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Attachment In California—What Now?

EDWARD N. JACKSON*

*The California supreme court has recently declared California's prejudgment statute unconstitutional. The court's decision is the most recent in a series of cases which have concluded that the interference with an individual's property, prior to judgment and without notice and an opportunity to be heard, is a violation of due process. Mr. Jackson, one of the most eminent attorneys in the field of debt collection practice, briefly discusses the attachment procedures in other states and identifies the competing interests of creditors and debtors. The author then analyzes the court's decision in *Randone v. Superior Court of Sacramento County*, [5 Cal. 3d 536 (1971)] and suggests an attachment procedure which will satisfy due process requirements and accommodate the interest of both the creditor and debtor.*

The California supreme court unanimously ruled today that property, including bank accounts, cannot be attached by a creditor before judgment, without a hearing. Holding that the 99-year old attachment statute violated both the California and Federal Constitutions, the Court stated that it did no more than follow the 1969 Supreme Court decision in *Sniadach v. Family Finance Corporation* which struck down a Wisconsin statute permitting garnishment of wages without prior notice and hearing.¹

The latest in a long line of decisions, *Randone v. Appellate De-*

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1. Administrative Office of the Courts Press Release (August 26, 1971).

*partment*² is certain to alter debt collection practice in California and perhaps in other jurisdictions where the decisions of our supreme court are regarded as the highest of respectable authority. For example, the Bureau of Collection and Investigative Services which licenses and supervises collection agencies in California³ issued an emergency bulletin immediately following the decision in *Randone* urging its licensees to review collection practices in light of *Randone*.⁴ The California Law Revision Commission, planning to submit a comprehensive recommendation to the 1972 Legislature dealing with wage garnishment and related matters, issued its Memorandum in which Nathaniel Sterling, Legal Counsel to the Commission, comes to this conclusion:

Randone appears to have completely wiped out California's attachment statutes and practice, both because the statutes allow seizure of necessities of life without a hearing on the validity of the creditor's claim and because they allow seizure of assets generally rather than in extraordinary circumstances. It appears that the statutes cannot be construed to be constitutional and that, if attachment is to be used, it may occur only under a substantially revised statutory scheme.⁵

It is the purpose of this article to review the remedy of attachment, to scrutinize the objections made in *Randone*, and to suggest a solution which can be adopted as an interim measure.

THE ATTACHMENT PROCESS

Attachment is one of seven provisional remedies available in California in civil actions.⁶ It affords an ancillary remedy by which a creditor may have property of a defendant sequestered as security for the satisfaction of any judgment the creditor might recover against the defendant.⁷ The remedy is purely statutory⁸ and the provisions of the statute must be strictly followed.⁹

The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached in the following cases:

1. In an action upon contract, express or implied, for the direct payment of money;¹⁰

2. 5 Cal. 3d 536 (1971).

3. CAL. BUS. & PROF. CODE §§6850 *et seq.*

4. September, 1971 Administrative Bulletin #15.

5. Third Supplement to Memorandum 71-58, September 3, 1971.

6. Title VII CAL. CODE CIV. PROC.

7. CAL. CODE CIV. PROC. §537.

8. CAL. CODE CIV. PROC. §§537-561.

9. *Halstead v. Halstead*, 72 Cal. App. 2d 832 (1946).

10. CAL. CODE CIV. PROC. §537.1.

2. In contract actions against nonresidents;¹¹
3. In an action against a nonresident to recover damages for injuries to person or property in this state;¹²
4. In an action in unlawful detainer;¹³
5. In an action by the State for the collection of taxes;¹⁴ and
6. In an action by the State to recover funds paid by police officers in the process of a narcotics investigation.¹⁵

An attachment may likewise be issued in connection with actions to foreclose mechanics liens¹⁶ and in actions for damages for conversion of personal property.¹⁷

Procedure

The procedure for the attachment of the debtor's property is briefly as follows:

The plaintiff must file with the clerk of the court, or the judge if there is no clerk, a declaration showing that an attachment is proper under the circumstances of the particular case.¹⁸ At the same time, the plaintiff must file an undertaking¹⁹ with two or more sufficient sureties²⁰ or a corporate surety²¹ or, in lieu of sureties, a cash deposit,²² "to the effect that plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment."²³ The sum specified in the undertaking is one-half of the principal for which the writ is to be issued, but not less than \$50.²⁴

Upon receipt of the declaration and undertaking the clerk issues a writ of attachment to a levying officer,²⁵ which directs him to "attach and safely keep" the property of the defendant, not exempt from execution, sufficient to satisfy the plaintiff's demand.²⁶

The code specifies the manner in which property, according to its

11. CAL. CODE CIV. PROC. §537.2.

12. CAL. CODE CIV. PROC. §537.3.

13. CAL. CODE CIV. PROC. §537.4.

14. CAL. CODE CIV. PROC. §537.5.

15. CAL. CODE CIV. PROC. §537.6.

16. *Beltinger Lumber Co. v. Kerrin*, 99 Cal. App. 686 (1929).

17. *Warner Mfg. Co. v. Standard I.M. Co.*, 97 Cal. App. 2d 494 (1950).

18. CAL. CODE CIV. PROC. §538.

19. CAL. CODE CIV. PROC. §539.

20. CAL. CODE CIV. PROC. §1057.

21. CAL. CODE CIV. PROC. §1056.

22. CAL. CODE CIV. PROC. §1054a.

23. CAL. CODE CIV. PROC. §539.

24. *Id.*

25. The levying officer in a county is the sheriff; in a city, the marshal; and in a township, a constable.

26. CAL. CODE CIV. PROC. §540.

nature, may be attached,²⁷ and further provides that if judgment be awarded, the property attached may be sold to satisfy the judgment.²⁸

Personal property in the possession of the defendant, must be attached by the levying officer by taking it into custody.²⁹ For example, the defendant's automobile would be seized by the sheriff and placed in storage.

Debts, credits and other personal property not capable of manual delivery are attached by levying with the person owing the debt, or having in his possession or under his control the credits or other personal property, a notice that such property belonging to the defendant is attached pursuant to the writ.³⁰ Thus, earnings of the judgment debtor are attached by the levy upon his employer and money in a bank account is attached by the levy upon the banking institution. Such levies on third parties are called "garnishments"; the third party in possession or control of the property of the defendant is known as the "garnishee".

History

This summary procedure has been available in California even before statehood.³¹ Originally it was available; 1) when the debtor was not a resident; 2) when the debtor was in various ways attempting to conceal himself or his property to defraud his creditors; and 3) when the debt was incurred outside California and the debtor entered California to defraud his creditors.³²

From this relatively simple beginning attachment evolved into the patchwork it is today. The biggest change occurred in 1851 when the legislature authorized attachments in actions upon a contract, express or implied, for the direct payment of money when the contract is made or is payable in California and is not secured.³³ In 1853 a similar provision was added in contract actions against nonresidents.³⁴

Since that time California has allowed two types of attachment: the "foreign attachment," against nonresidents, and the "domestic attachment," against residents.³⁵ Each type of attachment has been con-

27. CAL. CODE CIV. PROC. §§541, 542.

28. CAL. CODE CIV. PROC. §541.

29. CAL. CODE CIV. PROC. §542.3.

30. CAL. CODE CIV. PROC. §542.6.

31. See, *Background Study Relating to Attachment and Garnishment*, CAL. L. REV'N COMM'N, 1 (October 13, 1970, revised October 22, 1970) [hereinafter cited as COMM'N STUDY]. The Study was prepared by Professor S. A. Riesenfeld.

32. CAL. STATS. 1849-50, c. 136, §2.

33. CAL. STATS. 1851, c. 5, §120.

34. CAL. STATS. 1853, c. 178, §3.

35. COMM'N STUDY, at 3.

tinuously expanded reflecting a tendency to emphasize the interests of the creditor over the debtor.³⁶ The main protection afforded debtors related to exemptions. Realizing that there could be substantial injury to a defendant whose property was attached, and that the seizure of his property was accomplished before a judgment was rendered against the defendant (in other words, before a hearing upon the merits of the plaintiff's claim) the legislature attempted to protect the defendant not only by requiring the undertaking on attachment,³⁷ but also by setting up a procedure whereby the defendant could prevent the levy in the first instance by bonding against it³⁸ or on motion to discharge the attachment after levy.³⁹ In addition, the legislature enumerated certain property as exempt from attachment or execution, some of which is exempt without the defendant making a claim for the exemption, and some of which may be exempted only if the defendant claims the exemption.⁴⁰

Attachment in Other Jurisdictions

The historical development outlined above left California among the most permissive states in allowing attachment.⁴¹

In New Jersey, attachment is an extraordinary writ⁴² which will issue: 1) where plaintiff would be entitled to an order of arrest before judgment, generally, the plaintiff is entitled to the order in certain aggravated torts, and in contract actions where the debtor has or is attempting to defraud his creditors;⁴³ 2) where defendant absconds or is a non-resident and cannot be served; and 3) in certain actions involving non-resident decedent's estates and corporations.⁴⁴

It should be noted that attachment in New Jersey is an extraordinary writ requiring judicial scrutiny and that it is authorized only in situations involving nonresidents or fraudulent conduct on the part of the debtor.

Illinois likewise allows attachment only when the debtor is a non-resident or when he has or is about to defraud his creditor by concealing himself or his property.⁴⁵ The creditor must file an affidavit detailing various facts about the case; however, he is examined by a judge only if the action sounds in tort.⁴⁶

36. *Id.* at 1.

37. CAL. CODE CIV. PROC. §539.

38. CAL. CODE CIV. PROC. §540.

39. CAL. CODE CIV. PROC. §§554, 555.

40. CAL. CODE CIV. PROC. §690 *et seq.*

41. COMM'N STUDY, at 14.

42. *Russel v. Fred G. Pohl Co.*, 7 N.J. 32, 80 A.2d 191 (1951).

43. N.J. STAT. ANN. tit. 2A, §15-41, 15-42.

44. N.J. STAT. ANN. tit. 2A, §26-2.

45. ILL. ANN. STAT. ch. 11, §1.

46. ILL. ANN. STAT. ch. 11, §2.

Professor Riesenfeld has noted that New York law 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.⁴⁷

He goes on to comment that "in Pennsylvania likewise domestic attachment is abolished and attachment is either 'foreign attachment' (nonresident) or 'fraudulent debtor's attachment' ".⁴⁸

This brief comparison indicates that other states allow attachment in two situations: "foreign attachment," where the debtor is a nonresident, and "domestic attachment," where the debtor is involved in attempting to defraud the creditor. These are the same categories as found in California law; however, "domestic attachment" in California is much broader since it includes not only actions against debtors involved in fraudulent conduct, but also any action on an unsecured contract. Because of the latitude allowed creditors in "domestic attachment", California had one of the most liberal attachment statutes.

THE COMPETING INTERESTS INVOLVED

Before reviewing the recent line of due process cases commencing with *Family Finance Co. of Bay View v. Sniadach*⁴⁹ and culminating in *Randone*, it would be useful to analyze the competing interests of the parties involved in an attachment proceeding.⁵⁰

"Domestic Attachment"

The creditor's main need for attachment is to provide security for any money judgment he may be awarded. Although such a judgment may be enforced by means of a writ of execution, this remedy is valueless if the debtor has absconded or concealed his nonexempt property before the writ can be issued. The law of fraudulent conveyances affords no satisfactory protection in this situation since it either does not apply or the litigation involved is too expensive.⁵¹

Of course, the creditor needs the security provided by attachment

47. COMM'N STUDY at 15. The New York statute is N.Y. CIV. PROC. §6201.

48. COMM'N STUDY at 16 (footnotes omitted). The Pennsylvania statutes are PA. RULES OF CIV. PROC. §§ 1251-1279, 1205-1292, 1461-1462.

49. 395 U.S. 337 (1969).

50. See generally, COMM'N STUDY at 7-12; Note, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254, 1258-1264 (1970).

51. COMM'N STUDY at 11; 22 STAN. L. REV., *supra* note 50, at 1259.

only if the debtor is about to abscond, conceal his property, or otherwise attempt to defraud the creditor. Thus, this particular need of the creditor corresponds to the narrower "domestic attachment" found in other jurisdictions.

Besides the creditor's interest in obtaining security for a possible judgment, attachment provides the creditor with considerable leverage in pressing for a settlement of his claim.⁵² Attachment deprives the debtor of the use of his property. A keeper may frighten customers or trade creditors away. A debtor whose wages are garnished may lose his job. Under these circumstances, a debtor is under great pressure to settle disputed claims quickly.

If the debtor actually owes the debt, he obviously ought to pay it. This leverage is arguably beneficial since it encourages him to pay his just debts promptly. On the other hand, the leverage gained by a creditor through attachment puts the debtor in a very poor bargaining position, encouraging him to pay more than he may actually owe simply to have the attachment removed.

The debtor's interest in paying no more on a claim than a court would find him to owe certainly should be protected. This leverage may be justified when the debtor is attempting to defraud his creditor. But there seems little justification for this leverage when no fraudulent conduct is involved and the court can acquire personal jurisdiction over the debtor. Thus, leverage seems to do the most harm under California's broader definition of "domestic attachment."

Other considerations also tend to weaken the justification for California's broad "domestic attachment." A debtor's other creditors are affected by attachment by one creditor. The first creditors to attach gain considerable bargaining strength, since they will have first claim on substantially all of the debtor's property. The only solution available to the remaining creditors is to declare bankruptcy within four months or wait until the debtor has re-acquired assets. Bankruptcy may not be the best solution however: bankruptcy procedures are expensive for all concerned; a potentially viable business may not survive; and the social costs of bankruptcy are well-known.⁵³

Other, more general, interests of the debtor and creditor have been reviewed elsewhere.⁵⁴

"Foreign Attachment"

One of the most important reasons for attachment, traditionally,

52. COMM'N STUDY at 112-12; 22 STAN. L. REV., *supra* note 50, at 1200-1261.

53. *See generally*, 22 STAN. L. REV., *supra* note 50, at 1263-1264.

54. *Id.*

has been its utility in providing quasi-in-rem jurisdiction. Despite the fact that a forum was unable to obtain *personal* service on, and *personal* jurisdiction over a nonresident debtor, the Supreme Court allowed state courts to obtain jurisdiction as long as property belonging to the debtor was located within the forum.⁵⁵ Federal due process was satisfied by: 1) substituted service on the nonresident; and 2) if any judgment obtained was limited to satisfaction from the assets originally attached.

This was a direct method of satisfying a nonresident's debt. Another, more circuitous method of satisfying the claim has always been available. The creditor can go into the forum having personal jurisdiction over the debtor, obtain a money judgment, and satisfy the judgment by supplementary proceedings wherever assets of the debtor can be found. Probably because of the expense involved in pursuing this method, it has never been seriously discussed as an alternative to quasi-in-rem jurisdiction.⁵⁶

The case authorizing this kind of jurisdiction was decided long before *International Shoe Co. v. Washington*,⁵⁷ which formed the basis for today's long-arm statutes.⁵⁸ The argument has been raised that personal service under the long-arm statutes is now so pervasive that quasi-in-rem jurisdiction is no longer necessary.⁵⁹ Professor Riesenfeld has reduced the arguments supporting this position to one: in no case where a nonresident debtor has assets located in the forum will personal service be unavailable.⁶⁰ In other words, the mere fact that a debt may be collected from a nonresident's assets in the forum provides sufficient "minimum contacts" with the forum to afford a basis for personal jurisdiction.

Professor Riesenfeld, however, asserts that this position is "highly questionable."⁶¹ "Nothing in the more recent decisions of the Supreme Court expanding the scope of personal jurisdiction authorizes such extreme latitude."⁶² He concludes that ". . . [i]n many cases there is still a need for a quasi-in-rem jurisdiction and for attachment based on jurisdictional needs."⁶³ Thus it would appear that a legitimate need for attachment to provide quasi-in-rem jurisdiction still exists, although

55. *Pennoyer v. Neff*, 95 U.S. 714 (1878).

56. COMM'N STUDY at 8.

57. 326 U.S. 310 (1945).

58. In California, see CAL. CODE CIV. PROC. §410.10.

59. Carrington, *The Modern Utility of Quasi-in-Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

60. COMM'N STUDY at 9-10.

61. *Id.* at 10.

62. *Id.*

63. *Id.*

it should be limited to situations where personal service under the long-arm statutes is unavailable, or unavailing (e.g. the code method of service by registered air-mail is of little value if the person to whom the mail is addressed refuses to sign for it).

FROM SNIADACH TO RANDONE

Although the law of attachment had occasionally been attacked on constitutional grounds, the courts, until recently, reacted complacently.⁶⁴

In 1969 the United States Supreme Court decided *Sniadach v. Family Finance Corporation of Bay View*.^{64a}

In *Sniadach*, the plaintiff alleged that the defendant owed it \$240 on a promissory note executed by the defendant. Mrs. Sniadach's wages were garnished and she was served with proper notice in accordance with the statutory requirements of the State of Wisconsin. She moved to dismiss the garnishment proceedings, claiming that she was deprived of her property without prior notice and an opportunity to be heard. Although the Supreme Court of Wisconsin did not find the garnishment statutes unconstitutional⁶⁵ the Supreme Court of the United States held that at least in the case of critical property such as the wages of a debtor, the deprivation of the use⁶⁶ thereof is unconstitutional where the deprivation is made before judgment without notice and an opportunity to be heard.

The *Sniadach* decision had an immediate effect across the country. In California the cases of *McCallop v. Carberry*⁶⁷ and *Cline v. Credit Bureau of Santa Clara Valley*⁶⁸ both followed *Sniadach* by holding unconstitutional prejudgment garnishment of wages. These decisions were followed by amendments to the code abolishing prejudgment attachment of wages.⁶⁹ Wisconsin, New Mexico and New Hampshire, prompted by *Sniadach*, also adopted the statutes prohibiting prejudgment garnishment of earnings. Section 5.104 of the Uniform Consumer Credit Code likewise now outlaws prejudgment garnishment of wages.⁷⁰

64. *Id.* at 18.

64a. 395 U.S. 337 (1969).

65. *Family Finance Corp. of Bay View v. Sniadach*, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

66. Justice Harlan, concurring in *Sniadach*, said that "[t]he property of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit." (Original italics). 395 U.S. 337, 342 (1969).

67. 1 Cal. 3d 903 (1970).

68. 1 Cal. 3d 908 (1970).

69. CAL. STATS. 1970 c. 1523; see also 2 PAC. L.J. 319-324 (1971).

70. U.C.C.C. §5.104 (rev. 1969 draft).

The first major dispute to arise in the wake of *Sniadach* involved the kinds of property to which the decision should be extended. The facts of *Sniadach* involved wages. It would certainly seem reasonable to assume that if prejudgment garnishment of wages is an unconstitutional taking, then prejudgment garnishment of other property under the same circumstances would likewise be unconstitutional. The Court indicated, however, that its ruling was based squarely upon the critical nature of property involved; "we deal here with wages—a specialized type of property presenting distinct problems in our economic system."⁷¹ From this language it has been argued that

. . . [T]he prejudgment garnishment of wages produces greater hardship than the prejudgment garnishment or attachment of other forms of property. The former apparently meets the relaxed standards of due process as long as an opportunity to be heard is provided before the taking of the property becomes final.⁷²

This dispute over whether *Sniadach* should be limited to prejudgment garnishment of wages was taken up in the courts with inconsistent results. Arizona has confined *Sniadach* to wage attachment,⁷³ while Wisconsin has applied the rationale to other kinds of property.⁷⁴ California has followed Wisconsin by clearly rejecting the theory that *Sniadach* should be limited to the narrow question of the unconstitutional seizure of wages. "The principle that an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest . . ."⁷⁵ has been extended into other areas of California statutory law.

In *Klim v. Jones*,⁷⁶ a federal court struck California's Baggage Lien Law. Prior to the decision, Civil Code Section 1861 allowed a landlord a lien upon his tenant's personal property located on the premises for unpaid charges, primarily rent. Because Section 1861 failed "to provide for any sort of hearing prior to the imposition of the innkeepers lien thereunder, thus depriving the boarder of property without due process of law,"⁷⁷ the court found the section constitutionally infirm.

Following this decision, the Supreme Court of California, in a unanimous decision, found California's claim and delivery statute⁷⁸ unconsti-

71. 395 U.S. 337, 340 (1969).

72. Hawklund, *Prejudgment Garnishment of Wages After Sniadach*, 75 COM. L.J. 5 (1970).

73. *Termplan Inc. v. Superior Court of Maricopa County*, 105 Ariz. 270, 467 P.2d 8 (1969).

74. *Larson v. Fetherstone*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

75. 5 Cal. 3d 536, 541 (1971).

76. 315 F. Supp. 109 (N.D. Cal. 1970).

77. *Id.* at 122.

78. CAL. CODE CIV. PROC. §509-521.

tutional.⁷⁹ One of the bases for this decision was that the “seizure of the property under the claim and delivery law constitutes a taking without due process of law.”⁸⁰

This far reaching trend was extended further in *Randone*. Expressly pointing out that “the constitutional principles underlying *Sniadach* are not confined to wage garnishment,”⁸¹ Justice Tobriner settled the dispute in California. He focused attention instead on the substantive rights guaranteed by the due process clause. His main objections were three:

1. Section 537, subdivision 1, permits the initial attachment of all of a debtor’s property without affording the individual either notice of the attachment or a prior hearing to contest the attachment.⁸²
2. Section 537, subdivision 1, is not narrowly drawn to confine [prejudgment] attachments to those “extraordinary situations” which require “special protection to a state or creditor interest.”⁸³
3. Section 537, subdivision 1, is drafted so broadly that it permits the attachment of a debtor’s “necessities of life” prior to a hearing upon the validity of the creditor’s claim.⁸⁴

The opinion concludes that Section 537(1) is so overbroad that “this court cannot properly undertake the wholesale redrafting of the provision which is required.”⁸⁵ However,

We do not doubt that a constitutionally valid prejudgment attachment statute, which exempts ‘necessities’ from its operation, can be drafted by the Legislature to permit attachment generally after notice and a hearing on the probable validity of a creditor’s claim . . . [citation omitted] and even to permit attachment before notice in exceptional cases where, for example, the creditor can additionally demonstrate before a magistrate that an actual risk has arisen that assets will be concealed or that the debtor will abscond.⁸⁶

The solution thus seems obvious. Attachment *after* notice and a hearing is permissible. Attachment *before* notice and a hearing is permissible in “extraordinary situations” as long as “necessities of life” are exempted. The only remaining problem is to define “necessities of life” and “extraordinary situations.”

79. *Blair v. Pitchess*, 5 Cal. 3d 258 (1971).

80. *Id.* at 277.

81. 5 Cal. 3d 536, 547 (1971).

82. *Id.* at 543.

83. *Id.* at 552.

84. *Id.* at 558.

85. *Id.* at 563.

86. *Id.* at 563.

"Necessities of Life"

The opinion makes it clear that in no event will attachment of a debtor's "necessities of life" without prior notice and hearing be justified.

. . . the hardship imposed on a debtor by the attachment of his "necessities of life" is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and a hearing on the validity of the creditor's claim.⁸⁷

Moreover, it appears that the exemptions must be automatic rather than merely claimable, as some are under the current statute.

Debtors are frequently unaware of available legal remedies, however, and, as we recently recognized in *McCallop*, even if they were, 'while awaiting hearing upon . . . [their] claims . . . of exemption . . . defendant[s] . . . with famil[ies] to support could undergo the extreme hardship empasized in *Sniadach* [citation ommitted].'⁸⁸

The opinions also makes a valiant effort to indicate the extent of the exemptions required by due process. Citing a student comment, the court said: "'attachment of any asset critical to the debtor's immediate well-being exerts the same type of pressure as does wage garnishment.'"⁸⁹ Among such assets, the court mentions bank accounts composed of the earnings of the debtor,⁹⁰ "'television sets, refrigerators, stoves, sewing machines and furniture of all kinds,'"⁹¹ accounts receivable,⁹² the debtor's dwelling,⁹³ and his clothing and other personal possessions.⁹⁴ It appears that "necessities of life" would parallel current exemption statutes⁹⁵ in an expanded form, and would of course be automatically exempt.

"Extraordinary situations"

The court also attempted to indicate the meaning of the term "extraordinary situations" which was so often referred to.

Although the kind of 'extraordinary situation' that may justify summary deprivation cannot be precisely defined, three decisions involving such situations cited by the majority in *Sniadach* give

87. *Id.* at 558.

88. *Id.* at 562-563.

89. *Id.* at 560.

90. *Id.* at 559.

91. *Id.* at 560.

92. *Id.*

93. *Id.*

94. *Id.* at 561.

95. CAL. CODE CIV. PROC. §690 *et seq.*

some indication of the type of countervailing interests that have been found sufficient in past cases. Both *Fahey v. Mallone*, [citation omitted] and *Coffin Bros. v. Bennet*, [citation omitted] entailed the validity of summary procedures permitting specialized governmental officers to react immediately to serious financial difficulties of a banking institution by seizing operational control of the bank's assets.

In *Ewing v. Mytinger & Casselberry, Inc.*, [citation omitted] the general public interest at stake was even more compelling than in the banking cases, for the challenged procedure permitted the federal Food and Drug Administrator summarily to seize misbranded drugs which the administrator had probable cause to believe endangered health or would mislead consumers.⁹⁶

The court identified a number of factors in the three cases which coalesced to justify the resort to summary procedures.⁹⁷ Then the court turned to quasi-in-rem jurisdiction as an "extraordinary situation."

. . . [T]he *Sniadach* court did cite, apparently with approval, one other case, *Ownbey v. Morgan*, [citation omitted] which involved neither extreme public urgency nor the built-in governmental protections noted above. In *Ownbey* the court found constitutional a state statute permitting the prejudgment attachment of property of a nonresident by a resident creditor.⁹⁸

The court felt that the "public interest served by such 'quasi-in-rem' attachment does not seem as strong as that involved in the cases discussed above . . ." but that it could be justified "under the notions of jurisdictional authority controlling at the time of the *Ownbey* decision" in light of the state's interest in providing an effective remedy against nonresidents.⁹⁹

96. 5 Cal. 3d 536, 553 (1971).

97. First, the seizures were undertaken to benefit the general public rather than to serve the interests of a private individual or a single class of individuals. Second, the procedures could only be initiated by an authorized governmental official, charged with a public responsibility, who might reasonably be expected to proceed only to serve the general welfare and not to secure private advantage. Third, in each case the nature of the risks required immediate action, and any delay occasioned by a prior hearing could potentially have caused serious harm to the public. Fourth, the property appropriated did not vitally touch an individual's life or livelihood. Finally, the 'takings' were conducted under narrowly drawn statutes that sanctioned the summary procedure only when great necessity actually arose.

Id. at 554.

98. *Id.*

99. Did *Randone* approve attachment as a means of securing quasi-in-rem jurisdiction in light of today's long-arm statutes? The Los Angeles County Council has taken the position that subdivisions 2 and 3 of §537 are still valid, permitting attachment for jurisdictional purposes. The California Law Revision Commission apparently feels that the entire statute has been struck down (*supra*, note 5). I have taken Professor Riesenfeld's position that it is still available when jurisdiction under the long-arm statutes is not. The question, however, cannot be considered as definitely settled.

The creditor in *Randone* advanced two further arguments. First, without summary attachment

. . . [C]reditors will find it more difficult and more expensive to collect their debts; consequently they will be obligated to raise credit rates and to terminate the extension of credit to certain higher credit risk individuals. Such a consequence, plaintiff argues, will work to the detriment of the public interest in liberalized credit.¹⁰⁰

The court rejected this argument because the assertion was unproven; because even if it were proven, there was no demonstration that such credit practices serve the "general public interest"; and finally because the assertion was implicitly rejected in *Sniadach*.¹⁰¹

The second argument advanced by the creditor was that prejudgment attachment may "be justified by the interest in preventing a debtor from absconding with, or concealing, all his property as soon as he is notified of a pending action."¹⁰² The court recognized that this was a very real danger, but rejected the argument since Section 537(1) was not limited to such an extraordinary situation, and, indeed, did not even require such an allegation.¹⁰³

In summary, the court indicated three "extraordinary situations" which might justify summary attachment.

1. Where the "general public interest" was threatened by immediate harm according to the factors quoted above.

2. For purposes of securing quasi-in-rem jurisdiction.

3. Where there is a threat of concealment of assets, or of the debtor's absconding.

It is interesting to note that these situations more closely parallel attachment statutes in other jurisdictions. "Foreign attachment" to secure quasi-in-rem jurisdiction is permissible. "Domestic attachment" is also allowable, but only in the narrower situation where fraudulent conduct on the part of the debtor justifies it. In fact, California's broad definition of "domestic attachment" on any contract appears to have been the main target of *Randone*.

"Taking"

Randone hints of an alternative to the approach outlined above of defining "necessities of life" and "extraordinary situations." This alternative approach would eliminate the "taking" aspect of attachment, thereby avoiding due process problems.

100. 5 Cal. 3d 536, 555 (1971).

101. *Id.*

102. *Id.* at 556.

103. *Id.* at 556, 557.

The extent to which procedural due process must be afforded [an individual] is influenced by the *extent to which he may be 'condemned to suffer grievous loss'* [citation omitted] *and depends upon whether the [individual's] interest in avoiding that loss outweighs the government interest in summary adjudication* (emphasis added).

Thus, the greater the deprivation an individual will suffer by the attachment of property, the greater the public urgency must be to justify the imposition of that loss on an individual before notice and a hearing, and the more substantial the procedural safeguards that must be afforded when such notice and hearing are required.¹⁰⁴

Summary attachment violates due process because there is a "taking" of the debtor's property. Justice Tobiner appears to have adopted the view of Justice Harlan in *Sniadach* that this "taking" consists of the deprivation, which cannot be characterized as *de minimis*, of the use of the debtor's property.¹⁰⁵ If this use were not interfered with, or were only minimally interfered with, due process objections could be avoided. As an example, the opinion hints in a footnote that the "taking" involved in attaching real estate might be *de minimis* since the deprivation of use is frequently "less severe."¹⁰⁶

Ownership is classically a collection of rights to use and enjoy property, to the exclusion of others.¹⁰⁷ Presumably included in this bundle of rights are the narrow rights to conceal and dispose of property. If a way could be found to temporarily curtail these rights, pending a hearing, it is certainly arguable that this interference, when properly justified by countervailing rights, could be characterized as a *de minimis* taking, thus avoiding due process problems.

A PROPOSAL FOR LEGISLATION

Any remedial legislation should be patterned after the statutes authorizing the issuance of temporary restraining orders.¹⁰⁸ In addition to authorizing attachment to secure quasi-in-rem jurisdiction, summary attachment could be authorized when the threat of concealment or absconding exists, pending a noticed hearing within a reasonably short time.

This procedure has several advantages:

1. It utilizes currently existing procedures already familiar to attorneys;

104. *Id.* at 558.

105. *Id.* at 552.

106. *Id.*

107. CAL. CIV. CODE §654; BLACK'S LAW DICTIONARY 1260 (rev. 4th ed. 1968).

108. CAL. CODE CIV. PROC. §527 *et seq.*

2. Because the debtor would merely be prevented from hypothecating or concealing his assets for a reasonably short period of time prior to the hearing, the interference with his use and thus the "taking" would be minimal;

3. The attachment would issue only upon a showing of a threat of removal or hypothecation. Thus, besides avoiding a "taking," it would issue in an "extraordinary situation;"

4. The debtor would have the opportunity at the hearing to show his interest in retaining the property free of attachment, while the creditor would be allowed to demonstrate the threat of removal, allowing the judge to refuse the attachment if it would work an undue hardship on the debtor;

5. Any attachment which might be issued after the hearing would avoid the due process objections of *Randone* because notice and an opportunity for a hearing would have been provided;

6. "Foreign attachment" would be allowed, but only when personal service was not available under the long-arm statute.

The proposal would bring California into line with most other jurisdictions, in that "domestic attachment" would be limited to situations involving fraudulent conduct. The procedure goes even further, however, by having only a limited effect on the use of the property because only certain rights would be interfered with and because of the noticed hearing provision.

It should be pointed out that if the "taking" in such a procedure is unconstitutional under *Randone*, then doubt is cast on the constitutionality of all temporary restraining orders affecting property. For each time an individual is prohibited from selling or otherwise using his property, his "use" is interfered with. It seems highly unlikely, however, that the precepts of the due process clause would be extended this far, for

. . . what is due process depends on circumstances. It varies with the subject matter and the necessities of the situation [citation]. Its content is a function of many variables, including the nature of the right affected . . .¹⁰⁹

Attachment could be dispensed with altogether, limiting creditors to the writ of execution as a post judgment remedy. This approach, however, fails to recognize the creditor's legitimate interest in obtaining security for his debt. This interest in preventing removal of a debtor's assets prior to judgment would seem sufficiently strong to justify

109. 5 Cal. 3d 536, 558 (1971).

protection if a constitutional means of doing so can be found.¹¹⁰ Moreover, abolishing attachment would leave the creditor virtually remediless in those situations involving nonresident debtors who cannot be served under the long-arm statutes.

For the sake of clarity, the suggested procedure is outlined in greater detail as follows:

1. At the time of the filing of the complaint or within some reasonable period thereafter, the creditor would be required to file a declaration showing "extraordinary circumstances which require special protection to a state or creditor interest." These circumstances would include threatened removal of assets from the jurisdiction, hypothecation of assets, and other fraudulent conduct on the part of the debtor.

2. The declaration would be presented to a judge of the court having jurisdiction of the action, and upon good cause shown, the judge would issue an order requiring the debtor to show cause why his property, describing it, should not be attached.

3. The hearing on the order to show cause should be set within five to ten days after its issuance. The hearing should be continued only at the request of the debtor and if the creditor is not ready to proceed, the order to show cause should be discharged.

4. Pending the hearing of the order to show cause the debtor should be restrained from hypothecating or concealing the property sought to be attached, and if the hearing on the order to show cause is continued at the request of the debtor, the restraining order should continue in force pending the hearing.

5. At the time of issuing the order to show cause the judge should require the creditor to post an undertaking which would protect the debtor against any damages, including attorney fees incurred by him by reason of the restraining order should the order to show cause be discharged.

6. If upon the hearing to show cause, the judge determines that it is a proper case for an attachment to issue, he may order the writ to issue upon the creditor posting an undertaking to protect the debtor from all damages, including attorney fees, incurred by him should the action be dismissed.

7. If upon the hearing to show cause, the judge determines that it is not a proper case for an attachment to issue, he shall order the order to show cause to be discharged and direct the clerk not to issue a writ of attachment until the further order of the court.

110. See 22 STAN. L. REV., *supra* note 50 at 158.

8. A specific section would authorize attachment *ex parte* where the debtor is a nonresident or has concealed himself within the jurisdiction, and cannot be reached under the long-arm statute.

9. Finally, current exemptions would be expanded and made automatic.

CONCLUSION

Several matters remain unresolved by *Randone*. As already indicated, it is not entirely clear that *Randone* has approved attachment to secure quasi-in-rem jurisdiction.¹¹¹

One further unresolved matter relates to actions for the price of a particular piece of property. Code of Civil Procedure Section 690.52 provides that property otherwise exempt from execution is not exempt from execution issued upon a judgment recovered for its price or from a judgment of foreclosure of a mortgage or other lien thereon. It is arguable that the interests involved when the property is attached in an action for its price are entirely different than those in an action in which any property is sought as security for a cause of action unrelated to the property. It seems likely, however, that the same due process protections would have to be extended, for California has held that they are required even when the seller retains a security interest in the property.¹¹²

Another closely related issue is whether the fact that the buyer obtained the property initially through fraud could be an "extraordinary situation" justifying prejudgment attachment. As already noted,¹¹³ some other states authorize attachment not only when the debtor threatens to abscond or conceal his property, but also when he obtained the property fraudulently. It would seem that the seller's basic interest of obtaining security for a possible money judgment is the same as in any other attachment situation. It can be argued, however, that the debtor's previous fraudulent conduct indicates the likelihood that he will again fraudulently dispose of the property. Moreover, if perishables are involved, the creditor's interest in converting the perishables into more durable assets during the pendency of the action seems sufficiently strong. In either case, there are valid arguments that an "extraordinary situation" exists.

It is imperative that a constitutional statute be enacted to protect a creditor's legitimate interest in obtaining security for debts owed him. In today's highly mobile society it is an easy matter for a debtor to

111. See note 99, *supra*.

112. See note 79, *supra* and accompanying text.

113. See text, *Attachment in Other Jurisdictions*, *supra*.

abscond or conceal property and avoid his just debts. Where such a threat exists, the creditor should be protected by a narrowly-drawn attachment statute. The California supreme court decision in *Randone* should not be interpreted to mean all prejudgment attachments are void.