#39.200 5/26/77

Memorandum 77-36

Subject: Study 39.200 - Enforcement of Judgments (Comprehensive Statute--Third-Party Rights)

At the May meeting, the Commission requested the staff to prepare a memorandum examining the rights and remedies of third persons who have or claim an interest in property which a judgment creditor seeks to apply to the satisfaction of a judgment against a judgment debtor. This memorandum summarizes existing law and prior Commission decisions in this area, and lists some alternatives to existing law. Attached hereto as Exhibit 1 is a discussion of the recent decisions of the United States and California Supreme Courts bearing on the constitutionality of a levy without notice and hearing where title is in doubt.

EXISTING LAW

Remedies of Third Persons and Other Provisions for Protection of Third-Party Rights

1. Levy procedures. Existing statutory law seeks to protect the interests of third persons at the time of levy in two situations: Code of Civil Procedure Section 682a requires the judgment creditor to give a bond in twice the amount of the judgment as a condition to levying upon a bank account or safe deposit box that does not stand solely in the name of the judgment debtor, and Code of Civil Procedure Section 689b(1) requires the levying officer to determine the legal owner of a motor vehicle or vessel from the Department of Motor Vehicles and notify the legal owner (if different from the registered owner) of the levy.

As discussed in the Tentative Recommendation Relating to Attachment of Property Subject to Security Interest (considered at the May meeting), the decisions have held in general that a secured party with a perfected security interest in collateral involving a bailment or the indebtedness of an account debtor to the defendant or judgment debtor is entitled to the disposition of the collateral without interference from a subsequent levy on the defendant's or judgment debtor's interest in the pledged property. Where judgment creditors, bailees, and account debtors are aware of this body of law, the interests of third persons who are secured parties should be more likely to be protected.

The third person may refuse to comply with a levy by refusing to turn over tangible property in his possession or to pay over amounts owed to the judgment debtor, thereby forcing the judgment creditor to take additional action such as supplementary proceedings or a creditor's suit to determine the respective interests of the third person and the judgment debtor.

2. Request for notice of sale. Code of Civil Procedure Section 692a permits any person to file with the clerk a request for notice of sale on execution issued under the judgment. This provision is apparently used only rarely.

3. Third-party claim. The third person may claim title and right to possession of personal property by way of a third-party claim under Code of Civil Procedure Section 689. A secured party may assert a security interest by a claim under Code of Civil Procedure Section 689b.

4. Undertaking to release property levied upon. A third party who claims ownership of personal property levied upon may give an undertaking in twice the value of the property in favor of the judgment creditor to secure its release pursuant to Code of Civil Procedure Sections 710b to 713-1/2.

5. Action to enjoin sale. At least in the case of a pending execution sale of real property, the third person may bring an action to enjoin a sale which would be a cloud on the third person's title. Einstein v. Bank of California, 137 Cal. 47, 69 P. 616 (1902).

6. Action to quiet title. The third person may bring an action to quiet title against the purchaser at the execution sale. See Code Civ. Proc. § 738. This remedy is particularly important where real property is involved since the third-party claims procedure does not apply to real property. See First Nat'l Bank v. Kinslow, 8 Cal.2d 339, 65 P.2d 796 (1937).

7. Action for specific recovery of personal property. The third person may bring an action against the creditor and levying officer for specific recovery of tangible personal property. See Taylor v. Bernheim, 58 Cal. App. 404, 209 P. 55 (1922). In order to bring such an action, the third person must be entitled to immediate possession.

8. Action for damages for conversion. Where the third person concedes the loss of title, or where the possession cannot be recovered

in an action for specific recovery, the third person may sue for damages for conversion. 5 B. Witkin, California Procedure Enforcement of Judgment § 115, at 3481 (2d ed. 1971). Usually the levying officer will be protected by Code of Civil Procedure Section 689 which protects the officer from liability where no third-party claim is filed; where a claim is filed and an undertaking is given, the third party's remedy is against the creditor and sureties on the undertaking. Cory v. Cooper, 117 Cal. App. 495, 4 P.2d 581 (1931).

9. Action to remove cloud on title. There is an equitable action to remove a cloud on title in order to enforce the right under Civil Code Section 3412 to have void or voidable written instruments which may cause serious injury to the title of the third person delivered up or canceled. 3 B. Witkin, California Procedure Pleading §§ 535-538, at 2183-2185 (2d ed. 1971).

10. Declaratory relief. Code of Civil Procedure Section 1060 would appear to permit the bringing of an action for declaratory relief to determine the rights and duties of the parties before there is an actual invasion of a right, such as where the judgment creditor has attempted to levy on property in the third person's possession.

11. Abuse of process. The third person may bring an action for abuse of process where the judgment creditor has had an ulterior purpose, process has been improperly used in the proceedings, and there are damages. See McPheeters v. Bateman, 11 Cal. App.2d 106, 53 P.2d 195 (1936); cf. White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968). It has also been argued that exemplary damages should be available to third persons by way of an action for malicious prosecution. See Riesenfeld, Torts Involving Use of Legal Process in Debt Collection Tort Practice § 5.7, at 116-117 (Cal. Cont. Ed. Bar 1971).

Remedies of Judgment Creditor

1. Levy procedures. If a judgment creditor wishes to assert that property is owned by the judgment debtor, the creditor may instruct the levying officer to levy upon the property. Whether a mere levy will be sufficient to obtain control of the property is another matter--the creditor may be forced to resort to other proceedings in a case where

the third person refuses to give up possession or to make payments. However, particularly in cases where the debtor has possession of the property or a "fourth person" such as a bank controls property in the name of the debtor and a third person, the judgment creditor may levy and force the third person to assert his claim against the creditor or, perhaps, against a purchaser at the execution sale. The use of levy to assert title in the judgment debtor is specifically recognized by Civil Code Section 3439.09 regarding fraudulent conveyances; subdivision (a)(2) of this section provides that the creditor may "disregard the conveyance and attach or levy execution upon the property conveyed."

2. Demand for secured party claim. Code of Civil Procedure Section 689b(8) permits the judgment creditor to have the levying officer serve the secured party with a demand that the secured party make a third-party claim under Section 689b within 30 days of service of the demand or forfeit the interest in the property levied upon.

3. Attack on invalid transfer. Civil Code Section 3439.09 permits the judgment creditor to bring an equitable action to set aside a transfer which is fraudulent under the Uniform Fraudulent Conveyance Act. In addition, other types of fraudulent transfers such as transfers without change of possession and bulk transfers may be set aside. 5 B. Witkin, California Procedure Enforcement of Judgment § 150, at 3515-3516 (2d ed. 1971).

4. Examination. A debtor of a judgment debtor or a person holding property of a judgment debtor may be ordered to appear and be examined before the court pursuant to Code of Civil Procedure Section 717. The court's order may be issued on the basis of the judgment creditor's affidavit on information and belief. The person to be examined is paid mileage fees of 20 cents per mile, one way, but may not be required to attend an examination outside the county of such person's residence unless the distance is less than 150 miles. Code Civ. Proc. § 717.1. At the conclusion of the examination, the court may order the property applied to the satisfaction of the judgment unless the third person makes an adverse claim or denies possession of the property or the debt to the judgment debtor. Code Civ. Proc. § 719; Bond v. Bulgheroni, 215 Cal. 7, 8 P.2d 130 (1932).

5. Creditor's suit. Where the third person makes an adverse claim or denies possession of the judgment debtor's property or the debt to the judgment debtor, or where the examination of the third person would be futile, the judgment creditor may bring a creditor's suit to subject the property to the satisfaction of the judgment. See Code Civ. Proc. § 720; Bond v. Bulgheroni, supra. The court at the examination proceedings may enjoin transfer of the property or payment of the debt until a creditor's suit can be commenced and prosecuted to judgment. Code Civ. Proc. § 720.

6. Declaratory relief. Presumably the judgment creditor may bring an action for declaratory relief either before or after levy to determine the interests of the respective parties. See Code Civ. Proc. § 1060. However, the annotations under Section 1060 do not indicate that this is done.

TENTATIVE COMMISSION DECISIONS

The Commission has considered many issues arising under these various remedies and procedures, frequently in a context other than the recognition of third-party rights. There have been no decisions to change the traditional remedies such as conversion, quiet title, specific recovery, and abuse of process. Tentatively, the Commission has decided to permit the bringing of a creditor's suit without having to first exhaust the legal remedy of examining the third person. See Section 705.220 in the draft statute attached to Memorandum 77-3.

The Commission has also determined to continue most of the substance of the law relating to levy procedures, request for notice of sale, and examinations of third persons. The Commission previously considered the constitutional issues involved in permitting levy on property of a third person (see Exhibit 1) and, while expressing some uneasiness about these procedures, decided to retain existing levy provisions, at least insofar as the due process clause is concerned, until some clear statement by the courts appears. It was the consideration of the proposed revisions of the third-party claims procedures, especially the provision for demanding that the third person make a claim (draft Section 706.410), that has prompted the present inquiry.

POSSIBILITIES FOR CHANGE

Several suggestions for revision of existing procedures were made in previous meetings. The following discussion attempts to summarize these suggestions and list other possibilities. Some of these alternatives might be combined whereas some are mutually exclusive.

1. Actions for Damages or Declaratory Relief

The staff does not think there is any need to tamper with the various remedies existing independent of the enforcement of judgments title that permit an aggrieved party to sue for damages or for declaratory relief of some sort.

2. Wrongful Execution

Section 490.050 in the Attachment Law permits a third person to recover on the plaintiff's undertaking for damages for wrongful attachment through a noticed motion procedure. Section 490.010 makes the plaintiff liable for a levy on property of a third person except where all of the following conditions exist:

> (1) The property levied on is required by law to be registered or recorded in the name of the owner.
>
> (2) It appeared that, at the time of the levy, the person against whom the writ was issued was such registered or record owner.
>
> (3) The plaintiff made the levy in good faith and in reliance on the registered or recorded ownership.

This more efficient remedy for wrongful attachment was added because it was felt that the remedy of abuse of process was too cumbersome and expensive in many cases.

In proceedings to enforce a money judgment, the law currently provides for an undertaking only where the judgment creditor seeks to levy on a deposit account or safe deposit box not standing solely in the name of the judgment debtor. It would be possible to force the judgment creditor to search available title records by providing a statutory liability for levying upon the property of a third person analogous to that provided in Section 490.010(d). This would require that the judgment creditor give some sort of undertaking as a condition to obtaining a writ of execution. Liability on the undertaking would then be similarly enforceable by motion under Code of Civil Procedure Section 1058a.

However, the staff believes that requiring an undertaking in every case would add needlessly to the expense of enforcing a judgment and would increase the costs assessable against the judgment debtor.

It should also be noted that statutory specification of levy procedures which recognize the distinct possibility that accounts receivable, choses in action, chattel paper, and the like may be subject to prior rights of secured parties (see Tentative Recommendation Relating to Attachment of Property Subject to Security Interest) and which require levy to be accomplished by serving notice on the secured party should reduce the number of situations where careless levies are made and where secured parties are impelled to make third-party claims. Hence, the number of cases where the undertaking for wrongful execution would benefit third persons would appear to be small as compared to the total volume of cases where the expense of an undertaking would be incurred.

3. Liability for Expenses Incurred in Making Third-Party Claim

The judgment creditor could be made liable for costs and reasonable attorney's fees incurred by a third party in third-party claim proceedings. This sort of provision would presumably have the effect of making judgment creditors more careful about what they instruct levying officers to levy upon. However, it seems a bit harsh if a judgment creditor has taken all reasonable measures to determine third persons' interests. Perhaps this sort of provision would best be limited by a provision that the judgment creditor is not liable for the attorney's fees of a prevailing third-party claimant if the interest was required to be registered or recorded but was not or if the judgment creditor reasonably believed there was no third-party interest.

4. Duty of Inquiry Concerning Third-Party Interests

The judgment creditor could be required to state on the application for a writ of execution or in any later instructions to the levying officer that it is reasonably believed that the described interests in personal property are subject to levy to satisfy the judgment. Reasonable belief could be defined in a manner similar to that provided in Civil Code Section 1980 (enacted upon Commission recommendation) concerning the disposition of personal property remaining on leased premises at the termination of a tenancy:

(d) "Reasonable belief" means the actual knowledge or belief a prudent person would have without making an investigation (including any investigation of public records) except that, where the landlord has specific information indicating that such an investigation would more probably than not reveal pertinent information and the cost of such an investigation would be reasonable in relation to the probable value of the personal property involved, "reasonable belief" includes the actual knowledge or belief a prudent person would have if such an investigation were made.

Alternatively, the judgment creditor could be required to state on penalty of perjury that an investigation had been made of public records. Such provisions should inhibit levies on property in which the various ownership interests are unclear. However, it might be objected that the standards are not clear enough for the judgment creditor to be able confidently to instruct the levying officer to levy upon property in many situations.

The statutory duty of reasonable inquiry could be combined with a provision for notice before or promptly after levy to third persons who are believed to have an interest and for an undertaking (like that given pursuant to third-party claim proceedings) as a condition of levy on such property. In essence, this scheme would reverse the order of certain steps in the traditional third-party claims procedure by requiring the judgment creditor to discover third persons and provide an undertaking indemnifying them for any taking before there is actually any third-party claim.

5. Prelevy Judicial Determination of Interests

The discussion above noted the possibility of using declaratory judgments to determine property interests before levy when the judgment creditor is in doubt and wishes to avoid liability. It was also noted that a quick check did not reveal that this is done. There are obvious problems with using equitable actions for declaratory relief in this manner. The time and expense when compared with the possibility and the amount of liability would discourage such a course. In many cases, to delay the actual seizure of property until title can be determined, would result in the loss of the property. In any event, assuming that the remedy currently exists, we would not suggest that it be restricted in any way.

In earlier memorandums, the question of requiring a prelevy hearing of some sort has been discussed. It has been concluded from an examination of the relevant cases (see Exhibit 1) that there is presently no indication of a constitutional requirement of prelevy hearings after judgment and therefore that requiring prelevy hearings in every case would be unreasonable. However, no recent cases have actually dealt with the specific question in light of the interests of third persons. But to say that prelevy hearings are not constitutionally required does not answer the question whether such hearings should be required in certain circumstances out of considerations of fairness. Should the Commission determine that some additonal protections for third parties are necessary at the point of levy, the staff recommends a procedure with the following features as a practical solution:

(1) An ex parte hearing to determine the existence of third-party interests (keeping in mind that even a meaningful ex parte hearing before a judge may offer little protection since the facts are typically within the knowledge of the judgment debtor and the possibly unknown third person) or, if the court so orders, a hearing on notice and notice of levy to the third person would be required in the following special cases:

(a) Where the creditor seeks to levy upon property (including real property?) that is recorded or registered in the name of a third person but is claimed by the creditor to be property of the debtor to some extent.

(b) Where the creditor seeks to levy upon property that is no longer owned by the debtor, but was subject to an attachment lien or judgment lien prior to being transferred.

(c) Where the creditor seeks to levy upon property that the creditor believes or has reason to believe is jointly owned by the debtor and some third person but is in the possession or under the control of some other third person (e.g., bank account, safe deposit box).

(2) Where the creditor seeks to levy upon property in the debtor's possession or under his control that the creditor believes or has reason to believe is jointly owned by the debtor and some third person or is subject to a lien or security interest, the creditor must give notice of the levy to the third person promptly after levy. This affords the third person the opportunity for an early hearing, but no hearing is required because the third person's possession or use of the property is probably not being disturbed.

(3) In any other situation where the property is in the debtor's possession or under his control, the creditor would be able to levy on such property without any prior hearing. This principle is based on the presumption that property in the debtor's possession belongs to the debtor and that, if it does not, the taking is de minimis insofar as the third person is concerned.

(4) In any other situation where the property is in the possession or under the control of a third person, the creditor would be able to levy on such property without any prior hearing. This is based on the assumption that the third person can look out for his own interests in such cases. (This fourth principle could be made paramount over exceptions (a) and (b) under the first principle.)

(5) The creditor could also be required by statute or in the court's discretion to give an undertaking indemnifying third persons in any case where an application to the court is required.

6. Availability of Third-Party Claims Procedure in Supplementary Proceedings

Professor Riesenfeld has suggested (see First Supplement to Memorandum 76-72) that the third-party claim procedure be made available when a third person is examined in supplementary proceedings.

> Present law does not permit third party claims under § 689 or 689b in supplementary proceedings because of constitutional doubts. Since the procedure has been upheld as constitutional in case of a levy, see Rauer's Law and Collection Co. v. Higgins, 95 Cal. App.2d 483, 213 P.2d 45 (1950), there are no reasons why similar steps should not be permitted if a third party chooses to claim superior rights in supplementary proceedings. If the supplementary proceedings implement a post-judgment levy, §§ 689 and 689b are applicable by their very terms. Why should the same procedure not be applicable if the judicial lien is obtained by supplementary proceedings?

Florida, Indiana, Kansas, Maryland, Michigan, New York, North Carolina, Oklahoma, and Washington permit such proceedings. See S. Riesenfeld, Creditors' Remedies and Debtors' Protection 277, 289 (2d ed. 1975).

There are several manners in which this policy could be accomplished. The least coercive scheme would permit the third person to make the claim in supplementary proceedings. A more useful procedure from the point of view of the judgment creditor (and sometimes the judgment debtor) is to permit the court to determine title despite the

objections of the third person. In order to afford procedural protections, the third person should be permitted to move for a change of venue (since supplementary proceedings may be held outside the county of the third person's residence, but a creditor's suit would normally be filed in the county where the third person resides) and provision should be made for granting continuances. This latter approach appears to be more typical of the states which provide for the determination of third-party interests in supplementary proceedings. At past Commission meetings, objection has been made to summary proceedings to determine the title to property; however, the alternative is that the judgment creditor is forced to bring an independent action with the consequent delay and added expense.

7. Request for Statement of Interest

At the last meeting, it was suggested that an inexpensive manner for the judgment creditor to obtain a statement of the interest claimed by a third person could be patterned after Commercial Code Section 9208 which permits a debtor on a security agreement to prepare a statement of the amount of the unpaid indebtedness and a list of collateral and forward it to the secured party to be corrected and returned. The secured party is required to comply within two weeks from receipt and, if the secured party does not comply, he is liable for any loss caused to the debtor thereby. The debtor is entitled to a statement once every six months or more often if a 10-dollar fee is paid.

It would be simple to extend the right to obtain such a statement to judgment creditors of debtors on security agreements. However, there are problems with extending this procedure to permit judgment creditors to obtain statements from third persons who are not secured parties. Unsecured third persons do not necessarily have any contractual relationship to the judgment debtor, or at least not a continuing one. Such third persons are not currently under a duty to provide statements as are secured parties under existing Commercial Code Section 9208. The less clearly defined nature of interests of unsecured third persons may render a statement of the sort envisioned by Section 9208 inappropriate.

CONCLUSION

Arriving at a confident conclusion about the proper mix of remedies and procedures calculated to protect the interests of innocent third

persons while permitting as prompt and inexpensive enforcement of a money judgment as possible is, needless to say, rather difficult. It must also be borne in mind that the judgment debtor will in the end bear much of the cost for additional requirements for levy and additional procedures although at the same time it is recognized that the judgment debtor in some cases could avoid any added expense by paying the judgment or making an arrangement with the judgment creditor.

The staff tends to believe that the following suggestions offer the best approach to this problem:

(a) Levy procedures should be modified along the lines suggested in point 5 supra.

(b) With provisions for continuances and change of venue, the court should be able to adjudicate third-party claims in supplementary proceedings. (See point 6 supra.)

(c) A judgment creditor of a debtor on a security agreement should be able to obtain a statement of the interest and collateral from the secured party pursuant to Commercial Code Section 9208. (See point 7 supra.)

Respectfully submitted,

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EXHIBIT 1

DUE PROCESS AND THIRD-PARTY RIGHTS

Common Law

Under the common law, the levying officer was liable to the third person for conversion or replevin and was not protected by the fact that he was operating on the authority of a writ in the favor of the creditor and against the debtor. If the officer released the property to the third person, he would be liable to the creditor if it turned out that he was in error. In California Section 689 was enacted originally to protect the levying officers from these conflicting liabilities.

Solving the levying officer's liability problems obviously does not guarantee the fairness or constitutionality of the procedure as it has developed through the years, particularly in view of the courts' greater sensitivity to due process claims in creditors' remedies after Sniadach and Randone. A review of these decisions will aid in determining their applicability to the third-party situation.

U.S. Supreme Court Decisions

In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the United States Supreme Court held unconstitutional the prejudgment garnishment of wages without notice and an opportunity for a hearing prior to the taking. The unconstitutional taking in Sniadach was the deprivation of the "enjoyment of the earned wages" which the court referred to as a "specialized form of property." Justice Harlan's concurring opinion spoke of the need for notice and hearing "which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use.

In Fuentes v. Shevin, 407 U.S. 67 (1972), the court held Florida's and Pennsylvania's ex parte prejudgment replevin procedures unconstitutional. The court made clear that the force of Sniadach was not to be restricted to wages, despite the contrary indications in Sniadach itself. The property interest found to be entitled to the protection of the Fourteenth Amendment was the possession and use of the household goods even though the debtors lacked full title to the goods and their

claim to continued possession was in dispute. The court stated that 'it is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." The court also held that the opportunity for a later hearing and damage award could not "undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. In its statement of the holding, the court said that the procedures were unconstitutional because they "work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." (Emphasis added.)

Suspicions about the force of Fuentes (decided by a 4-3 vote, with Justices Powell and Rehnquist not participating) seemed to be confirmed in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), which upheld the Louisiana sequestration (replevin) procedure permitting prejudgment seizure of the property on the ex parte application of the seller. The court emphasized the fact that both the buyer and the seller had an interest in the property and stated that the property interests of both parties should be considered when deciding on the validity of the challenged procedure. The court found that the seller would be most likely to protect the value of the property. It also noted that a judicial officer determined whether the ex parte writ should issue and that the debtor had an immediate opportunity to seek the dissolution of the writ whereupon the creditor would have to prove the grounds for issuance. The debtor could also file a bond to release the property. The court rejected the notion that the debtor was entitled to the use and possession of the property until all issues in the case were judicially resolved at a full adversary hearing. Furthermore, the court noted that the creditor had to file a bond to cover any damage or cost incurred by the debtor because of the taking. The court found that the nature of the issues at stake and the probabiltiy of being able to use documentary evidence minimized the risk of abuse. Finally, the court said that it was unconvinced that the impact on the debtor of the deprivation overrode the interest of the creditor in protecting the value of the property and that even assuming a "real impact" the basic source of the debtor's income remained unimpaired. Mitchell said that Sniadach and Fuentes

merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' [Quoting from Phillips v. Commissioner, 283 U.S. 589 (1931).]

The court seemed to retreat from Mitchell and take several steps back toward Sniadach and Fuentes in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), which declared unconstitutional the prejudgment garnishment of a corporation's bank account based on the affidavit of the creditor. This Georgia procedure, like the procedure in Mitchell, required the filing of a bond to protect the debtor from loss or damage and permitted the debtor to obtain the release of the property by filing a bond. However, the Supreme Court disapproved the procedure because the writ was issuable by a court clerk rather than a judge on conclusory allegations of the plaintiff without the opportunity for an early hearing. The court did not say that a hearing had to be held before the writ was issued; it merely noted that a major defect was the lack of the opportunity for an early hearing. However, the court did make clear that, for the purposes of the Due Process Clause, it was not going to distinguish between types of property--in particular the wages in Sniadach, household goods in Fuentes, and a corporation bank account in North Georgia Finishing--since the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard agains the risk of initial error. (Emphasis added.) (See also Justice Powell's concurring opinion, stating that the most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing.)

California Decisions

In Randone v. Appellate Department, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), the California Supreme Court declared unconstitutional the basic prejudgment attachment procedure since it did not provide for notice and an opportunity for a hearing before property was attached, did not strictly limit summary procedures to extraordinary

circumstances, and did not adequately exempt necessities from attachment. Decided between Sniadach and Fuentes, the California decision seems to set a stricter due process standard than Mitchell and North Georgia Finishing. Randone and Blair v. Pitchess, 5 Cal.3d 158, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), decided a month earlier, anticipated Fuentes by reading Sniadach broadly to apply to the loss of use of the debtor's property. In the normal case, absent extraordinary circumstances, the creditor's interest in preserving a fund for the eventual collection of the judgment was found not to be sufficient to uphold the ex parte procedure. However, in footnote 20, the court indicated some willingness to balance the interests of the parties on a case by case basis:

> We recognize, of course, that bank deposits, by their very nature, are highly mobile and thus that a general risk may arise that such assets will be removed to avoid future execution. We do not believe, however, that the mere potential mobility of an asset suffices, in itself, to justify depriving all owners of the use of such property on a general basis. Instead, in balancing the competing interests of all parties, we believe a more particularized showing of an actual danger of absconding or concealing in the individual case must be required.

This, of course, would still require an ex parte hearing before levy. It is not clear what Randone means by a "significant interest" since it focuses on the potential duration of the prejudgment taking (three years); the decision does not discuss the constitutional effect of the defendant's opportunity to quash the writ in this connection as does the U.S. Supreme Court in Mitchell and North Georgia Finishing. The California court did invalidate the postattachment exemption procedure which placed the burden on the debtor to seek exemption of "necessities" (even though the Randones' bank account would appear not to have been exempt).

In Adams v. Department of Motor Vehicles, 11 Cal.3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), the court invalidated the sale provisions of the garageman's lien law, but upheld the possessory lien itself on the grounds that the garageman had added his labor or materials to the car and therefore had an interest in it. "To strike down the garageman's possessory lien would be to alter the status quo in favor of an opposing claimant; the garageman would be deprived of his possessory interest precisely as were the debtors in Shevin [Fuentes] and Blair."

In footnote 15, the court noted: "Implicit in Shevin and Blair is the policy of honoring that possessory right actually vested in possession, at least until conflicting claims of possession have been judicially resolved. That policy is consistent with the general policy of the law."

In Empfield v. Superior Court, 33 Cal. App.3d 105, 108 Cal. Rptr. 375 (1973), the court of appeal upheld the lis pendens statute (Code Civ. Proc. § 409 et seq.) against the argument that it deprived the property owner of a significant property interest without due process. In rejecting this challenge, the court stated:

> The notice of lis pendens does not deprive petitioners of "necessities of life" or any significant property interest. They may still use the property and enjoy the profits from it. [Citing Randone at 544, fn.4.] Concededly, the marketability of the property may be impaired to some degree, but the countervailing interest of the state in an orderly recording and notice system for transactions in real property makes imperative notice to buyers of property of the pending cause of action concerning that property.

In Raigoza v. Sperl, 34 Cal. App.3d 560, 110 Cal. Rptr. 296 (1973), the court of appeal upheld the procedure for the postjudgment garnishment of wages against the claim that notice and hearing on the amount of the exemption was required before levy. The court continued:

> To characterize levies of execution as a 'taking' is nonproductive. Without doubt, a levy of execution involves a 'taking' in the sense that the debtor is deprived of an interest in something of value against his will. The focus, however, must be on the 'process' and here the question is simple: Is it consistent with due process to require the judgment debtor to apply for and prove the right to an exemption after seizure, rather than to insist that the creditor prove in a pre-seizure hearing that arguably exempt property is subject to levy?

The court concluded that the former procedure is consistent with due process since wage exemptions are a matter of "legislative choice" rather than constitutionally protected rights such as freedom of speech and "that [i]t is eminently reasonable to place the burden of applying for and proving that wages are exempt on the debtor, who knows best what is 'necessary for the use' of his family . . . . Surely he is in a better position to prove his need for the garnished wages, than the creditor is to disprove it." It should be noted, however, that this logic would not apply to exemptions which by statute are automatically exempt; apparently the court believes that it is for the Legislature to

determine which exemptions are automatic and which must be claimed. The California Supreme Court denied a hearing in Raigoza (Dec. 5, 1973).

Similarly, in Phillips v. Bartholomie, 46 Cal. App.3d 346, 121 Cal. Rptr. 56 (1975), the court of appeal rejected the contention that the judgment debtor was entitled to a hearing to determine whether the debtor's checking account was exempt before it was levied upon. In this case the money was derived from Social Security, AFDC, county welfare, and veteran's benefits--all of which are not subject to execution. The court followed Raigoza by holding that it is reasonable to require the debtor to claim the exemptions.

In In re Marriage of Crookshanks, 41 Cal. App.3d 475, 16 Cal. Rptr. 10 (1974), the court of appeal answered a constitutional challenge to the issuance of a writ of execution to enforce court-ordered child support by stating broadly that the

> Sniadach-Randone rationale is inapplicable to a California writ of execution.
>
> Sniadach and Randone, relying upon the proposition that no person may be deprived of a substantial property right, including the right of immediate possession, without due process of law, require notice to the debtor and a hearing as a prerequisite to the issuance of a writ of attachment or garnishment except in special circumstances. The hearing must prima facie establish an obligation and its nonpayment. In the situation of a writ of execution, the judgment upon which it issued establishes the obligation of the debtor. The judgment itself was rendered in a proceeding in which the debtor had an opportunity to be heard. In the situation of a writ of execution, the debtor is afforded ample legal protection on the issue of payment since Code of Civil Procedure Section 675 gives him the right to insist upon a satisfaction of judgment being filed and recorded on the register of actions as he makes his payment. . . . No writ of execution can issue on a satisfied judgment.
>
> Appellant seeks to avoid the inevitable consequences of the California statutory scheme by arguing that in some circumstances equitable considerations may prevent the enforcement of a valid unpaid judgment. The argument fails since the Sniadach-Randone rule requires only a prima facie and not conclusive showing as a prerequisite to the issuance of a writ. While equitable considerations may be pertinent in a motion to quash a writ of execution, the possibility that they may exist does not detract from the requisite prima facie case.

One court has hinted at the unconstitutionality under the principles set forth in Randone of using a levy to assert a fraudulent conveyance. In Lauer v. Rose, 60 Cal. App.3d 493, 131 Cal. Rptr. 697 (1976), a former wife caused a writ of execution to be levied on real property which her former husband had quitclaimed to his second wife on the ground that it was a fraudulent conveyance. The opinion concludes with the following discussion:

> Assuming that a bidder could be obtained and a sale consummated, recordation of the deed evidencing the sale creates a cloud upon the title which can only be removed by a judicial determination of the interest purchased. In this respect the result is not unlike the prior law which permitted prejudgment attachments depriving a debtor of property before notice or hearing and which was declared invalid by the Supreme Court in Randone v. Appellate Department . . . . Although no question of due process arises as to sale under writ of execution of [the former husband's] property since he is the judgment debtor, we conclude that the rationale of Randone authorizes judicial interference with an indiscriminate sale affecting [the second wife's] property without due process of law. Not being a party to the action between [the former wife and husband, the second wife] has had no opportunity to establish that the property was her sole and separate property.

The court also states, however, that no question of lack of due process arises in this case because the former husband (apparently upon receiving notice of sale) moved to quash the writ and restrain the sale, which motion was granted after a noticed hearing.