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Attachment In California: Senate Bill 1048, The Interim Response To Randone

In 1971, California's long-standing prejudgment attachment procedures were held unconstitutional. The basis of this decision was that these remedies denied the debtor procedural due process by failing to provide him with notice of the attachment or an opportunity to contest it. The California Supreme Court also made it clear that the fact that attachment remedies reached necessities of life—without a hearing on the validity of the creditors claim—was an additional ground for holding it unconstitutional. The Legislature responded to the court's criticisms by enacting a revised attachment procedure. This comment analyzes the court's opinion and tests the constitutionality of the new legislation. The author concludes that these procedures may suffer certain constitutional infirmities.

In 1971 the Supreme Court of California in Randone v. Appellate Department held that the California prejudgment levy of attachment procedure under subdivision 1 of Section 537 of the Code of Civil Procedure—which permitted the initial attachment of a debtor's property without affording him either notice of the attachment or a prior hearing—violated procedural due process as guaranteed by the California and United States Constitutions. In 1972 the California Legislature enacted a new attachment bill designed to fill the void created by the Randone decision. These new statutes will expire on December 31, 1975. This comment will briefly explain the prejudgment attachment procedure prior to 1972 and indicate why they were held unconstitu-

1. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
2. S.B. 1048, Cal. Stats. 1972, c. 550. The new law becomes effective March 7, 1973. It adds the following sections to the Code of Civil Procedure: 537, 537.1, 537.2, 537.3, 538, 538.1 to 538.5, 541, 542.1 to 542.4, 542b, and 542c. It amends Section 537.5 and 539 and repeals former Sections 537, 538, 541, and 542b.
3. S.B. 1048, Cal. Stats. 1972, c. 550, §27. This legislation is given a termination date because the California Law Revision Commission is conducting a study to provide a more fundamental and thorough revision of the entire area of prejudgment attachment.
tional in Randone. 4 Next an analysis of the new legislation will be provided, including indications of changes in the prior law and problem areas in interpretation and application. Finally, the new legislation will be examined to determine if the constitutional requirements mandated by Randone have been satisfied.

Attachment Procedure Prior to Randone

Under prior California law, attachment was generally allowed in suits based on unsecured contracts, express or implied, for the direct payment of money. 5 If the defendant was a nonresident, or one who had departed from the state, or had concealed himself, or could not be found within the state the requirement that the contract be unsecured was dropped. 6 The remedy was also available against nonresidents in a suit for money damages arising from injury to person or property as a consequence of negligence, fraud, or other wrongful act. 7

To obtain the writ of attachment the plaintiff had to file an affidavit with the clerk of the court where the action was pending showing that his cause of action came within those enumerated in Code of Civil Procedure Section 537. 8 If the contract was both made and payable outside the state, the minimum amount claimed had to be $5,000. 9 In all other cases the minimum claim had to be at least $200. 10 The plaintiff was also required to file an undertaking 11 for one-half the amount of damages claimed but not less than $50. 12 The purpose of the undertaking was to reimburse the defendant for damages sustained by the attachment if the attachment was improperly issued or

5. Former CAL. CODE CIV. PROC. §537(1), enacted, CAL. STATS. 1970, c. 1523, §2, at 3058, repealed, CAL. STATS. 1972, c. 550, §1. Also under former Section 537(4) attachment was authorized in unlawful detainer; under former Section 537(5) it was authorized in an action by the state for the collection of taxes; and under former Section 537(6) in an action by the state to recover funds paid by police officers in the process of a narcotics investigation.
11. An undertaking is simply a promise or guarantee to pay a sum of money upon the happening of a certain event. Generally, in an attachment action a plaintiff is required to file an undertaking of two or more sufficient sureties. (CAL. CODE CIV. PROC. §1056), or, in lieu of sureties, a cash deposit. (CAL. CODE CIV. PROC. §1054a).
the plaintiff was unsuccessful in his suit. Once the clerk of the court received the affidavit, and the undertaking was filed, the writ of attachment was issued. The writ was directed to the sheriff of the county in which the defendant's property was located and required him to attach and keep a sufficient amount of the defendant's property to satisfy the plaintiff's claim. The property seized was held in custody by the sheriff. The defendant was denied all right to use the property, but did, however, retain title and could sell or assign the property subject to the attachment.

Issuance of the writ of attachment by the clerk was a ministerial act and no judicial officer reviewed the affidavit. The attachment could be issued without notice to the debtor if so requested by the plaintiff in writing at the time the complaint was filed. The debtor, however, could at any time, even before the attachment was actually levied, apply to the court in which the action was brought to have the attachment discharged if improperly or irregularly issued. The question of whether the attachment was improperly or irregularly issued was limited to whether there had been compliance with the specific conditions of Section 537 and the court did not concern itself with the validity of the plaintiff's claim. There was no hearing or other opportunity provided for the debtor to contest the validity of the plaintiff's claim prior to the attachment. If the writ of attachment was improperly or irregularly issued, as, for example, when the action was not in contract or when the debt was secured, the defendant could get the attach-

13. *Id.*
15. See 5 **CAL. JUR. 2d, Attachment and Garnishment** §136 (1967).
17. **CAL. CODE CIV. PROC.** §§537.5, enacted, **CAL. STATS.** 1959, c. 1073, §1, at 3133, amended, **CAL. STATS.** 1972, c. 550, §6.
18. **CAL. CODE CIV. PROC.** §556.
20. See text accompanying note 33 *supra*.
21. For a secured debt prior to 1971, a creditor could have invoked the provisional remedy of claim and delivery. In 1971, the California Supreme Court held the claim and delivery procedure unconstitutional in Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42, on the grounds that (1) it violated procedural due process by allowing a taking of property without prior notice or opportunity to be heard, and (2) the official intrusions authorized were unreasonable searches and seizures unless made with probable cause (referring to both probable cause to believe that plaintiff's claim to the property is valid and that the property to be seized was in a certain place). In response to the *Blair* decision, the 1972 California Legislature repealed the procedures held invalid and enacted a modified claim and delivery remedy. (**CAL. STATS.** 1972, c. 855). These new provisions went into effect immediately as Code of Civil Procedure Sections 509-521. These new statutes, like the new attachment statutes are operative only until December 31, 1975 (§521, see also note 3 *supra*.) Under the new procedure the plaintiff, at any time after the commencement of an action to recover possession of personal property (§509), may make a showing to the court either by verified complaint or affidavit of his entitlement to the possession of such property. (§510(a)). If the court is satisfied that a valid claim exists it issues to the defendant an order to show cause why the property should not be taken
The defendant could also get his property released from the attachment if he filed an undertaking of at least two sufficient sureties, which had to first be approved by the judge of the court issuing the writ. Also, by filing such an undertaking the defendant could have prevented the attachment altogether, but since a plaintiff usually requested that the writ issue without notice pursuant to Section 537.5 there was little opportunity for a defendant to file the undertaking prior to attachment.

Initially, any property of the debtor except wages could be attached. The law did provide that various types of property were exempt from attachment, but an exemption could only be claimed after levy on the property had occurred. If judgment in the action was awarded to the plaintiff, the property attached could be sold to satisfy the judgment.

**The Randone Decision**

In *Randone v. Appellate Department* the California Supreme Court struck down as unconstitutional on its face Code of Civil Procedure Section 537(1). The court examined the operation of California's attachment procedure, and sharply criticized its integrity and inadequacy. The court pointed out that the procedure was not limited in

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23. CAL. CODE Civ. PROC. 8855, 555.
24. CAL. CODE Civ. PROC. 88540.
27. CAL. CODE Civ. PROC. 88690.50(a).
29. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
its operation to specific categories of property, but allowed the creditor to select whichever assets of the defendant he pleased.30 A creditor could thereby exercise his choice so as to place the debtor under severe deprivation to gain leverage to compel a settlement.31 The court also noted that the creditor did not have to prove or even allege any special circumstances showing the need for an immediate attachment.32 The attachment was automatically issued without review of the affidavit by a judicial officer. Neither was notice of the attachment nor opportunity to contest the attachment afforded to the debtor.33 The court further indicated that the exemption statutes did not relieve the hardship of attachment because the debtor could be forced to wait as long as 25 days before obtaining the release of his property.34

The court then turned to the United States Supreme Court's decision in *Sniadach v. Family Finance Corp.*35 In that case, the United States Supreme Court invalidated a Wisconsin prejudgment wage garnishment statute on the grounds that it violated a debtor's right to procedural due process by allowing the taking of his property without affording him prior notice and hearing. The California Supreme Court stated that the constitutional principles underlying *Sniadach* were not limited to wage garnishments. In so holding, the court cited *Blair v. Pitchess*,36 where it had previously construed the *Sniadach* rationale to apply to California's claim and delivery law.37 The court also cited two cases decided by the United States Supreme Court subsequent to *Sniadach* which held that the due process requirements of *Sniadach* extended to any situation in which a defendant was subjected by force of law to a deprivation of any significant property interest.38

In the *Randone* opinion, the California court concluded that the balancing test of due process which was used in *Goldberg v. Kelly*39 also applied in the context of prejudgment attachments. To determine if due process has been satisfied the court will balance the harm to the individual against the interest of the state or creditor:

[T]he greater the deprivation an individual will suffer by the attachment of property, the greater the public urgency must be to

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30. 5 Cal. 3d at 544, 488 P.2d at 17, 96 Cal. Rptr. at 713.
31. 5 Cal. 3d at 561, 488 P.2d at 30, 96 Cal. Rptr. at 726.
32. 5 Cal. 3d at 544, 488 P.2d at 17, 96 Cal. Rptr. at 713.
33. *Id.*
34. 5 Cal. 3d at 546, 488 P.2d at 19, 96 Cal. Rptr. at 715.
36. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).
37. See note 21 supra.
39. 397 U.S. 254, 262-63 (1970). The *Goldberg* case held that the extent to which due process must be afforded a welfare recipient before termination of benefits is influenced by the amount of loss and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.
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.\(^{40}\)

Relying on this balancing test, the \textit{Sniadach} decision, and the recent line of cases\(^{41}\) subsequent to \textit{Sniadach}, the court in \textit{Randone} arrived at two constitutional principles, each of which formed an independent basis for its holding:

(1) No one can be deprived of any significant property interest without notice and an opportunity to be heard \textit{except in extraordinary circumstances};\(^{42}\)

(2) No one may ever be deprived of necessities of life before a hearing on the validity of the creditor’s claim \textit{even in extraordinary circumstances}.\(^{43}\)

Applying these constitutional principles the court found Section 537(1) deficient on both grounds. The court held that the attachment procedure deprived the owner of a significant property interest—the use of his property—\(^{44}\) even though he retained title while the attachment was in effect. The court concluded that Section 537(1) was unconstitutional because this \textit{taking}, without notice and hearing, was sweepingly overbroad and not confined to extraordinary situations:

In sum, the instant attachment provision authorizes the deprivation of a debtor’s property without prior notice or hearing; it has not been narrowly drawn to confine such deprivation to those “extraordinary circumstances” in which a state or creditor interest of overriding significance might justify summary procedures. As such, we find that section 537, subdivision 1, constitutes a denial of procedural due process and violates \ldots the California \ldots and the United States Constitution[s].\(^{45}\)

The court also made it clear that the fact that Section 537(1) reached necessities of life was an additional ground for holding it unconstitutional:

\begin{itemize}
  \item \(^{40}\) 5 Cal. 3d at 558, 488 P.2d at 28, 96 Cal. Rptr. at 724.
  \item \(^{42}\) 5 Cal. 3d at 541, 488 P.2d at 15, 96 Cal. Rptr. at 711.
  \item \(^{43}\) 5 Cal. 3d at 562, 488 P.2d at 30, 96 Cal. Rptr. 726. The court made it clear that it meant the actual as opposed to the probable validity of the creditor’s claim. (Id. at 563, 488 P.2d at 31, 96 Cal. Rptr. at 726). The court, therefore, by requiring a hearing on the validity of the debt appears to have judicially exempted all necessities from prejudgment attachment.
  \item \(^{44}\) Prior cases had reasoned that prejudgment remedies did not amount to a “taking” of property since the attachment or garnishment was only a temporary measure. See McInnes v. McKay, 127 Me. 110, 116, 141 A. 699, 702 (1928), \textit{aff’d per curiam}, 279 U.S. 820 (1929).
  \item \(^{45}\) 5 Cal. 3d at 557, 488 P.2d at 27, 96 Cal. Rptr. at 723.
\end{itemize}
The presently broadly phrased attachment provision covers an enormous variety of property . . . sweeping widely to permit prejudgment attachment of non-necessities and necessities alike. This overbreadth constitutes a further constitutional deficiency.\textsuperscript{46}

\textit{Senate Bill 1048: The Interim Response to Randone}

The main purpose of Senate Bill 1048 is to restore the attachment remedy in commercial situations in which one business has furnished goods on credit or loaned money to another business.\textsuperscript{47} The court in considering the facts of \textit{Randone} was concerned with the plight of the "poor consumer" in rendering its decision and these commercial cases were not considered.\textsuperscript{48} The court, however, held that it was necessary to declare Section 537(1) unconstitutional \textit{in toto} indicating that it was not the responsibility of the court to revise the statute to save it where it could be constitutionally applied.\textsuperscript{49}

The \textit{Randone} decision resulted in creditors of businesses having no effective remedy to prevent the dissipation of assets or to collect their debts.\textsuperscript{50} They could only wait until they received a judgment and hope that there would be sufficient assets remaining to satisfy it. Senate Bill 1048 was introduced to provide an interim attachment remedy for commercial creditors and modifies the former procedure in an attempt to meet the specific objections in \textit{Randone}.\textsuperscript{51}

\textbf{A. Actions In Which Attachment Is Available}

The new legislation provides for prejudgment attachment against corporations, partnerships, or individuals engaged in a trade or busi-

\begin{footnotesize}
\begin{enumerate}
\item[] 46. 5 Cal. 3d at 558, 488 P.2d at 27, 96 Cal. Rptr. at 723.
\item[] 47. See Memorandum in Support of S.B. 1048 by Harold Marsh, Jr., 1-4. (Mr. Marsh provided the initial draft of S.B. 1048 which was introduced into the Legislature by Senators Zenovich and Coombs).
\item[] 48. \textit{Id.} at 1.
\item[] 49. 5 Cal. 3d at 562, 488 P.2d at 31-32, 96 Cal. Rptr. at 727-28.
\item[] 50. In responding to a questionnaire on attachment prepared by the California Law Revision Commission, many attorneys and businessmen indicated that procedures in lieu of attachment were generally unsatisfactory. Equitable relief such as a preliminary injunction was said to be too costly, too time consuming, and too cumbersome. It was also remarked that the courts sometimes favor a defendant too much under such a procedure. Obtaining a receiver was also said to be expensive and too slow by many of those who have used this procedure. Efforts to get summary judgment were also found ineffective by many in that it was usually denied except in unusual circumstances, the standards of evidence and proof required were high, and it was easy for the defendant to delay by a general denial or by raising issues which did not exist. A confession of judgment was found useful by almost half of those having tried it. The procedure was, however, almost as expensive as a suit, and others disliked using this harsh remedy. It was also difficult to get the debtor to agree to a confession of judgment, and if the confession of judgment was contained in an adhesion contract the court many times would relieve the debtor. \textit{CALIFORNIA LAW REVISION COMMISSION, Memorandum 72-69—Prejudgment Attachment (Review of Responses to Questionnaire).}
\item[] 51. Memorandum in Support of S.B. 1048, supra note 47 at 3.
\end{enumerate}
\end{footnotesize}
ness when the action is based on money loaned, a negotiable instrument, the sale, lease, or licensed use of real or personal property, or for services rendered. Also, the requirement that the claim of the plaintiff be unsecured is continued from the prior law. It is further required that the action be for a liquidated sum of money and that the total sum claimed be at least $500, exclusive of interest, attorney's fees and costs. Prior to 1972 the attachment was authorized only if the amount of the claim was at least $200. There was also no requirement that the action be for a liquidated sum under prior law. The purpose of this change is to exclude attachment in situations in which the defendant has a legitimate argument regarding the extent of the obligation.

Attachment is also available if the defendant is a nonresident (including any foreign corporation or partnership not qualified to do business in the state), if the defendant cannot be found within the state after the plaintiff has used due diligence to locate him, or if the defendant conceals himself to avoid service of summons. This is similar to former Code of Civil Procedure Sections 537(2) and 537(3), except that now foreign corporations and partnerships complying with California corporation and partnership law are treated as domestic corporations or partnerships.

As to the defendants specified in Section 537.2(d), nonresidents etc., discussed above, the $500 minimum limit on the sum claimed also applies, but the amount claimed does not have to be a liquidated sum of money, nor does the claim have to be unsecured. Also, the action can be based on any type of claim for the recovery of money. Under former Sections 537(2) and 537(3) the action could be based

52. CAL. CODE CIV. PROC. §§537.2(a)-(c), enacted, CAL. STATS. 1972, c. 550, §4.
53. CAL. CODE CIV. PROC. §537.1(a), enacted, CAL. STATS. 1972, c. 550, §3.
54. Id. See discussion of claim and delivery remedy for secured debts, note 21 supra.
55. Id. This section further provides that interest, attorney's fees, or costs claimed by the plaintiff in addition to the principal amount of the debt shall not make the claim unliquidated. (A liquidated sum of money is an amount fixed by agreement of the parties, or by operation of law, or one which can be ascertained with reasonable certainty). BLACK'S LAW DICTIONARY 1079 (rev. 4th ed. 1968).
56. CAL. CODE CIV. PROC. §§537.1, enacted, CAL. STATS. 1972, c. 550, §3.
57. CAL. CODE CIV. PROC. §538(4), repealed, CAL. STATS. 1972, c. 550, §7. Also, under prior law the minimum claim had to be $5000 if the contract was both made and payable outside the state. CAL. CODE CIV. PROC. §537(1)(b), repealed, CAL. STATS. 1972, c. 550, §1.
60. See text accompanying notes 6-7 supra.
61. CAL. CODE CIV. PROC. §537.1, enacted, CAL. STATS. 1972, c. 550, §3.
62. CAL. CODE CIV. PROC. §537.1(a), enacted, CAL. STATS. 1972, c. 550, §3.
63. CAL. CODE CIV. PROC. §537.1(b), enacted, CAL. STATS. 1972, c. 550, §3.
on any contract or any action for damages based on negligence, fraud, or other wrongful act.

B. Property Subject to Attachment and Levy Procedures

The new law provides that any of the following property that is not otherwise exempt from execution may be attached: all property of a corporation or partnership; and all property of any defendant who is either a nonresident, or one who cannot be found within the state, or one who conceals himself to avoid service of summons.

With respect to individuals engaged in a trade or business, the writ of attachment is limited to the following types of property (if not exempt from execution): (1) inventory; (2) accounts, contract rights, chattel paper, and general intangibles consisting of any right to the payment of money, except where the principal sum is less than $150 for any individual claim; (3) bank and deposit accounts in excess of an aggregate total of $1000; (4) securities; (5) equipment, other than a motor vehicle or a boat required to be registered; and (6) real estate, including any leasehold estate with an unexpired term of one year or more.

It is further provided that an individual engaged in a trade or business may apply at the hearing or any time thereafter to have the court exclude from levy (or release) any of the above property found necessary for the support of the defendant and his family. Securities are to be levied upon pursuant to Section 8101 et seq. of the Commercial Code. Equipment is to be levied upon by filing a notice of lien with the Secretary of State. The apparent purpose behind this method of attaching equipment is to avoid depriving the defendant of such equipment during the pendency of the lawsuit since there is not the same degree of danger that equipment will be removed, concealed, or simply dissipated as there is with respect to inventory, receivables.

64. CAL. CODE CIV. PROC. §§690.1-690.29 list property exempt from execution.
65. CAL. CODE CIV. PROC. §537.3(a), enacted, CAL. STATS. 1972, c. 550, §5.
66. CAL. CODE CIV. PROC. §537.3(c), enacted, CAL. STATS. 1972, c. 550, §5.
67. CAL. CODE CIV. PROC. §537.3(b), enacted, CAL. STATS. 1972, c. 550, §5. It should be noted that Section 537.3 of the new law (which specifies the types of property of an individual engaged in a trade or business that may be attached) also provides that terms used in that subdivision which are defined in the Commercial Code shall have the meanings therein specified. Commercial Code Section 9109(3) specifically provides that inventory and equipment does not include farm products. Farm products are defined as crops, livestock, or supplies used in farming operations and also as the products of such crops or livestock in their unmanufactured state. Thus, if the defendant is an individual engaged in farming crops or raising livestock much of his property will not be subject to attachment. Also, for individuals engaged in a trade or business some negotiable instruments may not always be subject to the levy of attachment since under Commercial Code Section 9106 “general intangibles” does not include “instruments.”
68. CAL. CODE CIV. PROC. §537.3(b), enacted, CAL. STATS. 1972, c. 550, §16.
69. CAL. CODE CIV. PROC. §541, enacted, CAL. STATS. 1972, c. 550, §16.
70. CAL. CODE CIV. PROC. §542.1, enacted, CAL. STATS. 1972, c. 550, §17.
and bank accounts. The present method of levy on real property, personal property, bank accounts, commercial paper, and other credits is retained.\textsuperscript{71}

C. Procedure For Obtaining A Writ Of Attachment

(1) Affidavit

To obtain the writ of attachment the plaintiff must file with the court in which the action is pending an affidavit based upon the personal knowledge of the persons subscribing thereto. The affidavit must show: (1) that the action is one in which an attachment is authorized under Sections 537 to 537.3;\textsuperscript{72} (2) that the indebtedness claimed is due and presently owing; (3) that the attachment is not sought to delay, hinder, or defraud other creditors of the defendant; and (4) that the plaintiff has no information or belief that the defendant has filed for bankruptcy or made a general assignment for the benefit of creditors.\textsuperscript{73} There was no provision concerning a general assignment to creditors under prior law.

(2) Undertaking

As under the former procedure, the plaintiff must file an undertaking with two or more sureties to insure that if the defendant recovers judgment the plaintiff will be able to pay all costs and damages.\textsuperscript{74} The damages recoverable by the defendant include all damages proximately caused by the temporary restraining order or the levy of attachment up to the amount of the undertaking.\textsuperscript{75} The amount of the initial undertaking is to be one-half of the principal amount of the plaintiff's claim excluding attorney's fees.\textsuperscript{76} The limitation that the undertaking

\textsuperscript{71} CAL. CODE CIV. PROC. §542(1) provides that real property shall be attached by recording a copy of the writ in the county where the property is located. Personal property is attached by taking it into custody if capable of manual delivery, §542(3). Credits and judgments owing to the defendant are levied upon by leaving a copy of the writ with the persons owing such debts, and bank and other deposit accounts are levied upon by leaving a copy of the writ with the bank manager, §542(5). There are also provisions for utilizing a keeper when the assets of a going business are attached, §542(3).

\textsuperscript{72} These sections specify the type of claim upon which an action may be based, the minimum amount of the claim, the proper type of defendant, and the property subject to attachment. Actions in which attachment is available are discussed in text accompanying notes 52-63 supra.

\textsuperscript{73} CAL. CODE CIV. PROC. §§538(a)-(d), enacted CAL. STATS. 1972, c. 550, §8.

\textsuperscript{74} The defendant still may file an undertaking of one corporate surety or a cash deposit in lieu of sureties. See note 13 supra.

\textsuperscript{75} The amount of the undertaking may now be increased to any amount necessary to protect the defendant. (See text accompanying notes 80-81 infra.) Since the defendant's recovery is limited to the amount of the undertaking it is important that he make a motion to have the undertaking increased if he believes that it will be insufficient to cover his damages. It is, however, only the surety's liability which is limited by the amount of the undertaking and not the plaintiff's. CAL. CODE CIV. PROC. §917.1, as amended, CAL. STATS. 1972, c. 546, §1.

\textsuperscript{76} CAL. CODE CIV. PROC. §539(a), as amended, CAL. STATS. 1972, c. 550, §14.
be not less than $50\textsuperscript{77} is removed. The court, however, must be satis-
fied that the defendant is adequately protected.\textsuperscript{78}

The defendant may object both to the character of the sureties and
the amount posted. If the defendant fails to object to the sureties\textsuperscript{79}
within five days after the levy of attachment he is deemed to have
waived all objection to them. The defendant may, however, object
to the dollar amount of the undertaking at any time before final judg-
ment is entered and there is no limit on the amount to which the under-
taking may be increased.\textsuperscript{80} Under prior law the amount of the under-
taking could not be increased to an amount that would exceed the
amount for which the writ had been issued.\textsuperscript{81} The new law permits
the court to require an undertaking in whatever amount is necessary
to give full protection to the defendant should he prevail in the ac-
tion. In this regard it should be noted that the liability of any surety
furnishing a bond may be enforced without the necessity of an inde-
pendent action.\textsuperscript{82} The statute oflimitations on a motion to enforce
liability on an undertaking is one year after the final judgment has
been entered in the action in which the undertaking was given and the
time for appeal has expired.\textsuperscript{83}

(3) The Temporary Restraining Order

Once the court is satisfied that the affidavit has established a prima
facie case, and the undertaking is filed, it shall issue, without prior
notice to the defendant, a temporary restraining order and notice of a
hearing.\textsuperscript{84} The temporary restraining order restrains the defendant
from the following: (1) transferring, other than in the ordinary course
of business, any property in this state that is subject to the writ of at-
tachment; (2) issuing checks in excess of an aggregate of $1000 which
would reduce defendant's bank balances to less than the creditor's
claim; (3) opening new bank accounts; and (4) paying antecedent
debts.\textsuperscript{85}

\textsuperscript{77} CAL. CODE CIV. PROC. §539, enacted, CAL. STATS. 1967, c. 292, §2 at 1475,

\textsuperscript{78} CAL. CODE CIV. PROC. §539(a), as amended, CAL. STATS. 1972, c. 550, §14.

\textsuperscript{79} The qualification of sureties are set out in CAL. CODE CIV. PROC. §§1056,
1057.

\textsuperscript{80} CAL. CODE CIV. PROC. §539(a), as amended, CAL. STATS. 1972, c. 550,
§14.

\textsuperscript{81} CAL. CODE CIV. PROC. §539, enacted, CAL. STATS. 1967, c. 292, §2, at 1475,

\textsuperscript{82} CAL. CODE CIV. PROC. §539(b), as amended, CAL. STATS. 1972, c. 550, §14.

\textsuperscript{83} CAL. CODE CIV. PROC. §1058a, enacted, CAL. STATS. 1972, c. 391, §2.

\textsuperscript{84} CAL. CODE CIV. PROC. §538.1, enacted, CAL. STATS. 1972, c. 550, §9. It
should be noted that under this section banks do not have to observe the temporary
restraining order.

\textsuperscript{85} CAL. CODE CIV. PROC. §538.3, enacted, CAL. STATS. 1972, c. 550, §11.
The defendant, however, is expressly permitted to meet any regular payroll not exceeding $300 per week per employee; to make C.O.D. payments for business goods; to pay taxes where a penalty will accrue for delay; and to pay legal fees in connection with the attachment action.\textsuperscript{86} The temporary restraining order expires 30 days after its service upon the defendant unless it is earlier terminated by the issuance of the writ of attachment, or by the defendant posting an undertaking pursuant to Code of Civil Procedure Section 555, or by the court vacating it upon an \textit{ex parte} showing by the defendant that sufficient property will be available to satisfy the creditor’s claim.\textsuperscript{87}

\textbf{(4) The Hearing}

A hearing is set for seven business days after service of notice upon the defendant or on the first regular date that law and motion matters are heard thereafter, whichever occurs later.\textsuperscript{88} As pointed out in \textit{Randone}, prior law did not provide for a hearing. At least 24 hours before the hearing each party is required to serve upon the other any affidavits he intends to introduce unless the court waives this requirement upon a showing of good cause. Oral evidence may also be introduced at the hearing by either party.\textsuperscript{89}

If the defendant does not appear in person or through counsel, the court must issue the writ of attachment without further review. If the defendant does appear at the hearing, the plaintiff must establish the probable validity of his claim and that there is not a reasonable probability that the defendant can assert a successful defense. Once the court is satisfied of this, a writ of attachment shall immediately issue.\textsuperscript{90} It is further provided that the court may direct that other assets of the defendant be levied upon if those to be attached exceed the amount of the plaintiff’s claim.\textsuperscript{91}

\textbf{D. Ex Parte Attachment}

In the following situations the court may issue the writ of attachment without notice of hearing afforded to the defendant: (1) When a bulk sales notice has been recorded and published, or when an escrow has been opened regarding the defendant’s sale of a liquor license;

\textsuperscript{86} \textsc{Cal. Code Civ. Proc.} \textsection{538.3(a)-(d), \textit{enacted}, Cal. Stats. 1972, c. 550, \textsection{11.}}
\textsuperscript{87} \textsc{Id.}
\textsuperscript{88} \textsc{Id.}
\textsuperscript{89} \textsc{Id.}
\textsuperscript{90} \textsc{Id.}
\textsuperscript{91} \textsc{Id.}
(2) When the plaintiff shows the court that there is a substantial danger that the defendant will transfer (other than in the ordinary course of business), remove, or conceal the property; (3) When the notice of hearing cannot be served within ten days after the use of reasonable diligence and the court is satisfied that the defendant has departed from the state or has concealed himself to avoid service; or, (4) When the defendant is a nonresident (including unqualified corporations and partnerships), or cannot be found within the state, or conceals himself to avoid service.92

A defendant described in (4) above, who is not a corporation, partnership, or individual engaged in a trade or business, may have the attachment automatically lifted if he files a general appearance in the action. Also, any defendant described in (4) above, even if a corporation, partnership, or individual engaged in a trade or business, may have the attachment discharged if the claim upon which the attachment is based is not authorized under Section 537.1(a).93 This appears to limit the use of the writ of attachment against such defendants to the function of securing jurisdiction. A defendant whose property is levied ex parte, but whose property would have been subject to the writ of attachment under normal procedure cannot have the attachment lifted by filing a general appearance. This defendant may, however, request a hearing at any time upon notice to the plaintiff.94

E. The Lien Of Attachment

The issuance of the notice of hearing and the temporary restraining order creates a lien on all the debtor's personal property subject to the levy of attachment. The lien, however, would be subordinate to the claims of a bona fide purchaser, encumbrancer, or transferee in the ordinary course of business. The lien terminates if the writ of attachment is not issued within thirty days after the service of notice for hearing, or if the defendant files for bankruptcy or makes a general assignment to creditors prior to the levy of the writ of attachment.95 Once the levy of attachment takes place,96 the lien which arose from

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93. Cal. Code Civ. Proc. §538.5(d), enacted, Cal. Stats. 1972, c. 550, §13. Under §537.1(a) a claim may be based upon money loaned, a negotiable instrument, the sale, lease, or licensed use of real or personal property or for services rendered.
94. Id.
96. For certain property, such as equipment, the levy of attachment actually takes place by filing a notice with the Secretary of State. (Cal. Code Civ. Proc. §542.1, enacted, Cal. Stats. 1972, c. 550, §17).
the issuance of the temporary restraining order and notice of hearing is perfected on the property attached, and becomes valid against any subsequent bona fide purchaser or encumbrancer. When the writ of attachment is issued *ex parte* a lien is created at that time and is valid against all third persons.97

Depending on the type of property attached, there are different periods for the duration of the lien, and also different procedures for extending the lien. A lien on equipment lasts for five years from the date of filing unless previously terminated by disposition of the case.98 When more than four years and six months has elapsed after filing the notice of the attachment lien, and there is no final judgment in the action, the plaintiff may apply for an extension. If the extension is granted, the effectiveness of the original lien is extended for another five year period, and, if necessary, can be renewed again in the same manner.99

A lien of attachment on personal property (other than equipment) expires after one year from the date of levy unless a notice of readiness for trial is filed (or a judgment has been entered). The court may, however, upon motion of the plaintiff made between ten and sixty days before the expiration of the one year, extend the duration of the attachment for an additional period or periods if satisfied that the delay in trial is due to the fault of the defendant.100 Under prior law the duration of a lien of attachment on personal property was three years and could be extended for one year periods, but not to exceed two years.101 A lien of attachment on real property is for three years. The plaintiff may move to have the lien extended for a period of up to two years, and the lien may be extended in this manner from time to time if necessary.102

**Problem Areas**

The new law purports to limit attachment to commercial situations (except when Section 537.2(d) is involved).102 Yet, for an individual engaged in a trade or business, the law does not limit the type of claim upon which the attachment action may be based to debts arising

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98. CAL. CODE CIV. PROC. §542.2(c), enacted, CAL. STATS. 1972, c. 550, §17.1.
99. CAL. CODE CIV. PROC. §542.4, enacted, CAL. STATS. 1972, c. 550, §17.3.
100. CAL. CODE CIV. PROC. §542c, enacted, CAL. STATS. 1972, c. 550, §20.
102. CAL. CODE CIV. PROC. §542a. The procedures for the length and extension of the lien on real property are not part of the new legislation.
103. See Memorandum in Support of S.B. 1048, supra note 47. Included under §537.2(d) are nonresidents, those who cannot be found within the state, and those who conceal themselves to avoid service of summons.
solely out of the business activities of such individual. His property, for example, may be subject to attachment for a debt arising from medical services furnished to him or for the purchase of a consumer good such as a car. As an individual engaged in a trade or business he is a proper defendant under Section 537.2(c) and an action based on a claim for services rendered or the sale of personal property is proper under Sections 537.1(a)(3) and 537.1(a)(4). The operation of the new law in this manner leads to a situation in which an individual in business for himself may have his property attached for a doctor bill or other personal debt while the ordinary working individual is not subject to attachment for the same type of debt. This seems discriminatory against individuals engaged in a trade or business and may raise an equal protection problem.\textsuperscript{104}

A similar inconsistency exists in that not only may an individual engaged in a trade or business be subject to attachment for a nonbusiness debt, but he may also have nonbusiness property attached. Although the property of an individual engaged in a trade or business subject to attachment is limited under Section 537.3(b)\textsuperscript{105} to certain assets, there is no requirement that these assets be used or held in connection with the business. For example, securities personally held including those acquired before the defendant entered the business could be attached, or a personal bank account kept separate from the business bank account, or personal debts owing to the defendant could also be attached. Perhaps this is justified since unlimited liability is a disadvantage of doing business in this manner. Yet, the result still seems inconsistent with the purpose of the bill by tending toward the possibility of working a hardship on an individual which was sought to be avoided by limiting attachment to commercial cases.

The new law additionally does not provide a definition of "individuals engaged in a trade or business." It may not, therefore, be clear as to what facts are necessary to create the status of one engaged in a trade or business.\textsuperscript{106} Would this term include, for example, a

\textsuperscript{104} In areas of economic regulation a state is only required to show some rational basis to sustain a classification that is discriminatory. See Dandridge v. Williams, 397 U.S. 471 (1970). It may, therefore, be difficult to find a violation of the equal protection standards adhered to by the courts. The courts may also narrowly construe the bill, in light of its main purpose, so that it does not apply to nonbusiness debts. This construction would also reflect the general policy of the courts to uphold a statute as constitutionally valid whenever possible.

\textsuperscript{105} See text accompanying note 67 supra.

\textsuperscript{106} The words "trade" and "business" appear to have no definite legal meaning. The terms are generally not restricted to commercial enterprises nor to an individual's main occupation. For example, under Rev. & Tax. Code §6013 the term business includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. Under Rev. & Tax. Code §17020 the term "trade or business" includes the performance of the functions of a public office. Under
housewife making stuffed animals for sale at local flea markets? Could the “Avon lady” have her accounts attached for a doctor bill? The determination of whether or not a person is engaged in a trade or business could be crucial; especially since a creditor may obtain a writ of attachment for debts of a personal nature once it is established that an individual is engaged in a trade or business.

Section 538.1 of the new law provides that “any bank” shall not have to observe the terms of the temporary restraining order. The term “any bank” is broad and it is uncertain whether savings and loan associations would be included.

Code of Civil Procedure Section 540 (not part of the new legislation) provides that the value of the property attached must not exceed the amount of the plaintiff’s claim stated in his complaint. Due to the possibility of a defendant having property which is exempt from execution and property that is classified as a necessity free from attachment a situation could arise in which the only item of property available for attachment exceeds the amount claimed by the plaintiff. If the plaintiff were to attach this piece of property which exceeded in value the amount of his claim, the defendant could under Code of Civil Procedure Section 556 have his property released from the attachment on the grounds that the writ was improperly issued. Case law has established that when the writ issues for a greater amount than stated in the affidavit, it is sufficient grounds to have the attachment discharged as improperly issued. Further, an attachment greatly in excess of the amount stated in the affidavit could subject the plaintiff to an abuse of process action.

Under Code of Civil Procedure Section 542 (not part of the new legislation) the sheriff, constable, or marshall, upon receipt of written instructions from the plaintiff, must proceed to levy the attachment without delay. In Blair v. Pitchess it was held unconstitutional for

Code of Civ. Proc. §1953e the term "business" includes every kind of business, profession, occupation, or calling whether carried on for profit or not. In fact one of the reasons that Code of Civ. Proc. §388 was amended (CAL. STATS. 1967, c. 1324, §1, at 3150) was that the term "business" constituted little if any limitation on the right to sue. This section had formerly provided that any persons transacting "business" under a common name could be sued under that name. See CAL. LAW REV. COMM’N comment, CAL. CODE CIV. PROC. §388 (West Supp. 1972).


108. White Lighting Co. v. Wolfson, 68 Cal. 2d 336, 438 P.2d 345, 66 Cal. Rptr. 647 (1968). There are presently no statutory remedies for wrongful attachment. The common law remedies are malicious prosecution and abuse of process. For a more detailed discussion see 2 WITKIN, CALIFORNIA PROCEDURE, Provisional Remedies §214 (2d ed. 1970).

109. 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). See also discussion in note 21 supra.
a sheriff to intrude into private places without probable cause to believe that the property to be seized was at a specified location. Under present procedure there is no requirement that the plaintiff produce evidence of where the property sought to be attached is located. The plaintiff in his instructions to the sheriff must only (a) describe the property, and (b) if it is real property or growing crops, give the name of the record owner of the land. To prevent a reluctance on the part of the sheriff to act in light of Blair, it would seem advisable that a plaintiff now provide the sheriff with evidence of where the property is located.

Are The Constitutional Requirements of Randone Satisfied?

A. The Requirement of Notice and Hearing

The new law does provide for a noticed hearing, thereby affording the defendant a chance to contest the validity of the plaintiff's claim. Even in situations treated as extraordinary, where the writ of attachment is issued ex parte, there are provisions allowing for the writ of attachment to be discharged if the defendant complies with the requirement in Section 538.5(d). At the hearing the plaintiff must produce evidence to establish a reasonable probability that he will be successful in his suit and the defendant may bring forth evidence of any possible defenses he may have. These provisions appear to satisfy the Randone requirement that adequate notice and opportunity to be heard be given where the writ of attachment is not issued under extraordinary circumstances.

Since, however, the deprivation of use was held to be a "taking" of a significant property interest in Randone, doubt is cast upon the validity of the issuance of the temporary restraining order under Section 538.1. A recent California case has held that a temporary restraining order could be granted without notice and a hearing only upon a

112. CAL. CODE CV. PROC. §538.5(d), enacted, CAL. STATS. 1972, c. 550, §13. Under this subdivision a defendant who is a nonresident, or who cannot be found after due diligence, or who conceals himself to avoid service, but who is not a corporation, partnership or an individual engaged in a trade or business may cause the writ of attachment to be discharged if he files a general appearance. A defendant who is a corporation, partnership or individual engaged in business may cause the writ of attachment to be discharged by filing a general appearance if the claim upon which the attachment is based is not authorized under §537.1(a). This section allows an attachment only when the claim is based on money loaned, a negotiable instrument, the sale, lease, or licensed use of real or personal property or for services rendered. If the type of claim is proper under §537.1(a) the defendant may request a hearing at any time upon notice to the plaintiff.
showing that great or irreparable injury would result to the applicant before the matter could be heard on notice. The court stated that these requirements satisfied the dictates of Randone. Section 538.1, however, provides for the automatic issuance of the temporary restraining order without notice once the affidavit shows that the action is a proper one for a writ of attachment. There is no requirement that the plaintiff show such relief is necessary to avoid great or irreparable harm. It might be argued, however, that the restraining order, due to its limited scope under the provisions of Section 538.3, is of such de minimus effect that due process is not violated. The court in Randone stated:

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

It would seem difficult for the court to find that the Legislature intended that upon the affidavit establishing a prima facie case there would be an automatic presumption of irreparable harm since the facts in the affidavit only show that the action is proper for the attachment and not that it is necessary in the particular case. Perhaps this problem may be avoided if, in his affidavit, the plaintiff alleges circumstances showing that he would suffer irreparable harm if there was no restraining order issued while the hearing is pending.

B. Ex Parte Attachment in Extraordinary Circumstances

Randone was clear on the fact that only in extraordinary circumstances could a person's property be attached without prior notice and hearing. The four subdivisions of Section 538.5 of the new law permit attachment without notice and a hearing when certain conditions are present. Under subdivision (a) ex parte attachment is allowed when a bulk sales notice has been recorded and published, or when an escrow has been opened by the defendant with respect to the sale of a liquor license. The property subject to the attachment is limited to the goods covered by the bulk sales or to the creditor's pro rata share of the proceeds of the sale of the license. Under both of these narrowly confined circumstances a creditor may be left without an effective remedy against his debtor unless he can obtain an immediate writ of attachment. For example, under a bulk sales transfer a creditor of the transferor has no rights against the transferee personally or against the

114. 23 Cal. App. 3d at 499, 100 Cal. Rptr. at 362.
115. See Jackson, Attachment In California—What Now?, 3 PAC. L.J. 1, 16 (1972).
116. 5 Cal. 3d at 558, 488 P.2d at 28, 96 Cal. Rptr. at 724.
property once the bulk sale is concluded in compliance with the notice requirements, unless some other statute is violated such as where there is a fraudulent conveyance.\textsuperscript{117} Thus, if the debtor absconds with the proceeds or there is only a small consideration paid the creditor may be left with virtually nothing. It is common practice for an escrow to be opened in connection with a bulk sale and upon notice of the sale, creditors often erroneously assume that by filing their claims with the escrow holder they are assuring themselves of at least pro rata payment. But, unless the transferor has voluntarily given instructions in the escrow to pay creditor claims their filing can be ignored without legal consequences.\textsuperscript{118} Also, the debtor-transferor could designate himself as the escrow holder and could easily depart with the funds. Thus, under these circumstances, if a debtor wished to treat his creditor unfairly, the only effective remedy the creditor has is to obtain a writ of attachment. Where these facts are present it seems that the requirement of the extraordinary circumstance would be satisfied. This subdivision still may be too broad, however, since there are many legitimate bulk transfers and liquor license sales where the debtor has attempted to provide satisfactory terms to pay outstanding claims. This subdivision should not apply unless the plaintiff shows the court that there are specific facts indicating the debtor may abscond and not just that there is going to be a bulk sale or a liquor license sale.

Subdivision (b) permits attachment without notice or hearing when the court finds that there is substantial danger that the defendant will transfer (other than in the ordinary course of business), conceal, or remove his assets. In \textit{Randone}, the court stated that it would be constitutionally valid

\begin{quote}
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.\textsuperscript{119}
\end{quote}

Subdivision (c) authorizes \textit{ex parte} attachment when notice cannot be served on the defendant with the use of reasonable diligence after ten days, and the court is satisfied that the defendant has departed the state or concealed himself. If the defendant cannot be found to be served, the creditor has no remedy unless he can obtain a writ of attachment \textit{ex parte}. Since it is further required that the court must be satisfied that the defendant has departed the state or concealed himself

\textsuperscript{117.} CONTINUING EDUCATION OF THE BAR, CALIFORNIA COMMERCIAL LAW vol. 1, \textit{Bulk Transfers} §15.
\textsuperscript{118.} Id.
\textsuperscript{119.} 5 Cal. 3d at 563, 488 P.2d at 31, 96 Cal. Rptr. at 727.
Randone appears to be satisfied. It should be noted that once the defendant does appear he may request a hearing to contest the plaintiff’s case.\(^{120}\)

Subdivision (d) allows *ex parte* attachment where the defendant is a nonresident, or cannot be found within the state, or has concealed himself. This subdivision is similar to former Code of Civil Procedure Section 537(2)\(^{121}\) which was tested in several California cases\(^{122}\) subsequent to Randone and found constitutionally valid. Several federal court cases\(^{123}\) have also upheld nonresidency as grounds for attachment without notice or hearing.

C. *Necessities Must Be Exempt From Attachment*

According to Randone, necessities have to be automatically exempt from any attachment procedure. The new law provides that all property of corporations, partnerships, nonresidents, those who cannot be found within the state, and those who conceal themselves may be attached if not otherwise exempt from execution.\(^ {124}\) With respect to individuals engaged in a trade or business, only specified property not otherwise exempt from execution may be attached.\(^ {125}\) These provisions may be too broad to satisfy Randone.

Since corporations and partnerships do not have any exemptions from execution under present law,\(^ {126}\) the new law may be deficient in that it in essence assumes that corporations and partnerships do not have necessities. Generally, a large corporation or partnership would probably not have necessities within the meaning of Randone, but it seems that a strong argument could be made that a one shareholder corporation or a two-man partnership would have necessities. Randone cited with approval a Minnesota Supreme Court case\(^ {127}\) that observed that the attachment of the receipts of a small business would often involve harsh deprivations comparable to those suffered by the individual debtor:


\(^{121}\) See text accompanying note 5 supra.

\(^{122}\) Property Research Financial Corp. v. Superior Court, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972); Damazo v. MacIntyre, 26 Cal. App. 3d 18, 102 Cal. Rptr. 609 (1972). See also Banks v. Superior Court, 26 Cal. App. 3d 143, 102 Cal. Rptr. 590 (1972).


\(^{126}\) See, e.g., Cal. Corp. Code §15025(c).

The hardship and the injustice stressed . . . in Sniadach are equally applicable to the laborer, artisan, or merchant whose livelihood depends on selling customers his services or his goods . . . . No reason occurs to us why the corner grocer, the self-employed mechanic, or the neighborhood shopkeeper should have his income frozen by the garnishment of his accounts receivable prior to the time his liability is established.\textsuperscript{128}

Thus Randone recognizes that an individual in business does have necessities and that if the assets necessary to keep his business running and providing his income are attached, the businessman, like the consumer, could be subjected to severe hardship by deprivation of his property.

It is clear that a businessman may be caught in the same "easy credit trap" into which the "poor consumer" can fall. Randone has recognized this as applied to the individual in business for himself. There is no reason to believe that an individual operating as a corporation, or two individuals calling themselves a partnership are not also susceptible to this same trap.

The Randone concern for the individual businessman was directed to the possibility that he would be stripped of the means of carrying on his business or the source of family support, before his liability is clearly established. Persons operating their business as a partnership or as a small corporation also derive their support from the business. In this respect no distinction exists between those who are members of a firm and those who are not. The same reason which exists for protecting an individual in business applies with equal force to each member of a partnership or small corporation. It seems that the same necessities which must be exempt for the individual engaged in a trade or business should apply to corporations and partnerships which are owned and operated by one or two individuals. Today, especially, this should be true as there are many individuals operating as corporations, usually advised to do so by an accountant or attorney for tax or other considerations.

A second possible deficiency of the new bill is that under certain circumstances the necessities of an individual engaged in a trade or business may be attached. Although the new law provides that an individual engaged in a trade or business may exclude from the attachment any item shown to be necessary for the support of his family by claiming such exemption at the hearing or any time thereafter,\textsuperscript{129} this

\textsuperscript{128} Cal. 3d at 560, 488 P.2d at 29, 96 Cal. Rptr. at 725.
\textsuperscript{129} Cal. Code Civ. Proc. \$537.3(b), enacted, Cal. Stats. 1972, c. 550, \$5.
may not be sufficient protection since if the defendant misses the hearing the writ of attachment will automatically issue. Also the writ could be issued *ex parte* if the defendant was a nonresident or could not be found within the state or if the defendant could not be served by the plaintiff within ten days. Thus a debtor may at times have his necessities attached before he has a chance to claim them. *Randone* clearly stated:

> [T]he hardship imposed on a debtor by the attachment of his 'necessities of life' is so severe that we do not believe that a creditor's private interest is *ever sufficient* to permit the imposition of such deprivation before notice and a hearing on the validity of the creditor's claim.¹³⁰ [Emphasis added].

**Conclusion**

Although it is a significant improvement over the procedure criticized and held unconstitutional in *Randone*, Senate Bill 1048 may fail to meet the strict requirements set forth in *Randone*. The impact of the temporary restraining order, automatically issued in every case without the necessity of showing irreparable harm, may be a fatal defect. A much more probable defect is that the bill fails to automatically exempt necessities of life in certain situations and, perhaps erroneously, assumes that corporations and partnerships do not have necessities. The bill also seems unfairly broad in allowing actions against individuals engaged in a trade or business to be based on non-business related debts.

Even if Senate Bill 1048 is found defective it should be commended for some of the procedural safeguards it offers the defendant which could provide the foundation for any attachment law that may follow. The nature of the hearing, the method by which equipment may be attached by filing notice of a lien instead of by seizure, the fact that the defendant can now have the amount of the undertaking increased to fully protect himself, and the procedures allowing a defendant to have an *ex parte* attachment lifted by filing a general appearance in the action, are all significant improvements in the law and should be continued in any subsequent attachment law.

*John P. Stayner*

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¹³⁰ 5 Cal. 3d at 558, 488 P.2d at 27, 96 Cal. Rptr. at 723.