

Election of Remedies and Pretrial Writs

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I. INTRODUCTION

Our established civil procedure rules permit a plaintiff to invoke varied temporary remedies before the trial takes place. The best known pretrial writ is still attachment, but many others are at times available, ranging from body arrest or claim and delivery to *lis pendens* or receivership.¹ These writs are very powerful because they are still easy to obtain, take prompt effect and may impound defendants' property for years until the plaintiffs' rights are tested by a trial. Their effectiveness is demonstrated by the attention they receive in law reviews and court decisions. Hardly a session of our legislature passes without some changes in these laws. By these methods, the formal rules determining the use of writs are shaped to fit our ever-changing views of public policy.

Once the laws are set, however, we find the published purposes ignored, and writs becoming tactical weapons of the parties to our

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1. These writs are under strong judicial attack but the *remedy* is still held proper, even though the *procedure* has been ruled unconstitutional. See, *Randone v. Appellate Dept.*, 5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971) and cases cited. Our courts may hereafter eliminate the substance of various writs by holding all procedures to be unconstitutional. The decisions say, however, that the attack is solely on the issue of a hearing before writs may be used.

trials. By their use, litigation sometimes is "little short of attempted extortion, which depends upon method of collection rather than the merit of the claim to payment."² The justice of the conflict is ignored and cases won by callous economic bludgeoning.

One cannot stand aghast at such practices. They are to be expected. Lawyers are condottieri in the commercial world. Their weapons differ from their forebears' of the Renaissance, but not their tactics or their social purposes. Their object simply is to win, regardless of the justice of their cause or the social side effects of victory. Success in the courtroom lottery brings substantial gains, not only to the litigants but also their attorneys. The stakes in money, prestige and influence are high. Every incentive, therefore, exists for an attorney to "fix" his case, through skillful manipulation of trial court procedures. Improper conduct in this area is unaffected by mere moral indignation. Procedural roadblocks to their use increase the cost of using writs, but leaves the problems of their use as pressure tactics unresolved. The correct way to safeguard society against misuse of such procedures is through institutional controls which will reduce substantially the scope afforded lawyers for such manipulation and will penalize severely an offending litigant. Clients who lose their claims because an attorney has used sharp practices will quickly find a way to discipline the bar.

II. MISUSE OF PRETRIAL WRITS ARISES FROM OUR LEGAL CONCEPTS

Our statutes and our public policy authorize use of preliminary remedies only in a comparatively few specific situations; they should not be invoked in other circumstances. We say that "when the law . . . designates and specifies in what instances an attachment may issue and in what cases it is not a legal remedy, the express will of the legislature must control."³ But this is just our

2. *Petition of Herbert Aller Business Representative*, 298 P.2d 128, 131 (2nd Dist. 1956), *aff'd sub nom In re Aller's Petition*, 47 Cal. 2d 189, 302 P.2d 294 (1956). This case involved resort to the Labor Commission to help collect a debt. The leading discussion of these problems is *Spellens v. Spellens*, 49 Cal. 2d 210, 232-33, 317 P.2d 613, 627 (1957). There the problem is described as the "use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation . . . which constitutes the tort." (Emphasis in text).

3. *Standard Auto Sales Co., Inc. v. Lehman*, 43 Cal. App. 763, 767, 186 P. 178, 180 (3rd Dist. 1919; *hear. den.*)

rhetoric. The hard fact is that limits set by statute on the use of pretrial writs are in practice widely circumvented because a skillful lawyer can find ways to use a writ in almost any commercial case, regardless of whether it is supposed to be available.

This comes about because our legal doctrines, including those on which the use of writs are based, do not correspond to actual divisions of human activity. They are artificial models for events, which like other formal theories,⁴ themselves establish the pattern or relationship among observed phenomena. The "facts" in every situation are consistent with many different legal theories and only groups of facts viewed in terms of a specific formal concept will explain to us other yet unclassified events, and determine how such unknowns should be interpreted.

This may be illustrated easily by a simple arithmetic analogy. In the progression (1,2,3,n) the unknown term "n" could be 4, 5, 6, 7 or any other conceivable number, depending in the theory (or "set") selected to establish such a mathematical sequence.⁵ Except in light of the theory chosen, there is no value for "n" which is more "true" than any other value; "n" could therefore be anything. This

4. K. POPPER, CONJECTURES & REFUTATIONS at 214 (1962): "But in another sense we might say that these facts do not exist *as facts* before they are singled out from the continuum of events and pinned down by statements - the theories which describe them." KOVESI, MORAL NOTIONS at 20, 25: "In our language, to be able to understand the significance or the meaning of a term, we have to be able to follow a rule in using that term, not to be able to perceive an entity of which our term is a name. . . . Standards, needs and wants also enter into the formation of terms that we usually call descriptive terms. What makes a term descriptive is . . . the point of view from which we organize these and other elements into concepts." Law, of course, has no monopoly here. It is equally true of every formal body of knowledge. R. WILDER, EVOLUTION OF MATHEMATICAL CONCEPTS at 108: "Certain parts of mathematics are labeled 'geometry' . . . just as certain parts are labeled 'analysis' and other parts 'algebra'. But these labels again seem to be a matter of words and their conventions. . . . Although labels are convenient and quite useful in their proper context, they should not be allowed to conceal underlying facts."

5. The starting number 1, is given in each case. The sequence 1, 2, 3, n, for any value of n can be derived from the general formula $y = (n-3) + \frac{(14-3n)x}{2} + \frac{(n-4)x^2}{2}$, when x equals the last known term in the sequence and y the unknown which follows it. From the main formula we can derive the sequence 1,2,3,4,5 by the special formula $y = 1+x$. The sequence, 1,2,3,5,7 is a list of primes, treating 1 as a prime. 1,2,3,5,12 can be derived by the special formula $y = 2-(\frac{1}{2})x + (\frac{1}{2})x^2$. The sequence 1,2,3,6,27 is derived from the formula $y = 3-2x+x^2$. The sequence 1,2,3,7,53 is derived by the formula $y = 4-(\frac{7}{2})x + (\frac{3}{2})x^2$. Any other special formula desired can come from the general formula listed above.

Appreciation is expressed to Peter L. Besag, Ph.D. for the foregoing formulas.

is also true in legal logic.⁶ Without an overriding concept, no group of facts selected from the total surrounding events can lead to any fixed conclusion, or give the legal "n". This is true whether the issue is state of mind, unavoidable accident, reasonable reliance, due process, testamentary intent or any of the other catchwords about which lawyers fight interminably. Since "n" will vary with the theory used, one can also reverse the process, determine first the outcome that is sought, and then produce a theory giving that result. This is the game that lawyers really play. They usually assume the end they wish, and then evolve a legal doctrine going there. That is why the "same" acts are so easily described in doctrines from the field of torts or trusts or contracts or of crimes. They are all one, with different emphases. In order to analyze, describe or even just to understand events, they must be related to systems. Such systems, however, are not less artificial because of this analytic necessity.

In practice, this makes it easy for a plaintiff to argue several legal "sets" at once, and plead his cause in varied ways, hoping to find thereby at least one which will be accepted by the courtroom judge and become the basis for his victory. Nor is there anything wrong in urging many theories at one time. A litigant should not be prematurely bound to any single concept of his rights or forced to "gamble on his remedy" before he knows the outcome of the trial.⁷

6. S. TOULMIN, *THE USES OF ARGUMENT* at 7, 8 (1958) refers to logic as "generalized jurisprudence" and described lawsuits as "just a special kind of rational dispute, for which the procedure and rules of argument have hardened into institutions." Certainly, law employs a type of proof or justification quite different, for example, from scientific proof or from determination of matters by force, and is therefore well adapted to resolve certain kinds of social problems, although many other problems are far beyond it.

7. *Klinger v. Modesto Fruit Co.*, 107 Cal. App. 97, 103, 290 P. 127, 129 (3rd Dist. 1930; *hear. den.*)

The doctrine of election, whether it be applied to the selection of optional courses of procedure or the choice of individuals who are deemed to be severally liable for an obligation, is intended for the benefit of the parties charged. Obviously this defense may therefore be waived by them. . . . An election is in fact the exercise of a choice of optional remedies or debtors. . . . It is illogical and unjust to require a creditor on his own initiative and without a demand or motion to make an election. . . . This would require him to speculate upon the decision of the court. . . . An election before the rendition of judgment might not accord with the court's view of the relationship as disclosed by evidence. A premature choice might result in an erroneous selec-

The voluntary use of pretrial writs in this situation, however, is very different and raises other policy considerations, because the rights of the defendants are severely affected by them.

The situation often comes about that one of several legal ways to view events permits a pretrial remedy not available when the same facts are organized under another doctrine. The same fact situation, for example, can be described in language of either tort or contract. In each such case, the plaintiff's lawyer is greatly tempted to phrase his claim so as to take advantage of a writ. He does this by including within his pleadings a theory permitting pretrial remedies, or even by deliberately inventing such a claim, while also making other arguments based on theories under which the writ could not be used. The writ is then employed, with all the pressures that flow from its use. In most cases the dispute is settled, perhaps because of the employment of the writ. If, however, agreement is not reached and the trial eventually takes place, the plaintiff may find that he cannot win on the claim with which he invoked the writ, and must seek recovery upon some non-writ theory. Such conduct is indefensible. It deliberately evades and mocks the limitations permitted by statute on the use of writs. That an "attachment may not issue in an action founded on tort"⁸ is as much part of our law and public policy as that one may issue in a contract case⁹, and this is true no matter how improperly the defendant may have acted. However "just" the plaintiff's case, his

tion and a total loss of a valid claim. . . . The uncertainty and injustice of an erroneous election is apparent. The law will not require a litigant to gamble on his remedy.

Of course, a plaintiff "may not pursue both [theories] to a final judgment, but must instead prior to that event elect between the inconsistent remedies previously pleaded." *Thorson v. Western Development Corporation*, 251 Cal. App. 2d 206, 214, 59 Cal. Rptr. 209, 304 (4th Dist. 1967).

8. *Stowe v. Matson*, 94 Cal. App. 2d 678, 683, 211 P.2d 591, 594 (3rd Dist. 1949; *hear. den.*). Attachment traditionally has been permitted in certain tort cases.

9. *Sniadach* does not eliminate attachments; *Randone* merely holds our present statute unconstitutional, but a revised statute could constitutionally permit attachments "generally after notice and a hearing on the probable validity of a creditor's claim". In *Blain v. Pitchess*, 5 Cal. 3d 258, 96 Cal. Rptr. 42 (1971) the court held the present claim and delivery statute unconstitutional, but also ruled that "in order to create a constitutional prejudgment replevin remedy, there must be a provision for a determination of probable cause by a magistrate and for a hearing prior to any seizure. . . ." These cases do not go to the remedy, but are apparently solely procedural. Of course, the courts could effectively eliminate all such writs by holding every implementing procedure to be unconstitutional, while merely giving lip service to the continued use of writs. There is no reason, however, to doubt that the courts mean what they say in these cases, and that most writs may constitutionally be used and will be with us for many years to come.

misuse of the process of the court must be stopped. This type of abuse of the writ procedures is rampant in our courts. Effective methods must be found to combat such practices.

III. ESTABLISHED REMEDIES ARE NOT ENOUGH

The traditional ways to penalize a plaintiff for misuse of a provisional remedy have all proved insufficient. The defendant usually must bring a second lawsuit when the first is finally over, with all of the attendant delays, uncertainties, and cost. In most situations the wronged defendant must win the first suit as a condition to bringing the second, although a victorious plaintiff is as likely to have used a writ improperly as one who loses the first suit.

A second suit is not an effective solution. Not only does it further burden our overcrowded courts, but it is not a useful way to stop abuses. This kind of recovery must be based on malice, bad motives or extreme overreaching, and these claims are most difficult to prove. The threat of retaliation by a later tort suit for misuse of a provisional remedy has not controlled plaintiffs in this field and is not regarded as a serious issue in settlement negotiations, which further shows what little use they are. Even a defendant who successfully resisted the plaintiff's claims initially, wins little by his second suit. In cases where the plaintiff wins the initial action, the later tort claim for procedural abuse against the successful plaintiff is almost worthless.¹⁰

10. The plaintiff is not liable for a statutory wrongful attachment claim, but only for a tort such as malicious attachment, as a result of a highly misguided claim of public policy. *Asevedo v. Orr*, 100 Cal. 293, 34 P. 777 (1893). When a bond is posted, the defendant may proceed against the surety. This type of suit is not a sufficient answer. A successful defendant may have a meaningless remedy against the surety because an insufficient bond was posted or the sureties are insolvent and because relief on any bond is rarely adequate. Still, a suit on the plaintiff's bond is usually of some value, although this area is badly in need of reform. A more detailed discussion of some of these problems is contained in Alexander, *Wrongful Attachment Damages*, U. SAN FRANCISCO L. REV. 38 (1969). A tort claim for abuse of a preliminary remedy is sometimes available as a cross-complaint in the original suit, without waiting until the first judgment. *White Lighting Company v. Wolfson*, 68 Cal. 2d 336, 66 Cal. Rptr. 697 (1968). This practice should be encouraged and expanded as much as possible, as it would afford great relief. Malicious prosecution, for example, should also be made available as a counterclaim. Unfortunately, *Babb v. Superior Court*, 3 Cal. 3d 841, 92 Cal. Rptr. 179

Another way proposed to end such practices is to demand high standards of the bar, and punish lawyers who offend by censure, fines or even terms in jail. Such a proposal, while dramatic, is not meaningful. Abuse of writs is too widespread for such a cure to work, and censure calls for even greater proof than tort.¹¹

Limitations on the use of special writs is another answer regularly proposed.¹² Restrictions on *ex parte* writ procedures¹³ and the many court hearings regularly available reflect this pressure for judicial supervision.

Two very different approaches can be noticed here. Some writs are altogether banned and held invalid under any circumstances. They just cannot be used again. Other courts permit the writ to issue following a formal judicial hearing. Although the initial effect of such rulings may be the same, they are very different in theory and in eventual social implications. Neither approach, however, will really solve the problems of abuse of writs.

(1971) seems to emasculate the highly beneficial *Wolfson* rule. At least the policy considerations seem inconsistent. A second suit generally comes too late and is too expensive to be an effective remedy. If the plaintiff wins at the first trial, even though on a completely different theory, few take a defendant's subsequent complaints about procedural abuse seriously. *Pete v. Norberg*, 163 Cal. App. 2d 154, 329 P.2d 20 (1st Dist. 1958); *Coy v. Advance Automatic Sales Co.*, 228 Cal. App. 2d 313, 39 Cal. Rptr. 476 (1st Dist. 1964; *hear. den.*) Even when the defendant does win at first, he has difficulties collecting through a second trial. In *Lerner v. Glickfield*, 187 Cal. App. 2d 514, 9 Cal. Rptr. 686 (2nd Dist. 1960; *hear. den.*) it took about seven years before the plaintiff finally won. Few litigants can afford such stamina.

11. THE AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS, Canon 30 (1908) states that an attorney will not participate in a suit "to harass or to injure" a defendant. CALIFORNIA RULES OF PROFESSIONAL CONDUCT, Rule 13 (1970) is to the same effect, and is sometimes applied. *Bryant v. State Bar of California*, 21 Cal. 2d 285, 131 P.2d 523 (1942). Such claims are rare, although a lawyer might be held liable for tort damages resulting from his conduct of the litigation, as in *Munson v. Linnick*, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (4th Dist. 1967). We now recognize a good faith reliance on advice of counsel as a defense to a tort claim. *Brinkley v. Appleby*, 276 Cal. App. 2d 244, 80 Cal. Rptr. 734 (2nd Dist. 1969) (*but see* *Templeton Feed and Grain v. Ralston Purina Co.*, 69 Cal. 2d 461, 72 Cal. Rptr. 344 (1968)). We cannot control litigation by threatening the attorney and at the same time hold that the attorney's advice is a defense in a tort suit against the client.

12. For example, the recently enacted 15 U.S.C. 1671 (1964) *et seq.* The general exemption laws are typical of state statutes of this type.

13. *Sniadach v. Family Finance Corporation of Bay View*, 395 U.S. 337 (1969), and subsequent state cases, collected in *Randone, supra* n.1. See CAL. CODE OF CIV. PRO. §§ 554-558 (West 1954). *Rubin v. Barasch*, 275 Cal. App. 2d 835, 80 Cal. Rptr. 337 (2nd Dist. 1969) shows how releasing attached property without a hearing may prove as dangerous as attaching in the first place.

Reducing access to a particular pretrial remedy is a control technique of limited worth. Exempting only certain assets or a portion of one's earnings does not prevent seizure of remaining property or impounding the balance of the wages due.¹⁴ Eliminating some writs is not enough, since "pseudo-attachments"¹⁵ or other formal pretrial remedies will often yield the same results. We could, of course, abolish every writ.¹⁶ This is unsatisfactory since it would also end the legitimate use of pretrial remedies, and deprive a wronged plaintiff of what often is his sole worthwhile redress.

Such considerations, undoubtedly, explain the great attraction that our judges find in making every act discretionary, and in eliminating the *automatic* use of writs. The present law is clearly heading towards a system where some court must rule on everything and thereby see that "justice" may be done.¹⁷ This, after

14. This is the point of *Sniadach*, since the objectionable Wisconsin Statute exempted up to 50% of accrued wages. Statutes in other states are similar, but still unconstitutional. Although only wages were involved in *Sniadach*, the principles are equally applicable to any use of such a writ, as held in *Randone*, and in some other states, as in *Larson v. Fetherstone*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969). The California courts have now held that all prejudgment levies on wages are absolutely invalid. *McCallop v. Carberry*, 1 Cal. 3d 903, 83 Cal. Rptr. 666 (1970). What has happened here is the creation of a new exemption "statute" by court decree. Similar points appear in *Blair*, *supra* note 9 (claim and delivery) and *Kline v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (inkeeper's liens).

15. These are available pretrial remedies which are often privileged and can be invoked by a creditor without posting a bond or incurring any obligation towards a successful defendant except, perhaps, in tort. Repossession, wage assignments, interpleader, *lis pendens*, and criminal complaints are of this nature. See, Alexander, *Claims in Interpleader*, 44 CALIF. ST. B.J. 210 (1969).

16. Clearly pretrial writs are being eliminated by the courts as well as by statute. *Mihans v. Municipal Court for Berkeley-Albany Jud. Dist.*, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1st Dist. 1970) held unconstitutional the writ of immediate possession authorized by CAL. CODE OF CIV. PRO. § 1166a (West 1955) despite a prior judicial hearing. Other writs are currently under attack. It is not likely, however, that all such writs would fall, although a hearing will probably be required in every case. Pretrial writs should not be abolished. Although not the subject here, there is a valid basis for the use of writs. They have an important and respectable place in our legal procedure, when used properly. There is nothing inherently wrong or immoral in protecting plaintiffs and letting creditors get paid.

17. Judges sometimes act as though they alone are capable of solving every social ill. It is not surprising that they feel this way. Every skill group imperiously claims a special competence to govern. Plato, after all,

all, is the meaning of *Sniadach*, *Randone*, and their progeny. It, however, is not a sufficient solution and will not work.

Let us suppose that all the laws were changed and provisional relief was made dependent on a pre-trial hearing. For the plaintiff to win at such a hearing, he would have to show proof that he at least *might* well prevail when the suit finally comes to trial. *Randone* approaches this requirement. In such a legal world, all writs would be processed as are receiverships today. The total scheme of pre-trial remedies might even be encased within one single writ, and tailored to the merits of the controversy by the pretrial judge, after a proper hearing.

In such event, more judges would be used, more hearings held, more pleadings written and more legal fees received. Except as makework for the bar, however, things would still be the same.

Every pretrial remedy now requires a prior showing of the merits of the plaintiff's cause, either by testimony or *ex parte* affidavit.¹⁸ Unless the substantive law is also changed, forcing a hearing in every case would not affect the use of writs. *Randone* does not prescribe attachments nor attack the use of writs; only their use without a prior judicial hearing is condemned. What significant improvement would pretrial hearings make? Defendants rarely go to court after a garnishment to seek protection of exemption laws or file a challenge to the sureties.¹⁹ If actual impounding of their funds does not produce response, one can not think that preattachment hearings would. Suppose defendants did appear; what then? The debt itself is rarely in dispute; and even if it were, the court would only set a higher bond, permit the pretrial remedy, and pass the case along for trial. We cannot expect judges to act otherwise when every case must pass before them in an unending procession of petty claims.²⁰ Although an occasional defendant might win ab-

believed philosophers should be the kings. What is surprising, though, is that so many people acquiesce in the judges' imperial claims. We are in many ways a lawyer-ridden society, in the same sense that other cultures have been priest-ridden. There is no reason for this save our tradition, because it is not true in other developed industrial countries.

18. *E.g.*, CAL. CODE OF CIV. PRO., §§ 481, 510, 527, 538, 566, 1069, 1088, 1107, 1166a, etc. (West 1955).

19. The court in *Randone* concedes that "at present, if a debtor is aware of his legal rights and can afford to do without the attached necessity until he is able to secure release through the courts, a creditor generally cannot gain the undue leverage afforded by the attachment of such property". The point of *Randone* is that this is not enough. Why does the court assume that the new procedures will be better?

20. One envisions massive calendars, with hundreds of cases set for every hour. We can be sure a standard procedure would evolve using "commissioners" rather than "clerks", with prehearing approval lists, group oaths, mass testimony, postponement of contested cases and spe-

solutely at the outset, a hearing in each case is still not justified. The same relief could otherwise be obtained on the defendant's motion for a summary dismissal. Our legal system must give speed and uniformity because of the size of our communities and the great demands made on our courts. Exceptions to the rules and special cases must have a separate hearing at a different time, apart from the court's ordinary business.

Preattachment hearings would probably become in practice a kind of exemption hearing held before the property is seized, rather than after the writ has been returned. The question commonly before the court would not be if the plaintiff might prevail, but whether the writ's use might hurt too much. No good can come from this. Before the fact, no judge can know what assets might be caught, or how a garnishment would really work or how much impounding would hurt "excessively". Nor could a plaintiff list the properties to be attached and hope to find them when the writ is authorized. Broad principles would have to be employed, since detailed hearings would seem to be unworkable. In fact, such hearings might even harm impoverished defendants. An Order to Show Cause why an Attachment Should Not Lie would, no doubt, be served along with the Complaint. The defendant often would ignore the papers and default, partly because he has no real defense, partly because he does not understand, and partly because he has not then been stung to action by the garnishment. Inevitably the writ would issue, and, when wages are withheld, the debtor might well find his hearing date has passed and that the goods were seized with court permission.²¹ The point, of course, is that the formal dif-

cific standards for relief. This is exactly what we have now, on an *ex parte* basis, with court hearings afforded for unusual cases. Summary proceedings are available in the appellate courts to give immediate review. *McCall v. Superior Court*, 1 Cal. 2d 527, 36 P.2d 642 (1934). Injunctions prevent a truly improper threat of misused writs. *Czap v. Credit Bureau of Santa Clara County*, 7 Cal. App. 3d 1, 86 Cal. Rptr. 417 (1st Dist. 1970). The change from oral testimony to affidavits for use in default judgment prove-ups permitted by CAL. CODE OF CIV. PRO., § 585(4) (West 1955) illustrates the benefits of writings over oral hearings in some cases. One method of proof is not inherently better or more "moral" than another; the issue is just which procedure is more effective in given situations. The *Randone* court finds this intolerable because of the delay involved. Still these matters can be heard even more quickly, and some procedural delays are inevitable in any system.

21. Of course, there could be another hearing at this point, but this

ference between a writ issued based on an *ex parte* showing and one after a court hearing is a trivial distinction. That change will not prevent abuses in this field and might even make matters worse for all involved.

IV. A NEW APPROACH

The real question is not the proper procedure needed for a writ to issue; the problem is the use of writs in cases where such remedies are not properly employed or used as bargaining pressures on the litigants. It is not whether writs require a sworn document or a noticed hearing. It is not whether one deals with a judge or clerk or court commissioner. The abuse arises from the evasion of the limited rights to employ writs, and the response to their misuse must go to this basic problem. No program, of course, can provide a perfect remedy. A partial solution appears, however, in those cases where writs are employed in support of one of several theories by a plaintiff for relief. The courts should let the lawyer's arsenal alone and allow litigants to use writs in their suits. However, the plaintiff's right to win, no matter what the merits of his claim, should be limited to theories under which the writ employed is strictly proper. This eliminates all inquiry as to the plaintiff's motives, and evaluates only his conduct. It will not stop misuse of writs, but will reduce the cases in which claims allowing writs are advanced just to have the power of the writ used as a weapon to enforce a different sort of claim. Thus, if alternative inconsistent theories exist, and if the plaintiff invokes a writ authorized by just one particular theory, he must win on that claim or lose his suit. This would apply even though he might have won upon a different theory on which he could not have received pretrial relief.

One may complain that this is harsh and will sometimes preclude a "just" result, as when plaintiffs have been careless, ignorant, or greedy, or when defendants are more culpable. However, in each such case the plaintiff has deliberately chosen to use the writ for his own benefit. He knows—or must be held to know—that his right

only brings matters back to where they started. In *Independence Bank v. Heller*, 275 Cal. App. 2d 84, 79 Cal. Rptr. 868 (2nd Dist. 1969; *hear. den.*) household furniture worth over \$20,000.00 was held exempt based on the "manner of comfortable living to which" the defendant "has become accustomed". This means anything might happen at such a hearing, and it becomes too speculative to be a matter for effective planning. Maybe the best solution is to provide public insurance to pay every creditor in full for debts proved uncollectable from non-exempt assets of an insolvent buyer, since courts seem resolved to make collecting difficult. The principle is the same as public indemnity to victims of some crimes. After all, as costs rise in any field, insurance must be used to spread the risk.

to an attachment, for example, or a *lis pendens*, is based on only certain of his theories. In fact, because of *Randone*, he will have actually convinced some judge of his legal right to an attachment, and not merely filed a printed form in court. He has had the benefit of the theory authorizing writs and now must bear the burden. By hypothesis he cannot win on the writ's theory. Penalizing the occasional plaintiff who uses such remedy in good faith because he thinks the law gives him the right to do so (even though he is wrong but had another argument that would have won) is a price society must pay to end a greater evil. We apply rigorous rules mechanically to felonies. We often let a violator free rather than condone a lawless search or use of tainted testimony, in order to purify thereby the pretrial methods of our criminal courts. We should do the same more willingly to end misuse of pretrial remedies in civil cases, because more people are affected by commercial litigation than by police procedures. Placing the plaintiff's suit in jeopardy because he uses unfair tactics is an effective way to control the conduct of the bar. It works in other fields, and would help here.²²

The proper purpose of courts is to promote settled rules of business conduct which all potential litigants may know and must accept, so that there is less point to go to court. The outcome of any

22. Justice Traynor could as easily have been speaking of improper pretrial writs when he said:

If those guarantees were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented. . . . Experience has demonstrated, however, that neither administrative, criminal or civil remedies are effective. . . . The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. . . . There is thus all the more necessity for courts to be vigilant in protecting these constitutional rights if they are to be protected at all. . . . Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves, since not to do so will jeopardize their objectives . . . [I]f courts respect the constitutional provisions by refusing to sanction their violation, they will not only command the respect of law-abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways.

People v. Cahan, 44 Cal. 2d 434, 449-50, 282 P.2d 905, 913-14 (1955). We now know, from *Sniadach*, that freedom from excessive use of pretrial writs is also a constitutionally protected right. The policy is the same and the same results should follow.

individual dispute before the courts or the justice and morality of any party's acts in each specific case should generally be less important than supplying fixed standards for commercial conduct. This is not the goal of courts today. Our courts now aim at "justice" for each litigant, without regard to settled rules. This demand is so pervasive that there hardly is a private cause where victory is certain, or one too wrong to be upheld by claims of "equity". As a result, every litigant demands "justice" of the court. Morality can be—and regularly is—invoked to further any act that man performs, no matter how unfair, cruel or oppressive it may be.²³ When tested by "morality", the outcome of every lawsuit is in doubt. Since either side may win if counsel can successfully maintain the abstract justice of his client's cause, and since an ethical justification can be made for almost anything, there is a powerful incentive to fight (or to settle) every time. Tactics and the use of oppressive procedures become increasingly significant as the outcome on the merits is in doubt.²⁴ One cannot accept a judicial system where the procedures used have more effect upon the final outcome than the merits of the cause.

The formal doctrine of election of remedies has long held that use of any pretrial remedy restricts the plaintiff to a legal theory countenancing such a writ and, therefore, the "obtaining and levy of a writ of attachment is an election of a contract remedy and estops plaintiffs from seeking relief on a tort theory of liability."²⁵

The doctrine of elections, unfortunately, has little viability today. In cases where the theory might apply, a maze of technical

23. Descartes once wrote, "There is nothing we can imagine, however absurd or incredible, that has not been maintained by one philosopher or another", quoted in POPPER, *supra* note 4 at 312. It is only necessary to consider the intellectual apologists for every dictatorial regime or oppressive social practice.

24. R. POUND, *THE SPIRIT OF THE COMMON LAW* at 141-42 (1921). "But the endeavor to make law and morals coincide and to reach an ethical solution of each particular controversy gives too wide a scope to judicial discretion so that at first the administration of justice in this stage is too personal and too uncertain." Pound believed that this stage would soon be over, when law becomes "mature". However, it has not ended in the half-century since he lectured us. On the contrary, justice has become more personal and more uncertain as time has gone by. This has increased the practical importance of the use of oppressive procedures as a form of blackmail.

25. *Barrett v. Hammer Builders, Inc.*, 195 Cal. App. 2d 305, 316, 16 Cal. Rptr. 49, 56 (2nd Dist. 1961). Of course the several legal concepts must be inconsistent. A suit joining independent contract and tort actions is permissible, and attachment on the contract claim in such a case will not waive the independent tort. *Symcox v. Zuk*, 221 Cal. App. 2d 383, 34 Cal. Rptr. 462 (2nd Dist. 1963; *hear. den.*)

distinctions has evolved so that the rule is merely one more tool a judge may use to come to any end result he wants. It does not control the tactics of the bar.

Thus, courts have held there can be no election unless the defendant has been "injured or prejudiced" by the plaintiff's acts, and, accordingly, allowed an action to proceed despite a prior inconsistent judgment against a co-defendant²⁶ or an unsuccessful claim on funds in court.²⁷ Courts have used quasi-contract theories to justify attachments for what are, traditionally, tort claims²⁸ and freely hold that damages allegedly owing from a tort-created "duty" becomes by law a contract "debt", permitting an attachment.²⁹ Elections doctrine is held applicable only where the remedy first sought is properly invoked, and if the "plaintiff is mistaken and undertakes to avail herself of a remedy to which she is not entitled, she is not prevented from subsequently availing herself of the one to which she is entitled under the facts of the case."³⁰

Other courts explain that though attachment "elects" for contract doctrines, the fraud may still be used collaterally so as to toll the bar of limitations applicable upon the contract claim.³¹ Courts only apply elections rules consistently in holding that attachment is a bar to punitive damages³² and even that is far from certain.³³

Most cases in this field arise from use of an attachment when tort theory also is involved, and what little strength the doctrine has to-

26. *Pacific Coast Cheese v. Security First National Bank*, 45 Cal. 2d 75, 286 P.2d 353 (1955). In *J.C. Peacock, Inc. v. Hasko*, 184 Cal. App. 2d 142, 7 Cal. Rptr. 490 (2nd Dist. 1960; *hear. den.*) the trial court held that an unsuccessful levy of attachment was not an election.

27. *Dickinson v. Electric Corporation*, 10 Cal. App. 2d 207, 51 P.2d 205 (2nd Dist. 1935; *hear. den.*).

28. *Steiner v. Rowley*, 35 Cal. 2d 713, 221 P.2d 9 (1950).

29. *Acme Paper Co. v. Goffstein*, 125 Cal. App. 2d 175, 270 P.2d 505 (1st Dist. 1954).

30. *Verder v. American Loan Soc.*, 1 Cal. 2d 17, 33, 32 P.2d 1081, 1087 (1934).

31. *Sears, Roebuck & Co. v. Blade*, 139 Cal. App. 2d 580, 294 P.2d 140 (2nd Dist. 1956; *hear. den.*).

32. *Arcturus Manufacturing Corp. v. Rork*, 198 Cal. App. 2d 208, 17 Cal. Rptr. 758 (2nd Dist. 1961; *hear. den.*).

33. The cases clearly hold attachment is proper in a quasi-contract claim, and also that quasi-contract permits punitive damages. *Ward v. Taggart*, 51 Cal. 2d 736, 336 P.2d 534 (1959). One can conclude that some court will permit attachment for the punitive, as well as the compensatory, damages in such a case.

day is usually shown here. When other pretrial remedies are used, elections principles are weaker still. This is doubly unfortunate, as protection from misused pseudo-attachment remedies is greatly needed.

In one such case, the plaintiff had bought a motel and paid in part by assigning notes payable to him, and partly by his own new note, secured by a trust deed on the purchased property. When difficulties later came, he sued in fraud for damages and also for rescission. Pending trial, the court enjoined defendant from foreclosure of the purchase money deed of trust, and also from selling the notes received as the down payment. The plaintiff later dropped his rescission claim, and won fraud damages at trial. The court found nothing wrong in this, despite the fact that plaintiff on the damage claim alone could hardly have enjoined defendant from selling off the notes assigned to him.³⁴

Another plaintiff sought specific performance of a contract to purchase real property or, alternatively, damages for the vendor's breach, and recorded a *lis pendens*. The court upheld a judgment for his damages, despite the seller's plea that no *lis pendens* lies in damage suits, and that the voluntary employment of that remedy should bar a different basis of recovery.³⁵

V. CONCLUSION

The problem is one of social policy. How do we stop, as much as any system can, sophisticated counsel from adopting a paper theory and using pretrial writs available thereunder to put pressure on an "uncooperative" defendant, who should not, by our public policy, be harrassed by such a writ, and who may, in fact, not owe the debt at all? The problem is not whether an act traditionally considered a tort may also give rise to a contract claim, permitting judgment either way. The only wrong is when inconsistent theories are advanced at the same time as means of pretrial pressuring. It is no

34. *Lenard v. Edmonds*, 151 Cal. App. 2d 764, 312 P.2d 308 (1st Dist. 1957; *hear. den.*). The injunction against foreclosure is proper on either theory, since damages offset or pay the debt. The injunction against sale of the down payment notes, however, must presuppose the right to rescind, for otherwise the plaintiff had no proper interest in them. The court ignored this problem completely in its opinion.

35. *Brandolino v. Lindsay*, 269 Cal. App. 2d 319, 75 Cal. Rptr. 56 (2nd Dist. 1969; *hear. den.*). *Lis pendens* is only available in certain limited statutory cases. CAL. CODE OF CIV. PRO. § 409 (West 1954). Damages for breach of contract to convey is not among them. Had the suit originally been just for damages, one cannot doubt the court would have expunged the notice under CAL. CODE OF CIV. PRO. § 409.1 (West 1954).

help to have another pretrial hearing. That goes to how the plaintiff gets his writ, but not the side effects of granting it.

A partial solution lies within elections doctrine. This would work well where several inconsistent theories are advanced, which do not all permit the use of a given preliminary writ. The courts should rule at the outset of each case that when a party voluntarily employs a pretrial remedy, he thereby abandons rights under any legal formula which does not clearly authorize the writ. Attachment would preclude recovery when acts are viewed in tort, and also would not let tort doctrines toll the Statute of Limitations, affect the venue, or even let the plaintiff win at all.³⁶ Using this system, *Lenard* and *Brandolino* would both have been reversed. This thinking should be our public policy in this area. Provisional remedies must be available when needed, but their use should be discouraged, because they often are so terribly unfair.

Sniadach and *Randone* show the right social aspirations, if not a useful remedy. More hearings, more lawsuits, more judges and other shopworn remedies will not help. To get results, we must control the conduct of the bar, because the litigation process rests within its hands. It is the client, not the judges, who can control lawyers. The parties to a suit are now rarely concerned with what is happening. All that they want is victory; attorneys do the rest. If certain tactics hampered that recovery, the lawyer would become more responsible.³⁷ Were election rules effectively applied, the

36. *James v. P.C.S. Ginning Company*, 276 Cal. App. 2d 19, 80 Cal. Rptr. 457 (5th Dist. 1969) involved conflicting rights under an equitable mortgage and an intervening homestead. The Court there used elections doctrine in accordance with the policy expressed here. Unfortunately, it seems to have been used as a justification for putting down a manipulative defendant, rather than as an overriding judicial concept. The policy in that case can hardly be reconciled with that shown almost simultaneously in *Samuels v. Superior Court of Los Angeles County*, 276 Cal. App. 2d 264, 81 Cal. Rptr. 216 (2nd Dist. 1969; *hear. den.*) except as another example of the use of doctrine to promote "justice" in each case, depending on the side the judges deem proper.

37. The courts will now impose sanctions on a client for a frivolous appeal or an improper law and motion matter, even though in fact everything is done by the attorney, and the client is only nominally involved. *Reber v. Beckloff*, 6 Cal. App. 3d 341, 85 Cal. Rptr. 807 (1st Dist. 1970; *hear. den.*). As stated in *Romero v. Snyder*, 167 Cal. 216, 222, 138 P. 1002, 1004 (1914), "The court may have well believed that the delay was without reasonable excuse. The neglect of her [plaintiff's] attorneys, if the delay was due to them, is imputable to her as her own neglect." If attorney's

plaintiff will not often swear out pretrial writs based on a tenuous theory merely to press a tactical advantage. Faced with loss of a good claim, and perhaps the only one that might actually prevail, the claimant will tend to use the writ only in those cases where he is prepared either to stand squarely upon it or to gamble that the pressure of the provisional remedy will force the defendant to surrender. Clearly, fewer writs would then be used.

There is nothing unfair or unreasonable in this. The starting point is that defendants, too, have rights. Our established public policy decrees that they should be left in peaceable possession of their property until the plaintiff has obtained a judgment. *Randone* is eloquent on this point, but seems to think there is some magic in a writ judicially prescribed that cleanses it of all the sins affecting the same writ when issued merely by a clerk. But this is not the case. It is the writ, however issued, that does the damage, and generally the same facts will cause judicial writs to issue as will coax them from the clerk. Attorneys will present the case for writs, and, if they are available at all, will get them regularly. Only if there is a serious penalty imposed on a writ erroneously issued will this practice stop. A plaintiff does not have to seek a pretrial writ. He may present his various theories to the court without a writ, wait until he wins a judgment on some theory, and then proceed with post-trial remedies. To do so, of course, denies him the benefit of the writ and all the pressures that flow from its use. But he has no right to use the writ in every case. His voluntary selection of a provisional remedy must rest upon his firm reliance on the theory under which it is advanced, not the tactical advantage from its use.

Strict adherence to elections doctrines will preclude some unnecessary writs, yet still permit such remedies in cases where the need for them is great and the propriety is most clear. It will reduce one area of abuse. No reform can offer more.

malpractice were easier to prove, greater care in litigation must ensue. *Campbell v. Magana*, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (2nd Dist. 1960), which holds that a negligent attorney is not liable unless the client would have won, seems poor social policy, particularly when the outcome of every lawsuit is so unpredictable. The courts have recently started dismissing cases for delay in bringing them to trial, and as a result the plaintiffs' bar has speeded up its work. The same would happen here.