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THE DISPOSAL OF ATTACHED OR GARNISHED PROPERTY: A PROCEDURAL KNOT

[Editors Note: After this note had been sent to the printer the California legislature amended section 542b (Cal. Stat. 1971, ch. 1359). This amendment permits the court, upon motion and for good cause, to order extensions of the three year time limit; each extension may be for up to one year, but the total of all extensions may not exceed two years. This note deals with the disposal of property once the attachment or garnishment has expired. The amendment lengthens the time before the disposal must be made from three to a maximum of five years. However, the amendment does not correct the basic inconsistency between sections 544 and 542b.]

There is a major inconsistency, under certain conditions, in two California statutes dealing with the return of property when a writ of attachment or garnishment is released or expires. To avoid unnecessary repetition, it should be noted at the outset that under the statutes the terms "attachment" and "garnishment" are treated as synonymous. One of these provisions, section 542b of the Code of Civil Procedure, requires the sheriff to return the garnished property to the principal *defendant* or his successor after the property has been in the possession of the sheriff for three years or longer.¹ Section 544, on the other hand, requires the sheriff to return the property to the party from whom it was received after release or discharge of the garnishment.²

1. "An attachment or garnishment on personal property, whether heretofore levied or hereafter to be levied, shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on be released from the operation of such attachment or garnishment, at the expiration of three years after the issuance of the writ of attachment under which said levy was made; and the property levied on shall be delivered to the *defendant or his order or to his assignee or executor or administrator.*" CAL. CODE CIV. PROC. § 542b (West 1954) (emphasis added).

2. "All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in this chapter, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, constable, or marshal, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment or garnishment be released or discharged or any judgment recovered by him be satisfied.

"The levying officer shall release such attachment or garnishment in full or in part as required, by *issuing a written release addressed to the person served with the copy of the writ and notice*, upon (1) written direction of the plaintiff or his attorney, or (2) upon receipt by the officer of an order of the court in which the action is pending, or a certified copy thereof, discharging or dissolving the attachment or gar-

Therefore, if the garnishment or attachment of the property extended beyond three years, the property could be returned either to the defendant or to a third person from whom the property had been received.

In order to further illustrate this conflict in the statutes the following hypothetical situation is presented:

A sues *B* and causes a writ of garnishment to be issued against *C* who is indebted to *B*. *C* then deposits the property described in the writ of garnishment with the sheriff in accordance with section 544. Three years later, there has not yet been a final adjudication in the lawsuit between *A* and *B*. Since more than three years have passed after the issuance of the writ of garnishment, section 542b requires the sheriff to return the property to *B*. Section 544, on the other hand, directs the sheriff to return the property to *C*, when the garnishment has been released or discharged.

As indicated by the above illustration, the conflict between sections 542b and 544 arises only when three years or more have expired from the time of the issuance of the writ of garnishment and no judgment has been rendered in the principal action.

This statutory conflict was discussed in *Booolodian v. Ohanesian*,³ a recent case decided by the California Court of Appeal for the Fifth District. The court recognized, but was not required to resolve, the conflict created by the two code sections. This note will analyze sections 542b and 544 both in the factual setting of *Booolodian* and in light of past decisions of the courts which have interpreted the two statutes. Since difficulties are encountered in achieving a satisfactory administrative determination in the disposal of property released from attachment or garnishment because of this conflict in the two statutes, this note will also discuss possible statutory modifications which could be made to eliminate this conflict.⁴

Booolodian v. Ohanesian—The Factual Setting

On June 19, 1963, the plaintiff sued the defendant on a note, and on the same day caused a writ of garnishment to be issued against a third person, the garnishee, who was indebted to the defendant. Pursuant to this writ, the garnishee paid \$2,757 to the sheriff to avail himself of the protection offered by section 544 of the Code of Civil Pro-

nishment or releasing the property; provided, no appeal is perfected and undertaking executed and filed as provided in Section 946 of this code or a certificate to that effect has been issued by the clerk of the court, or (3) in all other cases provided by law. There shall be no liability for such persons acting in conformity with such releases or for such officers releasing such attachments or garnishments in accordance with the foregoing." *Id.* § 544 (West Supp. 1971) (emphasis added).

3. 13 Cal. App. 3d 635, 91 Cal. Rptr. 923 (1970).

4. See text accompanying notes 63-74 *infra*.

cedure.⁵ On August 9, 1963, the garnishee filed a petition in bankruptcy under Chapter XI of the Bankruptcy Act.⁶ Promptly thereafter, the bankruptcy court issued a stay specifically forbidding the plaintiff, defendant and others from enforcing their liens or obligations against the garnishee until a final determination could be made in the bankruptcy proceedings.⁷ Four years later, in November 1967, the superior court, pursuant to stipulations,⁸ issued an order dissolving the garnishment. Thereafter, the plaintiff, following the procedure in section 544, gave written directions to the sheriff to pay the \$2,757, which had been obtained in the original garnishment, to the referee in bankruptcy and the garnishee jointly, and the sheriff made out the check accordingly.

On June 3, 1968, judgment was rendered for the defendant in the action brought against her on the note, and the plaintiff did not appeal. Since the lawsuit had been terminated in her favor the defendant, pursuant to section 542b, moved to have the garnishment on the \$2,757 dissolved and to have the sheriff pay the money to her on the basis that the prior release by the plaintiff was improper. This motion was denied by the superior court, which held that section 544, rather than section 542b,⁹ was controlling, and that the prior disposition of the property was therefore proper.

Section 542b provides that, after three years from the date of the service of the writ of attachment or garnishment, such attachment or garnishment ceases to be of any effect and "the property levied on shall be delivered to the defendant or his order or to his assignee or executor or administrator." On appeal, the defendant claimed that this section compelled the sheriff to pay the \$2,757 to her since more than three years had elapsed since the original garnishment had been issued. The defendant also contended that the plaintiff had no power to execute the unilateral release of the garnishment.

The plaintiff, on the other hand, claimed that section 544 of the Code of Civil Procedure was controlling and that the sheriff's release

5. The express provisions of this section allow the garnishee to shield himself from potential liability to the plaintiff by paying or turning over the subject of the garnishment to the sheriff.

6. 11 U.S.C. §§ 701-99 (1970).

7. 13 Cal. App. 3d at 639, 91 Cal. Rptr. at 926. See 11 U.S.C. § 714 (1970). The \$2,757 remained in the sheriff's possession until November, 1967.

8. 13 Cal. App. 3d at 639, 91 Cal. Rptr. at 926. The stipulations did not appear in the record sent to the court of appeal; this cast some doubt as to whether or not the defendant had agreed to them.

9. See also CAL. CODE CIV. PROC. § 553 (West Supp. 1971), which provides that if the defendant recovers judgment against the plaintiff and no appeal is taken, any property attached by the sheriff is to be returned to the defendant. Of course an attachment does not involve property of a third party.

of the funds to the original garnishee was therefore proper. Section 544 provides that when an attachment or garnishment is released, discharged or expires, the sheriff is to release the property to the person originally served with the writ of attachment or garnishment; in this case, the garnishee.¹⁰

The court of appeal noted initially that the defendant had not made the sheriff a party in the current proceedings and that the court was unable to bind the sheriff or adjudicate his rights without his presence. The court also pointed out that the sheriff would be exempt from liability in any event for releases of attached or garnished property under section 544.¹¹ The court's reasoning, of course, assumed that section 544 was controlling in the case; a proposition to be further explored below.¹²

The appellate court acknowledged, as had the lower court, that there was a basic inconsistency between sections 542b and 544. However, under the peculiar facts of the case, it was not necessary to resolve this conflict since it was held that section 542b was inapplicable. First, the court noted that the three year period of section 542b "is analogous to a statute of limitations."¹³ Once this determination had been made by the court, the use of section 542b was prevented by invoking a provision of the bankruptcy act, which tolls all statutes of limitation during the pendency of bankruptcy proceedings.¹⁴ In thus finding section 542b inapplicable to the case in question, the court

10. *Id.* § 544.

11. *Id.*

12. See text accompanying notes 13-17 *infra*.

13. 13 Cal. App. 3d at 640, 91 Cal. Rptr. at 926, *citing* Boyle v. Hawkins, 71 Cal. 2d 229, 239, 455 P.2d 97, 103, 78 Cal. Rptr. 161, 167 (1969).

14. 11 U.S.C. § 791 (1970) provides: "All statutes of limitation affecting claims provable under this chapter and the running of all periods of time prescribed by this title in respect to the commission of acts of bankruptcy, the recovery of preferences and the avoidance of liens and transfers shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed."

The appellant argued that section 542b is only a statute of duration rather than a statute of limitation; *i.e.*, it limits the remedy and not the right to that remedy, and consequently, the tolling effect of 11 U.S.C. § 791 (1970) did not apply. Appellant's Petition for Hearing at 5-9, *Boloodian v. Ohanesian*, 13 Cal. App. 3d 635, 91 Cal. Rptr. 923 (1970).

In *Robinson v. S & S Dev. Corp.*, 256 Cal. App. 2d 13, 63 Cal. Rptr. 663 (1967), the court, in discussing constitutionally prescribed mechanic's liens (CAL. CONST. art. XX, § 15), held that a ninety-day limitation on the efficacy of such liens was a statute of limitation was tolled by 11 U.S.C. § 791 (1970). Since sections 537-40 of the Code of Civil Procedure grant the rights of attachment and garnishment while section 542b of the same code limits these rights, it seems that appellant's argument is unsound, by analogy, under the reasoning of *Robinson*. *Cf.* *Dower v. Bomar*, 313 F.2d 596 (5th Cir. 1963); *In re Warren*, 192 F. Supp. 801 (W.D. Wash. 1961); *Engstrom v. DeVos*, 81 F. Supp. 854 (E.D. Wash. 1949).

was able to sustain the application of section 544 and the concomitant propriety of the sheriff's release.¹⁵

The court also found no merit in the defendant's claim that the plaintiff was without power to unilaterally release an attachment or garnishment, and referred to cases in which the courts had sustained precisely that same power.¹⁶ The court noted that section 544 specifically commanded the sheriff to execute a release upon "written direction of the plaintiff or his attorney."¹⁷

Although the court in *Booloodian* did not have to deal with the inconsistency between the two code sections, there is, nevertheless, the possibility that the issue may arise in the future, and the courts may not always be able to so neatly avoid the problem. It would seem appropriate, therefore, to further analyze the two sections in an effort to illuminate the conflict. Earlier constructions of these sections by the courts will be discussed briefly in an effort to seek out and offer proposals for the solution of this unresolved conflict.

Sections 542b and 544—The Present Conflict

Section 542b applies to all attachments and garnishments and provides that they will expire at the end of three years after the issuance of the writ, unless sooner released.¹⁸ However, section 542b does not, in itself, specify how such an early release may be effectuated. Section 544, in contrast, contains no express time limitation, but does contain three methods for the release of attachments or garnishments.¹⁹

The most troublesome aspect of the two sections arises when, prior to any judgment in the principal suit, the sheriff is required to release the attached or garnished property. Section 542b unequivocally states that upon the expiration of three years (unless sooner released), the sheriff must return *all* property in his possession to the *defendant*, regardless from whom the property was originally acquired.²⁰ Section 544, on the other hand, directs the sheriff to release the property to the person served with the writ of attachment or garnishment upon the release of the writ.²¹

15. 13 Cal. App. 3d at 640, 91 Cal. Rptr. at 927.

16. *Id.* at 638, 91 Cal. Rptr. at 924, *citing* Smith v. Robinson, 64 Cal. 387, 1 P. 353 (1883) where the court stated that "[t]he claim of respondent's counsel that real property attached as this was can only be released by order of court is not, in our opinion, tenable;" *accord* Bachelder v. Perley, 53 Me. 414 (1866); *Southwestern Broom & Warehouse Co. v. City Nat'l Bank*, 52 Okla. 422, 153 P. 204 (1915).

17. *See* CAL. CODE CIV. PROC. § 544 (West Supp. 1971).

18. *Id.* § 542b (West 1954).

19. *Id.* § 544 (West Supp. 1971). *See* text accompanying notes 49-55 *infra*.

20. *Id.* § 542b (West 1954).

21. *Id.* § 544 (West Supp. 1971).

Section 542b

Of particular significance to the problem, as seen in *Booloodian*, is the recognition that section 542b is analogous to a statute of limitation. This construction of section 542b was first enunciated by the California Supreme Court in *Boyle v. Hawkins*.²² In that case, the plaintiff was suing to enforce the garnishee's liability under section 544; the defendant (garnishee in the principal action) had refused to deliver up some \$6,000 given to her for safekeeping by the principal defendant.²³ The defendant asserted that because more than three years had elapsed since the garnishment was made, section 542b automatically released the garnishment.²⁴ The court, however, noting that the plaintiff had filed this complaint *before* the three years had elapsed, held that

[t]he filing of a complaint under section 544 must prevent the "release" time from running for purposes of the liability imposed by that section; otherwise a defendant could always frustrate the imposition of liability by a skillful application of the motion and discovery practices for purposes of delay.²⁵

The court was clearly concerned with the possibility of deliberate stalling maneuvers by the defendant to nullify an attachment or garnishment. While the *Boyle* case involved a delaying defendant-garnishee, the possibility of intentional delay would likewise seem to exist when the defendant is *not* the garnishee.²⁶

At least one case has held that an attachment or garnishment does not have a minimum time limit but is restricted by section 542b to a maximum of three years.²⁷ Moreover, even an appeal and the filing of an undertaking bond cannot extend this period.²⁸

In contrast to the above view is the early decision of *Estate of Troy*,²⁹ where the court of appeal held that the only purpose of section 542b was to compel diligence on the part of the attaching plaintiff.³⁰ The court also held that intervening delays beyond the control

22. 71 Cal. 2d 229, 455 P.2d 97, 78 Cal. Rptr. 161 (1969).

23. *Id.* at 232, 455 P.2d at 98-99, 78 Cal. Rptr. at 162-63.

24. *Id.* at 238, 455 P.2d at 103, 78 Cal. Rptr. at 167.

25. *Id.* at 239, 455 P.2d at 103, 78 Cal. Rptr. at 167.

26. In *Booloodian* the defendant relied heavily on *Arcturus Mfg. Corp. v. Superior Court*, 223 Cal. App. 2d 187, 35 Cal. Rptr. 502 (1963) in which the court allowed an otherwise valid garnishment to expire; however, it appears that the pretrial delay was caused by the *plaintiff*. But more importantly, this case did not include the element of the garnishee's intervening bankruptcy and its concomitant tolling of statutes of limitation under 11 U.S.C. § 791 (1970).

27. *Durkin v. Durkin*, 133 Cal. App. 2d 283, 284 P.2d 185 (1955).

28. *United States Liability Ins. Co. v. Superior Court*, 252 Cal. App. 2d 557, 60 Cal. Rptr. 723 (1967). *But cf.* CAL. CODE CIV. PROC. § 542a (West 1954) (extension of attachment on realty).

29. 1 Cal. App. 2d 732, 37 P.2d 471 (1934).

30. *Id.* at 736, 37 P.2d at 472.

of the plaintiff (here a probate proceeding) would not cause the attachment or garnishment to lapse.³¹

There is another line of cases in which the courts have been able to suspend the operation of section 542b. In *California Home Extension Association v. Hilborn*,³² the defendant paid money into the court to secure the release of an attachment on certain property with the stipulation that the money was to be held on deposit until a final determination was made in the case.³³ The court held that the defendant could not claim an automatic release at the expiration of three years under section 542b, and he would be held to his stipulation.³⁴ In another recent case,³⁵ the court held that where the parties agree to have the property released, there is a contract between them which will constitute a sufficient release under section 542b, and the three year period included in section 542b does not apply.³⁶

In summary, section 542b is of no force and effect on an otherwise valid attachment or garnishment when there is some unavoidable intervening delay which necessitates a wait of more than three years between the time of the service of the writ and the final outcome of the principal case.³⁷ Further, an attachment or garnishment does not expire when a timely complaint has been filed before the three year period of section 542b has lapsed.³⁸ Also, where some contractual arrangement between the parties has superseded the attachment or garnishment, section 542b has been held not to apply.³⁹

Section 544

Section 544 provides for the direct imposition of liability upon any person who has possession of the property or credits of the principal defendant,⁴⁰ or who owes money to the principal defendant, at the time of the service of the writ.⁴¹ Service of the writ of attachment

31. *Id.*

32. 115 Cal. App. 2d 634, 252 P.2d 368 (1953).

33. *Id.* at 635, 252 P.2d at 369.

34. *Id.* at 636, 252 P.2d at 369.

35. *Shepherd v. Miles & Sons, Inc.*, 10 Cal. App. 3d 7, 89 Cal. Rptr. 23 (1970).

36. *Id.* at 13, 89 Cal. Rptr. at 26-27.

37. *In re Estate of Troy*, 1 Cal. App. 2d 732, 37 P.2d 471 (1934). *But see* *United States Liab. Ins. Co. v. Superior Court*, 252 Cal. App. 2d 557, 60 Cal. Rptr. 723 (1967); *Durkin v. Durkin*, 133 Cal. App. 2d 283, 284 P.2d 185 (1955).

38. *Boyle v. Hawkins*, 71 Cal. 2d 229, 455 P.2d 97, 78 Cal. Rptr. 161 (1969).

39. *Shepherd v. Miles & Sons, Inc.*, 10 Cal. App. 3d 7, 89 Cal. Rptr. 23 (1970); *California Home Extension Ass'n v. Hilborn*, 115 Cal. App. 2d 634, 252 P.2d 368 (1953).

40. CAL. CODE CIV. PROC. § 544 (West Supp. 1971).

41. *Id.* *See also* *Smith v. Crocker First Nat'l Bank*, 152 Cal. App. 2d 832, 314 P.2d 237 (1957).

or garnishment on such a third person creates a direct liability between that party and the attaching plaintiff provided the plaintiff prevails in the principal action.⁴² This contingent liability continues until the garnishee turns over the property, or pays the debt to the sheriff.⁴³ The liability of the garnishee under section 544 may also be extinguished if the writ is discharged or the judgment is satisfied.⁴⁴ A payment to the sheriff by the garnishee may admit the indebtedness to the defendant, but will not necessarily entitle the defendant to payment of the debt because of the existence of possible defenses to the debt.⁴⁵ In addition, the payment to the sheriff has no conclusive effect on the title to the money,⁴⁶ and the plaintiff would be forced to prove the debt between the defendant and the garnishee before it could be enforced.⁴⁷

Unlike 542b, section 544 establishes a method for release of the writ of attachment or garnishment and also specifies the means of disposal of the property when such a release occurs. A release of attached or garnished property, under section 544, may take one of three forms: (1) a written release executed by the plaintiff or his attorney, (2) a court order discharging the writ, or (3) a release in any other manner prescribed by law.⁴⁸ Upon the happening of one of these events the sheriff is instructed to release the property to the person served with the writ.⁴⁹

The first method—the written release by the plaintiff—appears to be a codification of prior California case law, which held that the attaching plaintiff may, on his own volition, release an attachment or garnishment at any time he desires.⁵⁰ Therefore, both under prior decisions and section 544, a sheriff releasing property under such a written order would be acting properly. The sheriff is required only to use

42. *Farmers & Merchants Bank v. Bank of Italy*, 216 Cal. 452, 14 P.2d 527 (1932).

43. CAL. CODE CIV. PROC. § 544 (West Supp. 1971).

44. *Id.*

45. *Broadway Ins. Co. v. Wolters*, 128 Cal. 162, 166, 60 P. 766, 767 (1900).

46. *National Bank of New Zealand v. Finn*, 81 Cal. App. 317, 327, 253 P. 757, 761 (1927). The court noted that the garnishee's action under section 544 "has no determinative effect upon the title or ownership of the property or credits denied to be held, admitted to be held or delivered to the sheriff."

47. *See Takahashi v. Kunishima*, 34 Cal. App. 2d 367, 93 P.2d 645 (1939); *Bunnell v. Wynns*, 13 Cal. App. 2d 114, 56 P.2d 267 (1936).

48. CAL. CODE CIV. PROC. § 544 (West Supp. 1971).

49. *Id.*

50. *See, e.g., Smith v. Robinson*, 64 Cal. 387, 1 P. 353 (1883); *accord, Bachelor v. Perley*, 53 Me. 414 (1866); *Southwestern Broom & Warehouse Co. v. City Nat'l Bank*, 52 Okla. 422, 153 P. 204 (1915). *See generally* 5 CAL. JUR. 2D *Attachment and Garnishment* § 75 (rev. ed. 1967).

reasonable care in executing releases secured under court order.⁵¹ To require the sheriff to investigate the legal "technicalities" of every court order would be "subjecting him to constant danger of liability [and] would be an intolerable hardship. . . ."⁵²

Section 544 also provides for releases in other cases as provided by law. As in *Boloodian*, this would include attachments or garnishments obtained within four months of the filing of bankruptcy by the person served with the writ, which can be avoided by the trustee in bankruptcy.⁵³ It could certainly be argued that this section also includes automatic releases after three years, as provided by section 542b.⁵⁴ Furthermore, section 544 provides that there will be no liability for "persons" or "officers" acting in conformity with the statute.⁵⁵

51. *Hayward Lumber & Inv. Co. v. Biscailuz*, 47 Cal. 2d 716, 306 P.2d 6 (1957). See also CAL. GOV'T CODE §§ 26606-08 (West 1968).

52. *Hayward Lumber & Inv. Co. v. Biscailuz*, 47 Cal. 2d 716, 722, 306 P.2d 6, 10 (1957).

The specific statutory duties of the sheriff, constable, or marshal are contained in CAL. GOV'T. CODE §§ 26600-13 (West 1968). Of special relevance is section 26606 which commands the sheriff to "release on the record all attachments of real property and [to] give the required written release of attachments or garnishments of personal property when the attachment or garnishment placed in his hands has been released [*Query*: How is this release to be accomplished?] or discharged either in full or in part."

In regard to the service of notices such as court ordered releases or plaintiff's releases, the sheriff is to "serve all process and notices in the manner prescribed by law." *Id.* § 26608.

"'Notice' includes all papers and orders required to be served in any proceeding before any court, board, or officer, or when required by law to be served independently of such proceeding. . . ." *Id.* § 26660(b).

"The sheriff shall certify upon process or notice the manner and time of service, or if he fails to make service, the reasons of his failure, and return the process or notices without delay." *Id.* § 26609.

53. See 11 U.S.C. § 107(a)(1) (1964) which provides in part: "Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void.

54. This problem might, in fact, be compounded if this is the proper construction. If section 544 applies to releases caused by the expiration of three years as provided in section 542b, then the sheriff is faced with the choice between delivering the property to the defendant or the garnishee. Under one or the other code section either choice would seem to be proper. Read in yet another way, it could be said that once the three year period elapses, the sheriff must refer to section 544 for disposal instructions; that is, section 544 could be construed to apply to any and all property disposals no matter how a release is effected.

55. Few cases construing section 544 have reached the appellate level since the section clearly provides means to effectuate the release of an attachment or garnishment, and also provides clear instruction to the sheriff for disposal of the property upon such a release.

From the foregoing analysis, it is readily apparent that the sheriff or other officer releasing attached or garnished property is confronted with an underlying conflict in sections 542b and 544 which the courts have failed to resolve.⁵⁶ As will be subsequently discussed, this creates not only theoretical but also concrete problems for the sheriff or other officer who attempts to comply with the code when releasing attached or garnished property.

The Sheriff's Dilemma

Initially, the sheriff is faced with the code's failure to clearly distinguish between the two terms "garnishment" and "attachment."⁵⁷ The code sometimes uses the two terms interchangeably⁵⁸ and other times specifies one or the other,⁵⁹ in effect leaving the sheriff to decide how the terms are to be interpreted.⁶⁰ The most serious problems occur, of course, when there has been a delay of more than three years between the time of the issuance of the writ of garnishment or attachment and the final determination in the principal suit. At the expiration of the three year period, the sheriff must, according to section 542b, return to the *defendant* all the property in his possession. If the property consists of a garnished debt due from a third party to which there may be defenses, and the garnishee has taken advantage of the protection offered by section 544 by paying the debt to the sheriff, the question arises whether the money should be turned over to the defendant, or returned to the garnishee at the end of the three year period. The defendant has not yet taken any action to prove that he is entitled to receive the money paid to the sheriff. Likewise, the garnishee, by the mere exercise of his rights under section 544, has not admitted that the defendant is entitled to payment of the debt.⁶¹ In fact, the cases seem to indicate that such a summary proceeding against the garnishee, without affording him "procedural due process," would be

56. There is no such problem when the defendant has prevailed in the principal action and it is his property that is in the hand of the sheriff. The sheriff is required to return all of the defendant's property in his hands to the defendant. CAL. CODE CIV. PROC. § 553 (West Supp. 1971).

57. See note 72 & accompanying text *infra*.

58. In CAL. CODE CIV. PROC. § 542b (West 1954) the terms are used interchangeably but at the same time the single term "attachment" is apparently used in that section to apply to both types of proceedings although it is used alone. See also *id.* § 544 (West Supp. 1971). In CAL. GOV'T CODE § 26606 (West 1968) the terms attachment and garnishment are also used interchangeably.

59. See, e.g., CAL. CODE CIV. PROC. § 553 (West Supp. 1971).

60. To be sure sections 542b and 544 do not, in all cases, create problems for the sheriff or other officer effecting the release. The discussion in this note is limited to those situations which could actually confuse them.

61. See notes 45-46 & accompanying text *supra*.

highly improper.⁶²

Another problem may also arise when there has been some delay in the principal suit not caused by a lack of diligence on the part of the plaintiff—for instance, when clogged trial calendars prevent a prompt trial. If three years pass, must the sheriff pay whatever has been garnished to the defendant who has done nothing to show that he has a valid claim to the property? This would hardly square with any sense of justice or fair-play, especially from the eyes of the garnishee. It also seems highly unlikely that this result is that intended by the legislature when enacting these sections.

The problems discussed above are the product of statutory conflicts and should properly be resolved by the legislature and not the courts. Consonant with such a recommendation, therefore, this note will propose several remedies to the statutory conflict discussed above.

Legislative Proposals

Any proposed statutory revisions would have to consider the interests which would be most affected by such changes.⁶³ First, while it may be preferable to give the plaintiff some security for satisfying any judgment he might recover, it would also appear desirable to minimize the hardship placed on defendants and garnishees, when property in their possession is burdened by attachment or garnishment. Some reasonable limitation on the length of time within which an attaching plaintiff can burden property should therefore be provided.⁶⁴

Any legislative changes should also provide the sheriff or other attaching officer with clear and simple instructions in order to minimize possible confusion when disposing of attached or garnished property.⁶⁵ Lastly, and perhaps of greatest importance, the statutes should guarantee that property is returned to its rightful owner. In order to accomplish these three objectives, the legislature might consider the following proposals.

62. *See* *Broadway Ins. Co. v. Wolters*, 128 Cal. 162, 60 P. 766 (1900); *cf.* *Randone v. Superior Court*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

It would seem that to allow such a procedure would be to open the doors for possible collusion between plaintiffs and creditor-defendants in that they might use the office of the sheriff to collect debts from recalcitrant debtor-garnishees.

63. In light of the decision in *Randone v. Superior Court*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) holding section 537.1 of the Code of Civil Procedure unconstitutional, it is likely that many of the procedures for prejudgment attachment and garnishment in California will soon be substantially revised. This would give the legislature an excellent opportunity to evaluate and act upon these proposals.

64. *See* *Jones v. Toland*, 117 Cal. App. 481, 4 P.2d 178 (1931).

65. *Cf.* *Hayward Lumber & Inv. Co. v. Biscailuz*, 47 Cal. 2d 716, 306 P.2d 6 (1957).

There would be no conflict in the statutes if section 544 was revised so that it exclusively controlled property disposals under garnishments and attachments, including property released by the plaintiff or court, and property released by statutory expiration of the writ after three years.⁶⁶ This would mean that section 542b would only be concerned with the longevity of attachments or garnishments, and that once property was no longer subject to the writ, the sheriff would refer to section 544 for disposal instructions. This, of course, would require elimination of the last phrase of section 542b which commands the sheriff to return to the defendant the property subject to the writ at the expiration of three years from the date of the writ.

An alternative remedy would be to alter the wording of the last phrase of section 542b to conform with the disposition instructions of section 544.⁶⁷ This could be accomplished by inserting the following phrase to replace the present directions to the sheriff in section 542b: "and the property levied on shall be returned to the person served with the copy of the writ and notice." This latter proposal would retain the current three year limitation. It would also assure the *defendant* the prompt return of property taken from *his* possession, and would assure the *garnishee* that any property given by him to the sheriff would be recovered on release or expiration of the writ. Furthermore, since section 542b mentions releases, it would also be proper to include in the provision some description of the methods by which such releases can be effected.⁶⁸

A third possible approach would be to amend section 542b to read more like a statute of limitation, especially in light of *Boyle v. Hawkins*,⁶⁹ where the court found the two to be analogous. Such a revision could include provisions which would prevent automatic termination after three years (or any other reasonable time) when some action on the principal suit has been taken,⁷⁰ or when some delay has intervened which is not the fault of the plaintiff.⁷¹ However, where the plaintiff's own delay has caused the time period to expire, then of course the attachment or garnishment should be terminated.

A fourth, and perhaps more promising solution, would be to re-

66. See note 56 *supra*.

67. Section 544 provides that "[t]he levying officer shall release such attachment or garnishment . . . to the person served with the copy of the writ and notice"

68. The methods of release contained in section 544 might be appropriate. See text accompanying notes 49-55 *supra*.

69. 71 Cal. 2d 229, 239, 455 P.2d 97, 103, 78 Cal. Rptr. 161, 167 (1969).

70. See *id.* at 229, 455 P.2d at 97, 78 Cal. Rptr. at 161 (1969); *cf.* *Jones & Son Inc. v. Independence Indem. Co.*, 52 Cal. App. 2d 374, 126 P.2d 463 (1942). *But see* *United States Liab. Ins. Co. v. Superior Court*, 252 Cal. App. 2d 557, 60 Cal. Rptr. 723 (1967); *Durkin v. Durkin*, 133 Cal. App. 2d 283, 284 P.2d 185 (1955).

71. *E.g., In re Estate of Troy*, 1 Cal. App. 2d 732, 37 P.2d 471 (1934).

visé *both* sections 542b and 544. In that event it would be necessary to distinguish, by statute, between attachment and garnishment. Garnishment would be distinguished as a subset of attachment, whereby the property of the defendant—chattels, credits or money owed *in the hands of third persons*—would be held to satisfy any judgment which the plaintiff might recover.⁷² Next, all reference to garnishment would be deleted from section 542b and all reference to attachment deleted from section 544. Again, however, provision for the release of attachments would have to be included in the amended section 542b, since there is presently no such provision in the section.⁷³ Finally, to prevent the anomaly of a garnishment capable of infinite duration, the legislature should include a reasonable time limitation in the revision to section 544.⁷⁴

Conclusion

This note has pointed out certain inherent problems faced by the sheriff or other officer when attempting to interpret sections 542b and 544 of the Code of Civil Procedure in the release and return of attached or garnished property; *i.e.*, section 542b provides that the sheriff shall return the property to the defendant, while section 544 provides that the property is to be returned to the party from whom it was received, who may or may not be the defendant.

The court realized, but was not required to resolve these problems in *Boloodian v. Ohanesian*.⁷⁵ That case, however, appears to be one of the first on the appellate level to at least recognize this conflict, and it provides a realistic, factual setting to illustrate the problem which may result from the inherent conflict in the two code sections. In addition, these two sections fail to make the basic distinction between attachments and garnishments.⁷⁶

The proposed statutory changes which have been recommended would provide maximum security for the plaintiff balanced against a minimized burden for the defendant or garnishee, and would make a statutory distinction between the concepts of attachment and garnishment. The proposed revisions to the code sections would also provide the sheriff with clear, consistent instructions as to the disposal of attached or garnished property. Both sections, as they now stand, are inadequate. The sheriff or other officer commanded to release attached or garnished property is forced to make a discretionary choice

72. See 5 CAL. JUR. 2D *Attachment and Garnishment* § 2, at 744-45 (rev. ed. 1967).

73. See text accompanying notes 49-55 *supra*.

74. *E.g.*, CAL. CODE CIV. PROC. § 542b (West 1954) (three years).

75. 13 Cal. App. 3d 635, 91 Cal. Rptr. 923 (1970).

76. See text accompanying note 72 *supra*.

between the two code provisions without sufficient guidance from the courts or legislature. There is thus a practical necessity for modification and clarification of these code sections to solve the sheriff's dilemma. More importantly, however, the revision in the statutes would further the more fundamental policy of protecting the interests of both debtors and creditors in the rapidly changing area of attachment and garnishment.⁷⁷

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77. *Cf., e.g., Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment wage garnishment held unconstitutional); *Randone v. Superior Court*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (prejudgment attachment of bank accounts held unconstitutional); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (prejudgment replevin, claim and delivery held unconstitutional); *Cline v. Credit Bureau*, 1 Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970) (prejudgment wage garnishment held unconstitutional); *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970) (prejudgment wage garnishment held unconstitutional). See generally Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A.L. REV. 837 (1970); Note, *Attachment in California: A New Look at an Old Writ*, 22 STAN. L. REV. 1254 (1970).

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