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Due Process and Prejudgment Attachment in California

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DUE PROCESS AND PREJUDGMENT ATTACHMENT IN CALIFORNIA

Because John Smith had sufficient reason to believe that he had been the victim of fraud in the purchase of a new car he refused to make further payments. It was not long before he was served with summons in an action demanding the balance due on the installment payment contract. But along with the summons, John also received notice that in eight days his wages would be frozen in the hands of his employer pending the outcome of the trial. As if this were not enough, the next day the sheriff appeared and seized John's color television and his expensive golf clubs, telling John that this property would also be held pending trial, and that if John should be found liable his wages and personal property could be used to satisfy the judgment. Six months later John prevails in court, at the same time gaining release of his wages and other property. But in the interim he has been denied the use of his property without an opportunity to prove that he, rather than the plaintiff, was in the right.

Attachment—an Extraordinary Remedy

Prejudgment attachment is the statutory remedy enabling a plaintiff to seize and bring the defendant's property into legal custody pending trial on the plaintiff's claim.[1] Prejudgment garnishment is the process which enables the plaintiff prior to trial to freeze in a third person's hands, property, money or credits belonging to the defendant.[2] Garnishment is therefore an attachment of the effects of the defendant in the garnishee's hands; the only significant difference is that the creditor in garnishment proceedings does not obtain a lien on the property garnished.[3]

This procedure dates back to early England,[4] where its original purpose was to compel the appearance of a defendant who had failed to respond to judicial summons. The sheriff seized his property, whether in his or a third person's hands, and forfeited it if he again failed to appear in the action.[5]

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1 Wilder v. Inter-Island Steam Nav. Co., 211 U.S. 239, 245 (1908).

2 Kimball v. Richardson-Kimball Co., 111 Cal. 386, 393, 43 P. 1111, 1112 (1896).

3 *Id.* at 393, 43 P. at 1112.

4 For a general historical review of the law of attachment, see 1 W. WADE, ATTACHMENT & GARNISHMENT (1886).

5 "Foreign attachment is an incidental process against a defendant to a suit, who has not appeared, having been summoned according to the course of the Court, to compel his appearance. The only thing which makes such a custom reasonable at all

The remedy of prejudgment attachment, in varying forms, has been incorporated into the legal systems of all our jurisdictions.[6] The various state statutes now in force have vastly extended and liberalized the procedure, contrary to its historically limited purpose. Many states authorize the remedy in cases where the resident debtor is fraudulently concealing, removing or otherwise disposing of his property with intent to defraud his creditors.[7] Most states, in line with the original purpose of the remedy, also authorize the practice as a means of compelling the appearance of nonresident defendants and others upon whom personal service of process cannot be attained.[8] California has extended the remedy over a much wider field and seems to proceed upon a theory different from the attachment laws of other jurisdictions. The original design of the California attachment statute seems to have been not merely to reach nonresident and absconding debtors or to circumvent fraud, but to afford the creditor security for every demand not otherwise secured, arising upon contract for the direct payment of money made or payable in this state.[9]

Rationale for Prejudgment Attachment

The jurisdictions holding these liberalized attachment laws constitutional advance the theory that the debtor in a prejudgment

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. . . is, that the Court which has jurisdiction over the defendant is, in substance, by this custom, acting against the defendant alone, to compel his submission to that jurisdiction. For this purpose it arrests or attaches his goods owing him within the jurisdiction . . . ." *The Mayor and Aldermen of the City of London v. The London Joint-Stock Bank*, L.J. QUEEN'S BENCH NEW SERIES 594, 597 (1881).

[6] Ownbey v. Morgan, 256 U.S. 94, 104 (1921).

[7] "One of the purposes of attachment is to . . . prevent the debtor's sequestration of funds or fraudulent transfer of assets in an attempt to hinder or defeat the payment of just claims." American Ind. Sales Corp. v. Airscope, Inc., 44 Cal. 2d 393, 398, 282 P.2d 504, 507 (1955).

[8] "[T]he debt is the property of the creditor, and because it is, the law seeks to subject it . . . to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us." Chicago, Rock Island and Pacific Ry. Co. v. Sturm, 174 U.S. 710, 716 (1899); *see* In Re Consolidated Container Carriers, Inc., 254 F. Supp. 605 (E.D. Pa. 1966); Hanson v. Graham, 82 Cal. 631, 23 P. 56 (1890); Anderson v. Groff, 72 Cal. 65, 13 P. 73 (1887); Root v. Superior Court, 209 Cal. App. 2d 242, 25 Cal. Rptr. 784 (1962).

[9] It appears that our first attachment statute was "[D]esigned for the purpose of securing the property of the debtor, to answer the judgment which may be obtained." Low v. Adams, 6 Cal. 277, 281 (1856).

The original CALIFORNIA PRACTICE ACT sec. 120 (The General Laws of the State of California) read: "The Plaintiff, at the time of issuing his summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment recovered. . . ."; *see* Myers v. Mott, 29 Cal. 359, 366 (1865); Schneider v. Zoeller, 175 Cal. App. 2d 354, 346 P.2d 515 (1959): "The purpose of a writ of attachment is to effect a lien on the property of the defendant as security for the payment of any judgment plaintiff may recover against him." *Id.* at 358, 346 P.2d at 517. *See also* Crisman v. Dorsey, 12 Colo. 567, 21 P. 920 (1889); Whinery v. Kozack, 216 Ind. 136, 22 N.E.2d 829 (1939); Lincoln Tavern v. Snader, 165 Ohio St. 61, 133 N.E.2d 606 (1956).

attachment or garnishment situation is merely being temporarily deprived of the full use of his property pending trial on the validity of the creditor's underlying claim.[10] That because the taking is only temporary and the debtor is afforded a full hearing prior to final judgment, due process has been satisfied. Further, because of the vast territorial expansion of the United States, the rapid means of transportation that gives rise to population mobility, and the liberal credit now available, these procedures are both necessary and inevitable.[11]

Judicial Response

The case of *Sniadach v. Family Finance Corporation*[12] has, however, opened the door to scrupulous judicial examination of prejudgment attachment to determine whether due process is satisfied by this extraordinary remedy. In *Sniadach*, a creditor instituted a prejudgment wage garnishment proceeding against his alleged debtor, naming as garnishee the defendant's employer. Pursuant to Wisconsin law, the creditor was able to freeze fifty percent of his debtor's wages prior to a hearing on the validity of the underlying claim. The debtor moved that the garnishment proceedings be dismissed for failure to comply with the notice and hearing requirements of the fourteenth amendment. The Wisconsin Supreme Court sustained the lower court's finding that due process had been satisfied.[13] On appeal the United States Supreme Court held the Wisconsin statute invalid as a deprivation of property without due process of law.[14]

The purpose of this comment is twofold: First, to discuss the ramifications that the *Sniadach* case will have on California prejudgment attachment procedure as applied to situations where property *other than wages* is being attached or garnished to afford the creditor security for any judgment obtained. Second, to analyze the effect *Sniadach* will have on California prejudgment wage garnishment statutes in particular.

Effect of Sniadach on California Prejudgment Attachment

Sniadach was a "garnishment" case. Yet garnishment differs[15] from attachment only as to the type of interest the plaintiff acquires

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[10] "The most that such a procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon." Byrd v. Rector, 112 W. Va. 192, 196, 163 S.E. 845, 849, 81 A.L.R. 1213 (1932).

[11] Ownbey v. Morgan, 256 U.S. 94, 104 (1921).

[12] 89 S. Ct. 1820 (1969).

[13] 37 Wis. 2d 163, —, 154 N.W.2d 259, 265 (1968).

[14] 89 S. Ct. at 1823.

[15] See note 3 *supra* and accompanying text.

in the property prior to trial. Garnishment is but a form of attachment.[16] Both practices in effect deprive a defendant of his property pending trial. In the following discussion, *Sniadach*'s "garnishment" holding is applied to California's "attachment" practice, the assumption being that the two practices, although different in procedure, are one and the same in their effect. The hearing requirement of the fourteenth amendment therefore applies equally to both.

Hearings and Due Process

In overturning the Wisconsin statute, the *Sniadach* Court stressed the fact that attachments in general are summary in nature.[17] Between the time the creditor, ex parte, initiates the procedure whereby the defendant's property is seized and the time of trial where the validity of the claim is tested, the debtor is effectively deprived of the use of his property without being afforded an opportunity to present any defenses he may have to the plaintiff's claim. A fundamental requirement of due process is the opportunity to be heard.[18] But it is not in every case true that a person is constitutionally guaranteed a hearing prior to the temporary taking of property pending a later determination of the rights thereto. When the necessities of the situation require immediate action, such a person must yield to a more compelling interest and hence he is deemed not to be deprived of his property without due process of law.[19] Just what situations show a "compelling interest" depend upon the circumstances of each case.[20] The *Sniadach* Court cited the cases of *Fahey v. Mallonee*,[21] *Ewing v. Mytinger & Casselberry, Inc.*,[22] *Coffin Bros. v. Bennett*,[23] and *Ownbey v. Morgan*[24] as examples of extraordinary situations where the temporary taking of property did not violate due process, stating that the circumstances of each case

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[16] Steineck v. Haas-Baruch Co., 106 Cal. App. 228, 231, 288 P. 1104, 1106 (1930); *accord*, FHA v. Burr, 309 U.S. 242, 245 (1940); Annot., 71 A.L.R. 78 (1931).

[17] 89 S. Ct. at 1821.

[18] Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[19] Bowles v. Willingham, 321 U.S. 503, 520 (1944); *cf.* Bates v. Little Rock, 361 U.S. 516, 524 (1960).

[20] "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); *see* Anderson Nat. Bank v. Luckett, 321 U.S. 233, 246 (1944); Moyer v. Peabody, 212 U.S. 78, 84 (1919); Buttny v. Smiley, 281 F. Supp. 280, 288 (D. Colo. 1968).

[21] 332 U.S. 245 (1947).

[22] 339 U.S. 594 (1950).

[23] 277 U.S. 29 (1928).

[24] 256 U.S. 94 (1921).

demonstrated those "compelling interests" which require that special protection be given to a state or creditor interest.[25]

In *Fahey,* the Federal Home Loan Bank Administration had named a conservator to take possession of a federal savings and loan association prior to a hearing to determine the validity of the Administration's charges of misconduct. The Court held this summary procedure valid on the ground that the impossibility of preserving credit during an investigation would frustrate the interests of the savers.

In *Ewing,* a national distributor of a food supplement suffered eleven prehearing seizures of its product pursuant to a federal statute and upon a claim by the government that the product was misbranded. The Supreme Court found this procedure to be valid, stating that the initial taking was merely the statutory prerequisite to the bringing of a lawsuit and that the claimant had the right to a full hearing before the court.

In *Coffin,* the Supreme Court upheld a Georgia statute authorizing the Superintendent of Banks to issue executions against stockholders of insolvent banks who, after notice from him, had neglected to pay assessments on their stock. The defense based its objection on the fact that this procedure was an execution and therefore the creation of a lien at the beginning, before and without any judicial proceedings. But the Court noted that the stockholders were allowed to raise and try every possible defense by an affidavit of illegality which in fact made the so-called execution merely a mode of commencing the suit to enforce their liability to depositors.

In *Ownbey,* a Delaware statute required a nonresident defendant in a foreign attachment action to give a surety's undertaking to the value of the property attached as a condition to his right to defend the action. Relying on *Pennoyer v. Neff*[26] the *Ownbey* Court stated that "[T]he process of foreign attachment has its fundamental basis in the exclusive jurisdiction and sovereignty of each State over persons and property within its borders,"[27] giving rise to the authority and duty of a state to protect its own citizens in their claims against nonresident owners of property located within the state.[28]

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[25] 89 S. Ct. at 1821.

[26] 95 U.S. 714 (1877).

[27] 256 U.S. at 109.

[28] "[A] property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed *ex necessitate* to consent that the State may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted." *Id.* at 111.

"Compelling Interest" and Attachment

The thrust of these cases appears to establish the rule that to pass inspection under the due process clause, the creditor in an attachment proceeding would be required to demonstrate a compelling interest to protect the obligation owed him. Such would be the case where the debtor is threatening to conceal, remove or otherwise dispose of his property with intent to defraud his creditor, or where the debtor is either a nonresident or for some other reason not amenable to personal service of process. These situations certainly call for immediate action to eliminate the possibility of future frustration to the creditor's interest in satisfying a judgment. However the California procedure, whereby the creditor can attach the effects of his resident debtor merely for the purpose of providing security for a later judgment,[29] apparently fails to demonstrate such a compelling interest requiring protection. The present state of the California law is that a creditor does not have to show that his interest in satisfying a future judgment is being threatened by actions of the debtor.[30]

The Supreme Court apparently analyzed this very proposition in *Sniadach*:

> But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and in personam jurisdiction was readily obtainable.[31]

Although this "compelling interest" requirement of *Sniadach* is a prerequisite to summary procedure in its general use,[32] it is not applicable to all summary attachment situations. The *Sniadach* Court cites *McKay v. McInnes*[33] for a procedural rule that satisfies due process for attachments in general. In *McKay*, the plaintiff brought an action to recover for services rendered his resident debtor. The applicable Maine attachment statute authorized the seizure of defendant's property without first filing an affidavit setting out prima facie proof of good faith, filing a bond, or setting out facts demonstrating a "compelling interest" requiring protection. From the facts given it appeared that the plaintiff obtained personal service on the defendant and was not being threatened by actions of his debtor that would tend to frustrate his attempt to satisfy a

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29 CAL. CODE CIV. PROC. § 537 (West Supp. 1970).
30 See note 44 *infra* and accompanying text.
31 89 S. Ct. at 1821.
32 It was at least prerequisite to the Wisconsin statute.
33 279 U.S. 820 (1928).

future judgment. The plaintiff then attached certain real and personal property of the defendant. Upon a claim by the defendant that this procedure violated the due process clause of the fourteenth amendment, the Maine Supreme Court[34] stated:

> But we think it is clear that the attachment statute does not deprive the defendant of due process of law.
>
> An attachment creates a lien upon the estate which may be made available to the creditor after judgment by a levy of the execution thereon [citation omitted]. *Its purpose is simply to secure to the creditor the property* which the debtor has at the time it is made *so that it may be seized and levied upon in satisfaction of the debt after judgment. . . .*[35]

Aside from a consideration of the nature of the property involved, California Code of Civil Procedure section 537 nearly parallels that practice approved in *McKay*. Both allow attachment to give the plaintiff security for a future judgment and neither require a showing by the plaintiff that his interest in satisfying his claim is being threatened by actions of the defendant. Hence, the Supreme Court in *Sniadach*, having cited *McKay* approvingly, has apparently approved California attachment from a procedural standpoint.

Effect of Sniadach on California Prejudgment Wage Garnishment

Pre-seizure Hearings

The *Sniadach* Court stressed the fact that wages have become a unique type of property, a deprivation of which can cause tremendous hardship on wage earners in our present economic system.[36] Because of this, a prejudgment wage garnishment procedure that in practice substantially deprives a debtor of his means of family support, even temporarily, and does not afford the debtor an opportunity to be heard prior to the taking must fall as a violation of due process.[37]

In Wisconsin the creditor could have a garnishee summons issued,[38] thereby commencing garnishment procedure any time after the summons and complaint had been issued in the main action.[39]

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[34] 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1928). McKay was affirmed on authority of Ownbey v. Morgan, 256 U.S. 94 (1921) and Coffin Bros. v. Bennett, 277 U.S. 29 (1928).

[35] 127 Me. at —, 141 A. at 702 (emphasis added).

[36] 89 S. Ct. at 1822.

[37] *Id.* at 1822-23.

[38] Wis. Stats. Ann. § 267.04 (West Supp. 1965).

[39] *Id.* § 267.02.

Plaintiff in the garnishee summons was required to allege the existence of one of the grounds for garnishment required by statute, the amount of the plaintiff's claim against the defendant above all setoffs, and that the plaintiff believed that the named garnishee was indebted to the defendant.[40] After service of summons on the garnishee, he was required to answer within twenty days, stating whether he was indebted to the defendant. If so, he was required to retain the property.[41] Within ten days after service of the complaint upon the garnishee, notice of such service, or a copy of the garnishee summons and complaint together with the summons in the principal action, had to be served on the principal defendant informing him that an action had been commenced against him and that his wages had been garnished to satisfy the claim.[42]

Thus the Wisconsin procedure allowed the plaintiff, ex parte, to freeze the debtor's wages upon a showing merely that he had commenced an action permitting garnishment against the debtor and believed the garnishee was indebted to the principal defendant.

In California, proceedings in garnishment are initiated at or after the issuance of the summons in the principal action,[43] by filing with the clerk of the court an affidavit showing that the plaintiff is entitled to the writ. Recitals in the writ must establish one of the statutory grounds upon which garnishment is authorized.[44] However it is not necessary for the affidavit to allege all facts necessary to state a cause of action. The affidavit is not a true pleading, but more in the nature of evidence.[45] The writ of attachment[46] is then directed to the sheriff,[47] accompanied by information in writing from the plaintiff or his attorney stating that the defendant's employer owes money to the defendant.[48] The sheriff must then serve upon such employer a copy of the writ of attachment and a notice that the debt is attached.[49]

Thus both the California and the former Wisconsin procedure

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40 *Id.* § 267.05.

41 *Id.* § 267.08.

42 *Id.*

43 CAL. CODE CIV. PROC. § 537 (West Supp. 1970).

44 *Id.* § 538. This section also requires the plaintiff to make averments showing good faith in that the action is not being prosecuted to hinder, delay, or defraud any creditor of the defendant, the amount of the demand being made by the plaintiff, and a statement on information and belief that the defendant has not been adjudicated a bankrupt. But the plaintiff need not allege that his interest in satisfying a future judgment is being threatened by actions of the defendant.

45 Nichols v. Davis, 23 Cal. App. 67, 72, 137 P. 41, 43 (1913).

46 The term "garnishment" appears rarely in California statutes.

47 CAL. CODE CIV. PROC. § 540 (West Supp. 1970).

48 *Id.* § 543.

49 *Id.*

allow garnishment proceedings to be initiated upon ex parte application of the plaintiff in the principal action. Whereas the plaintiff in California must file an affidavit showing the existence of an alleged debt, the plaintiff in a Wisconsin garnishment action had to make the same averments in his garnishment summons. The practical result is the same. The debtor has not been afforded the opportunity to contest the validity of the alleged debt.[50] The consequences which follow such procedure are obvious. By the time the debtor is served with summons in the principal action, the machinery to freeze his wages is in motion and he has been denied "[A]ny opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise."[51]

Obviously the manner of initially starting garnishment proceedings in California is in no material way dissimilar from that procedure which was struck down in Wisconsin. Neither provide for a hearing *of any kind* prior to the initial taking.

Financial Hardship

In *Sniadach*, the fact that the Wisconsin procedure placed the wage earner in serious financial trouble, prior to trial on the validity of the creditor's claim, was the dominating factor in holding the statute invalid.[52] The financial burden placed on the defendant in a wage garnishment action in California is not unlike that burden placed on the defendant in *Sniadach*. The discussion which follows suggests that such burden exists in California.

Exemptions

California Code of Civil Procedure section 690.11[53] limits the amount of wages which can be garnished. Pursuant to this section, one-half of a defendant's wages are automatically exempt from levy. Moreover, if the debtor can show that the remaining one-half is needed for the support of his family, and that the debt sued upon was not incurred for the common necessaries of life or for

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50 "What we know from our study of this problem [of prejudgment wage garnishment] is that in a vast number of cases the debt is a fraudulent one . . . ." 114 CONG. REC. H 688 (daily ed. Feb. 1, 1968) [remarks of Congressman Sullivan during debate on the proposed Consumer Credit Protection Act (H.R. 11601, 90th Cong., 2d Sess. (1968))].

51 89 S. Ct. at 1821.

52 "[T]he statutory exemption granted the wage earner is 'generally insufficient to support the debtor for any one week.'

"The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall." *Id.* at 1822-23.

53 CAL. CODE CIV. PROC. § 690.11 (West Supp. 1970).

personal services rendered by an employee of the debtor, *all* his earnings can be exempt. But as a practical matter section 690.11 serves only to exempt the first half of the debtor's wage.

For the plaintiff to be able to reach the one-half of the wages that is not automatically exempt he must merely allege in his affidavit for attachment that the action is brought to collect a debt incurred for the common necessaries of life.[54] If the debtor then seeks to challenge this averment he must file an exemption affidavit stating the code section or sections upon which he is relying for his claim or exemption "[A]nd all facts necessary to support his claim . . . ."[55] Upon the filing of the exemption affidavit by the debtor, the creditor may then file a counter-affidavit.[56] Within five days either party may then move to have the exemption claim heard in court.[57] The hearing takes place fifteen days after the motion.[58] At the hearing the burden of proof is on the debtor to show both that the remaining one-half of his wages is needed for the support of his family, and that the debt was not incurred for common necessaries of life.[59] As a result of this procedural tangle, that can take as long as twenty-five days, most debtors in reality receive only the one-half of their wages that is automatically exempt. For example, during the month of February, 1965, the Sheriff of San Francisco levied 1781 attachments and executions but received only 52 exemption claims.[60] Further, during the months of January, April and July, 1967, there were 337 actions filed in the Municipal Court for the San Jose-Milpitas-Alviso Judicial District of Santa Clara County, California, in which property of various types was attached or garnished, but there were only seven (or two percent of the 337) exemption claims filed and only one was fully allowed.[61]

In most cases in California, this loss of one-half of a debtor's

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54 *Id.* § 538.

55 *Id.* § 690.26 (1).

56 *Id.* § 690.26 (3).

57 *Id.* § 690.26 (5).

58 *Id.*

59 *Id.* § 690.26 (9).

60 Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1217 (1965).

Further, a debtor is subject to weekly levies on his wages: "Several writs may issue upon the same affidavit and undertaking simultaneously or from time to time within 60 days after the filing of the affidavit and undertaking . . . *whether or not any writ previously issued has been returned.*" CAL. CODE CIV. PROC. § 540 (West 1967) (emphasis added). "This is and can be a very vicious practice. . . . This can really kill a man. He doesn't have a chance." Assembly Interim Comm. on the Judiciary, *Proceedings on Attachments* 49-50 (June 23, 1964).

61 R. Such, *A Survey of Attachment*, Preliminary Report, Nov. 10, 1968 (unpublished paper on file with the Legal Aid Society Administration Office, Santa Clara County, California).

wages pending trial must surely disrupt whatever budget he is relying on for relative financial security. Recent studies have substantiated this proposition.[62] The conclusion follows that California wage garnishment practice does not appear to afford the debtor any greater basic financial security prior to a determination of rights at trial than did the Wisconsin statute which was invalidated in *Sniadach.*

Hearings Prior to Trial

The *Sniadach* Court found that "[w]here the taking of one's property is so obvious . . . ." a hearing prior to the taking must be afforded to satisfy the fundamental requirements of due process.[63] The Wisconsin procedure did not afford the debtor a statutory right to a hearing prior to the trial.[64] And it was not sufficient that case law did allow a limited review of the propriety of the garnishment. But far from being a hearing on the merits of the creditor's claim, this limited hearing examined only the mechanics of bringing the action, that is, whether or not the plaintiff had complied with the procedural requirements of stating a cause of action for damages founded upon contract.[65] This lack of an adversary hearing on the merits prior to trial is also present in California practice.

Motion to Discharge Attachment

By statute the California debtor may, on motion, apply for discharge of the writ of garnishment on the ground that it was im-

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[62] In his comprehensive coverage of wage garnishment in California, *supra* note 60, George Brunn estimates the family budget for an employee with three dependents is $6,859 a year in San Francisco and $6,882 in Los Angeles. "This budget is designed to maintain a family at a 'modest but adequate' standard of living." 53 CALIF. L. REV. at 1217. Brunn further states that during March 1965 average income in the manufacturing industry was $6,784 per year in San Francisco and $6,207 per year in Los Angeles.

That the majority of wage garnishments are directed at the "poor" man who must maintain a week to week existence is not seriously contested: "While precise data are lacking, wage garnishment is probably predominantly used against debtors in the low-to-middle-income groups; 'garnishee' is one word that is better known among the poor than among those who are economically well off." Brunn, *supra* at 1229. It is clear that a debtor in California who loses even one-half of his weekly wages will face serious economic hardship.

For excellent coverage of the problems wage earners face when experiencing wage garnishment see Comment, *Wage Garnishment in Washington—an Empirical Study,* 43 WASH. L. REV. 742 (1968); Comment, *Wage Garnishment as a Collection Device,* 1967 WIS. L. REV. 759; THE LAW AND THE LOW INCOME CONSUMER, project on Social Welfare Law Supplement, No. 2 (1968).

[63] 89 S. Ct. at 1823.

[64] "No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action . . . ." WIS. STATS. ANN. § 267.16 (1) (West Supp. 1965).

[65] Orton v. Noonan, 27 Wis. 572 (1871); Chernin v. International Oil Co., 261 Wis. 308, 52 N.W.2d 783 (1952).

properly or irregularly issued.[66] If the writ is issued in a case provided by statute[67] it is considered "properly" issued.[68] And if the statutory requirements as to the manner of its issuance are complied with, the writ is considered "regularly" issued.[69] The result is that the motion to discharge the garnishment prior to trial cannot be used to try the merits of the action itself. In the case of *Republic Truck Sales Corporation v. Peak*,[70] the defendant moved that an attachment be discharged on the ground that he was not in fact indebted to the plaintiff. In so doing, the defendant in effect attempted to try the question of his liability to the plaintiff and to examine the validity of the claim sued upon. The court stated that a motion to discharge an attachment may not be turned into a trial on the merits of the case itself.[71] These issues must await determination from the pleadings and evidence presented in the main action.[72] The result is that a defendant is not afforded an opportunity, prior to trial, to present any defense to the plaintiff's claim in order to obtain release of his wages. Therefore the California prejudgment wage garnishment procedure differs in no material degree from the one struck down in *Sniadach* and must be considered in violation of the due process clause of the fourteenth amendment.

CONCLUSION

The law of prejudgment attachment as practiced in California is a harsh and drastic remedy. It favors the creditor, allowing him to attach the effects of his debtor for the mere purpose of securing such property for a possible future judgment. The case of *Sniadach v. Family Finance Corporation* has penetrated this practice to a limited extent, holding that the prejudgment garnishment (which is in substance not unlike attachment) of wages without a hearing on the validity of the plaintiff's underlying claim is a deprivation of property without due process of law. In California a debtor in a wage garnishment case does not have the opportunity to contest the validity of his creditor's claim either before the garnishment is levied or before trial, but must await formal litigation to present any defenses he may have. He is thus deprived of his wages tem-

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66 CAL. CODE CIV. PROC. § 556 (West 1954).

67 *Id.* § 537.

68 Landry v. Marshall, 243 Cal. App. 2d 170, 52 Cal. Rptr. 119 (1966).

69 Kohler v. Agassiz, 99 Cal. 9, 33 P. 741 (1893); Challenge Cream & Butter Ass'n v. Royal Dutch Dairies, 212 Cal. App. 2d 901, 28 Cal. Rptr. 448 (1963).

70 194 Cal. 492, 229 P. 331 (1924).

71 *Id.* at 503, 229 P. at 335; *accord,* Minor v. Minor, 175 Cal. App. 2d 277, 345 P.2d 954 (1959).

72 Challenge Cream & Butter Ass'n v. Royal Dutch Dairies, 212 Cal. App. 2d 901, 908, 28 Cal. Rptr. 448, 452 (1963).

porarily without a hearing. In light of *Sniadach* this practice must now be considered unconstitutional.

Sniadach, however, appears on its face to be limited to those situations where wages, or their equivalent, are the subject of the action. Being of a special nature, wages present unusual problems in our economic system. Thus to extend *Sniadach* to other situations it appears that there must be a showing that the property subject to deprivation has special characteristics, a taking of which will cause undue hardship to the debtor.

David J. Bishop