the hour set for the appearance of said defendant in such action. ~~The provisions of this code as to counterclaims are hereby made applicable to small claims courts, so far as included within their jurisdiction.~~ Such answer affidavit shall be made on a blank substantially in the following form:

In the Small Claims Court of ....., County of ....., State of California.

...., Plaintiff,)
vs.)
...., Defendant.)

~~Counterclaim~~ Claim of Defendant

State of California,)
) ss.
County of .....,)

....., Being first duly sworn, deposes and says: That said plaintiff is indebted to said defendant in the sum of ..... ($.....) for ....., which amount defendant prays ~~may~~ be allowed ~~as a counterclaim~~ to the defendant against the ~~claim of~~ plaintiff herein.

Subscribed and sworn to before me this ..... day of ....., 19....

.....
Judge (Clerk or Notary Public.)

Comment. The amendment to Section 117h deletes the former references to "counterclaim" and makes other conforming changes to reflect the fact that counterclaims have been abolished. See Code of Civil Procedure Section 428.80. There are no compulsory joinder of actions or compulsory cross-complaint requirements imposed upon either the plaintiff or defendant in small claims actions. See Code of Civil Procedure Section 426.60(b) and the Comment thereto.

Section 379. The case references at the conclusion of the Comment to this section were modified by addtion of the qualifiers "See .....; but see ....."

Sections 383 and 384. These two sections which provide exceptions to the old common law rules of compulsory joinder were approved for repeal.

Sections 425.20, 426.20, 430.50 and others. These sections all make reference to a "cause of action." The staff was directed to examine the definition of cause of action to determine whether the proposed legislation has altered its meaning in any way, and to determine whether substitution of the words "count" or "theory of relief" would be appropriate in any of these sections.

Section 426.20. The staff was directed to revise this section to make the date for determining which causes of action must be joined, the date of commencement of the action, rather than service of summons. A sentence excepting persons not served and who do not appear should be included to protect the plaintiff from unknown "Doe" defendants who are never served. These changes are to be made if, upon consultation with Professor Friedenthal, they meet with his approval.

The Comment to this section might be revised to state that an example of an alternative statutory provision is the case of splitting causes of action, allowed for anticipatory repudiation of a lease, if the parties so agree.

Sections 426.40 and 426.60. Subdivision (d) of Section 426.40, relating to the exemption of small claims court from compulsory joinder and cross-complaint requirements, was removed from Section 426.40 and made subdivision (b) of Section 426.60.

The first sentence of subdivision (a) of the Comment to Section 426.60 was revised to read, "Section 426.60 makes the provisions for compulsory joinder of causes inapplicable to special proceedings."

Section 426.50. The following sentence was deleted from the Comment to this section: "Of course, subdivision (b) does not apply unless the cross-complaint is timely filed; if it is not, the party may seek relief under subdivision (a) but not under subdivision (b)."

Section 428.20. This section was clarified to read in substance as follows:

> 428.20. When a person files a cross-complaint as authorized by Section 428.10, he may join any person as a cross-complainant or cross-defendant, whether or not such person was previously a party to the action, if, had the cross-complaint been filed as an independant action, the joinder of that party would have been permitted by the statutes governing joinder of parties.

Section 1048. The expanded Comment to Section 1048, that authority given to the court to sever issues may duplicate similar authority granted by other statutes addressed to particular issues, was approved.

Operative date. The final section specifying the operative date of the statute was clarified to allow the Judicial Council to make rules applicable to actions pending at that time.

EXHIBIT

EDITED TRANSCRIPT OF PORTION OF THE MEETING OF THE CALIFORNIA LAW REVISION COMMISSION ON OCTOBER 22-23, 1970, RELATING TO THE STUDY OF ATTACHMENT AND GARNISHMENT

Note: The letter R indicates a statement by Professor Riesenfeld. The letter C indicates a comment, question, or suggestion by either a Commissioner, staff member, or one of the observers present at the meeting.

[There was a brief introduction of those persons present and an outline of the procedure that would be followed at the meeting. Professor Riesenfeld then started his presentation.]

TAPE 1

Four-part study

R The study which I prepared and which has been distributed to you is Tentative Part I of a four-part study. The four parts deal with four major subjects although they are interrelated, of course. These four parts are:

(1) Attachment proceedings--that means provisional remedies before judgment.

(2) Wage execution and what should be done in California as a result of the Federal Truth-in-Lending Act.

(3) The exemption laws.

(4) Technical aspects of the three topics listed above.

The first three topics will necessitate that other aspects--more technical aspects of the whole process--are looked into, and I want to comment on that

fourth aspect a little bit more. But generally speaking, attachment, wage execution, exemptions, and general technical improvements are the four major packages, so to speak, which, if the Commission wishes us to pursue, we will present in due course to the Commission.

Part 4--technical amendments

The so-called technical amendments are not minor technical matters, but would be rather important reassessments of the California statutes. These statutes present a patchwork of fragmentary amendments which perhaps have caused more confusion than clarity. Let me give you one example. At a later meeting, Professor Warren will discuss execution against earnings. This will include not only past earnings--which now can be executed upon--but also future earnings. In this connection, wage deduction statutes like they have in New York, Illinois, New Jersey, and some other states will be considered. Now if you have a statute which covers future income, should you amend our statutes also to reach other sources of future income? If so, I refer to one case which is very perturbing.

This is a case called Meacham v. Meacham, 262 Cal. App.2d 248, 68 Cal. Rptr. 746 (1968). In Meacham, an inventor had invented a device which is used in dentistry called the Wizard Wedge. He had assigned his rights and the know-how to a manufacturer in exchange for a share of the profits. A creditor of the inventor tried to reach this share. Note that the debtor's right had an uncertain value because it represented forthcoming earnings over a period of years. The creditor did not ask for a receiver which would probably have been the best way under California law. Instead, he levied upon the debtor-inventor directly. Judge Lillie held that the levy and subsequent execution

sale upon notice were valid with the result that the debtor's contract was sold at a very nominal price. The execution sale could not be set aside and the levying creditor got the total income at a very small sum. Judge Lillie did not discuss whether the creditor should have proceeded by garnishing the manufacturer who was paying over or whether he should have proceeded by receivership. She merely held that this right in the future earnings was property incapable of manual delivery which could be reached by notice.

I do not want to criticize the Meacham case, but I think the whole concept of property not capable of manual delivery and how you reach it--whether by garnishment or by any other proceedings--has to be studied. In partnership --perhaps you could have said the Meacham situation was like a joint venture-- a charging order would have been the appropriate means. At any rate, I would suggest that, if the Commission goes into the problem of future earnings from personal services, this opens up the whole question of how you reach future income generally. For example, how do you reach nonnegotiable instruments? Do you garnish the maker or do you garnish the payee? There are cases going one way and cases going the other. The whole question of how future income under a contract--whether contingent or unconditional, matured or not matured, all these variations--has to be looked into and studied in this stage because there is a total confusion. One method at the moment which works is a receivership, but it is very rarely applied. In any event, there is some need for study particularly in the light of Meacham and other California cases. See also Husted v. Superior Court.

Another technical matter which I think the Commission should look into is the relationship between Section 689b of the Code of Civil Procedure--which deals with conditional sales and chattel mortgages--and the Uniform Commercial

Code. Under Section 689b, the creditor is required to pay off the security interest before he can reach the debtor's rights in the collateral. Is there any real reason why, if everything is on record, the creditor should be required to pay off the security interest? He does not do so in the case of a pledge. If you have a possessory security interest, you reach the pledgor's interest by garnishment and then you get the proceeds if there are any. Should therefore the requirement of Section 689b be retained or, where we have recordation, should the creditor be able to sell on an execution sale the debtor's right in the collateral, subject to the security interest? This is a question which should be studied. So there are innumerable technical questions which are opened up by the proposals of Professor Warren and myself. Professor Warren and I will submit these to the Commission in what I call package Number 4, but these technical improvements are interrelated with everything else.

Attachment and garnishment terminology

Now then, if I can address myself to attachment and garnishment, which is package Number 1. First, a matter of terminology. We have in California two writs. One before judgement is called attachment. One after judgment is called execution. If you have an intangible, the levy of attachment is done according to Section 542(5) of the Code of Civil Procedure. That is,

> Debts and credits and other property not capable of manual delivery must be attached by leaving with the persons owing such debts, or having in his possession, or under his control, such credits and other other personal property, . . . a notice . . . .

Now generally speaking, that is called garnishment. You have to realize, however, that in California garnishment is a mode of levying an attachment or levying a writ of execution; garnishment is not a separate and independent

proceeding as, for instance, it was in Wisconsin in the Sniadach case. That is, we have one type of provisional remedy called attachment. The attachment is executed and served by levy, but the mode of the levy varies according to the asset which is sought to be reached by the attachment. If you reach a debt which is owed to the defendant, then you serve a notice on the debtor's debtor and that procedure is commonly called garnishment. But it is not an independent proceeding.

Attachment, in the course of history, has sometimes been an original process and sometimes a mesne process. Original process means that it is the original writ by which the proceedings are commenced. Mesne process means that you start an action by filing a complaint and the attachment is a remedy which can be resorted to after the lawsuit has been commenced. In California now--although it was not always so--attachment is a mesne process which means that you have to commence a lawsuit by filing a complaint and then you can proceed and ask for a writ.

Three types of attachment--resident, nonresident, and fraudulent debtor's attachment

Attachment has traditionally been based on grounds of attachment which I classify into three main grounds: namely, resident attachment, nonresident attachment, and fraudulent debtor's attachment. Let me explain in detail what those three terms mean. The nomenclature is not used by the California statutes, but it is an historically accepted nomenclature.

Resident debtor's attachment permits an attachment against a California resident without any further reason except that an action has been commenced alleging a particular type of cause of action. Code of Civil Procedure Section 537(1) provides simply that, in an action upon a contract, the creditor

can have an attachment. Nothing else is required; nothing except that the cause of action is of the statutory type and the action has been commenced. It is not necessary that the debtor be a nonresident. It is not necessary that the debtor has committed an act of fraudulent conveyance, or concealment, or anything else. All that is necessary is that there is an action against the resident.

If you look at the history of the attachment provisions in California, you will see that California has wavered between having only some of these three main types of attachment--resident, nonresident, and fraudulent debtor's--or all of them. However, for a long period now in California, resident debtor's attachment has been available. That is, the debtor has been able to resort to the provisional remedy of attachment without any reason other than filing a particular type of action. That is not the law in many other states. Resident attachment does not exist, for instance, in New York, Ohio, or Pennsylvania. These are three of the most populated states outside of California, and there may be others. But I took the most populated ones because it was important to me to show that very populous areas can live without resident attachment. One of my recommendations is to repeal all provisions on resident attachment and only leave fraudulent debtor's attachment and nonresident attachment in California. I would, therefore, like to point out that, until 1959, Pennsylvania had the three types of attachment--nonresident attachment, fraudulent debtor's attachment, and resident debtor's attachment--but, in 1959, Pennsylvania repealed the resident debtor's attachment without a ripple.

Nonresident debtor's attachment is an attachment which is sought against a person who is not a resident of the State of California--either because he

never was a resident or he has left the state with the intention not to return. This has traditionally been a ground for attachment for a very long time.

(I would like to say parenthetically that in 1970 Assembly Bill 1602 attempted to distinguish a resident who left the state without intention to return from a nonresident. I think that somebody who leaves the state with the intention not to return ceases to be a resident, but that is not the bill which was enacted.

C May I ask a question? So that we do know what the present state of the law is that we are dealing with, do I understand that A.B. 2240 was passed?

R Yes.

C Both [A.B. 1225 and 2240] were passed. [See Cal. Stats. 1970, Chs. 1319, 1523.]

R A.B. 1602 was not passed.)

R Nonresident attachment may be either jurisdictional--that is, you need the attachment to obtain jurisdiction--or it may be nonjurisdictional. In the latter situation, the creditor can obtain personal jurisdiction over the debtor but, because the man is not a resident, there is some doubt whether he will live up to his obligation even if he is adjudicated in California. Therefore, in the case of nonresident attachment, I would like to distinguish further between jurisdictional attachment and nonjurisdictional attachment. So in the further presentation, I will classify attachment into resident attachment, fraudulent debtor's attachment (discussed next), and nonresident attachment. I will differentiate in the case of nonresident attachment between jurisdictional nonresident attachment and nonjurisdictional nonresident attachment.

I now want to discuss what I call fraudulent debtor's attachment. In the history of American attachment law, statutes have been enacted which

provide resident attachment but only if the resident does something which threatens to frustrate the collectability of the creditor's claim. For example, where the resident has concealed himself, has avoided service, has threatened to make a fraudulent conveyance, or has entered into a contract by fraud, and so on. If you look at our new statute, these latter grounds are interspersed with the grounds for nonresident attachment in Sections 537(2) and (3).

> The plaintiff . . . may have the property of the defendant attached . . . in an action against a defendant, not residing in this state, or who has departed from the state, or who cannot after due diligence be found within the state, or who conceals himself to avoid service of summons . . . .

Some of these reasons, if not all, except the nonresidency, authorize what may be called fraudulent debtor's attachment. On the other hand, subdivisions (1) and (4) of Section 537 authorize resident debtor's attachment.

Reasons why study needed

There are three major occurrences which have prompted the Commission to look at this area of the law:

(1) The decision in the Sniadach case by the Supreme Court of the United States and the aftermath of the cases which have followed Sniadach.

(2) The Federal Consumer Credit Protection Act--the so-called Truth-in-Lending Act.

(3) The passage of the new California "long arm" statute.

Those three occurrences in my mind justify a look again at the adequate or inadequate, excessive or nonexcessive, scope of the availability of attachment in California.

The Sniadach decision

What did Sniadach do? That is one of the big questions. The meaning of Sniadach is a matter which has perplexed everybody, and my reading of Sniadach

is not entitled to greater authority than anyone else's reading. However, Sniadach was based, if you take the majority opinion, on an accumulation of aggravating circumstances. I list them as follows:

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

(2) The levy deprived the debtor of his 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 wins;

(4) The assets consisted of wages;

(5) The state had a very paltry exemption statute;

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

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

(8) No situation calling for the protection of the creditor was presented by the facts.

These eight aggravating circumstances, taken together, prompted the judgment that the Wisconsin procedure was unconstitutional. That is possibly the narrowest reading--that the procedure is not constitutionally adequate if you have eight aggravating circumstances of the severity of the circumstances in the Sniadach case. The question now is whether Sniadach has to be read in a more broadly conceived light. How does Sniadach affect fraudulent debtor's attachment? How does it affect nonresident attachment? How does it affect attachment other than wages? and so on. There are a multitude of questions.

[It may be mentioned that the Sniadach case was to a certain extent foreshadowed by the decision in Hanner v. DeMarcus, 390 U.S. 736. In Hanner, an execution sale was attacked as violative of due process because under applicable law no prior notice had been given to the judgment debtor.]

In Hanner, the Supreme Court refused to overrule the Endicott case [266 U.S. 285] which had held that no such prior notice of the judgment before execution was necessary. But there were strong dissents in Hanner, and the dissenters wrote the majority opinion in Sniadach. So, in my mind, it cannot really be said that all that Sniadach requires is prior notice and hearing in case of resident wage attachment.

Cases which have followed Sniadach have reached conflicting results on this question. Some courts have extended Sniadach to nonresident wage garnishment whereas others have confined it to only residents. There is also a question whether other assets are affected--bank accounts in which wages have been deposited; bank accounts in which wages have not been deposited; assets necessary for conducting a business. I have given you a survey of the post-Sniadach cases, which is not completely up to date, in my report at pages 21-24. In that survey, I have carefully limited myself to cases involving attachment and have not included cases involving other summary proceedings. But I must tell you that a number of courts, including federal courts, have applied the Sniadach rule to other proceedings. For example, in Laprease v. Raymours Furniture, Inc., decided by the Federal District Court for the Northern District of New York on July 29th, 1970, and reported in CCH, Poverty Law Reporter, ¶ 11915, the rationale was applied in a replevin suit.

In short, by and large, there seems to be a tendency to expand Sniadach rather than to restrict it.

Question whether 1970 California Act Constitutional

Reading the cases I have mentioned, I have some question in my mind whether the new California act is constitutional. Although this act

abolishes wage garnishment with respect to both residents and nonresidents, it does not provide for notice and hearing in other attachment cases, regardless of whether the assets attached belong to a resident or nonresident. In the light of the cases, which have accumulated after Sniadach, I must say that, frankly speaking, I have doubts whether the California act will stand the test of constitutionality.

Moreover, the Supreme Court said in the Sniadach case that it would not sit as a superlegislature, thereby intimating that, regardless of what the constitution requires, there should be a review of the legislative policy. The statute, which I propose, is therefore not based on the fact alone that anything else may be unconstitutional, but also on what I think represents a consideration of both the creditors' interests and the debtors' interests.

Statute Proposed by Professor Riesenfeld--special forms of relief for creditor

Attachment is a very harsh remedy and something easier might be devised. I have tried to devise as a temporary matter something easier. If you will look at paragraph 6 of Section 538 of the statute, which I have submitted. [The statute referred to is entitled "Draft of Amended Sections 537 and 538." It was distributed at the October meeting and is also included in Professor Riesenfeld's study.]

> (6) After the motion for attachment and prior to the hearing and determination thereon, the judge, justice, or referee may issue an order enjoining 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.

This paragraph, I think, in cases of need provides something less drastic and still satisfactory to help the legitimate needs of the creditor. You see, present law is rather drastic. The property is either seized or a keeper is appointed. You cannot appoint the debtor himself as the keeper, and you cannot authorize the debtor to conduct his business under a restraint not to do anything which is not in the ordinary course of business. There are states which not only permit a debtor to be the keeper himself but also to go on with his business. In contrast, in California, attachment is about as drastic as drastic can be. It ruins everything. I thought that it might be better if something less drastic could be devised. Therefore, while I propose that the scope of attachment be restricted, I put in subsection 6 which tries to accommodate the legitimate needs of both debtor and creditor.

Let me add one thing more concerning the general theory of the attachment remedy. This remedy originally grew out of proceedings in the English commercial courts, and it applied only to absent foreign defendants. This was called foreign attachment for 700 years. The common law itself never recognized attachment--except in early days as a method to compel appearance. After the default judgment was invented, attachment disappeared. In the United Kingdom today, you do not have any provisional remedy comparable to attachment. Attachment in England means wage garnishment after a writ of execution. And 53 million people of the common law background live quite comfortably without any attachment. This is much more radical than what I have proposed. Recently, England had a very extensive review of all these procedures. One of their conclusions was that perhaps something like I suggest in Section 538(6) might be appropriate. However, anything as drastic as our attachment does not exist at all in the United Kingdom.

Of course, an order under Section 538(6) will be issued by the judge or by a judicial officer and not by the clerk of the court. One of the difficulties with attachment in California--just to refer to one of the features which make it particularly susceptible to a doubt on its constitutionality--is that it is issued as a matter of course by the clerk of the court. In New York, an attachment is issued only by the judge and then only in his discretion. In other words, the New York statute lists grounds of attachment. Only if those grounds are present, an attachment may, but need not, be issued. Moreover, attachment in New York is by judicial order--not by a writ issued by the clerk upon the satisfaction of some requirements--and the discretion of the judge is reviewable upon appeal. Finally, in New York, to contrast it with California, attachment is not available in resident cases but only in nonresident cases and in fraudulent debtor cases. Obviously, the fact that one big state can live with this type of an arrangement is one reason to ask whether we, in California, really need all that we have or whether it is not, in some respects, unduly harsh and unduly excessive. In short, whether attachment should be allowed only after notice and hearing, whether it should be available in all cases or only some cases, whether an order of attachment should be issued by the clerk of the court as a matter of right or whether it should be issued by a judge as a matter of discretion, and whether its harshness can be alleviated in certain instances, are all questions of policy which should now be considered by the Legislature of the State of California.

Now let me make two more points by way of introduction, and then we can go into a little bit of the details if you are not exhausted. Attachment, traditionally, was a process used in an action at law. The courts, therefore, have said: We have to take the attachment statute as it is; We are not entitled to grant equitable relief, even in cases where some equitable relief might be necessary. The fact that our Legislature has enacted an attachment statute means that no other forum of relief should ever be granted. But the entire question of equitable relief and its availability to both the creditor and the debtor are questions which I would like to discuss with you. My views are set forth in Section 538(6) which I quoted to you--attachment should not be the only provisional remedy, but a judge should have the power to do other things if that is necessary, especially if the scope of attachment is restricted.

Notice and hearing requirement

Notice and hearing is the other point. This is a two-fold question: Should the notice and hearing be before or after the attachment? What should be the scope of the hearing? In California, we have certain hearings on the attachment after the attachment has been served and issued. That is, Section 556 of the Code of Civil Procedure provides:

> 556. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

If Section 556 is taken without due caution, you might conclude that the defendant, after the writ of attachment has been issued and levied, can, at

any time before the conclusion of the lawsuit, argue that the attachment should be set aside because it was improperly or irregularly granted without particular regard to what "improperly or irregularly" means. But, in the light of the California adjudications, "improperly and irregularly" has been given only a very narrow reading. For example, a defendant may obtain a discharge on a showing that the plaintiff has not alleged a cause of action of the type that justifies attachment. Thus, in a resident attachment, the defendant may show that the action is on a contract made outside of the state not reaching the required amounts. But the defendant may not show that the plaintiff has no valid cause of action. "Irregularly" means something else. It means that there was no bond, no affidavit, and so forth. So "improperly," as well as " irregularly," under Section 556 are very narrowly restricted.

Thus, once an attachment has been issued and levied, the defendant can get relief by putting up a bond, but he cannot argue those things which Sniadach held he should have a chance to argue before the attachment. One of the questions which you should face is whether the defendant should, at least, be able to argue those things after the attachment. That is, he should have not just a summary hearing on the question whether "regular or irregular" or "properly or improperly," but should have an adequate hearing on the question whether the attachment was sought without probable cause or whether the plaintiff has a prima facie case. In other words, at least in those cases where there is no prior hearing, should there not be at least some hearing after the attachment so that the defendant does not have all these assets frozen until the trial in the main action is over. The hearing

could be a summary hearing--similar to the summary hearing we have in supplementary proceedings. For example, under Section 720 of the Code of Civil Pnocedure, as you know, you interrogate the debtor's debtor in summary proceedings, then, if he denies that he is indebted to the debtor, there is an action on the merits, but the judge in the interim can issue a protective order.

The other aspect of notice and hearing is its timing. Notice and hearing according to the Supreme Court means prior notice and hearing--not notice and hearing after the attachment has been granted. It is true that the majority opinion held only that attachment of wages without prior notice and hearing is unconstitutional. However, the concurring justices' opinion made it very clear that all resident attachment without prior notice and hearing is unconstitutional and not just wage attachment. Regardless which of the two opinions should be read as authoritative, you can say this is at least a danger line. I think we should have a statute which also complies with the concurring opinion provided that this is a reasonable way to proceed.

I have also considered and studied whether we could not have summary hearings in some cases before the issuance of the writ and, in some cases, after the issuance of the writ. My proposed Section 538(5) provides:

> If the attachment is sought on a ground provided in Section 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 the defendant shows that the order was made without sufficient cause.

The grounds provided in Section 537(2)(a) and (c) are nonresident attachment and attachment to secure the collection of taxes. In these cases, it is

possible and permissible under Sniadach to have an attachment issued without notice of hearing. However, you should have a speedy notice and hearing at least after the attachment if the defendant so desires.

To summarize, I do not want to just stay with the rigid Sniadach question of prior notice and hearing. I would like you to consider whether you should not introduce in some instances where there is no prior notice and hearing, at least a subsequent notice and hearing. The hearing could be a summary proceeding. A summary proceeding dealing with the question whether the plaintiff can at least make out a prima facie case that justifies the freezing of the assets pending the outcome in the main suit. If he cannot in these summary proceedings make at least a prima facie case, then the referee, judge, or justice who has made the preliminary order should have the power to vacate the attachment. Thus, in addition to irregularity and impropriety, I would like you to consider whether or not a third ground should be added--that is, the issuance of the attachment was without probable cause or without sufficient cause. These then are matters which I open up in my report to you.

I think, too, that, if you keep fraudulent debtors' attachment, you should have a prior notice and hearing if the person is within the jurisdiction of the state. However, here I think that you should have other temporary measures necessary for the protection of the creditor as provided by my Section 538(6). In other words, the debtor should have prior notice and hearing on fraudulent debtors' attachment, if the fraudulent debtor is a resident of this state or is a nonresident within the personal jurisdiction of the state. But, although there is a prior notice and hearing, before the

prior notice and hearing is held, the judge should be able to resort to temporary restraining orders or to any other form of relief which he thinks is necessary or appropriate.

C Can I interrupt to ask a question? I can visualize a case where the debtor is about to leave the jurisdiction, perhaps for a foreign country, and take his movable assets with him. Would you contemplate that, in such a case, an ex parte order by the judge for an attachment could be issued?

R That is correct, except that the judge can say--keeper or no keeper--what can be done, and so on.

C I understand that, and that is what I thought you meant, but I think it should be made a little clearer. That is, what we are doing is denying ex parte attachment by the clerk, not by the judge; the judge would be allowed to issue an order for attachment (or for something like attachment) if a sufficient case is made for this form of relief.

R But there should be a showing at least, and the judge has the affidavit and can say, "That is not enough, show me something more."

C I understood that, I was afraid that possibly as it is drafted it could be construed to say that you can have any other relief except an attachment, yet the only relief that would be of any value would be a writ of attachment or its equivalent. And prior notice would be of no good.

C What would be wrong in that situation--where there is a danger of the defendant fraudulently disposing of the assets or fleeing the jurisdiction of the court--of allowing attachment but providing an opportunity to the defendant to come in and contest?

R Well, the only thing I wanted to make clear was that the judge had a broad range of relief available--not only attachment but other equitable remedies, but it does obviously need clarification.

Nonresident attachment--effect of new long-arm statute

R Now I want to address myself to the question of nonresident attachment. Not just wages, but nonresident attachment in general. I submit to you that the picture has substantially changed as a result of enactment of the "long-arm" statute in California. In order to show you that this is not just my own whim, I would like to cite you a statement to that effect by a very excellent state judge. [See page 26 of Professor Riesenfeld's report.] Chief Justice Fuld of the Court of Appeals of New York made the following statement in a recent case--Simpson v. Lochman:

> Almost half a century ago, Chief Judge Cardozo began his famous article, "A Ministry of Justice," 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 relationship inter se of in rem jurisdiction, in personam jurisdiction and forum non conveniens.

Now this last part of the desiratum of Chief Justice Fuld I have tried to carry out in my study. I have given some thought how quasi in rem jurisdiction, in rem jurisdiction, and forum non conveniens should be related.

Attachment is used for a variety of purposes. I listed some of these purposes in my report, starting on page 7, under the heading "Contemporary Utility of and Need for Attachment." There I dealt first with foreign, or nonresident attachment, and then with resident attachment. I pointed out that resident attachment, as contrasted with nonresident attachment, has four main purposes: (a) To protect the creditor against the dissipation of the assets by the debtor; (b) To protect the creditor against conversion of nonexempt assets into exempt assets; (c) To acquire priorities over other creditors or purchasers; (d) To protect against insolvency and resulting equality of distribution, provided that the bankruptcy petition is filed more than four months after the levy.

In the case of nonresident attachment, however, there is one more important fifth ground--a ground which does not exist in the case of all other attachments--that is, to get jurisdiction over the debtor. Now, the California long-arm statute says California can go as far as the Constitution permits in obtaining jurisdiction. However, in my mind, it is still necessary under the "long-arm" statute that there be a minimum contact with the state. In my opinion, if you have a general money claim, and the only reason you bring the action in the State of California is because of the presence of assets of the defendant in the State of California, you do not have the required minimum contact. The mere fact that you purport to have a claim on a cause of action which has, apart from the presence of assets,

no contact with the state whatsoever, plus the presence of assets in the state, in my mind does not permit invocation of the "long-arm" statute against such a defendant. In this situation, you still have to invoke quasi in rem jurisdiction. That means you have to attach the assets. Then you can serve summons--either by publication, or by out-of-state delivery, or by whatever means is permitted for service of summons in that case. After service, you then can get a judgment. This is a quasi in rem judgment up to the amount of the assets attached. The judgment is not entitled to full faith and credit. The doctrine of res judicata does not apply to the judgment. The judgment only permits the creditor to reach the assets up to the amount of the judgment if the creditor wins the lawsuit and otherwise has no other binding affects. A judgment of this kind, if properly rendered, looks like any ordinary in personam judgment but with the execution permanently stayed with respect to all other assets except the assets attached. Sometimes our judges do not do that, but, generally speaking, no harm results. Nevertheless, the proper form is an ordinary money judgment with the execution stayed except with respect to the assets which have been attached.

This procedure is still necessary, in my mind, in that case where the claim asserted has no other contact with the state and the only reason suit is brought in California is that there are assets in the state. Now, you can say, "Why should that still be the law? Why not go into the foreign jurisdiction, get an in personam judgment there, and then reach the assets in California?" But the mere fact that you have got a judgment in a foreign state is still not enough. You would still not be under the

"long-arm" statute and you would still be in the same position as you were before. You would have to attach the assets, and then get a judgment on the foreign judgment with respect to the assets attached. But this again would be only a quasi in rem judgment. Thus, the mere fact that you may get an in personam judgment in another forum does not help you at all with respect to jurisdiction in California, in my mind, unless the Constitution is read a little different.

C I have a question. Why shouldn't nonresident attachment for the purpose of obtaining quasi in rem jurisdiction be limited to the situation which you just described? That is, nonresident attachment should only be permitted where necessary to obtain jurisdiction to enforce a personal judgment already properly obtained in another state. It seems to me that, if personal jurisdiction cannot be obtained under our very liberal "long-arm" statute, you have thereby eliminated every case where it would be fair to the defendant to require him to litigate the claim in California. By permitting attachment and quasi in rem jurisdiction in these cases where personal jurisdiction cannot be obtained, you are at least permitting coercion, if not denying the defendant due process.

C I have a different question on this point. My problem is, as I understand the "long-arm" statute, it is as broad as whatever the Constitution means or almost. So that a poor plaintiff's lawyer or plaintiff does not know when he goes out to bring his action--until he has read the latest decision of the court and this has gone over many years--whether he is going to get personal jurisdiction. Would it not be preferable, at least in one

place or the other, to have some more defined basis for jurisdiction. You cannot, under your proposed statute, as I read it, use quasi-in rem jurisdiction--which you can now to get a case going in California--if you have jurisdiction in personam. The difficulty that causes is that you have to visualize what the then current Supreme Court will decide is the basis for in personam jurisdiction before you know whether you can get quasi in rem jurisdiction. It seems to me, somewhere along the line, as a practical matter, there ought to be a little clearer, more static basis of jurisdiction.

R Well, I would not want to tamper with something which has come from the Judicial Council.

C I would too, but we are not afraid to tamper with attachment.

C You know what might happen would be that you would develop all your law on the meaning of the "long-arm" statute under this attachment statute. Don't you think?

C Yes, but there are going to be cases--if this were the statute that was enacted--where the plaintiff's attorney is just not going to know just where he is going to get jurisdiction. Now there is one answer--he can just go to another jurisdiction where he knows he can get it.

R We should at least not put the clerk of the court in that shoe. That is why it should be the judge who decides whether the order for attachment should issue.

[There is also the problem of liability for wrongful attachment.]

R Well I had hoped that we would avoid that where there is a judge and a notice and hearing after the attachment.

C No, I am talking about the ultimate determination. Was this a wrongful attachment because there was in fact in personam jurisdiction? The defentant's interest at this stage would be to show that there was personal jurisdiction and a wrongful attachment because he then might very well get damages for the attachment.

R Well, assuming that the wrongful attachment statute, I propose, does not change, I would say, that there is no wrongful attachment because the judge has made the order.

C Oh no, if the judge is erroneous in the order, then it is a wrongful attachment.

C Yes, but perhaps we could change the penalty.

C Another thing is that attachment is used for leverage by a creditor.

R Yes, it is strategic.

C Yes. And it is one thing, where the creditor and debtor are in California, to say that we should get rid of that leverage, but when you are talking about California in relation to other states, the other states will not necessarily limit the use of attachment as to nonresidents, including residents of California.

C There is another side to this. Attachment could be used for harassment, but, actually going back into the history of it, this is not a bad way of getting jurisdiction over nonresidents because theoretically the debtor knows where his property is and is more apt to get notice than under some of the "long-arm" statutes. Some of these statutes do not really give the

debtor as good a notice as the fact that his property is attached. That is how, in part, quasi in rem jurisdiction grew up and that is why it is done in admiralty today. You are getting notice to the defendant that he has to come into California or whatever the state is and defend his property and he is going to know that he has been sued. The difficulty and the risk of the "long-arm" statute, and one of the reasons, probably, why it took so long to extend this jurisdiction was the fear that the defendant would have a judgment against him when he never actually got notice. The theory of quasi in rem jurisdiction is that a man follows his property and watches that.

R That is exactly the point I made, or tried to make, on page 8 of my report. I put the question--"Has the extension of personal jurisdiction over a nonresident defendant under the so-called long-arm statutes obliterated the need for quasi in rem jurisdiction based on nonresident attachment. The answer seems to have to be 'no.'" And there I take issue with my distinguished colleague, Professor Carrington. Professor Carrington has strenuously argued to the contrary in his noted article on the modern utility of quasi in rem jurisdiction. Unfortunately, I think, 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. Federal Rule 4 has in fact been amended so as to grant quasi in rem jurisdiction to the Supreme Court. I take issue with the many people who have argued that there is no more need for quasi in rem jurisdiction. I think there is a definite need for it in the cases where there is no in personam jurisdiction.

C I was not disagreeing with your theoretical basis. I was presenting what I thought was a practical problem, where you get in that grey area

where nobody really knows for sure how far the "long-arm" statute goes, so that you do not know whether in rem jurisdiction can be used to replace the "long-arm" statute.

C Noble is asking--can you draft a provision clearly describing in personam jurisdiction?

R I understand that and I am willing to reconsider that, but I would also like to point out to you that fraudulent debtor's attachment under this statute applies to both nonresidents and residents alike.

C I understand, but I visualize a perfectly legitimate means--comparable to admiralty jurisdiction where that is the basic means still today, and has been historically, of getting jurisdiction. In admiralty you seize the ship. Then when the ship is seized you substitute a bond or some other method. But seizure is the way to get jurisdiction because the ship owners are going to defend their ship. Then when you have jurisdiction you decide the case on the merits. Now that is one of the things you are talking about here as I see it. My problem is--not the fraudulent case--but the perfectly legitimate case where the plaintiff wants to get the case decided and he wants jurisdiction.

R I completely agree with you, but you must not forget that it has been held in other states that, where there is in personam jurisdiction under the "long-arm" statute, it must be exercised. You cannot say--"I am satisfied with quasi in rem jurisdiction." Whenever you have jurisdiction, whenever you can reach the defendant and exercise in personam jurisdiction, you must do so. You cannot say, "I will not do so, because that would be harassment."

C You miss my point. I would say that you would probably attempt to get jurisdiction under the "long-arm" statute, but to be sure that you have

jurisdiction in California, you would also want to seize the property for the legitimate purpose of making clear that you have a jurisdictional basis for your lawsuit. Now my only objection is that your statute would read so that you could not do both because one excludes the other. The problem that I am talking about is the fact that the "long-arm" statute is based upon whatever the Supreme Court of the United States at the moment says is sufficient for in personam jurisdiction. Therefore the litigant does not know when he starts out which way to go.

C Yes, but this is going to be affected by what your sanction is and what is wrongful. If in good faith you think that you do not have personal jurisdiction and therefore you attach--

C Okay, then the other guy comes and he says you have got personal jurisdiction--

C Well, then you are happy because he has come in--

C But then you are liable for wrongful attachment.

C The question then is what is the standard for wrongful attachment. The standard should be that only if there was clearly personal jurisdiction would the attachment be wrongful.

C I am not saying that my suggestion is the only one, but I think serious consideration might be given to defining the limit in which in rem jurisdiction could be obtained without making it as loose as the "long-arm" statute is. There is a lot more reason for the "long-arm" statute to be loose and broad than there is for in rem jurisdiction to be that way.

C Why couldn't you do what was suggested down at the end of the table? If you are going to have a judge issue this order in the first place, why would the attachment necessarily be wrongful in any situation, unless the creditor lost the main case?

C Except for practical purposes, the order of attachment would be ex parte and certainly you would not want to give the judge such an absolute power.

C Perhaps if we devise a procedure so we would not seize the property physically so that the damages to the defendant would not be that much.

C But if you do not seize the property then you are defeating the historical purpose.

C Let us say it is a piece of land. All you have to do is clog up the records. Then if you also liberalize your standard for wrongful attachment so that you do not pay off everytime the judge later makes some technical decision--

C I suggest an effort be made to have a more definitive standard for quasi in rem jurisdiction.

R If you would be good enough to look at my Section 537(2)(a). I say--"A writ of attachment may be issued in any action . . . if (a) the defendant is not residing in the state and apart from the attachment not subject to the jurisdiction of this State." You could add--"or if there is any reasonable doubt of the jurisdiction."

C That might do it.

R But, it would not affect the rest of the statute.

C The thing is, this language would pick up cases on personal jurisdiction and these would give meaning to the statute. On the other hand, if you write a standard in there, you would have to keep amending it all the time.

C I think something along the line of what Professor Riesenfeld suggests would accomplish it.

C What is your position where the nonresident defendant whose property is attached comes in and confers jurisdiction by making a general appearance? Does this give him the right to move for dissolution of the attachment?

R I do not think that that would be a general appearance.

C But supposing he does come. He says--"I'm here now and I confer personal jurisdiction on the court."

R Then, unless there is another reason--that is, there is still a question of fraud or--

C I just ask the question because logically that is the answer which would be implied although I am not sure that is what should be done.

R Once you adopt this scheme generally, then those questions, I think, ought to be ironed out. I felt, at the moment, I just wanted to see whether you, even in general, approve of some of these ideas or whether you want me to do something else.

C I was going to say, in evaluating the product, you can hardly take just this little bit of it. We are going to have a lot more in the package eventually that will provide remedies other than attachment. I would not want anyone to get upset because the Commission tells Professor Riesenfeld to go ahead on this. We are not going to make any final decision until we have got the whle package together. People, at that time, can evaluate it and say what they think of it. I just hope that the visitors here understand that what Professor Riesenfeld has given us is part of a comprehensive study. As we pointed out there are really four parts to the package, and this is only one of them.

R Let me say, in parenthesis, that some attachments are totally innocuous, for example, attachment of real estate. You merely file, with a recorder, a copy of the writ. The debtor is not deprived of the use of his property. The only thing he cannot do is sell it or convey it, but he can still plant beets or do whatever else he wants to do. When it comes to personal property, it becomes very grim because either there is a keeper or it is carried away. Finally, where it comes to choses in action they are totally frozen. So, although one would expect the opposite, attachment with respect to real estate does not have very drastic effects. But when it comes to tangible personal property, it is quite drastic, and when it comes to choses in action it is extremely drastic. If you wish, when you consider Section 542, I will make some suggestions how to reduce the drasticity of attachment as it stands now. Not all states do it as drastically as California does, as I have tried to point out.

C At some point, we will need to make certain policy determinations. How your study proceeds is going to depend a bit on such decisions. However, I do not want to interrupt now if there is more in the background which you would like to put before us before we get down to discussing more precise policy recommendations.

C We would like to get all the background you think is useful to us, because we do not want to make decisions, and then later have someone come and tell us something we did not know.

R If I can then recapitulate. The Sniadach case, the federal consumer credit protection act (or the Truth-in-Lending Act), and the whole approach of the "long-arm" statue has put a new dimension on attachment--especially nonresident attachment. These three factors should not be overlooked in determining our policy and what you want to do with the attachment statute.

I hope you will agree with me that there is still a remaining utility for nonresident attachment despite the "long-arm" statute. My present statute may be a little bit narrow for the reasons stated by the Commission, but we do both agree that, at least to a certain extent, there is a continued utility for nonresident attachment.

The next question then is how should an attachment for jurisdictional purposes be sought. It would be very difficult to say that there should be notice and hearing before nonresident attachment. You would have a bootstrap argument--how can there be jurisdiction to hear the attachment before there has been the attachment? Maybe the court would not be that technical. In the present case law, however, there is absolutely no jurisdiction to do anything without an attachment. That means that the notice and hearing on nonresident attachment would have to be subsequent to the attachment. At

the moment California does not provide for such hearing. Therefore some provision must be made for a subsequent hearing with dispatch on the question whether this is a proper case for a nonresident attachment

Enlargement of scope of fraudulent debtor's attachment.

If the nonresident attachment is limited, then the scope of the fraudulent debtor's attachment should be enlarged. At the moment, there are holes in the statute even as it is. They would be worse if you restrict nonresident and resident attachment. So commensurate with the restriction of resident and nonresident attachment, there should be an expansion of fraudulent debtor's attachment. The result would be something similar to the law of Pennsylvania, Ohio, and New York. I looked at those three jurisdictions because they have a very large number of people, and they do not have any resident attachment. There is no question that an expanded fraudulent debtor's attachment--whether applied to residents or nonresidents--would be useful and constitutional.

I tried to devise a procedure for a prompt hearing on the issue of sufficient cause in those cases where there is no prior hearing--that is, nonresident attachment and attachment for the collection of taxes. Thus, in those two cases where prior notice and hearing is not needed and would be too cumbersome, at least you have a subsequent notice and hearing. This is a subsequent notice and hearing outside of Section 556. Even the state, I think, should face a subsequent notice and hearing. I see no reason why the state should have an attachment for taxes without any notice and hearing. The claim might not be due and so forth. I do not read Sniadach as holding that, where prior notice and hearing is not required, a subsequent hearing would not be required. The Supreme Court never faced directly the question of subsequent notice and hearing. On the question whether you can wait until the whole trial is over, Sniadach

is mute. I could imagine that, if the argument comes to the Supreme Court in a new battery of cases, they will say--"alright, no prior notice and hearing, but at least subsequent notice and hearing, prior to the determination of the main lawsuit, is required by due process." In order to forestall the possibility of unconstitutionality, I suggest that in the cases where there is no prior notice and hearing that you provide for a subsequent notice and hearing.

If it is true that Sniadach requires a prior notice and hearing in all resident debtor attachment cases--and there is a good chance that it does have to be read that way and there is an enormous amount of case law since Sniadach on that point--you would have in every resident debtor attachment case two hearings: one summary, and one plenary, after the debtor is there. That, in my mind, would be a complete waste of judicial time. Therefore, I think that we should expand the reasons for fraudulent debtor's attachment, where there is a prior notice and hearing, and have no cases of resident attachment. One, because the remedy is harsh; secondly, because it is really unnecessary; and thirdly, because it is a waste of judicial time. To me, the third reason is really the most persuasive.

The expansion of fraudulent debtor's attachment requires consideration of some old-fashioned words which have always been used. Let me refer to those a little bit. I think one can reduce those reasons or grounds for fraudulent debtor's attachment to a minimum so that one does not have an endless catalog but everything will be covered. I have four grounds: (1) He has removed or is about to remove property from the state; (2) He has concealed or is about to conceal property; (3) He has transferred or is

about to transfer property; (4) He has concealed himself within or absconded from the state. I think "absconded" includes the leaving of the state to avoid service. Why we have duplications in many statutes, I do not know. I think that attachment should issue if the defendant does those things listed under circumstances which permit the inference of an intent to hinder, delay, and defraud his creditors. I think it is too hard on the creditor to have to show that the defendant did have the actual intent. All that the creditor, seeking an attachment, shows are factors which permit the inference of the debtor's intent to hinder, delay, and defraud the creditor. So, if there are factors which permit such inference and, in addition, the debtor has done any of those four, I think, that would be sufficient cause for what I call, fraudulent debtor's attachment. Although there are only four stated reasons, the field which is embraced by those four reasons is as large as any other jurisdiction, except that other jurisdictions have all kinds of unnecessary words which are traditional.

C Would it change the meaning if you said: "or left the state," or "has concealed himself within or left the state?" You still have got that qualification.

R Instead of "absconded?"

C Yes. Is that a word of art or something? I think "has left the state" is a more general word.

R Well, I had that first, and then I read the Attorney General's draft that provided "left with the intent not to return."

C Yes, but you have placed the inference to defraud in the introductory clause.

R I cannot give you a brief in favor of the word "abscond." It is just a word that is commonly used.

C Yes, but is has got a connotation of something more than "leaving." That is what I am afraid of.

C I have a much more basic question. Why do you have any requirement of intent? Take Mr. Gregory's earlier example. A man is about to leave the country for entirely proper reasons--he is transferred by his business or by the military or whatever. His leaving will obviously hinder and delay his creditors but he is not doing this with an intent to defraud anyone, he is leaving because he is under orders to leave. Will you protect the debtor, or are you going to protect creditors in that situation? Are you going to require a showing of intent? It would be a simple matter, I think, for the debtor to show that he has no intent whatever to defraud creditors. But he sure is going to take his property with him and the creditor will have a heck of a time collecting, if and when he gets his judgment.

C If you are talking about a subjective intent of any kind of dimension it would seem to me that a bona fide reason to leave would eliminate that. Why do you need an inference of his intent? Why not simply facts that show that he will hinder, delay, or defraud?

C Would you seize all the debtor's property? In other words, a debtor is transferred and he cannot move any of his property? Juse seize it all even if he says, "Look, if I am liable, I will pay it." He is a responsible guy and you assume he will pay.

C I am not saying you take it all, but do you take none if the judge will not infer the debtor is a bad guy, even though you show he is leaving and taking everything with him?

C He has got a very legitimate point. The debtor obviously does not think he is liable or he would have already paid the judgment. He thinks that he has got a very good defense but whether he does or not he is darned if he is going to help the plaintiff. That is what you visualize.

C Yes, having practiced in a community of military personnel who are moving all the time.

C Obviously he will take his property with him and then you will never see him again.

C Are you saying that we should have no subjective element in here if we can avoid it?

C I think if you put a subjective element in there it will be a rare case when you can prove anything.

R My reason for this is that the debtor has a constitutional right to go wherever he wants. If your statute limits that then it would be unconstitutional.

C Just because somebody makes a claim that you are liable they can harass you in that way.

R I do not think that would stand up for one minute, in any federal court, at any rate.

C Think about it. Let us say you are going to move to Minnesota and I have a dubious lawsuit; I might as well start it and I will just attach all this property and you will probably pay me something.

C But, think about this too. I have got a perfectly bona fide claim against you. You have written me letters that say "I will not pay although I owe this debt, and I am leaving." I am not going to get a judgment within three years because the courts are clogged. You are gone by then. You have taken your property with you and I am going to have a perfectly empty judgment.

C You put a fact in there that I think would meet the professor's standard. You say, "I admit I owe the money, but I am leaving." Then you are obviously leaving with intent to defraud or delay the creditors. The example you gave me before is a little bit more legitimate. The man does not really think he owes the money.

R I think "permits the inference" is going as far as it can be.

C I would think you would not have any trouble showing the intent if he sent the letter and said that "I owe you the money but I am going to make it hard for you. I am moving to Texas. I have a legitimate reason to move to Texas but I owe you the money and I am not going to pay it." But I was thinking you were describing the situation where there is a legitimate doubt as to whether he owes the money and, like most defendants, he is not going to make it easy for the plaintifff.

C I think you are right and I have overstated the case. But rarely will you ever get such a letter and I think it will be difficult to prove any subjective intent in most cases.

R May I remind you of my recommended Section 538(6). You can resort to that if the judge says, "Well there is something that is necessary, we will do it." Do not forget that section is in the picture.

C Yes, but on what ground are you going to have to get an attachment? Subsection (6) does not permit an attachment unless there is some ground for it. I have got a cause of action against someone and he is moving to Texas. How can I get any attachment? I do not have any grounds. It is not non-resident, it is not fraudulent, it is not a tax, it is not alimony. So there is no ground.

R Nobody can constitutionally require that you have to leave something here.

C Well, I guess the question is really that, where there is a dispute about liability and a person is moving, can you tie up his property or not? You obviously cannot decide whether it is a meritorious action until you try the action, so how do you separate the ones where the person is really liable and the ones where the plaintiff is an undue optimist?

C I do not know whether this would be adequate, but I think the creditor should have his attachment on an objective showing that the debtor is about to leave. Then, the defendant can come and ask to have the attachment discharged. If the defendant is going to come in at that point with an affidavit that he is not liable and is not acting fraudulently, then the judge can grant the proper temporary relief to both sides. At least, the debtor is going to pause before committing perjury or putting out a false affidavit. But under the proposed statute, you deny attachment on this ground even on the most bona fide claim.

C Yes, but you are not entitled to get your money until you get a judgment.

C I was going to leave this particular phase of the thing to later. These are important areas; there is no doubt about it, but I think the principal thing that we are talking about doing here, in at least one of the measures, is knocking out attachment and garnishment prior to judgment for residents. This issue would seem to me to be the major one. This debate that we are having is beside the point if we decide to keep resident attachment.

C Yes, but proposed Section 537(6) is going to be what is left of resident attachment.

C But that is fraudulent, and I do not want to get into that just yet. I do not want to argue about those objective-subjective elements and so forth now. What I am talking about now is getting rid of resident attachment because that is the major issue. That is where, I would suspect, more than 90% of the attachments occur now. Under the"long-arm" statute, I suspect, it would be a little more than that. Now the Wisconsin case said that the prior notice and hearing requirement is not limited to wage cases. I think Professor Riesenfeld has gathered from that decision that the prior notice and hearing requirement probably will apply to all other types of resident attachment. It is one thing, though, to require notice and a hearing--it is a real major step to just wipe out resident attachment. Now the fact that New York and Ohio and New Jersey and England all seem to get along without it fairly well may be a good argument, and it probably has a considerable amount of weight, but I would really like to explore that a little bit more. I ask also, if you know, whether there is any substitute or collateral way in which

in those jurisdictions they do by indirection what they apparently cannot any longer do directly, that is, not attach prior to judgment. Is there any hue and cry in those states? I know you said in England they get along without it very well--

R New York never had resident attachment nor do Pennsylvania and Ohio have it.

C What purpose do you want to achieve in resident attachment? Are you not just concerned about the fraudulent debtor? Do you want to achieve priority over the other creditors, or what?

C You have got a modern time where you have got a vast number of people in a very mobile economy that are moving around from place to place. You have got extended credit facilities all over the country and in much greater degree probably than at any other time in our history. I am not making a brief for it in one way or another. I do not know. But I am saying you are talking about knocking out a procedure entirely that has been in existence in this state for a long time and has been used, and used a lot.

C Yes, but is it going to be used when you have to give prior notice and a hearing and have to go before a judge? How many judges are we going to add to our courts to hear all these cases, too? The people of the state are going to be paying for all of this.

C These are the arguments that maybe we should be hearing but--

R You remember that I said that duplication in hearings was my main reason for eliminating resident attachment. We do not know how much of a

hearing is required. If the hearing is complete, you convert the attachment order into a writ of execution.

C But, Professor Riesenfeld, I do not know if there is any statistical evidence or any way to show this, but if somebody could come forth and persuasively show that, without the ability to strike while the iron is hot, they are going to lose--creditors throughout the country are going to lose, umpteen million dollars because they are not going to be able to follow these people and track them down in a mobile society for legitimate debts that they owe, or that it is going to severely restrict the granting of credit in multi-million dollar amounts throughout the state and that will adversely affect the economy in some way. I think those are countervailing policy considerations perhaps, although maybe they do not carry the day at all.

R This is what I wanted to discuss tomorrow. We have as models those states which do without resident attachment. Are the credit conditions or anything substantially different?

C No, they probably are not.

R They are not, so far as I know, but I have only done a very little bit of research. It is very difficult to do. You do not know whether the downpayment is higher or not, and so on. I have tried to find out from a motor car dealer who deals both in California and in New York and Pennsylvania, do you require different downpayments? But again the answers are not conclusive. They say, "Well, the downpayment really depends on the credit of the particular person and not on the question of attachment and garnishment."

It is very hard to guess what would happen or to measure whether there is really a difference between those three eastern states and California. People in New York are just as mobile as in California, and these three states are in one area. I have tried my best to find out and I will continue some more. If the banks, or anybody who is a lender, can show us this evidence it would be wonderful. But I think the person who wants to retain resident attachment should have the burden of proof.

C If you were to abolish wage garnishments, would there be much left of resident attachment? Are not most of them really wage garnishments?

Requirement of prior hearing on a resident attachment

C The problem is, if we need a hearing before we can attach a resident, are we going to come in and recommend that at the 1971 legislative session. I do not think we can come in and recommend that unless we were convinced that the benefits of it exceed the burden on the judicial system and so on. So we are forced to say--are we going to recommend that or not? We have probably got an unconstitutional provision. Now, what are we going to do about it? We are forced to look at what the alternatives are. Are there going to be other means if you get a judgment against somebody? Will there be more effective means of enforcing the judgment later than there are now? So there would be an offset. Maybe you do not have the debtor's property all tied up. Maybe you cannot go seize his $2,000 car in which he has got a $300 equity and tie that up. But are you going to be able to collect your judgment when you get it even though he has moved around in this state.

C The answer to that is that it is going to be hard, because the provisions for examining a judgment debtor are practically useless.

C Is there any jurisdiction in which they have resident attachment including attachment of wages with hearing requirements at the present time?

R No.

C No one has ever tried it?

R As a result of Sniadach they have tried to make amendments one way or the other--

C Have those amendments resulted in any state saying there was still an attachment of wages prior to judgment but with a preliminary hearing?

C Is there much left to attachment of wages in view of the federal law?

R So far as I know, four states have changed their statutes. After Sniadach Wisconsin enacted a new statute that was then again held unconstitutional by the Supreme Court. What they did in order to remedy Sniadach was still unconstitutional.

C No state, then, has said we will have a full summary hearing as the Supreme Court requests on resident attachment.

R I have not seen any such statute.

C On the other side, would not having a hearing on wage earners' garnishments be more of a harassing tactic. I am not sure how far the federal law goes, but I would think that the combination of the federal law and Sniadach has abolished wage earner garnishments for all practical purposes. But we are not talking about that, we are talking about other kinds of personal property.

C The point I am getting at is the constitutional requirement of preattachment hearing such that it makes resident attachment suddenly impractical? Is it your opinion that our present California statutes may well be unconstitutional?

R Yes.

C What do you think would be the minimum necessary to cure that defect? Some system for a hearing however practical or impractical? Just addressing yourself to a pure constitutional question, what do you think is the minimum that would be necessary to cure the defect?

R Notice and hearing on all resident attachments.

C Which is impractical.

C Are not there some types of assets though, where you could have resident attachments and it would not hurt the debtors, like land, for example. Why get rid of being able to put an attachment on land or why not permit the sheriff to pick up the debtor's ownership certificate so he cannot sell his car? I mean, there are a few kinds that you could maybe get rid of, but keep a few kinds where it does not really hurt the debtor. Maybe you would not need a hearing, or maybe it could be a posthearing rather than a prehearing.

R Except that the judges of the Supreme Court have said that full use includes the power to dispose.

C The question I would like to propound to the professor is: If the rationale of Sniadach is meant to extend to all types of property--that is, that you must have a hearing and so forth--why do you think Justice Douglas went to such great lengths to distinguish wages as a special type of property? In order to support his opinion?

R I said, sir, that he gave all those things in order to persuade some of his colleagues. He did not take that view in the previous Hanner v. DeMarcus case, and the concurring Justices did not take that limited view in Sniadach. I cannot know why Justice Douglas did what he did. He may have had some very good reason to do so. But what you must do is see what happens after Sniadach. Despite that dictum in our Court of Appeal case [9 Cal. App.3d 659], I think the trend is the other way; that is, to include all kinds of property. I think that we must see what happens in the replevin cases and all those other cases the judges have taken. I can also tell you that, when it was reported that I had prepared this study, a number of judges made telephone calls to me--saying, do something. I think the current judicial thought, certainly to a very large extent, is not to stick with Sniadach. Whether that will change, whether these cases are authoritative, I cannot tell. However, the courts have said that they will not be superlegislative bodies. So I tried to say to myself--do what is good for the state, good for the creditor and the debtor, and good for judicial economy. I do not think we should necessarily go only so far as Sniadach absolutely required. I think if you do only the absolute minimum, then you have to amend a statute every time the court changes something. I think we must examine what will it do to credit? Will credit be more expensive?

If so, is this wholesome or not wholesome? You get into the whole area of economic questions, which I cannot answer and I defy anybody to answer. I have asked so many people about it since I started the study. You can hear any view you want. I think there is no way at the moment, regardless of what people say, to measure the effects of change. As you know, in Pennsylvania, Florida, and Texas, there has not been any wage execution for ages, and yet, the people have given credit and banks have continued to lend, and so forth. It has led, perhaps, to an increase in the security demanded, but even that is hard to evaluate.

C They have some pretty short security statutes down in Texas.

R I really cannot see that there is a really legitimate need for resident attachment except to make it so uncomfortable that the debtor pays up--win, draw, or lose. If you look at the statistics for Wisconsin and Washington, there, out of 537 attachments, only one ever went to trial afterwards. If you look at those statistics--which include not only wage garnishment but also other garnishments--you begin to wonder whether resident attachment, with its present scope, has a legitimate purpose except to force the man to pay, regardless of anything else.

C I would like to ask one last question. If the Supreme Court, or our other courts, hold that the rationale of Sniadach--that is, that you have to have prior notice and hearing--should be extended beyond wages to all other types of property, would it follow then, that that rationale would also, to be consistent, have to be applied to all types of possessory liens, such as the garage keeper's lien, the innkeeper's lien, or anything else where you have a holding or taking of property without a prior notice?

R I have not studied that question. I do not know. I only know that many cases have come to that conclusion. I just do not know the answer to that. But that is a danger.

C We were considering the scope of what we were going to do. Is it your feeling, Professor, that we need to consider this basic, fundamental question--whether we should recommend the discontinuance of resident attachment--as a preliminary to deciding what we will try to do at the 1971 session?

C As a practical matter, is it feasible to do anything in 1971 on this? Think about all the interest groups that are going to want to study our proposal, and the problem of drafting and integrating all these things we are going to try to do. You know unless you give people a real chance to look at the recommendation, they will probably be afraid of it, and you will not get it considered anyway.

R However, you do not know what will happen between now and the end of the session, and, I think, you should at least have something available in case the present law is declared unconstitutional.

C Well, we would be working on the recommendation, but we would not represent that we were putting it in in 1971. I would not like to represent that we are going to have a statute in 1971 that is going to take care of all of these Sniadach and related problems, and then not be able to come up with a statute. We take three months to go through and review and figure out what we want to do. Others will want a couple of months to look at it before they react. We want the statute in the best form we can get it. We would try to get it done, but we would not necessarily be doing it for 1971.

If the roof fell in, we would have the best thing we could have at that time, but our intent would really be to put a recommendation in in 1972. Although, as you say, all the judges are wondering what to do. That is the problem--everybody is wondering what to do. They would rather have something now, that is not perfect, than they would a year from now, which is supposed to be better. Something may happen in this session, too. I mean, if we do not have a proposal, somebody else may.

C Perhaps there are one or two things that we might want to take care of immediately because of Sniadach--provide for notice and hearing, or abolish the resident attachment.

C We have got to make that decision. That is a decision we have to make.

C That is the heart and soul of the whole thing.

C Or we could wait until the California Supreme Court tells us whether the present law satisfies Sniadach.

R That is right. There are some cases in which the courts have said that all resident attachment is bad, but there is some other authority the other way. There is a split on that question.

C However, when the major commercial states do not have resident attachment, it is going to be hard to convince the United States Supreme Court that California has got to have it. The Court looks at things practically, too. I do not think it is just a theoretical question--it is a practical one. Are they going to be convinced you need to have resident attachment? If they were convinced, they would try to work it out in some way where it would be practical, but I do not know that you are going to convince them you need it.

Should the writ of attachment be issued by the clerk as a matter of course, or by judicial order

R There is another question. Should we leave the issuance of the writ with the clerk of the court or should we make it judicial? I think you gain a lot if orders of attachment, as in New York, are always based on a judicial order.

C That is, if the order is the product of a reasonable hearing. If the judge is just going to sign attachment orders like they sign warrants, it is not really going to accomplish anything. It is just going to make more work for the judge, but he is not really going to have time to hear any argument or even read the basic papers. He will just give them a quick glance and sign an order. That is not going to accomplish anything. Moreover, I would suspect that that is what happens in New York. Even if the judge does sign the order, it does not mean that he gives it very serious consideration.

R That is not my understanding, but I would have to make a more complete inquiry as to what the actual practice is--

C It would vary with the area; I mean, it would not be a statewide practice.

R Moreover, they may have changed their practices after Sniadach. Nobody knows.

C My remarks were only addressed to the suggestion that it would, as a practical matter, accomplish anything just to take it from the clerk and give it to the judge.

Creditors' views of resident attachment

C It has been suggested here and with some vigor that the requirement of a hearing preliminary to the issuance of the writ would be utterly

impractical because it would require far more time and judicial machinery than we should demand. Moreover, it might lend itself to harassment. That position sounds persuasive to me, but I am a little uncomfortable in accepting it just on the basis of somebody saying so.

C Well, you think of what it would do to other litigation. This would have to be expeditiously done. What would it do to personal injury cases? And other cases? This would have to have a priority of some kind--a very high priority.

C You would have to have an adversary hearing.

C You are just saying you would have to get in line ahead of everything except criminal--

C Is there anybody here who would like to comment on this proposal?

C I have been waiting to hear from representatives of the creditors on the policy issues here.

C Do you have any comments?

C As a practical matter, requiring prior hearing in a resident attachment case, at least as far as commercial collections go--where, for example, you try to get a bank account, this is the only asset this particular businessman has, you give notice and that bank account vanishes overnight, he switches it to another bank or he takes his assets and puts them somewhere else--would eliminate attachments for all potential purposes. In the retail field, I think that prior notice and hearing would eliminate attachment there, too. So I think that, if you devise a system with a hearing and notice, for all intents and purposes you have eliminated the attachment process.

C Domestic attachment or all attachment?

C Domestic attachment.

C To what extent do you attach land?

C This is not much utilized at all in retail attachments. I certainly find a valid and reasonable distinction between attachment of land, under the rationale of Justice Harlan, in his concurring opinion, where he talks about the prime abuses, the prime concerns. You do not have deprival under the attachment of land. The only deprival is, of course, the seller is unable to convey title. A valid distinction can be made in the attachment of land, and attachment of land is utilized, of course, in large collection cases, but not in a mass collection practice.

C Then, the thrust of your remarks is that Sniadach has for all practical purposes eliminated resident attachment?

C Yes, if it is applied as broadly as suggested here. But I still think that the position of the Court in Sniadach was more limited. That Sniadach is limited to wage garnishment cases.

C What has been the practical attitude of the industry--because there is legal liability involved if it turns out that your attachment is illegal because of the lack of constitutionality? Has the industry still gone ahead with their attachments under the California law?

C Yes. Attachment is still allowed in Califcrnia, of course, with the exception of wage attachments. They are gone. We have certainly adjusted to that, but as to other attachments, they are proceeding along as usual. I do not feel that, if they are later declared unconstitutional, this is going to expose you to wrongful attachment per se. But they are proceeding.

C What adjustments did you make when they eliminated the attachment of wages? In terms of the economics of the matter--

C Well, to be very frank with you, in the retail area, retail collections area, the attachment of wages had been going downhill. It had been utilized less and less. In the collection business, their goal is to get the debtor to come in and talk about his debt and see if they can work out some payment schedule. Sometimes service of process does this; many times it does not. Attachment usually always did it. Now, of course, the attachment of wages is out. So most collectors now are going through and getting judgment because, I would say, a large extent of the collection litigation goes by default. The debtor, you can only presume, has no defense. He owes the bill. He just does not have the money, or he does not desire to pay. And he does not take the time to go to court, and it goes by default. Then they can use the execution processes which are wide open with the exception of the limitation on the wage execution.

C Will then the abolishment of resident attachment necessitate no adjustment whatsoever except perhaps an increase in litigation costs?

C No, on other items, attachment is important. I would say attachment is fairly important to the retail collection business and of extreme importance to the commercial collection area. In the latter area, you have a much more sophisticated debtor, who does actively conceal his assets.

The proposal before you shows a lot of thought and study, but as a practical matter, much of this was included or much of the basic idea was in A.B. 1602 before the 1970 Legislature. Professor Riesenfeld has, of course, expanded it and refined the thoughts behind it, but much of it was there. Now, the immediate problem you face is that you must file an affidavit setting forth facts that the debtor is going to conceal himself

or abscond with his property. Then you could have a writ of attachment issued by the judge. Well, this affidavit is under oath; it has to be signed under oath, and immediately our people and other people in the credit world say, "My God, signing that under oath! We may know it, but how do we prove it?" Then later we get stung with a wrongful attachment suit even though we knew he was trying to hide, but he comes out and lies later that he was here all the time. He was just staying with his aunt.

C It seems that the prior hearing creates two practical problems. One is the one pointed out by this gentleman--any time you have a prior notice and hearing, you have the danger of the debtor immediately disposing of the property. The other problem, I suppose, is the increased burden imposed upon the judicial process. A suggestion has been made that may answer one problem, but not the other. That suggestion is, that the system be bifurcated, as it is now in injunction proceedings. That is, that you move in and get what amounts to a temporary restraining order or writ of attachment on an ex parte basis. Go out and levy the attachment, but then be required to have your hearing within a short period of time after that. I suppose that would solve the advance notice to the debtors problem. I do not know that it would be a complete solution to the burden on the court problem.

C Well, you would probably find a practice developing, as it has in TRO's, of getting the attorney for the other side in before the order is granted.

C That is something that would have to be solved by legislation.

Is the Sniadach rationale limited to wage attachment? Should wages be distinguished?

C What about this question of fairness; maybe this is equal protection and maybe not. But if, as you say, wages are gone as a source of attachment, is it fair to other debtors to say that you can go out and take their income-producing property even with a prior notice. In other words, suppose a fellow has his own store, or his own shop, or is managing his own apartment house. He does not get wages as such, but he has property through which he generates his income. A bank account or stock may be his whole source of income. I guess the reason for getting rid of the attachment of wages is some feeling that you should not fool around with the product of a man's work in this manner until you can get a judgment. But it seems to me that that argument can be applied just as well to a host of other people that are not working for salaries or ordinary wages. If it is fair to make an exception for wages, why is it not just as fair as a matter of equity--forgetting the constitutional principle--to leave them out in the other? Are we drawing some false lines if we do this? Or does anybody feel that that is unfair?

C Mr. Chairman, I would be happy to comment on that. I think that the speaker's comments are very well taken. And this was one of the arguments made to the United States Supreme Court in the Sniadach case. But Mr. Justice Douglas said, "Yes, but wages are a very special type of property. And anyone who wants can trace the tragic results that happen when wages are attached and are levied upon, taking food from hungry children, et cetera." Then, in order to sink the hook of federal involvement, he added that this produces bankruptcy. A rash of bankruptcy is produced throughout the country which is adverse to the public good. Because it produces that

result, wage garnishment is bad for the public interest, so wages may be distinguished. As the professor said, there are eight different items of distinguishment, and I do not know whether we want to agree with Mr. Justice Douglas or not, but that is not too important. The point is, he, as the justice of the Supreme Court who wrote the opinion--and the three or four who voted with him or really seven when you count the concurring opinion--has stated the present law.

C Yes, but he was just getting enough votes to have a majority--

C Well, you do not know, that is what you do not know.

C Maybe Justice Harlan was standing by himself. He wrote the concurring opinion.

C You do not know, so you cannot say for sure how the decision is restricted. That is the problem you have. We have had that with other cases, in other areas of law the Commission is studying.

C But to go on with my line of reasoning, you may say--well, alright, we will accept the reasoning of Mr. Justice Douglas and in this one area, it may be for the best interests of our country and our community, et cetera. But it seems, to some of us anyway, that, at that point, we have to stop. And those things that you say about wages and salaries do not apply to airplanes and motorboats, land, shares in stock, and things of this nature. The latter are just more in the commercial world.

C Yes, that might be, but you may still have guys that are living off that just as much as wages.

C I agree, it is conceivable and possible, but I suppose that you get into the question of percentages.

C Part of your problem, too, is the exemption problem, which I take it eventually we will be into.

C John, you listed in the memorandum two decisions that you felt we should make.

C When I did that, I did not know what I know now. My feeling now is that it is not feasible or desirable to represent that we are going to put a bill in in 1971. Maybe we will, but I am not sure that we will. I think we need to give it the highest priority. We need to really keep pouring it on because we need to have a bill eventually. I think one problem you have under the present uncertainty is that the credit people want to wait until they get wiped out, if that is what is going to happen. They would rather wait until there is a case that says you have to have a prior hearing before you may take the assets of an operating business, or something like that. I do not know if the United States Supreme Court will come out and say there is no resident attachment absent a showing of a fraudulent debtor, or something else. Whatever their attitude, I think we might as well work on a recommendation and try to develop it. But I do not know about putting a bill in.

C You could still put a bill in on wage earnings.

C What would you do on wage earnings?

R I think that should wait for Professor Warren's presentation.

C We are not getting that report today. We have another consultant, Professor Warren, and he is writing a report on that which we are going to take up next month. We are trying to cover the attachment area in enough depth so that we have adequate background on it and so we may find out

basically what Professor Riesenfeld thinks are some of the areas that need attention and whether they sound like they are profitable and promising enough to tell him to go ahead and try to draft something. Then we will have the rest of the report at the November meeting from Professor Warren. At the December meeting, we will look at what we have and we will try to decide: (1) what, if anything, do we do for the 1971 session; (2) what is our general approach going to be. I think, in deciding what prejudgment protection one gets, depends on what postjudgment protection one gets, too.

C The Legislature thought they took care of wage attachments in A.B. 2240, I know that.

C Yes, well do you want to comment on that?

Professor Warren I am struggling with exactly the same problem you people are discussing. I wrote a series of recommendations last summer. I started out along the lines of focusing on a few things that absolutely have to be done. I wrote that series before A.B. 2240 came out, and the more I worked on the problem, the less willing I was to say that there are just a few Band-Aid amendments that should be made now. Then A.B. 2240 came out, which in substance has what you might call a Band-Aid for all you need right now. So I have a new series of proposals that I will make to you in November. Altogether, they come to long-range proposals. Some of these proposals you might be interested in for 1971. But my guess is, listening to your discussion here tonight, particularly the discussion just pursued, that you might well say, "Well, maybe a little bit for 1971, but in general a long-term statute and a long-term look at it."

C Let me come back and ask a question. I take it that the creditor's position is, as John DeMoully suggested, that you are going to stick with the position that Sniadach only applied to wages and does not apply to resident attachment and other forms of property until you are told to the contrary, and you are not going to be willing to legislate in any manner. Why? What is the justification for the position? Will it cost you more money to go the postjudgment route?

C No, it will not cost us any more money but it will cost the debtors more money in the form of tightened credit, and it will ultimately cost the purchasers of commodities more money in the future.

C Can you demonstrate this?

C I can tell you what our people tell us. They say that, particularly in the large commercial transactions, their ability to attach a large piece of property, their ability to put a keeper in charge of a large store or establishment, their ability in the case of mercantile and wholesale houses to attach a bank account, inevitably aids their collection of debts and the payment on their judgment. This collection of their debt minimizes their debt loss which, in turn, keeps down their costs of goods. Otherwise, the debt collection process is added to their cost and thereby increases prices.

C Do these people, in making those statements to you, offer any empirical evidence of this by reference either to states which have, as Professor Riesenfeld indicated, no resident attachment or by other evidence? In other words, is this an assertion made to you on behalf of the industry --unsupported by any other--

C You do have leverage though--

C It is a pretty general assertion. We get it all the time, in all areas of the industry.

R Do they think, though, or do they know it? That is the question. I spent more than a few hours of discussion with the general counsel of the Bank of America about that. I cannot prove that I am right, but he cannot prove to my satisfaction that he is right. The industry does not have the facts to compare the two situations because credit depends on many things which are independent of whether you have resident or nonresident garnishment or attachment.

C Another point, and this is especially relevant in commercial collection. We will assume that the debt is legitimate. I would say that, in many, many cases when an attachment takes place, the debtor, in a hurry, if he wants to continue his business, makes arrangements to pay off the debt, or make installment payments, or make some type of arrangement to take care of his obligation. If you knock out the attachment process, you then require the creditor to go to court, incur court costs, which are added onto the debt, and in most large commercial cases, you have some underlying agreement or contract that provides for attorney's fees which are added on. I think these are legitimate costs that are added on, which the debtors today are having to withstand, even in the small collection cases, and they would not and are not sustained when the attachment process is allowed to exist.

R Well, you assume that, when a person does not pay, there is no doubt about the debt, and there are no other reasons, and--

C In your position, you can ask, well, is this a valid assumption or not? We can produce evidence; I do not have it here tonight, that this is

pretty much a valid assumption. There are a large majority of problem people we have to go after. They do not refuse to pay because they have a legitimate defense--I think that that would be the exception, not the rule--but because, for one reason or another, they either cannot pay it now, or do not think they can pay it now, or do not want to pay it now, or want to use that money to make money in their business or elsewhere. Now, this is a pretty well substantiated fact.

Liability for abuse of process as a limitation on wrongful attachment

C May I add one thing to that too. Particularly is this true in the commercial field, the mercantile field. As you all know, the state of the law in wrongful attachments today is such that, if you lose your case, almost for sure it is a case of wrongful attachment. You are just that exposed. So the creditors do not authorize the use of attachment, unless they are extra sure of the bona fides of the obligation. It seems to me that the reason to knock out resident attachment on property other than the wages, comes from the idea--"Well, we should not tie up or deprive a guy of the use of his property until he has a chance to have the claim adjudicated." That might be a good argument, but if it is adjudicated, and he wins, he certainly has a remedy of wrongful attachment. I come back and say that the credit grantors today are pretty sophisticated regarding possible exposure to wrongful attachments suits, and, believe me, they sure do not want to get into that situation.

C I do not know whether you had an opportunity to see this letter that we received from Leon J. Alexander, a practicing lawyer, who has written a

number of articles on this subject. He takes the following approach, which he would apply to other pretrial writs besides attachment and garnishment. He says:

> No pre-trial writ could be employed without posting a substantial bond. This would apply not only, as is now the case, to attachments but would apply equally to [other] areas . . . .
>
> (2) I do not believe that additional hearings would be the solution. Rather, the bond requirements should be scheduled in advance and based on the allegations of the Complaint. Then, as is now the case with attachments, any aggrieved party could go the Court for special relief. However, a standard practice should first be established.
>
> (3) I believe personal sureties should be eliminated and all sureties should be admitted corporate sureties for every bond.
>
> (4) I would eliminate all limits on recovery under the bond, up to total relief of damage to the aggrieved party. Specifically, I would include punitive damages, recovery for mental distress, pain and suffering, and other comparable tort features in bond recovery.
>
> (5) I would dispense with a separate suit for recovery under the bond and would, instead, have the bond recovery treated in the initial trial of the action.
>
> (6) I would further include any tort claims--such as malicious attachment, etc.--in the original lawsuit, as a compulsory counterclaim.
>
> (7) I would attempt to reduce the areas in which pretrial writs could be employed . . . .

The letter goes on, but that is his general approach to these cases. If you have a case now for wrongful attachment, apparently he feels you do not get full recovery.

R In addition, as a result of Judge Tobriner's ruling in the White Lightning [?] case, there has been an enlargement of the abuse of process cases. That is, I think, Tobriner has already opened the gate very substantially, so that you will have a notice and hearing anyway in these cases, in a much more pronounced form on the abuse of process issue. You really try the issue at that point as a counterclaim. What issue the judges will try first and what else, you do not know. But again, I think, in terms

of the long-range economy of the state, that employing judicial officers here is not sound. In fact, if you read the vast number of cases in this area--and the mere fact that special reporters like the CCH reporter exists indicates something--you will see that the courts will be tied up more and more in these cases. There is no question about it. Unless something is done about it, the state will just drown in litigation on attachments. I think that is unavoidable. Obviously it is much better to limit attachment to a legitimate area.

Summary of considerations concerning resident attachment

C Is it too late to ask a question? Could I ask this of the consultants? Has any thought been given to substitute devises for certain types of assets, such as land, shares of stock, maybe savings accounts, and so forth, in the nature of a lien rather than attachment? Distinguishing between types of assets on the basis of immediate use and enjoyment and so forth?

R Well, I pointed out earlier, that the Commission should consider whether the service of the writ of attachment, which is now by seizure, whether that cannot be alleviated. And what you suggest in part, I suggested in terms of temporary measures, comparable to the restraining order, which would have a lien effect. Maybe these measures could be spelled out in the statute if the Commission thinks it is necessary. But this is a secondary question. All this would only be necessary, if you think that you are really facing dangerous losses in the commercial area, if resident attachment is eliminated. I wonder: Whether the creditors really want to be constantly having to seek judicial opinion on the constitutional issue; Whether another statute would be more in their own interest--a statute which expands, more

or less, the area that we call fraudulent debtor attachment within the constitutional limits; Whether the creditors would not be better off to be rid of all those abuse of process cases and all the other questions. I personally really feel that you minimize the use of judicial personnel if you have a statute which limits resident attachment and expands fraudulent debtor attachment. But this is just a basis for discussion. This is all I intend. I wanted to give you my thinking, but this is nothing final or conclusive. I am not one hundred percent convinced, but I felt that this was a good way to start to identify the major issues. After all, if you look at resident attachment, the Legislature has constantly expanded it. It used to be very narrow. You have all kinds of queer quirks and limitations, which you say you can live with, but still the statute does not really mean what it says and so forth.

Method of approach to work on this project; legislative authority; comprehensive recommendation should both resolve fundamental substantive issues and provide greater clarity and technical accuracy

R I would appreciate it, Mr. Chairman, if the Commission would make a decision on one point concerning my further direction. I, personally, would like to direct myself, whenever the next report is due, to certain technical questions in the statute--the relationship, for instance, between paragraphs (4), (5), and (6) of Code of Civil Procedure Section 542. These questions do not affect the industries as much as does restricting attachment, but rather concern technical difficulties which have grown up in the law of execution and attachment. I think that it is very important that, at some time, you look at the whole process. I wonder whether it would be advisable in the Commission's judgment to start working on that aspect with some dispatch, while other things are going on, or whether you want to go step by step and not start anything more--

C Well, let us open that for discussion. My own reaction is to the affirmative. One of the problems in this particular area of the code is that it is strung out in page-long sections where you cannot find anything you want. I think there is a good deal of recodification to be done in connection with cleaning it up. I think we ought to come in, not in 1971 perhaps, but certainly before the project is finished, with a workable section of the Code of Civil Procedure dealing with attachment, garnishment, and writs of execution.

R And supplementary proceedings.

C Yes, the things included in the study. How do the others feel on this?

C Well, I would be inclined to go along with that idea. Certainly, not only are there problems in the code but it is awfully hard to find any answers.

C They are very poorly written statutes.

C It is a combination of fundamental substantive questions, as well as a drafting job to accomplish what should be done.

C I feel the same way about it. I feel that it is difficult to find anything in that section. It looks to me like it has been added on and added on, patched over, and certainly needs to be reworked.

C Now our charter from the Legislature on this one is pretty broad.

C Yes, it covers attachment, garnishment, exemptions from execution, and related matters. We could do anything really.

C Our experience has been that, when we get into something like this, if we touch one thing, we really have to take care of something else, and then, soon the only feasible thing, as long as we have a broad enough mandate, seems to be to go at it with the idea that we are going to come up with a complete, comprehensive scheme.

R It might be wise to identify a catalog of questions that might be looked at. For example, what is the effect of the Uniform Commercial Code upon this whole procedure? Nobody knows how you reach garnished stock; I have been in thousands of discussions on that and nobody knows. What happened to nonpossessary security interests? Section 689b was left untouched when the Commercial Code was drafted. There is the whole question of current income

as an object of creditors' satisfaction. Then, Section 691 of the Code of Civil Procedure provides:

> 691. The officer to whom the writ is directed, must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property . . . .

When do you sell things in action and when do you collect them? There is no answer. Anywhere. Judge Lillie says you sell; other judges say you can only collect. The code says "collecting or selling" but never gives you any criteria when one of these is proper. Is it fair? Should you be able to sell future income at a very reduced, discounted price? Or should the creditor wait and collect it as it falls due, or what should be done? There are innumerable questions which do not affect the life and death of an industry but which should be clarified because there is a great deal of concern and people do not know what to do. This is just lawyer's law but it should be straightened out.

C You referred to a Meacham case last night. Is that a California case?

R Yes, Meacham v. Meacham, decided by Judge Lillie. The citation is 262 Cal. App.2d 248, 68 Cal. Rptr. 746 (1968). Then there came the Husted case in 7 Cal. App.3d [?], and then there is one in the Superior Court. These are the three recent cases and they make quite clear that, how you reach future rentals, future income from a business, or other future income, is uncertain. What you do in the case of a nonnegotiable promissory note is equally unclear. This whole area is in total confusion.

C Does Section 691 apply only to execution? Is it possible to have a sale of an intangible under an attachment?

R Section 691 relates only to execution.

C So you could not have a situation where someone attaches property and then that property is sold under the attachment?

R Yes, but that would be a rare case. That would only be in the case of a perishable chattel.

C What you are saying, Professor Riesenfeld, is that you found out that it is really better to look at the whole process, that you cannot just patch it up. We originally thought that maybe we would do a patch-up job. Put in a few patches here and there that would take care of things and then some day do a complete study. But you are finding that it is all interrelated, and that to get a good statute, you really should look at everything. My feeling is that there is a better chance of getting something enacted if it is a comprehensive scheme.

R Unless there is an emergency; unless the courts declare the new statute invalid. There is a good chance that that will happen.

C Yes, but we are going to be working on this as fast as we can. If the courts do do this, we will give the Legislature what we have even though it is not perfected.

R I have not had a chance to discuss this with Professor Warren.

Professor Warren. I would certainly think that it would be appropriate to go through and clarify a number of things in these sections. I have done the same thing Professor Riesenfeld has done; I have been trying to teach this to students over the years, and they say the same thing the Chairman said. Basically, that they cannot understand these sections. Then you have the

problem that Professor Riesenfeld raises. Once you understand the section, that is, understand what the sections are trying to say, you still have some problem making sense of them.

R For example, you have a writ of execution and you garnish a third person or you levy a writ of execution on a third person. He denies the debt. Why should you have to examine him under Section 719? Why can't you immediately proceed under Section 720? But the Supreme Court says that the statute says we must do so. I think it is a total waste of time if the third person denies the debt.

There are just innumerable technical matters where the law just does not make any sense. I do not think anybody will be materially affected one way or the other. The industry could live perfectly well with the code. This is not so much of a hot potato, but there are large areas of unnecessary formalities, lack of clarity, and enormous confusion. There are areas where the Supreme Court has not spoken, but where the Courts of Appeal are in conflict. I think all this should be treated together. I have worked with it now for 30 years, and I have a list that long of purely technical matters which I would like to straighten out. If it is possible under this program, if we have time, we should try to look at these problems.

C I think that the reaction is that we would like to do that. But what kind of schedule are we facing? What is the magnitude of the research job involved? Are we talking about one year, two years? What do you contemplate? When will we be getting your reports?

R You would have progress reports, and then the whole thing in a year.

C You will be giving us reports from time to time?

R With Professor Warren. I want to have time to collaborate with Professor Warren.

C May I make a suggestion as to a possible approach, now that we seem to be comitted to the project. We probably should keep going as much as our time will permit, so that if we do have an emergency, we will be able to come in with a bill. Is there any reason why the Commission cannot also be working--the way we do on many of our measures--with drafts, revisions, and statutes while you, at the same time, are doing your study? We can do this with the idea that you will make a report or reports, but we will also be working along. Perhaps you could outline preliminarily, without completing your study, the areas or the particular points, or some of them at least, that you think need to be revised. We can then work with the staff, who will perhaps be coming in with draft revisions of particular code sections. We can debate, consider the points that you suggest, and the process will continue on. Is that a feasible approach?

C Maybe I could elaborate on that. Generally, on a major project, we will get a background study on only a portion of the entire project. We start working on that portion, trying to draft the statutes that will work the problems out. It may take six months of picking at the language before we get it. I think if we can identify particular areas here, where the Commission can really start getting down and working, drafting, and picking at the statute, and getting comments on that part rather than waiting until we get a whole big report a year or more from now, that we will make the best progress.

Is it possible for us to take some areas, like the two sections you gave us today, and work on those? While, at the same time, you would be giving us more material on other things.

R From my point of view that would be extremely desirable.

C I wonder about the breadth and scope of this thing. I do not know enough about it to see even the smallest part of all of the ramifications, but we are only allowed to study what the Legislature tells us. Does this pose some problems?

Some of the suggestions here--for example, doing away with resident attachment and garnishment--are really taking quite a cut at things. This opens up a whole new avenue of ancillary matters. If you cannot attach before and you cannot get hold of anything to satisfy your claims out of property attached prior to judgment, what remedies do you provide after judgment? The present remedies are, in my view, quite inadequate and antiquated as I have said before. What do you do with related matters such as the examination of the debtor after judgment? For example, you cannot now even go outside of the county to examine a judgment debtor. Then, before judgment, what happens to discovery? If you cut off the right to find and attach property, should we allow the right to discover the existence of assets before judgment? In California now, you cannot do that, except in limited situations of insurance. I just wonder how far we can or should go.

C I think that, if the issue is necessarily related, our legislative directive was intended to be a very broad one and would cover it.

C Well, what about replevin? I think in certain instances that it can act almost like attachment.

C Well again, I think that, if it is related to the subject, you can study it. Now, like everything else, if you try to solve all the possibly related problems, you are going to be here 20 years from now still working on it. You may have to draw the line someplace, but I am not worried about the legislative authority.

R Also referring to other states, there are ones which I would like to look at some more. You know Massachusetts had a very interesting procedure called a procedure "to reach and apply." Maybe some ideas can be gained from it that would be useful here. I feel that models of other states are at least helpful to focus your ideas on.

I am aware, and I totally agree, that attachment is one thing and discovery a different thing. There is a lot of antiquated material in the statute, and I would agree with you that there should be other avenues available and the creditor should at least know where the assets are.

C One difficulty with trying to solve the problems of the Sniadach case is that, if that case is given a broad interpretation, you necessarily get into other areas because you have to substitute some alternative remedies.

C That is why I asked yesterday if there were any other things that New York, Ohio, Pennsylvania, and England do to compensate for the lack of resident attachment.

R I do not think that those three states do have anything, although Massachusetts might. New York, Ohio, and Pennsylvania take the attitude that you can do very little before the judgment is rendered, except where there are enough facts known to the creditor so that he can show fraud. I have the three statutes here in the appendix.

Original purpose for attachment; present use of attachment

I would like to make two other points here. Section 537 provides:

> 537. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered . . . .

Now, as you have heard from the representatives of the creditors, creditors also use attachment to induce the debtor to refinance or otherwise satisfy the claim. But this is not at all what the statute says or what attachment was meant to be for. Despite the fact that courts sometimes hold that creditors who use attachment for reasons other than security, may be liable for abuse of process; despite the danger that such a claim will be asserted in counterclaim, creditors still feel attachment is very helpful because it makes the debtor refinance, and soon. But that is not what this statute says attachment is for.

The other point is this. Technology has changed. At the time these statutes were drafted, movables were more valuable than today with mass production. There is a general complaint that you cannot collect on chattels. Nobody can. Except for new inventory, nobody buys second-hand goods. So the use of this process as a means of actually collecting out of the assets and of having the debt paid has become more and more minimal. This is a worldwide problem. I have investigated the collection process in many countries, not only this country. Even in Switzerland they complain--"Who wants second-hand goods?" They are only of value to the debtor himself. To nobody else. Their only value is that, if you take them away from the debtor, he may think twice about whether he wants to live without them. But, if he says--"I can live without them"--the creditor can do practically nothing with them. He cannot really collect out of them. In Switzerland,

they do not have sheriffs, they have collection officers. These people know more about the collection process than anybody else; they see what is paid. For this reason, Switzerland is one country where you can really find out what happens to second-hand goods. And you find that they really serve the creditor no useful purpose, except as inducements to the debtor to pay.

Thus, when the statute was drafted, the ideas were totally different. Attachment was for security for collection. Today, nobody can really contest that the main value of attachment, in most cases, is, what I call, the strategic value. Attachment is not really a collection process at all anymore, except perhaps where land is attached, because of the total impossibility that you really can collect anything out of second-hand goods, except mercantile inventory. I do not think that we should lose sight of these considerations.

C Mr. Chairman, I would like to make a few comments here. I certainly agree that the attachment process does bring a debtor around to recognizing his obligation and trying to make some type of disposition of it. However, I think Professor Riesenfeld confuses two different types of credit transactions when he talks about second-hand goods. Very rarely does the attachment process go after second-hand goods or something that is of questionable retail or market value. Second-hand goods are taken in the situation where you have a chattel mortgage or security interest over furniture, such as these loan companies have. This is a completely different situation from the attachment process. They do not have attachment, of course, but what they have is a security interest. They do not want the furniture, but they use repossession as a vise over the debtor's head to collect what is due and owing on the furniture. In the attachment process, I believe, furniture is what he

referred to because this is the most common second-hand goods--

R Cars actually.

C Well, alright, cars then. They do have more value than furniture on the market. But, in either case, you have quite liberal exemption provisions in the code. Really just about all his furniture can be exempt if he goes through the process of seeking this exemption. I suggest to the Commission that you are getting off the track when you suggest that going after second-hand, questionably marketable goods, is a devise actually used in mass. I do not believe it is.

R As I say, I would like to study what assets attachment is currently used to reach. The only way to study it is to look at the attachment returns to see what is attached, and so forth. Wages are now out. Formerly, of course, the best thing was wages, now it is bank accounts. Of course, these may be wages in a different form. What happens when wages are paid into bank accounts? Our statute leaves that question completely open and there will be a lot of litigation on that. But, no matter what you say, what I would like to see, by looking at actual attachment returns, is what was attached apart from wages, and what became of it. How much satisfaction, if any, did the creditor get of it? Or was attachment just for strategic purposes? This is one question which really agitates me not only as a matter of curiosity, but also as one of intrinsic policy. And the fact is that the few studies which have been made seem to imply that the value of attachment as a means of satisfaction in the majority of cases is questionable. But I do not want to make any foregone conclusion. I want the Commission to give me a chance to study and look at the records. The only way to know is by taking representative samples, if it is possible, of the sheriff's returns and see what actually happened.

Priority of issues

C I think it is clear from the discussion that we are interested in getting into both the basic substantive issues and also the housekeeping issues. I think that, if we follow the procedure that was suggested a little earlier--with the Commission working at the same time that you and Professor Warren are working on your part of it, avoiding, as much as we can, duplication of effort, or going down blind alleys--we can probably keep this project moving and be prepared in the event of an emergency and also, hopefully, have something comprehensive by 1972, or perhaps 1973.

C One thing though, I think that, in planning the parts to do, we have to give priority to the problems that are the most acute in the light of the constitutional issues. Then, after we have enough background to start work on these problems, Professor Riesenfeld can start work on the housekeeping matters, and so on.

C I think that, if we follow the approach we have followed on the past projects, we will save time and also have a pretty workable statute. Now, part of that process at this stage is a definition of issues. When I say definition of issues, I mean framing the questions that are presented by the study. We want to proceed in some logical fashion for the rest of the day. Are there other areas that you have not been over yet, Professor Riesenfeld, that you would like to cover this morning so that we can start to indicate the questions to be decided? You had indicated that perhaps it would be of help to you to have some reaction from the Commission on these things. Is now an appropriate time to start that, or is there further--

R No, I would be grateful for any guidance the Commission can give me on what they think about the issues I raised so far. Perhaps I should state what, in my own mind, is the order of priority of my recommendations.

Issuance of writ of attachment: clerk, commissioner, referee, or judge?

R I think that really the most important of my recommendations is that the order of attachment should no longer be issued as a matter of course by the clerk. Rather, a writ of attachment should be issued only after a judicial order or by an order of a judicial officer to that effect. That is the most important of my recommendations. I also thought that we could have something like a supplementary proceeding--

C Professor, do you want to require a judicial order in the quasi in rem jurisdiction situation?

R Yes, any time there is a writ of attachment.

C Could I ask a question? As I understant it, all that is going to be presented for the issuance of the writ is an affidavit setting forth the criteria that allows its issuance under the statute. Is that correct?

R No.

C It is not going to be an oral hearing, is it?

R Well, it is like a preliminary injunction.

C Usually that is an affidavit. In the federal courts there can be oral testimony if you want, but in state proceedings usually that is by affidavit at least initially.

R But the judge must be satisfied with the affidavit. In the end, there must be some showing in the affidavit, or otherwise--

C Well, at least in the initial instance, the moving party is going to come in with an affidavit that ticks off the requisite number of things that the statute requires. And if that is the way it is going to be done, I think that it is going to be a more or less perfunctory procedure, whether the clerk does it, or a commissioner does it, or a judge does it. I cannot see them really doing more than just checking the list to see if there is some basis and if all the statutory requirements are met.

R Well, this again shows that everything is interrelated. If you have a notice and hearing before, of course, it would be different from the situation where there is no prior notice and hearing. It is so hard to separate these matters. But even in those cases where the notice and hearing is afterwards, the debtor should at least have the assurance that someone--not just a clerk of the court--will look at this. Also, once you have a judicial officer involved, issuance of a writ is no longer as a matter of right, but as a matter of his discretion. He may be satisfied with the affidavit, he may say--"Can you show me more?" There is more scrutiny of the affidavit and you do not have so many 556 proceedings, where the debtor says after the attachment that it was irregularly or improperly issued. So, it is subject to debate, but I think that it is much better, even if sometimes it will be perfunctory, if the matter is in the hands of a judge, justice, or referee, and he makes the order to the clerk to issue the writ.

C I think, I fear, that we will get into the same situation that we have in probate proceedings. You will get a commissioner, and they vary in quality. Many commissioners in probate take a very serious look to see whether they have complied with the form. Some of them go into the substance.

Some just sign anything that a particular lawyer that the commissioner may have respect for brings in without looking at anything. I have some question whether we really would be accomplishing a great deal by substituting a commissioner for a clerk.

C If you have a subjective element of intent in there though, I agree, you are not going to be able to get a clerk to make that decision on an affidavit.

C I realize that. I am talking practicality. I have had experience in a few other matters, which have not involved attachment, where the courts have been perfectly satisfied to permit ex parte orders by judges, who they somehow think will give more consideration to something, rather than an order issued as a matter of form, and then have a serious hearing afterwards. I disagree with this. But our Supreme Court has ruled that that was perfectly satisfactory. Whereas actually the party got less of a hearing because he had a perfunctory order and it was facing him right at the beginning.

R For that reason, I say it could be a referee, because the judges are very busy. Probably the danger of perfunctoriness is alleviated if you do it like that. There is precedent that it would be constitutional to have a referee appointed for application for--

C Suppose you have a case where there is a notice and a hearing and nobody shows up? Why should we take the time of a judicial officer or anybody else--if what was suggested yesterday by representatives of the creditors proves to be right, that is, ninety-nine times out of a hundred the debt is owed and the debtor is not going to make an appearance? What do we do in that situation? Do we have a big, full-scale hearing--

R I provide opportunity to be heard.

C Yes, but he does not show up; then what do we do? Make the judge go through the application notwithstanding the debtor has not shown up?

R After all, the judge has the affidavit, and he may be satisfied with that. The statute says--and I tried to make clear that it should not be overly stringent so as to hamstring the whole procedure--Section 538:

> 538. (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 . . . .

and so forth. I do not want to bind the court's discretion. If the judge is satisfied that there is sufficient evidence, he has a perfect right to issue the order. If the defendant does not show up, normally the judge should be satisfied with the affidavit, because the debtor would have shown up if he had a good objection. But I think there are so many unknowns, that I feel you should have judicial control at that initial point.

C What does your provision (c)(3) mean to you? That is, the judge has to be satisfied "that the motion for attachment, and the cause of action, are not prosecuted to hinder, delay, or defraud any creditor of defendant." What does that mean?

R Well, this is in the statute now. This is in the statute because once some creditor took all in order to exclude all other creditors. He was in cahoots with the debtor. This is a possible danger.

C You mean, he attached more than was legitimately due to him, in order to stop somebody else from getting it, or--

R There is an enormous amount of case law on it. Usually, there will be no indication of fraud between creditor and debtor, but those sections are in the statutes in order to prevent such collusion. Since it is in the statute, I felt I should not cut it out.

C But you want any attachment creditor to make a showing--

R Well, the affidavit would be the showing unless there is some evidence of collusion.

C Right now, is it not just a conclusory statement in the affidavit for attachment?

The preliminary, ex parte order under proposed Section 538(6)

C I have a question concerning your proposed subdivision (6) of Section 538. Subdivision (6) provides:

> 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.

You do not specifically say that this order may be granted prior to notice to the debtor. This gets us to the basic question that was raised earlier that, if you give the debtor an opportunity to do anything with his assets, he will do it and the creditor will be holding an empty bag. You will not only be taking up judicial time, and time of the creditor, but you will be doing it all to no avail.

C I think what is intended is that you have to have a notice and hearing before you can get a writ of attachment. But in those cases where you have to do something immediately or assets are going to be gone, the judge can make a temporary, ex parte order. In the latter case, you can have a sheriff seize the assets or do something so that the debtor cannot dissipate them. But this would be an extraordinary remedy available only on a case by case basis, under the facts of each case. You would have to justify doing this.

R Sniadach in effect may mean--as construed by Justice Harlan and the lower courts--that resident attachment of all personal property without prior notice and hearing is unconstitutional. For example, the Supreme Court of Wisconsin in Larson v. Fetherstone held that the Sniadach rule

also applies to the garnishment of personal property other than wages, especially bank deposits--if so, then you have a situation where, if you want resident attachment, there is a requirement of prior notice and hearing and such a procedure will take time. But I think, even if you have that enlarged Sniadach rationale, that it will be constitutional to permit the creditor to seek at least some temporary restraining order. Thus, even if you have a notice and hearing, something can be done to help the creditor.

C But subsection (6) should be clarified. It should be made clear that the order could be ex parte.

C If you go that far, I think we have got the cart before the horse. If the only major area of attachment is going to be fraudulent debtor attachment, before the creditor can get the attachment, he has got to file an affidavit that says, in effect, that the debtor is a bad guy. That says, he is going to disappear, or he is going to take his assets and hide them, or he is going to flee the jurisdiction. If the creditor has to lay all that out in the original affidavit to get his hearing on attachment in the first place, why provide in subsection (6) that a judge can order prior attachment without notice if the creditor makes a proper showing? All the creditor is going to do is refer back to his original affidavit where he says--"The debtor is going to leave, that is why I am bringing this motion in the first place; please help me in advance. Do not tell the debtor that I am after him, because the very thing I am afraid of will happen, and the debtor will be gone." Why don't you simply allow attachment in the first place and give the other side, the debtor, the right to come in and knock it out?

C As a practical matter, what you are saying is--if we are only going to permit attachment against residents on the fraudulent debtor grounds, then subsection (6) will be the operative section in every case.

C Yes, the creditor cannot have attachment unless he proves or there is an inference that the debtor is going to take the property and leave. If the creditor has to show that much to bring his motion, why shouldn't he be able to grab the assets in the first place?

R Because, I am afraid, sir, that the Supreme Court ultimately will knock out all attachments which are done by the clerk of the court.

C No, he is talking about your proposed subsection (6).

C Do you think judges are going to routinely issue ex parte orders permitting the seizure of property?

C What I am saying is that, if you only permit fraudulent debtor's attachment, then, in every case where attachment is sought, the creditor will need the protection of this type of ex parte order. Therefore, why not permit the issuance by the judge of the order or writ on the creditor's original affidavit, and let the debtor come in and contest it if he wants to?

C Well, the judge might be willing to make an order but not as broad a one as you ask for. The judge might say, "Well, I am willing to do something, but I am not going to put a keeper in the debtor's business in the meanwhile." I am not so sure that routinely you are going to get the kind of relief that you can get now.

C Well, if it is a bank account, you are probably going to end up with an injunction on the bank and on the debtor which is going to restrain closing up the bank account.

C There is no difference between that and an attachment.

R Yes, but the judge may say--"The debtor shall be permitted to withdraw $50 per month or so." You cannot do this under an attachment; it is all or nothing. My procedure is much more flexible. There are degrees of relief which can only be determined by the judge.

C How is the judge going to know enough to make an order like that if it is ex parte?

C What we are saying is that, following the normal TRO, preliminary injunction route--where you have the hearing within 10 days--creditors are going to at least try to come within your subsection (6). Where it is a bank account, they are going to enjoin the removal of the account which is all they need. But that is the same as an attachment for 10 days. In effect, they are going to attach the bank account for 10 days. Then, at the end of 10 days, the judge will have a hearing as to whether this is going to be the order for the future, or whether there are going to be some modifications, or whether he is going to discharge the temporary restraining order.

R But there is one point, sir, if I may make it. In attachment you freeze the whole account; if you have an order, it can be partial--

C But the judge is faced with an ex parte application by the creditor. The creditor, even with the best intentions, it is not going to present the case for the debtor. The creditor is not going to say the debtor needs $10 or

$15, or whatever, a week that he is supposed to get. That, as a practical matter, will not come until your hearing on what is the equivalent of a preliminary injunction. The problem arises because of the requirements or grounds set for obtaining the attachment. The average creditor's lawyer is going to say, "Well, I am going under subsection (6) in every case," because it will be a very rare case under fraudulent attachment where the creditor is going to want anything but an order under subsection (6) or a TRO out of the judge.

R Yes, but an attachment, in my mind, is really more drastic. Under attachment, the evaluation of what can be reached is the responsibility of the creditor. He decides how much he wants to attach and so forth, subject, of course, to the limitation of the statute. I think there should be some intermediate solution which permits the judge to say "I will not issue the attachment because that is too drastic. But you have made enough of a showing that I will at least give you some security, until we have a notice and hearing."

C I have another problem along this line. You can get a temporary restraining order without a bond, but it would seem to me that, in this debtor-creditor situation, you would want to always require a bond. That is, you would inevitably, invariably want a bond before you permit attachment.

R That is right, but the bond has to accompany the motion for attachment. That would be covered in Section 539.

Abuse of attachment procedures

C To what extent do we have any evidence that there is an abuse of the attachment procedure apart from the wage earner attachment under the existing practice?

R Well, there are at least alleged abuses in those two articles which I cited to you. But I would like to form my own opinion, and I have not had the time to do that yet. In order to make a factual study, you have to have some kind of frame of reference first. So I have tried first to prepare a frame of reference of what I want to look at. There are complaints of abuses, but I do not know how serious they are.

C How would you go about finding out about abuses in modern-day California? We are not really equipped to make this sort of investigation. Although we have two members of the Commission who have authority to hold legislative hearings, we have never done this. However, we do solicit views, and people from the respective industries who are interested in a project have informed us of their views. Many of these reforms strike me as necessary only if there have been abuses.

R There are complaints about abuses. They are not proven. In my report, I have not said there are any abuses because I will not say anything until I am convinced myself. Abuses have been alleged in innumerable hearings, in innumerable articles, but these allegations have been contested.

C I do not think that it would be difficult to document the fact that there have been abuses in the attachment of wages. I think anybody who has had experience in representing employers knows what goes on but apparently that now has stopped. Whether we have similar situations in other areas, I do not know.

R Well, there are cases--there is a municipal court case which I cite--where abuses have been alleged and even found by the judge. But how widespread

that is, I do not know. Of course, up to now, wages were the most easily reachable asset; now that wages are out, we do not know what will happen with respect to other assets. If you close one door, whether everyone will go to the other, I do not know. This is also true of repossessions. Everything is interrelated. A creditor will, of course, try to get his claim paid, and this is his good right. In which way he will pursue his recovery depends on what is open to him. There have been complaints about the practices of collection agencies, in general, not just with respect to wage garnishments. There may be other abuses. I do not know whether these are true or not. I think: (1) It is better to have a statute which prevents abuses; (2) I would like and need more time to see what I can find out myself, after studying certain records to see what they disclose. We will hear from the other side, I am sure. We will get letters from the OEO, from the Rural Legal Assistance League, and those other organizations.

Should judge or clerk issue orders?

C As an alternative to this recommendation, I assume that it would be possible to leave the law as it is at the present time, with the clerk acting, but add a procedure either for the debtor, if he wants to, to come in and have a hearing where he can obtain relief prior to the actual filing of judgment or for the creditor to show before a judge that he has established his case.

R Except if, as mentioned, there is--soundly or not soundly--a predisposition by the judge to think that everything is fine.

C No, it hurts the creditor, actually, to have the clerk issue the initial writ. This is because of the way these ex parte orders are handled

subsequently by the judges. It is hard to set them aside. Here, as a practical matter, will be the situation. The poor debtor, the one who we are really concerned about, is not going to have a lawyer who is ready to go out and defend him immediately. (I might add also that it does not help him to say that he can post a bond to release the attachment. Take a businessman, whose bank account is about to be attached or has been attached. He cannot operate without funds, but to release a bank account, your banks require bonds, and the bonding companies require collateral in the amount of the account, so it is circular. I have had the situation where a businessman had his bank account attached, if he wanted to use the money he had to put up the same amount of money, and the insurance company would then issue a bond to release the bank account. So he has to leave it, and he is put out of business.) However, to return to the debtor whose assets have been attached. Now he has to get a lawyer that he does not have regularly and go out to this hearing. He goes out 10 days later, after the ex parte order. The judge has had all these affidavits. The debtor's lawyer may be very competent, or he may not be. But if the order is issued by the clerk, the judge is less inclined to regard that as having too much continued validity. The debtor is not fighting against something already issued by a judge. It is the psychological effect of having the judge issue the ex parte order that makes it so much harder to defend against. A real subsequent hearing may make for more relief to the debtor than would an ex parte judicial order followed by another proceeding. Of course, a lot of debtors will go by the boards because they cannot afford a lawyer because they are on the verge of bankruptcy anyway. Their bank account is now attached and most businessmen, when their bank account is attached, are just out of business.

R But if Sniadach, in effect, requires a prior notice and hearing in resident attachments, regardless of whether you restrict it to fraudulent debtors attachment, then, in order to comply with Sniadach, you have to have at least a prior review by the judge.

C That is why I am inclined to agree with you that resident attachment should be out. I am talking now about fraudulent debtor's attachment where the creditor comes in with an affidavit which complies with everything you require. He, undoubtedly, is going to try to get an ex parte hearing before whomever you designate. Then the restraining order is issued. The businessman cannot use his funds for 10 days. That may not put him over the hump into bankruptcy but it probably will. But maybe, if he gets a lawyer who comes in there 10 days later, if he is able to set it aside, he may be able to get back some of his customers, and he may continue in business. I realize he has a remedy for wrongful attachment and ultimately he may have a suit for abuse of process. But, you should give him every opportunity to be able to set it aside. If the judge issues the ex parte order, then you limit, you restrict this opportunity as a practical matter.

R I am still inclined to think that you save time if you have to go to the judge for those restraining orders. Since, in 90% of those cases, there will be an application for such a restraining order, it is better if the judge hears both the application for the ex parte order and for the writ of attachment than if the creditor goes first to the clerk and then to the judge.

C Well, I again visualize something like it is in probate. People who do a lot of probate work know the commissioner very well and are in to see him every day. Now these representatives of the creditors are very competent

lawyers and are going to naturally be getting these writs very regularly out of the commissioner or out of the judge. If they do it on a regular basis, they are going to show that they have everything done right, and, as far as I know, everything will be correct so far as their client sees it. They are going to get these writs because they are going to make the right showing. They are going to know what this particular commissioner has in mind, what he is looking for--just like a good probate lawyer knows just what the commissioner wants. And the creditors are going to get their writs more times than they are going to be denied. Unfortunately, there may be one in 10 cases where their client has misled them into getting an attachment where there is a good defense. But that one in 10 businessman is going to be behind the 8-ball. The other nine, it would make no difference any way how you do it.

R Except the creditors at least would have to tell the judge what measures should be taken. The procedure would not be done mechanically. I am troubled by the fact that now what follows once you have a writ of attachment is very rigid--

C I do not disagree with you. It should not be as rigid. I am just suggesting that this may not be as good a remedy in practice as it looks in theory to protect the innocent debtor. I visualize a businessman who is, in effect, enjoined from using a bank account--necessary for him to do business. He would have to get a very competent lawyer--an expert in attachment. The average businessman, if he has a lawyer, does not have an expert in creditor's rights, whereas the creditor will because of the nature of his business. This attachment may push the debtor right into bankruptcy just because he is not able to get around that first ex parte order. I am not

suggesting that anything wrong is done in going out to the commissioner in getting these things. It is just perfectly natural that the people, who are out there before that commissioner every day, are going to know how to get the order.

C Well, what is the alternative? The suggestion was--why don't we keep what we have? The answer is that that is probably unconstitutional.

C As I say, I am inclined to agree that you can knock out the resident attachment--where the courts are going to say you have got to have as a matter of right a prior hearing in every case. But I am not so sure that, in the fraudulent debtor attachment case--if you have the proper affidavit and the proper forms, and the proper protection which you can give to the debtor by requiring evidence of fraud or something like that--that you need the prior hearing. My point is that. I do not think the debtor is served so well by the prior hearing, as he would be by a subsequent hearing for which his attorney can prepare his case.

C On the other hand, it protects the creditor in a way if the judge issues that order--

C Exactly.

C And he should be protected.

C Why should he, if he puts a man out of business?

C What would be the test afterwards on whether you properly got attachment?

C Well, it is not in the interest of the state to have a lot of bankruptcies and a lot of good claims against creditors. I just wonder if it

would not be more protection to a legitimate debtor to have notice that his bank account has been stopped for 10 days and that, at the end of 10 days, he will get a full hearing and the issues will be decided then for the first time by a judge. Whether that is not more protection than this other procedure.

C Well, under this other procedure, the creditor goes in and says--"I need relief and protection." The judge says--"Alright, I will give you relief to this extent." What is the practice on temporary injunctions now? Are they issued as a matter of course or are the carefully looked at?

C Temporary restraining orders are one thing. But these requests for attachment are going to be a volume business, like probate.

C When you are tying up a debtor's bank account, it seems to me a judge should take a look at that.

R My purpose really is to get something flexible. To have a procedure where someone can say--"Alright, you cannot withdraw more than that for the next 10 days." And this decision will depend on whether it is a large business, whether there are employees who need their wages, whether it is a small business, and so on. I want something that is flexible.

C I do too. Our purpose, I think, is the same. I am just concerned with the practicality of the procedure suggested. I have seen from experience in other related fields, where theoretically you get a lot of protection from certain requirements and procedures, but the practicalities become something different.

Affidavits to obtain order

C I think that I have a fundamental misinterpretation of what is proposed here if what you are saying is right. Are you saying that all the creditor has to do in these affidavits, with respect to fraud, is to show that the debtor is going to remove the property from the state, or that he has concealed it, or is about to conceal it, or that he has transferred or is about to transfer the property? I do not think that is what Professor Riesenfeld has said.

C Sure he does. This is the way the statute is going to be interpreted. And if it is not interpreted this way, it is not going to give any protection to the creditor.

C I do not think it is going to be that easy to make an affidavit. If it is, what is this language for--that there must be an intent to hinder, delay, or defraud his creditors?

C I do not think it is very difficult. Anybody with any experience in dealing with these things is going to be able to make an affidavit that the debtor will hinder and delay the creditor if he is not stopped. If the debtor does not really think that it is a legitimate debt, if he disputes it, the fact is that he will remove his bank account, and he will attempt to hinder and delay his creditors. He has got to, that is how he is going to stay in business. As soon as he knows he is going to be attached, he is going to take that bank account, put it in cash, put it in a safe place. I think that is obvious.

C Well, we are going to have to work on the language.

C The classic case is the businessman, the debtor, who, as soon as he knows he is in danger, is going to take his money out of his bank account. He is a perfectly honest man. But, in his mind, he does not think it is a legitimate debt. The jury and the judge and everybody else may ultimately disagree with him, but he still is going to think it is an illegitimate debt. He is going to do everything he can to hinder the creditor. It is perfectly proper for him to take his money and keep it from his creditors. But you can make an affidavit to that effect. It would be a routine affidavit. It would be printed and all we would have to do is put in the names and the pages. Or have an MST machine that will run these off regularly and they will be legitimate and they will be honest affidavits. There will be no perjury.

C Professor Riesenfeld, is that your opinion that the creditor could make an adequate showing under this section with such an affidavit?

R The creditor must have some evidence why the debtor can be expected to do that.

C It would not simply be enough to say that the debtor in the natural operation of his business will probably pay somebody else, or move his bank account, or--

R No, because the statute says that it must be under circumstances which permit the inference of his intent to hinder, delay, or defraud his creditor. The creditor must, if he is an honest creditor, have at least some good reason to believe why the debtor will withdraw the whole thing instead of going on--

C Yes, that was what I understood.

C Well, I think you will find that the average businessman who is in a shaky financial condition, who thinks he has got a good defense to this thing, if he thinks he is going to have his bank account tied up for any length of time, is going to remove the money from the bank. He would be a darned fool not to do it. And it would be perfectly legitimate.

C How are you going to prove that he has got the intent? The debtor is not going to go around and make it public knowledge. My problem is that you presume you can make an affidavit on the basis of general human nature, that this debtor is going to try to hide his property. I think this statute is going to require some actual intent.

C You can show he is in shaky financial condition, that he absolutely needs this account to stay in business, and from human nature, I think any judge would draw the right conclusion.

C Why? Many times debtors just go down and file bankruptcy.

C Are we not in a position of debating another specific recommendation of the consultant in order to reach some sort of decision on the initial basic issue of the right to resident attachment?

C Yes, but these issues are all interrelated, and the problem I have with the question whether a judicial officer or someone else should approve the issuance of the writ is the problem that I have with this element of intent. If the subjective element of intent is in here, then, of course, you are going to have to have a judicial officer pass on it.

C You will also need to have a judicial officer when you have a request for a temporary restraining order.

C I would certainly say that these are real issues, and we need to address ourselves to them. But, speaking only for myself, I would not be prepared to decide them until I heard from the people on both sides who are actually in this field, and until we were given some basis for believing that there is a problem of abuse, serious enough to require action of this somewhat drastic nature, and that no other alternative would meet the problem.

C Has there been any evidence of the volume we are talking about? How many attachments?

C We have not yet had any statistics, or anything of that nature.

C Do we know what kind of load we would be dumping on the courts or how many extra referees we would have to hire?

C I think there would probably be a net reduction, because the proposal is to knock out all resident attachments except where you can show fraud.

C That is right, unless you can bring everything back in under fraud.

C Of course, if Sniadach requires prior notice and hearing, then, if we keep resident attachment, we are going to flood the courts with these cases.

C It seems to me we should know, however, the volume we are talking about in weighing whether you keep certain segments of it.

Requirement that attachment not be sought to hinder other creditors

C Let me pose this question based on some experience that I have had. When a debtor is in difficulty, he will pay off the fellow who presses the hardest or has the greatest opportunity to injure him. He will not pay anything to others. He is being perfectly honest in a sense, yet he is not being honest or fair with all of his creditors. Is that going to be a factor in the right to attachment? For example, he is trying to build a building that he probably bid a little too low on. You can demonstrate that, although he is obligated under his union contract to pay a dollar an hour into a pension fund for the benefit of his employees, he has been using that money to pay his supplier. In the eyes of some people that is a fraud. But, is this what we are talking about?

If he is thrown into bankruptcy, where you have priorities and all that, that is one thing. But I am talking about the man who is skirting bankruptcy but he has not reached there. Do you try to say, "Well, this debt is a more preferred debt than some other debt and therefor"--Maybe it is not appropriate to this particular issue, but I am afraid that we are going to have to get into problems of this nature.

R May I say one word on this. My Section 538(3)(c)(3) requires that the attaching creditor not hinder other creditors. That is in the present statute. I personally left it only because it is in the present statute. There may be some fringe situations where it will apply, but I do not think that it is very important. If the Commission feels they want to strike that out, I will not shed a tear.

C I certainly would like to strike it out. Anytime a person attaches, he is trying to hinder the other creditors in the sense that he wants to get paid whether they get paid or not.

Is prior judicial review constitutionally required for fraudulent debtor attachment?

C Professor Riesenfeld, there is something that is troubling me. We talked about the constitutionality of notice and prior hearing for resident attachment generally. Your feeling is that probably the courts will require that. Probably, although you cannot say for sure. Now, what about fraudulent debtor attachment? What do you think the courts will say is constitutionally required there? Do you think, if the clerk issued the writ as a matter of course, it would be held unconstitutional? Is that the motivating force for saying that the judge should review even the preliminary order?

R Well, my thoughts are really a little bit more complicated than that. I do not think anybody knows what type or what quantum of hearing is required. I think different judicial minds will respond differently. I think in purely resident attachment, without any elements of fraud, the courts will require a rather full-dress hearing. I cannot prove it. That is my appraisal. If this is so, you will have a duplication of hearings. The prior, summary hearing and the plenary hearing will be almost indistinguishable. To have plain resident attachment, you would have to prove there is an honest debt. I think that Sniadach requires it. If so, then the two hearings will be alike. The attachment will become a writ of execution, for actually the issue to be heard is the merit of the unlerlying case. Thus, my main fear is that there will be two almost coextensive hearings.

When it comes to fraudulent debtor attachment, then I think the more summary hearing will satisfy the courts and the creditor can have attachment possibly with a less formal hearing. Moreover, my recommendation, under Section 538(6), gives them something in between.

C You think that having this motion heard by the judge or referee is probably constitutionally required? You would feel great concern if we had the clerk issuing even the preliminary writ?

R That is right.

C Even if we had a hearing later?

R Yes. I mean the "prior" has been underlined and underscored by the judges so often. I think you will just have to have a prior hearing in all cases except where the state is involved or the debtor is a nonresident.

C Yes, but why? Why, in these two situations, do you say that you can get a writ without a hearing? You give two situations. One is where there is a nonresident defendant and there is no other basis for jurisdiction, and the other is where the state is the moving party. What are the criteria for saying that, one can get away without prior hearing in those two situations, but you must have a prior hearing where you allege fraud or where it is for support and maintenance?

R Well, the Supreme Court has, in many cases, singled out the state for special treatment because it needs taxes for revenue or whatever--

C But anybody who is familiar with the way the state collection agencies work could make a pretty good case that they can be just as brutal and vigorous, or more vigorous, than private collection agencies.

C Why they will take it right out of your account.

C Why should they be able to do it?

R They should not. I just thought that it would not be possible to get that through politically and I did not want to tie up this recommendation with that additional burden. As for the nonresident, how do you get the hearing for the nonresident defendant if there is no other jurisdiction except by the attachment?

C Well, alright, that is a practical necessity. But why then, is it such a great step to say that, in a case where you make a prima facie showing of fraud, you cannot also get attachment before a hearing?

C Or some lesser, adequate relief before a hearing?

R For the reason, as I say, that attachment is so drastic and so rigid, the courts, in my own opinion, will not permit it.

C Even where there is a showing of the possibility of fraud?

R Even that. Because, after all, it is only on an affidivit. It is not really a showing of fraud. It is just an allegation under oath.

Application of Sniadach to bank accounts--would ex parte order of judge satisfy Sniadach?

C As I understand Sniadach, it does not apply to in rem actions, nor does it apply to anything except wages. The court in Florida held that it applied to nothing but wages. Our Supreme Court here and our district court held that it does not apply to anything but wages. Why do you think, in view of those decisions, that an attachment on anything other than wages would be held unconstitutional?

R Because there are other cases where the courts have reached the opposite result.

C There is only one that I know of.

R Oh, no! There are many more. I can only say that Sniadach has been applied beyond the collection of wages. I think, if our state courts will not do it, the federal courts will. That is my appraisal of the whole question. I may be wrong on it.

C How would the federal courts get involved?

R By saying that the practice in the state is unconstitutional. They would enjoin the sheriffs, as they have in a few other states, from levying attachments. Then if we have two conflicting circuits, it might come up before the Supreme Court with due dispatch, I do not know.

C Is there a feasible remedy in the following situation? You want to attach an account, but the notice of motion will warn the debtor and he will take the money out. Could you put a lien on the account and then, when you have your hearing, one of the issues would be whether the debtor is required to put the money back in if the court finds that the levy was proper? Is that practical?

R The hearing may be too late. The argument would be that you had the debtor on the wall. Justice Douglas seems to think that that is not practical. Who am I to argue with Mr. Justice Douglas?

Besides, the federal government, just a few days ago, said it would start having 3 million paychecks deposited directly in its employees' bank accounts. So bank accounts will, from now on, be flooded with wages. It is just unrealistic to think that bank accounts do not consist of wages. And there will be more and more of this done. The bank account is precisely one of the reasons why I want to make the procedure flexible. The federal Consumer Protection Act says wages "paid or unpaid." Sniadach dealt only with unpaid wages. What happens to the paid wages? Well, more and more, wages will be paid wages.

I am terribly afraid that, unless something similar to what I propose is done, the whole procedure will be held unconstitutional and then there will be a vacuum. You may, if you wish, wait until that situation happens. But here, in my recommendation, you have something which, in my mind, will stand the constitutional test because the rigidity of attachment is alleviated. I hope the procedure will not become a routine matter but that it will provide protection to both debtors and creditors.

C I do not see how we can get around your constitutional argument by giving a judge the power to issue ex parte what would be equivalent to a temporary restraining order. The debtor does not have notice and has no opportunity to be heard until afterwards.

R Well, I think that is a matter of assessment of the judicial mind. But I think judges have just been more inclined to permit ex parte disposition

by a judge than by a clerk. At least then you have the scrutiny of a judicial officer.

C There is good authority for that position. I have had the situation where we were trying to get a ruling that there be prior notice. But the Supreme Court said, in effect--"No, the ex parte judicial order is similar to a warrant." They seem to think that, if a judge does it, it somehow adds majesty to the action.

C This is analogous to a search warrant which requires the approval of a judge, not a clerk. You make your showing to a judge. The judge then issues the search warrant. The property is seized under a search warrant --or the individual, if it is a warrant of arrest--and the individual then has the opportunity to challenge the seizure of the property in a hearing in court, under Section 1538.5 of the Penal Code, which sets out the procedure. If the property is illegally seized, it is returned to him. It seems to me that there is a good analogy to what we are talking about here, and what has already been set out as being constitutional in the criminal practice of the state.

C I agree with you.

Professor Warren Mr. Chairman, may I follow up this statement by saying there are two cases. There is the Laprease case, where a three-judge federal court in New York said just exactly what you have said, and a Superior Court case in Los Angeles to the same effect. It was a replevin case in New York, and a claim and delivery case in California. What the New York court said was--a writ of replevin is, in effect, a search order, and it must be issued under the constitutional restrictions. If it is issued by a clerk who allows a party to go into the home of the person having possession of the property, it is in violation of the Fourth Amendment of the Constitution. And the Superior Court in Los Angeles said the same thing about a claim and delivery. They used exactly the argument that you raised. It seems to me that this means, in cases like that, that you cannot have a writ issued by a clerk.

C That does not mean that it could not be issued without a prior hearing?

Professor Warren That is correct.

C That is the point that I have tried to make in the fraudulent debtor area. I cannot believe that, if you make a showing to a judicial officer, the property is in danger of being lost, or sequestered, or whatever, you have to give the other side prior notice and a hearing before you can go out and attach it.

C Professor Riesenfeld does not contemplate prior notice for fraudulent debtor attachment; doesn't his scheme contemplate that you go in and get your restraining order and then, 10 days later, you get your writ of attachment? If, at that time, the debtor does not appear, the writ would issue as a matter of course, I suppose, at least if the judge found that a proper showing was made. But you do not give any prior notice of the restraining order. You serve the restraining order, and the notice of the hearing at the same time, and from that point on, the debtor has all his assets tied up.

C What you are saying is how it would work; not what the statute of Professor Riesenfeld proposes. The proposal is that subsection (6) of Section 538 be used only in exceptional cases.

C No, I would think that subsection (6) is going to apply whenever the debtor is going to dissipate his assets; you would have to do that.

C Don't we have another analogy in the domestic relations field? There, we have ex parte orders that restrain the husband from disposing of the community property. My understanding is that those are obtained ex parte with the wife's attorney going in and getting a judge to sign on the basis of a petition for dissolution.

Well, we have, I think, brought out some of the considerations that the Commission has in mind. There have been some suggestions, and analogies, and suggested areas of further study. Professor Riesenfeld, do you need more on this particular issue? I do not know that there is much more that we can give you at this point.

R I understand. I would like to study the actual current practice. If this helps me, I will come back and report what I found. If I find nothing, I will have to be candid about it and say--"I wasted alot of time and effort." But, at least, I would like to try to convince myself.

C Well, I guess all that we can say in summary is that some Commission members are hesitant, and other are not so hesitant, about the idea of a judicial officer hearing this matter initially, and it is certainly something we want to consider. What is the next recommendation that we might discuss?

Should wages of nonresidents be protected?

R The first question was the role of the judicial officer in this whole proceeding. I frankly have to admit that my recommendation is modeled after the New York procedure.

The next question is whether the wages of nonresidents should be protected from attachment in the same way as wages of residents. The present law provides that, regardless whether the debtor is a resident or a nonresident, his wages are not reachable by attachment.

C As a practical matter, there is not anything we can do about that.

Application of fraudulent debtor's attachment to personal injury actions

R The next thing I would like to talk about is the limitation of attachment according to the type of cause of action alleged. The statute

has been expanded and expanded, and, frankly, makes no sense. Present subsections (2) and (3) of Section 537 provide that a plaintiff may have attachment:

> (2) In an action upon a contract, express or implied, against a defendant not residing in this state, or who has departed from the state, or who cannot after due diligence be found within the state, or who conceals himself to avoid service of summons.
>
> (3) In an action against a defendant, not residing in this state, or who has departed from the state, or who cannot after due diligence be found within the state, or who conceals himself to avoid service of summons, 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.

Please note that this is fraudulent debtors and nonresident attachment. Is there any good reason, therefore, why we do not include all causes of action? All claims for money?

C My immediate reaction is that, I think, it would be a horrible thing to have attachment in a personal injury action. Certainly domestic attachment.

R But I am talking about fraudulent debtor's attachment, and you already have it. The statute says already--

C I suppose if it is in California law-- And I suppose if there is insurance, the problem really does not exist because no one is attached for it. But I can see a very great distinction between a contract action for the direct payment of money and an action for personal injuries.

R We are not talking about domestic attachment but nonresident attachment and fraudulent debtor's attachment. Now the one thing which is excluded

in the present statute is damage to property not located in the state. Nobody knows what that means. In the course of time, this limitation has become meaningless.

C What you are saying is that you should not have to look at the cause of action. If it is a claim for money, that is sufficient. Right?

R That is right.

C Before we go on, can we stop and talk a little bit about the application of this attachment statute to the personal injury field? As I understand your recommendation, the attachment provisions would apply to all causes of action. That is, if the case falls within proposed Section 537(2)(b) and the four criterion for fraudulent debtor's attachment are present, attachment is permitted. If the statute does apply to personal injury actions, including domestic personal injury actions, if you can get attachment in personal injury actions, the Section 537(2)(b) has got to be interpreted to require the debtor to do something bad. You should have to show that the debtor is going to do something that is fundamentally unfair and wrong before the plaintiff can attach his assets. Otherwise, you can get attachments in a personal injury action on the perfunctory type of affidavit that was referred to earlier.

C What you are suggesting, as I understand it, is that you ought to have a greater showing in a personal injury action before you can get an attachment or even a temporary restraining order. Just because there was an automobile accident, and the defendant did not have insurance, you cannot tie up his bank account. Otherwise, by saying--

R But the plaintiff, in a personal injury action, would not have that right unless the defendant either was a nonresident, or had departed from the state, or cannot be found in the state, or conceals himself to avoid service, or is about to transfer property.

C The last one is the broad one. Suppose the defendant is going to move his bank account to his wife.

C We are not really saying quite the same thing. I think Noble thinks maybe there should be two standards. One for contracts and another for personal injuries. I interpret Section 537(2)(b), perhaps wrongly, to prohibit attachment unless the plaintiff can make a prima facie showing of intended bad action on the part of the debtor--something beyond his normal desire to hinder his creditor.

C I just think that it would be human nature for most people to hinder their creditors. I agree with you that that attachment should not be allowed merely because somebody is involved in an automobile accident. However, I do think that, taken literally, the proposed statute would apply in personal injury actions. The statute says, if the defendant is about to do any of these things--depart, conceal, transfer--for the purpose of hindering or defrauding his creditors, attachment is available. "To hinder his creditors" is not difficult to show. Every time a debtor moves his bank accounts, he hinders his creditors. It is very difficult for many creditors to find out the location of bank accounts. Some have a great facility in this, but others have great difficulty. So, the plaintiff can easily say that the defendant has made a practice of moving his bank account regularly whenever he has had any problem. Therefore, if the defendant has been involved in a

personal injury action, as a means of harassment, the plaintiff can make a proper allegation and attach the defendant's bank account, hurt his business --do anything he wants. I suggest that, in a personal injury action, where recovery is very much more problematical than it is in an average contract action, there should be a higher standard or burden of proof on the plaintiff to make an attachment.

C Is the plaintiff in a personal injury action a "creditor?"

C He is under this statute.

C If you are under the fraudulent debtor statute, you are a creditor entitled to attachment in a personal injury action or any other kind of action, even though you have not proven your cause of action.

C I think that that would be a valid distinction; a plaintiff is not really a creditor in a personal injury action.

C But the fraudulent debtor statute says you are for this purpose. Today, the requirements are more stringent because you have a broad resident attachment statute. But, as the professor points out in his study, if you are going to take away resident attachment, you have got to broaden your so-called fraudulent attachment. Well, if you do that, you create some problems with personal injury cases. I suggest that the solution would be to put a higher standard--a greater burden--on the plaintiff in a personal injury case. I think that is not too hard to solve.

C My approach would be a little different. I think that we should shape this up so that there is a strict standard to apply to everything.

C Then it is too narrow in the contract situation.

C But, if you broaden it out, as you suggest, then you have still got resident attachment.

C You have it where you need it. That is all, you do not have it where you do not need it.

C I certainly agree with you that attachment in the tort case should be limited, but I do think that you have got to be realistic, and the courts are not going to allow debtors to move their bank accounts when there is a legitimate claim for--

C How long has the present Section 537(3) been in the law? How does it operate? Suppose I sue for $500,000 and I know that the defendant has got insurance up to a hundred thousand dollars--can I attach for the difference between the hundred thousand and five hundred thousand in my prayer?

R Well, paragraph (3) came in by little spurts. First, it was only a contract, express or implied. Then it was damage to property. Then came personal injury, short of death. Then, finally, death. That is the history of that section.

C But you have now very stringent requirements. The plaintiff has to show that the defendant is not residing in the state, has departed from the state, or has concealed himself. Under the proposal that we are talking about, you would not have such stringent requirements to get a so-called fraudulent debtor's attachment. You merely have to show that he is about to transfer his property.

C I am just trying to evaluate this. I think that it is a pretty drastic thing to permit attachment in a personal injury case. I do not think attachment really has much place in a personal injury action.

C Resident personal injury.

C No, any personal injury action. Just because a guy lives in Nevada and--

C Of course, now you can get jurisdiction under the "long-arm" statute. But, for a long time, that was not true, and this was very important. Before you had the "long-arm" statute, attachment was a legitimate means for the injured party to get jurisdiction in California if it was not an automobile case. If it was an automobile case, there was another means. But in the normal tort action, where the defendant went out of the state, or where he did not reside here, this was a perfectly normal and legitimate means of getting jurisdiction to the extent of his property in California. It is very similar to the admiralty principle where you grab the ship, seize it before they go off to New Zealand or wherever they are going to be going. Then, you try the case in California instead of having to go to New Zealand to try it.

C You cannot, under the existing law, attach in a resident personal injury case, can you?

C That is not exactly true. I think, if you can show in a personal injury action that the defendant is about to take the property away or sequester it and so forth, you can get some relief--injunction, restraining order, or whatever. It is similar to what we were talking about here under the proposed Section 538(6). The plaintiff can come in and stop the defendant even before he gets a judgment.

C That is for residents and nonresidents?

C Yes. Do you agree with that, Professor? That, in California now in a personal injury action against a resident tortfeasor, where there is an attempt to fraudulently delay the creditor, the plaintiff can show what the defendant is doing, he is sequestering his property, about to move, or--

R The courts are very reluctant. You cannot--

C Nobody uses those sections, but they are there.

R That is right. With my proposed statute, I felt that, in general, I have, what I thought were very high standards upon fraudulent debtor's attachment and that it would be harmless and, in fact, helpful to extend attachment to tort actions, but I might have been too liberal. I was trying with my whole scheme to balance things out everywhere where I thought that it would be fair. For example, your Nevada situation. I have some special provisions in my statute which try to take care of that. The plaintiff invokes the "long-arm" statute. Then the court says, "No, we will not hear the case. You have to try it in Nevada." What happens then to the assets that are attached here? Do they have to be released or not? To me, that is interrelated. And I have tried to provide for that in Section 537(3).

C Maybe we can put something in the statute that would indicate there must be a stronger showing for attachment in the case of a personal injury action.

C That is what I would suggest. The problem could be solved.

C I just have difficulty in understanding how attachment plays any part in personal injury actions, except in this limited area of getting

jurisdiction. We all know how the plaintiff arrives at the amount of his prayer. It is completely fictitious, and we have--

C The point is that, under the proposed Section 537(2), the grounds for fraudulent debtor attachment are broadened and they should be if we are doing away with resident attachment. But, I think there is a lot to be said for not giving fraudulent debtor attachment that broad a scope for a tort action for personal injury where, as was suggested, the plaintiff sues for $500,000, and it is problematical what he is going to recover. Some of these plaintiffs' lawyers would use it as a means of harassment. There is no question about it.

R Except there is a prior hearing. The judge can say, "I do not believe that that is true. I do not believe you have shown you will recover," and so on.

C What you could do is provide that, in a personal injury case, the judge shall require a detailed showing--

C If, as the professor says, the plaintiff in the prior hearing has to show the amount of his recovery, it is going to be very difficult for a plaintiff--

C That may solve your problem. On the other hand, I know some judges who think that all plaintiffs should recover. Some of them are better advocates for the plaintiff than some of the members of the plaintiff's bar.

R Perhaps because I have not practiced so much, I have more confidence in judges, but I may be wrong. However, I do not want the statute to have too many "ifs and buts."

C It seems to me, if we try to cover personal injury cases, we are going to destroy any sensible scheme of hearing. If you are going to get

into these questions--whether the plaintiff has a bona fide cause of action, or whether he can possibly recover as much as he is asking for--in order to determine whether he is entitled to attachment, we get into the position of trying the case twice. You have problems of locating all your witnesses--and it is simply a tremendous way of harassment. Whereas, if attachment is limited the way it is now, to contract actions, except where there is a problem of getting jurisdiction--and I cannot believe that Section 537(3) has been given as broad an interpretation as its words would indicate--

C I do not think, in a personal injury case, that subsection (3) has been interpreted that broadly.

C In a personal injury case, you have got insurance. There is a principle that you cannot attach if you have security. If there is an insurance policy, is that security? Does the policy keep a plaintiff from having a right of attachment? It might not be adequate for the amount you are claiming, but--

C If you have a contract that says you are entitled to $150,000, there is not much argument about that. But if there is a question whether you have $150,000 damages in a personal injury case, you have to try the case to find out.

C My feeling on this is that, if the discovery statutes were broadened, you would be able to handle fairly well the personal injury case within the existing scheme of things. Suppose you have a situation where the insurance is inadequate, or the plaintiff legitimately believes that it is inadequate for the amount of his alleged recovery. He can now discover the policy limits. He cannot now discover the existence of any other assets of the defendant prior to judgment. But, if the plaintiff were permitted to

discover the other assets and ask questions in discovery about what the defendant's assets were and where the defendant lives and what he is intending to do and so forth, the plaintiff then could obtain enough factual background so that he could go under the fraudulent debtor statute, which now exists, and make a showing that would entitle him to judicial relief, injunctions, a receiver, and so on. In other words, discovery will permit the plaintiff to make a proper showing for attachment so that he would have something to go after if he prevails in his lawsuit. The statutory scheme is there. The hiatus is in the discovery field. The creditor, the plaintiff, in a personal injury action now, usually does not know the defendant, knows nothing about the defendant, and he is prohibited from finding anything out about the defendant--whether the defendant is going to hide his assets, what assets he has, or where he is going to go with them. That is why I said before--before we got into this issue, that we are going to spread out into all kinds of other areas when we really get into an in depth study of creditor's remedies.

C I personally think we should not get into tort cases in attachment.

C Well, there is a problem there. But I do not think we should cut it completely off.

R You have persuaded me that I should cut it down.

C You can see the concern and different thoughts. Why don't you think about it some more?

R This was a basis for discussion. I had not really considered all the points we have discussed. I thought that, since it worked in New York,

Pennsylvania, and Ohio--and I have never heard any enormous complaints about it--it was good enough for me. But I should reconsider it.

Elimination of domestic attachment

C There is a basic issue that we have discussed, and many of us, I think, are talking on the assumption that it is a decision that has been tentatively made, but what about the question whether we abolish attachment in the domestic, resident situation.

C Of course, if the professor is right--that you have to have a prior hearing in every one of those cases--one way or another, resident attachment is abolished. Either as a matter of practicality on the one hand or legislation on the other.

C Is that necessarily true? That would eliminate attachment in the vast number of retail collections. But it seems to me that, if you are talking about some items in the commercial field, it might still be practical.

C It might be, but I think that, if you expand your so-called fraudulent attachment--and I think that is a misnomer because it does not really require a showing of fraud. If you expand fraudulent attachment enough so that it gives protection where you have a legitimate claim and a legitimate need to protect your ultimate recovery, then you do not need to have a routine resident attachment in which you can take property in any case where there is a contract over $5,000 subject to a prior hearing each time. In the prior hearing, among other things, you are going to have to show that there is a legitimate case. Is that not correct? That means you have two

trials. That is the difficulty today. You are going to try the case for the creditor in the preliminary hearing and then you are going to try it ultimately. If you do not have to have a prior hearing, then, of course, there is a place for resident attachment.

C One of the present purposes or uses of attachment is to aid a creditor in getting the assets first, ahead of the other creditors. And I do not think the expansion of the fraudulent debtor remedy would give a weapon to a creditor who simply wants to get in there before the other creditors. I think you are leaving that person without a remedy.

C Yes, but, of course, none of the creditors will be able to get ahead of the others.

C Yes, but maybe the debtor will write a check to the one creditor.

C You know this problem of clogging the courts is a real problem. Unless you can really show a substantial benefit and value for providing some type of a hearing, you should not be providing--

C I suppose, from the court's point of view, that this is the real dilemma. If it is true that Sniadach has imposed upon the judicial process the necessity for a prior hearing in every attachment case--that is your interpretation of Sniadach and a lot of other people's too--then the work that creates for the courts on a day-to-day basis presents a very difficult problem.

C Think of the work it creates for the parties. The defendant may have a legitimate defense which he has to prematurely expose in order to protect himself from attachment.

C I think, frankly, that that is the real policy question. One answer to that problem is to do away with resident attachment. I do not know whether the hearing process can be tailored and pushed around it so it would meet constitutional requirements.

C If we assume--as we are assuming on the basis of the law as the professor has advised us--that you are going to have to have a prior hearing for a resident attachment, then, I think, it is not a very difficult job to say that resident attachment is going to have to be abolished as a routine method of starting a case involving a contract for the payment of money in excess of $5,000 in the State of California.

C You know the figure I have heard thrown around--I do not know if it is true--is that it costs a half a million dollars a year to add a new Superior Court judge, considering the courtroom and the facilities, and so on. That is a lot of money that you are talking about.

R At least there are three major states in the union--Ohio, Pennsylvania, and New York--and there may be more where there is no routine resident attachment. There were long studies in both Pennsylvania and New York of these rules leading to the abolishment of resident attachment. The trend is to abolish it rather than to increase it. California is, perhaps, the only state which has increased it and increased it in the course of history.

C As a part of the overall problem of clogging the courts, I wonder whether there is any empirical evidence or indication of the impact upon bankruptcy when you take away resident attachment or make attachment more difficult. Maybe, if you restrict attachment, you just postpone the levy until the creditor gets his judgment, and then you have the same ultimate

result. But I am not sure about that. Maybe if we restrict attachment, creditors will join together and put more debtors into bankruptcy. Therefore, would we be shifting the burden from our own courts to the federal courts?

C If they had any experience with bankruptcy, I do not think they would. If they have gone through one of those, they would realize that everybody gets it but the creditor.

C But maybe there are other things; there are marshalling statutes in the state courts, too--I do not know whether they use them--and assignments for the benefit of the creditors. I do not know how they work these things out.

R I am a member of the National Bankruptcy Conference; I am also a member of the Supreme Court Advisory Committee on Bankruptcy Rules. We have discussed this many, many times in those groups. But again we have not come to any conclusion. There are so many variables and factors to consider. In New York and Pennsylvania, for instance, commercial bankruptcy in the corporate form can be handled by dissolution proceedings in the state courts. The lawyers prefer this because the judge has no control over the fee. So what would be proper bankruptcy never reaches the federal court; they go instead into the state courts and the only reason is that the lawyers prefer this because they have a better chance to get adequate fees for their labors. Even if you look at the bankruptcy proceeding statistics, which are, of course, available, this still does not help you too much because of other imponderabilia. You cannot really tell what happens in these states unless you know the whole picture, I am afraid.

Effect of Commercial Code

Professor Warren Mr. Chairman, let me make a statement and then ask a question. This is certainly not my area of expertise. But it does seem to me that, in consumer cases, if you are going to require a hearing before attachment--given the exemption laws, given the prevalence of default judgments, and so forth in consumer cases--it is almost inconceivable to me that anyone would be attaching in these cases.

The question I would like to ask is about the commercial area where it would seem that, in certain instances, attachment might, as you suggest, be very desirable. I just wonder what impact the Uniform Commercial Code has had on the commercial area? With the exception of a bank account, or something like that, the code gives the creditor the easiest possible way of getting a security interest in everything. When the code was being debated in California, this was pointed out in great detail, and the lawyers who represented unsecured people argued against the code for years on that basis. When the code passed, we assumed that they became lawyers who represented secured creditors, because I do not see how a commercial creditor could avoid or could not secure himself if he wants to at the inception of the transaction. It is so easy to do. I just wonder how big a problem you really have in the commercial area?

C I wonder if anyone from the industry could indicate?

C Well, I think that the feed-back that we get from the industry, state-wide, is that, notwithstanding the comparative ease of obtaining secured positions, as Professor Warren indicated, the great bulk of commercial transactions between manufacturers, wholesalers, distributers, through to

the retailers, is still on an open book account basis--open extension of credit. The mercantile business, the commercial business, just operates too rapidly on a day-to-day basis to permit even the bother of a financing statement and a security agreement and forwarding it to Sacramento. There was a very recent case where a financing statement was filed, but there was no security agreement underlying it. The question was whether or not this could still give you an effective position, and the appellate court held --no, you had to have the underlying security agreement containing a grant of a security interest. I think that, in itself, is a cumbersome thing not to lawyers, perhaps, but to the average day-to-day mercantile practice. So, while I agree with Professor Warren that it is really relatively easy to get a secured position, the feed-back we get is that it just does not happen.

C I think that the security transaction is more one step back. Where the wholesaler is discounting his accounts, either through a factor or financing agent, and they have your security transaction. But the deal between the wholesaler and the jobber or the ultimate retailer is, to my knowledge, rarely covered by a security contraction.

Professor Warren I see the distinction that you are drawing.

C Out of a hundred commercial cases, in how many would there be an attachment?

C I do not know. I do not handle very many commercial cases. But I should point out that the general experience is--by reason of the difference in fee that the attorney receives for handling commercial items as opposed to handling retail items--that, the quicker he can make a collection, the less expense he has, and the more fee he can make, comparatively speaking. Rarely will a commercial item be handled at a greater fee than 20%, and some of them drop down to 18% and 15%. But, with a retail item, the fee can go up as high as 50%; the time element is not so important. The account has already been written off to profit and loss.

R Would the Commission want me to consider whether the prohibition of resident attachment should be restricted only to consumers? Is that one possibility which you want me to study further?

C I do not see how you can limit it by the nature of the debtor or the nature of the transaction.

R I do not either.

C Mr. Chairman, we can attempt to obtain some of the statistics that the professor desires on this. If we are able to obtain them through our statewide association, we could pass them on to him.

C We would appreciate that. In connection with other studies, where statewide groups have had information, they have passed it on to us, and we have been able to get some feel for the problems that we have to deal with.

R Can you break it down to commercial and retail and so forth?

C Is our work at a stage where we would be able to state some questions to be circulated among the interested people?

C I think that would be premature. If we send out a questionnaire saying--"Should resident attachment be abolished?"--everybody will be up in arms unnecessarily.

C I am not suggesting that we have reached that point--

C I do not think we have. I think in December, we might be able to formulate some questions and be able to block out how we are going to proceed, I hope.

C We certainly will need to do that as soon as we can.

Have we exhausted the subject of whether or not we should have resident attachment? Professor, what do you think is next for us to consider?

Code of Civil Procedure Section 538(4): Effect of bankruptcy proceedings upon availability of attachment

R Let us talk about a minor point first, to get you back in the mood. Before the writ of attachment may be issued, Section 538(4) of the Code of Civil Procedure requires:

> (4) That the affiant has no information or belief that the defendant has been adjudicated a bankrupt, with reference to the indebtedness for which the writ is sought, by any United States district court, nor that the defendant is, at the time of the request for the writ, under any wage earner's plan approved by any United States court.

With due respect, this is a very unfortunate way of phrasing this. Nobody is adjudged a bankrupt with respect to any indebtedness. The issue is really whether the debtor has obtained a discharge of the debt or whether there is an ongoing bankruptcy proceeding, and the prosecution of the action

is stayed by the bankruptcy court. I think the statute should say that because that is what is meant. I hope I am not wrong; I have pondered it, but what the statute says is incomprehensible to me. In my proposal, I have suggested that the matter be rephrased as follows:

> 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 Bankruptcy Act.

This, I think, would cover the waterfront, including discharge, a wage earner's plan, and a stay of proceedings.

C May I make a suggestion? I think the evil that is sought to be corrected here is the attachment of property of someone who is in bankruptcy--using that rather loose phrase. I would prefer to see, so far as the debtor is concerned--"that the creditor has no information or belief that the obligation on which the attachment is sought is included in the schedule in a bankruptcy action." Because the time that it takes between the application and notice to creditors can be as long as five weeks under the press of business, the creditor may still know that the man has been adjudicated and not know that he has been discharged. In such situation, he would still be able to attach under your language.

R I do not understand, because the discharge--

C I know, but the debtor does not get his discharge at the same time as the adjudication.

R Yes, that is right.

C He is adjudicated for all practical purposes when he files his petition.

R Yes, and then all the prosecutions are, at the same time, stayed as a matter of course under the bankruptcy act.

C Yes, but you do not know that the debtor is going to get his discharge--there could be objections--even though he has gone into a bankruptcy proceeding, whether it be Chapter 13, 11, or straight bankruptcy. The creditor will not get any notice of the debtor's discharge until it is actually granted. But if the creditor has notice of the adjudication, should he still be permitted to attach?

R How could he, because the state proceeding is stayed?

C Every referee does not stay. There is no automatic stay in Oakland, for example. There is in San Francisco. Every person who files a petition of bankruptcy in San Francisco receives an automatic stay as well as his creditor's. But this is not true of the two referees now in Alameda County.

R Even under the new act?

C Yes, even under the new act. The new act only provides that the discharge is automatic. The debtor does not have to file a petition for discharge, as I understand it. But there is still a period of time in between the adjudication and the discharge, which will not be covered by the language that you have here. I think the evil would be just as bad if the debtor has been adjudicated as if he had been discharged.

R I certainly did not want to make the provision worse. I wanted to make it better. Maybe we should add something more. Certainly the provision as it stands is much too narrow.

C That is what I am saying. We are agreed. I am talking now of the debtor's position, not the creditor's position. I do not want the creditor to be allowed to attach a debtor's property because the creditor has no knowledge of a discharge if he does have knowledge of an adjudication.

R I follow you absolutely. As you know, there was a report put out by the advisory committee on the bankruptcy act that said that there should be an automatic stay of proceedings on all claims upon the filing of the petition. I had that report in mind when I wrote this, and I may have been premature. Perhaps something should be added to say that--

C If you have it in mind, that is all that I am concerned with. I do not know that the new amendment to the bankruptcy act automatically stays all proceedings.

R I thought that that was the case, but I will check it. But, at any rate, you agree with me that Section 538(4) shows very bad draftsmanship and should be changed. Perhaps my draftsmanship is still not satisfactory. But the provision should make clear that, if the creditor knows of any impediment to the prosecution of his claim because of other proceedings under the National Bankruptcy Act, then he should not seek attachment.

C Yes.

R Whichever way you have to phrase it.

C I am sure we all agree with that so that it is just a question of the proper phrasing of it.

Nonresident attachment and the effect of a stay or dismissal on the basis of forum non conveniens

R The next issue is the matter of forum non conveniens. Formerly, nonresident attachment was typically used to secure jurisdiction over the

defendant. The plaintiff could attach the nonresident's property and prosecute the action up to the amount of the property attached. The nonresident would have to decide whether it was worth his while to defend or not, but he only had to defend up to the amount of his attached property. Now the situation has materially changed. Under the new "long-arm" statute --Code of Civil Procedure Section 410.10--the nonresident will now often be subject to the personal jurisdiction of the state. A nonresident, subject to personal jurisdiction, has to come in and defend the whole suit, not only in the amount of the attachment but all the excess and so forth. I do not think you can limit the jurisdiction. The courts in New York have held on a similar statute that, if there is in personam jurisdiction, you cannot restrict jurisdiction to only the assets. The defendant is completely before the court upon the service of the summons and subject to a default judgment for the whole thing. What happens if the defendant comes before the court and moves for a stay or dismissal on the grounds of forum non conveniens? The new "long-arm" statute, Section 410.30, provides:

> When a court, upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any condition that may be just.

Under my scheme, of course, fraudulent debtor attachment is the only possible form of attachment where you have in personam jurisdiction. What will be come of that attachment? Suppose there is a dismissal? An attachment requires that an action be pending in the court from which the

attachment issued. Therefore, I have tried to work out a solution to that problem. Of course, the best thing would be to say that, in that situation, the court cannot dismiss but can only stay until the plaintiff gets a judgment somewhere else. Then, once the plaintiff gets the judgment, he can return to satisfy the judgment here. That would be the proper procedure. You could say that this is already implied in Section 410.30 and that nothing need be added. But, I think, considering everything, that it is too much to assume that all judges will act that way. Therefore, I thought that I should prescribe in the statute what the court should do where it wants to grant a motion to dismiss for forum non conveniens.

The proposed provision referred to states:

> 537(3). If an action against a nonresident subject to the jurisdiction of the 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 grounds specified in subsection 2b [grounds for fraudulent debtor attachment] of this section.

C A state court cannot grant a transfer out of state.

R No, of course not. The court can either dismiss or stay the action for one or two years until the plaintiff has prosecuted the action elsewhere. Then on the basis of the judgment in the other court, which, of course, is entitled to full faith and credit, our court can enter judgment.

C I have a practical problem as well as, perhaps, a technical problem with the proposal. As presently phrased, it seems to me that proposed subsection (3) would apply only where the defendant comes in and makes a

motion to have the proceeding stayed under the doctrine of forum non conveniens. If that is right, then the defendant is going to know in advance, before he makes the motion to stay or dismiss, that he may be subject to an attachment. What is to stop him from moving his property out of the jurisdiction before he makes a motion? It seems to me that all we are really talking about here is real property or personal property that might, for some reason, be incapable of movement. Maybe a debt or something of that nature where the defendant's debtor is still here in this state. In short, isn't the attachment subject to anticipation by the debtor himself?

C Of course, if the debtor is threatening to move his property, or if the creditor thinks the debtor might do that, the creditor can seek a fraudulent debtor attachment.

C There is nothing fraudulent; I have not made my motion yet.

C That does not matter, if it is probable, if it looks like you are going to do that.

C How would the creditor know that the debtor was going to move his property out?

R I think you cannot, generally speaking, prevent the debtor from moving his property if he has legitimate reasons. I have some doubts, with all those travel cases, whether the Supreme Court will condone attachment where there is a mere removal of property without any indicia of frustration of the creditor's claim. This is a constitutional question. A citizen is entitled to move from one state to the other with his assets unless he wants to do this for fraudulent purposes. Why should you pin the assets

down, unless there are additional reasons? This again is a constitutional question, and I think the courts have become very sensitive to that.

C Professor, in your hypothetical, were you not talking about an existing attachment? You wondered what happens to it in case the defendant gets the action dismissed. Section 537(3) would not cover any existing attachment where the action is dismissed. This only talks about new attachments. What happens to an existing one?

R I am primarily concerned with the case where there is jurisdiction, but the court wants to transfer the case. Transfer under Section 410.30 would be an additional ground for an attachment, and the judge may so order.

C But I thought that the problem that you were worried about was that, if there is a dismissal under Section 410.30, there is no action to support the attachment that was valid at the time it was made.

R There are really two situations, and perhaps I was not very clear. One case is where you have an existing attachment--which must be a fraudulent debtor's attachment because there is "long-arm" jurisdiction, and nonresident attachment is, therefore, not applicable, i.e., there was fraudulent debtor's attachment against a nonresident subject to the personal jurisdiction of this state. Now, in that case, I thought that it was already implicit in Section 410.30 that the court would say that it would stay the action to save the attachment. But I wondered whether I should spell that out in so many words.

The second situation concerns Section 537(3) and what happens if there is no attachment.

C But in the latter situation, you seem to have the judge dismissing the action and, at the same time, issuing a writ of attachment on a nonexistent action.

R No, what I intend in effect is a conversion from an in personam to a quasi in rem proceeding. You still have the action and the attachment. Perhaps the section could be drafted a little better. I wanted to get the policy--

C I would be inclined to put the first one in there, too, so you do not argue about it. That is, if there is already an attachment, the action should not be dismissed but should be stayed pending a final determination by the other court.

R If the defendant makes himself a nonresident, so to speak, by saying you have to try the case somewhere else, then he should be treated as if he were a nonresident not subject to in personam jurisdiction. If there is no attachment already, then the court can issue a writ of attachment. If the original attachment has already issued, the writ of attachment should stay and not be released.

C Isn't there a constitutional problem? In the situation you pose, the "long-arm" statute makes unnecessary the quasi in rem proceeding. If you do not need attachment and quasi in rem jurisdiction in order to prosecute an action against a nonresident, how can you justify permitting an attachment against the nonresident when you do not permit it against the resident?

R Because there is a difference between residents and nonresidents. The judge would, of course, make the order only after a hearing in

connection with whether the suit is to be dismissed or stayed because of forum non conveniens.

C But it occurs to me that you are making a distinction between a resident and a nonresident. What right has the State of California to treat differently a former resident of California who has gone to Neveda in the situation where there is no fraud and there the state does not need the attachment to get jurisdiction because the "long-arm" statute provides jurisdiction?

C In other words, if the plaintiff is already entitled to attachment under the facts of the case, he should keep the attachment even though the action is going to be stayed. But why should this--a motion for stay or dismissal--be a further ground for attachment?

C If we retain resident attachment, then there would be no discrimination; I presume that we would treat nonresidents the same as residents. But once we depart from the necessity of nonresident attachment in order to get jurisdiction for the state action, don't we run into a constitutional problem?

R I did not think so. I thought that, where you have a nonresident who is subject to the "long-arm" statute, once you have granted the motion for forum non conveniens, you effectively make him a nonresident for whom there is no jurisdiction. So I treat the nonresident who is not subject to the "long-arm" statute and the nonresident who invokes forum non conveniens relief under the "long-arm" statute alike.

C In other words, your theory would be that, by seeking a dismissal or stay on the ground of forum non conveniens, the defendant has, in effect, consented to this discrimination.

R That is right.

C Yes, but what is the purpose of having this? We do not need attachment for jurisdiction. We do not need it because the defendant is a fraudulent debtor.

R Because, even if you get the judgment in the other state, and the California action has been dismissed, you have to regain jurisdiction here. And you will have to attach the assets again so that you can regain jurisdiction. I thought, in order to save this extra procedure, that it would be good to pin the assets and jurisdiction down at that point.

C If you have jurisdiction under the "long-arm" statute, why do you say you lose jurisdiction if there is a stay or dismissal?

R Because, if the court dismisses on the ground of forum non conveniens, that means that jurisdiction is lost. You could not start again.

The statute says:

> 410.30. When a court upon motion of a party . . . finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action . . . .

C That is complete dismissal, not a conditional dismissal?

R Yes. My proposal is that we have a special provision in the attachment statute so that an attachment may be levied, and when the judgment is obtained, although the action was dismissed, you can then collect the judgment of the sister state out of these assets.

C Well, yes, I can see a great advantage to the plaintiff in this situation. You would preserve the attachment which the plaintiff was able to obtain because of the defendant's claim that he was a nonresident.

R I have no very strong feelings in this. I was just seeking guidance from the Commission.

C I think you are just using a theoretical basis for attachment so a plaintiff can later collect his judgment in California. He may not need to have these assets tied up. Maybe it is IBM or some big company that is as good as gold, and the plaintiff does not need attachment for security. It is not fraudulent attachment because that is treated separately. Why should you tie up these assets?

C Of course, the judge has discretion not to issue the writ of attachment. But suppose this is the only real asset the defendant has. The defendant comes in and moves for forum non conveniens and the action is dismissed and they go back to Illinois to try the case. The plaintiff wins, but he has to come back to California and file another suit. By this time, the assets are gone--obviously. And that is not because the defendant is doing anything fraudulent in the normal sense.

R I thought that, if the plaintiff had no prior attachment but the defendant invoked the "long-arm" statute, that would be a valid reason to treat the defendant like a nonresident where you do not need any other grounds for an attachment. In other words, I want to make this case automatically like my proposed Section 537(2)(a).

C We could change Section 410.30 to accomplish the same thing by providing that the court may only grant a dismissal on the condition that the plaintiff is adequately protected is some way.

R Well, this is in effect what I tried. I did not want to touch the "long-arm" statute which was prepared by the Judicial Council.

C When we were talking about quasi in rem jurisdiction, the reason we allowed attachment there was that we could not break away from the concept that you have to have the property before you can bring the action. Otherwise, there is no real justification. Now we are taking this situation and saying--"Well, because we allowed attachment there (where we had to have it in order to have jurisdiction to bring the action), we will allow it here." But now we do not need to have attachment to bring the action in this state. There is no fraud, and I do not see why--

C The point is that this procedure would preserve an asset. If the procedure was mandatory and automatic, that would be one thing, but it is discretionary. The availability of this remedy actually gives the party that is moving for forum non conveniens an additional argument why the case should be moved to another forum.

R There should, of course, be a notice and hearing on these issues. Maybe I should spell this out.

C Why not hear both issues at the same time? Determine whether there should be an attachment at the time of the hearing on the motion for forum non conveniens.

C Is the reason we give a remedy to this creditor--who started a suit in California instead of the state where we now determine it should have been started--because we are not allowing him to continue his suit? In other words, we deprive a creditor of some benefit when we say--"You cannot continue with your suit, go start somewhere else." Are we going to give him back a benefit over other creditors by letting him tie up this property here? Is that why we are doing this?

C Let us assume that there is a debtor in Nevada whose only asset is in California. We get jurisdiction over the debtor through the "long-arm" statute. We have no attachment. Now, the defendant in Nevada comes into California and says--"I want this action transferred to Nevada," where he has no assets whatever. The court here, if it decides that he has no assets other than in California, would then be permitted to issue an attachment. Assume the attachment is issued, the property is attached. If the plaintiff now goes to Nevada and tries the case and wins, how does he execute on the property that is under attachment?

C He has to come back and establish the judgment in the original California action. He does not have to bring another suit in California. If you have a judgment in Nevada, it has got to be given full faith and credit by the California courts in the other action. Of course, this presents an argument that can be made on the motion for dismissal for forum non conveniens. That is, it is improper to dismiss because that would compel the plaintiff to file a new suit in California to establish the out-of-state judgment.

C This is analogous to a suit on a contract. One party says that the dispute is subject to arbitration. There is a stay of the action, the parties arbitrate, and then bring the arbitration award back in the action and enforce it.

R The action is dismissed, not on the merits, but on procedural grounds. The plaintiff could start a quasi in rem action the next day and attach those assets again without any ground for attachment except that the defendant is a nonresident. The defendant is now no longer subject to

the jurisdiction of the state because the court has dismissed the action. Instead of going through this procedure, I suggest we do it in the original action.

C Well, I can understand that. The problem is the plaintiff has started the suit in California, and the court tells him to go to Nevada. He goes there, he gets his judgment, then he must come back and sue again in California to make his judgment effective in California before he can collect. Maybe there is justification in that kind of a situation when it is the defendant that is forcing the plaintiff to do this.

C You may also aid the defendant in his efforts to get the case moved to Nevada because he can say--"Well, you can protect the assets by an attachment or something short of an attachment."

R Also, obviously, the court should not make an attachment order where the action is really not meritorious. But here, there is a notice and hearing, and the court should hear the whole thing.

C You need a noticed motion. I think it would be good to spell that out.

C You could do it at the time of the motion under Section 410.30.

C That is right as long as there was a noticed motion that the plaintiff was going to ask for the attachment. If the defendant brings the motion to either dismiss or stay the action, the plaintiff has to file some kind of countermotion for an attachment.

R Couldn't that motion be done right in open court?

C No, I think you have to give the defendant an opportunity to prepare for the hearing.

C But suppose the judge is doubtful about what he is going to do after he hears everything. He says--"Well, I will transfer the case on the condition that there be an attachment." There is no noticed motion or anything.

C As a practical matter, that is just what is going to happen. The judge will say--"I am not going to move this unless there is some way to protect the plaintiff"--and there will be a stipulation that there be an attachment or something less. If it is a bank account, there will be the right to make reasonable withdrawals, and so on.

C If it is a discretionary act and not mandatory, it would seem to me that the other side would have the right to prior notice--

C Of course they would, but they may well want to waive that--

C The statute gives the defendant notice because it tells him what the court can do. All he has to do is read the statute. Why do you have to clutter up the court's records with an additional notice where the plaintiff says--"I am going to attach your property if the judge orders the action transferred."

C Would you assume that Section 537(3) allows the judge to issue an attachment on his own motion?

C I think the basic statute that says the judge can dismiss the action would allow him to dismiss only on certain conditions.

C As a practical matter, it would be worked out as follows. The objection would be made that the court should not move the action because the only asset the plaintiff can reach is in California. The judge would

then say--"I will not transfer the action unless the defendant agrees to waive any requirement of notice, if there were any, and the property will be subject to attachment or whatever means is appropriate."

C I think we are generally in agreement that there should be some protection for the plaintiff in this situation. Certainly this is a necessary procedure if we were to keep resident attachment, and, arguably, it is necessary even if we do not.

C Would this be a new action? Would you give it a new number or something if you dismiss the old action? Now you have a writ so it becomes an original action.

C I would not worry about the details. We could simply provide that, where the plaintiff is entitled to an attachment, the court should only stay the action.

C The arbitration statute would give you a pretty good idea how to do that, I think.

The attachment of bank accounts into which wages have been paid

R The last issue is the matter of the bank account into which wages have been paid. I raised the issue in my report, but I did not do anything with it in the statute. I have proposed no solution.

C What section of the new law provides that attachment of wages is not longer permitted?

R That is Code of Civil Procedure Section 690.6(a):

> (a) All the earnings of the debtor due or owing for his personal services shall be exempt from levy of attachment without filing a claim for exemption as provided in Section 690.50.

C Professor, what is the distinction between (a) and (b)?

R Section 690.6(b) is after judgment. Execution.

C Section 690.6 is oriented toward money that has not been paid?

R That is right.

C What if the money has been paid?

R This statute says nothing at all about that. I have not proposed anything, but I would like to have some guidance on this question, and I would like to make a presentation on it.

C I would think that, whether wages were paid or unpaid, they should be treated the same.

R Well, wait a minute. Let me give you the problem. Wages which are owing will probably, generally speaking, be only the wages of one pay period. But if you have a bank account, it may contain wages of two pay periods, or more. Secondly, there may be other money--from sources other than wages--in the account. How does the creditor know that?

R I have some grave doubts whether subdivisions (b) and (c) of Section 690.6 are in conformity with the federal law. Subdivision (a) does not provide specifically for bank accounts, but, on the other hand, you cannot say whether this attachment exemption should apply to bank accounts because you do not know what is in the bank account.

C The way it is done now, the sheriff levies the attachment on the bank account, and the debtor must then come in and claim his exemption on a showing to the judge. Is that not correct?

R That is right, but the question is whether the debtor should not have a greater, or more liberal, exemption before judgment than he has after judgment. I think you should say the wages are exempt even if they are paid over into a bank account and, therefore, the creditor cannot attach them at all.

C No matter how much he accumulates in that account?

R That is right.

C For how long a period of time?

R Also, I am not satisfied--although this is another policy question--that, before judgment, the same exemptions ought to apply as after judgment. My proposal--although I did not put it down--is that, if the creditor wants to reach a bank account, the debtor, at the time of the noticed hearing on the issue whether an attachment should issue, may show that he has wages in the account, and he may ask for an exemption equal to two pay periods or whatever standard is set. The judge then would write the restriction into the attachment order. I do not think that this provision should be included in Sections 537 and 538.but should go into another statute. But

I do think something should be done with a bank account into which wages have been paid. Again, my proposal is that, in the fraudulent debtor cases where under my statute you have a prior notice and hearing, the debtor should be able to show that so much of his bank account consists of wages, and these wages should be subject to a more generous exemption before judgment than after judgment.

C Well, generous or not, if it is a mixed account, how are you going to do it? Are you going to adopt a rule to be applied like the last-in first-out rule or the first-in last-out rule?

R Or give an automatic exemption equal to the amount of two pay periods or one pay period.

C What if the debtor cannot afford to come to court, or does not come for whatever reason he may have; how is the plaintiff or the judge going to know what the debtor's pay was for the last two pay periods?

R If the debtor does not come, then he is reduced to his minimum exemption claim. If he does come, he may receive more; if he does not come, he is at least entitled to the minimum exemption.

C You should give some protection to the poor guy who cannot afford a lawyer.

R How does that person make a claim for exemption now?

C Doesn't the federal exemption now provide a standard equal to three-quarters of the current federal minimum wage rate?

R That is right, or the state law, if it is greater.

C Why shouldn't you apply the same rule to the bank account? In other words, the debtor would have to make a showing that his wages are

paid directly into the account; then he would have an exemption but only as to an amount equal to one month's wages. The only reason for this protection is that you do not want to dry up the debtor's continuing source of income. You are not trying to protect his life savings if he has gotten himself into bad financial condition unless he meets some other special exceptions.

R That is right. However, because this is before judgment, I thought I would give the debtor two pay periods. That is a matter of policy, but I would tend to be a little bit more liberal and treat the federal law as a minimum. I do not think that two periods would be excessively liberal. I would say the debtor must claim the more liberal exemption in the hearing or he would be limited to whatever the federal exemption is.

C Yes, but if we are talking about a bank account, and a poor debtor who cannot afford to come to court for a day, then you do not know what his pay period is.

R But under the federal law, he is entitled to a minimum exemption at least.

C Where there is a garnishment, the employer can figure out what is exempted if the statute says three-quarters, or one-half, or whatever, of a pay period.

C That is fine. But where we have a bank account--and the statute says that bank accounts may be garnished--and a working man who is not so poor that OEO or the poverty people will take care of him, who has got to make a living for his family, who does not understand all about his rights,

who does not want to hire a lawyer and pay out two-weeks salary to save two-weeks salary, to me this proposal is no protection at all. I think there should be some kind of exemption in a blanket amount.

C We could say so much money.

R I am equally willing to take a flat amount, perhaps equal to twice what the federal minimum is.

C Why couldn't you say a thousand dollars is exempt?

C We have an exemption like that for savings deposited in a savings and loan association. What about the banks; don't they come in under Section 690.7?

R Not yet.

C It just seems to me that gearing it to wages creates problems and arguments about what the wages are and so on. What is wrong with just a flat amount?

C That is just what I am suggesting.

C I think the debtor should be able to come in and show that his wages for one or two pay periods exceed the minimum flat amount.

C The statute would say whichever is the greater.

C Weren't we talking about where the employer pays directly into a bank account rather than--

C No, you could deposit your own check--

C Aren't we talking only about a fraudulent debtor--

C Again, I think that term is misleading. If you abolish resident attachment, you will, at the same time, have to enlarge so-called fraudulent attachments to include what is not fraud. The grounds will include what is

not really something bad. The debtor simply does not want to pay his creditor because he does not think he justly owes him anything. The debtor has got to support his family while he protects his right.

C Let us call it protective attachment.

C I think we get hung up on that word "fraudulent" attachment because it is not really fraudulent. It is something that you have probably advised your client to do in the past, and I am sure you never thought you were advising him to commit fraud. As I mentioned earlier, I once had a case where a client who was in business had two bank accounts; one account was attached. He would have had to tie up an amount equal to the amount in that account to get the money released. I told him to take the other account and move it. I obviously did not think that I was committing fraud, and I was not condoning fraud. If, under the proposed statute, the plaintiff could show that the debtor was going to do what I just described, then the plaintiff should be able to get the attachment. Therefore, this is the kind of thing that is going to happen all the time if we go this route--if the courts make it go this route--which I think they will.

Professor Warren I just wanted to make one point. It was suggested --why, instead of tying to wages, do we not tie it to a flat amount? I think what the federal statute does, in effect, is to provide a flat amount with an inflation scale built in; that is why they tied it in to the minimum wage. What they now have as a figure is 30 times $1.60. If you wanted a higher minimum, you could simply increase the multiple to 60, 90, or whatever. You would then have this built-in inflation feature. If you have a flat dollar amount, the standard is going to be obsolete four years from now.

C That seems to be more desirable. Using a pay period can be unfair because some people will be paid by the week, some two weeks, some monthly.

C I would compute it on a monthly basis.

C That is what it should be.

C Would you provide that bank accounts per se are exempt from attachment? What about the bank account of a commercial business?

R I would limit the exemption to the bank account of a debtor who has income from his personal services.

C Is that too narrow a definition though? What about the partnership? What about widows, orphans, and elderly people, who are living off interest and so on? They have as much right to--

C They are not exempt now.

C Some of them are. If you look, for example, at Sections 690.9 and 690.22, this very problem is dealt with. Section 690.22 provides you cannot attach or execute against certain annuities, pensions, or retirement allowances "whether the same shall be in the actual possession of such . . . [person], or deposited by him." In short, one class of people--those living on this type of income--are completely protected.

C This is the same type of problem where a debtor takes his paycheck and puts it in the bank.

C I do not see any reason why you could not have this figure apply to all accounts unless there is a strong showing to the contrary; that is, that the source of the funds was not one of these exempted sources. The creditor could probably make this showing in the normal case of a commercial account. But he could not do it in a normal wage earner's case.

C How much money are we talking about? $48.00 a week times 4, say $200? Or $400, if we use two monthly pay periods? When you provide adequate minimum exemptions, you minimize the need for a hearing, don't you?

C Are you going to go ahead and try to draft something on this, Professor Riesenfeld?

R Well, first I would like to have a little guidance. Before attachment, should there be a more liberal exemption than after attachment? Who has the burden of proof? Should an exemption be claimed or should there be an automatic exemption in a certain amount unless the creditor makes a showing that these assets are not exempt? If you want a showing made, to whom does the creditor make that showing?

C As I understand the proposed scheme, there will be a court order before you have any attachment. Where a bank account is being attached, couldn't the order show that a certain amount is exempt? The amount automatically exempted, figured on the basis we were considering, unless there is a showing to the contrary. Wouldn't that work?

R No, I have some trouble with that. What if the account is in more than one name?

C I would then say that you put the burden on the plaintiff to get a special order. Otherwise, any bank account will be exempt in this amount of $400, or whatever the minimum is.

R I still have some hesitation. How, for example, would this provision dovetail with the $2,500, overall exemption provided in Section 690.4?

C I have a different problem. It seems to me that, whether you call it fraudulent debtor or protective attachment, the creditor still has to show there are circumstances here where he needs the court's protection; there is some reason to believe that the creditor is not going to be paid what is rightfully due him. Therefore, perhaps the burden ought to be where it is now in the exemption statute; that is, on the debtor to show that the thing being attached is protected or exempted by law.

C But you do not understand that it will cost the debtor a couple of hundred dollars to get a lawyer educated enough to come in there and protect him.

C I think we should have an overall, blanket exemption comparable to what is now applied to savings and loan associations. This figure, which is now $1,000 under Section 690.7, would be enough to cover the normal, average wage earner whom you want to protect.

C You think we should extend Section 690.7 to cover checking accounts and so on?

C Well, that is the easiest approach.

C That would be the easiest way. And what is the difference? You put your money in the savings and loan, and creditors cannot reach it. If you put it in your checking account, they can. What is the logic to that? If you have your check deposited directly, creditors can reach it. If your wages are paid directly to you, the creditor cannot reach them? What sense does it all make?

C I think the theory behind the savings and loan exception is that it is like an annuity and the creditor should not be able to get at your nest-egg.

C Your checking account, though, is more like your salary; you are trying to live out of that. If anything is protected, that should be.

C To a certain extent, at least.

C What is so sacred about a savings and loan account? The only thing it does is give a bankrupt an exemption of a thousand dollars before he goes into bankruptcy.

C Why can't the debtor have his nest-egg account in a bank?

C Why can he put it anyplace? Why shouldn't the creditors get it? I would be more willing to let his creditors get that than his checking account.

C What about the situation where you have a joint bank account and both the husband and wife are working? Do you double the exemption?

C Yes, I would follow the same exemption set forth in Section 690.7(b). "Such exemption . . . shall be a maximum of one thousand dollars ($1,000) per person, whether the character of the property be separate or community."

C I agree. Why don't we make Section 690.7 apply to checking accounts? We would get rid of all kinds of problems, and it is perfectly logical to do so. You would then protect the person that puts his salary into a checking account to pay his bills rather than keeping money in cash.

C How do you handle the problem of multiple accounts? You are going to have people with several accounts in several institutions each with a maximum of a thousand dollars.

C Yes, but you would not overlap this. You would only permit one deduction whether it be a checking account or savings account. Under Section 690.7, the debtor cannot go around and set up 50 savings accounts in 50 different savings and loan associations. This would be the same deal.

The only difference would be that a checking account would be included in this exempted category. The debtor would be able to protect up to $1,000. If I have got $500 in my checking account and $500 in my savings account, I can accumulate that. Actually, I would be more willing to get rid of the protection for savings accounts and put in an exemption for checking accounts. A debtor can more easily afford to lose his nest-egg than he can the money he is living on which is probably in his checking account. But, don't you think that the logical thing would be to make Section 690.7 include checking accounts?

C No, I would prefer to have a flexible figure. I think you do not want to have to amend the statute every two years for inflation.

C Shouldn't we then change Section 690.7 to refer to whatever flexible figure we are going to use but have the section apply to every type of account?

C Why not have the banks provide a separate category of account where people deposit their pay checks exclusively and have the account so designated by the banks? I think that a man who wants to preserve his checking account for his earnings should not commingle other funds in that account.

C Well, yes, but, as a practical matter, what if the person gets a $4.00 dividend from some stock, or a refund on a bill paid, or some other miscellaneous amount? What does he have to do with it? Cash it?

Don't you think that Section 690.7 should be examined and some figure put in there--maybe not as high as a thousand dollars--and that exemption

should apply to all accounts, checking accounts as well as savings accounts, and all banks, savings and loan associations, credit unions, and similar institutions? In short, the debtor would only get one total exemption for everything. To me, that makes sense.

C Corporate accounts as well as personal accounts?

C Well, Section 690.7 would include corporate accounts now. Corporations can deposit in savings and loan associations now and get a one thousand dollar exemption. To the extent you can eliminate issues that you argue about, you accomplish something.

C Is the new savings and loan bill-paying service which is comparable to a check included in this kind of scheme?

C Section 690.7 says: "Savings deposits in, shares or other accounts in, or shares of stock of, any state or federal savings and loan association; 'savings deposits' shall include 'investment certificates' and 'withdrawable shares' . . . ."

C I do not know how the new scheme works. I do not know whether it is set up as a separate account in the savings and loan association or whether the bill is actually paid out of the savings account itself.

C Savings and loans are not permitted to have commercial accounts, are they?

C Well, there is a regulation out of the federal home loan bank board that, as of September 14, 1970, allows these associations to arrange a bill-paying service which would seem quite similar to a checking service.

C Would they issue third-party checks? For example, if you had to pay an insurance premium, would they send the check for you?

C I do not think any of the associations are doing this yet because no one has figured a way to make money out of it. The association can deduct the money from the depositor's account, but it then has to be deposited into the association account and the association then has to write the third-party check on a commercial bank account.

C I think, Professor Riesenfeld, that you should look at Section 690.7 and try to draft a provision that provides one exemption for these various types of savings and checking accounts. The exemption might be a flat thousand dollars or not. Perhaps the exemption should be limited so that, if the creditor could show that the account did not consist of wages or retirement funds but was a commercial account, the exemption would not apply.

R Shall we do this now or when we come to the third part of our study dealing with exemptions?

C I think this problem ties in with the wage problem.

R Maybe I should make a tentative proposal now and, when we come to the third package, I may look at it again.

C This proposed solution may not work because, if there is a real constitutional objection to the attachment of wages, we may need to identify this exemption with wages.

R That is correct. Also, you have to get a certificate from the Secretary of Labor in order to apply your own garnishment statute. I do not think that the present statute will qualify for what the Labor Department, in my mind, will demand. The federal requirement says wages "paid or

unpaid"; the California statute now says "due or owing." There is, therefore, already a discrepancy and, thus, I think this statute will not comply with the "truth-in-lending" act.

C I suppose, then, we would like your recommendation as what would at least comply with the federal act, and then we can go from there.

Professor Warren I think we will see an additional dimension to this problem when we examine it next month.

C Professor Riesenfeld, is your thought that an amended Section 690.7 is not the solution to this? that such an amendment would be too subtle to be considered an exemption for paid wages up to a thousand?

R Yes, that is right. But Professor Warren has more experience with those federal officials who administer this.

Professor Warren When I last talked to them, the federal officials were not sure what the federal law meant, but their attitude is that they will ordinarily contend that these restrictions should be as broadly construed as possible.

C Professor Riesenfeld, what more do you have for us?

"Property" means only property that can be reached by attachment

R The introductory clause to my proposed Section 537 states:

> The plaintiff, at the time of issuing the summons or any time afterward before judgment, may have the property of the defendant, other than earnings for personal services due and owing, attached as security. . . .

The words "property of the defendant" may require some further qualification beyond the qualification that the property be other than earnings. This phrase should not, therefore, be considered as final.

For example, at the moment there is a very curious and troublesome relationship between Sections 688.1 and 688. Section 688.1 gives a judgment creditor and only a judgment creditor--not a creditor seeking an attachment--the right to intervene in a pending proceeding and get a lien on the possible recovery. The first issue is whether we should exclude the attachment creditor. I think the Commission should examine whether this remedy should be available only to the judgment creditor. This is not a levy. This is an application for a lien and is really a special kind of supplementary proceeding. It is not an execution process at all. When Section 688.1 was enacted, the following phrase was added to Section 688: "Provided, that no cause of action nor judgment as such . . . shall be subject to levy or sale on execution." Arguably, these words would permit a levy on attachment. Moreover, I do not know whether the phrase means "levy or sale on execution," or only "sale on execution," or only "levy on execution." The phrase is totally ambiguous to me.

These sections indicate, however, that the word "property" is qualified in certain ways by other sections. That is, certain things cannot be reached by attachment. This is not because they are technically exempt but because the attachment process does not apply to them. Section 688.1 is one of these sections. It does not specifically say that a cause of action is exempt. But the section only applies to judgment creditors and only provides a procedure for such persons. I do not know what Section 688 means; it may apply to attachment or not. I do not think it means at all what it says. It was supposed to restrain a sale of a pending cause of action because, upon a forced sale, the cause will go for a song. Why you

cannot attach, I do not know. Certainly a judgment debtor's judgment debtor should be subject to an attachment by notice to him. In short, we will have to look at these sections. At the moment, I only want to say that "property" does not mean "all property" but only property (a) which can be reached by attachment as provided in other sections and (b) which is not made exempt from attachment or cannot be reached by attachment because of other quirks in the statute at which we may have to look. So it should be understood that what I had in mind when I said "property" was that this word is subject to the other provisions of this chapter on provisional remedies. I think that, when we come to Sections 688 and 688.1 and similar sections, we should see what should be done with them, and we should clearly refer to those sections in the introductory section. We should not let them be discovered by the judges only after a painful process. Those are about all of the problems which I wanted to present today.

C Thank you very much.

C Professor Riesenfeld, am I correct that you are going to review your recommendations and your report and then give the Commission a revised version? Then the Commission will send the revised study out, saying--"This is the tentative report of our consultants, and the Commission solicits your comments on these recommendations, and your comments will be taken into account when the Commission discusses at the December meeting what action it will take upon these recommendations."

R I will need a week or so to determine if it is essential that the report be revised before it is sent out.

Drug investigations

C Before we leave this, I have one or two further questions in areas that we have not talked about at all. First, proposed Section 537(2)(a) through (e) lists five grounds for the issuance of an attachment. Now, in proposed Section 538, subdivision (4) provides for a prior notice and hearing where the grounds are (b) and (e); subdivision (5) provides for a subsequent hearing where the grounds are (a) and (c). But subdivision (d) is not mentioned at all.

R The situation where there is no hearing involves drug investigations. The Health and Welfare Code provides that, where a narcotic peddler is caught with funds paid over to him in the course of investigation, this money can be recovered by the state. I do not know why this attachment provision is in the Code of Civil Procedure; it should all be placed in the Health and Welfare Code.

Secured or unsecured position of creditor

C The other subject that we have not talked about concerns the secured or unsecured position of the creditor. Now, the present law provides, at least with respect to contract actions, that, if there is any security interest unless it has become valueless through no fault of the plaintiff, there can be no resident debtor's attachment. My question is--since we tentatively have been talking about maintaining attachment in the fraudulent situation--if the plaintiff could convince the court at the hearing that whatever security he has is totally inadequate, should he be deprived of all right to attachment?

R The issue of security is gone from my statute. It is not in there because it was only applicable to resident attachment. Since I eliminated resident attachment, I left that out also. But you raise the point--and maybe this is the opposite of what you intended--that, perhaps, my proposed statute is overly generous. Perhaps the court should consider whether the security interest adequately protects the creditor and whether the attachment should cover only the amount by which the debt claimed exceeds the value of the security interest plus any amount claimed by cross-complaint or counterclaim.

Support and maintenance

C The other area we have not talked about is attachment for support and maintenance. Here, it seems to me the plaintiff-creditor has got a judgment, and what she is trying to do is collect on the judgment. It is really an execution problem and not an attachment problem.

R Well, the thing is you may have to have a court order before you--

C I think we ought to take a look at this, especially in view of the change in emphasis in the divorce law. Certainly attachment is about as adversary as you can be; the procedure may be necessary, but it certainly is inconsistent with the theory behind the new family law act.

C Here, there is a court determination that the debtor is liable for a certain amount which has not been paid. It is not a case where a creditor merely claims somebody owes them something.

C Yes, I know, but I do not think that the normal attachment remedies that exist for other creditors are necessarily adapted to the divorce situation.

R Section 537(1) was amended to provide that:

> An action upon any liability, existing under the laws of this state, of a spouse, relative, or kindred, for the support, maintenance, care, or necessaries furnished to the other spouse, or other relatives, or other kindred, shall be deemed to be an action upon an implied contract.

The provision covers not only the alimony order, but also reimbursement of third persons for support furnished.

C It may well be, and undoubtedly is, a situation which needs to be covered, but I wonder what is the best way to do it.

C Isn't there a provision where the domestic relations court compels the husband to pay through the court trustee, or something? Would that procedure be subject to the new wage exemption provisions?

C This situation came up at the Conference of the State Bar Delegates in Beverly Hills. Two of the bar associations proposed amendments to the Code of Civil Procedure which would permit a levy upon pension funds--if the obligation was based upon either spousal support or child support. The motivation was that, under the case of Miller v. Miller, a pension fund is exempt; it cannot even be touched. Contempt proceedings do not accomplish the purpose because the fellow who is getting a pension is still going to get a pension, and he would just as soon go to jail rather pay his spouse's support.

C Hasn't the state Supreme Court just knocked that in the head? Haven't they held now in a divorce action that you can get to the pension on the theory that it is community property?

C Miller v. Miller says you cannot.

C I do not know. This case that I am talking about is not over 60 days old. It held that the wife had a community property interest in the fund, and the court had the authority to divide the property. A portion of the fund, in effect, was really her property.

C In any event, I would think that this area requires further study.

R The case you refer to deals with community property and does not affect the children at all. Therefore, this case does not cover some of the situations covered by Section 537. So, I still think that there is some reason to have some provision in the statute, even if you otherwise abolish resident attachment.

C Well, we will need to do something about it, and we would like your recommendations, Professor Riesenfeld.

#39 October 13, 1970

BACKGROUND STUDY

relating to

ATTACHMENT AND GARNISHMENT

(Revised October 22, 1970)

Prepared for

California Law Revision Commission

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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 started with the sentences:[42]

"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.[54]

In New York attachment may issue in any action for eight statutory grounds, 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.

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.[86] To what extent absence of certain of these aggravating features might dispense with the need for prior hearing remains conjectural.[87] 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.

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 U.C.C., 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 v 582 [745]), eff 1-10-61, changed the asterisked section "2713.26" 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

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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 § 75:5.

§ 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. §§ 359, 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.