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INSTITUTE OF LAW RESEARCH AND REFORM

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During the period when the proposals in this report were being developed Richard H. Bowes, of Institute Counsel, had the primary responsibility for the carriage of this project and the drafting of the report. However, the Board assumes sole responsibility for the opinions and recommendations in the report.

PREFACE

The Institute has been working on possible reform of the law relating to remedies for unsecured creditors for several years now.

As part of the work on that project, in June of 1984 we issued Report No. 42, *Debt Collection Practices*. In March of 1986 we issued Research Paper No. 16, *The Operation of the Unsecured Creditors' Remedies System in Alberta*, which was an empirical research paper. In May of 1986 we issued Report for Discussion No. 3, *Remedies of Unsecured Creditors*. This document was a consultative one, and suggested a tentative blueprint for the evolution of a new legislative regime in this subject area in Alberta.

Subsequent to that report the Institute has engaged in widespread consultation with the Bar and other interested persons and agencies in Alberta.

One of the recommendations in Report for Discussion No. 3 was that there should be a new "unified" prejudgment remedy. This report advances the tentative proposals made in that respect in Report for Discussion No. 3, in firm form. It is presently contemplated that, in addition to this Report, the Institute will be issuing at least three more final reports in this subject area. One will be concerned with execution against land, another with the Execution Creditors Act, and a third with the proposed enforcement order. The Institute proposals and recommendations will also be reduced to draft legislative form. The exact form of these last reports, and whether these subjects will be contained in one volume, or three, has not yet been determined.

However, prejudgment remedies is a sufficiently "stand alone" area that a decision has been made to publish the Institute's recommendations on this subject now. There are certain advantages to doing this. The research in the Report may be valuable to members of the Bar now. There are logistical considerations in keeping reports moving through the Institute's production system. But, perhaps most importantly, by publishing our "final" recommendations now, this will afford a further opportunity for any person or organization who may consider the proposals ill-advised, either in general, or with respect to any particulars of the proposals, to make their views known before the draft legislation is prepared.

Thus, although this report is presented as a 'final' report, it would still not be too late for any party or person concerned by the recommendations in the report to make their views known to the Director of the Institute.

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NOTE REGARDING CITATIONS

For this report, we have adopted the following convention regarding the citation of cases and statutes. In the body of the report, only one citation is given for each case, and statutes are generally identified only by their title and date. Statutes published in the current edition of the Revised Statutes of Canada or of any province are identified by title only. Alternative citations for cases and full citations for statutes are given in the List of Cases and List of Statutes and Rules of Court which follow.

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Larnu Distributors (1970) Ltd. v. *Brochu* (1980) 26 A.R. 373.

Law Society of Alberta v. *Black & Company* (1983) 29 Alta. L.R. (2d) 326, 8 D.L.R. (4th) 347, reversing (sub nom. *Black v. Law Soc. of Alta.*) [1983] 3 W.W.R. 7, 24 Alta. L.R. (2d) 106, 42 A.R. 118, 144 D.L.R. (3d) 439.

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OSF Industries Ltd. v. *Marc-Jay Investments Inc.* (1978) 88 D.L.R. (3d) 446, 20 O.R. (2d) 566, 7 C.P.C. 57.

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An Act for Abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in *England*, 1 & 2 Vict., c. 110 (1838)

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PART I

SUMMARY

SUMMARY

This report, the first in a series of final reports on the general topic of remedies of unsecured creditors, deals with prejudgment remedies for unsecured claimants. In other words, it concerns legal mechanisms the purpose of which is to make it more likely than it otherwise would be that a person (a "claimant") who has a claim which could result in a money judgment against another person (a "defendant"), but who cannot rely on any security interest in property of the defendant, will be able to enforce a judgment if he eventually gets one. After describing in some detail the hodgepodge of prejudgment remedies which currently exist in this province, we conclude that they do not provide Albertans with as effective, coherent and fair a system of provisional relief as they could reasonably expect to have. We then go on to make fairly detailed recommendations for a legislative solution to the inadequacies we have identified.

One of the major problems with the existing remedies is simply that there are too many of them, and that they are in many respects inconsistent with one another. The problem here is not so much the plurality of remedies, as the absence of any unifying principle. As a result, an effective prejudgment remedy may be available to one claimant but not to another, because of what would appear to be an insignificant difference between the facts relating to their claims. Another problem with certain of the remedies (i.e. prejudgment garnishment and, especially, the writ of attachment) is the undue emphasis they place on matters of form. While this emphasis on form often works to the disadvantage of deserving claimants, other aspects of certain of the remedies seem calculated to oppress defendants. For example, a claimant is permitted to apply for a writ of attachment without giving any advance notice to the defendant, and once the writ is granted it is very difficult for a defendant to have the writ set aside unless he can point to some formal defect in the written material filed by the plaintiff in support of his application.

One of the existing prejudgment remedies avoids many of the problems associated with the others. This remedy is the Mareva injunction, a fairly recent invention of the courts of England which has even more recently been imported into this country and this province. However, we argue that the advent of the Mareva injunction has not eliminated the need for legislative reform of this area. In the first place, the Mareva injunction has its own problems, not the least of which is

uncertainty as to the rules which govern its use in this province. Moreover, even if the Mareva injunction were a perfect prejudgment remedy in its own right, in the absence of legislative intervention the other prejudgment remedies, with all their warts, would still be around. Our conclusion is that despite the recent judicial innovations in this field, reform through legislation is needed.

The crux of our recommendations is that all existing prejudgment relief mechanisms be replaced with a single mechanism by which an unsecured plaintiff may obtain a prejudgment remedy, to be called an "attachment order". An attachment order could only be granted by a judge of the Court of Queen's Bench. A judge to whom an application for an attachment order was made would have a broad but not unfettered discretion in deciding whether to grant an attachment order, and as to the precise nature of any order that was granted.

Provided that the grounds for attachment existed, an attachment order could be issued in any case where a claimant was asserting a claim against a defendant that could result in a money judgment or award. The availability of attachment orders would not be restricted to any particular kind of claim within this class, such as claims in respect of a "debt or liquidated sum". Doing away with such restrictions would avoid much costly and time wasting litigation. However, attachment orders would not be issued indiscriminately, but only where they were genuinely required to prevent the improper disposition of defendants' property. More specifically, an attachment order could not be granted unless the court were satisfied that:

1) there is a reasonable likelihood of the claimant getting judgment against the defendant;

2) there are reasonable grounds for believing that if not prevented from doing so, the defendant would be likely to make some disposition of his property that would seriously hinder the plaintiff in collecting on a judgment; and

3) considering all the circumstances, it would be just and equitable to grant an attachment order.

The court would also be directed not to grant an attachment order for the purpose of preventing a reasonable, *bona fide* disposition of the defendant's property in the ordinary course of business or

living, even if the disposition might hinder the claimant's efforts to collect on a future judgment.

Once the court decided to grant an attachment order, the legislation would allow it a good deal of flexibility in deciding how to prevent the improper disposition of the defendant's property. The attachment order could be directed against any property of the defendant against which a money judgment could be enforced. It could simply prohibit the defendant from disposing of property, or allow him to do so only upon certain terms and conditions. The order could require the defendant to deliver up his property for safekeeping to someone identified in the order. Alternatively, it could appoint a receiver over any property of the defendant, or authorize the claimant to issue a garnishee summons before judgment. In exercising its discretion as to the precise method of attachment, the court would be guided by the principle that the attachment order should be framed so as to be no more onerous for the defendant than was necessary to achieve the order's purpose.

The effect of an attachment order on third persons--that is, persons other than the attaching claimant and the defendant--would be fairly limited. The attachment order would not affect antecedent interests in the attached property, nor would judgment creditors of the defendant be delayed in enforcing their judgments against the defendant's property by reason of the fact that it was subject to an attachment order. In this latter respect, the attachment order would be more like a Mareva injunction than a writ of attachment or prejudgment garnishment under the existing law. Nor would an attachment order deprive a purported transfer of attached property of its ordinary legal effect, even if the transfer violated the terms of the order. However, attaching claimants would have a statutory remedy against third persons who deliberately assisted or participated in a disposition of property which was inconsistent with the terms of an attachment order.

Our recommendations also emphasize flexibility on the matter of procedure and safeguards. If the court were satisfied that it would be proper to do so, an attachment order could be granted before the claimant had commenced an action. As is presently the case, an application for an attachment order could be made without prior notice to the defendant, the claimant being under a duty to make full and fair disclosure of all material information, even information which might not favour the granting of an order. However, in a departure from the usual practice in this province, an order granted without prior notice to the defendant would automatically expire shortly after it was made unless it was confirmed on an application made on notice to the defendant. On the

application to confirm, the court would be encouraged to ignore matters of form, concentrating instead on the substantial issues between the parties.

The court would be authorized to terminate an attachment order on the application of any person where it appeared just to do so. For example, the court might terminate an attachment order if, after obtaining the order and tying up the defendant's property, the claimant then failed to prosecute the action with due diligence. In addition, the court would also have a broad power to vary or clarify an attachment order on the application of any affected person. In particular, the court would be able to vary an order so as to permit a disposition of property that would not be inconsistent with the object of the remedy. Another important safeguard is that every claimant who obtained an attachment order would be required to file an undertaking in favour of the defendant and third persons to pay any damages, including exemplary damages, or indemnification which the court thought the claimant ought to pay. The court could require the claimant to provide security to back up this undertaking.

This report does not include a draft statute based on our recommendations. A draft statute will be included in the last report of this series. In the meantime, however, we have framed most of our formal recommendations in statutory language. Thus, the draft statute--or at least the part of it dealing with prejudgment remedies--will bear a close resemblance to the list of recommendations set out in Part III of this report.

PART II

REPORT

CHAPTER 1

INTRODUCTION

A. Background of the Report

1.1 In May, 1986, the Institute published Report for Discussion No. 3, Remedies of Unsecured Creditors.[1] The purpose of Report for Discussion No. 3 was "to examine the remedies available under Alberta law to unsecured creditors for collection of their debts, and to make tentative proposals for the reform of those remedies".[2] The report made and invited comment upon certain tentative recommendations regarding, *inter alia*, prejudgment remedies for unsecured creditors.[3] It was contemplated that the subject of prejudgment remedies would be dealt with in more detail in our final report. For logistical reasons we have decided to issue not one, but a series of final reports. This first report deals with the subject of prejudgment remedies for unsecured claimants.

B. Scope of the Report

1.2 We have just said that the subject of this report is prejudgment remedies for unsecured claimants.[4] But what does this encompass? We think it useful to start by providing a working definition of the term "prejudgment remedy" for the purposes of this report. We shall use this term to refer to an order or other positive act (e.g., the issuing of a writ) of a court made or done 1) at the request of a person who does not rely on any interest in or rights against the particular property that will be affected by the order or act, and 2) for the purpose of making it more likely than it otherwise would be that a money judgment or award which has not yet been but which might be granted in favour of that person will be enforceable.

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1 Hereinafter cited as Report for Discussion No. 3.

2 *Id.* at 1.

3 *Id.* at 239-49, 356-58.

4 Future references in this report to prejudgment remedies can be taken as references to prejudgment remedies for unsecured claimants, unless the context makes it plain that we are talking about prejudgment remedies for persons other than unsecured claimants.

1.3 It should be made clear at the outset that our definition is not intended to resolve or even provide a means for resolving any substantive issues. It is merely intended to give a general indication of the range of issues that can be expected to be dealt with in this report. In the following two sections we point out some particular matters that are, and some that are not, covered in the report. In so doing we frequently refer back to our working definition of the term "prejudgment remedy".

1. What is Covered

1.4 Our definition refers to a person who might get a money judgment or award. It will be noted that we have avoided use of the word "creditors" in the definition. There are two reasons for this. The first is that to call X a creditor of Y is to *presume* that Y owes X money, while we are concerned with situations in which it has not yet been established whether the defendant owes any money to the claimant. To emphasize this point we generally avoid the words "creditor" and "debtor" in this report, and instead refer to claimants or plaintiffs, and defendants. A second reason for avoiding the term "creditor" is that a distinction is often made by lawyers between a creditor of a person--someone to whom that person is indebted--and someone who merely has an unliquidated claim against that person. We shall not discuss the merits of this distinction here. Suffice it to say that we take our subject to encompass any claim which could result in a money judgment or award, whether the claim is or is not in respect of what a lawyer would call a "debt".

1.5 Our working definition of "prejudgment remedy" refers to a claim which could result in a money judgment or award. By the phrase "money judgment or award" we simply mean any judgment or order of a court, or award of an arbitration tribunal, by which one person is declared liable to pay money to another person. Note that we do not say anything about the claimant having commenced proceedings in which he could obtain a money judgment or award. One of the issues we consider in this report is whether a claimant who has not yet initiated proceedings should be able to obtain a prejudgment remedy.

1.6 The final observation we want to make here relates to the phrase "person who does not rely on any interest in or rights against the particular property which may be affected by the order or act". This phrase obviously limits the scope of our enquiry, but the limit should not be construed

too narrowly. It is quite possible that an application for a prejudgment remedy could be made by a person whom we would ordinarily regard as a secured creditor. Suppose, for example, that a mortgagee who is worried that his security is inadequate applies for an order that would prevent the mortgagor from disposing of property that is not subject to the mortgage. Since the mortgagee does not rely on any security interest in that property, the order he is seeking comes within our definition of a prejudgment remedy, and, hence, within the scope of this report. Of course, the fact that the mortgagee is in one sense a secured creditor might be significant in relation to the question of whether he should get a prejudgment remedy, but that is something to be taken up later in the report.

2. What is Not Covered

1.7 Our enquiry does not extend to persons who rely on any special interest in or rights against property that would be affected by an order. Obvious examples of such a person include a mortgagee of land seeking the appointment of an interim receiver pending the conclusion of foreclosure proceedings, and a trust beneficiary seeking an order requiring money alleged to be trust money to be paid into court by the trustee pending the conclusion of an action to determine whether it is in fact trust property. However, there are less obvious examples of persons within this category. We would consider that a person seeking interim relief in a Matrimonial Property Act action would be relying on an interest in or rights against property: the rights or interests given him or her by that Act.[5] These are but a few of many possible examples of situations which are not within the scope of this report because they involve a person relying on an interest in or rights against specific property in order to get prejudgment relief relating to that property.

1.8 Our definition refers to court orders or acts made or done for the purpose of making it more likely than it otherwise would be that a money judgment or award which has not yet been but which might be granted will be enforceable. We do not mean to suggest that this must be the actual purpose of the person, be it judge or court clerk, responsible for making the order or doing the act. Rather, what we mean is that the institutional purpose of the order or act - the purpose or function of the order or act within the legal system - must be that which we have described. This point can be made clearer by a couple of examples of prejudgment orders whose institutional purpose is not to

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[5] Ss. 34 and 35 of the Matrimonial Property Act provide for the granting of interim relief in proceedings under that Act.

make it more likely that a judgment which might be granted in the future will be enforceable.

1.9 A few years ago, the English Court of Appeal endorsed a new prejudgment order which has come to be called the "Anton Piller order".[6] The Anton Piller order is issued in civil proceedings and requires the person to whom it is directed to reveal to the person serving the order the location of physical evidence that may be relevant to the plaintiff's action, and to allow that person to inspect and even remove such evidence. Its purpose is to enable a plaintiff to obtain and preserve evidence which it is feared would be deliberately destroyed by the defendant if given the opportunity to do so. As interesting[7] a subject as the Anton Piller order is, it does not fall within the scope of this report. As we said above, its purpose is to help the plaintiff obtain and preserve evidence which may be relevant to the issues in the action. It is concerned with the process of getting a judgment, not of enforcing one.[8]

1.10 Another example of an order which falls outside the scope of this report because of its purpose is an interim order for the payment of alimony to a plaintiff in an action under the Domestic Relations Act. The purpose of such an interim order is not to provide security for any judgment the plaintiff might get. Rather, its purpose is to provide support for the plaintiff during the course of the proceedings. The underlying philosophy behind interim relief of this sort is very different from that underlying relief which is merely intended to make it more likely that a future judgment will be enforceable.

C. Structure of the Report

1.11 This report is nominally divided into three parts. However, Part II really *is* the report. Part I is a short summary of Part II, and Part III is simply a list of the recommendations made in Part II.

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[6] The name comes from the case in which the Court of Appeal endorsed the new order: *Anton Piller KG* v. *Manufacturing Processes Ltd.* [1976] 1 All E.R. 779.

[7] The Anton Piller order is not only an interesting development but a controversial one. For a discussion of the darker side of the order see *Columbia Picture Industries Inc.* v. *Robinson* [1986] 3 All E.R. 338 (Ch. D.).

[8] The Anton Piller order should be distinguished from discovery orders in aid of Mareva injunctions, which are similar in form to but different in purpose from the Anton Piller order. The latter are discussed in Chapter 5.

1.12 Part II consists of eight chapters, including this one. Chapter 2 gives a brief history of prejudgment remedies in England, the United States, and, of course, Canada. The purpose of Chapter 2 is to set the stage for the discussion of the existing law of prejudgment remedies which takes up Chapters 3 through 6. Chapter 3 looks at the writ of attachment, Chapter 4, garnishment before judgment, and Chapter 5, the Mareva injunction. Chapter 6 is concerned with miscellaneous remedies which may or may not be available in Alberta. Chapter 7 does three things. First, it considers whether prejudgment remedies can be justified, and concludes that they can. Next, it considers whether legislative reform of this area of the law is necessary, and concludes that it is. Finally, it briefly describes some recent reforms that have either been implemented or suggested in other jurisdictions. Chapter 8 contains our recommendations for reform of the law of prejudgment remedies in this province, and, just as importantly, our reasons for making those recommendations.

1.13 This report does not contain a draft statute to give effect to our recommendations. The concluding report in this series will consist of a draft statute or statutes dealing with, *inter alia*, prejudgment remedies. In the meantime, we thought it would be useful to put most of our recommendations in something approaching statutory form. Thus, many of our recommendations contain phrases such as "the court shall" or "the court may". Our intention in framing our recommendations in this way has been to indicate what statutory provisions based on our recommendations might look like.

CHAPTER 2

PREJUDGMENT REMEDIES IN HISTORICAL PERSPECTIVE

2.1 It might at first glance seem incongruous in a report whose subject is reform of the existing law to devote an entire chapter to an historical examination of the subject under discussion. However, we think there are good reasons for doing so. In the first place, looking at the history of prejudgment remedies will assist us in answering the question of how the law on this subject came to be as it now is. This is important because some knowledge of how the law reached its present state is a prerequisite to any constructive criticism of the law. In the second place, and this point is perhaps but a refinement of the first, assumptions and myths about the history of any area of the law often colour perceptions of what that law is and should be. Thus, if these assumptions or myths distort or even contradict the actual historical record, there is something to be said for setting the record straight.

2.2 Alberta's law on the subject of prejudgment remedies is the product of American and English influences. This in itself is by no means unusual.[9] What is unusual is the fact that the older law on this subject is largely based on American influences while the more recent developments have been inspired by recent currents in English law. In order to see how this situation has come to pass, we have divided this chapter into four main sections. In the first section we look at prejudgment remedies in England from medieval times up to about the end of the third quarter of this century. Next, we look at developments in the United States from colonial times up to and including the watershed years of the late 1960's and 1970's. Thirdly, we look at the development of prejudgment remedies of one sort or another in this country up to the beginning of this century. The fourth section examines the recent creation in England and importation into Canada of a new prejudgment remedy. The chapter concludes with a few observations regarding the lessons which can be drawn from the history of prejudgment remedies in this and other jurisdictions.

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[9] Our rules of civil procedure, for example, are largely based on English antecedents, but incorporate some American innovations, such as liberal rules regarding oral examination for discovery.

A. Prejudgment Remedies in England: The Medieval Period to the Twentieth Century

1. Prejudgment Remedies and Prejudgment Remedy Surrogates

2.3 One thinks of a prejudgment remedy as a preemptive legal device specifically designed to prevent defendants from disposing of or dealing with property in a manner that would make it impossible or more difficult for plaintiffs to enforce money judgments. In this sense of "prejudgment remedy", English common and statute law has throughout most of its history been very stingy. Indeed, thus conceived, prejudgment remedies have until very recently been virtually absent from the English legal landscape. However, throughout most of its history the English legal system has not lacked features that, whether by design or not, have had much the same effect as prejudgment remedies. These features could be thought of as prejudgment remedy surrogates. To explain their existence, it is necessary to briefly discuss certain aspects of early English common law procedure.[10]

2.4 One of the many idiosyncrasies of early English civil procedure in personal actions was its attitude to the defendant who did not appear when commanded to do so by a writ of summons.[11] For several hundred years, by simply avoiding appearing before the court a defendant could prevent a plaintiff from getting a judgment against him.[12] If the defendant did not appear there could be no trial and hence, no judgment. The obvious course of granting default judgment to the plaintiff where the defendant did not appear was not adopted, and then only in respect of actions for

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[10] The discussion which follows draws heavily upon N. Levy, "Mesne Process in Personal Actions at Common Law and the Power Doctrine" (1968) 78 *Y.L.J.* 52 and D. Sutherland, "Mesne Process upon Personal Actions in the early Common Law" (1966) 82 *L.Q.R.* 482. The term "mesne process" which appears in the titles of both articles, translates literally as "middle process" and encompasses a variety of writs which could be issued and executed after an action was commenced and before it was completed.

[11] We refer to "English civil procedure". What we are talking about is the procedure of the central courts of common law. In the middle ages and indeed for a long time after the middle ages, England had many courts of local or specialized jurisdiction (one of which we shall have occasion to refer to a little later in this chapter), and the procedure of these courts was often radically different than that followed by the central courts. Indeed, there were substantial variations in the procedure of the three common law courts: Common Pleas, King's Bench, and Exchequer. For our purposes these differences in procedure can safely be glossed over.

[12] F. Pollock and F. Maitland *The History of English Law before the Time of Edward I*, Vol. 2 (2nd ed. 1898), 594-95

relatively small amounts, until 1725.[13]

2.5 What the early law did do was go to great lengths to procure the defendant's appearance.[14] In the very early days of the common law courts, the sanctions directed to compelling a defendant's appearance in a personal action focused on his property. If the defendant did not appear in response to the writ of summons, some of his goods would be attached. They would remain under attachment until he found pledges (sureties) for his appearance before the court. If this did not achieve the desired result, increasingly more onerous distresses would be levied against the defendant's property. The purpose of attachment or distraint, however, was not to provide security for the plaintiff's claim, but to procure the defendant's appearance. If the defendant eventually appeared he would get his property back. If he did not appear, the attached or distrained property would be forfeited to the king.

2.6 By the end of the thirteenth century it was relatively common in certain sorts of personal actions (roughly, actions of trespass involving not only a civil wrong but a breach of the king's peace) for the sheriff to be directed, by a writ of *capias ad respondendum*, to arrest the defendant to ensure his appearance in court.[15] The defendant would remain in custody until he found sureties, called "mainpernors", for his appearance in court. If the defendant did not appear in court after finding sureties the latter would be fined.[16]

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13 An Act to Prevent Frivolous and Vexatious Arrests (1725); Levy, *supra* n. 10 at 69-70.

14 Pollock and Maitland, *supra* n. 12 at 593-95, where a brief account of the methods by which the law attempted to coerce the defendant's appearance through attachment and distress is given. More detailed accounts are given by Levy, *supra* n. 10 at 58-60; and Sutherland, *supra* n. 10 at 482-86.

15 Sutherland, *supra* n. 10 at 486-87.

16 *Id.* at 488. If all efforts to secure the defendant's appearance failed, proceedings could be set on foot to have him outlawed. The consequences of civil outlawry were not as drastic for the defendant as were those of outlawry in criminal proceedings, but they were severe enough. All of the defendant's personal property, including choses in action, were forfeited to the King. Indeed, by the 1600's a practice had developed whereby a plaintiff who had procured the defendant's outlawry could apply to the exchequer for a grant out of the forfeited property to satisfy his claim, even though he had not been able to get judgment. Thus, although originally conceived as the ultimate sanction to enforce a contumacious defendant's appearance, outlawry eventually took on the aspect of an important creditor's remedy in its own right: Levy, *supra* n. 10 at 80-7.

2.7 From its start in the thirteenth century as a means of procuring the appearance of the defendant in a limited class of personal actions, imprisonment or the threat of imprisonment took on ever increasing importance in the collection of debts. On the one hand, through a combination of legislation and judicial creativity, arrest and imprisonment as a means of ensuring the defendant's appearance became available in more and more kinds of actions.[17] On the other hand, and just as importantly, it came to be accepted that where a defendant could be arrested and imprisoned for the purpose of ensuring his appearance, he could also be arrested and imprisoned under a writ of *capias ad satisfaciendum* after judgment for the purpose of enforcing the judgment.[18] Thus, as arrest on mesne process for the purpose of ensuring defendants' appearance became available in more kinds of actions, imprisonment as a means of enforcing judgments also became more readily available.

2.8 Pausing here, it may be surmised that imprisoning judgment debtors as a means of enforcing payment of judgments could itself serve as a sort of surrogate prejudgment remedy. Forearmed with the knowledge that if he could not satisfy a judgment he would be liable to indefinite imprisonment, a defendant would certainly have reason to think twice before attempting to make himself "judgment proof" by disposing of or hiding his property. Thus, whether consciously designed to do so or not, the institution of imprisoning debtors who could not or would not pay judgments must have served as a deterrent to the sorts of activities which modern prejudgment remedies seek to prevent by other means. This is not to say that every defendant would be effectively deterred by the prospect of debtor's prison from disposing of or hiding his property. But we may speculate that many defendants who did have property were deterred by the shadow of the prison gate from taking steps to protect it from their creditors.

2.9 Further insurance against the possibility of a defendant's avoiding his obligations was provided by the system of bail.[19] We mentioned that a defendant who was arrested on a writ of *capias ad respondendum* would remain in custody only until he found sureties for his appearance. This procedure of supplying sureties for appearance came to be known as giving bail below. The sureties were only responsible for the defendant's appearance; once he had done so they were off the

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[17] 3 Blackstone's Commentaries, 281; Levy, *supra* n. 10 at 61-3.

[18] T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956) 389.

[19] See Levy, *supra* n. 10 at 64-7; 3 Blackstone's Commentaries 290-91.

hook. However, the appearance itself was effected by providing bail of another sort, "bail above" or "bail to the action". Bail above was put in by the defendant and two sureties executing a recognizance by which the latter undertook that if the plaintiff obtained judgment against the defendant they would either see to the payment of the plaintiff's judgment and costs or surrender the defendant into custody. The sureties' primary obligation was to deliver the defendant into custody should the plaintiff get judgment; they were only obliged to pay the judgment if for some reason they were unable to surrender the defendant into custody. Thus, the security provided by bail above was far from perfect. Nevertheless, bail did provide a useful form of insurance against the defendant absconding prior to judgment.

2.10 As useful to creditors as imprisonment of debtors on mesne or final process may have been, it was also the source of much hardship and misery for its victims.[20] As a result, Parliament, and to a lesser extent the courts, gradually chipped away at this institution. By late in the sixteenth century defendants in actions for relatively small amounts were permitted by the courts to put in common bail. The distinguishing feature of common bail as compared to special bail, which required real sureties, was that the named sureties were entirely fictitious.[21] Another inroad on the institution of imprisonment for debt was made in 1671 when the first in a long series of statutes intended to relieve certain honest but improvident debtors from the burden of imprisonment was enacted.[22]

2.11 In 1838 arrest of defendants on mesne process was abolished except where there was reasonable cause for believing that the defendant was about to quit England unless he was

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[20] It should be emphasized that where it was available, the right to have a defendant or judgment debtor imprisoned did not depend on any wrongdoing on his part. The defendant's inability to pay could be due to misfortune or other circumstances beyond his control; it made no difference to the law.

[21] In 1725 this practice was put on a statutory footing by An Act to Prevent Frivolous and Vexatious Arrests. This Act also allowed the plaintiff in these smaller actions to put in common bail on behalf of a defendant who neglected to do so himself, and then proceed to judgment. It thus represented the beginnings of what was eventually to become the general power of the English courts to grant judgment in default of the defendant's appearance. For a detailed discussion of this process, see Levy, *supra* n. 10 at 68-79.

[22] An Act for the Releife and Release of poore distressed Prisoners for Debt; see C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (1981) 96.

apprehended.[23] Of course, the logic for arresting a person who was about to quit England was that he would thereby render himself immune to the creditor's remedy of imprisonment after judgment. However, even this rationale for imprisonment on mesne process largely disappeared in 1869 when Parliament finally abolished, with certain relatively minor exceptions, imprisonment for debt as a postjudgment remedy.[24] Obviously, since imprisonment was no longer generally available as a postjudgment remedy, the departure of a defendant from England would no longer deprive the plaintiff of this remedy. Hence, the availability of prejudgment arrest was further restricted to situations in which the defendant's absence from England would materially prejudice the plaintiff in the prosecution of his action.[25]

2. The Gap Created by the Abolition of Imprisonment for Debt

2.12 Whether actually intended to do so or not, imprisonment for debt fulfilled to a certain extent the same function as a modern prejudgment remedy. Given the grim state of English prisons in the days of imprisonment for debt, it is probable that most debtors who had the means to do so would rather part with some of their property in order to satisfy a debt than languish in prison for an indefinite period of time. Although the Debtors Act, 1869 did not eliminate the possibility that a debtor who deliberately disposed of his property so as to frustrate his creditors would find himself on the wrong side of the prison walls, it greatly reduced the possibility.[26] Thus, after 1869 a defendant who was inclined to hide or otherwise protect his property from his creditors would have much less to lose by making the attempt. Short of being charged and convicted under the penal provisions of the Debtors Act, 1869, the worst thing that could happen to him was that the attempt to protect his property would be unsuccessful.

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[23] An Act for Abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases (hereinafter cited as the Judgments Act, 1838).

[24] The Debtors Act, 1869.

[25] *Id.*, s. 6. We will have more to say about this particular provision in Chapter 6.

[26] The long title of the 1869 Act is "An Act for the Abolition of Imprisonment for Debt, for the punishment of fraudulent debtors, and for other purposes". Part II of the Act created various offences in relation to bankruptcy, some of which involved fraudulent dispositions of the bankrupt's property after or within 4 months before the presentation of a petition.

2.13 It might have been expected that the English courts would quickly devise a remedy that would provide some measure of protection against the sort of illegitimate disposition of property which the abolition of imprisonment for debt seemed to invite. However, they were by no means quick to do so, even though they were familiar with remedial devices which could easily have been employed for this purpose. One such device was the venerable and potent weapon of courts of equity, the interlocutory injunction.[27] If the defendant could no longer be deterred from disposing of his property by the prospect of debtor's prison, could he not be prevented from doing so by means of an injunction? The resounding answer of the courts was that a plaintiff could not obtain an interlocutory injunction to prevent an alleged debtor from disposing of assets in which the plaintiff could assert no proprietary interest.[28]

2.14 The interlocutory injunction was not the only remedial device known to nineteenth century English judges which could have been adapted to protect plaintiffs against improper dispositions of property by defendants. At one time, England had a very large number of courts of specialized or local jurisdiction, which often employed procedures very different than those employed in the superior courts of common law and equity. For many hundreds of years prior to the nineteenth century some of these courts, most notably, the Lord Mayor's Court of the City of London, had employed a procedure known as "foreign attachment".[29]

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[27] An injunction is simply an order of a court which requires the person or persons to whom it is directed to refrain from doing something, or, more rarely, to do something. Failure to comply with the injunction is contempt of court, and can be punished with a fine or imprisonment. An interlocutory injunction is an injunction granted before final judgment.

[28] *See eg. Mills* v. *Northern Railway of Buenos Ayres Company* (1870) 5 Ch. App. Cas. 621 at 627; *Robinson* v. *Pickering* (1881) 16 Ch. D. 660; *Lister & Co.* v. *Stubbs* (1890) 45 Ch. D. 1 (C.A.). It is perhaps worth noting that it is only recently that the last mentioned case has come to be regarded as something of a leading authority on the subject.

[29] Foreign attachment was not a local invention. The procedure as practiced in the Mayor's Court and other local courts, bore more than a passing resemblance to prejudgment remedies which existed in continental European countries and in Scotland, in which latter country it was referred to as "arrestment on the dependence". For an account of the development of attachment remedies on the continent, see A. Engelmann *et al., History of Continental Civil Procedure* (1927) 171-72, 453, 491-92, 501-02. For a brief account of the Scottish procedure, see "Arrestment on the Dependence" (1927) 71 *Sol. J.* 508, 509.

2.15 The essence of foreign attachment as practiced in the Mayor's Court was this.[30] Where a defendant was absent from, but had property within, the jurisdiction (i.e., the City of London), the property could be attached in the hands of a third person in whose possession it had been left, who was referred to as a garnishee. The property might be chattels or it might be a debt owed by the third person to the defendant. In theory, foreign attachment served the same purpose as attachment of a defendant's goods served in early common law procedure: to induce the defendant's appearance. Thus, if the defendant entered an appearance after the attachment, which he could do by putting in special bail, the attachment would be dissolved and the action would proceed in the normal way.[31] However, and this is where foreign attachment really parted ways with common law attachment,[32] if the defendant did not appear, the garnishee would be required to show cause why the plaintiff should not have execution against the attached property.[33] Assuming that the garnishee could not show cause, the plaintiff, upon giving adequate security, was granted execution against the attached property. The security was necessary because if the defendant should appear and disprove his indebtedness to the plaintiff within a year and a day of execution, the plaintiff was liable to return the fruits of his short-lived victory. The security was intended to ensure that he would be able to do so.[34]

2.16 By the latter half of the nineteenth century the procedure of foreign attachment in the Mayor's Court was well known to but not well liked by much of the English legal profession. The profession's distaste for the procedure arose from the not altogether inaccurate perception that it gave

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30 For discussions of the details of foreign attachment proceedings see R. Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1962), 481-85; C. Drake, *A Treatise on the Law of Suits by Attachment in the United States* (6th ed., 1885), 1-8; N. Levy, "Attachment, Garnishment and the Garnishment Execution: Some American Problems Considered in the Light of the English Experience" (1972-73) 5 Conn. L.R. 399, 405-23; *The Mayor and Aldermen of the City of London v. Cox* (1867) L.R. 2 H.L. 239.

31 Levy, *id.* at 411.

32 *Id.* at 423.

33 The garnishee could not dispute the defendant's liability to the plaintiff, but he could, for example, deny that he, the garnishee was indebted to the defendant, or claim that he had a lien against the defendant's property: *id.* at 413-14.

34 *Id.* at 414.

great scope for abuse and oppression.[35] What the superior courts of common law might have done was adapt the remedy of foreign attachment, shorn of its objectionable features, to the needs of litigants in those courts. However, far from adapting foreign attachment for their own use, the superior courts gradually imposed restrictions on the procedure as employed in the Mayor's Courts which so greatly diminished its utility that it died out even in the latter forum.[36]

B. Prejudgment Remedies in the American Colonies and in the United States

2.17 In order to trace early American developments in this field, it is helpful to remind ourselves of two features of English legal procedure with which the American colonists would have been familiar. The first of these features was attachment at common law. By the time the first colonists arrived in America the common law had long permitted the attachment of a defendant's goods as a means of encouraging his appearance before the court.[37] Of even greater importance to subsequent developments was the procedure of foreign attachment. Although foreign attachment was a local custom, rather than part of the common law of the realm, it has been pointed out that most of the colonists were probably much more familiar with the local customs of their own community than they were with the common law administered by the central courts.[38]

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[35] The procedure was attended by many legal fictions. In theory, the defendant was summoned before his property was attached, but in reality he never was. Again, in theory, before the plaintiff could actually call upon the garnishee to show cause, the defendant would have to be called and fail to appear at four successive sittings of the court, but this requirement was also pure fiction. Contemporary discussions of some of the perceived abuses associated with foreign attachment are to be found in *The Mayor and Aldermen of the City of London* v. *Cox*, *supra* n. 30; "Foreign Attachment in the Lord Mayor's Court" (1864) 8 *Sol. J.* 260; "The Mayor's Court Again" (1871) 15 *Sol. J.* 264; "Foreign Attachment in the Lord Mayor's Court" (1873) 17 *Sol. J.* 439.

[36] Millar, *supra* n. 30 at 484-85. The two main cases are *The Mayor and Aldermen of the City of London* v. *Cox*, *supra* n. 30 and *The Mayor and Aldermen of the City of London* v. *The London Joint Stock Bank* (1881) 6 App. Cas. 393 (H.L.). Other cases on the subject are discussed in "Foreign Attachment in the Lord Mayor's Court", (1873) 17 *Sol. J.* 439.

[37] Although attachment of goods and distraint had been largely supplanted by the more efficient device of arresting the defendant himself: Levy, *supra* n. 10 at 61-3.

[38] Millar, *supra* n. 30 at 487.

1. Common Attachment in the New England Colonies

2.18 English common law attachment had two distinctive characteristics. First, it was available in personal actions generally, without the need to show any special circumstances, other than the usually purely fictitious one that the defendant had been served with and had failed to respond to a summons. Secondly, its purpose was to procure the defendant's appearance, not to provide security for the plaintiff's claim. When first imported into the colonies, "common attachment" retained both of these characteristics. However, in some colonies attachment of defendants' property was soon prohibited except as against absent or absconding debtors.[39] By contrast, the New England colonies, led by Massachusetts, followed just the opposite course. In these colonies the right to attach defendants' property was not limited to special circumstances. Moreover, attachment came to be viewed not simply as a means of enforcing the defendant's appearance, but also as a means of providing security for the plaintiff's claim.[40] Thus, in the New England colonies an ordinary action could be begun by attaching the defendant's property, which would remain under attachment as security for the claim until the plaintiff got judgment, and could then be taken in execution.

2. Foreign Attachment

2.19 While common attachment as a means of securing the plaintiff's claim in ordinary actions was confined to the New England colonies, every colony was anxious to ensure that its residents would have adequate remedies against non-resident or absconding defendants. Here the procedure of foreign attachment as practiced under the Custom of London provided a ready if imperfect model, and by the early 1700's statutes regulating proceedings in the nature of foreign attachment were common throughout the American colonies. A typical statute, passed in Pennsylvania in 1705, allowed the attachment of property of persons who "are not resident or residing

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[39] In N. Levy, "Mesne Process in the Early American Colonies" (1973) 44 *Miss. L.J.* 671 at 679, the author cites a Maryland statute of 1647 which restricted attachments against inhabitants of the province to cases where "the true Owner thereof bee not att that tyme resident or dwelling in the province".

[40] Millar, *supra* n. 30 at 486-88. Millar notes that this process of converting common attachment into a true security device had been completed in Massachusetts by 1701.

within this Province, or are about to remove or make their escape out of the same".[41]

2.20 Where the requisite special circumstances existed, foreign attachment could take either of two forms. It could be an ordinary attachment, that is, a straightforward seizure of the property to be attached. Or it could take the same form as attachment took under the Custom of London: attachment of the property - whether it was tangible goods or a debt owed to the defendant - in the hands of a third person, referred to as a garnishee.[42] The distinguishing feature of garnishment, as opposed to ordinary attachment, was that property attached by garnishment was not physically seized but was left in the hands of the garnishee until the plaintiff became entitled to levy execution. Garnishment was the appropriate remedy where the property in the hands of the third party was a debt, or was tangible property which for some reason could not be got at so as to be attached in the normal fashion.[43]

2.21 Attachment of an absent debtor's property under the American practice could serve three functions.[44] The first two functions - encouraging the defendant to appear, and providing security for the plaintiff's claim - have already been mentioned. The third function, one which has continuing vitality in the United States, was to provide the court with jurisdiction to determine a plaintiff's claim where, because of the defendant's absence from the jurisdiction (or his disappearance within the jurisdiction), it could not otherwise do so. Even if the absent defendant was not served with originating process and did not appear in the action, the court could obtain what is called *quasi in rem* jurisdiction over the defendant by the attachment of his property within the jurisdiction. The court could then grant a personal judgment against the defendant just as if he had been served with process and entered an appearance, but the plaintiff could only have execution

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41 An Act About Attachments, 4 Anne, c. 28, reprinted in *Earliest Printed Laws of Pennsylvania 1681-1713* (1978) 74.

42 In the New England colonies this form of attachment, elsewhere known as garnishment, was (and is) known as "trustee process", and the third party was referred to as a "trustee". The first Massachusetts trustee process statute, passed in 1708, restricted this particular remedy to the case of absent or absconding debtors, but this restriction was afterwards removed, making trustee process available in more or less the same wide circumstances as common attachment: Millar, *supra* n. 30 at 382.

43 Drake, *supra* n. 30 at 382.

44 Levy, *supra* n. 39 at 671.

against the attached property.[45]

3. Development and Reform

2.22 Until well into the second half of this century, the development of attachment law in the United States consisted of the gradual refinement of an institution which had assumed its basic shape long before the American Revolution. After the Revolution the Americans continued to build on the foundation laid down in colonial times, with new states and territories adopting and adapting the attachment laws of one or another of the older states to suit their own needs. Writing in 1952, Millar[46] divided the states into two main groups, the second of which he divided into two sub-groups. The first group consisted of the New England states and Hawaii which, as in colonial days, still embraced the idea of attachment as a remedy whose availability did not depend on the existence of special circumstances. The larger sub-group within the second group consisted of states which only permitted attachment where special circumstances, such as absence of the defendant from the jurisdiction, or concealment of assets, existed. The smaller of the two sub-groups consisted of a few western states, whose attachment laws were descended from California legislation first enacted in 1851. In these states, special circumstances of some sort were generally required before a defendant's property could be attached. However, where the plaintiff's cause of action was on a contract for the direct payment of money, the contract was made or payable in the state, and the plaintiff had no other security, an attachment could be obtained without the necessity of showing any other special circumstances.

2.23 One aspect of the attachment procedure that had remained substantially unchanged from colonial days was the manner of getting an attachment. In most states the issuing of a writ of attachment was a clerical function which followed automatically upon the plaintiff's filing certain documents. No prior judicial authorization was required. In those few jurisdictions, such as New York, where prior judicial authorization was required, such authority could be obtained without prior notice to the defendant. But in 1969 the settled practice of centuries received a rude jolt from the

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[45] This function of foreign attachment was not unique to America. Foreign attachment under the Custom of London played a similar role: Levy, *supra* n. 39 at 672. In Scots law, arrestment *ad fundandam jurisdictionem* had the same function: "Arrestment on the Dependence" (1927) 71 *Sol. J.* 508, 509.

[46] *Supra* n. 30 at 489-91.

United States Supreme Court.

2.24 The Fourteenth Amendment to the Constitution of the United States provides, among other things, that no state shall "deprive any person of life, liberty, or property, without due process of law". For almost exactly one hundred years[47] the attachment laws of the various states were not much bothered by the due process clause. However, this state of peaceful co-existence came to an abrupt end in 1969 when the United States Supreme Court held in *Snidach* v. *Family Finance Corporation*[48] that a Wisconsin statute which permitted prejudgment attachment of defendants' wages violated the due process clause of the Fourteenth Amendment. The statute in question allowed the plaintiff to obtain a garnishee summons before judgment without judicial intervention and without the need to demonstrate any particular urgency for prejudgment relief. It was held, by a majority, that the deprivation of wages, although temporary, amounted to a deprivation of property and was thus subject to the due process requirement. The majority conceded that there might be extraordinary situations where a deprivation of this sort without prior notice or hearing might meet the due process requirement, but held that the Wisconsin statute was constitutionally defective in failing to distinguish between the ordinary and the extraordinary. In a concurring opinion, Harlan J. made the following observation regarding the content of the due process requirement:

> Apart from special situations... I think that due process is afforded only by the kinds of "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.[49] [Italics in original]

2.25 In *Snidach* the court placed particular emphasis on the fact that attachment of wages could have particularly dire consequences for the defendant, so it was at least arguable that attachment of other forms of property would not attract the same due process requirements as were laid down in that case. However, in *Fuentes* v. *Shevin*[50] the Supreme Court dispelled any doubts on this point. *Fuentes* did not involve attachment as such, but replevin under a statute which allowed a secured creditor to recover possession of his security simply by applying to the court clerk for a writ

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[47] The Fourteenth Amendment was adopted in 1868.

[48] (1969) 395 U.S. 337.

[49] *Id.* at 343.

[50] (1972) 407 U.S. 67

of replevin and posting a bond to protect the defendant against damages. The court, by a 4 to 3 majority, held that the due process requirement applied to this proceeding, and that the safeguards provided by the statute in question, notably, the bond requirement, were not adequate substitutes for prior notice and hearing. The decision made it clear that the principle of *Snidach* was not limited to the attachment of special kinds of property, such as wages.

2.26 However, in *Mitchell* v. *W.T. Grant Co.*[51] the Supreme Court, in another close decision, seemed to retreat from the position it had reached in *Fuentes*. *Mitchell* concerned a Louisiana statute which allowed a conditional seller to recover possession of the property by obtaining a writ of sequestration. Although the writ could be obtained without prior notice to the defendant, there were other safeguards. The plaintiff had to file an affidavit setting out specific facts, rather than making conclusory allegations; the plaintiff had to provide a bond in favour of the defendant; and once the plaintiff recovered possession the defendant could immediately apply for dissolution of the writ, and the onus of sustaining the writ would then be on the plaintiff. Most importantly, perhaps, the initial application for the writ, although *ex parte*, had to be made to a judge. The majority held that this combination of safeguards was an adequate substitute for a prior hearing on notice to the defendant.[52]

2.27 In the aftermath of the constitutional attacks on various prejudgment remedies, many state legislatures subjected their attachment legislation to very close scrutiny. As a result, the 1970's saw fundamental changes being made to the attachment laws of many states. The general thrust of the changes was to make the attachment laws conform to the new due process requirements imposed by the courts. One state, Michigan, went so far as to abolish prejudgment attachment altogether, except for the purpose of securing *quasi in rem* jurisdiction over an absent defendant.[53]

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[51] (1974) 416 U.S. 600.

[52] Stewart J. wrote a dissenting opinion in which he chastised the majority for what he considered to be their overruling of *Fuentes*, despite their protestations that *Fuentes* was distinguishable. In *North Georgia Finishing Inc.* v. *Di-Chem Inc.* (1975) 419 U.S. 601 the majority struck down a Georgia garnishment statute which lacked the safeguards of the Louisiana statute considered in *Mitchell*. Stewart J., in a short concurring opinion, was able to write (at 608), "It is gratifying to note that my report of the demise of *Fuentes* v. *Shevin*... seems to have been greatly exaggerated".

[53] See Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters, Part IV* (1983) 66 (hereinafter cited as Ontario Report).

2.28 In other states, less radical solutions were adopted. California, for example, responded by amending its Code of Civil Procedure so that an application for an attachment order must now be made on notice to the defendant unless the plaintiff can demonstrate some special urgency justifying *ex parte* proceedings. Reacting to the perception that prejudgment remedies may have their harshest impact on consumer defendants, California also restricted the availability of attachment to actions arising out of commercial contracts. Other states, such as New York, took a somewhat different approach than California to the constitutional problem. A New York plaintiff is still permitted to apply *ex parte* for an attachment order without showing any special need for not giving notice to the defendant, but the attachment order so granted must be confirmed within 5 days of levy on an application on notice to the defendant.[54]

2.29 Later in this Report we shall have occasion to study certain provisions of the California and New York attachment legislation in a little more detail. For the moment, however, we have said enough about the development of American attachment law to provide a perspective for a brief account of the history of prejudgment remedies in this country.

C. Prejudgment Remedies in Canada

2.30 Quebec was undoubtedly the first jurisdiction within what is now Canada to permit the prejudgment attachment of a debtor's property for the purpose of providing security for a creditor's claim. As we have already mentioned, the custom of foreign attachment in the Mayor's Court, although somewhat at odds with common law procedure, was closely related to attachment procedures available in continental Europe. Naturally, the original French colonists of Quebec brought with them the attachment laws of that country. Thus, the first statutory provision we are aware of on this subject in Quebec, enacted in 1787, was simply intended to regulate and limit an already flourishing remedy.[55]

2.31 In 1761 Nova Scotia became the first common law jurisdiction in what is now Canada to pass legislation permitting prejudgment attachment. The statute, An Act to enable Creditors to

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[54] Civil Practice Law and Rules, s. 6211.

[55] An Ordinance to continue in force for a limited time, an Ordinance made in the twenty-fifth year of His Majesty's reign... with such additional regulations as are expedient and necessary (1787), ss. 10, 11.

Receive their just Debts, out of the Effects of their absent or absconding Debtors (1761), was a copy of the Massachusetts trustee process statute first enacted in 1708. The procedure called for by this statute was essentially garnishment in the manner of the Custom of London.[56] The statute only authorized trustee process in the case of defendants "absconding or absent out of the province". But it must be kept in mind that in its place of origin, New England, trustee process was intended to provide creditors with a remedy by way of "indirect" attachment of property in the hands of third persons which could not be attached in the ordinary way, that is, by common attachment. As we have seen, common attachment was not restricted to cases involving absent or absconding debtors, but was available as of course in ordinary actions.[57]

2.32 The New England common attachment procedure found its way to Nova Scotia by or shortly after 1761. Thus, where a defendant had tangible property in the colony in his own possession, it could be attached to provide security for the plaintiff's claim even if the defendant was not an absent or absconding debtor.[58] However, by 1824 the abuse of writs of attachment had caused such an outcry that the legislature restricted their use to suits against absent or absconding debtors.[59]

2.33 The other maritime provinces were not far behind Nova Scotia. In 1780 Prince Edward Island enacted the same trustee process statute which Nova Scotia had adopted in 1761.[60] In the first session of its legislative assembly, New Brunswick passed An Act for Relief against

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[56] There were differences of course. One major difference was that under the statute the trustee (garnishee) could defend on behalf of the defendant, whereas under the Custom the garnishee was not allowed to dispute the defendant's liability to the plaintiff.

[57] *Supra* para. 2.18.

[58] B. Murdoch, *Epitome of the Laws of Nova Scotia* (1833) 130-33.

[59] *Id.* at 132-33. The view expressed by Dunlop, *supra* n. 22 at 199-200, that the use of attachment in Nova Scotia against non-absconding resident defendants resulted from a perversion of the 1761 statute appears to be mistaken. If common attachment as practiced in Nova Scotia needed a statutory basis, it is to be found in a statute of 1778, An Act to amend, render more effectual, and reduce into one Act, the several Acts made by the General Assembly of this Province concerning Bail, s. 1, which permitted attachment, as well as arrest on mesne process, in "all causes where the demand shall exceed £3".

[60] Dunlop, *supra* n. 22 at 200. We do not know whether residents of Prince Edward Island, like their counterparts in Nova Scotia, enjoyed the benefits and suffered the burdens of New England style common attachment.

Absconding Debtors (1786). This Act, the main features of which survive in New Brunswick's present absconding debtors legislation, was not based on the New England model, but on New York legislation first enacted in 1751.[61] Compared to other attachment legislation, the New Brunswick legislation was very detailed, and in fact bears a striking resemblance to modern bankruptcy legislation. The most distinctive feature of the legislation was the manner and result of the attachment, which was accomplished by the appointment of trustees of the debtor's property for the benefit of all of his creditors. The trustees took possession of and dealt with the defendant's property in much the same fashion as a modern trustee in bankruptcy would.

2.34 Upper Canada (Ontario) got into the game at a relatively late stage and in a very cautious fashion. It was not until 1832 that Upper Canada passed any legislation permitting the attachment of an absconding debtor's property.[62] This Act allowed attachment only within a very narrow compass; the writ of attachment could only be obtained where the plaintiff made an affidavit stating his belief that the defendant *had* departed from or was concealed within the province with intent to defraud the plaintiff and other creditors or to avoid being arrested or served with process. Moreover, the departure or concealment had to be proved to the satisfaction of a judge by the affidavits of two credible witnesses. Even if the plaintiff could satisfy these stringent requirements for getting a writ of attachment, the defendant was entitled to have the attachment released upon filing a bond. The problem with the bond, from the plaintiff's point of view, was that as in the case of special bail under common law procedure, the sureties on the bond could discharge their obligations by satisfying the judgment *or* by rendering the defendant into custody.[63]

2.35 The first western Canadian legislation on the subject of attachment we know of is found in the Laws of Assiniboia, 1862. Law 36 provided for the detention of certain debtors who were about to leave the settlement, and Law 37 provided for the attachment of property of an already departed debtor in the hands of third persons. After Manitoba became a province, its legislature soon enacted more comprehensive attachment legislation as part of a statute dealing generally with the

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[61] We have not seen a copy of the New York statute of 1751, and our supposition is based on a description of that statute in Mussman and Riesenfeld, "Garnishment and Bankruptcy" (1942) 27 *Minn. L. Rev.* 1 at 15.

[62] An Act to afford means for attaching the property of absconding Debtors (1832).

[63] British Columbia's original absconding debtors legislation, An Act Respecting Absconding Debtors (1887), was based on the Ontario Act.

administration of justice.[64] This legislation was patterned on the most common form of American legislation, which allowed attachment of a defendant's property only in special circumstances, albeit much broader circumstances than were specified by the Ontario legislation.[65] The same Act also permitted a plaintiff to institute garnishment proceedings against a third person who was indebted to the defendant without having to show any special circumstances justifying such relief.[66]

2.36 In 1878 the Lieutenant-Governor in Council of the North-West Territories (which included the territory of the future provinces of Saskatchewan and Alberta) passed an Ordinance[67] which provided for the issuing of writs of attachment in certain special circumstances[68] and for garnishment proceedings before judgment without the need to show any special circumstances.[69] Both the attachment and garnishment provisions of the ordinance were closely modelled on provisions of contemporary Ontario legislation respecting Division Courts.[70] It is from these provisions of the 1878 Ordinance that the provisions regarding writs of attachment and garnishment now found in the

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64 An Act respecting the Administration of Justice (1874).

65 The three grounds set out in s. 11 of the Manitoba legislation were: 1) the defendant had departed from or concealed himself within the province with intent to defeat his creditors or to avoid being arrested or served with process; 2) the defendant was a non-resident and the cause of action arose in the province; or 3) the defendant, with intent to defeat his creditors, was about to remove any of his property from the province or had assigned, transferred, disposed of or secreted any of his property or was about to do so.

66 S. 44. We should say something about the origins of this garnishment procedure. The basic garnishment procedure set out in the Manitoba Act came from an English statute, The Common Law Procedure Act, 1854. Under this latter Act garnishment was exclusively a postjudgment remedy, a procedure for having debts owed to the judgment debtor applied in satisfaction of a judgment, something which the common law did not provide for. Unlike garnishment under the procedure of foreign attachment in the Mayor's Court and in America, it had no application to tangible property of the debtor in the hands of a third party. Being based on the English statute, the garnishment mechanism created by the Manitoba and other Canadian legislation was also exclusively a mechanism for attaching debts owed to the defendant. The one significant departure from the English procedure - and here the American influence is apparent - was the provision for garnishment before judgment.

67 An Ordinance Respecting the Administration of Civil Justice (1878).

68 Ss. 49-56. The special circumstances were similar to those set out in the Manitoba statute of 1874, except that there was no provision for attaching the property of non-resident defendants.

69 Ss. 57-59.

70 An Act respecting the Division Courts, R.S.O. 1877, c. 47, ss. 190-208 (writs of attachment) and 124-126 (garnishment). In modern parlance, Ontario's Division Courts were small claims courts.

Alberta Rules of Court are descended.[71]

2.37 So by the beginning of this century every jurisdiction within Canada had legislation which in special circumstances allowed plaintiffs to attach property of defendants before judgment. In some Canadian jurisdictions, including this one, a plaintiff could in certain actions initiate garnishment proceedings against a defendant without having to establish any special circumstances at all. The models for these prejudgment remedies were to be found in the United States rather than England. However, strange as it might seem, given the course of developments we have been describing, the most important prejudgment remedy had yet to be created, and the place of its creation was to be England.

D. The Mareva Injunction: A New Provisional Remedy is Created

1. English Genesis

2.38 By the end of the nineteenth century there was very little that a plaintiff in an ordinary English action could do to prevent the defendant from removing his property from the jurisdiction, hiding it, or otherwise making it unavailable to his creditors.[72] The defendant was no longer to be deterred from disposing of his property by the prospect of debtors' prison; his property could not be attached before judgment; and the courts had set their face firmly against the notion that a plaintiff could obtain an interlocutory injunction to restrain a defendant from disposing of his property.

2.39 From time to time there were calls in England for Parliament to introduce some sort of provisional remedy for unsecured claimants. In 1927, for example, the chambers of commerce of several large English cities persuaded the Lord Chancellor to appoint a committee to inquire into the advisability of adopting in England a procedure based on the Scottish provisional remedy of

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[71] The resemblance between the ancestor and the descendant is more striking in the case of the provisions regarding writs of attachment than in those regarding garnishment.

[72] There were of course certain *ex post facto* remedies against such things as fraudulent conveyances and preferences, but even where such a remedy was theoretically available, it would often amount to an opportunity to close the stable door after the horse had fled.

arrestment on the dependence. However, the committee recommended against doing so.[73] In 1969 the Committee on the Enforcement of Judgment Debts (the Payne Committee) presented a report which considered, amongst other related matters, "the powers which exist, and the powers which ought to exist, to prevent a debtor from disposing of assets or leaving the country and taking with him assets which may be required by judgment creditors for the satisfaction of their judgments".[74] The committee recommended that "[t]he court should have power before or after judgment to restrain a debtor from disposing of property or transferring it out of the jurisdiction, with the intention of defeating his creditors".[75] This recommendation was not immediately acted upon by parliament, and the perceived need for legislative action was soon to be extinguished by developments in the courts.

2.40 In England in 1975 it was undoubtedly regarded as "trite law" that "you cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property".[76] Thus, it must have been with considerable pessimism that counsel for the plaintiff in *Nippon Yusen Kaisha* v. *Karageorgis*[77] attempted to persuade the Court of Appeal that it should grant an injunction to do just that. The plaintiff was a foreign shipowner and the defendants were foreign charterers of several of the plaintiff's ships, for which the hire had not been paid. Although the defendants were nowhere to be found, they were known to have funds in certain London banks. The plaintiff's *ex parte* application for an injunction to restrain the defendants from disposing of or removing from the jurisdiction any of their assets currently within the jurisdiction was refused at first instance. However, the Court of Appeal, led by Lord Denning M.R., unhesitatingly granted the injunction. Lord Denning M.R. was little troubled by the lack of precedent for and, indeed, the authority against, granting an order of this sort:

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[73] "Report of the Committee on "Arrestment on the Dependence"", (1928) 72 *So. J.* 370. A lively debate on the merits of the proposal preceded the committee's report in the pages of the Solicitors Journal: (1927) 71 *So. J.* 508-09, 632-33, 648-49, 677; *see also* E. Weiss, "Arrestment: a Comparative Sketch" (1927) 43 *L.Q.R.* 493.

[74] Payne Committee, *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909, 1969) para. 1245.

[75] *Id.* at para. 1260(1).

[76] Per James L.J. in *Robinson* v. *Pickering, supra* n. 28 at 661.

[77] [1975] 3 All E.R. 282 (C.A.).

> We are told that an injunction of this kind has never been done before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them. ... We know, of course, that the practice on the continent of Europe is different.
>
> It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by s 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case.[78]

2.41 What is glossed over by Lord Denning's judgment is the fact that s. 45 of the 1925 Act originated in section 25(8) of the Supreme Court of Judicature Act, 1873,[79] and had long been held not to give the court any jurisdiction to grant an interlocutory injunction in circumstances where the Court of Chancery would not have done so before 1873. Thus, in the Payne Committee Report it was said of s. 45:

> It is, we think, clear that at the present time an injunction under this section would not be granted to restrain a debtor from disposing of assets or removing them from the jurisdiction.[80]

2.42 A month after *Karageorgis* was decided, the Court of Appeal was faced with a similar *ex parte* application in a case which was to provide the new remedy with its name.[81] On this occasion Lord Denning M.R. did refer to the apparent obstacle presented by *Lister and Co.* v. *Stubbs*,[82] but then proceeded to ignore that case in concluding that the court had all the

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[78] *Id.* at 283.

[79] The equivalent provision in Alberta is s. 13(2) of the Judicature Act, which reads as follows:

> An order in the nature of mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

[80] Payne Committee, *supra* n. 74 at para. 1251.

[81] *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1980] 1 All E.R. 213 (C.A.). One supposes that the honour of providing a name for the remedy fell to the second instead of the first case because "Mareva injunction" has a more poetic ring to it than does "Kaisha injunction".

[82] *Supra* n. 28.

authority it needed to grant the injunction in s. 45 of The Supreme Court of Judicature (Consolidation) Act 1925.

2.43 The first reported decision of the Court of Appeal following argument from both parties came in 1977,[83] by which time the Mareva injunction had already become a popular remedy. The court rejected the defendant's argument that it had no jurisdiction to issue an injunction to prevent an alleged debtor from disposing of property in which the plaintiff could assert no legal or equitable interest. Unable to ignore the cases which said that the court did not have such jurisdiction, Lord Denning observed that in all these cases, save one in which "the point was not canvassed",[84] the court was concerned with a defendant who was present in the jurisdiction. Thus, he reasoned, since in the present case the defendant was outside of, but had property within, the jurisdiction, the old cases were not applicable and the court could restrain the defendant from dealing with his property where it would be just or convenient to do so.[85]

2.44 Given the basis upon which the old cases were distinguished, it is not surprising that it was at first assumed that a Mareva injunction could be issued only against someone who was out of the jurisdiction. However, in reality there was no plausible reason for drawing such a sharp distinction between domestic and foreign defendants, and by 1980 Lord Denning M.R., confident that his invention was not going to be struck down from on high,[86] was prepared to totally abandon the pretense that there was any magic in the location or residence of the defendant as far as the jurisdiction to issue a Mareva injunction was concerned.[87] In 1981 Parliament implicitly

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[83] *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Manyak Dan Gas Bumi Negara (Pertamina)* [1977] 3 All E.R. 324 (C.A.).

[84] *Id.* at 332. The case referred to by Lord Denning, *Burmester v. Burmester* [1913] P. 76 (C.A.) is one of several "husband and wife" cases referred to by his Lordship.

[85] *Rasu Maritima* v. *Perusahaan, id.* at 332-33.

[86] In *Siskina (Cargo Owners)* v. *Distos Compania Naviera S.A., The Siskina* [1977] 3 All E.R. 803 (H.L.), The House of Lords had placed certain limitations on the Mareva injunction, but had not addressed - because it was not raised by either side - the fundamental issue of whether the English courts had the jurisdiction they were purporting to exercise in issuing Mareva injunctions. Lord Denning was only too happy to interpret the House's silence as an implied endorsement of the procedure: *Third Chandris Shipping Corp.* v. *Unimarine S.A.* [1979] 2 All E.R. 972 at 983 (C.A.).

[87] *Prince Abdul Rahman Bin Turki Al Sudairy* v. *Abu-Taha* [1980] 3 All E.R. 409

acknowledged the power of the courts to issue Mareva injunctions, while removing any doubt that the remedy was available against defendants resident or present within the jurisdiction.[88]

2. The Mareva Injunction is Exported

2.45 Once the new procedure gained a foothold in England it was quickly picked up by lawyers in other Commonwealth jurisdictions. In Australia and New Zealand the Mareva injunction met a mixed reaction from the courts. Judges in some of the Australian states were less ready than was Lord Denning M.R. to turn a blind eye to the authorities which seemed to stand in the way of injunctions of this sort.[89] However, courts in most of the states and in New Zealand eventually acceded to the arguments that it was within their jurisdiction to grant Mareva injunctions in appropriate circumstances.[90]

2.46 Before looking at the fate of the Mareva injunction in Canada, we should emphasize that when Lord Denning M.R. created the Mareva injunction, he made much of the fact that the Mareva injunction was simply going to give the English courts a facility for doing what courts in most other countries had long been able to do through the remedy of attachment. Referring to the attachment laws of the various American states and the continental European countries, he concluded that English law should provide similar relief, but should do so through "the modern procedure of granting an interlocutory injunction".[91] Of course, as we have seen, every Canadian province already had attachment legislation (which in some cases, including Alberta, were found in rules of

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[87](cont'd) (C.A.). The restriction had already been eroded in *Chartered Bank* v. *Daklouche* [1980] 1 All E.R. 205 (C.A.) and rejected at first instance by Megarry V-C in *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190 (Ch. D.).

[88] Supreme Court Act, 1981.

[89] *Pivovaroff* v. *Chernabaeff* (1978) 16 S.A.S.R. 329 (S.C., Full Ct.); *Deputy Commissioner of Taxation* v. *Rosenthal* (1984) 16 A.T.R. 159 (S.C., Full Ct.).

[90] See *e.g. Riley McKay Pty. Ltd.* v. *McKay* [1982] 1 N.S.W.L.R. 264 (C.A.); *Sanko Steamship Co. Ltd.* v. *D.C. Commodities Pty. Ltd.* [1980] W.A.R. 51 (S.C.); *Bank of New Zealand* v. *Jones* [1982] Qd. R. 466 (S.C.); *Hunt* v. *B.P. Exploration Co. (Libya) Ltd.* [1980] 1 N.Z.L.R. 104 (S.C.). For a discussion of Mareva injunctions in Australia, *see* M. Tedeschi "The Mareva Injunction - A Sleeping Giant Awakes", (1983) 11 *A.B.L.R.* 187; M. Tedeschi, "The Mareva Injunction - An Update", (1985) 13 *A.B.L.R.* 236.

[91] *Rasu Maritima SA* v. *Perusahaan Pertambangan Manyak Dan Gas Bumi Negara (Pertamina), supra* n.83 at 331-32.

court) based on American models, so it might have been thought that Canadian courts would hold that the Mareva injunction was created to fill a void which in Canada did not exist.[92] However, events were to prove otherwise.

2.47 The first reported attempt to persuade a Canadian court to follow the lead of the English Court of Appeal was a resounding failure. In *OSF Industries Ltd.* v. *Marc-Jay Investments Inc.*[93] Lerner J. of the Ontario High Court, although referred to *Nippon Yusen Kaisha* v. *Karageorgis*[94] declined to venture from the established rule that the court would not grant an injunction before judgment to restrain an alleged debtor from parting with his property. However, this rebuff was but a temporary setback for the Mareva injunction, for it was but the first in a series of skirmishes across the country which more often than not resulted in decisive victories for the new remedy.

2.48 The Northwest Territories was the first Canadian jurisdiction to produce a reported decision favourable to the new remedy.[95] In an application to set aside a Mareva injunction granted on an *ex parte* application, the defendant argued that the court did not have jurisdiction to issue the injunction because to do so would be inconsistent with the rules of court dealing with absconding debtors. Without attempting to analyze this argument, the court replied that the rules of court regarding absconding debtors were not inconsistent with the injunctive relief sought by the plaintiff. The court held that it did have jurisdiction to issue the injunction, and went on to reach the

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92 W.F. Bowker has brought to our attention an 1898 North-West Territories case in which the ingenious argument was advanced that the existence of legislation in the Territories providing certain prejudgment remedies (namely, writs of attachment and prejudgment garnishment) justified the issuing of an injunction to prevent a defendant from making a fraudulent disposition of his assets, where, because of a technical impediment, one of the statutory remedies was not available: *Pacific Investment Co.* v. *Swan* (1898) 3 Terr. L.R. 125 (S.C. *en banc*). The argument, rejected by a majority of the court but accepted by Rouleau, J., started from the premise that the reason the English courts would not grant a prejudgment injunction for this purpose was that there was no equivalent legal (as distinguished from equitable) remedy. In the Territories, however, there were legal prejudgment remedies, so, by analogy to the principles of equitable execution, the court would be justified in granting an injunction where some merely technical obstacle lay in the way of one of the legal remedies. Rouleau, J. agreed in the result because he thought that the obstacles standing in the way of the legal remedies were not merely technical.

93 (1978) 88 D.L.R. (3d) 446 (Ont.H.C.).

94 *Supra* n. 77.

95 *BP Exploration Co. (Libya) Ltd.* v. *Hunt* (1980) 23 A.R. 271 (N.W.T.S.C.).

conclusion that this was a proper case for doing so.[96]

2.49 Over the next few years the Mareva injunction secured a foothold in one province after another. By 1983 the highest courts of New Brunswick,[97] Ontario,[98] Manitoba,[99] and British Columbia[100] had either expressly or impliedly acknowledged that in appropriate circumstances the courts of those provinces could issue Mareva injunctions. Indeed, in 1982 one province, New Brunswick, confirmed the power of the courts to issue this sort of injunction in its rules of court.[101]

2.50 By 1985 one of the many skirmishes before the provincial courts had developed into a full scale battle before the Supreme Court of Canada.[102] The result of this battle is somewhat difficult to state, as the courts' conclusions are not set out altogether clearly in the judgment. On the one hand, the court concluded that Canadian courts do have jurisdiction to issue Mareva injunctions.[103] However, the court went on to hold that the courts below were wrong in holding that a Mareva injunction was justified by the circumstances of the instant case. In reaching this conclusion, the court cautioned against the temptation to apply without close scrutiny the reasoning of courts in a unitary state (i.e. The United Kingdom) to situations arising in a federal state. In particular, the court held that it would be a serious error to equate the removal of assets from one Canadian province to another with the removal of assets from a unitary state such as the United Kingdom to another sovereign state. In the aftermath of *Feigelman*, it seems safe to say that the jurisdiction of Canadian courts to issue Mareva injunctions is now firmly established, but the circumstances in which it is proper for the courts to issue such injunctions are less than perfectly clear.[104]

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96 *Id.* at 306.

97 *Humphreys* v. *Buraglia* (1982) 135 D.L.R. (3d) 535 (N.B.C.A.).

98 *Chitel* v. *Rothbart* (1982) 141 D.L.R. (3d) 268 (Ont.C.A.).

99 *Feigelman* v. *Aetna Financial Services Ltd.* [1983] 2 W.W.R. 97 (Man.C.A.).

100 *Sekisui House Kabushiki Kaisha* v. *Nagashima* (1982) 42 B.C.L.R. 1 (C.A.).

101 New Brunswick Rules of Court, R. 40.03.

102 *Aetna Financial Services Limited* v. *Feigelman* [1985] 2 W.W.R. 97 (S.C.C.).

103 *Id.* at 120-21 and 125.

104 Unfortunately, a good example of confused thinking regarding the Mareva injunction comes from the Alberta Court of Appeal in *Bradley Resource Corporation* v. *Kelvin*

E. Prejudgment Remedies Today: The Historical Legacy

2.51 One point which we hope emerges from the foregoing discussion is that the function performed by the modern prejudgment remedy has to some extent been fulfilled in one way or another from the very early days of the common law. The early English common law did not, it is true, have specific prejudgment remedies. This fact is sometimes used as the basic premise of an argument that to the extent that the law now provides such remedies, it gives to plaintiffs an advantage over defendants which they did not enjoy at common law. While the argument is accurate in one sense, it is a serious distortion of history in another, for certain features of common law procedure--notably, the workings of the institutions of imprisonment on mesne and final process--went a considerable way towards fulfilling the function of the modern prejudgment remedy. And they did so in a way that was much more onerous for the average defendant than is any modern prejudgment remedy. When these institutions died out, a gap was created which neither Parliament nor the English courts moved quickly to fill. It was not until the creation of the Mareva injunction in 1975 that England finally got a specific prejudgment remedy.

2.52 On this continent the story has been somewhat different. Long before they became independent, the various American colonies adopted legislation permitting the prejudgment attachment of defendants' property. Although some colonies permitted attachment as a matter of course, most permitted it only in special circumstances, such as where the defendant was not resident in or had absconded from the jurisdiction. This latter model--attachment in special circumstances--formed the basis for attachment legislation which eventually came to be adopted in every Canadian common law province. This province, as well as several others, also ended up with a separate prejudgment remedy for attaching debts before judgment. And as if two remedies were not enough,[105] Canadian courts proved willing to import the Mareva injunction into this country when the opportunity to do so came.

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[104](cont'd) *Energy Ltd.* [1985] 5 W.W.R. 763. The court sought to distinguish a Mareva injunction from a *quia timet* injunction, but the basis for the distinction is rather difficult to grasp: 766. The court actually granted injunction relief, but did so on the grounds that the plaintiff had something like a property interest in the funds caught by the injunction: 766-67. For a comment on this case see F. Erickson "The Mareva Injunction comes to Alberta: the Bradley Resources Case" (1987) 25 Alta. L.R. 305.

[105] This does not count the minor prejudgment remedies discussed in Chapter 6.

2.53 The legacy of history in this province is therefore a hodgepodge of distinct remedies. The three main remedies--attachment, prejudgment garnishment, and the Mareva injunction--are all intended to serve the same basic purpose: to prevent the improper disposition of defendants' property before judgment. Yet, as we shall see in the succeeding chapters, neither the grounds, the procedure, nor the safeguards associated with them are the same. The question which obviously arises is whether there is really any reason to have such a variety of remedies and associated procedures for achieving a single basic objective.

CHAPTER 3

ATTACHMENT OF PERSONAL PROPERTY OF ABSCONDING DEBTORS

3.1 As was noted in Chapter 2, a North-West Territories Ordinance of 1878[106] authorized the court to issue a writ of attachment under certain special circumstances. The authority for proceedings in Alberta against the property of absconding debtors is now found in Rules 485 through 493 of the Alberta Rules of Court.[107] The Rules are not strikingly different from the provisions of the 1878 Ordinance. Any significant changes which have been made in the absconding debtors legislation since 1878 are noted at appropriate points in this chapter. Our aim in this chapter is to describe the present law of Alberta, but we shall refer to the legislation and jurisprudence of other jurisdictions where this will either aid in the elucidation of, or highlight significant problems with, our own rules.

A. Grounds for Obtaining a Writ of Attachment

3.2 The grounds for obtaining a writ of attachment are set out in Rule 485:

> **485.** After the commencement of any action wherein the claim is for recovery of a debt of $200 or upwards,
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> (a) upon affidavit, made by the plaintiff or one of several plaintiffs, if more than one, or by his or their agent swearing positively to the facts establishing the debt and that he has reason to believe specifying the grounds of his belief, that the defendant
>
> (i) is about to abscond or has absconded from Alberta, leaving personal property liable to seizure under execution, or
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> (ii) has attempted to remove any of his personal property out of Alberta or to sell or dispose thereof with intent to defraud his creditors generally or the plaintiff in particular, or
>
> (iii) keeps concealed to avoid service of process, and

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106 An Ordinance Respecting the Administration of Civil Justice (1878).

107 Throughout this report we frequently refer to the writ of attachment and prejudgment garnishment as "statutory" remedies. Of course, the Rules of Court, which authorize these remedies, are not statutes. However, the Rules are subordinate legislation, and we use the term "statutory remedies" to include remedies which are the product of subordinate legislation. It is also worth recalling that although the writ of attachment and prejudgment garnishment are now authorized by the Rules of Court, they were originally created by ordinances of the body having general legislative competence for the North-West Territories: the Lieutenant-Governor in Council.

> that the deponent verily believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage and
>
> (b) upon the further affidavit of one other person swearing that he is well acquainted with the defendant and that he has good reason to believe specifying the grounds of his belief, that the defendant
>
> (i) is about to abscond, or
>
> (ii) has absconded, or
>
> (iii) has attempted to remove any of his property out of Alberta, or
>
> (iv) has attempted to sell or dispose of his property, or
>
> (v) keeps his property concealed with intent to defraud his creditors,
>
> the court may, on application to it *ex parte*, direct the clerk to issue a writ of attachment in Form M in the schedule, which writ shall be executed by the sheriff according to its tenor.

A plaintiff seeking to use the absconding debtor rules[108] must clear three hurdles. The first hurdle relates to the nature and amount of the plaintiff's claim against the defendant; the second, to the nature of the defendant's conduct; and the third, to the prejudice which is likely to result to the plaintiff if he does not obtain the remedy. We examine each of these hurdles in turn.

1. Nature of the Plaintiff's Claim

3.3 By virtue of the introductory words of Rule 485, attachment is only available to a plaintiff whose claim is "for recovery of a debt of $200.00 or upwards". Certainly, the monetary threshold of $200.00 is insignificant, as it will be rare indeed that an action for less than $200.00 is brought to court. On the other hand, the requirement that the plaintiff be seeking to recover a debt is extremely significant, as this requirement automatically excludes the claims of those many plaintiffs whose claims are for unliquidated damages. On the question of what is a claim in respect of a debt, as opposed to a claim for unliquidated damages, reference should be made to our subsequent discussion of the phrase "debt or liquidated demand" in the context of the garnishment rules.[109]

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[108] The phrase "absconding debtor rules" is a popular and convenient expression, although it does suggest that the grounds for attachment are narrower than they actually are.

[109] *Infra*, paras. 4.5-4.12.

2. The Defendant's Conduct

a. Absconding from the province

3.4 A plaintiff seeking to recover a debt of $200.00 or upwards must show, or at least swear in an affidavit, that the defendant is guilty of conduct falling into one of the three categories as set out in clauses (i), (ii) and (iii) of Rule 485(a). The first alternative, set out in clause (i), is that the defendant is about to abscond or has absconded from Alberta, leaving personal property liable to seizure under execution. The original Territories ordinance required the deponent to swear that the debtor "has absconded" from the Territories; an intention to abscond was not sufficient.[110] The phrase "is about to abscond" was added in 1897.[111]

3.5 What is meant by "abscond"? On this question, as indeed on most questions relating to the interpretation of the absconding debtor rules, there are no Alberta cases to assist us, but there are cases from other jurisdictions. In *Williams* v. *Sanford*,[112], a Nova Scotia case, it was held that a defendant who left neither secretly nor with the intention of evading payment could not be described as having absconded. The essential fact is not that the defendant has left or is about to leave the province, but that he has done so or is going to do so in secret and with the intention of evading his creditors.

3.6 Another question which arises from clause 485(a)(i) is, What is "personal property liable to seizure under execution"? It is not within the scope of this report to enter into an extended discussion on this point. Suffice it to say that the Seizures Act contains a catalogue of things which a sheriff may seize pursuant to a writ of execution, but this Act must be read in conjunction with and subject to the provisions of the Exemptions Act, which exempts certain property from seizure under a writ of execution.

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110 The Territories ordinance of 1878 was based on Ontario legislation. When Ontario's legislation was enacted, there was an alternative remedy against a debtor who was about to abscond; he could be arrested on mesne process and held to special bail. See *infra* para. 2.10 at n. 21.

111 An Ordinance To Amend and Extend The Judicature Ordinance and Amendments Thereto (1897), s. 53.

112 *Williams* v. *Sanford* (1911) 10 E.L.R. 151 (N.S. Co. Ct.).

b. Removal or disposition

3.7 The second sort of conduct on the part of a defendant that will ground an attachment order is described by clause 485(a)(ii). The defendant must have attempted to remove any of his personal property out of Alberta or to sell or dispose thereof with intent to defraud his creditors generally or the plaintiff in particular. The correct interpretation of this clause was one of the issues in two of the very few Alberta decisions interpreting the absconding debtor rules. In *Meadow Lake Car Sales Ltd.* v. *Michaud*[113] it was held that intent to defraud must be present whether the defendant has attempted to remove his property from the province or simply to sell or to dispose thereof. The plaintiff in that case had argued that fraudulent intent was only necessary in the latter case, that is, where the ground of complaint was the sale or disposition of property within the province.[114]

3.8 It will be noted that the deponent must state that the defendant "has attempted" to remove his property or to sell or dispose thereof. Clearly then, unless an artificial interpretation is placed on clause (ii) the fact that the defendant may be *about to remove* any of his property or to sell or dispose thereof with the requisite intent will not suffice if at the time the affidavit is sworn the defendant has not yet attempted to do so. This point is brought home by a very recent, as yet unreported, case, *J.R. Paine and Associates Ltd. et al* v. *Cairns et al.*[115] The plaintiff's affidavit stated that the defendant "may cause" certain fraudulent dispositions of her property to be made. Predictably, this statement was held not to satisfy the requirement for a statement that the defendant "has attempted" to do one of the things referred to in clause (ii).[116] This requirement of a previous attempt would seem largely to negate the value of this ground for attachment, since it requires that the defendant be allowed to make the first move, and this first move may well put all of his

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113 (1978) 7 Alta. L.R. (2d) 289 (Dist. Ct.).

114 Stevenson, D.C.J. (as he then was) relied on the grammatical sense of the words used. The legislative history of the absconding debtor provisions supports this interpretation: An Ordinance Respecting the Administration of Civil Justice (1886), s. 309(b) read "or has attempted to remove such property out of the said Territories with intent to defraud...". The words "or to sell or dispose of the same" were inserted between "Territories" and "with" in An Ordinance Respecting the Administration of Civil Justice, R.O.N.W.T. 1888, c. 58.

115 Alta. Q.B., October 1, 1987, No. 8703 06602.

116 *Id.* at 35.

attachable property out of the reach of the Alberta courts.

3.9 Another point of interpretation arising from clause (ii) is the meaning of the words "with intent to defraud his creditors". The interpretation of these and similar words in legislation aimed at fraudulent conveyances and preferences is a cause in the name of which much ink has been spilled over the course of many centuries. Suffice it to say that an intent to defraud in the context of clause (ii) is equivalent to an intent to defeat, hinder or delay one's creditors.[117]

c. Concealment

3.10 The third alternative ground relating to the defendant's conduct is that he "keeps concealed to avoid service of process".[118] This ground, set out in clause 485(a)(iii), could be regarded as an anachronism, a relic of the days when a defendant could effectively frustrate a plaintiff's efforts to bring his claim before the courts by avoiding being served with the originating process. This has long since ceased to be the case. Where a plaintiff is unable to effect prompt personal service of a document, such as a statement of claim, which ordinarily must be served personally on the defendant, the court may make an order for substituted service or an order dispensing with service of the document altogether.[119] Given these alternatives to personal service, it is difficult to envision circumstances in which the mere fact that a defendant is concealing himself to avoid service of process could give grounds for an honest belief that without the benefit of the attachment the plaintiff will "lose his debt or sustain damage". On the other hand, this ground for a writ of attachment might be defended on the basis of its evidentiary value. The argument would be that a defendant who conceals himself to avoid service of process is also likely to take steps, such as removing his property from the jurisdiction, that would prejudice the plaintiff in his efforts to enforce a judgment. Thus, so the argument would go, although the defendant's concealing himself will not in theory prevent the plaintiff from getting and enforcing a judgment, it is a good indication that the defendant will do what he can to avoid having to satisfy a judgment, and is therefore a

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117 The ordinance of 1878 actually used the words "delay, defeat or defraud". Over the years, judges have tended - usually unconsciously - to use "defraud" as a shorthand equivalent for the phrase "defeat, hinder or delay".

118 *J.R. Paine* v. *Cairns, supra* n. 115, at 36 makes the fairly obvious point that the fact that the defendant could not be found did not entail that she was keeping concealed to avoid service of process.

119 Alberta Rules of Court, R. 23.

proper ground for issuing a writ of attachment.

3.11 Before leaving "concealment" it is necessary to advert to an error of drafting which appears in Rule 485(b). Rule 485(b) sets out the requirement for a second affidavit by someone who can confirm the statements regarding the defendant's conduct made in the first affidavit. This requirement for a second affidavit was not in the original Territories' ordinance, but was added in 1884.[120] At that point the requirement was for an affidavit of one other credible witness "verifying the reasons alleged in such first affidavit". In the 1944 Rules of Court the relevant part of Rule 566 read:

> "and upon the further affidavit of one other credible person... that the defendant is about to abscond or has absconded or has attempted to remove his personal property out of Alberta or to sell or dispose of the same or keeps concealed with intent as aforesaid...".

3.12 The draftsman of the present rules appears to have misread the first part of what is now Rule 485, for clause 485(b)(v) now reads "keeps *his property* concealed with intent to defraud his creditors". In describing the contents of the first affidavit Rule 485(a) makes no reference at all to the defendant keeping *his property* concealed; the reference is to the defendant keeping *himself* concealed to avoid service of process. We are left with the curious situation that, on a literal reading of Rule 485, if a plaintiff intends to rely upon the defendant's concealing himself to avoid service of process, the deponent of the corroborating affidavit is required to depose to something entirely different: that the defendant is concealing his property with intent to defraud his creditors.

3. Prejudice to the Plaintiff

3.13 A casual reading of Rule 485(a) would suggest that the statement of a belief that without the benefit of the attachment the plaintiff will lose his debt or sustain damage is only required where the plaintiff is relying on the third alternative as to the defendant's conduct: that he keeps concealed to avoid service of process. This is because the words "and that the deponent verily believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage" appear to be part of clause 485(a)(iii). However, a careful reading of Rule 485(a) will confirm that the statement of belief as to the probable prejudice to the plaintiff is necessary whether the

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[120] An Ordinance to Amend and Consolidate as Amended the Ordinances Respecting the Administration of Civil Justice in the North-West Territories (1884), s. 67(5).

plaintiff relies on clause (i),(ii), or (iii).

3.14 The more difficult question concerns the meaning of the phrase "will lose his debt or sustain damage". The requirement for this statement was added in 1886,[121] and was borrowed from article 834 of the Quebec Code of Civil Procedure.[122] It is not altogether obvious how one "loses a debt". If a plaintiff gets judgment on his debt but is then unable to recover the amount of the judgment has he lost his debt? Is being unable to recover one's debt the same thing as losing it? Similarly, what would amount to "damage" is a matter of speculation. Ironically, a few years after the North-West Territories borrowed the phrase "the plaintiff will lose his debt or sustain damage" from the Quebec Code, Quebec adopted a new code of civil procedure in which this phrase was replaced by "the plaintiff will thereby be deprived of his recourse against the defendant".[123] The latter phrase probably only states simply and more directly what was intended by the former phrase, that the plaintiff will be unable to collect his debt unless he has the benefit of the attachment.

B. The Procedure for Obtaining a Writ of Attachment

1. Time for Bringing Application

3.15 The opening words of Rule 485 make it clear that an application for a writ of attachment can only be made after the commencement of an action. In Alberta, unless it is otherwise provided, a civil proceeding is commenced when the clerk issues a statement of claim.[124] This requirement that the statement of claim be issued before the plaintiff applies for a writ of attachment should not ordinarily create serious problems for a plaintiff. However, it could do so where, for example, the prospective plaintiff learns on a Friday evening after the court offices have closed for the weekend that the defendant is about to leave the province with all his belongings in tow.

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121 An Ordinance Respecting the Administration of Civil Justice (1886), s. 309.

122 Code of Civil Procedure, 1879.

123 Code of Civil Procedure, 1897, Art. 931.

124 Alberta Rules of Court, R. 6.

2. *Ex Parte* Application to the Court

3.16 Rule 485 provides that on the filing of the proper affidavits, the court may, on application to it ex parte, direct the clerk to issue a writ of attachment. Since the rule does not specifically require that the application be made to a judge, the application could be made to either a judge or a master in chambers.[125] The original Territories ordinance did not require the plaintiff to apply for an order directing the clerk to issue a writ of attachment. All the plaintiff had to do was file the required affidavit (originally, only one was required), whereupon the clerk was required to issue a warrant (as it was then called) of attachment. It was in 1897 that the requirement of an application to a judge was added.[126]

3. Evidentiary Requirements

3.17 Rule 485 requires two affidavits to be filed in support of an application for a writ of attachment. The first affidavit, which for convenience we shall refer to as the "primary affidavit" is to be sworn by the plaintiff, or one of several plaintiffs, or his or their agent. The second affidavit, which we shall refer to as the "corroborating affidavit" is to be sworn by one other person well acquainted with the defendant. Presumably, in deciding whether a sufficient case has been made out for the writ of attachment, the court is to have regard to the contents of both affidavits.

a. The primary affidavit

3.18 The person taking the primary affidavit is to be the plaintiff, one of several plaintiffs, or his or their agent. This is similar to the requirement in Rule 470 which requires that the affidavit in support of an application for a prejudgment garnishee summons be taken by the plaintiff, his solicitor or his agent. In this latter context garnishee summons have occasionally been set aside because the deponent of the affidavit was not, or was not stated to be, the plaintiff or his solicitor or agent.[127]

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[125] For convenience we will sometimes use the term 'judge' to refer to the judicial officer hearing an application, where it could be either a judge or master.

[126] An Ordinance to Amend and Extend The Judicature Ordinance and Amendments Thereto (1897), s. 53.

[127] *Century 21 Cameo Real Estate (1980) Ltd.* v. *Halverson* (1982) 17 Sask. R. 375 (Q.B.): plaintiff's employee not necessarily his agent, where no evidence to that

3.19 The first thing that the person swearing the primary affidavit must do is swear positively to the facts establishing the debt. It is not sufficient for this purpose that he swear positively that there is a debt; the facts establishing the debt must be set out in the affidavit.[128] Having set out the facts establishing the debt, the deponent must then swear that he has reason to believe, specifying the grounds of his belief, that the defendant is guilty of one of the three sorts of conduct, described above, that will justify a writ of attachment. Again, the court is clearly entitled and indeed required to form its own opinion as to whether the facts stated in the affidavit support the conclusion regarding the defendant's conduct sought to be drawn by the plaintiff. Thus, it was held in one Alberta case that the mere non-payment of a debt, or even a refusal to pay it, were not grounds for inferring an intent to defraud his creditors on the part of a defendant who was removing his goods from the province.[129] Similarly, where a deponent swore that his past experiences with the defendants gave grounds for inferring a fraudulent intent, the judge stated that the deponent ought to have set out those experiences so that the court could draw its own conclusions from the evidence.[130]

Indeed, it would appear to be a mistake of law for a judge to grant an application for a writ of attachment on the basis of affidavits containing conclusory allegations not backed up by statements of fact.[131] On the other hand, it would not seem that the plaintiff has to go so far as to actually prove that the defendant is guilty of the conduct alleged. It will suffice that the deponent swears to facts from which a reasonable person could reasonably infer that the defendant is guilty of the conduct alleged.[132]

3.20 Having satisfied the foregoing requirements, the deponent must then swear that he verily believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage. It will be noted that nothing is said about the deponent's having to state the grounds for

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[127](cont'd) effect; *Mohr* v. *Parks* (1910) 15 W.W.R. 250 (C.A.): an articled law student as such did not satisfy the requirement.

[128] See e.g. *Fields* v. *Northland Company* [1933] 1 W.W.R. 734 (Man. C.A.); *Hole* v. *Simpson* (1914) 6 W.W.R. 742 (Sask. S.C.M.C.).

[129] *Meadoow Lake Car Sales Ltd.* v. *Michaud, supra* n. 113, at 290.

[130] *Canadian Bank of Commerce* v. *Kenzie* [1923] 2 W.W.R. 993 (Sask.K.B.);see also *Lukian* v. *Shankoff* [1945] 1 W.W.R. 345 (Sask. K.B.).

[131] *Ex parte* Moore; *In re Long* (1883) 23 N.B.R. 229 (C.A.), granting application for certiorari in respect of a warrant of attachment.

[132] *Scott* v. *Mitchell* (1881) 8 P.R. 518.

this belief. Given that the draftsman was careful to indicate that the deponent was required to state the grounds for his belief regarding the defendant's conduct, it would appear that the omission in this case was deliberate, so that the affidavit will not be defective merely because the grounds for the belief that the plaintiff will lose his debt or sustain damage are not stated. At the same time, it must be recalled that the plaintiff has the burden of convincing a judge that a writ of attachment should be issued. A judge would be less likely to be convinced of this if there were nothing in the supporting material to indicate why the plaintiff would be prejudiced if the attachment were not granted.

b. Corroborating affidavit

3.21 In *Meadow Lake Car Sales* v. *Michaud*[133] the plaintiff neglected to file the corroborating affidavit required by Rule 485(b). However, it was common ground that the defendant was in fact intending to remove personal property from Alberta, and there was no dispute that the plaintiff had established the necessary intent to remove. It was held that "the respondent's own evidence, the course of these proceedings, and counsel's admissions" obviated the requirement of a corroborating affidavit.[134] This might be thought to represent a departure from the courts' usual insistence on strict compliance with the formal requirements of the rules. However, reference to this apparently less fastidious approach did not avail the plaintiff in *J.R. Paine* v. *Cairns*,[135] who had also failed to file a corroborating affidavit. Here, the defendant did not admit that she was removing her property from the province or otherwise disposing of it. It was held that *Meadow Lake* merely stood for the proposition that the second affidavit could be dispensed with where there was alternative corroborative evidence of the relevant allegations in the primary affidavit. Since in this case there was nothing else to corroborate the primary affidavit, the absence of the corroborating affidavit was fatal, even though the judge saw no reason to disbelieve the allegations in the primary affidavit.[136]

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133 *Supra* n. 113.

134 *Id.* at 290.

135 *Supra* n. 115.

136 *Id.* at 32-3.

3.22 The corroborating affidavit need not say anything about the defendant's indebtedness to the plaintiff nor the likelihood of prejudice to the plaintiff if the writ of attachment does not issue. All this affidavit need to do is state that the deponent is well acquainted with the defendant[137] and that he has good reason to believe, specifying the grounds of his belief, that the defendant's conduct falls into the required category. Whereas the deponent of the primary affidavit is only required to state that he has "reason to believe", the corroborating deponent has to state that he has "*good* reason to believe".

3.23 Although Rule 485(b) does not specifically say so, it is arguable that the draftsman intended that the belief of the corroborating affidavit's deponent be based on personal knowledge; otherwise it would be hard to discern any point in the requirement that this deponent be well acquainted with the defendant. Moreover, if the deponent of the corroborating affidavit were permitted to base his belief solely on information conveyed to him by some third person, the second affidavit would be pointless, since both deponents could refer to the same third person as the source of their information and belief. However, we know of no jurisprudence on this particular point.

C. The Operation and Effect of a Writ of Attachment

1. Scope of the Writ

3.24 What sort of property may be seized under a writ of attachment? How much of the defendant's property may be seized? Is the defendant entitled to the exemptions provided in the Exemptions Act? The answer to the first of these questions is reasonably clear, but, as we shall see in a moment, the answers to the latter two questions are somewhat problematic.

a. Kinds of property caught by the writ

3.25 As far as the kinds of personal property which may be seized under a writ of attachment are concerned, it is safe to equate such a writ with a writ of execution issued after judgment. This is so because of the Seizures Act. Section 1(i) of the Act defines "writ of execution" as including a writ of attachment. The Act says that a sheriff charged with the execution

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[137] Even this requirement can catch the unwary. In *Lukian* v. *Shankoff, supra* n. 130 the corroborating affidavit was deemed to be insufficient where the deponent stated that he was the defendant's son, but did not go on to say that he was well acquainted with the defendant, his father.

of a writ of execution may seize and sell any goods or other personal property of the debtor,[138] and then goes on to deal with the ins and outs of seizing special kinds of personal property such as money[139] or shares.[140] All these provisions would apply equally to attachment under a writ of attachment.[141]

3.26 One thing that the Seizures Act does not expressly say is that real property may be seized under a writ of execution. As far as writs of execution issued after judgment (writs of *fieri facias*) are concerned, though, the writ does catch real property. Rule 347 of the Rules of Court makes this clear.[142] On the other hand, a writ of attachment does not authorize the attachment of real property. It will be recalled that the concluding words of Rule 485 are "issue a writ of attachment in Form M in the schedule, which writ shall be executed by the sheriff according to its tenor". The tenor of form M is that the sheriff is to attach only the defendant's personal property, not his real property.[143] It is not clear why attachment of real property is not permitted. Land certainly can not be removed from the province, but it could be sold or disposed of for the purpose of defrauding the defendant's creditors.

b. How much property is the sheriff to seize?

3.27 Where the sheriff receives instructions to effect seizure under a writ of execution issued after judgment, his duty is to seize sufficient exigible assets of the judgment debtor to satisfy

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138 S. 5(1).

139 S. 6.

140 S. 7.

141 Troublesome questions can and frequently do arise regarding the exigibility under a writ of execution of some of the more exotic kinds of personal property. An examination of these questions is not within the scope of this report. They will be examined in a subsequent report in this series.

142 R. 347 reads as follows:

> Every writ of *fieri facias* shall be issued against both the goods and lands of the debtor.

See also s. 15 of the Seizures Act.

143 The relevant part of Form M, which refers to the defendant's "personal estate", is set out in para. 3.27. It is interesting to note that the form of the warrant of attachment set out in the Schedule to the original ordinance of 1878 referred to "all the real estate and personal property" of the defendant. The words "real estate" were deleted from the form in 1886.

the judgment and costs of the execution creditor who instructs seizure, as well as the amount outstanding on other subsisting writs of execution filed in his office. A literal reading of Form M suggests that a writ of attachment goes further than this and requires the sheriff to attach all of the defendant's personal property, regardless of the value of that property as compared to the amount of the plaintiff's claim and subsisting executions. Omitting irrelevant parts, Form M reads:

> You [the sheriff] are commanded to attach, seize and safely keep all the personal estate ... of the above named defendant to secure and satisfy the plaintiff the sum of ____ with his costs of action and to satisfy the debt and demand of such other creditors of the said defendant as shall prosecute their claims to judgment and lodge executions ... within the time allowed by the Execution Creditors Act to entitle them to share in the distribution of the proceeds.

The writ commands the sheriff to attach *all* the defendant's personal property, not just enough property to satisfy the plaintiff's claim and costs, or enough to satisfy the plaintiff's claim and any writs of execution registered in the sheriff's office at the time he executes the writ of attachment.

3.28 It could be argued that the real meaning of Form M is that the sheriff is to seize sufficient property of the defendant to satisfy the plaintiff's claim and probable costs and subsisting executions. However, not only would this require a strained interpretation of the wording of the writ, it is not supported by legislative history. In 1878 the effect of the writ of attachment was actually stated in the body of the ordinance.[144] The writ (or warrant, as it was then called) was to be "directed to the sheriff, commanding him to attach, seize, take and safely keep all the personal property and effects of such indebtor liable to seizure under execution, or a sufficient portion thereof to secure the claim sworn to and costs". Thus, the original ordinance made it quite clear that the sheriff was only to seize as much of the defendant's personal property as was necessary to secure the plaintiff's claim and costs. However, in 1886 the words "or a sufficient portion thereof to secure the claim sworn to and costs" were deleted.[145] It is reasonable to infer from the deletion of these words that the legislature intended that the sheriff should henceforth attach all of the attachable property of the defendant, regardless of the amount of the plaintiff's claim.

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[144] An Ordinance Respecting the Administration of Civil Justice (1878), s. 49.

[145] An Ordinance Respecting The Administration of Civil Justice, No. 2 of 1886, s. 309. The current wording directing the sheriff to execute the writ according to its tenor was introduced in 1898: Rules of Court, C.O.N.W.T. 1898, c. 21, r. 417.

3.29 But what possible point would there be in attaching more of the defendant's property than is necessary to cover the plaintiff's claim, and perhaps the claims of existing execution creditors of the defendant? An answer to this question is not difficult to find. The property caught by a writ of attachment can only be sold after the plaintiff gets judgment, and the proceeds will then be divided up between the execution creditors of the defendant.[146] When the writ of attachment is executed, it will not generally be possible to anticipate what the total value of executions filed against the defendant will be when it comes time to distribute the proceeds of sale. The plaintiff's claim may be for $1,000, and at the time the writ is to be executed there may be no subsisting executions against the defendant, but by the time the proceeds of sale of the attached property are to be distributed, there may be writs against the defendant totalling many thousands of dollars. Arguably, then, the prudent and wise thing to do is to always assume the worst and attach as much of the defendant's property as possible. This is especially so when it is considered that, given the grounds upon which a writ of attachment is granted, there is a good chance that any property which is spared from attachment will disappear.

c. Exemptions from attachment

3.30 Professor Dunlop has pointed out that it is not altogether clear whether a sheriff's bailiff executing a writ of attachment must refrain from seizing any property of the defendant which is exempt from execution under the Exemptions Act.[147] The problem is that the Exemptions Act exempts certain property from seizure under a "writ of execution", but, unlike the Seizures Act, does not define "writ of execution" to include a writ of attachment. Form M, which Rule 485 tells us is to be executed according to its tenor, says nothing of exemptions. Here, consideration of legislative history merely adds to the mystery. Prior to 1898, the position was fairly clear: the writ only affected personal property of the defendant liable to seizure under execution - a formula which would exclude exempt property - but a debtor who had absconded from the territories leaving no wife or family behind was entitled to no exemptions. In 1898 all reference to the scope of the writ was deleted from the body of the rules; we are now simply told that the writ is to be executed according to its tenor. The tenor of the writ is that it is to be executed without regard to exemptions, but it is a

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[146] For a brief discussion of why this is so, see *infra*, paras.3.36-3.37.

[147] Dunlop, *supra* n. 22 at 209-10.

matter for conjecture whether the legislature of the time really meant to effect this result.

2. Execution of a Writ of Attachment

3.31 Given the circumstances which must exist before a writ of attachment may be issued, one might assume that a sheriff would execute such a writ by actually taking the seized goods into custody, so that the defendant could not dispose of them. The absconding debtors rules themselves seem to contemplate that this is what will happen. Form M instructs the sheriff to "attach, seize and safely keep" the defendant's property. Rule 488 tells us that the person from whose possession the property was seized is entitled "to have it returned to him" upon furnishing sufficient security which implies that it is taken away from him in the first place. And Rule 489 tells us that unless the property seized is redelivered or relinquished by the sheriff under the rules, he shall, unless otherwise ordered, "hold it until the plaintiff obtains judgment". All of these things point to the sheriff actually taking physical control of the attached property.

3.32 However, as we have already noted, the Seizures Act equates writs of attachment with writs of execution, and the sort of seizure contemplated by the Act is what might be referred to as a paper or notional seizure. What normally happens when a sheriff seizes personal property under a writ of execution is that the sheriff simply serves certain prescribed forms[148] on the person whose property is seized, gets that person to sign a "bailee's undertaking"[149] and leaves the "seized" property with him. In other words, the judgment debtor or defendant is left with actual control and custody of the property. The sheriff has a discretion actually to remove the seized goods, but is under no obligation to do so.[150] The plaintiff could request, but not direct, the sheriff to remove the property from the defendant's possession. Thus, contrary to what seems to be contemplated by the absconding debtor rules themselves, seizure of a defendant's goods under a writ of attachment might well be accomplished without the sheriff taking actual custody and control of the goods.

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148 Seizures Act, ss. 25, 26.

149 *Id.* s. 16.

150 *Id.* s. 31(1).

3. Attachment and Third Persons

3.33 What is the effect on third persons of the attachment of a defendant's property? More specifically, if some third person asserts some interest in or right against attached property that is in competition with that of the attaching plaintiff, how is the conflict to be resolved? Much will depend on the precise nature of the interest or right asserted by the third person. As a general proposition, though, it is safe to say that the effect on third persons of attachment under a writ of attachment will be much the same as the effect of seizure under a postjudgment writ of execution. Since this statement will not be very enlightening to anyone who is not sure what the effect of seizure under a writ of execution might be, we shall briefly consider a few situations where a writ of attachment might bump up against the interests of a third person.

a. Persons with a prior interest in the attached property

3.34 Suppose that in the course of executing a writ of attachment the sheriff's bailiff seizes property in which some person other than the defendant turns out to have a pre-existing interest. Common sense would suggest that the pre-existing interest should not be affected by the attachment. Happily, this is one instance where the law and common sense are on all fours with each other. Section 5 of the Seizures Act makes it clear that a sheriff executing a writ of execution (which includes, it will be recalled, a writ of attachment), may only seize the defendant's interest in any property. The antecedent interest of a third person in property will be unaffected by the attachment of that property.[151]

b. Persons who subsequently acquire an interest

3.35 Suppose that a sheriff attaches a defendant's stereo by means of a paper seizure. In breach of his bailee's undertaking, the defendant sells his stereo at a garage sale to an unsuspecting third person, Tom Pigeon. What is Pigeon's position? The law of Alberta seems to be that once goods have been seized by a sheriff, he acquires a special interest in the seized goods which entitles

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[151] One significant caveat to the general proposition concerns prior interests--usually security interests--in property that must be registered to be effective. For example, the security interest of a vendor under a conditional sales contract that is not properly registered cannot be set up against, *inter alia*, subsequent executions or attachments against the buyer: Conditional Sales Act, s. 2(1). However, we do not propose to discuss the intricacies of chattel security law here.

him to follow them into the hands of a subsequent purchaser, even if the latter purchases the goods in good faith and without notice of the seizure.[152] This is so even if the seized goods are left in the defendant's possession. Thus, it would seem that the unfortunate Pigeon would find his interest in the stereo to be subject to the rights of the attaching plaintiff.

c. Execution creditors

3.36 In Alberta, as in other Canadian provinces, we have what can be described as a sharing regime for execution creditors. This sharing regime is established and governed by the Execution Creditors Act.[153] By virtue of this Act, when a sheriff sells property under a writ of execution, the proceeds of sale are divided on *pro rata* basis between persons who have subsisting writs of execution on file with the sheriff at the time he makes the distribution.[154] This applies to property which was originally seized under a writ of attachment: the attaching plaintiff does not get any sort of priority over subsequent execution creditors.[155] One potential advantage attachment does give the attaching plaintiff as against execution creditors is that the latter cannot require the attached property to be sold and the proceeds of sale to be distributed before the former gets judgment and becomes entitled to share in the distribution. This is made clear by Rule 489(1).[156]

3.37 When the attaching plaintiff eventually gets judgment, and the attached property is sold by the sheriff, the proceeds are distributed in accordance with the Act. One way that an attaching plaintiff might attempt to avoid having to share the fruits of his attachment with execution creditors of the defendant would be by settling with the defendant. In return for the plaintiff releasing the attachment, the defendant would pay an agreed amount to the plaintiff. This direct

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[152] *Traders Finance Corporation* v. *Stan Reynolds Auto Sales Limited* (1954) 13 W.W.R. 425 at 429 (Alta. S.C.T.D.); Dunlop, *supra* n. 22 at 378; *cf.* W. McGillivary, "A Problem Arising out of Section 4 of the Seizures Act" (1940-42) 4 Alta. L.Q. 77.

[153] The Execution Creditors Act is the subject of a subsequent report in this series.

[154] This is a bit of an oversimplification, but will do for present purposes.

[155] Execution Creditors Act, s. 2.

[156] R. 489(1) reads as follows:

> (1) Unless the property seized is redelivered or relinquished by the sheriff under these Rules he shall, unless otherwise ordered, hold it until the plaintiff obtains judgment in the cause and an execution upon the judgment is delivered to the sheriff.

payment would not be caught by the Execution Creditors Act. Unfortunately for the attaching plaintiff, but fortunately for execution creditors, such an end run around the Act is made more difficult by section 15.[157] By virtue of this section, the settlement could not be made without leave of a judge, who would presumably ensure that the proposed settlement would not leave existing execution creditors of the defendant in the lurch.

d. Bankruptcy

3.38 Given the grounds upon which a writ of attachment may be issued, it would not be the least bit surprising for a defendant against whom a writ has been issued to be petitioned or to assign himself into bankruptcy before the attaching plaintiff can get judgment and reap the fruits of the attachment. If this were to happen, the attached property would fall into the hands of the trustee in bankruptcy just as if it had never been attached.[158] The attaching plaintiff would rank as just another unsecured creditor in a distribution of the bankrupt defendant's estate, except that he would be entitled to priority for his costs.[159]

4. What Happens to Attached Property Pending Judgment?

3.39 Once property has been seized pursuant to a writ of attachment, and barring an event such as the writ being set aside, the sheriff's duty is to hold the property until the plaintiff obtains judgment and an execution upon the judgment is delivered to the sheriff.[160] However, where the plaintiff is guilty of unnecessary delay in the prosecution of his action, the court may order that the property be redelivered to the person from whose possession it was taken, unless there are other

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157 S. 15 reads as follows:

> 15. No proceeding whereby property has been attached by virtue of a writ of attachment, garnishee proceedings or proceedings in the nature of equitable execution shall be discontinued, withdrawn or settled as against a debtor except by leave of a judge, unless at the date of the discontinuance, withdrawl or settlement there are no subsisting writs of execution against the debtor in the hands of the sheriff of the district in which the proceedings are taken.

158 Bankruptcy Act (Canada), s. 50(1).

159 *Id.*, s. 50(2). It is only the first creditor to file a writ of attachment or execution, or to attach property by way of garnishment, who gets priority for costs.

160 R. 489(1).

subsisting writs of execution or attachment on file in the sheriff's office.[161]

3.40 Although the presumption is that the attached property will generally be retained until the action is finally disposed of, there are certain types of property which cannot be kept in this fashion. Rule 492 provides for the disposal of "livestock or any perishable goods or chattels that from their nature cannot be safely kept or conveniently taken care of". When property of this description is seized, the officer executing the writ is to have it appraised and valued on oath by two competent persons. If the plaintiff wants the property to be sold, he must give the sheriff a bond in double the appraised value of the perishable property, conditioned on the payment of the appraised value to the defendant together with damages and costs occasioned by the seizure if the plaintiff does not obtain judgment. If the plaintiff does not provide the sheriff with the required bond (the sheriff being the judge of the sufficiency of the sureties) within four days of receiving notice of the seizure of property described in Rule 492 the latter is relieved of all further liability to the former in respect of the property, and is to return it to the person from whose possession it was taken.[162]

3.41 One potential problem with Rule 492 is that it says nothing about property which, while not particularly susceptible to physical deterioration, is likely to decline significantly in value between the time it is attached and the time the plaintiff is likely to get judgment. On the other hand, if the proceedings are likely to be protracted, and all parties agree that all or some of the attached property is likely to decline in value, they presumably would be free to arrange for the property to be sold, with the proceeds to be paid into court or held on trust.

5. Disposition of Attached Property After Judgment

3.42 If the plaintiff's action is dismissed, the court may, and presumably will, order the redelivery of the attached property to the defendant or other person from whose possession it was taken, unless some other writ of attachment or execution is in the sheriff's hands for execution.[163] Where the plaintiff does get judgment against the defendant he must file a writ of execution with the sheriff, whereupon the sheriff is presumably free to sell the attached property in order to satisfy the

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161 R. 489(2).

162 R. 493.

163 R. 489(2).

plaintiff's writ and any other writs of execution which may have been filed.

D. Safeguards

3.43 In this section we examine two sources of protection for the defendant against whom a writ of attachment is granted. Perhaps the most important protection provided to the defendant is the requirement that the plaintiff apply to the court--that is, to a judge or master--for a writ of attachment. However, in this section we examine safeguards which become operative once the plaintiff has managed to obtain a writ of attachment from the court. We first examine the protections which are found in the rules themselves. We then look at judicially created safeguards.

1. Safeguards within the Rules

a. Notice and review

3.44 Since an order authorizing the clerk to issue a writ of attachment is granted on an *ex parte* application, the judge granting the order will not have had the benefit of hearing the defendant's side of the story. Fairness to the defendant therefore requires that the defendant be given a reasonable opportunity to convince the court that the order ought not to have been granted in the first place. There are two provisions intended to meet this requirement. Rule 486(1) provides that a copy of the writ of attachment is to be served on the defendant at the time the seizure is made, or so soon thereafter as service can be effected. Rule 486(2) provides for the situation where personal service cannot be effected. In such a case a copy of the writ is to be left with some "apparently adult resident" at the place where the seizure is made, or if such a person cannot be found, posted in a conspicuous place on the premises.

3.45 As for actually applying to set aside the writ of attachment, Rule 491 provides that a writ of attachment may be set aside on satisfactory proof by affidavit that the creditor who obtained it did not have reasonable cause for taking the proceedings. Rule 491 clearly puts the onus on the defendant to establish lack of reasonable cause for the proceedings. In a nineteenth century Ontario application to set aside a writ of attachment the judge stated:

> Unless I am satisfied beyond a reasonable doubt, on the evidence before me, that the plaintiff ought not reasonably to have drawn such inference, and that the said circumstance did not warrant a reasonable

> man in the plaintiff's position drawing such an inference [that the defendant intended to defraud his creditors] I cannot interfere.[164]

However, we can see no reason why an Alberta Court would apply such an onerous standard of proof--proof beyond reasonable doubt--to an application under Rule 491. On the other hand, the passage just quoted suggests what the defendant must prove: that there is no evidence from which a reasonable person could reasonably infer the facts which constitute the grounds for issuing a writ of attachment.

b. Obtaining release of seized property by providing alternative security

3.46 Since the whole purpose of proceedings under the absconding debtors' rules is to provide a form of security for the plaintiff's claim, it is only logical that the defendant should be able to have his property released from attachment upon providing suitable alternative security. This is provided for by Rule 488 which provides that the person from whose possession the property was seized is entitled to have it returned on giving the sheriff sufficient security for or paying into Court an amount equal to its value. This value is determined by reference to its estimated value as set out in the sheriff's return required under Rule 487. It will be noted that the Rule refers not to the defendant, but to the "person from whose possession the property was seized", who might or might not be the defendant.

c. No judgment except by order of court

3.47 Rule 490(1) provides that notwithstanding the issuing of a writ of attachment the action shall be proceeded with in the ordinary way, but the plaintiff shall not have judgment against the defendant except by order of the court. An action in which a writ of attachment is issued is necessarily an action to recover a debt. Normally, in an action to recover a debt the plaintiff can simply enter default judgment against the defendant if the latter does not file and serve his statement of defence within 15 days of being served with the statement of claim.[165] It is not clear to us that any real purpose is served by depriving a plaintiff who obtains a writ of attachment of the benefit of Rule 148.

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[164] *Scott* v. *Mitchell*, *supra* n. 132.

[165] R. 148.

d. Depriving the overreaching plaintiff of costs

3.48 Rule 490(2) provides that where the plaintiff recovers judgment for an amount less than the amount of the debt as sworn to in the affidavit upon which the writ of attachment was issued, the court may order that the plaintiff be deprived of his costs, either wholly or in part, or that the plaintiff pay to the defendant his costs, either wholly or in part.

e. No remedy for damages suffered by defendant

3.49 One important safeguard that is not provided by the rules is a remedy in damages for a defendant who is injured by a wrongfully issued attachment order. A standard requirement of American attachment legislation is that the plaintiff post a bond in a sufficient amount and with sufficient sureties to compensate the defendant for his costs and any damages which he may suffer should the writ be set aside or should the plaintiff ultimately be unsuccessful in the action. The Alberta rules contain no such requirement. Thus, a defendant who suffers pecuniary loss as a result of what might be regarded as a wrongful attachment is left to his common law remedies, whatever they might be.

2. Judicially Created Safeguards

3.50 Some of the more important safeguards provided to defendants owe little or nothing to the Rules of Court, but are purely judicial creations. They are in large measure the result of judicial suspicion of the absconding debtors rules, and are an attempt to ensure that defendants are not oppressed by the remedy provided by these rules.

a. Defects of form

3.51 Perhaps the best indication of judicial suspicion of the absconding debtor rules is the relative frequency with which writs of attachment have been set aside on the basis of "mere technicalities". A good example of this judicial fastidiousness with respect to matters of form is found in *Fitzgerald* v. *Warner*.[166] The Saskatchewan legislation under consideration in that case, like the Territories legislation from which it was descended, required the deponent to state that the debtor had absconded from the province, leaving personal property in any judicial district thereof

[166] (1912) 2 W.W.R. 299 (Sask.Dist.Ct.).

liable to seizure. In an application to set aside the plaintiff's writ of attachment it was pointed out that the affidavit had failed to state in which judicial district the defendant had left property liable to seizure. The application to set aside the writ was granted even though the judge considered the plaintiff to have had reasonable cause for issuing the writ:

> However, the remedy given the plaintiff by Order 38 is an extraordinary and drastic one, and comes under the class in which it has been held that the requirements of the statute or rules must be strictly complied with to entitle the plaintiff to the remedies so provided.[167]

This insistence on strict adherence to formal requirements has also been characteristic of the judiciary's approach to the prejudgment garnishment remedy.[168]

b. Misstatements or omissions in the original application

3.52 A defendant against whom a writ of attachment has been issued who cannot muster an attack based on any formal defect in the material in support of the original application or on the grounds set out in Rule 491 need not lose hope of having the writ set aside. One possible line of attack focuses not so much on the supposedly extraordinary nature of the remedy, but upon the fact that it is granted on an *ex parte* application. In the field of injunctions, it has long been established that the affidavit in support of an *ex parte* application for an injunction "must fully and fairly state all the material facts within the knowledge of the plaintiff, even where all of the facts may not support the plaintiff's case for an injunction".[169] Not illogically, this principle has been applied to *ex parte* applications for writs of attachment. In *Newton* v. *Bergman*[170] it was held that where all the material facts are not stated in the affidavit in support of an *ex parte* application for an order for a writ of attachment, the writ may be set aside on a subsequent application by the defendant even if the order authorizing the writ would have been granted had all the material facts been brought to the attention of the court in the first instance.

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167 *Id.* at 299. A failure on the part of the plaintiff to specifically refer to "property liable to seizure under execution" was given as one of the reasons for setting aside the writ of attachment in *J.R. Paine* v. *Cairns, supra* n. 115 at 35.

168 See *infra*, para. 4.34.

169 Kerr on Injunctions (6th ed. J.M. Patterson ed. 1981) 637.

170 *Newton* v. *Bergman* (1901) 13 Man.R. 563 (C.A.).

c. Abuse of process

3.53 Yet another ground upon which a defendant may attack a writ of attachment is that the proceedings are an abuse of the process of the court. That courts have the power to set aside a writ of attachment to avoid an abuse of their process was emphatically stated in *Jackson* v. *Randall*:

"but the absence of any express provision to set aside process can never be, we think, affect [sic] the right of the court to interfere to prevent the abuse of its process."[171] If one tries to envision situations in which the proceedings to obtain a writ of attachment could be described as an abuse of the court's process, many of these situations will involve lack of reasonable cause for the plaintiff's taking such proceedings, and this situation is of course already provided for by Rule 491. However, it is conceivable that a plaintiff could be shown to be guilty of abusing the court's process in obtaining a writ of attachment even where it would be difficult to attack the writ on the basis that there were no reasonable grounds for taking the proceedings. Such a case could occur where, for example, the plaintiff's real purpose in obtaining the writ was not to secure his claim but to harass the defendant.[172]

d. Defendants' right of action against the plaintiff

3.54 Where the defendant successfully applies for an order setting aside a writ of attachment or is ultimately successful in defending the action the attached property will ordinarily be returned to him, but in the meantime he will have been deprived of its use and enjoyment, and naturally may desire compensation from the plaintiff. We have already seen that the Rules of Court make no provision for compensating the defendant in these circumstances. However, we shall see that in certain circumstances the common law may provide the aggrieved defendant with a remedy against the plaintiff.

3.55 The defendant who perceives himself to be the victim of a wrongful attachment will find that the common law has not developed a cause of action specifically tailored to his situation. However, depending upon the particular facts of his case, the defendant could have a cause of action

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171 (1874) 24 U.C.C.P. 87 at 89 (C.A.); *cf. Coupal* v. *Buie* [1926] 2 W.W.R. 242 at 251 (Sask.C.A., per McKay, J.A.).

172 *Whittimore* v. *Herbert* (1878) 18 N.B.R. 361 at 371 (C.A.). This case was actually concerned with a garnishee summons before judgment.

against the plaintiff on the basis of one of three theories of liability: malicious attachment, abuse of process, or trespass to goods.

(i) Malicious attachment

3.56 The common law has long recognized a cause of action for malicious prosecution. The gist of the cause of action is that the defendant maliciously and without reasonable or probable cause instituted criminal proceedings against the plaintiff, which proceedings terminated with a result favourable to the plaintiff.[173] Malicious resort to various sorts of civil process, notably writs of capias and writs of execution against property, has also been held to give rise to a cause of action. There are few cases dealing specifically with malicious attachments of property,[174] but there is no reason why the principles applicable to other maliciously instituted civil proceedings could not apply in this case. The gist of the action for malicious attachment would be that the plaintiff[175] maliciously and without reasonable or probable cause procured a writ of attachment to be issued and executed, thereby causing damage to the defendant.[176]

(ii) Abuse of process

3.57 The action for abuse of process is closely related to the action for malicious civil proceedings, and indeed can be thought of as a special instance of that action. The action for abuse of process owes its existence to the decision of the Court of Common Pleas in *Grainger* v. *Hill*.[177] Hill had commenced an action against Grainger, issued a *capias ad respondendum*, and sent sheriff's officers to arrest Grainger in his sick bed, all for the purpose of extorting a ship's register from him. It was held that in the face of such a flagrant abuse of the process of the court, it was quite

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173 See J. Fleming, *The Law of Torts* (5th ed. 1977) 597-610.

174 We have found two cases specifically dealing with an action based on a malicious attachment. The first is *Hood* v. *Cronkrite* (1868) 4 P.R. 279, and the second is *Feinstein* v. *Paulin-Chambers Company Ltd.* [1921] 1 W.W.R. 554 (Man. K.B.).

175 We use the terms "plaintiff" and "defendant" to refer to the plaintiff and defendant in the proceedings in which the latter's property was attached, even though their roles would be reversed in the malicious attachment proceedings.

176 The requirements of malice and lack of reasonable or probable cause are conjunctive; the presence of malice or the absence of reasonable or probable cause is not sufficient without the other element of the cause of action.

177 (1838) 132 E.R. 769.

immaterial whether or not Hill had reasonable or probable grounds for commencing his action against Grainger. Thus, in an action for abuse of process, the plaintiff need not show that the defendant lacked reasonable or probable cause for instituting the original proceedings against the plaintiff. However, not only must the defendant in the abuse of process action be shown to have been motivated by an improper purpose in taking the original proceedings, he apparently must also be shown to have taken some overt step to pervert them from their true purpose.[178]

(iii) Trespass to goods

3.58 Another possibility which may be open to the defendant in some circumstances is to regard the act of the bailiff who actually seizes the attached property as a trespass to goods committed by the plaintiff, using the bailiff as his instrument. The advantage of framing the action in trespass is that it is not necessary to show that the plaintiff acted out of malice or without reasonable or probable cause; the burden on the defendant is simply to show that the bailiff seized the property on the instructions of the plaintiff or the plaintiff's lawyer.[179] However, a major problem for the defendant is that the plaintiff will usually have an unassailable defence: that the seizure was made under the authority of judicial process, the writ of attachment. That an act was done under the authority of valid judicial process is a complete defence to a complaint of trespass founded on that act.

3.59 But what happens if, after the alleged trespass, the writ of attachment is set aside? Can the plaintiff still rely on the writ to justify an act (the seizure) done before the writ was set aside? The answer to this question is somewhat complicated. It has long been held in actions of trespass (either to the person or to property) that once a writ has been set aside because of an irregularity, an alleged trespasser (other than a judicial officer, such as a sheriff's bailiff, who is entitled to rely on any writ that is regular on its face) cannot justify his actions by pointing to the writ. This is so even where the alleged trespass occurred before the writ was set aside.[180] The

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178 Fleming, *supra* n. 173 at 610-11.

179 *Clissold* v. *Cratchley* [1910] 2 K.B. 244 (C.A.); *Demers* v. *Desrosiers (No. 2)* [1929] 2 W.W.R. 241 at 249, 242-43 (Alta.S.C.). Where the process is actually set on foot by a lawyer acting on behalf of his client, both lawyer and client may be liable: *Covington* v. *Lloyd* (1839) 112 E.R. 909.

180 E.g. *Clissold* v. *Cratchley, id.*; *Demers* v. *Desrosiers, id.*

theory is that once the writ has been set aside, it is as if it had never existed. However, the Courts have always distinguished between process which is set aside as being irregular, and process which is set aside because a judge erred in authorizing the process to be issued. In the latter case the process issued in error will justify any act done under it before it is actually set aside.[181] The rationale for the distinction is sometimes said to be that in the case of an irregularity the plaintiff has no one to blame for the irregularity but himself (or his lawyer!), whereas in the case of an error he can "blame" the judge.[182]

3.60 In Alberta, as we have seen, a writ of attachment can only be issued upon the authorization of a judge or master. It is therefore arguable that where an application for an order authorizing a writ of attachment is granted on the basis of patently insufficient material and the order and writ are subsequently set aside, the writ would still protect the plaintiff, because the process was erroneously rather than irregularly issued. However, where the writ is subsequently set aside because the judge was induced to authorize it by a false or misleading affidavit, it would seem plausible to argue that the writ of attachment is set aside not because of an error by the judge but because of an irregularity. It would then be open to the defendant to argue that the plaintiff should be liable in trespass once the writ has been set aside.

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[181] E.g. *Philips* v. *Biron* (1722) 93 E.R. 667; *Parsons* v. *Loyd* (1772) 95 E.R. 1089 at 1092; *Varian* v. *Weeks* (1892) 40 N.S.R. 285(n).

[182] E.g. *Parsons* v. *Loyd, id.* at 345, E.R. 1092.

CHAPTER 4

ATTACHMENT OF DEBTS BEFORE JUDGMENT

A. Overview

4.1 Attachment of debts through garnishment procedure is not only or even primarily a prejudgment procedure; garnishment of debts owed to judgment debtors is a common method of enforcing money judgments. Most of the provisions in the Rules of Court and Execution Creditors Act regarding garnishment apply equally to garnishment before and after judgment. Similarly, many of the issues of interpretation which have arisen over the years are equally applicable to garnishment before and after judgment. As this report is concerned with prejudgment remedies, we examine in detail only those issues which relate particularly to prejudgment garnishment. Before discussing specific aspects of the present prejudgment garnishment rules, we shall make some general observations regarding the gradual evolution of these rules from 1878 to the present. What emerges from this review is a pattern of steadily increasing protection for defendants.

4.2 The garnishment provisions of North West Territories Ordinance No. 4 of 1878 were directly descended from provisions found in the English Common Law Procedure Act, 1854. However, while the English Act only permitted postjudgment garnishment, Ordinance No. 4 permitted a creditor to initiate garnishment proceedings "[w]henever any debt or sum of money, not being a claim strictly for damages, is due and owing...either on a judgment of the court or otherwise". Ordinance No. 3 of 1884 introduced a requirement that before a garnishee summons could be issued before judgment an affidavit had to be filed stating "that the primary debtor is well and truly indebted to the primary creditor in the amount and for the causes set forth in the statement of claim annexed to the summons".[183] By 1898 the requirements for obtaining a garnishee summons were stated as follows in Rule 384:

> Any plaintiff in an action for a debt or liquidated demand before or after judgment and any person who has obtained a judgment or order for the recovery or payment of money may issue a garnishee summons.... Such summons shall be issued by the clerk upon the plaintiff or judgment creditor, his advocate or agent filing an affidavit

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[183] An Ordinance to Amend and Consolidate as Amended the Ordinances Respecting the Administration of Civil Justice in the North-West Territories (1884), s. 76(2).

> (a) showing the nature and amount of the claim or judgment against the defendant or judgment debtor and swearing positively to the indebtedness of the defendant or judgment debtor to the plaintiff or judgment creditor;
>
> (b) stating to the best of the deponent's information and belief that the proposed garnishee (naming him) is indebted to such defendant or judgment debtor.[184]

It will be noted that so long as the plaintiff's claim was a debt or liquidated demand, no distinction was made in the requirements for obtaining a garnishee summons before, as opposed to after judgment. In either case, upon the plaintiff's filing the proper affidavit, the clerk was required to issue the garnishee summons.

4.3 This remained essentially unchanged until 1961, when Rule 550 of the 1944 Rules of the Supreme Court of Alberta was amended[185] so that the relevant parts thereof read as follows:

> (1) Any person who has obtained a judgment or order for the payment of money; or
>
> (2) any plaintiff in an action for a debt or liquidated demand who on *ex parte* application has obtained leave to issue a garnishee summons before judgment, may issue a garnishee summons....

Rule 550(2) then goes on to require the plaintiff or judgment creditor, his solicitor or agent to file the appropriate affidavit. It should be noted that the Rule gives no indication as to the grounds upon which leave to issue the garnishee summons should be granted. This omission was rectified in the Alberta Rules of Court, 1968. Rule 470(1) of the 1968 Rules reads as follows:

> (1) In any action for a debt or a liquidated demand, upon affidavit by the plaintiff, his solicitor or agent
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> > (a) swearing positively to the facts establishing his cause of action,
> >
> > (b) stating his belief that the plaintiff is entitled to the relief claimed,
> >
> > (c) exhibiting an undertaking by the plaintiff that if monies are paid into court under a garnishee summons issued pursuant to leave granted upon this application, he will proceed with the action without delay, and

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[184] An Ordinance Respecting the Administration of Civil Justice, C.O.N.W.T. 1898, c. 21, r. 384.

[185] Alta. Reg. 45/61 (O.C. 267/61).

> (d) establishing a reasonable possibility that the plaintiff will be unable to collect all or part of his claim or be subjected to unreasonable delay in the collection thereof unless permitted to issue a garnishee summons,
>
> the court may, upon *ex parte* application, grant leave to the plaintiff to issue a garnishee summons before judgment.[186]

Thus, from a situation where no distinction was drawn between garnishee summons before and after judgment, so long as the plaintiff's claim was not "strictly for damages", we have moved to a position where the plaintiff is required to satisfy a judge or master that certain special circumstances exist which make the issuing of a garnishee summons before judgment necessary.

B. Grounds for Obtaining Leave to Issue a Garnishee Summons Before Judgment

4.4 Although Rule 470(1) sets out four specific requirements for the affidavit in support of the application for leave to issue a garnishee summons before judgment, there are really only two substantive requirements: the affidavit must disclose a claim for a debt or a liquidated demand, and it must disclose a reasonable possibility of prejudice to the plaintiff if the garnishee summons before judgment is not issued. There is very little case law regarding the latter requirement, but a considerable body regarding the meaning of the phrase "debt or liquidated demand".[187]

1. Debt or Liquidated Demand

4.5 Rule 5(i) of the Rules of Court gives the following definition of "liquidated demand":

> (i) "liquidated demand" means a claim for a specific sum payable under an express or implied contract for the payment of a sum of money not being in the nature of a penalty or unliquidated damages, the amount whereof is fixed by the terms of the contract or can be ascertained by calculation only or upon the taking of an account between the plaintiff and the defendant; or a claim for a specific sum of money, whether or not in the nature of a penalty or damages recoverable under a statute which contains an express provision that the sum sued for may be recovered as a liquidated demand or as liquidated damages.

There is no similar definition for the term "debt", a term not easily susceptible of definition. There

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[186] Once he has obtained leave to issue a garnishee summons before judgment, a plaintiff, like a judgment creditor, is required by R. 470(3) to file a standard affidavit.

[187] *See* Dunlop, *supra* n. 22 at 15-20, 222-28.

are, of course, obligations which clearly fall within the definition of "debt"; the archetypal debt is the obligation of a person who borrows money. Another type of obligation well within the core meaning of the term "debt" is that which is created when one person buys goods or services on credit, the price having been fixed in advance by the parties.

4.6 It is worth emphasizing that, although each of the debts described above involves a contract, in the early common law the *causa sine qua non* for an action in debt was not the supposed existence of a contract between the plaintiff and the defendant but the fact that "a fixed sum, "a sum certain" is due from one man to another".[188] That a fixed sum was owed by one person to another was the hallmark of a debt; the means by which the obligation was created - by contract or otherwise - were immaterial.

4.7 However, over the years the idea of debt has come to be associated with contractual obligations. This association is natural enough where the contract in question fixes or provides a method for calculating the amount owed by one party to the other. But many contracts, especially implied contracts for the provision of goods or services, create an obligation to pay money without fixing or providing any method of ascertaining the amount to be paid. A brief discussion of a few of the many cases interpreting the phrase "debt or liquidated demand" and similar phrases will show that courts sometimes emphasize the fixed sum approach and at other times, the contractual approach.

a. Cases treating debts as obligations in a fixed or ascertainable sum

4.8 Treating debts as obligations for fixed or ascertainable sums rather than as contractual obligations allows some obligations to be treated as debts which could not be if one were to adopt a purely contractual definition. Claims for the repayment of monies, the payment of which was induced by fraud or a mistake of fact, have been held to be debts or liquidated demands for the purpose of the garnishment rules.[189] An action for conversion against a person who has stolen

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[188] Pollock and Maitland, *supra* n. 12 at 210-12; 3 Holdsworth, *A History of English Law* (3rd ed. 1923) 420-21, 425-26; J. Ames, *Lectures on Legal History* (1913) 88-90.

[189] *Halifax Fire Insurance Company* v. *McGilvry* [1939] 3 W.W.R. 542 (Alta. S.C.T.D.); *Alm* v. *Tyrone Hotels (Saskatchewan) Ltd.* (1963) 42 W.W.R. 297 (Sask. Q.B.); *T.D. Bank* v. *Pawluk* [1976] W.W.D. 171 (Sask.Q.B.).

goods from the plaintiff does not give rise to a claim for a debt, because the value of the stolen goods must be estimated. However, if the defendant subsequently receives money in exchange for the stolen goods, the plaintiff can elect to "waive the tort" and claim the money received by the defendant as money had and received to the use of the plaintiff. It has been held that where the plaintiff makes such an election, the claim will support a garnishee summons before judgment.[190] It will be noted that in none of these cases could there be said to be any sort of contract between the plaintiff and the defendant.[191] But in each case the claim is for a fixed, readily ascertainable sum of money.

4.9 However, the "fixed sum" formula can be more restrictive than the "contractual obligation" formula. This is so where the plaintiff is relying on an implied contract for services in which there is no express agreement as to the price of the services.[192] In *Wright* v. *Galisheff*[193] the plaintiff real-estate agent claimed compensation on a *quantum meruit* basis. There was a written contract in existence, but it did not provide a formula for fixing compensation in the circumstances which had arisen. It was held that a garnishee summons before judgment could not be issued on such a claim:

> The essence of a liquidated demand is that once the contract is established the ascertainment of the amount due becomes simply a matter of calculation. In the case of *quantum meruit* the plaintiff establishes a service for which the defendant is under obligation to pay and then it becomes necessary for the court to determine what such services are worth. This cannot be said to be a matter of calculation

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190 *Crown Tire Service Ltd.* v. *Kletzel* (1981) 15 Alta. L.R. (2d) 132 (Q.B.M.C.). It has been held that an action for conversion of money is a liquidated demand which will support the entry of default judgment under the English equivalent of our R. 148: *G.L. Baker Ltd.* v. *Barclays Bank, Ltd.* [1956] 3 All E.R. 519 (C.A.). This makes considerable sense: what could be more readily ascertainable than the money value of money? Nevertheless, in *J.R. Paine* v. *Cairns, supra* n. 115 at 30 it was held that an action to recover stolen money would not support a writ of attachment under R. 485 because the plaintiff's claim was for damages, not a debt. This case illustrates the confusion surrounding, and the emptiness of, the distinction between debts and liquidated demands, on the one hand, and unliquidated claims on the other.

191 It is true that these are all claims in "quasi-contract". But it is now accepted that the true basis of recovery in such claims is restitutionary, not contractual.

192 I.e. a claim in *quantum meruit*. There is a genuine understanding between the parties that the person providing the services is to be paid; there is just no express understanding as to the amount.

193 [1948] 1 W.W.R. 1082 (Sask.Dist.Ct.).

> only, and therefore attachment proceedings would not, in my opinion, lie in respect of such a claim.[194]

In *GRH Ventures Ltd.* v. *De Neve*[195] the plaintiff was claiming the balance alleged to be owing on a fixed price building contract. This would have been a classic case of a debt or liquidated demand, except that the defendant claimed that she was entitled to deductions for certain deficiencies and deletions. In applying for a garnishee summons before judgment, the plaintiff deducted an amount which it said was more than sufficient to cover the deficiencies and deletions. However, the court held that since the balance owing to the plaintiff was subject to deductions which were not merely a matter of calculation, the amount owing could not be said to represent a "debt or liquidated demand in money".

b. Decisions equating debts with contractual obligations

4.10 A good example of a case which equates debt with contractual obligation is *McMeekin* v. *Certified Concrete (Central) Limited*,[196] a case in which the judge thought himself bound to follow *Alm* v. *Tyrone Hotels*[197] in adopting the following definition of "debt or liquidated demand":

> Perhaps the best statement which can be attempted of the meaning of the expression "debt or liquidated demand (in money)", as used in 1851, is that it covered any claim:
> (a) for which the action of debt would lie;
> (b) for which an *indebitatus* (or "common") count would lie - including those cases formerly covered by the *quantum meruit* or *quantum valebat* counts, notwithstanding that the only agreement implied between the parties in such cases was for payment at a "reasonable" rate; (c) for which covenant, or special *assumpsit*, would lie, provided that the claim was for a specific amount, not involving in the calculation thereof elements the selection whereof was dependent on the opinion of a jury. [198]

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194 *Id.* at 1083; see also *Deneschuk Homes Ltd.* v. *Grunert* [1982] 4 W.W.R. 610 (Sask. Q.B.); *Pe Ben Industries Company Ltd.* v. *Chinook Construction & Engineering Ltd.* [1977] 3 W.W.R. 481 (B.C.C.A.) seems to regard a claim based on *quantum meruit* as not being a liquidated demand.

195 [1987] 4 W.W.R. 122 (Man. C.A.).

196 (1966) 58 W.W.R. 56 (Sask. Q.B.).

197 *Supra* n. 189.

198 *Id.* at 301, quoting from R. Burrows, *Words and Phrases Judicially Defined* (pocket supplement 1943).

The judge noted that the plaintiff's *quantum meruit* claim fell within (b) of the above definition, but held that the garnishee summons before judgment should be set aside because the deponent did not state that the work was done at the request of the defendant. It is clear, though, that but for this defect, the absence of any price-fixing mechanism other than the test of reasonableness would not have prevented the court from characterizing the claim as being for a debt or liquidated demand.

c. Cases turning on other considerations

4.11 Of course, not all cases turn on the question of whether there is a contractual obligation or a claim for a fixed sum. One situation where plaintiffs often seem anxious to have a garnishee summons before judgment is where the plaintiff expects to be required as a surety to pay a claim for which the defendant is the principal debtor or a co-surety. Clearly, a claim for indemnity by a surety against a principal for a sum already paid by the surety is a claim in respect of a debt or liquidated demand.[199] However, where the surety has not yet paid the claim the courts have held that a garnishee summons before judgment cannot be issued.[200] Similarly, a plaintiff who is not entitled to demand payment of sums due under a building contract until the work is accepted by an architect cannot issue a garnishee summons before judgment before the work is accepted.[201] These cases could be said to stand for the proposition that one cannot issue a garnishee summons before judgment in respect of a cause of action which has not yet accrued.

4.12 We have by no means mentioned all or even a large proportion of the cases dealing with the question of what sort of claim amounts to a debt or liquidated demand within the meaning of the Rules of Court. We have, we believe, discussed sufficiently many cases to indicate that the courts do not speak with one voice on this subject. We suspect that those cases which look for an obligation to pay a fixed or ascertainable sum are closer to the mark. However, we shall not dwell

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199 *Cf. Ben Ginter Construction Co. Ltd.* v. *Celgar Ltd.* (1967) 61 W.W.R. 766 (B.C.S.C.) which relies on and quotes from an unreported British Columbia Court of Appeal decision: *Campbell-Bennett Ltd.* v. *Comstock Midwestern Ltd.* (April 21, 1954).

200 *Agnes & Jennie Mining Company Ltd.* v. *Zen* [1982] 6 W.W.R. 59 (B.C.C.A.) (co-sureties); *Elite Insurance Company* v. *J.C. Kerkhoff & Sons Contracting Ltd.* (1983) 49 B.C.L.R. 266 (C.A.) (bondsman).

201 *Cascade Builders Limited* v. *Louis Benjamin Excavating Ltd.* [1971] 1 W.W.R. 700 (Alta. S.C.T.D.).

on this matter any further, for, as will be seen in Chapter 8, we are of the view that no matter how "debt or liquidated demand" is defined, there is no rational justification for putting such claims in a special category when considering the question of in what circumstances prejudgment remedies should be available.

2. Prejudice to the Plaintiff

4.13 The requirement in clause 470(1)(d) that the supporting affidavit establish a reasonable possibility that the plaintiff will be unable to collect all or part of his claim or be subjected to unreasonable delay in its collection unless permitted to issue a garnishee summons has attracted little judicial comment in the reported cases. This is no doubt partly accounted for by the fact that this requirement has only existed since 1968. However, we suspect that the real reason why there are so few cases which consider the interpretation of clause 470(1)(d) is that it raises a simple question of fact, instead of requiring the court to embark upon an exercise in legal scholarship to determine whether the plaintiff's claim is within a particular legal pigeon-hole.

4.14 Clause 470(1)(d) has attracted some attention in the reported cases. In *Cascade Builders Limited* v. *Lewis Benjamin Excavating Ltd.*[202] it was held, not surprisingly, that a garnishee summons issued on the basis of an affidavit which made absolutely no reference to any danger of the plaintiff's being prejudiced in the collection of his judgment should be set aside. In *Noel & Blanchette Construction Company Limited* v. *Medican Construction Limited*[203] a garnishee summons before judgment was set aside when the defendant filed an affidavit which rebutted the inferences the master had drawn from the affidavit filed by the plaintiff in his *ex parte* application for leave to issue the summons. The master held that the fact that the amount allegedly owed by the defendant contractor to various sub-contractors exceeded the amount still owed to the defendant by the owner did not of itself establish the necessary reasonable possibility of prejudice, where there was no evidence that the defendant was insolvent or an absconding debtor.

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[202] *Ibid.*

[203] (1982) 23 Alta. L.R. (2d) 215 (Q.B.M.C.).

C. Procedure for Obtaining Garnishee Summons Before Judgment

4.15 We would again note that garnishment is a method of enforcing judgments as well as being a form of prejudgment relief. If a plaintiff gets leave to issue a garnishee summons before judgment, he must still follow the same procedure to actually issue the garnishee summons that a judgment creditor would have to follow, and this procedure involves the filing of another affidavit.[204]

As we are concerned primarily with the procedure to obtain leave, we deal only incidentally with procedural issues common to all garnishee summons.

1. *Ex Parte* Application for Leave

4.16 As noted above, since 1961 the plaintiff with a claim for a debt or liquidated demand has been required to obtain leave in order to issue a garnishee summons before judgment. The present rule is not specific as to whether an application for leave to issue a garnishee summons may be made before an action is actually commenced, but the words "in any action" at the beginning of Rule 470(1) strongly suggest that leave may only be obtained in an action already commenced. Moreover, the cases[205] which hold that the affidavit in support of a garnishee summons before judgment must be sworn after the action is commenced seem to require that the issuing of the garnishee summons itself follow the commencement of the action. On the other hand, it is arguable that in an exceptional case a master could authorize the issuing of a garnishee summons before an action is commenced upon the plaintiff's giving appropriate undertakings.

2. Evidentiary Requirements

4.17 Unlike the plaintiff seeking a writ of attachment, the plaintiff seeking leave to issue a garnishee summons before judgment is only required to file one affidavit; a corroborating affidavit is not required. The affidavit is to be sworn by the plaintiff, his solicitor or agent. This requirement has been strictly interpreted in Alberta. In *Mohr* v. *Parks*[206] a garnishee summons was

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[204] R. 470(3). In *Noel & Blanchette Construction* v. *Medican Construction, id.,* Master Quinn referred without disapproval to the practice of some lawyers of filing one affidavit satisfying the requirements of both, R. 470(1) and R. 470(3).

[205] *Erwin W. Block Professional Corporation* v. *Dickson* (1979) 9 Alta. L.R. (2d) 322 (S.C.); *McParland* v. *Seymour* [1925] 3 W.W.R. 666 (Alta. C.A.).

[206] *Supra* n. 127.

set aside because the affidavit in support was sworn by an articling student who, it was held, was neither a solicitor nor an agent of the plaintiff. In another more recent case[207] an affidavit sworn by an employee of the plaintiff was held to be insufficient where there was no evidence, even a statement to that effect in the affidavit, that the employee was the plaintiff's agent.

4.18 Assuming that the affidavit is sworn by a proper person, the next question is whether the allegations in the affidavit concerning the plaintiff's cause of action are sufficient. Rule 470(1)(a) requires the deponent to swear positively *to the facts* establishing his cause of action. The older cases consider the somewhat different requirement, now found in Rule 470(3)(a), that the affidavit show the nature and amount of the claim and swear positively *to the indebtedness* of the defendant to the plaintiff. However, as we shall see in a moment, the older cases tend to approach the requirement that the plaintiff show the nature of his claim as a requirement that he set out the facts which establish his cause of action.

4.19 The jurisprudence regarding what is now Rule 470(3)(a) suggests that while it is not necessary to set out in the affidavit all the facts that it would be necessary to prove at trial in order for the plaintiff to get judgment, the plaintiff's cause of action must be set out with sufficient particularity to allow the court to decide intelligently whether the claim is for a debt or liquidated demand.[208] Obviously, the most positive statement that the defendant is indebted to the plaintiff will not suffice if none of the facts which would support this conclusion are set out.[209]

4.20 The requirement that the deponent swear positively to the facts establishing the cause of action, which seems to assume that the deponent has personal knowledge of the facts, would appear to make it a very rare case where the plaintiff's solicitor could properly swear the affidavit. Indeed, there would be many ordinary cases where no one person could be said to have personal knowledge of all the facts establishing the cause of action. However, in *Pomfret* v. *Morie*, a case where a garnishee summons before judgment had been set aside because the deponent of the affidavit

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207 *Century 21 Cameo Real Estate (1980) Ltd.* v. *Halverson, supra* n. 127.

208 *See, e.g. Vickery* v. *Security Home Financing Ltd* (1977) 6 C.P.C. 169 (B.C.S.C.); *Westland Mortgage Services Vancouver Ltd.* v. *Aboud* (1981) 24 C.P.C. 141 (B.C. Co.Ct.); *McMeekin* v. *Certified Concrete (Central) Limited, supra* n. 196.

209 *Joncas* v. *Plotkins* [1934] 2 W.W.R. 142 (Alta. S.C.T.D.); *Alberta Tractor Parts Limited* v. *Czech Construction Limited* (1959) 30 W.W.R. 163 (Alta. S.C.T.D.).

had not had personal knowledge of the facts, Harvey, C.J.A. made the following observation regarding this requirement:

> One must consider the purpose of this Rule, and as was said in the *Vinall*[210] case give a reasonable interpretation to it so as to carry out that purpose. ...the fact of the indebtedness of the defendant to the plaintiff must be sworn to positively and not on mere information and belief, but that does not mean that the plaintiff must necessarily have absolute and complete knowledge which in the circumstances of many cases would be impossible.[211]

It will be noted, though, that the Rule there under consideration only required the deponent to swear positively to the defendant's indebtedness to the plaintiff, whereas Rule 470(1)(a) requires him to swear positively to the facts establishing the cause of action, so it could be that a higher standard of personal knowledge is required under this rule than was required of the deponent (a solicitor) in *Pomfret*.

4.21 Clauses 470(1)(b) and (c) do not raise any particular evidentiary problems for the plaintiff. The former simply requires the deponent to state his belief that the plaintiff is entitled to the relief claimed, and the latter requires the affidavit to exhibit an undertaking of the plaintiff that if monies are paid into court under the garnishee summons, he will proceed with the action without delay. Each of these merely requires a simple statement, in the one case of the deponent's belief, and in the other case of the plaintiff's undertaking. Clause 470(1)(d) does impose an evidentiary demand, in that the affidavit must set out facts from which the court may infer that there is a reasonable possibility that the plaintiff will be unable to collect his judgment or will be delayed in its collection if a garnishee summons is not issued.

D. Nature of the Remedy

1. Property Affected by Garnishee Summons

4.22 We have already mentioned that once the plaintiff has obtained leave to issue a garnishee summons before judgment there is not a great deal to distinguish the proceedings on a garnishee summons before judgment and a garnishee summons after judgment. This is especially so

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210 *Vinall* v. *DePass* [1892] A.C. 90 (H.L.).

211 [1931] 2 W.W.R. 477 at 477, 480 (Alta.C.A.).

regarding the property caught by a garnishee summons; it is exactly the same whether the summons is issued before or after judgment. This topic is discussed in Report for Discussion No. 3[212] so our discussion of it here will be very brief.

4.23 Put simply, a person served with a garnishee summons is required to pay into court any money which at the time of service he owes to the defendant (or judgment debtor) named in the summons, or to pay into court enough of what he owes to the defendant to cover the amount set out in the summons. The amount set out in the summons will be the sum of the amount of the plaintiff's claim, the plaintiff's costs, and the amount of any subsisting writs of execution on file at the time the garnishee summons is issued.[213] We have referred to money owed by the garnishee to the defendant, but the precise wording of the Act should perhaps be set out:

> A garnishee summons served on the garnishee as and from the time of service binds each debt due or accruing due from the garnishee to the debtor....[214]

The phrase "debt due or accruing due" has been and continues to be a fertile source of litigation, and we would refer the reader to Dunlop[215] for an extended discussion of some of the difficulties which the courts have encountered in interpreting this phrase. It will suffice for our purposes to note that, subject to certain exemptions set out in Rule 483, wages and salaries are garnishable both before and after judgment, and that Rule 472 provides that wages or salaries are deemed to accrue due from day to day.

4.24 Assuming that the garnishee does not dispute his indebtedness to the defendant, he must pay the money into court within 10 days of service of the garnishee summons, or when the debt becomes payable if it is a debt accruing due but not actually payable at the time the garnishee

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212 *Supra* n. 1 at paras. 2.131-2.136. See also Dunlop, *supra* n. 22 at 234-262.

213 Execution Creditors Act, s. 5(1); Rules of Court, Forms K and L.

214 Execution Creditors Act, s. 5(2); curiously, the effect of service of the garnishee summons is also described, using similar but not identical wording, in the Rules of Court, R. 471(1). To the extent that the section and the Rule are inconsistent, the former, being part of a statute, would appear to govern.

215 Dunlop, *supra* n. 22 at 236-43, 249-53, 255-62.

summons is served.[216] If the garnishee does not pay the money into court as required by the rules, the plaintiff, once he has obtained a judgment against the defendant, may apply to the court for judgment against the garnishee "in such amount as may be proper".[217] Payment into court pursuant to a garnishee summons or payment of a judgment rendered pursuant to Rule 475(4) operate as a discharge of the garnishee's indebtedness to the defendant to the extent of the payment.[218]

2. Effect of Garnishment on the Rights or Interests of Third Persons

4.25 The priorities of garnishing creditors as against other claimants to the garnished debt is another subject over which much judicial ink has been spilled. Here again, as the position of the garnishor before judgment is much the same as that of the garnishor after judgment, we refer the reader to other sources for a detailed examination of the various situations in which a priority problem may arise,[219] and confine ourselves to a few general comments on the subject.

4.26 As is the case with a writ of execution, a garnishee summons only affects the debtor's interest in property. Thus, if the debt supposedly owed by the garnishee to the defendant has been assigned to a third person prior to service of the garnishee summons, the assignment not being fraudulent,[220] there is nothing to attach, although the prudent garnishee will pay the money into court. The prior assignee has priority even if he does not give notice of the assignment to the garnishee until after service of the summons.[221]

4.27 One situation where the garnishor before judgment is possibly in a worse position regarding priorities than a garnishor after judgment is where a floating charge debenture crystallizes after money has been paid into court pursuant to a garnishee summons. In *Continental Bank of*

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216 R. 475(1), (2).

217 R. 475(4).

218 R. 482.

219 Dunlop, *supra* n. 22 at 263-75.

220 R. 474 provides that a debt will be deemed to be still due to the defendant if it has been fraudulently assigned, charged or encumbered.

221 Dunlop, *supra* n. 22 at 265, 271.

Canada v. *Cranemaster Equipment Rentals Ltd.*[222] the Alberta Court of Appeal held that in the case of a garnishee summons before judgment, a floating charge debenture which crystallizes after money has been paid in but before the plaintiff has obtained judgment has priority over the garnisheeing creditor. Noting that there were no subsisting writs of execution on file at the time the debenture crystallized, the court said that the money in court had not yet been irrevocably taken from the defendant because, as "there is not yet any judgment, monies held in court after such a garnishment are simply moneys of the debtor over which the court has taken temporary control".[223] As the money had not been irrevocably taken from the defendant, it was capable of being attached by the crystallizing debenture. Some of the Court's comments suggest that even in the case of a garnishee summons after judgment, the crystallization of the debenture will only come too late if the monies in court have already been paid to the sheriff for distribution.[224] However, the actual decision in the *Continental Bank* case would not appear to preclude a garnishor after judgment from arguing that monies paid into court in response to the garnishee summons immediately cease to be the judgment debtor's property, and are thus immune from a subsequently crystallizing debenture.

4.28 Under Alberta's sharing regime for judgment creditors, funds paid into court pursuant to a garnishee summons, whether issued before or after judgment, are regarded as funds available for distribution to all of the persons entitled to share in a distribution under the Execution Creditors Act. Section 8(1)(b) of the Act provides that, except in cases where it is otherwise specifically provided by the Act, or where it is otherwise ordered by the court, all money paid into court in answer to a garnishee summons issued before judgment is to be paid by the clerk of the court to the sheriff immediately after the plaintiff enters judgment in his action. Once the money has been paid to the sheriff, he is to distribute it as money levied under execution.[225]

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222 (1983) 27 Alta. L.R. (2d) 187 (C.A.).

223 *Id.* at 189.

224 *Id.*; *see also* the concurring judgment of Freedman J.A. in *Lettner* v. *Pioneer Truck Equipment Ltd.* (1964) 47 W.W.R. 343 at 345 (Man.C.A.); *cf. Dresser Industries Canada Ltd.* v. *Commanche Explorations Ltd.* (1969) 70 W.W.R. 503 (Alta. S.C.T.D.); *General Brake & Clutch Service Ltd.* v. *W.A. Scott & Sons Ltd.* [1975] W.W.D. 158 (Man. C.A.). The headnote to the *Dresser Industries* case is inaccurate, being a paraphrase of Riley J.'s summary of one side's argument.

225 Execution Creditors Act, s. 8(2)(b).

4.29 An interesting case regarding the operation of these provisions is *Deco Electric Ltd.* v. *Republic Building Systems Alberta Ltd.*[226] In this case the plaintiff had issued a garnishee summons before judgment at a time when there were no subsisting writs of execution against the defendant. Thus, the garnishee summons was for the amount of the plaintiff's claim, plus his costs, and that was the amount paid into court pursuant to the garnishee summons. The plaintiff eventually recovered judgment against the defendant, but by then two writs of execution had been filed by other creditors of the defendant. The plaintiff applied to the court for an order requiring the clerk to pay the monies in court directly to the plaintiff, arguing that the words "where it is otherwise ordered by the court" in section 8(1) of the Execution Creditors Act[227] gave the court a discretion to short-circuit the scheme of distribution provided for by the Act, by requiring the clerk to pay the money directly to the plaintiff instead of to the sheriff. The court rejected this argument, holding, correctly, we think, that the quoted words did not give the court authority to interfere with the scheme of distribution set out by the Act.

4.30 It can be seen, then, that the plaintiff who is able to get money paid into court pursuant to a garnishee summons before judgment has a rather precarious hold on this money. A crystallizing floating charge debenture may deprive him of the fruits of his garnishment, and writs of execution which materialize after the money is paid into court may compel him to share these fruits with other creditors of the defendant. This by no means exhausts the law's weapons for tormenting the plaintiff. If the defendant becomes bankrupt before the plaintiff actually gets his hands on the money in court, the defendant's trustee in bankruptcy will be able to recover the money from court,[228] leaving the plaintiff in the unenviable position of having to prove as an unsecured creditor of

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[226] (1983) 25 Alta. L.R. (2d) 347 (Q.B.).

[227] The plaintiff's argument will be clearer if we set out the relevant part of s. 8(1)(b):

> (1) Except in cases where it is otherwise specifically provided by this Act, or where it is otherwise ordered by the Court, all money paid into court by virtue of a garnishee summons shall without an order be paid by the clerk of the Court to the sheriff of his judicial district,
>
> (a) ... or
>
> (b) if the garnishee summons is issued before judgment, immediately on the plaintiff entering judgment against the defendant or at any later time that may be ordered by the Court or judge.

[228] Bankruptcy Act (Canada), s. 50(1).

the defendant in the bankruptcy proceedings. And government or quasi-government agencies wielding statutory charges may snatch the proceeds of the garnishee summons from under the nose of the unhappy prejudgment garnishor. The possibilities, although perhaps not endless, will no doubt appear so to the plaintiff.

3. What Happens to Money Paid Into Court?

4.31 Money paid into court pursuant to a garnishee summons before judgment is generally paid into an interest-bearing account, where it will remain, in the ordinary course of the events, until the plaintiff obtains judgment against the defendant. Once the plaintiff does get judgment against the defendant, the money in court will be paid either to the plaintiff or, if there are writs of execution filed against the defendant, to the sheriff for distribution in accordance with the Execution Creditors Act.[229] If the defendant successfully defends the plaintiff's action, or the plaintiff recovers judgment for an amount less than the amount paid into court, the defendant ordinarily will be entitled to an order under Rule 480 requiring the clerk to pay out to him the money in court, or at least so much of it as is not needed to satisfy the plaintiff's judgment. However, there may well be other subsisting writs of execution against the defendant, in which case the other execution creditors must be given notice of the application under Rule 480. They in turn would be able to apply under s. 7 of the Execution Creditors Act for an order requiring the clerk to pay the money, or a sufficient portion thereof to satisfy the subsisting executions, to the sheriff.

E. Safeguards

1. Legislative Safeguards

4.32 The most significant legislative safeguard against abuse of the prejudgment garnishment process is the requirement that the plaintiff obtain leave to issue a garnishee summons before judgment. However, the Rules provide other protections for the defendant which come into operation once the plaintiff has obtained leave to issue the summons. The first of these is the requirement that the plaintiff give an undertaking to prosecute his action without delay if money is

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[229] The ability of a plaintiff who has attached money or other property of the defendant to settle his action with the defendant to the detriment of execution creditors of the defendant is circumscribed by s. 15 of the Execution Creditors Act, which is set out in n. 157.

paid into court in response to the garnishee summons.[230] Even without the benefit of such an undertaking, the courts have never hesitated to require a plaintiff who has issued a garnishee summons before judgment to proceed expeditiously in the prosecution of his action.[231]

4.33 Rule 471(3) provides that a copy of the garnishee summons shall be served on the defendant or his solicitor not later than 20 days after any money is paid into court. Rule 481(1) provides that any person claiming to be interested in the money attached may apply to the court to set aside the garnishee summons, or for an order for the speedy determination of any questions in the action or in the garnishee proceedings, or for such other order as may be just. Unlike the absconding debtor rules, which set out grounds upon which a writ of attachment may be set aside, the garnishment rules are completely silent as to the grounds for setting aside a garnishee summons. In order to discover these grounds one must look to the jurisprudence, which we do in the following section.

2. Judicially Created Safeguards

4.34 The fact that garnishment is a procedure alien to the common law[232] has encouraged the courts to view this remedy with suspicion, a suspicion which is heightened where the garnishee summons is issued or sought to be issued before judgment. We will quote but one of many judicial expressions of this suspicion:

> The remedy of attaching funds of a defendant before judgment by obtaining garnishee summons is an extraordinary remedy although one in very common use. It is very frequently the cause of great hardship, and even injustice to a defendant and all the requirements of the rules in relation thereto must be rigidly carried out if the plaintiff desires to obtain the advantage of the proceeding.[233]

This judicial attitude has resulted in many a garnishee summons being set aside because of some

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230 R. 470(1)(c).

231 *Van Ripper* v. *Bretall*, (1913) 4 W.W.R. 1289, 1290 (Alta.S.C.).

232 But, as we saw in Chapter 2, garnishment does have a non-statutory origin in the custom of foreign attachment, as practiced by various English local courts, most notably, the Lord Mayor's Court of the City of London: see *supra* paras. 2.14-2.16.

233 *MacFarlane* v. *Owen*, [1917] 3 W.W.R. 371 (Alta. Dist. Ct.)

technical defect in the affidavit in support of the application for the summons. Cases where a garnishee summons was set aside because the deponent of the affidavit was an articling student instead of a solicitor, or an employee rather than the agent of the plaintiff,[234] or because the affidavit was sworn before the statement of claim was issued,[235] are examples of this emphasis on matters of form. This situation has not been much mitigated by the provision, which now appears as Rule 470(5), that no garnishee summons shall be set aside for irregularity unless in the opinion of the court, there has been a substantial non-compliance with the rules. Very minor errors, such as errors of grammar in the affidavit,[236] will sometimes be excused, but the courts have consistently regarded as substantial non-compliance any failure to adequately describe the nature of the plaintiff's claim, even if this failing might have been corrected by a subsequent affidavit.[237]

4.35 If the defendant is unable to point out any patent defect in the plaintiff's affidavit, the courts have been reluctant to consider the relative merits of the plaintiff's claim and the defendant's defence on an application to set aside the garnishee summons. In *Armor Equities Ltd.* v. *Speedi Lubrication Systems Ltd.*,[238] for example, in support of an application to set aside a garnishee summons issued before judgment, the defendant filed material intended to show that it had a good defence to the plaintiff's claim. The court refused to set aside the garnishee summons, noting that the defendant's affidavit "does not address the main issue on this type of an application which is whether there is a reasonable possibility that the plaintiff will be unable to collect its claim or be subjected to unreasonable delay in collection unless it is permitted to issue garnishee proceedings before judgment".[239] On the other hand, in a British Columbia case the Court of Appeal upheld the

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234 *Mohr* v. *Parks, supra* n. 127; *Century 21 Cameo Real Estate (1980) Ltd.* v. *Halverson, supra* n. 127.

235 *McParland* v. *Seymour, supra* n. 205; *Erwin W. Block Professional Corporation* v. *Dickson, supra* n. 205.

236 *Banque Canadienne Nationale* v. *Labine* [1933] 1 W.W.R. 385 (Alta. C.A.); *see also Hamilton* v. *Peterson, Shirley & Gunther* [1930] 1 W.W.R. 526 (Alta. S.C.A.D.).

237 *Smith* v. *Metzer* (1915) 7 W.W.R. 1386 (Alta. S.C.); *Alberta Tractor Parts Limited* v. *Czech Construction Limited, supra* n. 209; *Avco Finance Ltd.* v. *Suppa* (1967) 62 W.W.R. 124 (N.W.T.S.C.).

238 (1983) 25 Alta. L.R. (2d) 317 (Q.B.); *cf. Westland Mortgage Services Vancouver Ltd.* v. *Aboud, supra* n. 208.

239 *Armor Equities Ltd.* v. *Speedi Lubrication Systems Ltd., id.*

decision of the judge in chambers who, after considering the relative strength of each side's case, had ordered that all but $31,000 of a sum of $172,000 paid into court be paid out to the defendant.[240] In approving that approach, Seaton, J.A. made the following observation:

> While I think under the Court Order Enforcement Act application, it is not appropriate to decide a case, I think it is open to the chambers judge to decide whether the plaintiff's case is a strong, or a weak one, or something in between; whether the defences raised are strong, weak or something in between; and whether the plaintiff's case or the defendant's case is in part weak or strong or something else. I would not require the chambers judge to blind himself to these considerations.[241]

The British Columbia Court of Appeal may have gone further in considering the merits of the case than the Alberta courts would be prepared to go. However, even where courts have been reluctant to consider the merits of the case, it has never been doubted that the defendant can submit evidence to show that the garnishee summons has been obtained on the basis of a false affidavit,[242] which might well entail showing that there is a good defence to the plaintiff's claim.

4.36 In Chapter 3 we considered whether and in what circumstances a defendant who was able to have a writ of attachment set aside, or was ultimately successful in defending the action against him, could recover damages from the plaintiff in respect of the period of time during which he was deprived of the use of the attached property. There is no reason in principle why in appropriate circumstances the victim of a garnishee summons before judgment should not have a cause of action for "malicious garnishment", or on the basis that the garnishment proceedings were an abuse of the process of the court. However, since money paid into court is generally held in an interest-bearing account and the principal, plus interest, is ultimately paid out to the person or persons found to be entitled, it would be rare for a defendant to suffer quantifiable damage. On

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240 *Min-EnLaboratories Ltd.* v. *Westley Mines Ltd.* (1983) 57 B.C.L.R. 259 (C.A.).

241 *Id.* at 260. Section 6(2) of the Court Order Enforcement Act, R.S.B.C. 1979, c. 75 provides that on an application to release a garnishment, where the Registrar or judge considers it just in all the circumstances, he may make an order releasing the garnishment in whole or in part.

242 *Lanin* v. *Zawislak* [1927] 2 W.W.R. 71 (Sask. Dist.Ct.); see also *Flater* v. *Stewart* (1914) 5 W.W.R. 1110 (Alta. S.C.), where the garnishee summons before judgment was set aside on the basis that the plaintiff had failed, in the face of the defendant's denial of the agreement alleged by the plaintiff, to show that he had a *bona fide* claim.

the other hand, it is not difficult to imagine situations where a defendant could suffer substantial consequential damages as a result of his money being held in court. If in such a situation the money has been paid into court in response to a garnishee summons procured maliciously and without reasonable cause, the defendant could well have a good cause of action against the plaintiff.[243]

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[243] See *supra* paras. 3.56-3.57.

CHAPTER 5

MAREVA INJUNCTIONS

5.1 In Chapter 2 we briefly described the genesis in England and importation into Canada of a new prejudgment remedy called the Mareva injunction. In this chapter we examine in a little more detail some of the doctrinal issues relating to the new remedy. However, before beginning our discussion of specific doctrinal points, it is necessary to make a general comment about the authorities on this subject.

5.2 Given the great volume of Mareva business done by the English courts over the last dozen years, a very considerable body of case law has been built up in that jurisdiction. Naturally, Canadian courts have given considerable weight to the English cases. Indeed, in *Aetna Financial Services* v. *Feigelman*[244] the Supreme Court of Canada suggested that some lower Canadian courts were perhaps being too uncritical in applying English decisions to situations arising in our federal state. The Supreme Court was undoubtedly correct to draw attention to the dangers of the uncritical application of English decisions to Canadian events. Nevertheless, the fact remains that the major contribution to the jurisprudence of Mareva injunctions has been English, so our discussion necessarily relies heavily on English authorities.

A. The Grounds for Obtaining a Mareva Injunction

5.3 Although the Mareva injunction is a judicial creation, the source of the power to make these orders has been found in a statutory provision[245] which allows the court to grant an interlocutory injunction where it appears to be "just or convenient" to do so. Thus, judges sometimes declare that the ultimate issue in an application for a Mareva injunction is simply whether in all the circumstances it would be just and convenient to enjoin the defendant from disposing of his assets.[246] Or, as one English judge put it, "the course to be taken is that which would involve the least risk of ultimate injustice having regard to the actual and potential rights and liabilities of the

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[244] *Supra* n. 102 at 125-6.

[245] In Alberta, s. 13(2) of the Judicature Act, which is set out in n. 79.

[246] E.g. Lord Denning M.R. in *Rasu Maritima* v. *Pertambangan, supra* n. 83 at 335.

parties on both sides".[247] Nevertheless, the cases are replete with statements of rules and guidelines for determining when it would be just or convenient to grant a Mareva injunction. In this section we examine some of these rules and guidelines.

1. Jurisdictional Prerequisites

5.4 In Chapter 2 we noted that in its efforts to establish a respectable foundation for the Mareva injunction, the English Court of Appeal originally suggested that this remedy was only available against non-resident defendants. Thus, it was originally supposed that no matter how compelling the plaintiff's case for prejudgment relief might be, there was no jurisdiction to grant a Mareva injunction against a resident defendant. This now abandoned[248] requirement that the defendant be a non-resident serves as a good example of a jurisdictional prerequisite to the granting of a Mareva injunction. The question we address here is whether there are any currently subsisting jurisdictional prerequisites to the granting of Mareva relief.

a. Nature of the plaintiff's claim

5.5 In our discussion of writs of attachment and garnishee summons before judgment, we observed that over the years a great deal of judicial effort has gone into the task of elucidating the distinction between a debt or liquidated demand, on the one hand, and an unliquidated claim on the other. This enquiry has been made necessary by the fact that these two remedies have traditionally been limited to claims in the former category. Fortunately, judges faced with applications for Mareva injunctions have been spared this particular enquiry, as it has never been seriously suggested that the Mareva injunction should be limited to any specific type of monetary claim.[249] Any claim that may result in a money judgment may ground a claim for a Mareva injunction.

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247 per Shaw L.J. in *Allen* v. *Jambo Ltd.* [1980] 1 W.L.R. 1252 at 1257 (C.A.).

248 See *supra* para. 2.44.

249 A few of the many cases in which Mareva injunctions have been granted in respect of what would commonly be regarded as unliquidated claims are *The Rena K* [1979] 1 All E.R. 397 (Ch. D.) (claim for damage to cargo); *Allen* v. *Jambo Holdings Ltd., supra* n. 247 (fatal accident); *Canadian Pacific Airlines* v. *Hind* (1981) 122 D.L.R. (3d) 498 (Ont. H.C.) (conversion).

b. Cause of action justiciable in the jurisdiction

5.6 Although it does not matter what sort of claim the plaintiff is asserting, as long as it might result in a money judgment, it does matter that the plaintiff have a cause of action justiciable in the jurisdiction. Ordinarily, this requirement will not be particularly burdensome for the plaintiff. However, it could be a different story where the defendant has assets in, but neither the parties nor the cause of action have any other connection with, the jurisdiction. This situation arose in *Siskina (Cargo Owners)* v. *Distos Compania, The Siskina.*[250]

5.7 The plaintiffs in *The Siskinia* were Saudi Arabian owners of cargo shipped to the Middle East from an Italian port on a Panamanian registered ship. Although the freight had been prepaid, the defendant shipowners nevertheless offloaded the cargo in Cyprus as a result of a dispute with the ship's charterers, a dispute with which the cargo owners had nothing to do. Shortly afterwards, the ship, the defendants' only asset, sank. Insurance on the ship became payable in London. The plaintiffs naturally considered that their only hope of recovering anything in respect of the damages they had suffered as a result of the offloading of their cargo was to obtain a Mareva injunction and thus tie up the insurance proceeds until the plaintiffs could obtain judgment, either in England, Italy or Cyprus.[251]

5.8 The difficulty faced by the plaintiffs was that neither the cause of action nor the parties had any connection whatsoever with England, other than the fact that the proceeds of the insurance policy were payable to the shipowners there. In the Court of Appeal the plaintiffs were able to overcome this obstacle. Lord Denning M.R. emphasized that the plaintiffs' only practical hope of enforcing the judgment of *any* court was to obtain a Mareva injunction from the English courts. After quoting from the choice of forum clause, he continued:

> That clause shows that the cargo owners would undoubtedly be able to pursue their claim by taking proceedings against the shipowners in the courts of Genoa. A judgment by that court would be both recognized and enforced in England. But a judgment there alone would not be of much use because the shipowners have no assets there. Again the shipowners have arrested the cargo *in rem* in

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[250] [1977] 3 All E.R. 803 (H.L.).

[251] The bills of lading contained a choice of forum clause in favour of the courts of Genoa, Italy, but proceedings were under way before the courts of Cyprus in respect of a lien claimed by the shipowners against the cargo.

> Cyprus. The cargo owners can counterclaim there for damages. But a judgment in Cyprus alone would not be of much use because the shipowners have no assets there. Their one asset, the ship, has gone and sunk. They have only lodged security [in Cyprus] in £30,000, which would only go to a small part of the counterclaim, and may not be available for it. The only courts in which a judgment would be of any use is England, where the insurance moneys are.[252]

Lord Denning M.R.'s conclusion was that the Mareva injunction should stand, not so much as a means of allowing the English courts to obtain jurisdiction to determine the merits of the dispute, as a means of ensuring that when the courts having jurisdiction did give judgment, there would be assets available to satisfy it. This purely protective purpose of the injunction is emphasized near the end of his judgment:

> I would, therefore, allow the appeal and grant an injunction to restrain the removal of the insurance moneys (or such part of them as would suffice to cover the claim of the cargo owners) pending the determination of the dispute in the courts of Italy, or Cyprus, by arbitration, or any other lawful method; but I would put the cargo owners on terms to proceed speedily in the courts of Genoa or Cyprus to determine their claim.[253]

5.9 Eventually, however, the difficulty which the plaintiffs had been able to overcome in the Court of Appeal scuttled them under the less beneficent gaze of the House of Lords. Their Lordships held that the presence of assets in the jurisdiction which could be made subject to a Mareva injunction was not one of the circumstances in which the court could grant leave to serve a writ of summons out of the jurisdiction. And, so their Lordships reasoned, if the court could not grant leave to serve originating process out of the jurisdiction, it certainly could not grant a Mareva injunction.[254]

c. Assets in the jurisdiction

5.10 Not only must there be a cause of action justiciable in the jurisdiction, the defendant must also have assets in the jurisdiction before the court can even consider granting a Mareva injunction. Or, at least, "the plaintiff should give some grounds for believing that the defendants

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252 *Supra* n. 250 at 809.

253 *Id.* at 814-15.

254 For similar Canadian cases see *Elesguro* v. *Ssangyong Shipping Co.* (1980) 117 D.L.R. (3d) 105 (F.C.T.D.) and *Suncorp Realty Inc.* v. *PLN Investments Inc.* [1986] 1 W.W.R. 619 (Man. Q.B.).

have assets here".[255] An obvious explanation for this requirement is that Mareva injunctions do not purport to restrict the disposition of assets located outside the jurisdiction, so it would be pointless to issue one unless the defendant has assets within the jurisdiction.

2. The Balance of Convenience

5.11 In most cases the plaintiff seeking a Mareva injunction will have no real difficulty satisfying the above mentioned jurisdictional prerequisites: a cause of action justiciable, and assets located, in the jurisdiction. The plaintiff's most difficult task will not be to establish that the court has jurisdiction to grant the injunction, but to convince the court that it should do so. As we said earlier, once the jurisdictional threshold is crossed, the ultimate issue is whether it is just or convenient to grant the injunction, and many different considerations may be relevant to this issue. But on most applications for a Mareva injunction, two matters will be of signal importance. They are the strength of the plaintiff's case, and the risk of a prejudicial disposition of the defendant's property. If the plaintiff's claim against the defendant is obviously without legal merit, or there is no real risk of the plaintiff being unable to collect on any judgment he does get, it obviously would be pointless to grant an injunction. However, this still leaves considerable scope for confusion and controversy. Just how strong must the plaintiff's case on the issue of liability be? Of what sort of disposition must there be a risk? And, assuming that the sort of disposition which is apprehended by the plaintiff is the sort of disposition that will move the court to grant an injunction, what evidence must the plaintiff present that such a disposition is likely to occur if the injunction is not granted?

a. The strength of the plaintiff's case

(i) Interlocutory injunctions generally

5.12 In this report we are concerned with plaintiffs who are seeking money judgments against their adversary. However, in many lawsuits the plaintiff's primary objective is to obtain a permanent injunction prohibiting the defendant from carrying out an activity which infringes some right of the plaintiff. In such an action the court may grant an interlocutory injunction to preserve

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[255] per Lord Denning M.R. in *Third Chandris Shipping Corporation* v. *Unimarine SA, supra* n. 86 at 984.

the status quo. But when should the court do so?

5.13 The obvious danger in granting an interlocutory injunction is that the defendant may be prevented from doing something which, as it later turns out, he has every right to do. One way to decrease this possibility is to grant an interlocutory injunction only where the plaintiff's chances of getting a *permanent* injunction appear to be very good. For many years this was in effect the route which the courts took. In order to get an injunction, the plaintiff would have to cross the threshold of convincing the court that he had a "*prima facie* case". This amounted to persuading the court that if the matter were to go to trial on the basis of the evidence before the court on the injunction application, the plaintiff would be successful. Having established a *prima facie* case, he would then have to go on to show that the balance of convenience was in favour of the injunction. For example, if any injury the plaintiff might suffer if the interlocutory injunction were not granted could be adequately compensated for by an award of damages after the trial, the balance of convenience would not favour granting an injunction, even if the plaintiff had crossed the threshold of establishing a *prima facie* case.

5.14 The main disadvantage of this approach to interlocutory injunctions was that the task of considering whether the plaintiff had established a *prima facie* case could itself assume the proportions of a trial of the action. Days could be spent in deciding whether the plaintiff was entitled to the interlocutory injunction. With this consequence of the *prima facie* case test in mind, the House of Lords held in 1975 that it was the wrong test.[256] The only threshold the plaintiff must cross, said their Lordships, is the much lower one of avoiding having the court conclude that the evidence "fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial".[257] Stated positively, the plaintiff would merely have to convince the court that he has a real prospect of succeeding at the trial. Once the plaintiff crosses this fairly low threshold, the court must then go on to consider the balance of convenience.[258]

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256 *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504.

257 *Id.* at 510.

258 *Ibid.* This approach has received the endorsement of the Alberta Court of Appeal: *Erickson* v. *Wiggins Adjustments Ltd.* [1980] 6 W.W.R. 188; *Law Society of Alberta* v. *Black & Company* (1983) 29 Alta. L.R. (2d) 326; *Ominayak* v. *Norcen Energy Resources* (1985) 58 A.R. 161.

(ii) Mareva injunctions

5.15 The first Mareva case, *Nippon Yusen* v. *Karageorgis*,[259] followed by a few months the House of Lords' rejection of the *prima facie* case test for interlocutory injunctions. Nevertheless, for a while it seems to have been assumed that to get a Mareva injunction the plaintiff had to have a very strong case, the kind of case that would support an application for summary judgment.[260] However, in *Rasu Maritima SA* v. *Perusahaan*[261] Lord Denning M.R. stated that the plaintiff could cross the threshold for obtaining a Mareva injunction merely by showing that he had "a good arguable case". In *Ninemia Maritime* v. *Trave Schiffahrtsgesellschaft, The Niedersachsen*[262] Mustill J., considered what was meant by the phrase "good arguable case" and concluded that it referred to "a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success".[263] The Court of Appeal confirmed its support for the good arguable case threshold, but added the reminder that "this aspect of the evidence before the court should not be looked at in isolation when deciding whether or not to grant a Mareva injunction".[264]

5.16 In Canada, judicial opinion has varied as to the appropriate threshold. In Ontario some judges quickly indicated a disinclination to apply the "American Cyanamid injunction rule" to Mareva injunctions.[265] Eventually, the Ontario Court of Appeal held that an applicant for a Mareva injunction in that province must establish a strong *prima facie* case in order to obtain the remedy.[266] However, the Ontario courts' enthusiasm for the *prima facie* case threshold has not been

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259 [1975] 3 All E.R. 282 (C.A.).

260 On this point see *Third Chandris Shipping* v. *Unimarine SA, supra* n. 86 at 975 (per Mustill J.).

261 *Supra* n. 83 at 334.

262 [1984] 1 All E.R. 398 (C.A.).

263 *Id.* at 404.

264 *Id.* at 415.

265 Dictum of Grange J. in *Canadian Pacific Airlines* v. *Hind, supra* n. 249 at 503. It is worth noting that the arguable case test was regarded by Mustill J. in *The Niedersachsen, id.* at 403, as establishing a higher threshold than was laid down for "ordinary" interlocutory injunctions in *American Cyanamid.*

266 *Chitel* v. *Rothbart, supra* n. 98 at 278, 288. In *Feigelman, supra* n. 102 at 118 the

shared by all Canadian courts. In a Nova Scotia case[267] the issue was decided in favour of the good arguable case threshold. This test was also recently adopted by Wachowich J. of the Alberta Court of Queen's Bench.[268] Wachowich J. specifically declined to follow *Chitel* v. *Rothbart*.[269]

5.17 Thus, it is apparent that in this country there is a difference of judicial opinion as to the appropriate evidentiary threshold for Mareva relief. But wherever the threshold is set, crossing it does not entitle the plaintiff to an injunction. It merely allows him to proceed to the next hurdle: establishing a sufficient risk of a prejudicial disposition of the defendant's property to warrant the court's intervention.

b. Risk of a prejudicial disposition of the defendant's assets

(i) The sorts of dispositions to be prevented

5.18 Since the earliest Mareva cases were concerned with foreign based defendants who had assets in England, it is not surprising that they defined the relevant risk as the possibility of the defendant's assets being removed from the jurisdiction.[270] However, it soon became apparent that to focus exclusively on the risk of removal of assets from the jurisdiction was to take too narrow a view of the issue. On the one hand, without actually removing them from the jurisdiction, a defendant could dispose of assets in a manner that would make it very difficult for the plaintiff to collect on a judgment. Thus, in *Prince Abdul Rahman* v. *Abu-Taha*[271] Lord Denning M.R. gave a much broader statement of the sort of risk which would move the court to grant an injunction:

> So I would hold that a Mareva injunction can be granted

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[266](cont'd) Supreme Court quoted without endorsing the Ontario Court of Appeal's view on this point.

[267] *Parmar Fisheries Ltd.* v. *Parceria Maritima Esperanca* (1982) 141 D.L.R. (3d) 498 (S.C., T.D.).

[268] *Banco Ambrosiano* v. *Dunkeld Ranching Ltd. et al.* (unreported, July 15, 1987, No. 8703 11161) at 2-3.

[269] *Supra* n. 98.

[270] The clearest statement of this position is that of Megarry V-C in *Barclay-Johnson* v. *Yuill, supra* n. 87, 193. See also *A.J. Bekhor & Co.* v. *Bilton* [1981] 2 All E.R. 565 at 577, 581 (C.A.).

[271] *Supra* n. 87.

> against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction *or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied*.[272] [Italics added.]

5.19 On the other hand, granting Mareva injunctions whenever there is a risk of the defendant's assets being removed from the jurisdiction would be unduly generous to plaintiffs. The removal of the defendant's assets from the jurisdiction will not necessarily make it any less likely that the plaintiff will be able to collect on a future judgment. In *Feigelman*[273] the Supreme Court of Canada struck down a Mareva injunction which sought to prevent the defendant from moving its Manitoba assets to Ontario and Quebec in the ordinary course of its business. The Supreme Court emphasized that a judgment obtained against the defendant in Manitoba could easily be enforced in either of the latter provinces.[274] Thus, the real issue is whether the apprehended disposition - whether it be the removal of assets from, or their disposition within, the jurisdiction - is likely to prejudice the plaintiff in the collection of a future judgment.

5.20 Another important question is whether every disposition of a defendant's property which would prevent the plaintiff from collecting on a judgment should necessarily ground a Mareva injunction. It has occasionally been suggested that an apprehended disposition will not support a Mareva injunction unless not only the *effect*, but also the *object* of the disposition would be to prevent the plaintiff from collecting on a future judgment. In England the Court of Appeal eventually rejected the idea that some sort of "nefarious intent" must be proven in order to get a

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[272] *Id.* at 412. See also *Z Ltd.* v. *A* [1982] 1 All E.R. 556 at 561, 571 (C.A.).

[273] *Supra* n. 102.

[274] *Id.* at 125. The Supreme Court seems to have thought that the root of the Manitoba courts' error was their uncritical application of English precedents to a situation arising in a federal context. But the actual result in *Feigelman* is entirely consistent with the principles laid down by the English courts. On more than one occasion an English court has refused to grant an injunction where there was no doubt that the defendant was removing his assets from the jurisdiction, but the court was not satisfied that this would prejudice the plaintiff in the collection of a judgment: *Rasu Maritima* v. *Pertambangan, supra* n. 83 at 335; *Montecchi* v. *Shimco (U.K.) Ltd.* [1979] 1 W.L.R. 1180 at 1184 (C.A.). As Megarry V-C put it in *Barclay-Johnson* v. *Yuill, supra* n. 87 at 195: "Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default".

Mareva injunction.[275] In Canada, however, the courts of several provinces have indicated that the defendant's intent in making a particular disposition must be considered in deciding whether that disposition will ground an attachment order. In a very recent case, the Nova Scotia Court of Appeal held that a plaintiff must show "that the defendant has committed fraud or is about to dispose of his assets in a way that is intended to render the plaintiff's eventual judgment fruitless".[276] Other courts have stopped short of requiring the plaintiff to prove some sort of fraudulent or dishonest intent, but would require the plaintiff at least to show that the defendant is disposing of property outside of the ordinary course of business.[277]

(ii) The degree of risk

5.21 Whenever litigation is commenced there must be some risk that something will occur that would make it impossible for the plaintiff to collect on a judgment. Thus, if Mareva injunctions are to retain their character of extraordinary relief, a plaintiff seeking one obviously must be required to show that the risk in the instant case is in some way out of the ordinary. The question is, How great must the risk of a prejudicial disposition of the defendant's property be in order to justify the granting of a Mareva injunction? In other words, What evidence must the plaintiff present in support of the allegation that the defendant is likely to dispose of his property to

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[275] *The Niedersachsen, supra* n. 262 at 419. But see n. 277.

[276] *Magliaro* v. *Scotia Wholesale Limited* (1987) 6 A.C.W.S. (3d) 403.

[277] The following dictum from *Chitel* v. *Rothbart, supra* n. 98 at 289 has sometimes been quoted in subsequent cases:

> "The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction *to avoid the possibility of a judgment*, or that the defendant is otherwise dissipating or disposing of his assets, *in a manner clearly distinct from his usual or ordinary course of business or living*, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law." [italics added]

Somewhat weaker dicta are found in *Lange* v. *Carlow* (1984) 29 A.C.W.S. (2d) 332 (B.C.S.C.); *United Oilseed Products Ltd.* v. *North American Car (Canada) Limited* (1986) 2 A.C.W.S. (3d) 202 (B.C.C.A. in chambers). See also *Aetna Financial Services* v. *Feigelman, supra* n. 102 at 123-5; *Deane* v. *LDS Corporation* (1983) 44 B.C.L.R. 373 at 374 (S.C.). Even in England, it is implicit in the reasoning of cases such as *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. SA,* [1980] 1 All E.R. 480 (Q.B.D.) that certain legitimate dispositions of property by a defendant would not ground a Mareva injunction notwithstanding their prejudicial effect on the plaintiff's chances of recovering on a future judgment.

the prejudice of the plaintiff unless restrained from doing so? This is a question which has arisen in many cases, and which different judges have answered in slightly different ways. However, the following characterization of the evidentiary burden resting on the plaintiff is as concise and as representative as any that we have encountered:

> It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there.[278]

5.22 It is fair to say that the evidence sometimes relied on by judges in evaluating the risk of dissipation would make a proponent of strict adherence to rigid rules of evidence weep. In *Canadian Pacific Airlines* v. *Hind*,[279] for example, the fact that the defendant in an action for conversion of a gold bar had been convicted of theft was taken as convincing evidence that he would dispose of his property to defeat the plaintiff's claim if given the chance. And, as is suggested by the quoted passage, adverse inferences have been drawn against corporate defendants because they have chosen to organize their affairs in a way which seems designed to prevent anyone from finding out anything about them.[280] Whatever may be said about such inferences in terms of strict rules of evidence, it must be conceded that they apply common sense to the problem of evaluating the risk of a prejudicial disposition of the defendant's property.

c. Other considerations

5.23 The strength of the plaintiff's case against the defendant and the risk of a prejudicial disposition of the defendant's property are the two major issues in most Mareva injunction applications, but the ultimate issue is whether it would be just and convenient to grant the injunction.

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[278] Per Mustill J. in *The Niedersachsen, supra* n. 262 at 405.

[279] *Supra* n. 249 at 502.

[280] *e.g. Third Chandris Shipping Corporation* v. *Unimarine SA, supra* n. 86 at 985, 987.

In some cases other considerations may assume great importance. We shall briefly discuss two such considerations: the plaintiff's ability to make good on his undertaking in damages,[281] and the effect of the injunction on third persons.

5.24 As a condition of obtaining any interlocutory injunction, the plaintiff is required to give an undertaking to compensate the defendant for any damages the latter suffers should it ultimately turn out that the injunction was not justified. In some cases it will be apparent that the plaintiff's undertaking is likely to be worthless to the defendant, because there is little possibility that the plaintiff could actually pay any damages the defendant might suffer. This will not necessarily be fatal to the plaintiff's chances of obtaining an injunction[282] - especially if he otherwise has a strong case for one - but it is certainly something which the court will take into account in determining whether the balance of convenience lies in favour of granting the injunction.

5.25 In considering whether to grant a Mareva injunction, the court naturally will be concerned with the respective rights and interests of the plaintiff and the defendant. However, a Mareva injunction may adversely affect the interests of persons other than the defendant, and this is something which must also be taken into account in determining where the balance of justice and convenience lies:

> Of course the courts will always be astute to ensure that third party rights are fully protected. Where this cannot be done by an effective undertaking, or where for whatever reason an undertaking is inappropriate, the rights of the third party must clearly prevail over the rights of the plaintiff.[283]

A striking illustration of this point, and the case upon which the preceding quotation is based, is *Galaxia Maritima SA* v. *Mineralimportexport, The Eleftherios*.[284] The defendant owned a cargo of coal which was loaded on a ship owned by the intervening third party. The plaintiff obtained a Mareva injunction enjoining the removal of the coal from the jurisdiction and served the order on the

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281 *See infra*, paras. 5.44-5.46.

282 In *Allen* v. *Jambo Holdings Ltd., supra* n. 247 a Mareva injunction obtained by a legally aided plaintiff who clearly would not be able to honour her undertaking in damages was upheld.

283 *SCF Finance Co.* v. *Masri* [1985] 2 All E.R. 747 at 752 (C.A.).

284 [1982] 1 All E.R. 796 (C.A.).

third party. This had the effect of preventing the shipowners from removing the ship containing the coal from the jurisdiction. The plaintiffs had undertaken to indemnify third parties against the reasonable costs of complying with the injunction. Nevertheless, on an application by the shipowners to discharge the injunction, it was held that in the circumstances, despite the proffered indemnity, the injunction placed an unjustifiable restriction on the shipowners' freedom of action, and should therefore be discharged.

B. The Nature and Effect of a Mareva Injunction

1. How Mareva Injunctions Achieve Their Purpose

a. Generally

5.26 A standard Mareva injunction is basically an order directed to the defendant prohibiting him from doing certain things with his property. The order may identify specific property, such as a particular chattel or a specific bank account, or it may be general, encompassing all of his property. If he has the resources to do so, the defendant may get the injunction lifted by providing suitable alterantive security, such as a bank guarantee, for the plaintiff's claim. However, so long as the injunction is in force, a defendant who makes a disposition of property which violates the order risks contempt of court proceedings, which could result in his being fined or imprisoned.

b. Delivery-up and service of the order on third parties

5.27 Since the penalties for contempt of court can be quite severe, most Mareva injunctions would probably achieve their purpose even if they depended for their efficacy solely upon the deterrent effect of these penalties. On the other hand, there are undoubtedly cases where, if left to his own devices, the defendant would not be deterred by the threat of contempt proceedings from doing precisely what a Mareva injunction ordered him not to do. A plaintiff who fears that he may be up against such a brazen defendant need not go without an effective remedy. If the plaintiff and the court fear that the defendant would disobey a Mareva injunction if given the opportunity to do so, the obvious way to prevent this is to deprive him of the opportunity. Thus, Mareva injunctions are occasionally granted which require the defendant not simply to refrain from disposing of certain

property, but to deliver the property up for safekeeping to a person designated by the court.[285]

5.28 However, the more usual course of action is for the plaintiff to give notice of the injunction to a third person who has control over property belonging to the defendant. Even though the third person is not a party to the action, and may not even be named in the injunction, he will ignore it at his peril. This is because the courts have held that a person not named in an injunction may be guilty of contempt of court if he knowingly aids or abets a breach of the order, or more generally, if he "knowingly interferes with the administration of justice by causing the order of the court to be thwarted".[286] Thus, a favorite tactic of plaintiffs is to obtain an order which prevents the defendant from dealing with funds in a bank account, and then serve the order on the bank. Even if the defendant would be prepared to ignore the order and risk contempt proceedings, the bank will not, and will not allow the defendant to remove funds from his account.[287] Another good example of the efficacy of serving a Mareva injunction on a third person in possession of the defendant's property is provided by *The Eleftherios*,[288] where the plaintiff sought to prevent the defendant from removing its coal from the jurisdiction by serving the injunction on the owners of the ship upon which the coal was loaded. The tactic failed only because the court lifted the injunction

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285 *CBS United Kingdom Ltd.* v. *Lambert* [1982] 3 All E.R. 237 at 242-3 (C.A.). *See also NEC Corporation* v. *Steintron International Electronics Ltd.* (1982) 5 C.P.C. (2d) 187 at 196 (Ont. H.C.), where a receiver was appointed over all the assets in Ontario of the defendant.

286 *Z Ltd.* v. *A., supra* n. 272 at 567 (per Eveleigh L.J.). There are conceptual and practical difficulties involved in this proposition. The problem is to reconcile it with the principle that an injunction can only bind a person who is party to the proceedings in which it is issued. This difficulty has been overcome by drawing a distinction between being bound by an order and being bound not to interfere with the administration of justice. The argument is that a person who is not bound by an injunction can nevertheless come under a duty not to act in a manner which would thwart the purpose of the order and thereby undermine the administration of justice in the particular proceedings in which the order was issued: *A-G* v. *Newspaper Publishing plc* [1987] 3 All E.R. 276 (C.A.). One can readily agree with the observation of Balcombe L.J. in this case, at 314, that this is a distinction which "is reached by a sophisticated argument which may not be readily apparent to the layman".

287 It has been observed that when a Mareva injunction - ostensibly a purely personal order - is served on a bank it assumes the characteristics of a remedy *in rem*: *SCF Finance Co.* v. *Masri, supra* n. 283 at 753.

288 *Supra* n. 284.

on the basis that it imposed too great a burden on the shipowners and the ship's crew.[289]

c. Discovery orders

5.29 The practice of giving notice to third persons leads to another weapon which the courts have deployed in an effort to make the Mareva injunction more effective. It may well happen that a plaintiff wants to give notice of the injunction to some third party, such as the defendant's banker, but has no idea of where the defendant keeps his bank account. What is to be done? The answer of some plaintiffs has been to ask the court to order the defendant to disclose the nature and whereabouts of his assets within the jurisdiction. In *A.J. Bekhor & Co.* v. *Bilton*[290] it was held that such an order can be made if it appears that the injunction would otherwise be ineffective or unworkable. Although the members of the Court expressed different opinions as to whether this power was derived from the English equivalent of s. 13(2) of our Judicature Act (as ancillary to the power to issue an injunction), or was part of the court's original jurisdiction,[291] and the majority thought that the judge had wrongly exercised his discretion to grant a discovery order, they were unanimous in their conclusion that the power to do so exists.[292]

5.30 Apart from the requirement that there should be some basis for thinking that the Mareva injunction will be ineffective or unworkable unless the defendant is required to disclose the extent and whereabouts of his assets, the courts have so far imposed only one restriction on the availability or scope of discovery orders. In *Ashtiani* v. *Kashi*[293] it was held that since a Mareva injunction cannot be made against assets located outside of the jurisdiction, a defendant should not ordinarily be required to disclose anything about such assets. As for the mechanics of discovery,

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289 See *supra* para. 5.25.

290 *Supra* n. 270.

291 *Id.* at 575-8, 582, 584-6.

292 A discovery order of this sort had previously been granted in *A* v. *C* [1980] 2 All E.R. 347 (Q.B.D). Subsequent cases in which discovery orders have been granted include *CBS* v. *Lambert, supra* n. 285 at 242; *Sekisui House* v. *Nagashima, supra* n. 100 at 5-7; *Banco Ambrosiano* v. *Dunkeld Ranching, supra* n. 268 at 1-2.

293 [1986] 2 All E.R. 970 (C.A.).

this would seem to depend on the circumstances. In *Sekisui House* v. *Nagashima*[294] the British Columbia Court of Appeal thought that it would be premature to allow an oral examination of the defendant, and instead required the defendant to provide an affidavit listing his assets and giving their location, adding that if the affidavit was unsatisfactory the plaintiff could apply for permission to cross-examine the defendant.[295]

2. Property to Which a Mareva Injunction May Apply

5.31 A Mareva injunction can easily be drafted so as to apply to any sort of property, real or personal, tangible or intangible, and to property acquired after[296] as well as before it is made. Thus, any limitation on the kinds of property which can be made subject to a Mareva injunction would not stem from the nature of the remedy, but would be the result of decisions by the courts that such limitations were necessary or desirable. But any kind of property can be disposed of in a manner that would hinder a plaintiff in the collection of a judgment. Even land, which cannot easily be made to disappear, can be sold, and the proceeds of sale can easily be made to disappear.[297]

Thus, the courts have not been anxious to place restrictions on the sort of property that can be caught by a Mareva injunction. Instead, the degree of inconvenience and disruption likely to be caused by tying up a particular kind of asset is taken into account in framing the terms of, and indeed in deciding whether to grant an injunction in a particular case.[298]

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294 *Supra* n. 100 at 6-7.

295 In *Bayer A.G.* v. *Winter (No. 2)* [1986] 2 All E.R. 43, Scott J. refused to permit the plaintiff to cross-examine the defendant on answers given by the latter in purported compliance with an order for discovery in aid of a Mareva injunction. Scott J. thought that the original order was Draconian enough.

296 As to property acquired after the injunction is granted, see *TDK Tape Distributors (UK) Ltd.* v. *Videochoice Ltd.* [1985] 3 All E.R. 345, 349 (Q.B.D.).

297 A graphic illustration of this point is *NEC* v. *Steintron, supra* n. 285, where the defendant's land in Ontario was sold with the transfer of proceeds taking place in a foreign country. *See also, Humphreys* v. *Buraglia, supra* n. 97 at 548.

298 *Rasu Maritima SA* v. *Perusahaan, supra* n. 83 at 334-35; *Intraco Ltd.* v. *Notis Shipping Corporation* [1981] 2 Lloyd's Law Rep. 256 (C.A.). In the latter case the court dissolved an injunction which enjoined the defendant from presenting a bank guarantee (equivalent to an irrevocable letter of credit) to the bank for payment. The court reasoned that to uphold the injunction in this case would be to undermine the utility of a very useful instrument of commerce. The case nicely illustrates the point that considerations other than the interests of the plaintiff, the defendant, and identifiable third persons may sometimes be of paramount importance.

5.32 On one aspect of the problem of what assets may be caught by a Mareva injunction, the English Court of Appeal has chosen to follow a conservative course. This issue concerns assets of a defendant which are located outside the jurisdiction. Since the Mareva injunction simply commands the defendant to do or refrain from doing something with his property, there is no theoretical reason why it could not apply to assets located outside of the jurisdiction. And in many cases, an order prohibiting the defendant from dealing with assets outside of as well as within the jurisdiction might have great utility. Nevertheless, in *Ashtiana* v. *Kashi*[299] the Court of Appeal held that a Mareva injunction could not purport to affect assets of the defendant located outside of the jurisdiction. This point has not been directly considered in Canada, although in his as yet unreported judgment in *Banco Ambrosiano* v. *Dunkeld Ranching Ltd.*[300] Wachowich J. did restrain the defendants from dealing with assets located anywhere in Canada. His Lordship did so on the basis of the dictum of Estey J. in *Feigelman*[301] that "[i]n some ways, "jurisdiction" extends to the national boundaries".[302]

3. Dispositions of Property Permitted Under Mareva Injunctions

a. Maximum sum orders

5.33 Ordinarily, the plaintiff will be sufficiently protected by a Mareva injunction if it catches enough of the defendant's assets to cover the plaintiff's claim and probable costs. Hence, Mareva injunctions issued by English courts are usually "maximum sum" orders. That is, they prohibit the defendant from dealing with his assets within the jurisdiction, save in so far as their value exceeds a stated amount, being the value of the plaintiff's *prima facie* justifiable claim. The defendant is free to deal with assets in excess of the stated amount.[303] But in exceptional circumstances, where for some reason a maximum sum order would be ineffective or unworkable a

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299 *Supra* n. 293 at 976, 979.

300 *Supra* n. 268 at 7.

301 *Supra* n. 102 at 125.

302 It must be said, though, that Estey J's comment was not directed to this particular issue.

303 A good discussion of the rationale for and problems associated with maximum sum orders is found in *Z Ltd.* v. *A, supra* n. 272 at 565, 574-6.

general order relating to all the defendant's assets may be made.[304]

b. Payments to other creditors

5.34 It was made clear very early in the life of the Mareva injunction that this remedy is not intended to be a means by which a plaintiff can get a leg up on other creditors of the defendant. Its purpose is to prevent the plaintiff from being done down by an improper disposition of the defendant's property, not to protect him against the ordinary perils of being an unsecured creditor of a person who has more financial commitments than he has financial resources. This point was brought home in *Iraqi Ministry of Defence* v. *Arcepey Shipping*,[305] in which another creditor of the defendant intervened in the action and obtained a variation of a Mareva injunction so as to allow the defendant to pay the amount it owed to the intervening creditor. The variation was granted even though payment of the debt would require virtually all of the funds that had been caught by the injunction, and it was arguable that the debt was not legally enforceable. The debt, even if it were unenforceable, was incurred and payable in the ordinary course of the defendant's business, so it would be inappropriate to prevent its payment.[306] *A fortiori*, a Mareva injunction would not prevent an execution creditor of the defendant from executing against property caught by the injunction.

5.35 The mere fact that the defendant owes money to a third person does not mean that the court will automatically vary a Mareva injunction to permit the debt to be paid. The defendant - or the third person - must persuade the court that it would be appropriate to allow the debt to be paid out of funds subject to the injunction, taking into account such factors as whether the defendant has assets not covered by the injunction (such as a foreign bank account) from which the debt could be paid. In short, the court must be persuaded that payment of the debt from funds subject to the Mareva injunction would not be inconsistent with the underlying purpose of the injunction.[307]

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304 *Ibid.* We have not encountered any discussion of maximum sum orders in the Canadian cases. However, the rationale for such orders would seem to apply equally to this country. The Mareva injunction granted and later set aside in *Feigelman, supra* n. 102 appears to have been a maximum sum order.

305 *Supra* n. 277.

306 See also *Van Brugge* v. *Arthur Frommer International Ltd.* (1982) 35 O.R. (2d) 333 (H.C.J.), 336-7.

307 *A* v. *C* (No. 2) [1981] 2 All E.R. 126 (Q.B.D.); *A* v. *B (X intervening)* [1983] 2

c. Disposition by third person in accordance with a prior obligation

5.36 It may sometimes transpire that a third person who has possession of the defendant's property and who is served with a Mareva injunction may have previously incurred a legal obligation to some fourth person in relation to that property. In *Z Ltd.* v. *A*[308] the example was given of a cheque written by the defendant before the Mareva injunction is issued, and accepted as payment for goods or services by the payee on the strength of a cheque guarantee card issued by the defendant's bank. The effect of all this is that the bank incurs an obligation to the payee to honour the cheque when it is presented for payment. Thus, even if the bank is served with a Mareva injunction before the cheque is presented, the bank probably would not be in contempt if it were to honour the cheque and debit the payment against the defendant's account.[309] The more general point is that where a third person who has possession of or control over property belonging to the defendant incurs an obligation to someone other than the defendant before receiving notice of a Mareva injunction, the injunction should not be taken to impose upon him any duty that would be inconsistent with his pre-existing obligation.

d. Other dispositions that may be permitted

5.37 The principle which underlies the several examples of permissible dispositions we have mentioned is that any disposition should be permitted which is not inconsistent with the purpose of the Mareva remedy. Depending on the circumstances of each case, there could be many sorts of dispositions which fall into this category. For instance, it has become commonplace to include in the order a provision which allows the defendant to spend a certain amount for ordinary living expenses and to pay the costs of defending the action.[310] If a defendant wishes to use funds caught by the injunction for a purpose that is not provided for in the original order, an application can be

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[307](cont'd) Lloyd's Rep. 532 (Q.B.D).

[308] *Supra* n. 272 at 570-71, 576-77 (per Eveleigh and Kerr L.JJ.).

[309] *Ibid.* Kerr L.J. said that the order should make it clear that the bank would be entitled to debit the defendant's account in such a situation: 577.

[310] *SCF Finance Co.* v. *Masri, supra* n. 283 at 750.

made for an appropriate variation. In an Ontario case,[311] for example, the injunction prevented the defendant from selling a perishable product which it held in inventory. The injunction was varied to allow the product to be sold, with the proceeds to be held in trust to the credit of the action.

C. Procedure and Safeguards

1. When Can the Application be Made?

5.38 Applications for Mareva injunctions are usually made shortly after the action is commenced. Occasionally, though, the need for an injunction may be so urgent, the threatened disposition so imminent, that to wait until an action can be commenced would be to defeat the purpose of the remedy. In urgent situations, upon the prospective plaintiff giving an undertaking as to the timely commencement of his action, an interlocutory injunction--Mareva or otherwise--may be granted before an action is commenced.[312] Usually, if a Mareva injunction is sought before an action is actually commenced, it will be because of some circumstance which would make a delay of even a few hours fatal. However, in some cases there may be some jurisdictional reason why the plaintiff cannot presently commence an action, even though he has what seems to be a good case for relief. This situation might occur because the plaintiff's claim arises out of a contract which requires all claims arising out of it to be submitted to arbitration. The English courts have not hesitated to grant Mareva relief for the purpose of preventing the dissipation of assets which might be required to satisfy an award in pending arbitration proceedings.[313]

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311 *Robert Reiser & Co.* v. *Nadore Food Processing Equipment Ltd.* (1977) 81 D.L.R. (3d) 278 (Ont. H.C.J.), 282.

312 In England there is a specific rule of court which permits this practice, but there is no such rule in Alberta. However, *Re N* [1967] 1 All E.R. 161 (Ch. D.) makes it clear that the practice preceded the rule. Cases in which Mareva injunctions were granted before the writ was issued include *A* v. *C, supra* n. 292; *Z Ltd.* v. *A, supra* n. 272. At the other end of the time scale, in at least one case a Mareva injunction has been granted to a judgment creditor: *Orwell Steel (Erection and Fabrication) Ltd.* v. *Asphalt and Tarmac (UK) Ltd.* [1985] 3 All E.R. 747 (Q.B.D.).

313 *The Rena K, supra* n. 249 at 417-8.

2. The Application for a Mareva Injunction

a. Formalities

5.39 We have seen that the applicant for a writ of attachment or garnishee summons before judgment must comply with a host of formal requirements, and that the failure to comply with any one of these requirements may be fatal. One of the many advantages of the Mareva injunction is the absence of such formal requirements. From time to time the courts have laid down guidelines as to the information which should be presented to the court on an application for a Mareva injunction, and as to the contents of the orders themselves, but it is routinely emphasized that they are just that - guidelines - not inviolable rules.[314] The Mareva procedure is so far removed from that of the statutory remedies, where a slight departure from the legislative formula can cost the plaintiff his remedy, that in an urgent case the plaintiff can obtain an injunction before an affidavit of any sort is even filed.[315]

b. An *ex parte* procedure

5.40 Applications for any kind of interlocutory injunction are normally required to be on notice to the adverse party. However, where the circumstances are such that giving notice to the adverse party would defeat the whole purpose of the plaintiff's application, it may be made *ex parte*. It is in the nature of the mischief which Mareva injunctions are intended to prevent that the majority of applications for this remedy fall within the exception to the general rule, and are made *ex parte*:

> In [an application for a Mareva injunction] speed is of the essence. *Ex parte* is of the essence. If there is delay, or if advance warning is given, the assets may well be removed before the injunction can bite.[316]

Where an order which can have such dire consequences for the defendant as a Mareva injunction can

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[314] The guidelines with the most notoriety are those laid down by Lord Denning M.R. in *Third Chandris Shipping* v. *Unimarine SA, supra* n. 86 at 984-5 (thoughtfully grouped under the heading "The guidelines"). The Ontario Court of Appeal added its own gloss to these guidelines in *Chitel* v. *Rothbart, supra* n. 98 at 288-9.

[315] *e.g. Allen* v. *Jambo Holdings Ltd., supra* n. 247 where an injunction to prevent the departure of an aircraft was obtained by means of a phone call to a judge.

[316] per Lord Denning M.R. in *Third Chandris Shipping* v. *Unimarine SA, supra* n. 86 at 985.

have is granted without notice, safeguards of some sort are obviously necessary. The two main safeguards (in addition to those which are not specifically related to the *ex parte* aspect of the procedure) are a requirement of full disclosure, and provision for reconsideration of the whole matter on notice to the defendant.

(i) Duty of full disclosure

5.41 A plaintiff making an *ex parte* application for a Mareva injunction is under a duty to make full and frank disclosure of all material information in his possession. One of the many elaborations of this requirement is that of Lord Denning M.R. in *Bank Mellat* v. *Nikpour*:

> When an *ex parte* application is made for a Mareva injunction, it is of the first importance that the plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally, in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere.[317]

Where it is found that a plaintiff who has obtained an *ex parte* Mareva injunction has not complied with this requirement, the injunction will be set aside.[318] This is so even if the non-disclosure is innocent, and even if the injunction would have been granted had the omitted fact been disclosed in the first place.[319] However, in setting aside the injunction, the court has a discretion to grant a fresh injunction to replace it, and the court obviously will be more inclined to exercise its discretion in favour of the plaintiff where the non-disclosure was innocent.[320]

(ii) Defendant's opportunity for a hearing

5.42 Allowing the plaintiff to apply *ex parte* for a Mareva injunction is a departure from ordinary procedure that is a concession to the urgency of the situation. Once the injunction is in place, basic principles of fairness require that the defendant should have the opportunity to raise in

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317 [1985] F.S.R. 87, at 89.

318 *Bank Mellat* v. *Nikpour, id.* at 91; *Chitel* v. *Rothbart, supra* n. 98 at 275; *Eastglen International Corp.* v. *Monpare SA* (1986) 137 New L.J. 56 (C.A.); *Lloyds Bowmaker Ltd.* v. *Britannia Arrow Holdings plc* (1987) 137 New L.J. Rep. 344 (C.A.).

319 *Lloyds Bowmaker* v. *Britannia Arrow, ibid.*

320 *Ibid.*

opposition to its continuance all the points that he might have raised against its being made in the first place, if he had been afforded the opportunity to do so. One way of doing this is to make the initial order temporary, one that will expire after, say, seven days, unless in the meantime it is renewed on an application made on notice to the defendant. An alternative is to not set an expiry date for the order in the first instance, but make it clear that the defendant is entitled to apply on short notice - or even *ex parte* in an extremely urgent case - to set aside the injunction.[321]

5.43 Whichever alternative is adopted,[322] the crucial point is that the subsequent hearing is regarded not as an appeal of the initial *ex parte* order, but as a hearing *de novo* to determine whether, on the basis of all the material presently before the court, the defendant should be subject to the injunction. In other words, whether the hearing is characterized as an application to continue a temporary order or an application to set aside an order of indefinite duration, the onus is on the plaintiff to convince the court that the injunction should be continued.[323]

c. The plaintiff's undertakings

5.44 As a condition of getting a Mareva or any other interlocutory injunction, the plaintiff must give what is commonly referred to as an undertaking in damages.[324] The undertaking in damages is a promise by the plaintiff to the court to pay any damages suffered by the defendant as a result of the injunction which the court decides the plaintiff ought to pay. At one time it was thought that the court should only require the plaintiff to pay damages suffered by the defendant if the plaintiff was guilty of misconduct, such as the suppression of material information, in obtaining the injunction.[325] However, the presently prevailing view is that if the plaintiff is ultimately

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321 Even where the first alternative is adopted, a defendant who cannot wait for the day set for the continuation hearing may bring an earlier application to set aside or vary the order: see *La Caisse Populaire Laurier* v. *Guertin* (1983) 36 C.P.C. 63 (Ont. H.C.J.), 73.

322 In England the former course is usually followed in the Chancery Division, while the latter is the usual course in the Commercial Court: *The Niedersachsen, supra* n. 262 at 422. In Canada, the usual practice seems to be to leave it up to the defendant to apply to set aside the *ex parte* order.

323 *Id.* at 409 (per Mustill J.); *Hart* v. *Brown* (1913) 9 D.L.R. 560 (Alta. S.C.).

324 *Third Chandris Shipping* v. *Unimarine SA, supra* n. 86 at 985.

325 *Smith* v. *Day* (1882) 21 Ch. D. 421 (C.A.); *McBrantney* v. *Sexsmith* [1924] 3 D.L.R. 84 (Alta. S.C. T.D.).

unsuccessful in establishing his claim against the defendant, the former should in the absence of special circumstances be liable for any damages suffered by the latter as a result of the injunction.[326]

Since it is the plaintiff who asks for and enjoys the benefit of the injunction when the validity of his claim has yet to be determined, it is he who, in the absence of special circumstances, should bear the ultimate financial burden for any loss suffered by the defendant if the claim ultimately fails. On the other hand, even a successful plaintiff may be required to pay damages on his undertaking if it turns out that he was guilty of some misconduct in obtaining the injunction.[327]

5.45 But it is not only the defendant who may suffer damage or incur expenses or liability as a result of a Mareva injunction. As was discussed in paragraph 5.28, a person having control over the defendant's property who is given notice of a Mareva injunction can be placed under fairly onerous duties relating to the safekeeping of that property. As a result of these duties, the unfortunate custodian may incur expenses, lose income, or incur liabilities. It was not long before the English courts reached the conclusion that the plaintiff who desired the benefits of serving a Mareva injunction on a third person should be prepared to reimburse or indemnify the latter for any expenses, losses or liabilities reasonably incurred in executing the duties thrust upon him. Thus, it has become commonplace for the court to require an undertaking in favour of third parties to whom the plaintiff intends to give notice of the injunction.[328]

5.46 The plaintiff's undertaking provides the court with the jurisdiction to award damages to an aggrieved defendant or third party in an appropriate case. What it does not do is provide any assurance that the damages will be paid if awarded.[329] Thus, the court may as a condition of

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326 *Griffith* v. *Blake* (1884) 27 Ch. D. 474 (C.A.); *Vieweger Construction Co. Ltd.* v. *Rush Tompkins Construction Ltd.* [1965] S.C.R. 195.

327 *Columbia Picture Industries Inc.* v. *Robinson, supra* n. 7, which actually deals with misconduct in the execution of an Anton Piller order.

328 Such an undertaking was first required in *Searose* v. *Seatrain* [1981] 1 All E.R. 806 (Q.B.D.). This received the Court of Appeal's endorsement in *Z Ltd.* v. *A, supra* n. 272 at 564, 573.

329 In England failure to comply with an award of damages pursuant to an undertaking in damages would be regarded and dealt with as contempt of court: *Hoffman-La Roche Co.* v. *Secretary of State* [1975] A.C. 295, 360-1. But in Canada it has been held that such an award will be regarded simply as an ordinary money judgment: *Paulson* v. *Murray* [1921] 2 W.W.R. 735 (Sask. K.B.).

granting the injunction require the plaintiff to provide security for his undertaking.[330] However, the court has a discretion and will by no means always require the plaintiff's undertaking to be secured.[331]

3. Review of the Injunction

5.47 Contrary to the usual practice with respect to other sorts of orders - which generally cannot be reviewed after they have been made except by means of an appeal - the courts have always been willing to tinker with Mareva injunctions so as to ensure that they are as fair as possible to everyone concerned. We have mentioned that where a Mareva injunction is granted on an *ex parte* application the defendant must then be given an opportunity for a hearing to determine whether it should be continued. Quite apart from that, however, there is considerable scope for the court to review and modify a Mareva order once it has been made. As we have seen, in an appropriate case the courts will vary a Mareva injunction so as to permit the defendant to make a legitimate disposition of property, such as the payment of a pre-existing debt. Applications for variation can of course be made by the defendant, as in *BP* v. *Hunt*[332] but they are at least as likely to be made by a third person who is adversely affected by the order, such as a creditor who wants to be paid out of funds caught by the injunction.[333] Indeed a third person may even apply for the injunction to be discharged outright.[334]

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330 *Third Chandris Shipping* v. *Unimarine SA, supra* n. 86 at 985; *Z Ltd.* v. *A, supra* n. 272 at 566; *Ashtiani* v. *Kashi* [1982] 2 All E.R. 970 at 978-9 (C.A.). Canadian cases in which the plaintiff's undertaking was required to be secured include *Liberty National Bank* v. *Atkin* (1981) 121 D.L.R. (3d) 160 at 169 (Ont. H.C.J.); *Sekesui House Kabushiki Kaisha* v. *Nagashima, supra* n. 100 at 4.

331 *Parmar Fisheries* v. *Parceria Maritima, supra* n. 267 at 506-7.

332 *Supra* n. 95 at 275.

333 *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.* [1978] 3 All E.R. 164 (C.A.); *Iraqi Ministry of Defence* v. *Arcepey Shipping, supra* n. 277; *Oceanica Castelana Armadora SA* v. *Mineralimportexport* [1983] 2 All E.R. 65 (Q.B.D.); *A* v. *B, supra* n. 307.

334 *Cretanor Maritime* v. *Irish Marine, ibid.*; *Galaxia Maritima SA* v. *Mineralimportexport, supra* n. 284.

CHAPTER 6

OTHER PREJUDGMENT REMEDIES

6.1 The writ of attachment, garnishee summons and Mareva injunction are the three major prejudgment remedies available in this province, but they are not the only ones. In this chapter we briefly examine some other remedies which are or at least arguably are available in certain circumstances. These remedies are 1) receivership, 2) "writ saving", 3) conditional leave to defend, and 4) arrest. However, before discussing any of these remedies, it is necessary to discuss a kind of injunctive relief granted in a few recent cases which looks very much like a Mareva injunction, but which is said not to be a Mareva injunction.

A. Injunctions in the Case of Theft or Fraud

6.2 Suppose that a plaintiff applying for an interlocutory injunction to prohibit the defendant from disposing of property says that his cause of action is based on a theft or fraud committed by the defendant. The property in question is not the very property of which the plaintiff has allegedly been fraudulently deprived. This looks for all the world like a straightforward application for a Mareva injunction, with the slight twist that evidence of theft or fraud could be considered good evidence of a risk that, if left to his own devices, the defendant would dispose of his property in order to defeat the plaintiff's claim.[335] However, there is no obvious reason why evidence of previous fraudulent conduct on the part of the defendant should alter the principles upon which the court should consider the plaintiff's application for an injunction.

6.3 Unfortunately, a few recent judgments have suggested that there is a special category of interlocutory injunction which does the same work, but which is not the same thing, as a Mareva injunction. This special category, which supposedly predates the Mareva injunction as an exception to the so-called *Lister* v. *Stubbs*[336] rule, consists of injunctions to prevent the disposition of property by a defendant who has apparently been guilty of theft or fraud. The suggestion is that this sort of injunction is not a Mareva injunction, and that different principles may apply to it than apply to the

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[335] See *Canadian Pacific Airlines* v. *Hind, supra* n. 249 at 502.

[336] *Supra* n. 28.

Mareva injunction. However, we think it can be shown that this supposed special category of interlocutory injunction is nothing more than the result of a lack of attention to what was said in some older cases dealing with suits to set aside fraudulent conveyances.

6.4 In *Longeway* v. *Mitchell*[337] it was held that a contract creditor who had not yet obtained a judgment in the courts of common law[338] could maintain a bill in the Court of Chancery (on behalf of all the debtor's creditors) to have a fraudulent conveyance made by the alleged debtor declared void, and to restrain the transferee from alienating or encumbering the property which had been fraudulently conveyed to him. This case was followed a few years later in *Campbell* v. *Campbell*,[339] in which Boyd, C., after referring to a case[340] in which the court had refused to continue an interim injunction restraining a defendant in an ordinary action from disposing of property prior to judgment, drew the following distinction:

> Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.[341]

Boyd C.'s dictum[342] was clearly directed towards a specific situation: an injunction to prevent a person who had received property through a fraudulent transfer from disposing of that property during proceedings to obtain a declaration that the initial conveyance was void as against the transferor's creditors.

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337 (1870) 17 Gr. 190 (Ont. Ch.).

338 In Ontario at this time there were still separate courts of common law and equity, and the plaintiff in this case would have had to get judgment for the alleged debt in the common law courts.

339 (1881) 29 Gr. 252 (Ont. Ch.).

340 *Hepburn* v. *Patton* (1879) 26 Gr. 597 (Ont. Ch.).

341 *Supra* n. 339 at 254-55.

342 Neither of these two early cases actually involved an application for an interlocutory injunction. They both were decisions regarding a demurrer to the plaintiff's bill by the defendant.

6.5 Largely on the strength of the dictum of Boyd C. in *Campbell* v. *Campbell*,[343] Canadian courts have come to accept that in an action to set aside a fraudulent conveyance it may be proper to grant an interlocutory injunction to prevent the further alienation of the property in issue, even if the plaintiff has not yet established his status as a creditor by obtaining a judgment, and even if it has not yet been established that the initial conveyance was in fact fraudulent.[344] All that appears to be required is substantial evidence that the transferor is indebted to the plaintiff, and that the conveyance was fraudulent.[345]

6.6 It is important to keep in mind that in each of the cases just cited the plaintiff was seeking to have a transfer of property by an alleged debtor declared void as a fraudulent conveyance, and the defendant transferee was enjoined from disposing of the very property alleged to have been fraudulently transferred to him. Thus, the granting of an injunction in these cases could well be regarded as but an illustration of the longstanding principle that the court will grant an interlocutory injunction to preserve property which is the subject matter of litigation.[346] However, the dictum of Boyd C., quoted in paragraph 6.4 has recently been referred to in support of the proposition that where the plaintiff's cause of action is founded on fraud or theft apparently committed by the defendant, this in itself is sufficient ground for enjoining the defendant from disposing of any property which the plaintiff might look to in order to satisfy a judgment.

6.7 The root of the current confusion seems to be the judgment of Steele J. in *City of Toronto* v. *McIntosh*,[347] in which an injunction was granted restraining the defendants from disposing of a particular parcel of land. The plaintiff's cause of action was for damages in respect of a theft for which the defendant McIntosh had been convicted. However, the plaintiff also sought a declaration that the conveyance of the land in question to McIntosh's co-defendant children was

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343 *Supra* n. 339.

344 *Fairchild* v. *Elmslie* (1909) 2 Alta. L.R. 115 (S.C.); *Bank of Montreal* v. *Pelletier* [1923] 4 D.L.R. 706 (Alta. S.C.A.D.); *City of Toronto* v. *McIntosh* (1977) 16 O.R. (2d) 257 (H.C.J.); *Robert Reiser & Co.* v. *Nadore Food Processing Equipment, supra* n. 311.

345 *Bank of Montreal* v. *Pelletier, id.* at 709 (as to the issue of whether the conveyance was fraudulent); *Robert Reiser* v. *Nadore, id.* at 280.

346 See e.g. *Aetna Financial Services* v. *Feigelman, supra* n. 102 at 106.

347 *Supra* n. 344.

fraudulent and therefore void against his creditors. Thus, it would have been quite possible to invoke the dictum of Boyd C. and restrain McIntosh's children from disposing of the land without any mention of the nature of the plaintiff's cause of action. Nevertheless, in concluding that the case fell squarely within the corners of Boyd C.'s dictum, Steele J. referred to the fact that McIntosh had been convicted of theft, as if this were the sort of fraud contemplated by the dictum.[348]

6.8 In *Mills and Mills* v. *Petrovic*[349] the plaintiff sought to enjoin the defendants from disposing of a house. There was no allegation of a previous fraudulent conveyance of the house, but the plaintiff's cause of action was founded on an allegation that the defendant had stolen money from the plaintiff. It was held that it would not be an unreasonable extension of the principle acted upon by Steele J. in *McIntosh*[350] and *Robert Reiser* v. *Nadore*[351] to grant an injunction where there was strong evidence that the defendant had stolen from the plaintiff. In fact, the two decisions of Steele J. can be explained as straightforward applications of the dictum of Boyd C. in *Campbell* v. *Campbell*,[352] whereas *Mills* cannot, because the property the disposition of which was enjoined in the latter case was not alleged to be the subject of a previous fraudulent conveyance.

6.9 In *Canadian Pacific Airlines* v. *Hind*,[353] Grange J. correctly suggests that *Mills*[354] can be explained as an application, albeit an unconscious application, of the Mareva principle. Unfortunately, in *Feigelman*[355] the waters were further muddied by the Supreme Court. In the course of describing the law as it supposedly existed before the advent of the Mareva injunction, Estey J. stated that one of the exceptions to the common law's abhorrence of "execution before judgment" was where an injunction was necessary "to prevent fraud both on the court and on the

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348 *Id.* at 259.

349 (1980) 118 D.L.R. (3d) 367.

350 *Supra* n. 344.

351 *Supra* n. 344.

352 *Supra* n. 339.

353 *Supra* n. 249 at 502-03.

354 *Supra* n. 349.

355 *Supra* n. 102 at 107-08.

adversary".[356] In support of this proposition he quoted the dictum of Boyd C. and referred to *McIntosh*[357] and *Mills* as "recent cases in which the fraud exception has been applied".[358]

6.10 Finally, we come to *J.R. Paine* v. *Cairns*.[359] The allegation in this case was that the defendant had stolen money from the plaintiff, an allegation that was denied by the defendant. One of the forms of relief sought by the plaintiff was a Mareva injunction. However, Andrekson J. concluded that it was unnecessary "to turn to this relatively novel form of injunctive relief to afford the Plaintiffs the remedy they seek".[360] After quoting Estey J.'s comments about the "fraud exception" and a passage from *Mills*, Andrekson J. concluded that the evidence supporting the allegation of theft was substantial enough, even in light of the defendant's evidence to the contrary, to support the granting of an injunction.[361]

6.11 To summarize, the so-called "fraud exception" originated in cases which held that an ordinary, non-judgment creditor could maintain a suit in equity to have a transfer of property by his debtor declared void as a fraudulent conveyance. One of these cases[362] produced a dictum that the plaintiff in such a suit could also get an interlocutory injunction to prevent the defendant transferee from alienating the property in question while the suit was in progress. This dictum has occasionally been acted upon in this and other provinces. More recently, it has been called out in support of the very different proposition that where a plaintiff produces substantial evidence of a cause of action based on fraud or theft, the court may, without more, grant an injunction to prevent

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356 *Id.* at 107.

357 *Supra* n. 344.

358 *Feigelman, supra* n. 102 at 108. At 105 Estey J. holds up *Lister* v. *Stubbs, supra* n. 28 as an application of the general rule to which injunctions to prevent fraud are supposedly an exception. But interestingly enough, in *Lister* v. *Stubbs* itself, the conduct alleged against the defendant--accepting a bribe from his principal's customer--could well be regarded as fraudulent: at first instance Stirling J. exclaimed that if the facts were as alleged "a more gross breach of duty it is impossible to conceive": 4.

359 *Supra* n. 115.

360 *Id.* at 43.

361 *Id.* at 43-46.

362 *Campbell* v. *Campbell, supra* n. 339.

the defendant from disposing of any property, including property that has no connection with the alleged fraud or theft. Contrary to what is suggested in *Feigelman*,[363] this latter proposition is of very recent vintage, originating, at the earliest, in some observations of Steele J. in *City of Toronto* v. *McIntosh*.[364] Cases such as *Campbell* v. *Campbell*[365] and *Fairchild* v. *Elmslie*[366] stand for a much narrower proposition, one that may be explained by reference to the principles regarding interlocutory injunctions to prevent the disposition or destruction of the very subject matter of an action. Thus, this notion of a special category of injunctions in the case of fraud or theft is actually of more recent origin than the Mareva injunction itself.

6.12 We have taken considerable pains to point out the questionable pedigree of the "fraud exception". Our intention in doing so has been to show that the supposed distinction between Mareva injunctions and injunctions enjoining the disposition of property by a defendant against whom there is evidence of fraudulent conduct has been created out of thin air. We make this point because of our perception that cases such as *Mills*[367] and *J.R. Paine*,[368] although they may well have reached the right result in granting an injunction, have done so by asking the wrong questions. The rationale for granting an injunction to prevent a defendant from disposing of his property prior to judgment must surely be that there is a justifiable apprehension that he will improperly dispose of his property if not restrained from doing so. However, both *Mills* and *J.R. Paine* seem to conclude that evidence of fraudulent conduct on the part of the defendant is sufficient reason for granting an injunction, making it unnecessary to consider whether the defendant is likely to improperly dispose of his property. Certainly, as is suggested by Grange J. in *Canadian Pacific Airlines* v. *Hind*,[369] evidence of fraudulent conduct on the part of the defendant may well ground such an apprehension, and we suspect that this is the unspoken rationale for granting an injunction in both *Mills* and *J.R. Paine*. But the danger of the "fraud exception" doctrine is that it deflects attention away from

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[363] *Supra* n. 102 at 107-08.

[364] *Supra* n. 344.

[365] *Supra* n. 339.

[366] *Supra* n. 344.

[367] *Supra* n. 349.

[368] *Supra* n. 115.

[369] *Supra* n. 249 at 502.

what should be the fundamental issue in any application for a prejudgment remedy: the risk of disposition of the defendant's property. Thus, perpetuation of the notion that there is a separate category of interlocutory injunction, consisting of injunctions against the disposition of assets based on evidence of fraudulent conduct by the defendant, is justified by neither the authorities nor good sense.

B. Receivership

1. Appointment of a Receiver of Auction Sale Proceeds

6.13 Rule 465 of our Rules of Court provides for the appointment of a receiver of the proceeds of an auction sale of a debtor's goods. The precise wording is as follows:

> 465 (1) If a debtor advertises a sale of his goods by auction, a creditor either before or after judgment may apply for a receiver and the court, if satisfied the creditor's claim is likely to be defeated, delayed or hindered, may appoint the sheriff or deputy sheriff receiver of the proceeds of the sale of such of the goods as are not exempt from seizure.
>
> (2) The order may provide that a sum sufficient to satisfy the plaintiff's claim and costs and any outstanding executions against the debtor be held by the receiver to satisfy the executions and any judgment the creditor may recover.

This provision goes back to the 1944 Rules.[370] So far as we have been able to ascertain, the reason why the rule was adopted in 1944 has not been documented. However, an explanation is not hard to come by.

6.14 It would be a very sanguine creditor who would not be concerned about the prospects of recovering his debt upon learning that his debtor had advertised his goods for sale by auction. The creditor would probably not object to the sale itself, since it would presumably produce funds from which his claim might be paid. Thus, even if he could get a writ of attachment before the goods were to be sold by auction, preventing the sale would be counterproductive. It probably would be in the creditor's best interests to allow the sale to go ahead, but to prevent the proceeds of sale from disappearing. Serving a prejudgment garnishee summons on the auctioneer might work, but timing could be a very difficult problem. It would have to be served on the auctioneer after the

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[370] The Consolidated Rules of the Supreme Court, R. 549.

sale (so there would be a debt to be attached) but before the proceeds of sale were paid to the debtor, an interval of perhaps only a few hours or even minutes. The advantage of appointing a receiver of the auction sale proceeds is that this would not interfere with the sale--as would attachment of the goods--and would avoid the timing problem associated with garnishment.

6.15 Not surprisingly, Rule 465 has not given rise to a great deal of case law. The cases which have been reported deal with priorities questions as between the plaintiff at whose instance the receiver is appointed and other persons with a claim to the proceeds.[371] These cases have established that the sole effect of the appointment of the sheriff as receiver of the proceeds of an auction sale is to preserve those funds; the plaintiff does not thereby acquire any charge or priority over the funds as against other claimants.

2. Ancillary or as an Alternative to a Mareva Injunction

6.16 Receivership, like the injunction, is an equitable remedy that can be granted by an interlocutory order of the court. Section 13(2) of the Judicature Act authorizes the court to grant an injunction or *appoint a receiver* by interlocutory order where it is just or convenient to do so. Prior to the advent of the Mareva injunction, an unsecured plaintiff whose case did not fall within the very narrow ambit of Rule 465 would have stood as little chance of getting a receiver appointed under section 13(2) as he would have stood of getting an injunction to restrain the defendant from disposing of his assets. On the other hand, the same process of reasoning by which the courts have concluded that section 13(2) (or its equivalent in other jurisdictions) authorizes the granting of Mareva injunctions supports the conclusion that it also authorizes the courts, in appropriate circumstances, to appoint receivers at the behest of unsecured plaintiffs. In fact, courts in both England and Canada have proved willing to appoint a receiver in aid of a Mareva injunction where it appears that the injunction by itself would not be an effective remedy.[372]

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371 *Hudson* v. *Brisebois Bros. Construction Ltd.* (1982) 135 D.L.R. (3d) 166 (Alta. C.A.); *Structural Instrumentation Inc.* v. *Hayworth Truck & Trailer Ltd.* (1984) 13 D.L.R. (4th) 614 (Alta. C.A.).

372 *CBS United Kingdom Ltd.* v. *Lambert, supra* n. 285 at 242-3; *NEC Corporation* v. *Steintron International Electronics Ltd., supra* n. 285 at 196.

C. Writ Saving

6.17 A defendant has 15 days after being served with a statement of claim within which to file a statement of defence and serve it on the plaintiff.[373] If he does not do so, the plaintiff can get judgment by default.[374] A default judgment can be enforced in the same way as any other judgment, but the defendant may apply to have a default judgment set aside. Rule 158 provides that the court may set aside or vary a default judgment "upon such terms as it thinks just". If the defendant can show that the default judgment was irregularly obtained (because, for example, the statement of claim was never served on him), the judgment will generally be set aside as of right, and without any terms being imposed on the defendant. In other cases, where the defendant is in effect asking to be relieved of the consequences of his own or his lawyer's carelessness, he usually will be required to file an affidavit disclosing an arguable defence to the plaintiff's claim, and the court will be inclined to impose terms of some sort on the defendant.

6.18 Sometimes, the court is persuaded that a default judgment should be set aside, but is also persuaded that as a *quid pro quo* the plaintiff should have some security for his claim. Thus, default judgments are occasionally set aside on the condition that the defendant pay into court the amount of the plaintiff's claim.[375] Alternatively, and less onerously as far as the defendant is concerned, default judgments are sometimes set aside on the condition that the writ of execution based on the judgment will remain in force pending the outcome of the proceedings, any steps to enforce the writ (such as seizure or examination in aid of execution) being stayed in the meantime.[376] A variation on this technique is to give the defendant leave to defend the plaintiff's action without actually setting aside either the default judgment or the writ of execution.[377]

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373 R. 85.

374 Rs. 142, 148, 152.

375 *E.g. Alberta Bingo Supplies Ltd.* v. *Pastimes Restaurants Ltd.* (1985) 66 A.R. 292 (Q.B.M.C.).

376 *E.g. Larnu Distributors (1970) Ltd.* v. *Brochu* (1980) 26 A.R. 373 (Q.B.M.C.).

377 *Cotton* v. *Dempster* [1925] 1 W.W.R. 954 (Alta. S.C.M.C.); *Westeel Rosco Ltd.* v. *Edmonton Tinsmith Supplies Ltd.* (1984) 58 A.R. 194 (Q.B.M.C.); *Atchison* v. *Boyd* (1985) 61 A.R. 189 (Q.B.M.C.).

6.19 In one Ontario case[378] it was argued for the defendant that in deciding whether to preserve a writ of execution upon setting aside a default judgment, the court should apply the same criteria that Lord Denning M.R. suggested should be applied by courts considering whether to grant a Mareva injunction.[379] The court recognized that certain of these criteria, particularly the requirement that there be some danger that property would be disposed of or removed from the jurisdiction if relief were refused, are relevant to the issue of whether a writ should be preserved when a default judgment is opened up. However, the court pointed out that different considerations may be relevant in deciding whether to save a writ than in deciding whether to grant a Mareva injunction. An example of a consideration that might be relevant in the former case but not in the latter is delay by the defendant in applying to set aside the default judgment.

6.20 The practice of writ saving has been criticized on conceptual grounds.[380] The argument, more or less, is that a writ of execution, or, more specifically, a writ of *fieri facias*, has always been regarded as depending for its vitality on an unsatisfied judgment. The writ is a mere appendage to the judgment, so if there is no unsatisfied judgment in existence, there can be no writ of execution. Thus, it would contradict the very notion of what a writ of execution is to hold that a writ of execution based on a default judgment can survive the setting aside of the judgment.

6.21 An appropriate answer to the preceding argument is, So what? Argument by means of definition does not, or should not, carry much weight in a discussion of whether the practice of writ saving should be exalted or denigrated. It is pointless to argue that judges in the past have always regarded writs of execution as being appurtenant to unsatisfied judgments if one's wish is to convince judges of the present that they should not engage in the practice of writ saving. This is especially so given that the favoured technique in this province--giving the defendant leave to defend without setting aside either the judgment or the writ--is not open to the conceptual objection.

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[378] *Bank of Montreal* v. *Heaps* (1982) 31 C.P.C. 246 (S.C.M.C.).

[379] *Third Chandris Shipping Corp.* v. *Unimarine S.A., supra* n. 86 at 984-85.

[380] *Jet Power Credit Union Ltd.* v. *McInally* (1973) 17 O.R. (2d) 59 (H.C.J.). *Jet Power* was overruled by a majority decision of the Divisional Court in *Canadian Imperial Bank of Commerce* v. *Sheahen* (1978) 22 O.R. (2d) 686. The majority decision in the latter case is strongly criticized in M. Springman, "Canadian Imperial Bank of Commerce v. Sheahen: Setting Aside Default Judgment on Terms That any Writ Stand Pending Disposition of the Action" (1981-82) 3 *The Advocate's Qrtrly.* 365.

There *is* an unsatisfied judgment in existence, albeit one that may cease to exist after the trial of the action.[381] Moreover, the harsher alternative of requiring a defendant to pay the amount of the default judgment into court as a condition of having the judgment opened up is not open to the conceptual criticism, either. If the practice of writ saving is to be effectively criticized, it must be on grounds of principle or policy, and such criticism would presumably also apply to the alternative of requiring the amount of the default judgment to be paid into court.

6.22 One possible criticism of both practices--writ saving and requiring money to be paid into court--is that they appear to place too much emphasis on the fact that a defendant seeking to open up a regularly obtained default judgment is seeking the indulgence of the court. As Springman[382] rightly observes, the fact that the defendant is seeking an indulgence is not in itself a good reason for arbitrarily requiring him to furnish security for the plaintiff's claim. In order to get the judgment opened up in the first place, the defendant must convince the court that he at least has an arguable defence, so why should he then be subjected to onerous terms that would not normally be imposed on a defendant with an arguable defence? At the very least, there should be some reason for thinking that the plaintiff would be prejudiced in collecting on a second judgment if terms as to the payment of money into court or the continuation of the writ were not imposed on the defendant.[383] Springman argues that courts opening up default judgments impose terms as a matter of course without considering whether they are justified in the circumstances.

6.23 On the other hand, it is not uncommon for a defendant to apply to set aside a default judgment months or even years after it was granted, on the basis of a defence that is barely arguable. Often, the court will harbour the suspicion that the defendant's sudden interest in opening up the judgment has less to do with any conviction that he has a good defence than with his desire to free property which has been caught by the plaintiff's writ of execution long enough to dispose of it. In such cases the court may grudgingly open up a default judgment if it can provide some protection to the plaintiff, by preserving his writ of execution or otherwise, but would almost certainly refuse to

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381 One might quibble with the practice of opening up a default judgment without setting it aside on the basis that Rule 158 says that the default judgment may be "set aside or varied". Does the practice in question amount to a variation of the judgment?

382 *Supra* n. 380 at 379.

383 *Id.* at 380.

open it up if it could not provide any protection to the plaintiff. Thus, if the courts are to maintain a fairly liberal approach to opening up default judgments, it is necessary that they should be able in appropriate cases to protect erstwhile judgment creditors against the most obviously prejudicial consequences of opening up such judgments. The only question is whether the presently employed techniques--writ saving and payment into court--are the appropriate means of doing so. We shall defer further discussion of this issue to Chapter 8.

D. Conditional Leave to Defend

6.24 Once a defendant files and serves a statement of defence a plaintiff cannot get default judgment. However, a plaintiff who thinks that the defendant's statement of defence does not raise a triable issue, but is merely a delaying tactic, may apply for summary judgment under Rule 159.[384]

A plaintiff hoping to get summary judgment is under a very heavy burden; he must show that despite what is said in the statement of defence and whatever evidence may be produced by the defendant on the application, the defendant's liability is so clear that no purpose would be served by holding a trial. Rule 159(4) provides that the court may allow the action to proceed on terms as to, amongst other things, the giving of security. The rationale for this provision is nicely captured in the following observation of Devlin L.J.:

> I think that any judge who has sat in chambers in R.S.C., Ord. 14 [the English equivalent to our Rule 159] summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court.[385]

6.25 Rule 159(4) would seem to allow a judge or master who has grave doubts about the *bona fides* of a defence to permit the action to continue only on the condition that security be provided for the plaintiff's claim. As a matter of fact, though, Canadian courts have virtually ignored this possibility, opting instead for an all or nothing approach to summary judgment

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[384] R. 159 was amended in 1986, so as to permit defendants as well as plaintiffs to apply for summary judgment.

[385] *Fieldrank, Ltd.* v. *Stein* [1961] 3 All E.R. 681, 683 (C.A.). The Court of Appeal actually concluded that this was not a proper case to impose terms on the defendant. For a case in which the opposite conclusion was reached, see *Van Lynn Developments Ltd.* v. *Pelias Construction Co.* [1968] 3 All E.R. 824, 827 (C.A.).

applications: the plaintiff is either entitled to summary judgment or the defendant is entitled to defend unconditionally.[386] We are not aware of any reported cases in which a defendant in this province has been required to provide security as a term of being allowed to defend following an application for summary judgment.[387] Thus, so far as its role as a possible mechanism for providing prejudgment security is concerned, Rule 159(4) seems to be something of a dead letter, and we shall henceforth treat it as such.

E. Arrest and Detention

6.26 Most lawyers would be surprised to find arrest and detention of defendants mentioned in a discussion of the prejudgment remedies currently available in Alberta. Arrest on *mesne* process might be of interest, so it might be said, to a student of legal history, but certainly not to a litigant or practitioner in present day Alberta. However, the matter is not as straightforward as one might think. To see why this is so, it is necessary to pick up the story of arrest on *mesne* where we left off in Chapter 2.

6.27 We noted in Chapter 2 that the Judgments Act of 1838 drastically limited the availability of arrest on *mesne* process in England. Henceforth, a writ of *capias ad respondendum* would only be available upon the order of a superior court judge who was satisfied that the plaintiff had a cause of action against the defendant for at least twenty pounds, "and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England unless he or they be forthwith apprehended".[388] The importance of preventing a defendant from leaving England was that if he was not in England when the plaintiff eventually got judgment, he could not very easily be imprisoned in execution. This rationale for preventing a defendant from quitting England disappeared when imprisonment for debt was virtually abolished by The Debtors Act, 1869. Thus, section 6 of this Act abolished arrest on *mesne* process entirely, and gave to the courts a limited statutory power to order the arrest of a defendant who was about to quit England.

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386 *Kaufman* v. *George Coles Ltd.* [1949] O.W.N. 357 (H.C.J.).

387 There are a handful of cases from western Canada in which payment of money into court has been made a condition of granting a defendant leave to defend following an application for summary judgment: *Law* v. *Neary* (1895) 10 Man. R. 592 (Q.B.); *Fey* v. *Seimer* (1905) 2 W.L.R. 566 (Y.T.); *Shell Co. of Hong Kong* v. *May* [1979] 2 W.W.R. 443, affd. [1981] 1 W.W.R. 193 (B.C.C.A.).

388 Judgments Act, 1838, s. 2.

6.28 Four conditions had to be met before the statutory power could be exercised. It could only be exercised 1) in an action in which, prior to the passage of the Act, the defendant could have been arrested on *mesne* process, where 2) the plaintiff had a good cause of action for at least fifty pounds; 3) there was reasonable cause for believing that the defendant was about to quit England; and 4) the absence of the defendant from England would materially prejudice the plaintiff in the prosecution of his action.[389] The words "in the prosecution of his action" are extremely important. Their effect is that an order could be made under the section only where the defendant's absence from England would prejudice the plaintiff in his efforts to *get* a judgment. The fact that the defendant's absence might prejudice the plaintiff in his efforts to *enforce* a judgment would not satisfy the fourth requirement.

6.29 In order to trace developments in England after 1869, it is necessary now to introduce a new player into the field, the equitable writ *ne exeat regno*.[390] As its Latin tag suggests, this writ is far from being a recent creation.[391] It began its career in medieval times as a means by which the king, for reasons of state, could prevent a subject from leaving the realm. However, the writ eventually--that is, by Elizabethan times--came to be used in civil suits in Chancery as an equitable analog to *mesne* process at common law. A major difference, however, was that the equitable writ could only be issued where the defendant was about to leave the jurisdiction. The writ authorized the arrest and detention of the defendant until he provided security for the plaintiff's claim. The 1838 Act brought common law arrest on *mesne* process into line with the writ *ne exeat regno* in restricting the former to cases where the defendant was about to quit England. The 1869 Act went beyond this in restricting arrest to cases where the defendant's departure would prejudice the plaintiff in the prosecution of his action. The significance of this is brought home by a series of English cases, beginning in 1968 with *Felton* v. *Callis*.[392]

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389 The Debtors Act, 1869, s. 6.

390 Strictly speaking, when talking about the use of this writ in Alberta, we should say, "*ne exeat provincia*", but for convenience we shall refer to the writ *ne exeat regno* throughout.

391 The following discussion of the writ is largely based on the account of Megarry J. in *Felton* v. *Callis* [1968] 3 All E.R. 673 (Q.B.D.). See also L. Anderson, "Antiquity in Action--Ne Exeat Regno Revived" (1987) 104 L.Q.R. 246.

392 *Ibid.*

6.30 In *Felton* v. *Callis*[393] the plaintiffs were the ex-partners of the defendant, and were suing to enforce the defendant's agreement to pay a portion of the amount owed by the partnership to a bank. The plaintiffs feared that the defendant was about to leave the country for Thailand, and that their chances of enforcing an order requiring the defendant to pay his agreed share of the partnership debt would be nil if he were permitted to leave without providing security. Unfortunately for them, any attempt to rely on section 6 of The Debtors Act, 1869 would founder on the requirement that the defendant's absence would prejudice them in the prosecution of their action. The defendant's absence would not prejudice them in getting a judgment, but in enforcing it. So the plaintiffs asked not for an order under the 1869 Act, but for a writ *ne exeat regno*.

6.31 The question was, Did the 1869 Act affect the writ *ne exeat regno*? In terms, it did not. The Act refers to *mesne* process, and the writ *ne exeat regno* was not, strictly speaking, *mesne* process. However, citing the handful of cases dealing with the writ *ne exeat regno* since 1869, and relying on the maxim that equity follows the law, Megarry J. concluded that the requirements of section 6 of the 1869 Act apply by analogy to an application for a writ *ne exeat regno*. Thus, the writ was only available where the defendant's absence would prejudice the plaintiff in getting a judgment, which was not this case.[394]

6.32 It might have been thought that the effect of *Felton* v. *Callis*[395] would be to put the writ *ne exeat regno* to rest for good. However, any such conclusion was called into question by a case decided in 1985, *Al Nahkel for Contracting and Trading Ltd.* v. *Lowe*.[396] The defendant was alleged to have stolen money from the plaintiff in Saudi Arabia, and was passing through London on

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393 *Ibid.*

394 Megarry J. also thought that the first requirement of the 1869 Act was probably not satisfied either. With one exception the writ *ne exeat regno* had only ever been granted in matters within the exclusive jurisdiction of equity (e.g. a suit to recover trust money from a defaulting trustee). The exception was in an action of account, which was within the concurrent jurisdiction of equity. Here, the plaintiffs' cause of action, being founded on a contract, was basically legal. Although the plaintiffs were seeking equitable relief in the form of a *quia timet* order, their suit lay within the auxiliary, or at most the concurrent, not the exclusive, jurisdiction of equity. Thus, to grant the writ here would be to grant it where the old courts of equitable jurisdiction would not have done so, and Megarry J. doubted that it would be proper to do so: *Id.* at 682-83. *Cf.* Anderson, *supra* n. 391 at 251-52.

395 *Supra* n. 391.

396 [1986] 1 All E.R. 729 (Q.B.D.).

his way to the Philippines with the money. The plaintiff applied for and got both a Mareva injunction and a writ *ne exeat regno*, whereupon the defendant was arrested while sitting on an airliner which was about to leave the country. He was held in custody until he gave certain undertakings and submitted to certain terms, the substance of which are not disclosed in the judgment. In explaining why he had granted leave to issue the writ, Tudor Price J. referred to the four conditions for the making of an order under section 6 of The Debtors Act, 1869 which in *Felton* v. *Callis* had been held to apply to an application for a writ *ne exeat regno*. He observed that "there was, prima facie, every reason to suppose that without the writ *ne exeat regno* this defendant would not have been restrained from leaving the jurisdiction with the allegedly stolen money in his possession".[397] He continued, "I was satisfied that in the present case all the four conditions set out above are satisfied and that it was a proper exercise of discretion to give leave to issue the writ".[398]

6.33 Insofar as the writ was issued in aid of a Mareva injunction, which itself was issued not to assist the plaintiff in getting, but to assist him in enforcing, a judgment, it is clear that Tudor Price J. was playing fast and loose with the fourth requirement of the Act.[399] Although he did not profess to be doing so, Tudor Price J. was in effect disagreeing with the orthodox interpretation, as embodied by *Felton* v. *Callis*,[400] of the phrase "prejudice the plaintiff in the prosecution of his action". In a yet more recent case, *Allied Arab Bank* v. *Hajjar*,[401] the orthodox view was reasserted by Leggatt J. in discharging a writ *ne exeat regno* that had been granted in aid of a Mareva injunction. As the primary purpose for which the defendant's presence in the country was required was to identify assets against which the injunction would operate, and this had nothing to do with prosecution of the action, as opposed to enforcement of a judgment, Leggatt J. concluded that leave

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397 *Id.* at 732.

398 *Id.* at 732.

399 Indeed, it could be argued that since the plaintiff's claim was certainly not within the exclusive jurisdiction of equity, the plaintiff should have asked for an order under section 6 of The Debtors Act 1869, not a writ *ne exeat regno*; see n. 394. Of course, given that the same conditions must be satisfied to get the writ as to get an order under section 6, it is largely academic whether the plaintiff's application is regarded as being for the writ or the section 6 order.

400 *Supra* n. 391.

401 [1987] 3 All E.R. 739 (Q.B.D.); see L. Anderson "Ne Exeat Regno--A Return to Principle" (1987) 137 N.L.J. 584.

to issue the writ should not have been granted. Unfortunately, no mention is made of *Al Nahkel*,[402] and it would seem to require a decision of the Court of Appeal to sort out the apparent conflict between the recent English cases.

6.34 One other recent English development should be noted here. The writ *ne exeat regno* authorizes the arrest and detention of the defendant until he provides security (or until a judge orders that he be released, on whatever terms seem appropriate). The writ is not simply an order directed to the defendant requiring him not to leave the jurisdiction. The latter sort of order was, however, granted by the Court of Appeal in *Bayer A.G.* v. *Winter*.[403] The plaintiffs had obtained a Mareva injunction with an ancillary order for discovery in aid of the injunction, but the judge at first instance had refused to make a further order prohibiting the defendant from leaving the jurisdiction, and requiring him to deliver up his passport to the person who served him with the order. The plaintiffs sought this latter order on the basis that if the defendant was not prevented from leaving the jurisdiction, the plaintiffs might well lose the benefit of the discovery order and, hence, of the Mareva injunction. The Court of Appeal, relying on the English equivalent of section 13(2) of the Judicature Act, granted the order, but only for a period of two days or until further order.[404] In so doing, the court casually observed that this was not a case where the plaintiffs could have obtained a writ *ne exeat regno*.[405] Apparently, then, the injunctive order made in *Bayer* may be issued in a broader range of circumstances than may the writ *ne exeat regno*.[406] This might be justified on the basis that the injunctive relief is not quite as Draconian as the writ, in that the former does not authorize the defendant's arrest and detention.

6.35 So much for the position regarding arrest and imprisonment in England. What of Alberta? In the first place, we may conclude that the process of reasoning employed by the English

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402 *Supra* n. 396.

403 [1986] 1 All E.R. 733.

404 *Id.* at 738.

405 *Id.* at 736.

406 On this point, see Anderson, *supra* n. 391 at 260-61. In *Bayer A.G.* v. *Winter (No. 2)*, *supra* n. 295 Scott J. refused to extend the Court of Appeal's order beyond the two days for which it was originally to be in force.

Court of Appeal in *Bayer A.G.* v. *Winter*[407] could be applied by an Alberta court. Thus, it would arguably be open to a court of this province in appropriate circumstances to order a defendant not to leave the province for a certain very limited period of time. Of course, one would think that very rarely, if ever, could a court consider it necessary to prevent a defendant from leaving Alberta for another province, as opposed to another country.[408]

6.36 The availability of the writ *ne exeat regno* in this province is more problematic. The uncertainty arises because of an Act passed by the Alberta legislature in 1908.[409] Dunlop[410] informs us that this Act was passed by the legislature in reaction to a 1907 case which held that section 5 of the Debtors Act, 1869 was in force in this province. This section permitted the imprisonment for up to six weeks of a judgment debtor who had not paid a judgment of fifty pounds or less although he had the means to do so. The legislature's initial reaction to this decision was swifter than it was well thought out. As originally enacted, the 1908 Act simply said, in section 1, that the 1869 Act "shall not be in force or effect in the Province of Alberta from and after the date of the coming into force of this Act". Section 2 went on to say that nothing in the Act was to be taken "to imply or to mean that the said *Debtors' Act* has been in force in the province, prior to the date of the coming into force of this Act".

6.37 The question raised by the 1908 Act was this. If The Debtors Act, 1869 was not in force in this province, was the law relating to imprisonment for debt as it existed in England prior to

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407 *Supra* n. 403.

408 Constitutional considerations could not be ignored in considering an application for a Bayer style injunction. Mr. Winter was a non-resident British citizen. If he had been Canadian and the application had been made in Canada, the court would have had to consider subsection 6(1) of the *Canadian Charter of Rights and Freedoms*, which provides that "[e]very citizen of Canada has the right to enter, remain in and leave Canada". Of course, this right would be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": s. 1. The question would be whether the injunctive restraint fell within s. 1. An application for a Bayer injunction or a writ *ne exeat regno* could also raise issues under ss. 7 and 9 of the Charter.

409 An Act respecting the Imperial Debtors' [sic] Act of 1869, S.A. 1908, c. 6, amended by S.A. 1909, c. 4, s. 20.

410 *Supra* n. 22 at 100.

1869 now part of the law of Alberta?[411] For the reasons given by Dunlop,[412] it is very doubtful that the 1908 Act had the effect of reviving any aspects of the law of imprisonment for debt which had been abolished by The Debtors Act 1869. However, to resolve any doubt on this point, the 1909 amendment added the following words to the end of section 2 of the 1908 Act:

> And nothing herein contained shall be deemed to have brought into force within the province the law of England as to arrest or imprisonment for making default in payment of a sum of money as the same existed either immediately prior to the passing of the said *Imperial Debtors' Act* of 1869, or in the year 1670; and it is hereby declared that the said law of England as to arrest or imprisonment for making default in payment of a sum of money as the same existed at either of the dates mentioned is not in force in the province.

6.38 What effect did all this have on the writ *ne exeat regno*? We have already mentioned that section 6 of The Debtors Act, 1869 did not in terms apply to the writ, but the courts of equity applied requirements analogous to those of section 6 to applications for the writ. Section 5(1) of our Judicature Act provides that the superior courts of the province possess the jurisdiction that on July 15, 1870 was in England vested in, *inter alia*, the High Court of Chancery. Since the writ *ne exeat regno* was clearly within the jurisdiction of the Court of Chancery as of July 15, 1870, it is more than arguable that prior to the 1908 Alberta Act (as amended in 1909), the Supreme Court of Alberta had the power to issue this writ. Presumably, though, on the principle that equity follows the law, this power would only have been exercised in accordance with the requirements of the Debtors Act, 1869.

6.39 The concluding words of section 2 of the amended 1908 Act, set out in paragraph 6.37, do not preclude the continuing vitality in this province of the writ *ne exeat regno*. The law of England which is declared not to be in force in this province is the law "as to arrest or imprisonment for making default in payment of a sum of money". This description does not apply to the writ *ne exeat regno*, because, strictly speaking, the writ was issued to prevent someone from leaving the jurisdiction, not because he had defaulted in the payment of a sum of money. Thus, the 1908 Act

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411 It will be recalled from our earlier discussion that the Debtors Act, 1869 abolished imprisonment for debt, subject only to a few exceptions. The exceptions were set out in s. 5, the section which caught the legislature's attention.

412 *Supra* n. 22 at 100. Our reference is to the original text, rather than the text as amended by Dunlop, *Supplement to Creditor-Debtor Law in Canada* (1984), at 24.

is consistent with the continued existence of the writ in this province.

6.40 If the writ *ne exeat regno* is still with us, under what circumstances could it be issued? The doctrine that equity follows the law could be invoked in aid of two radically different conclusions. One possible conclusion is that the Alberta legislature's declaration that the Debtors Act, 1869 is not in force in this province actually liberalized the circumstances in which the writ can be issued. The argument in support of this conclusion would be to the following effect. Prior to 1869, assuming that the plaintiff was asserting the right sort of claim, a court of equity would issue the writ upon it being shown that the defendant was about to leave the jurisdiction. After 1869, because of the doctrine that equity follows the law, the applicant would have to satisfy the more stringent requirements of section 6 of the 1869 Act, including the requirement that the defendant's departure from the jurisdiction would prejudice the plaintiff in the prosecution of his action. But the declaration of the legislature that the Debtors Act, 1869 is not in force in this province means that the courts need no longer feel constrained to apply the requirements of section 6 of that Act to an application for the writ *ne exeat regno*.

6.41 However, a more plausible application of the doctrine that equity follows the law leads to the conclusion that even if the writ *ne exeat regno* is theoretically available in Alberta, it should never be used to prevent a defendant in a civil action from leaving the jurisdiction. When the legislature declared in 1908 that the Debtors Act, 1869 was not in force in this province, it abolished the statutory power which the courts of this province presumably then had under section 6 of that Act to authorize the arrest of a defendant where the four conditions of the section were met.[413] Since arrest on *mesne* process had already been abolished by the 1869 Act[414] this left the courts of this province with no common law or statutory powers to order the arrest of a defendant to prevent him from leaving the jurisdiction. Hence, if equity truly follows the law in this instance, the most sensible conclusion is that the writ *ne exeat regno* should not be available where, because of a conscious decision of the legislature, no corresponding legal (as opposed to equitable) remedy is available.

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[413] *See supra* para. 6.28.

[414] We assume that the legislature's declaration that the 1869 Act was not in force here should not be taken to have revived arrest on *mesne* process.

CHAPTER 7

THE CASE FOR LEGISLATIVE REFORM

7.1 In the first part of this Chapter we inquire into the justification for a system of prejudgment remedies for unsecured claimants. We conclude that such a system is justifiable if it gives adequate consideration not only to plaintiffs seeking prejudgment remedies, but also to defendants against whom they may be granted and to third persons whom they may affect. Next, we endeavour to show that legislative reform of this area of the law is desirable. Finally, we briefly survey reforms that have recently been implemented or suggested in other Canadian jurisdictions.

A. Prejudgment Remedies: Justification and Constraints

1. Justifying Prejudgment Remedies

a. The rationale for prejudgment remedies

7.2 The effect of a prejudgment remedy[415] is to deprive a defendant of his property, or at least to prevent him from enjoying the usual incidents of ownership of that property. This occurs when the plaintiff has taken or is going to take legal proceedings against the defendant to enforce a claim, but at a time when the validity of the claim has not been established. What we have, then, is a person being deprived of his property or its use and enjoyment in order to meet an obligation which has not yet been determined to exist. How can this be justified?

7.3 Our legal system is an institution which performs certain necessary social functions. One of its functions is to provide a mechanism for resolving disputes regarding the correlative rights and duties of citizens. This could be described as the legal system's "adjudicative function". In our context, this function consists of determining the validity of claims by one person that another person either owes him money, or should at least be required to pay him money as compensation for the breach of some duty owed by the latter to the former.

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[415] For the moment, we shall assume that arresting the defendant is not an available remedy.

7.4 A second and equally important function of the legal system is to try to ensure that the rights and duties which the adjudicative process determines to exist are protected or carried out. This could be described as the "enforcement function" of the legal system. In our context, it amounts to ensuring, so far as it is possible to do so, that money judgments awarded to plaintiffs are satisfied by defendants. This is accomplished, to put a very large and complicated subject in a very small and simple nutshell, by taking property from the defendant, converting it into money, and giving the money to the plaintiff.

7.5 It is obviously in the interests of the community that the legal system effectively perform both its adjudicative and its enforcement function. The effective performance of each function is necessary if the legal system is to perform its more general function of resolving disputes or "doing justice" between different members of the community. The legal system could hardly be regarded as an instrument of justice if it could not generally be relied on to fairly and accurately determine disputes between citizens as to their respective rights and duties and to enforce those rights and duties once they had been ascertained. The trouble is that while the two functions--adjudication and enforcement--are complementary in object, they are to some extent antagonistic in execution.

7.6 The object of the adjudicative process is to determine the rights and duties of the litigants. What these rights and duties are will largely depend on the facts, so the adjudicative process must include a mechanism for determining disputed facts with as much accuracy as possible. But accurately determining facts can be a time consuming business, especially when they are disputed by parties with vested interests in the outcome. Thus, it is inevitable that a considerable period of time will elapse between the point at which the plaintiff makes his claim and the point at which the validity of the claim can be determined by the courts.

7.7 As far as the enforcement function goes, the problem with delay in the adjudicative process is that property which would have been available to satisfy the plaintiff's claim when it was first asserted may not be available by the time the validity of the claim is determined. Thus, even if the plaintiff gets a judgment, it may be unenforceable because of the delay in getting it. Of course, the longer it takes to get the judgment, the greater the likelihood that something will happen to frustrate its enforcement, so shortening the time taken up by the adjudicative process would mitigate

the problem. However, there comes a point where reducing the time taken to determine the validity of a claim can be achieved only at the expense of the reliability and fairness of the adjudicative process. Hence, some measure of delay between the time a claim is advanced and the time its validity is determined is a necessary incident of the adjudicative process.

7.8 So there is a tension between the respective demands of the adjudicative and enforcement functions of the legal system. It would be in the interest of the administration of justice to find some way to reduce this tension: to increase the effectiveness of the enforcement function without compromising the fairness and reliability of the adjudicative function. The problem is delay, or more accurately, the opportunity which delay affords for property to be disposed of in a manner that frustrates the enforcement of judgments. Since delay cannot be entirely eliminated from the adjudicative process, the only alternative is to attempt to minimize its undesirable consequences. Therefore, what is needed is some means of preventing dispositions of property which would hinder the enforcement process. What are needed, in other words, are prejudgment remedies.

7.9 Of course, a system of prejudgment remedies has its costs. The most obvious cost is that if prejudgment remedies are allowed at all, they are bound on occasion to be granted against defendants in respect of claims which are ultimately found to be invalid. This is unfortunate, but is no more an argument against prejudgment remedies than the possibility of an erroneous finding of liability at the conclusion of a trial is an argument against postjudgment remedies. In either case, the objective must be to maximize the possibility, for it cannot be guaranteed, that the ultimate result of any given proceeding will be just to both parties. As we emphasized above, this requires that both the adjudicative and enforcement processes function effectively. Where a system of prejudgment remedies contributes to this goal, it may be justified even though a prejudgment remedy occasionally may be granted in cases where an omniscient court would not have granted one.

b. Prejudgment remedies and redundancy

7.10 The argument we have just made for prejudgment remedies moves from the proposition that prejudgment remedies assist the enforcement process without impairing the adjudicative process to the conclusion that such remedies are justified, even if there are certain costs

associated with them. However, this argument would lose much if not all of its force if there were some means of achieving the same purpose as prejudgment remedies at less cost. In this regard, voidable transactions legislation[416] comes to mind. Such legislation serves much the same purpose as a system of prejudgment remedies, but while prejudgment remedies are pre-emptive, voidable transactions legislation is reactive. It seeks to achieve its purpose by characterizing certain transactions regarding a debtor's property as void or voidable as against the debtor's creditors, and by allowing the latter to bring proceedings to set aside an offending transaction. The key point is that the remedy comes at the conclusion of the proceedings against the debtor and the transferee, not at their commencement, as in the case of a prejudgment remedy.[417] Voidable transactions legislation therefore does not raise the same problems of due process that are raised by prejudgment remedies, and is much less likely to lead to a remedy being granted in error.

7.11 However, while there is undoubtedly considerable overlap between voidable transactions legislation and a system of prejudgment remedies, the former is far from being a complete substitute for the latter. In the first place, voidable transactions legislation is aimed at reversing the legal effect of a transaction such as the purported transfer of ownership of the defendant's property. It cannot assist the plaintiff if the defendant has simply hidden or destroyed his property, or spirited it out of the jurisdiction. The decree of a court will not reveal the whereabouts of hidden property or remake property that has been destroyed. So there are certain sorts of disposition which the remedies provided by voidable transactions legislation simply cannot undo; the only real remedy will be one which prevents the disposition from occurring in the first place.

7.12 Even where voidable transactions legislation provides a suitable remedy in theory, it will not always do so in practice. A fraudulent conveyance may be set aside after it occurs, but in the meantime the transferee may have fled the jurisdiction with the property or transferred it to a *bona fide* purchaser, making the plaintiff's right to set aside the original transaction a hollow one.

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[416] E.g. Alberta's Fraudulent Preferences Act and various provisions of the Bankruptcy Act (Canada).

[417] This is not entirely accurate, for even before the Mareva injunction came along, the plaintiff in an action to set aside an allegedly fraudulent conveyance could sometimes obtain an injunction restraining the original transferee from disposing of the property to a fourth person: see Chapter 6, section A.

In other words, an *ex post facto* remedy may often amount to closing the stable door after the horse is gone. Finally, and in any event, it will usually be much less costly to interdict a disposition before it occurs than to set it aside after it has been accomplished. Thus, the theoretical availability of *ex post facto* remedies to set aside certain sorts of transactions does not provide a cogent argument for the proposition that those sorts of transactions should never be prevented by means of prejudgment remedies. At the same time, common sense suggests that the necessity and propriety of interdicting an apprehended disposition of a defendant's property will depend to some extent on whether the disposition could be undone later if the need to do so arose.[418]

c. Internal constraints

7.13 The purpose of granting a prejudgment remedy is to make it more likely than it otherwise would be that justice will be done between the parties to an action. In designing a system of prejudgment remedies, the object should be to ensure that the grounds and procedure for getting a remedy and the safeguards built into the system are well adapted to this purpose. In this regard, the grounds and procedure for obtaining relief should be chosen with a view to preventing prejudgment remedies from being granted where they are not really necessary. However, since it is inevitable that prejudgment remedies will sometimes be granted in error, the system should contain safeguards calculated to mitigate the consequences of error. This has two aspects. First, the undesirable consequences of errors that do occur should be minimized by always framing the remedy so as to cause as little inconvenience and disruption to the defendant as is consistent with achieving its purpose. Secondly, and obviously, there should be an effective procedure for detecting and rectifying errors once they have occurred.

2. External Constraints

7.14 The premise of our justification for prejudgment remedies was that it is in the interest of the community that the legal system perform two functions: adjudication and enforcement. The effective performance by the legal system of each of these functions can be said to be of considerable social importance. However, they cannot be said to be pre-emptive goals. That is, they are not so crucial that they are to be achieved at any cost. A particular measure which might

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[418] The conclusion reached in this paragraph is similar to that reached in the Ontario Report, *supra* n. 53 at 79-80.

have considerable value in the effort to do justice as between litigants must also be evaluated in the light of other social goals or moral principles.[419] In the context of prejudgment remedies, there are a number of external constraints on how far we should go in trying to bolster the legal system's enforcement function.

a. Competing demands on the defendant's resources

7.15 One important external constraint is derived from the probable existence of legitimate, competing demands on a defendant's resources. A demand is competing if satisfying it would make it significantly less likely that a judgment in favour of the plaintiff would be satisfied. Such a demand is legitimate if it can be justified by reference to some social goal or moral principle that carries weight as against the goal of making sure that the enforcement function of the legal system is effective. Of course, a disposition of property by the defendant for no other purpose than to frustrate the enforcement of a future judgment would not fall into this category. The purpose in question, attempting to avoid having to satisfy a possible obligation, is far from being a legitimate demand on the defendant's resources.

7.16 In many cases where a prejudgment remedy is sought, there will be legitimate, competing demands on a defendant's resources. Consider, for example, a defendant who carries on a business. The plaintiff is asserting a claim against him which may or may not be valid. In the meantime, the defendant has trade creditors and employees to pay, equipment to maintain, inventory to purchase, and so forth. These are all demands on the defendant's resources which must be taken into account in deciding how far to go in trying to ensure that any judgment against the defendant will be enforceable. They should be taken into account in deciding whether to grant a prejudgment remedy at all, and if the decision is made to do so, in determining the scope of the remedy which is granted.

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[419] A good example of this sort of constraint is provided by the old institution of imprisonment for debt. The major criticism of this institution is not that it was not an effective means of collecting debts. Although not without its flaws as a debt collection mechanism, imprisonment for debt was undoubtedly a useful weapon for creditors. The trouble is that imprisonment for debt, whatever its merits as a debt collection mechanism, is inconsistent with other important social goals and moral principles.

b. Interests of third persons

7.17 The interests of third parties place another important external constraint on prejudgment remedies. We have just been discussing the problem of competing demands on the defendant's resources. In some cases, the interests of third persons give rise to precisely this problem. For example, the interest of a trade creditor of the defendant in being paid gives rise to a legitimate demand on the defendant's resources which must be measured against the goal of preventing the dissipation of the defendant's property. But not all possible adverse effects of prejudgment remedies on third persons involve the problem of competing demands on the defendant's resources. For example, a bank served with a Mareva injunction against one of its customers may be put to considerable trouble and expense in complying with the duties which knowledge of the injunction imposes on it. The problem here is not that the bank is asserting a claim to the property covered by the injunction, but simply that it is made an involuntary participant in the battle between the litigants.

7.18 It is not improper for part of the burden of having an effective legal system to fall on persons who do not have a stake in the outcome of particular litigation.[420] Hence, it is not necessarily improper for prejudgment remedies to impose burdens on third persons, such as the bank served with a Mareva injunction. On the other hand, there is a major difference between imposing reasonable burdens on third persons and sacrificing their interests in the name of an effective legal system. Thus, to the extent that a system of prejudgment remedies imposes any burdens on third persons, they should be both reasonably necessary to the effective operation of the legal system and fair to the persons upon whom they fall.

B. The Case for Legislative Reform

7.19 Having come to the conclusion that Alberta law should make some provision for prejudgment remedies, we have next to consider whether the law as it stands is adequate, adequate that is, not only from the point of view of plaintiffs, but also from that of defendants and even third persons. To the best of our knowledge, no one has argued that it is in the area of prejudgment

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[420] For example, a bystander who witnesses an accident may be required to testify as to what he saw, even though he is not an interested participant in the litigation. Requiring the bystander to submit to the inconvenience of testifying is considered to be justified by the community's interest in the proper administration of justice.

remedies for unsecured claimants that the law of Alberta is in most urgent need of reform. On the other hand, no one that we know of would maintain that on this subject the present law is as clear, as coherent, or as just as it might reasonably be expected to be. Here we explain why in our view the defects and uncertainties that do exist warrant reform through legislative action.

7.20 We develop our case for reform in two steps. The first step consists of a brief analysis of some of the major shortcomings of the existing statutory prejudgment remedies. We argue that these shortcomings cry out for legislative reform. Next, we set out and then reply to an argument to the effect that the development of the Mareva injunction has made statutory reform of prejudgment remedies unnecessary. We conclude that the case for legislative reform is strong even given the development of the Mareva injunction in recent years.

1. Perceptions of Commentators

7.21 Before setting out our own views on the case for reform, we think that it would be useful to set out the gist of some of the comments we have received from outside sources.[421] Naturally, our commentators were not unanimous in their views on what, if anything, is wrong with our existing system of prejudgment remedies, and what, if anything, should be done about it. Indeed, there was not even unanimity on the fundamental point of whether we should have prejudgment remedies. However, it is fair to say that the great majority of our commentators thought that there should be prejudgment remedies, and also expressed a degree of dissatisfaction with the present remedies. The following are points upon which there seems to have been something approaching a consensus amongst the commentators:

> 1. The major problem for creditors is not inadequate prejudgment remedies, but the length of time it takes to get judgment. However, given the delays which seem to be inherent in the civil litigation process, prejudgment remedies will sometimes be required.
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> 2. Although prejudgment remedies should be available where required, it would be unfair to potential defendants to make prejudgment remedies too freely available.
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> 3. A major practical difficulty in this field is that the horse is usually gone prior

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[421] These outside sources fall roughly into three groups. The first group consists of written comments we received on *Report for Discussion No. 3, supra* n. 1. The second group consists of lawyers whom we interviewed in the summer of 1986. The third source is participants in a workshop on Creditors' Remedies organized by the Institute in November, 1986.

to the stable door's being closed. In other words, often the plaintiff will not find out that he needs a prejudgment remedy until it is too late for the prejudgment remedy to have any effect.

4. There is general frustration with the technicalities which surround the statutory prejudgment remedies.

5. There is concern about the adequacy of the safeguards provided to defendants.

6. Many commentators thought that there should be only one prejudgment remedy, albeit a flexible one which could be tailored to the circumstances and the type of assets involved.

2. The Statutory Remedies

7.22 Our two main statutory remedies are the writ of attachment and the prejudgment garnishee summons.[422] Not to be forgotten, of course, is the procedure under Rule 465 for the appointment of a receiver of auction sale proceeds. In the chapters on the existing law relating to these remedies we pointed out certain defects and uncertainties from which they suffer. We do not propose to reiterate here everything we said earlier on this score. Rather, we simply point out certain major flaws in these remedies, which result in our not having as fair and as effective a scheme of prejudgment relief for unsecured claimants as we reasonably could expect to have.

a. Compartmentalization

7.23 Like cases should be treated alike. As difficult as this principle may sometimes be to apply, it is undoubtedly a fundamental element of the idea of justice. It is also a principle which is ill served by our existing statutory remedies. This is so in large measure because the statutory remedies are unnecessarily compartmentalized. What we mean by this is the drawing of distinctions where there is no good reason for doing so. This has two aspects: 1) compartmentalization within remedies; and 2) compartmentalization between remedies.

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[422] As to our use of the term "statutory" in this context, see n. 107. Insofar as the jurisdiction for the Mareva injunction is said to be based on s. 13(2) of the Judicature Act, it might also be described as a statutory remedy. However, given the precarious nature of the relationship between the Mareva injunction and its supposed statutory source, we will treat it as a judicially created remedy, rather than a statutory one.

7.24 A good example of compartmentalization within the two main statutory remedies is the distinction which they make between liquidated and unliquidated claims.[423] Only persons with a claim in the former category are eligible to obtain a writ of attachment or a prejudgment garnishee summons. But while the consequences of the distinction are clear enough--claims which fall on the wrong side of the line are automatically shut out from relief--the reason for making it is not.[424] Moreover, and this is no doubt largely due to the absence of a clear rationale for the distinction, there is considerable confusion as to exactly how the line is to be drawn in any given case. Thus, the chief result of the liquidated-unliquidated distinction has been a great volume of time and money wasting litigation.

7.25 Turning to compartmentalization between remedies, this is exemplified by the fact that there is one set of rules for obtaining a remedy (writ of attachment) against tangible personal property, a completely different set for obtaining a remedy (garnishee summons) against debts owed to the defendant, and no provision at all for obtaining a remedy against land. Because the grounds and procedure for obtaining relief vary so greatly, depending on the form of the defendant's assets, the scope for like cases not being treated alike is correspondingly great. One hypothetical example will serve to bring this point home.

7.26 Suppose that D_1 owes $100,000 to C_1, D_2 owes $100,000 to C_2, and D_3 owes the same amount to C_3. Each debtor has an exigible, unencumbered asset worth $100,000. As it happens, D_1's asset is a deposit in a current account at a bank, D_2's asset is $100,000 in cash sitting in his personal safe, and D_3's is real estate. Each creditor has good reason to fear that his debtor and the asset will disappear (or, in the case of D_3, that he will sell the land and disappear with the proceeds) before the creditor can get judgment.

7.27 Since the only difference between the three cases is the nature of the debtor's exigible asset, the cases are similar enough that the principle of treating like cases alike would seem to be applicable, so C_1, C_2 and C_3 should face roughly the same obstacles in obtaining a prejudgment remedy. But C_1 has to apply for leave to issue a garnishee summons before judgment, while C_2 can only get at the money in D_2's safe by applying for a writ of attachment. As we have seen in

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[423] See *supra* paras. 3.3; 4.5-4.12.

[424] For a discussion of the most obvious possibilities, see *infra*, paras. 8.16-8.18.

previous chapters, the procedural and substantive obstacles which C_2 must overcome in order to get his writ of attachment (such as the requirement that he file a corroborating affidavit) are much more onerous than those which C_1 must overcome in order to get leave to issue a garnishee summons before judgment. Thus, C_2 could rightly complain that although his case for relief is essentially on all fours with that of C_1, they are treated very differently by the legislation. Of course, since there is no statutory remedy at all where land is concerned, C_3 would have even more cause for complaint than would C_2.

7.28 We could multiply examples of situations in which compartmentalization within and between the statutory remedies leads to the injustice of treating like cases differently and to unnecessary litigation. However, we need not do so in order to make our point that whatever the grounds and procedure for obtaining prejudgment relief are, they should not vary wildly, as they do now, on the basis of such fortuitous circumstances as the form of the defendant's assets. Our law of prejudgment relief should be consistent in its treatment of similarly situated persons, and the existing statutory remedies certainly do not meet this requirement.

b. Useless formalities

7.29 Under our Rules of Court, a plaintiff seeking a writ of attachment against an allegedly absconding debtor must comply with a host of formal requirements. Perhaps most notably, he is required to file what we have referred to as a corroborating affidavit, an affidavit sworn by someone "well acquainted with the defendant" which reiterates what has already been alleged about the defendant in the plaintiff's or the plaintiff's agent's affidavit. In practice, this requirement is sometimes impossible to satisfy even though the plaintiff would otherwise have a good case for relief. The purpose of these formal requirements would appear to be to reduce the chance that a prejudgment remedy will be granted where one is not warranted. In reality, many of these formal requirements do little more than provide a trap for the unwary. There might have been something to be said for them where, as was originally the case in the Territorial ordinances from which our present Rules are derived, the remedy in question could be obtained without judicial intervention. However, where a prejudgment remedy can only be obtained upon convincing a judge (or master) that the remedy is necessary, we fail to see the value of a plethora of inflexible and often inapt formal requirements.

c. Inadequate safeguards

7.30 It is not only or even primarily from the point of view of plaintiffs that our existing statutory remedies exhibit serious deficiencies. Defendants have good reason to complain that the safeguards for defendants are inadequate. These inadequacies are especially acute in two areas: 1) the defendant's opportunity to contest the granting of the remedy in question; and 2) his ability to recover compensation if the remedy causes him unjustifiable injury.

7.31 Leave to issue either a writ of attachment or a garnishee summons before judgment may be obtained on an *ex parte* application. In either case, a defendant may later apply to the court for an order setting aside the writ or summons. However, at least where writs of attachment are concerned, unless the defendant can point to some technical defect in the proceedings, he will be at a very considerable disadvantage when the court comes to consider his application to set aside the writ. Rule 491 provides that the court may set aside the writ on proof that "the creditor who obtained the writ did not have reasonable cause for taking the proceedings". Thus, in the application to set aside the writ of attachment a heavy onus is placed on the defendant. Once the plaintiff has been able to convince a judge on an *ex parte* application that a writ should issue, there is in effect a presumption of validity that can only be displaced by a positive showing that the plaintiff did not have a reasonable basis for seeking the writ. This would seem to be an unfairly heavy burden for the defendant to bear, given that he was not represented on the original application at which the plaintiff obtained the writ.

7.32 Prejudgment remedies are granted at the request of and for the benefit of the plaintiff before the true facts have been authoritatively determined, and it is a readily conceivable consequence of such a remedy that the defendant will suffer some damage as a result of it. Therefore, it only seems fair that the plaintiff should generally be required to compensate the defendant for any injuries the latter suffers if the plaintiff's claim is eventually dismissed or for some other reason it is finally determined that on the true facts, the remedy should not have been granted. But neither the absconding debtor rules nor the garnishment rules provide any such remedy to the injured defendant. If the defendant is to have any remedy at all, it is to be found in the common law, and as we have seen, the common law remedies which might be available are applicable only in certain narrowly

defined circumstances.[425] Here too, then, we think that the legitimate interests of defendants are not properly addressed by the rules regulating the statutory remedies.

3. The Mareva Injunction

7.33 One possible argument against legislative reform in the area of prejudgment remedies is that no matter how serious the defects in the existing statutory remedies may be, the need for reform has been addressed by the courts through the creation of the Mareva injunction. After all, is not the Mareva injunction "the greatest piece of judicial law reform in [Lord Denning's] time"?[426]

The Mareva injunction is flexible, in that it may be made to cover any sort of asset, including land, which a defendant might own. The procedure is not burdened by a plethora of formal requirements, as are the statutory remedies. And the interests of defendants are protected by the procedure for setting aside *ex parte* injunctions and the requirement that the plaintiff give an undertaking in damages. In short, the Mareva injunction is, or can be expected to develop into, a perfectly satisfactory prejudgment remedy which avoids the pitfalls of the existing statutory remedies. Or, as one of our correspondents put it, "the common law should be left alone until fully developed in the next century".

7.34 We certainly would not dispute that the Mareva injunction has reworked the landscape of prejudgment remedies, and that in many respects the Mareva injunction is a much better prejudgment remedy than the existing statutory remedies. But by no means would we agree that the advent of this new, judicially created remedy has eliminated or can reasonably be expected to eliminate all the major problems that are evident in the area of prejudgment remedies for unsecured claimants.

7.35 One reason for our skepticism towards the view that the Mareva injunction has or soon will solve all our problems in this area is that it is only one of several prejudgment remedies which are available to plaintiffs. The defects, major and minor, which afflict the statutory remedies cannot be made to go away by judicial fine-tuning of the Mareva injunction. Of course, to the extent that the Mareva injunction is simply a more flexible and effective alternative to the statutory

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[425] *Supra* paras. 3.54-3.60.

[426] A.T. Denning, The Due Process of Law (1980), 134.

remedies, many defects in the latter will be rendered academic, because the plaintiff who is unhappy with a statutory remedy will apply for a Mareva injunction instead.

7.36 But, as we have seen, in some instances it is not the plaintiff but the defendant who suffers the burden of a defect in the statutory remedies. Since the plaintiff gets to choose which remedy to pursue, he naturally will choose the one that is most advantageous to him and, perhaps, most prejudicial to the defendant. Suppose, for example, that a plaintiff thinks he could successfully apply for either a writ of attachment or a Mareva injunction, and is not anxious to expose himself unnecessarily to liability for damages suffered by the defendant if his action is ultimately unsuccessful. He can avoid giving an undertaking in damages by the simple expedient of applying for a writ of attachment instead of a Mareva injunction. Thus, the development of the Mareva injunction is not likely to bring about significant improvement with respect to defects in the existing statutory remedies which adversely affect defendants, rather than plaintiffs.

7.37 If the Mareva injunction in its present or foreseeable state of development were now or would eventually become a perfectly adequate prejudgment remedy, the problems outlined in the preceding paragraph could be dealt with by simply abolishing the existing statutory prejudgment remedies. Plaintiffs would then be unable to pick and choose between remedies in the manner just described. As is presently the case in England, there would only be one remedy: the Mareva injunction. However, this approach could only be regarded as appropriate if we were convinced that considered by itself, the Mareva injunction is, or is likely to develop into as effective and as just a prejudgment remedy as might be achieved through legislative action. In this respect, we are not as sanguine as our correspondent quoted in paragraph 7.33.

7.38 One very significant problem associated with the Mareva injunction in Canada is uncertainty. We do not mean the sort of uncertainty which attends the fact that the Mareva injunction is a discretionary remedy. Rather, we mean uncertainty as to the very principles which the courts should apply in dealing with the issues which have arisen or are likely to arise in relation to the Mareva injunction.

7.39 Perhaps the most critical issue concerning any prejudgment remedy is the circumstances in which it can be obtained. But this is an issue which Canadian cases have not

wrestled to the ground, even though several provincial appellate courts, including our own,[427] as well as the Supreme Court of Canada,[428] have had at least one crack at it. Indeed, it is fair to say that some of these cases have left the law relating to this issue in a less settled state than they found it. This is true, for example, of the *Feigelman*[429] decision.

7.40 As we saw in Chapter 2, in *Feigelman* the Supreme Court confirmed that Canadian courts do have the jurisdiction to grant Mareva injunctions. However, the judgment then went on to conclude that in the instant case the Manitoba courts had wrongly exercised their discretion by enjoining a federal company from removing its assets from one province to another province in the ordinary course of business. Apparently coming to the conclusion that the root of the Manitoba courts' error was in uncritically applying English precedents to the very different circumstances of a federal nation, the Supreme Court observed that "one must not apply in toto or verbatim the dicta of the decisions in other legal systems though they may have much in common with those of Canada".[430]

That is a sensible statement, so far as it goes. Unfortunately, the judgment does not go on to indicate which principles or dicta of the English jurisprudence are considered to be incompatible with the Canadian "federal context",[431] or to give any indication of the Court's view as to when it *would* be appropriate for a Canadian court to grant a Mareva injunction.[432] Moreover, the Court seemed to give credence to the rather dubious "fraud exception" doctrine.[433]

7.41 In our own province, the Court of Appeal's brief consideration of the Mareva injunction in *Bradley Resources*[434] has certainly not clarified the circumstances in which this remedy is available. What the Court did do was draw a somewhat cryptic distinction between Mareva

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427 *Bradley Resources* v. *Kelvin Energy, supra* n. 104.

428 *Aetna Financial Services* v. *Feigelman, supra* n. 102.

429 *Ibid.*

430 *Id.* at 125.

431 *Id.* at 126. See n. 274 *supra*, where it is argued that there is nothing in the principles acted on by the English courts that is inconsistent with the result actually reached by the Supreme Court in *Feigelman*.

432 E. Gertner, "The 1984-85 Term: Opportunities Lost", foreword to (1986) 8 *Sup. Ct. L.R.* vii at x-xi.

433 See Chapter 6, section A.

434 *Supra* n. 104.

injunctions and *quia timet* orders to protect against feared future harm.[435] We would venture to suggest that this distinction will not make any easier the task of judges in future cases who have to decide whether to grant a Mareva injunction.

7.42 In short, there is good reason to think that the process of elaborating through caselaw the principles upon which Mareva relief should be granted in this province would be a relatively slow and uncertain process. The number of occasions upon which the English Court of Appeal has had to consider issues arising in relation to the Mareva injunction is a fair indication that we could not expect our own Court of Appeal to resolve all or even a substantial proportion of these issues in one fell swoop. In Alberta there has so far been but a single reported decision dealing with the Mareva injunction,[436] so it would seem unreasonable to expect that authoritative guidelines on most of the issues connected with the Mareva injunction would quickly emerge from the law reports. Thus, we agree with our correspondent that if authoritative guidelines on this were eventually to emerge from the "common law", it probably would not be until the next century.

7.43 We do not think that litigants, or judges who are called upon to grant Mareva injunctions, should have to wait until the next century for guidance. Based on what we have been told by practicing lawyers, the paucity of reported decisions on Mareva injunctions in this jurisdiction belies the true situation, which seems to be that applications for Mareva injunctions, although not an everyday occurrence, are not all that rare. The combination of the lack of authoritative guidelines relating to Mareva injunctions and a fairly frequent resort to this remedy is unhealthy. In the absence of authoritative guidelines, different judges are likely to take different approaches and apply or emphasize different principles in considering applications for Mareva injunctions. At the very least, this will result in infringement of the principle that like cases should be treated alike. We believe that this alone is reason enough for the legislature to provide authoritative guidelines in an area where, as to many of the important issues, there are presently none.

7.44 The final point we shall make here is that we do not think it is proper to leave it up to individual litigants and the courts to develop this area of the law. The broad issue we are dealing

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435 *Id.* at 766.

436 *Bradley Resources* v. *Kelvin, id.* We understand that the decision of Wachowich J. in *Banco Ambrosiano* v. *Dunkeld Ranching, supra* n. 268 is under appeal.

with involves many important points of principle and policy which merit the consideration of the legislature. This is not to say that it is either possible or desirable for the legislature to establish detailed rules on every conceivable issue which could arise in this area. Rather, what is needed, in our opinion, is legislative guidance as to the principles which should be applied by the courts in considering applications for prejudgment relief.

C. Reform in Other Provinces

7.45 We left off our account of the history of prejudgment remedies in Canada at about the turn of this century. We noted that by that time, every province in Canada had legislation or rules of court which were similar in substance to our absconding debtor rules, and that several provinces also made provision for prejudgment garnishment. In the last few years there have been significant legislative changes or proposals for change in no less than six provinces: Nova Scotia, Prince Edward Island, British Columbia, New Brunswick, Newfoundland and Ontario. We do not propose to discuss these changes or recommendations in any great detail here, but we think it would be useful to describe what in each province appears to have been the main thrust of the changes or recommendations for change.

1. Nova Scotia, Prince Edward Island and Newfoundland

7.46 It will be recalled that Nova Scotia has had legislation dealing with the problem of absent or absconding debtors since 1761.[437] Some 210 years later, in 1971, the existing rules on this subject, which in the meantime had undergone substantial but incremental changes, were done away with and replaced by a completely new set of rules.[438] This was part of a complete overhaul of Nova Scotia's civil procedure rules. In 1976 Prince Edward Island adopted rules of civil procedure containing attachment provisions[439] which, with one exception to be mentioned below, are virtually identical with those in the Nova Scotia Rules. In 1986, Newfoundland also adopted new rules of procedure containing attachment provisions[440] substantially identical to Nova Scotia's. For the sake

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[437] *Supra* para. 2.31.

[438] N.S. Civil Procedure Rules, R. 49.

[439] P.E.I. Civil Procedure Rules, R. 49.

[440] Rules of the Supreme Court, 1986, R. 28.

of brevity, we shall generally refer only to the Nova Scotia Rules.

7.47 Perhaps the most important feature of any prejudgment remedy is the grounds upon which it may be awarded. In this respect, the Nova Scotia Rules are fairly liberal. Rule 49.01(1) enumerates six different circumstances which may ground an attachment order.[441] Given the conclusion of the Supreme Court of Canada in *Aetna Financial Services Limited* v. *Feigelman*[442] it is interesting that one of the grounds listed in Rule 49.01(1) is that the defendant "is about to remove or has removed his property or any part thereof permanently out of the jurisdiction".[443] Thus, in one respect at least, the grounds for attachment under the Nova Scotia Rules would seem to be even wider than are the grounds for obtaining a Mareva injunction.

7.48 Another important feature of the Nova Scotia attachment provisions is that not only is the application for an attachment order made *ex parte*, it is made to an official, called a prothonotary, whose function does not appear to be to weigh the evidence and decide whether an attachment is warranted, but simply to ensure that the plaintiff's affidavit meets the technical requirements of the Rule.[444] However, the plaintiff is required to file a bond by which he and his sureties undertake, among other things, to pay any damages which may be suffered by the defendant or by anyone else as a result of the attachment.[445] Moreover, the defendant or any person claiming any interest in the attached property is entitled to make an application to have the attachment order set aside or modified, or to have certain property released from the attachment.[446] Provision is also made for the defendant or other person claiming to be the owner or entitled to possession of attached property to file a bond as security for the plaintiff's claim, and thereby retain or regain possession of

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441 Rule 49.01(1) is set out *infra* para. 8.32.

442 *Supra* n. 102.

443 It will be recalled that in *Feigelman, id.* at 124-26 the Supreme Court held that the mere removal by a defendant of his property from one province to another province is not a proper ground for granting a Mareva injunction.

444 R. 49.01(2). The prothonotary may refer an application for an attachment (or any other sort of) order to a judge: R. 51.05(2).

445 R. 49.03.

446 R. 49.10(2),(3); R. 49.12.

the property.[447]

7.49 As for the attachment order itself, it authorizes and directs the sheriff to attach "any property in which a defendant has an interest" and which is not exempt from seizure.[448] The term "any property" is expressly stated to include, among other things, "any debt", and the sheriff is specifically authorized to "accept as a receiver" any property which may be attached.[449] Thus, while debts may indeed be attached under the Nova Scotia Rules, the procedure and grounds for doing so are exactly the same as for any other sort of property. By contrast, in their one major departure from the Nova Scotia Rules, the Prince Edward Island Rules do make special provision for the attachment of debts both before and after judgment.[450] It would seem that in Prince Edward Island the plaintiff seeking to attach a debt due to the defendant does not have to show any of the special circumstances that would have to be shown in order to obtain an ordinary attachment order under Rule 49.[451] It is not clear why Prince Edward Island chose to maintain this distinction between the prejudgment attachment of debts and the prejudgment attachment of other sorts of property.

2. New Brunswick

7.50 As we mentioned in Chapter 2, New Brunswick's original attachment legislation of 1786 was quite unusual, in that it had many of the attributes of modern bankruptcy legislation. In 1976 the Law Reform Division of the New Brunswick Department of Justice issued a report[452] which recommended, amongst other things, that the existing Absconding Debtors Act, which still followed the 1786 model, be repealed and replaced with legislation more along the lines of the standard

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447 R. 49.06.

448 R. 49.04.

449 *Id.*

450 P.E.I. R. 49.14.

451 *Ibid.* The plaintiff applying before judgment to attach a debt due to the defendant must file an affidavit intended to show that he has a good claim against the defendant, but he is not required to show that there is any particular need for a prejudgment remedy.

452 New Brunswick Department of Justice, Law Reform Division, *Third Report of The Consumer Protection Project, Vol. II, Legal Remedies of The Unsecured Creditor After Judgment* (1976), 92-6.

Canadian approach. The report argued that the existing legislation rested on a very shaky constitutional footing because of the striking resemblance its procedure bore to bankruptcy procedure.[453] However, the report voiced more fundamental objections to the existing procedure:

> [The provisions of the Act] face other objections. They provide an unnecessary short-cut for creditors to avoid the normal procedure to judgment. To a large extent they provide execution without judgment, rather than execution before judgment. The latter may be acceptable where safeguards are provided to ensure that the plaintiff either obtains judgment or compensates the defendant, but execution without judgment is contrary to due process of law.[454]

7.51 To date, New Brunswick's legislature has not acted on the recommendations of the report: the province still has its unusual absconding debtors legislation. However, one interesting development, also noted in Chapter 2, is that in 1982 the Mareva injunction was given explicit recognition in Rule 40.03 of the New Brunswick Rules of Court. Since the rule is short, we shall quote it in full:

> 40.03 **Injunction For Preservation of Assets (Mareva Injunction)**
>
> (1) Where a person claims monetary relief, the court may grant an interlocutory injunction to restrain any person from disposing of, or removing from New Brunswick, assets within New Brunswick of the person against whom the claim is made.
>
> (2) In considering whether to grant an injunction, the court shall take into account the nature and substance of the claim or defence, and consider whether there is a risk of the assets being disposed of or removed from New Brunswick.
>
> (3) Notwithstanding Rule 40.02, an injunction may be granted under this subrule to remain in effect until judgment.
>
> (4) Where an injunction has been granted under this subrule to remain in effect until judgment and the claimant succeeds on his claim for debt or damages, the injunction shall, without further order, continue in effect until the judgment is satisfied.

We suspect that given the availability of the Mareva injunction, very few creditors would resort to the cumbersome procedure of New Brunswick's Absconding Debtors Act.

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[453] *Id.* at 95, n. 98.

[454] *Id.* at 95.

3. Ontario

7.52 In 1983 the Ontario Law Reform Commission recommended sweeping changes in the laws of that province relating to prejudgment remedies for unsecured creditors.[455] The Ontario Commission paid considerable attention to the attachment provisions of Nova Scotia's Civil Procedure Rules, and many of the Commission's recommendations take the same approach as the Nova Scotia Rules. However, in several instances the Commission's recommendations depart from the approach taken in Nova Scotia. Without going into detail at this point, we shall highlight those areas where the recommendations of the Ontario Commission part company with the Nova Scotia Rules.

7.53 The Ontario Commission could see no sense in having a variety of different prejudgment remedies, each involving a different procedure and different grounds for relief. Thus, with an exception for provisional relief in proceedings arising out of Ontario's Family Law Reform Act, the Commission recommended that all existing prejudgment remedies, including the Mareva injunction, be done away with and replaced by a single remedy, called attachment.[456] The remedy would be flexible and, depending on the circumstances, might involve physical seizure of property, notional seizure ("walking possession"), registration of an attachment order under the Personal Property Security Act or in the Land Registry or Land Titles Office, or an injunction. In a sense, it would be more accurate to say not that there would be a single prejudgment remedy, but that on any application for prejudgment relief the court would be able to grant the type of remedy which seemed most suitable in the circumstances.

7.54 The catalogue of circumstances in which a plaintiff could get an attachment order would be shorter under the Ontario Commission's proposals than it is under the Nova Scotia Rules. However, if the Ontario plaintiff could not fit his case within the confines of one of the specifically enumerated circumstances, he could still hope to rely on a "basket clause", a provision allowing the court to grant a prejudgment remedy "whenever there is a danger that, without such relief, recovery

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[455] Ontario Report, *supra* n. 53. The Commission's recommendations regarding prejudgment remedies have yet to be implemented.

[456] Of course, Nova Scotia's Civil Procedure Rules can hardly be criticized for not dealing with injunctive relief. The Mareva injunction had not been invented when the Rules came into force.

of a debt may be jeopardized".[457] Although the Ontario Commission agreed that attachment orders should be available on *ex parte* applications, it departed from the Nova Scotia Rules in recommending that the application should be made to a judge, who would have to be satisfied that the plaintiff was entitled to the relief sought.[458] The judge's conclusion on the *ex parte* application would only be tentative, in that any attachment order granted on an *ex parte* application would be temporary, and would have to be continued on an application made on notice to the defendant.[459]

4. British Columbia

7.55 In 1978 the British Columbia Law Reform Commission issued a short report[460] concerning the Absconding Debtors Act and the Bail Act. The report concluded that these two statutes had outlived any usefulness they may ever have had, and recommended that they be repealed. This recommendation was acted on by the legislature in 1978,[461] and since that time British Columbia has made do without absconding debtors legislation. It should be noted, though, that the Commission was not inspired by any conviction that prejudgment relief for unsecured claimants was wrong in principle. Rather, the Commission concluded that whatever might be the arguments in favour of providing prejudgment relief to unsecured claimants in certain circumstances, the Absconding Debtors Act was not an appropriate vehicle for doing so:

> One thing that is clear to us at this stage is that the *Absconding Debtors Act* does not provide an appropriate legal framework for a more general prejudgment remedy. It is over 150 years old in concept; its language and substance are directed to a society and a legal regime that ceased to exist many years ago; and it adopts unacceptable criteria for the granting of relief. The Act is beyond repair and should be repealed as obsolete.[462]

The narrow basis of the Commission's recommendation that the Absconding Debtors Act be repealed

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457 Ontario Report, *supra* n. 53 at 120 (Recommendation 3(d)).

458 *Id.* at 122 (Recommendation 18).

459 *Id.* at 122 (recommendation 19(1)).

460 Law Reform Commission of British Columbia, *Report on the Absconding Debtors Act and Bail Act: Two Obsolete Acts* (1978).

461 Attorney-General Statutes Amendment Act (1978), s. 1.

462 Law Reform Commission of British Columbia, *supra* n. 460 at 8.

is confirmed by its report on the Attachment of Debts Act, also issued in 1978, which recommended that "subject to a number of qualifications, prejudgment garnishment should continue to be available" in British Columbia.[463]

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[463] Law Reform Commission of British Columbia, *Report on the Attachment of Debts Act* (1978) 39. The authority for the attachment of debts in British Columbia, either before or after judgment, is presently found in the Court Order Enforcement Act, s. 4.

CHAPTER 8

RECOMMENDATIONS FOR REFORM

A. Overview

8.1 This chapter contains our recommendations for reform of the law relating to prejudgment remedies for unsecured claimants. Two general recommendations are set out at the end of this section, but most of our recommendations are contained in the three succeeding sections entitled, respectively, "The Circumstances in which an Attachment Order may be Granted", "The Nature of the Attachment Order", and "Procedure and Safeguards". Our discussion and recommendations make reference to and draw upon the approaches which legislatures, courts and law reform bodies in this and other jurisdictions have taken to resolving these issues, but we are not at all bashful about elucidating and acting upon our own thoughts.

8.2 At the end of our discussion of each issue or group of related issues, we set out our formal recommendation or recommendations relating to it or them. The recommendations reflect our view that the primary object of legislation in this area should not be to establish a set of rigid rules to govern every possible situation, but, rather, to articulate principles which will guide the courts while allowing them the flexibility necessary to deal with new or unusual situations as they arise.

1. Terminology

a. "Claimant"

8.3 Up to this point we have generally referred to the person seeking a prejudgment remedy as a "plaintiff". The simple reason for doing so is that the person seeking a prejudgment remedy usually *is* the plaintiff in an action. However, it is quite possible for prejudgment remedies to be sought by persons who do not fit comfortably under the rubric of "plaintiff". The person seeking prejudgment relief may be a defendant who has set up a counterclaim, in which case he becomes the "plaintiff by counterclaim". Or a prejudgment remedy may be sought before an action is commenced, in which case we would have a "prospective plaintiff". In order to avoid such terminological muddles, we shall henceforth generally refer to the person who is seeking or has

obtained a prejudgment remedy as the "claimant", although we may sometimes have occasion to use the more specific term, "plaintiff". We shall continue to refer to the person or persons against whom a prejudgment remedy is sought or granted as the "defendant".

b. "Execution" or "Enforcement"

8.4 At present, a person who gets a money judgment against a defendant may issue a writ of execution, and the process of enforcing the judgment is referred to as "execution" of the judgment. In Report for Discussion No. 3 we tentatively recommended that "all existing remedies for the enforcement of money judgments should be abolished and replaced by one new remedy, to be called the enforcement order".[464] This tentative recommendation will be carried forward and expanded upon in subsequent reports in this series. As a matter of fact, the recommendations contained in this chapter are entirely compatible with the existing law relating to the enforcement of judgments in this province. However, so as to achieve terminological consistency between this and other reports in this series, our recommendations will refer to enforcement orders and enforcement of judgments, rather than to writs of execution and execution of judgments. At the same time, we shall still have occasion to refer to the existing law, and this will require some resort to the existing terminology.

c. "Dispose"

8.5 As rich as it is, the English language sometimes refuses to yield a word which in its ordinary usage precisely captures the idea one wishes to convey. We are faced with this problem in trying to describe the mischief which prejudgment remedies are supposed to combat. Broadly stated, this mischief consists of defendants doing something with their property which will put it beyond the reach of creditors. There are many ways in which this can be accomplished; property can be destroyed or damaged (either actively or by neglect), hidden, removed from the jurisdiction, sold, mortgaged, or given away, just to mention some of the more obvious possibilities. Unfortunately, there is no single word whose ordinary meaning encompasses all these possibilities. For convenience, we shall adapt a word to serve this purpose. The word is "dispose", and its derivative noun form, "disposition". In ordinary speech, to say that someone has disposed of

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[464] *Supra* n. 1 at para. 6.99.

something is to suggest that he has permanently rid himself of it. However, we shall use "dispose" in an extended sense, comprehending anything a defendant might do, or not do, with his property that would make it unavailable or less available to his creditors.[465]

2. A Single Mechanism for Obtaining Prejudgment Relief

8.6 In stating the case for reform in the preceding chapter, we emphasized the incoherency and inconsistency of our existing potpourri of prejudgment remedies. The disparate grounds and procedure for obtaining the various remedies offend the principle of treating like cases alike. Whenever a claimant applies for one of these remedies the court must ask the following two questions in this order: 1) What remedy is the claimant seeking? 2) Does the claimant satisfy the conditions that have been laid down for obtaining that remedy? That is, the conditions to be satisfied by the claimant depend upon the type of remedy he is seeking. In contrast, we think the court should consider these two questions: 1) Has the claimant made out a good case for prejudgment relief? 2) If so, what is the best way of providing this relief, all things considered?

8.7 The best way to obtain a coherent, consistent system of prejudgment remedies for unsecured claimants is to replace the various existing prejudgment relief mechanisms with a single, well thought-out procedure for obtaining provisional relief. Our recommendations are intended to accomplish this result. Every claimant seeking a prejudgment remedy would be required to follow the same basic procedure and to satisfy the same general conditions in order to obtain relief. Once the claimant had made out a case for a remedy, the court could provide it by making what we shall call an "attachment order". The proposed attachment order should not be confused with the present writ of attachment. The attachment order would be a flexible device by means of which the court, subject only to broad legislative constraints, could grant whatever sort of relief seemed most appropriate in the circumstances.

8.8 We have just said that the attachment order would replace the various existing prejudgment relief mechanisms. We would include within our definition of "prejudgment relief mechanism" the various means which the courts have used to provide some sort of security for

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[465] We adopt this convention throughout this chapter. However, in the expectation that not everyone who reads our formal recommendations will have read the full text of our report, we use the phrase "dispose of or deal with" in some of the recommendations.

claimants whose default judgments are opened up.[466] Once the court opens up a claimant's default judgment, he should be in the same position as any other claimant, so far as security for his claim is concerned.[467] Hence, there should be no special prejudgment remedies--writ (or enforcement order) saving, payment of money into court, or otherwise--for claimants whose default judgments have been set aside. Such a person simply has an unproven claim against the defendant which could result in a money judgment, so the grounds for and nature of any provisional remedy should be the same as for any other person with such a claim.

8.9 Moreover, the practice of saving writs of execution (or enforcement orders) upon opening up a default judgment raises certain practical problems. Legislation regarding writs of execution (enforcement orders) naturally assumes that they are only given to persons who are true judgment creditors. The incidents of this status include, for example, the right to share in a distribution of the proceeds of enforcement measures initiated by any judgment creditor of the defendant. Obviously, this right should not extend to someone whose writ of execution (enforcement order) has been preserved upon the opening up of his default judgment. Thus, if proceeds of enforcement proceedings are distributed before the claimant whose writ has been preserved obtains a second judgment, it will be necessary for the court to make special provision for disposition of the share that would ordinarily go to that claimant.[468] This is but one example of the complications that may arise if a mechanism for enforcing judgments is pressed into service as a surrogate prejudgment remedy.

8.10 One practical point that we have considered is that applications to open up default judgments are generally made to a master in chambers, while we shall propose that, for constitutional reasons, applications for attachment orders be required to be made to a judge.[469] Hence, the official most likely to be called on to open up a default judgment would not have the authority to

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[466] See Chapter 6, section C. We use the term "opening up" rather than the term "setting aside" in recognition of the fact, discussed in Chapter 6, that in this province default judgments are sometimes opened up without being set aside.

[467] See Springman, *supra* n. 380 at 379-80.

[468] In *Larnu Distributors* v. *Brochu, supra* n. 376 Master Funduk ordered that the claimant's share of any distribution by the sheriff under the Execution Creditors Act be paid into court to the credit of the action.

[469] See *infra*, para. 8.117.

grant an attachment order. If masters in chambers had no means of providing claimants whose judgments were opened up with some sort of security, they might well be more hesitant than they now are to open up default judgments in borderline cases.

8.11 However, while under our recommendations masters in chambers would not have the authority to grant an attachment order, they would still have the ability to impose terms on defendants as a condition of opening up default judgments. Thus, the master could make the opening up of a default judgment conditional upon the defendant first consenting to an attachment order, which would actually be granted by a judge. In deciding whether to impose such a condition, the master would have regard to the same considerations that a judge would have to consider on an application for an attachment order. If the defendant was unhappy with that condition he could, of course, appeal the master's order to a judge in chambers.

RECOMMENDATION No. 1

A statutory prejudgment remedy called the "attachment order" should be created. Attachment orders should only be available in the circumstances and in accordance with the procedure and safeguards set out in this report.

RECOMMENDATION No. 2

The following mechanisms by which an unsecured claimant may obtain prejudgment relief should be eliminated:

(a) writs of attachment under Rules 485-493 of the Rules of Court;

(b) garnishee summons before judgment under Rule 470(1);

(c) appointment of a receiver of proceeds of an auction sale under Rule 465;

(d) the granting of Mareva injunctions or similar relief under s. 13(2) of the Judicature Act;

(e) the various existing methods of providing security for a claimant whose default judgment is set aside pursuant to Rule 158.

B. The Circumstances in Which an Attachment Order may be Granted

1. The Nature and Amount of the Claim

8.12 In Chapter 1 we stated that we did not wish to arbitrarily limit ourselves to a consideration of claimants seeking to recover debts or liquidated demands. We would consider as

within the scope of our enquiry any claim which could result in a money judgment or award. Here we consider whether attachment orders should be available only to claimants asserting particular sorts of claim, such as claims in respect of debts or liquidated demands, or to claimants with claims for more than a certain amount.

a. Distinctions based on the nature of the claim

8.13 As far as distinctions on the basis of the nature of the claim go, there are two basic alternatives. The first is to allow attachment in appropriate cases no matter what sort of claim the claimant is asserting, so long as it could result in a money judgment. This is the approach recommended by the Ontario Law Reform Commission[470] and it is also reflected in the existing legislation of some jurisdictions.[471] Moreover, as noted in Chapter 5, Mareva injunctions are not restricted to particular sorts of monetary claims, such as claims for debts or liquidated demands.

8.14 The second alternative is to restrict the availability of attachment to claims of a particular character or claims which arise in particular circumstances. As we have seen, in Alberta both prejudgment garnishment and attachment of personal property are only available where the claimant is trying to enforce a debt or liquidated demand. This is a feature of many older statutes, and also of some newer ones.[472] Alternatively, or in addition to restricting prejudgment relief to claims falling into a particular legal category (e.g. claims for debts or contractual claims), it could be restricted to claims that arise in particular circumstances. In California, for example, in cases involving individual as opposed to corporate defendants, prejudgment relief is only available in respect of contractual claims arising out of the conduct by the defendant of a trade, business or profession.[473]

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[470] Ontario Report, *supra* n. 53 at 83-4.

[471] British Columbia's Court Order Enforcement Act, s. 4 (applicable only to attachment of debts); Nova Scotia Civil Procedure Rules, R. 49.01; New York Civil Practice Law and Rules, s. 6201.

[472] California's Code of Civil Procedure, s. 483.010 restricts attachment to claims on a contract for a fixed or readily assertainable amount.

[473] *Id.*, s. 483.010(c).

(i) Liquidated and unliquidated claims

8.15 Is there a significant difference between a situation where C_1 is claiming money lent to D_1, and a situation where C_2 is claiming monetary compensation from D_2 because, say, D_2 deliberately burnt down C_2's house? Is there a difference, that is, which makes it proper to allow the attachment of D_1's property to meet C_1's claim but improper to allow the attachment of D_2's property to meet C_2's claim. Of course, there are many differences between the two situations - C_1's claim is based on contract, C_2's on tort; C_1's claim is liquidated, C_2's is not. But do any of these differences justify the proposed difference in treatment?

8.16 Certainly, no one would say that C_2 is less deserving of the court's assistance than C_1 because of the nature of the former's claim, nor that D_1 should necessarily be in a more vulnerable position than D_2 because of the differences between the claims against them. Could we say that there is something about C_1's claim as compared to C_2's, that makes it intrinsically more likely that C_1 will be able to prove his claim than it is that C_2 will be able to establish his? Surely not. Depending on the evidence available at the time the attachment order is applied for, the validity of C_2's claim against D_2 might well be more obvious than is the validity of C_1's claim against D_1. To the extent that the claimant's chances of ultimate success are a consideration in the decision to grant an attachment order, this consideration would be better served by requiring a relatively high standard of proof on the application for attachment than by excluding certain types of claim from eligibility for relief.

8.17 Another possible justification for the proposed distinction is that in the case of a liquidated claim the amount of the claimant's eventual recovery can be calculated in advance, whereas in the case of an unliquidated demand it can only be estimated. Suppose this were true. What sort of argument does it provide for categorically denying prejudgment relief to claimants with unliquidated demands? Could it be argued that since the amount of the claimant's eventual recovery must be estimated instead of calculated, there would be too much scope for excessive attachments based on exaggerated estimates of the claimant's damages? Such an argument might have considerable plausibility if the claimant were responsible for making the estimate, but it becomes much less plausible if it is a judge, rather than the claimant, who is responsible for estimating the amount of the damages. Any legitimate concern about defendants being subjected to excessive

attachments in respect of unliquidated claims could be addressed by making it clear that the amount of any attachment order is to be based on a conservative judicial estimate of the claimant's damages.

8.18 The best argument we have come across for drawing a distinction between unliquidated claims, which tend to be tortious, and liquidated claims, is that very often the defendant in a tort action has liability insurance which covers the claimant's claim, so the claimant has no need to worry about collecting on any judgment he may get. Certainly, tort claims are often covered by liability insurance, a fact which undoubtedly makes rarer than they otherwise would be situations where the claimant in a tort action requires prejudgment relief. However, that such situations may arise relatively infrequently is not to us a good reason for denying a remedy where it is required.

8.19 In short, we do not think that there is any justification for the proposed distinction between liquidated and unliquidated claims. Indeed, as was seen in our discussion of writs of attachment and prejudgment garnishment, the chief result of the restriction of these remedies to "debt or liquidated demands" has been a great deal of court time and litigant's money being spent in arid debates over the applicability of this phrase to various kinds of borderline claims. And because many judges have attempted to achieve a just result while purporting to stay within the letter of the law, many decisions on the meaning of this phrase are explicable only on the basis that they are attempts to do justice in spite of the "debt or liquidated demand" requirement. Thus, we believe it would be in the interest not only of justice and fairness, but also of court time and litigants' pocketbooks, to allow attachment orders to be made in respect of any claim which could lead to a money judgment against the defendant, whether the claim is or is not for a debt or liquidated demand. We are fortified in this conclusion by the fact that it is consistent with the views of other law reform bodies which have recently considered this issue.[474]

(ii) The circumstances in which the claim arises

8.20 We mentioned a few paragraphs ago that in California, where the defendant is an individual (as opposed to, say, a corporation) attachment is only permitted where the claim arises out of a trade, business or profession conducted by the defendant. The origin of this particular distinction is to be found in the American constitutional cases which found especially repugnant to

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[474] Law Reform Commission of British Columbia, *supra* n. 463 at 40-41; Ontario Report, *supra* n. 53 at 83-84.

notions of due process statutes that permitted prejudgment attachment of consumer necessities or wages, especially where the claimant did not need prior judicial approval for the attachment. The California Law Revision Commission found in this concern a justification for restricting prejudgment relief to commercial transactions:

> Certainly a partially effective, if indirect, way of preventing attachment of such consumer necessities is to deny the use of the remedy in actions based on obligations generally and to authorize attachment only in actions to recover debts arising out of the conduct by the defendant of a trade, business or profession.[475]

8.21 In evaluating the California Commission's proposals it should be kept in mind that in California, so long as the claimant's claim fits into the right sort of category - a contractual claim for a fixed or ascertainable amount - prejudgment attachment is generally available without the need to show any special necessity for it.[476] Since prejudgment attachment is so readily available in California, it is perhaps not surprising that special protections are thought necessary for certain classes of vulnerable defendants. In our view, if one's goal is to preserve consumer necessities from attachment, or more generally, to prevent abuse of prejudgment remedies, there are much better ways of doing so than by simply disallowing relief where the defendant is wearing his consumer's hat. Therefore, we do not recommend that attachment be restricted to claims arising out of commercial contracts.

8.22 Another feature of the California attachment procedure is that a secured creditor is not permitted to resort to prejudgment attachment unless through no fault of his own the security has become valueless or has decreased in value to less than the amount owing on the claim, in which case the undersecured creditor can get an attachment for an amount representing the difference between the claim value and the security value.[477] Certainly, there would seem to be no good reason to allow a well secured creditor to attach property of his debtor in which he does not have a security interest. On the other hand, in the case of an undersecured creditor, we do not think that the fact that he has some security should disqualify him from obtaining prejudgment relief if the need for it can be

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[475] California Law Revision Commission, *Reports, Recommendations and Studies* (1972-73) at 722.

[476] If the claim is not in this special category the attachment may still be available but then the claimant will have to show special circumstances: C.C.P., s. 492.010.

[477] *Id.* s. 483.010(b).

shown. Of course, an applicant for an attachment order who has some form of security should be required to make this fact clear to the court, so the latter may take this into account when deciding whether an attachment order is warranted.

b. Distinctions based on the amount of the claim

8.23 Much of the older and some of the more recent prejudgment relief legislation only allows relief to be granted for claims in excess of a certain amount. For example, in Alberta the absconding debtor rules can only be resorted to for a claim of $200 or more. California's Code of Civil Procedure, which is of more recent vintage than our absconding debtor rules, limits prejudgment attachment to cases where the total amount of the claimant's claim or claims is $500 or more, exclusive of interest and costs.[478] On the other hand, most modern prejudgment relief legislation does not have a monetary threshold. For instance, a garnishee summons before judgment can be obtained in this province no matter how small the claimant's claim may be. This trend is supported by the Ontario Commission, which rejected the notion of a monetary threshold for the availability of prejudgment attachment, recommending that "prejudgment attachment should be available regardless of the amount claimed by a creditor in his main action".[479]

8.24 In discussing the already existing threshold of $500.00 in its 1973 report, the California Law Revision Commission had this to say in its defence:

> This limitation also tends to eliminate those cases where consumer necessities might be attached. Moreover, the elimination of these relatively small cases helps to save court time and resources which are inefficiently employed to collect such debts under the attachment procedure. It should be noted also that the $500.00 minimum corresponds to the jurisdictional limit of the Small Claims Court; hence for lesser amounts a creditor will generally have an expeditious legal remedy available to him.[480]

The Ontario Commission did not find the reasons given in the California Report persuasive,[481] and we agree with the former in rejecting any minimum monetary threshold for the availability of

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[478] *Id.* s. 483.010(a).

[479] *Supra* n. 53 at 85.

[480] *Supra* n. 475 at 723-24.

[481] *Supra* n. 53 at 85.

prejudgment relief. Our main reason for doing so is the principle that like cases ought to be treated alike. Supposing the threshold were set at $2,000 (the present upper limit of the Small Claims Division's jurisdiction), there would be something incongruous in granting prejudgment relief to one claimant and denying it to another simply because the former's claim was for $2,001.00 and the latter's only $1,999.00. The fact that the claim a person brings before the court is relatively small should not make it any less worthy of consideration. And the safeguards we recommend later in this chapter should be as effective to protect defendants in cases involving small amounts as to protect defendants in cases involving large amounts.

8.25 If there is to be no minimum monetary threshold for the availability of attachment orders, the question arises as to whether the Small Claims Division of the Provincial Court should be able to grant such orders in respect of claims within its jurisdiction. We think not. Quite apart from any consideration of the merits of allowing attachment orders to be made by Small Claims Division judges, there would be constitutional problems in doing so. For, as will become apparent later in this chapter, the proposed attachment order is a remedy which arguably must be granted by a judge appointed under s. 96 of the Constitution Act, 1867, which a judge of the Small Claims Division is not.[482]

RECOMMENDATION No. 3

The Court of Queen's Bench should be authorized to grant an attachment order in respect of any claim which could lead to the recovery by the claimant of a money judgment against the defendant.

2. The Grounds for Attachment

8.26 Perhaps the most important issue we have to address concerns the grounds for issuing attachment orders. There are really a series of issues here. The first issue is whether the legislation should even attempt to specify the grounds for attachment, or whether they should be left for the courts to determine. If the latter course were chosen, courts might simply be authorized to grant attachment orders whenever it appeared to be just and equitable to do so. The advantage of this approach is that it would give judges a very large measure of flexibility in dealing with

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[482] See n. 550. As noted in Report for Discussion No. 3, *supra* n. 1 at 25-6, it is very doubtful that a judge of the Small Claims Division now has the power to grant any sort of prejudgment remedy.

applications for attachment orders. Its main disadvantage is that it would entirely abdicate to the courts the critical chore of deciding upon and articulating the principles upon which applications for prejudgment relief should be decided. While we think it is important that the courts be given a fair measure of discretion in this area, we are also convinced that the legislature should give some guidance as to the basic principles to be applied by courts in considering applications for attachment orders.

8.27 We are of the view that these goals can be achieved by a two stage process combining statutory threshold requirements and judicial discretion. What we mean by a threshold requirement is simply this, that as a necessary condition for getting an attachment order, the claimant would have to satisfy the court as to certain specified matters. Upon being satisfied as to these threshold matters, the court would have a discretion to grant an attachment order if, in all the circumstances, it considered that it would be just and equitable to do so. The underlying idea behind the threshold requirements is this. Although it may be impossible to identify in advance all the situations in which it might be appropriate to grant an attachment order (hence, the discretion given to the court), it is possible to identify certain circumstances in which we can be pretty sure that it would be inappropriate to do so. The purpose of the threshold requirements is to ensure, so far as it is possible to do so and still have a reasonably effective prejudgment remedy, that attachment orders are not granted where these circumstances exist.

8.28 The threshold requirements we shall recommend relate to two issues that are bound to be of central importance on any application for a prejudgment attachment order. The first issue relates to the strength of the claimant's case, the apparent likelihood of his eventually getting a money judgment against the defendant. The second issue relates to the risk that unless an attachment order is granted, something will happen to the defendant's property that would seriously hinder[483] the claimant in collecting on a future judgment against the defendant.

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[483] We should explain why we say "seriously hinder", instead of simply, "hinder". Something which "hinders" the claimant in the collection of a judgment might amount to nothing more than a minor irritant, something that would not really prejudice the plaintiff in collecting on his judgment. We use "seriously hinder" only to make it clear that we are talking about something that amounts to more than such a minor irritant in the collection process.

a. Strength of the claimant's case

8.29 We do not think it very controversial to suggest that a claimant who does not have any reasonable prospect of getting a money judgment against a defendant should not be able to get an attachment order. It would be pointless and unfair to tie up the assets of a defendant in order to meet a claim which has no real prospect of success. Hence, in order to obtain an attachment order, a claimant should, as a first step, have to convince the court that his claim has a real prospect of succeeding. But how high should this threshold be set? The Ontario Commission thought that the threshold should be set at the relatively high level of a "strong *prima facie* case",[484] a case which is more likely than not to succeed at trial. However, we do not agree that the threshold should be set at the level of a *prima facie* case ("strong" or otherwise).

8.30 Adopting the *prima facie* case test for attachment orders would lead to the same practical problems that were discussed by the House of Lords in *American Cyanamid* v. *Ethicon*.[485] The detailed and lengthy enquiry which often would be required in order to determine whether a claimant had a strong *prima facie* case would be inconsistent with the need for an expeditious procedure for determining whether an attachment order should be granted. But quite apart from its practical difficulties, the *prima facie* case test is inappropriate. Although a claimant should not be entitled to an attachment order unless he can establish that he has some reasonable prospect of getting a judgment, we are not convinced that requiring the claimant to show at an early stage in the proceedings that he is more likely than not to be successful at trial is the course most likely to result in justice ultimately being done between the parties.

8.31 In our view, once the claimant has crossed the hurdle of convincing the court that there is a reasonable likelihood of his getting a money judgment against the defendant, justice would best be served by treating the relative strength of the claimant's case as but one of the factors to be considered in determining whether it would be just and equitable to grant an attachment order. Suppose, for example, that a claimant comes to court with a case that clearly stands a reasonable

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[484] Ontario Report, *supra* n. 53 at 101. In adopting this test, the Ontario Commission agreed with the Ontario Court of Appeal's decision in *Chitel* v. *Rothbart*, *supra* n. 98 as to the appropriate threshold for Mareva injunctions. However, by no means have all Canadian courts agreed that this represents the appropriate test for Mareva injunctions: see *supra* para. 5.16.

[485] *Supra* n. 256; for Alberta cases endorsing the "Cyanamid test" see n. 258.

chance of succeeding, but which the judge cannot say is more likely to succeed than not. Suppose, further, that there is very good reason to believe that the defendant is disposing of his property for the purpose of hindering his creditors, and that the claimant is prepared to give a secured undertaking in damages. If nothing is done, the claimant will almost surely be unable to collect on a judgment if he does in fact get one. On the other hand, if an attachment order is granted, and the defendant is ultimately found not to be liable, he can be compensated for any damages he has suffered. It seems to us that in these circumstances the chances of justice ultimately being done between the parties will be increased if an attachment order is granted. Thus, we think that in order to cross the initial threshold for getting an attachment order, a claimant should only be required to convince the court that there is a reasonable likelihood that he will eventually get a money judgment against the defendant.

b. Risk of a prejudicial disposition of the defendant's property

8.32 As mentioned above, the second threshold we would require the claimant to cross relates to the possibility of something happening to the defendant's property that would seriously hinder the claimant in the collection of a judgment. However, before setting forth our views as to what this threshold should be, we pause to consider a popular alternative approach to the problem of defining the grounds for attachment. This alternative could be described as the "list approach", and consists of setting out a list of fairly specific circumstances that will entitle a claimant to an attachment order. If the claimant shows that one of these specific circumstances exists he gets the attachment order; otherwise, he does not. This is the approach taken by our own absconding debtor rules.[486] A more modern example of this sort of approach is Rule 49.01(1) of the Nova Scotia Civil Procedure Rules, which sets out the following list of circumstances in which a claimant may obtain an attachment order:

> 49.01(1). Where a defendant,
>
> (a) resides out of the jurisdiction, or is a corporation that is not registered under the Corporations Registration Act;
>
> (b) conceals himself or absconds within the jurisdiction with intent to avoid service on him of any document;
>
> (c) is about to leave or has left the jurisdiction with intent to

[486] R. 485(a).

> change his domicile, defraud his creditors, or avoid service of a document;
>
> (d) is about to remove or has removed his property or any part thereof permanently out of the jurisdiction;
>
> (e) has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of all or any part of his property with intent to hinder or delay his creditors, or is about to do so;
>
> (f) has fraudulently incurred a debt or a liability in issue in a proceeding;
>
> a claimant may ... make application for an attachment order ... .

8.33 In our view, as a means of identifying situations in which there is good reason to apprehend that the claimant will be seriously hindered in the collection of a judgment unless an attachment order is granted, the list approach is inadequate. In the first place, there is always the possibility that an unfortunate claimant with what everyone would agree is a good case for an attachment order will fall into a crack between one of the favoured categories. Another very real possibility is that in order to avoid the first problem, the drafter of the list will include many circumstances which sometimes will, but sometimes will not, justify the relevant apprehension. Take, for example, Rule 49.01(1)(d) of the Nova Scotia rules. Certainly, in certain circumstances the removal of some or all of the defendant's property from the jurisdiction would be cause for legitimate concern, but in other circumstances it would not. Thus, the mechanical application of this rule could result in the granting of an attachment order where it really is not warranted.

8.34 The Ontario Commission chose to recommend a modified version of the list approach. The modification consisted of appending a "basket clause" to the list of specific circumstances that would ground an attachment order.[487] The basket clause would empower the court "to grant prejudgment relief whenever there is a danger that, without such relief, recovery of a debt may be jeopardized".[488]

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[487] Ontario Report, *supra* n. 53 at 81-2. The Commission's list is similar to the Nova Scotia list, but is not as permissive. For example, the Commission rejected residence out of the province and the fraudulent incurring of the debt as proper grounds for attachment. The Commission's list also imposes a requirement of fraudulent intent on removal of property from the jurisdiction, not just on dispositions within the jurisdiction: 78-81.

[488] *Id.* at 82.

8.35 The list and basket clause approach does avoid the problem of claimants falling into cracks in the list. Moreover, insofar as the list itself is less permissive than it might have been were there no basket clause, the Commission's approach gives less scope for the granting of attachment orders where they are not really needed. But the Commission's approach does give rise to a fundamental question. If the courts may grant relief whenever there is a danger that without such relief recovery of a debt may be jeopardized, what is the point of the list? Insofar as the list merely identifies situations where relief is obviously called for, it would seem to be redundant. Anticipating this question, the Commission noted that "our recommendations concerning the specific instances in which prejudgment relief should and should not be available will provide courts with considerable guidance in respect of the manner in which the discretion inherent in a "basket clause" should be exercised".[489] What the Commission is saying is that by perusing the specific grounds in the list, judges should be able to extract a principle which will guide them in exercising their discretion under the basket clause. Our preference is to dispense with specific grounds, and to define the area of the courts' discretion by the use of generalized threshold requirements embodying the basic principles which ought to govern every application for prejudgment relief.

8.36 A few paragraphs ago, we described the purpose of our threshold requirements as being to ensure, so far as it is possible to do so and still have a reasonably effective prejudgment remedy, that attachment orders are not granted in circumstances where we can be pretty sure that they are not justified. Now, the basic rationale for granting an attachment order must be that there is a danger that something will happen to make property of a defendant that might have to be looked to in order to satisfy a judgment unavailable for that purpose. If there is not real danger of such a thing happening, the rationale for attaching a defendant's property disappears. Thus, we can say right away that the threshold should be at least as high as this, that an attachment order should only be available where there are reasonable grounds for believing that if an attachment order is not granted, the defendant will dispose of (keeping in mind the broad definition of "dispose" given at the beginning of this chapter) some or all of his property in such a way as to seriously hinder the claimant in the collection of a judgment. In fact, though, we think the threshold should be somewhat higher than this.

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[489] *Ibid.*

8.37 In our view, certain dispositions of property should not ground an attachment order even if they are virtually guaranteed to seriously hinder the claimant in the collection of a judgment. As we noted in Chapter 7, the goal of making sure that judgments are enforceable sometimes must be subordinated to other social goals or principles. One instance where this is so is where achieving the former goal would require the court to deliberately prevent a defendant from meeting reasonable and ordinary business or living expenses. There are, we think, a couple of reasons why this is so.

8.38 The first reason is perhaps best explained by reference to the reasonable expectations of an unsecured claimant regarding the conduct of the person against whom he is asserting his claim, keeping in mind that the claim's validity has yet to be established. Certainly, it is reasonable to ask of the defendant that he take into account his possible liability to the claimant when considering the disposition of resources out of which the claim would have to be satisfied. On the other hand, it must be kept in mind that while the validity of the claimant's claim is being determined, there will continue to be legitimate demands on the defendant's resources. It would seem unreasonable to expect the defendant to refrain from meeting reasonable and ordinary business or living expenses in order to conserve his resources for the purpose of meeting the claim whose validity has yet to be established.

8.39 A second reason for not employing the attachment order to prevent a defendant from meeting reasonable and ordinary business or living expenses relates to the institutional setting and purpose of the attachment order. The attachment order is intended to provide an expeditious means of preventing a prejudicial disposition of a defendant's property. In essence, it is for emergencies. It is not intended to be a mechanism for achieving an orderly winding up of the affairs of an insolvent debtor. That is the function of legislation such as the federal Bankruptcy Act. More generally, the purpose of the attachment order is not to protect a person from the ordinary risks of being an unsecured claimant. One such risk is that one's debtor will simply run out of resources to pay his debts. The purpose of the attachment order is to try to ensure that this situation is not brought about by an extraordinary or unreasonable disposition of the defendant's property.

8.40 Thus, the second threshold that we believe the claimant should have to cross before the area of the court's discretion is entered is this. The claimant should be required to satisfy the court

that there are reasonable grounds for believing[490] that the defendant is making or is likely to make a disposition of property (1) otherwise than for the purpose of meeting his reasonable and ordinary business or living expenses,[491] and (2) in a way that is likely to seriously hinder the claimant in the enforcement of any judgment he might get against the defendant. We are not saying, it should be emphasized, that in order to get past first base a claimant must give reasonable grounds for believing that the defendant is disposing of property with some sort of fraudulent or nefarious intent. That is, the court could conclude that a disposition was not made for the purpose of meeting a reasonable and ordinary business or living expense, without necessarily concluding that it was made for a fraudulent purpose.

c. Just and equitable to grant an attachment order

8.41 It should be emphasized that we have been speaking of threshold requirements. Before issuing an attachment order the court would have to be satisfied as to the reasonable likelihood of the claimant getting a judgment and as to the possibility of a prejudicial disposition of property by the defendant. But, upon being satisfied as to these points, the court would not automatically grant an attachment order. The court would then have to consider, taking into account the interests of the plaintiff, the defendant, and any apparently interested third persons, whether it would in fact be just and equitable to grant an attachment order.

8.42 As we said earlier, it is impossible to catalogue all the circumstances which might affect the question of whether it would be just and equitable to grant an attachment order in any given case, although it is easy to think of some factors that might be relevant in certain situations. For example, the apparent ability of the claimant to compensate the defendant if the latter is

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[490] We appreciate that we have not explained why we have framed the evidentiary burden as being to establish "reasonable grounds for believing" that certain dispositions will occur unless an attachment order is granted. It would be idle to pretend that there is any magic in these words, or that they have some inherent advantage over other possible expressions such as "justifiable apprehension". Whether the available evidence furnishes reasonable grounds for any particular belief is really a matter of common sense. For a discussion of a similar problem in the context of Mareva injunctions, see paras. 5.21-5.22.

[491] It will be recalled from our discussion of this point in Chapter 5 that Canadian courts have not been disposed to grant Mareva injunctions unless there is some evidence of an impending disposition of property outside the ordinary course of the defendant's business or living: see text and cases cited at n. 276.

ultimately successful in defending the action, and the question of whether an attachment order would seriously inconvenience a third person are two issues which might often be regarded as important or even decisive. However, in other cases these two issues might be relatively unimportant. We do not think there is anything to be gained by attempting to draw up a list of considerations that are most likely to be relevant to the issue of whether it is just and equitable to grant an attachment order. The danger of doing so is that potential issues which were not included in the list would come to be viewed as unimportant or as less important than those which were included.

RECOMMENDATION No. 4

An attachment order may be granted only where the court is satisfied that

(a) there is a reasonable likelihood that the claimant will recover a money judgment against the defendant;

(b) there are reasonable grounds for believing that the defendant is disposing of or dealing with his property, or is likely to do so (i) otherwise than for the purpose of meeting the reasonable and ordinary business or living expenses of the defendant, and (ii) in a way that is likely to seriously hinder the claimant in the enforcement of any judgment he might get against the defendant; and

(c) it would be just and equitable, taking into account the interests of the claimant, the defendant, and any affected third persons, to grant an attachment order.

3. Attachment and Jurisdiction

8.43 In Chapter 2 we made passing reference to the practice under the Custom of London and in the United States of using attachment as a device for obtaining jurisdiction over a defendant over whom the court would not otherwise have or be able to obtain jurisdiction.[492] In a typical instance, the defendant is outside of the court's jurisdiction and there is no basis for allowing the defendant to be served with originating process outside of the jurisdiction. However, the defendant has assets within the jurisdiction. By attaching these assets, the court obtains what is called *quasi in rem* jurisdiction, and can proceed to hear the claimant's claim and give judgment just as if the defendant had been personally served with originating process. The only drawback as far as the claimant is concerned is that he can obtain execution only against the attached property, unless the court eventually acquires personal jurisdiction over the defendant.[493] As far as the defendant is

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[492] See *supra* para. 2.21.

[493] Another drawback is that courts outside of the state in which the attachment occurs will not generally recognize a judgment based solely on *quasi in rem* jurisdiction.

concerned, the drawbacks of a *quasi in rem* action based on the attachment of his property are much more serious. He may be faced with the unhappy choice of doing nothing in response to the attachment, and thus losing the attached property, or contesting the action in a faraway jurisdiction with which the matter in dispute has absolutely no real connection. Canadian courts have traditionally refused to allow attachment statutes to be used as jurisdictional devices, an approach which has been endorsed by the Ontario Commission.[494] We also are of the view that it is not proper to allow attachment to be used as a device for obtaining jurisdiction over a dispute over which the courts of this province would not otherwise have or be able to obtain jurisdiction.

8.44 However, there is a major difference between using attachment as a device for expanding a court's jurisdiction, and using attachment as a means of preventing a defendant in foreign proceedings which could result in a judgment enforceable in Alberta from disposing of assets located in Alberta for the purpose of frustrating enforcement of the anticipated foreign judgment. A concrete example of such a situation is presented by *The Siskina*,[495] which was discussed in Chapter 5. Significantly, in holding that the court *did not* have jurisdiction to grant a Mareva injunction in the circumstances of that case, the House of Lords did not say that it *should not* have such jurisdiction. Indeed, Lord Diplock was prepared to concede that "there may be merits in Lord Denning M.R.'s alternative proposals for extending the jurisdiction of the High Court over foreign defendants".[496] However, his Lordship thought that if the courts were to acquire this jurisdiction it would have to be through legislation, not judicial decision. Thus, to the extent that the House of Lords gave any hint as to its views on the policy issues involved, they seem to be more or less in line with those expressed by Lord Denning M.R.. What the House of Lords objected to was the Court of Appeal's perceived usurpation of the legislative function.

8.45 A case which may be usefully compared with *The Siskina* is *Polar Shipping Limited* v. *Oriental Shipping Corporation*.[497] Here a forum selection clause in a charter agreement selected the courts of England, but the claimant sought to attach assets of the defendant located in Hawaii.

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[494] *Supra* n. 53 at at 85-87.

[495] *Supra* n. 86. See paras. 5.7-5.9.

[496] *Id.* at 827.

[497] (1982) 680 F 2d 627 (U.S.C.A. 9th Circ.).

The court held that attachment in these circumstances for the purpose of providing security for a possible judgment in favour of the claimant by the English courts was permissible. Thus, the attachment was not used in this case to expand the jurisdiction of the American court to determine the merits of the dispute, but to provide a means of enforcing a judgment of the courts of the forum the parties had themselves chosen.

8.46 In our view, a claimant who has actually commenced proceedings before a foreign tribunal which could lead to a judgment enforceable in Alberta[498] should be able to attach property of the defendant situated in this province even if he could not presently obtain leave to serve a statement of claim in respect of that matter outside the jurisdiction. Of course, the claimant should only be able to obtain the attachment order if he can satisfy the normal grounds for attachment, as set out in Recommendation No. 4, and the court should be able to impose appropriate terms on the claimant as to such matters as the diligent prosecution of his action before the foreign tribunal.

8.47 In recommending that the courts of Alberta be authorized to grant attachment orders against certain defendants over whom they do not and could not acquire personal jurisdiction with respect to the subject matter of the dispute, we part company with the Ontario Commission. The Commission rejected attachment for any purpose in situations where the Ontario courts could not otherwise obtain personal jurisdiction over the defendant. After referring to the possible utility of attachment as a means of providing security for an anticipated judgment of a foreign court which could be enforced in Ontario, and after approving the conclusion of the House of Lords in *The Siskina*, the Commission continued:

> As we have stated earlier, a just and equitable law of prejudgment attachment requires that the interests of debtors and creditors be balanced evenly. Attachment of a person's property on the contingency that, at some future time, the Ontario courts will have jurisdiction over that person poses serious risks to the debtor, risks that we believe outweigh the possible benefit to his creditor.[499]

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[498] By "enforceable" we mean enforceable either by registration under the Reciprocal Enforcement of Judgments Act, or by bringing an action on the judgment. In this regard, we would refer to R. 30(p) of the Alberta Rules of Court, which provides for service out of the jurisdiction of originating process in an action on a foreign judgment where the defendant has exigible assets in Alberta of a value of at least $500.

[499] *Supra* n. 53 at 86.

However, our recommendation would limit the "extraordinary" attachment jurisdiction of the court to situations where the claimant has already commenced proceedings against the defendant before a foreign tribunal which could give rise to a judgment enforceable in Alberta. In other words, there would be more than a mere contingency that, at some future time, the Alberta courts would have jurisdiction over the defendant. This, combined with the facts that the claimant would have to establish the normal grounds for attachment and that the court could impose appropriate terms and conditions, convinces us that the risks to the defendant of such a protective attachment order would not be inordinate in comparison to its potential benefit.

RECOMMENDATION No. 5

An attachment order shall not be used as a means of acquiring jurisdiction to determine the merits of a dispute where the court would not otherwise have or be able to obtain personal jurisdiction over the defendant under the Rules of Court.

RECOMMENDATION No. 6

(a) A claimant who has commenced proceedings before a foreign tribunal may apply for an attachment order.

(b) The court shall not grant such an application unless it is satisfied that

(i) a judgment granted by the foreign tribunal would be enforceable in Alberta either by an action on the judgment or by registration of the judgment under the Reciprocal Enforcement of Judgments Act;

(ii) the defendant has attachable property in Alberta; and

(iii) the grounds for attachment as set out in Recommendation No. 4 exist.

C. The Nature of the Attachment Order

8.48 In this section we proceed from the assumption that the claimant has established his case for prejudgment relief, and consider what form the relief should take. In other words, what should the remedy be? The answer to this question will reflect what was said in Chapter 7: the court should be able to grant a remedy which is powerful enough, but no more powerful than is necessary, to achieve the purpose of preventing the defendant from making an improper disposition of his property.

1. Remedies Against the Person

8.49 The phrase "remedies against the person" is somewhat ambiguous in that each of the following could be described as a prejudgment remedy against the person:

> 1. arresting and imprisoning a defendant as a means of coercing him into providing security for the claimant's claim (i.e., as with arrest under a writ of *capias ad respondendum* in a bailable action in the old days);
>
> 2. detaining a defendant in order to prevent him from doing something calculated to preclude the claimant from enforcing a future judgment (i.e., the writ *ne exeat regno*, as employed in *Al Nahkel*;[500]) or
>
> 3. enjoining a defendant from making an improper disposition of his property (i.e., Mareva injunction).

The third remedy could be described as a remedy against the person because the defendant is ordered not to do something which he normally would be at liberty to do. Of course, it is a very different sort of remedy against the person than are the first two.

8.50 Prejudgment remedies against the person of the first type mentioned above have never been available in Alberta, and we do not see any good reason for this situation to change. On the other hand, remedies against the person of the third type are available in the form of Mareva injunctions. Ordering a person not to deal with his own property in a particular way restricts that person's liberty. However, it is a much less serious restraint on a defendant's liberty than is arresting and imprisoning him. Hence, the availability of the former as a prejudgment remedy does not engender the same fundamental misgivings that the availability of the latter would.

8.51 The troubling case is the second sort of prejudgment remedy against the person: physically detaining the defendant in order to prevent him from making an improper disposition of his property. Certainly, where a defendant is likely to do something such as remove his property from the jurisdiction, there will generally be means of preventing him from doing so that are at least as effective as, and less harsh than, arresting and detaining him. However, it is always possible that situations will arise such as that which arose in *Al Nahkel*,[501] where nothing short of the immediate

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[500] *Supra* n. 396.

[501] *Ibid.* It will be recalled that in *Al Nahkel* the defendant was actually arrested and taken off a plane that was about to depart for the Phillipines. The defendant had the cash which was the subject of the action on his person, and it seems to have

physical detention of the defendant would prevent him from carrying out his purpose of putting his assets beyond the reach of the claimant and the courts. We are perhaps left with the choice of conceding that there occasionally may be no effective remedy against someone such as the defendant in *Al Nahkel*, or of having a remedy that in exceptional cases would allow a defendant to be physically detained.

8.52 The 1976 New Brunswick Report on remedies of unsecured creditors reached the following conclusion regarding arrest and imprisonment in civil actions:

> The cost of imprisonment to the individual arrested and to society invariably outweighs the benefit to the claimant. The availability of this procedure should be limited to cases in which there is also an affront to society, such as contempt of court.[502]

This conclusion was echoed, and indeed partially quoted, in the Ontario Commission's Report. We agree that in a civil action a defendant should not be subject to any form of arrest or imprisonment except on the basis that he is guilty of a public wrong such as disregard of a court order. In order to effect this result, all it is necessary to do is to abolish the power of the court (assuming the power still exists in this province)[503] to issue the writ *ne exeat regno* in civil actions. We reach this conclusion even though we realize that the absence of a remedy against the person of the second sort might very occasionally allow a defendant to escape from the jurisdiction with his property.

8.53 Several considerations fortify us in our conclusion that physical detention of a defendant should not be available as a prejudgment remedy. Firstly, we have got along without such a remedy for many years in Alberta. True, the writ *ne exeat regno* may have been theoretically available, but we know of no occasions upon which this writ has been issued in Alberta, and it would not seem to be a remedy whose demise would cause great consternation in any quarter. Secondly, the trend of reform proposals and legislative activity in Canada has been to eliminate arrest and imprisonment as prejudgment remedies in civil actions.[504] Thirdly, as pointed out in the Ontario

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[501](cont'd) been assumed that an injunction would have been ignored.

[502] New Brunswick Department of Justice, *supra* n. 452 at 77.

[503] See *supra* paras. 6.36-6.41.

[504] Ontario Report, *supra* n. 53 at 73-74; New Brunswick Department of Justice, *supra* n. 452 at 77-78.

Report,[505] the remedy of arrest and imprisonment raises problems in relation to the provisions of the Canadian Charter of Rights and Freedoms.

RECOMMENDATION No. 7

The power of the court to issue the writ *ne exeat regno* in civil actions should be abolished.

2. Property Subject to Attachment

a. In general

8.54 The object of prejudgment relief is to prevent a defendant from making an improper disposition of exigible property, property that the claimant could look to in order to satisfy a judgment against the defendant.[506] Logically, then, unless there is some good reason for arriving at a different conclusion, the categories of exigible and attachable property should be identical. In other words, exigible property should be attachable, and non-exigible property should be non-attachable. What follows is a consideration of certain possible exceptions to the suggested identification of attachable with exigible property.

b. Exemptions

8.55 It is not within the scope of this report to discuss at length the problem of what property of a judgment debtor is, and what property should be, exempt from the execution process.[507] The questions which interest us here are (1) Should an item of property that would be exempt from execution if the defendant were a judgment debtor necessarily be exempt from attachment? and (2) Are there any circumstances in which exigible property of a defendant should be exempt from attachment notwithstanding its exigibility?

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505 *Id.* at 73.

506 A highly technical interpretation of the term "exigible property" might restrict it to property which could be seized under a writ of execution. We use the term in a broader sense, to include any property which through any enforcement process could be made available to satisfy a money judgment.

507 This problem will be dealt with in a subsequent report in this series.

8.56 As we noted earlier,[508] in Alberta the relationship between prejudgment remedies and exemptions is somewhat murky. It is possible that a writ of attachment may be executed without regard to the exemptions to which the defendant would be entitled if he were a judgment debtor. In any event, if the defendant has absconded from the province, leaving no wife or child here, he is not entitled to any exemptions even under a writ of execution.[509] In the case of a garnishee summons before judgment, the defendant whose wages are attached is entitled to the same exemptions as a judgment debtor.[510] In either case, the wage garnishment exemption does not apply where the defendant or judgment debtor has absconded from the province, leaving no wife or infant children here.[511] As for the other prejudgment remedies available in Alberta, they would seem to be unaffected by the Exemptions Act, which only purports to deal with seizure under writs of execution or under a landlord's distress for rent.

8.57 In other jurisdictions the general rule seems to be that the range of assets subject to prejudgment attachment should be co-extensive with the range of assets subject to the postjudgment execution process.[512] Exigible property of a defendant is subject to prejudgment attachment, and exempt property is not.

8.58 The Ontario Commission accepted the appropriateness of restricting prejudgment relief to exigible property of a defendant, but it was not prepared to say that all such property should be attachable. In an earlier volume of its report, the Commission had recommended that absconding debtors not be afforded the normal exemptions from postjudgment execution.[513] However, the Commission recommended that "[i]n the absence of a judgment against the debtor... he should be given the benefit of any doubt",[514] so that even an absconding debtor would be entitled to his exemptions in the case of prejudgment attachment.

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508 *Supra* para. 3.30.

509 Execution Creditors Act, s. 1(2)(a).

510 R. 483.

511 R. 483(5)(b).

512 See e.g. Nova Scotia C.P.R., R. 49.04(1)(a); New York C.P.L.R., s. 6201.

513 Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters, Part II* (1981) 99.

514 *Supra* n. 53 at 91.

8.59 Moreover, the Ontario Commission felt that "wages, salary and other similar income deserve a special status".[515] In Part II of its report the Commission had recommended a *prima facie* 85% exemption for wages and salary. In Part IV, however, the Commission, noting that prejudgment garnishment of wages and salary was not possible in most Canadian provinces and that "the vast majority of the public survive day-to-day on their employment income", recommended that prejudgment garnishment of wages, salary, and related income not be permitted in Ontario.[516]

8.60 The purpose of prejudgment attachment is to prevent a defendant from taking steps calculated to make it more difficult for the claimant to enforce a future judgment. Since a judgment creditor cannot look to the debtor's exempt property for satisfaction of his judgment, it is difficult to see how a claimant could be prejudiced by anything a defendant might do with his exempt property. Therefore, we are of the view that all property that is exempt from the postjudgment execution should also be exempt from prejudgment attachment.

8.61 Turning to the question of whether any exigible assets of a defendant should be immune from attachment, we would reiterate our view that every exigible asset of a defendant should be subject to attachment unless there is a good reason why it should not be. In this regard, if what normally would be exempt property loses this status where its owner is an absconding debtor with no dependents in the province, we are not convinced that it should retain its immunity from attachment.[517]

8.62 A more difficult issue is prejudgment garnishment of wages or salary. In 1978 the Institute made the following observations regarding the disadvantages of prejudgment wage garnishment:

> The disadvantages of pre-judgment wage garnishment are:
>
> (a) The debtor has no opportunity to state his case until after the garnishment has been made. Such a procedure seems contrary to notions of natural justice, due process, and equity. It may result in a debtor being garnisheed notwithstanding that he has a good defence

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515 *Id.* at 92.

516 *Ibid.*

517 In our 1978 *Working Paper on Exemptions from Execution and Wage Garnishment* we expressed considerable doubt as to the wisdom of depriving absconding debtors of their postjudgment exemptions: These doubts persist.

to the action.

(b) It can be used as a powerful lever by the creditor to force the debtor into an inequitable repayment scheme. It may also precipitate some of the calamities mentioned in relation to the use of the threat of post-judgment wage garnishment.

(c) A debtor may not understand the difference between a pre-judgment and post-judgment garnishment order. He may therefore assume that the action has already gone against him and not take any further action to defend the claim.[518]

Our present view is that while a defendant should always be entitled to the normal wage garnishment exemptions, there should not be an absolute prohibition on the prejudgment attachment of non-exempt salary and wages.

8.63 As compared to other forms of attachment, the basic complaint about prejudgment garnishment of wages or salary is that the effect of the remedy on the defendant is likely to be especially debilitating. However, from the point of view of the person whose wages are garnished, the financial embarrassment caused by garnishment is likely to be much the same whether it occurs prior to or after judgment. If it is feared that existing exemptions are not generous enough to achieve their intended purpose, the solution to the problem would seem to be to adjust the exemptions, not to eliminate prejudgment attachment of wages and salary. After all, the number of persons affected by prejudgment wage garnishment will be small in relation to the number affected by postjudgment garnishment. Given that the concern is the effect of the remedy on the person whose wages are garnished, it is not addressed by simply eliminating prejudgment attachment of wages and salary. This is especially so where, as we have proposed, prejudgment attachment of any sort is an extraordinary remedy available only in exceptional circumstances. Given the need for special circumstances involving a likelihood of improper dealing with his assets by a defendant, it is highly unlikely that prejudgment wage garnishment could become an engine for the wholesale oppression of impoverished defendants.

8.64 Moreover, while it is impossible to perfectly insulate any judicial procedure from abuse, the dangers associated with prejudgment wage and salary attachment can be greatly mitigated by well thought out procedures and safeguards. In this regard, we think that in addition to the procedures and safeguards which should apply to every application for an attachment order, a

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[518] *Id.* at 52.

claimant seeking to attach the wages or salary of a defendant should be required to show that no other form of attachment is likely to achieve the intended purpose with less serious consequences for the defendant.

RECOMMENDATION No. 8

The property potentially subject to prejudgment attachment should consist of all the defendant's exigible property. Property of the defendant which would be exempt from postjudgment execution should be immune from prejudgment attachment, but there should be no special immunities in the latter case.

RECOMMENDATION No. 9

Notwithstanding Recommendation 8, a prejudgment attachment order shall not permit the garnishment of a defendant's wages, salary or similar income unless the court is satisfied that no other remedy or combination of remedies is likely to achieve the intended purpose with less serious consequences for the defendant.

3. What to Attach

8.65 At present in this province, when an application is made for prejudgment relief the court determines whether relief will be granted, but, except in the case of an application for a Mareva injunction, it has little say as to what property will be affected if the application is granted. If the application is for a writ of attachment, the writ authorizes the sheriff to seize personal property of the defendant. If the application is for leave to issue a garnishee summons before judgment, the garnishee summons attaches debts due or accruing due to the defendant. A master or judge to whom an application for leave to issue a garnishee summons before judgment is made cannot decide that although relief of some sort is appropriate, the claimant should be able to attach a chattel, or land, instead of a debt owed to the defendant by a third person.

8.66 Nor is there always an opportunity for the claimant to choose his remedy, since the grounds for obtaining leave to issue a garnishee summons before judgment are different, and less onerous, than the grounds for obtaining a writ of attachment. Thus, a claimant with good grounds for obtaining leave to issue a garnishee summons before judgment, but who knows of no debts due or accruing due to the defendant, may be unable to apply for a writ of attachment even though he knows that the defendant owns, say, a valuable racehorse. In short, except where a Mareva injunction is applied for, the currently available remedies provide very little flexibility as to the type of property which may be attached.

8.67 The court should have the power to grant prejudgment relief in whatever form seems most appropriate in the circumstances. The appropriate remedy is the one which seems likely to achieve the desired result while causing as little disruption to the defendant as possible. This end is best served by allowing the court to determine what property of the defendant will be attached. This is not to say that the court should necessarily be required to identify the specific items of property to be attached. In some circumstances that sort of particularity would be appropriate, while in other cases the appropriate order would be one affecting a certain type of property, or, perhaps, all of the defendant's exigible property up to a specified value. The point is that the property which it is most appropriate to attach in the particular circumstances of any given case can best be determined by the court.

RECOMMENDATION No. 10

The property to be attached shall be determined by the court.

4. Methods of Attachment

a. What is to be prevented and possible means of doing so

8.68 The Ontario Commission's recommendations respecting the methods of attachment emphasize flexibility:

> Accordingly, subject to our recommendation relating to the attachment of realty, the commission recommends that the issuing authority should have a broad discretion to order any method or methods of attachment it considers just and equitable, having regard to all the circumstances of the case, including the type of property sought to be attached and the desirability of avoiding hardship to the parties or any interested person. In particular, it should be possible to order physical seizure, "walking possession", registration of the order under the Personal Property Security Act, and attachment by injunction.[519]

As for the attachment of realty, the Commission was "of the view that registration of a copy of an attachment order in the appropriate land registry office should be the only method of attachment available to creditors."[520] We agree with the Ontario Commission that flexibility in the methods of

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[519] *Supra* n. 53 at 96.

[520] *Id.* at 99.

attachment is crucial. In order to better see what sort of flexibility is required, we think it would be useful to consider what it is a prejudgment remedy is supposed to prevent.

8.69 The purpose of prejudgment attachment is to prevent dispositions of property which would seriously hinder the claimant in the collection of a judgment. Dispositions of this sort can conveniently be divided into two groups. The first group consists of dispositions by which the property is made physically unavailable, as where it is hidden or destroyed, or something of the like. There are two ways of preventing dispositions which would make property physically unavailable. One is to take custody of the property before it can be disposed of, to take it out of the possession or control of the defendant.[521] The other way is to order him, on pain of being punished for disobedience, not to make the apprehended disposition. The Mareva injunction is a ready example of the latter technique.

8.70 The second group of dispositions consists of those by which the property is made legally unavailable, such as where the property is alienated to a third person. Since the property no longer belongs to the defendant, it is not available to help satisfy the claimant's judgment, even if it is still physically present. Any one or more of three methods might be employed to prevent property from being made legally unavailable. Two of these methods have already been mentioned: taking custody of the property,[522] and ordering the defendant not to make the apprehended disposition.

8.71 The third method of dealing with dispositions which would make the property legally unavailable is to deny to the purported disposition its ordinary legal effect, to say that it is void, or voidable or whatever. This method would usually be combined with one of the other methods. It might be provided, for example, that any transfer of property made in violation of a prohibitory order is void as against the claimant. The consequences of this third method will fall heavily on third persons. Thus, we shall defer further consideration of it until we consider the effect of

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[521] We would count garnishment as a custodial remedy in this sense. The effect of the garnishee summons is to cause the garnishee to pay the amount of the debt into court, thus putting it beyond the defendant's control.

[522] It is worth noting that simply depriving the defendant of possession of property will not necessarily prevent him from making it legally unavailable, because valid interests in many kinds of property (such as land) can be transferred by a person who does not have physical possession of the property in question.

attachment orders on third parties generally.

8.72 For present purposes, then, no matter what sort of disposition is feared, there are two basic methods of preventing it: 1) ordering the defendant not to make the apprehended disposition, or 2) actually taking the property out of the defendant's possession or control. Of course, each of these basic methods admits of variations in the way it is carried out, depending, among other things, on the type of property involved. In our view, an attachment order should be able to employ either or both of these methods, as the circumstances warrant. For convenience, we shall refer to an order which employs the first method as a "prohibitory" order (because the defendant is prohibited from doing something with his property), and to one which employs the second method as a "custodial" order (because, the order authorizes or directs that the defendant's property actually be placed under the custody or control of someone other than the defendant). We emphasize, however, that these terms are used for convenience of reference, not to suggest that there is some sort of fundamental distinction between the two sorts of order.

b. The principle of minimum disruption

8.73 Before getting into the details of the methods of attachment, we shall restate the general principle that should guide the court in deciding upon the method of attachment in any given case: the principle of minimum disruption. This principle simply requires that the method of attachment be calculated to cause as little disruption and inconvenience to the defendant as is consistent with achieving the object of the remedy.

8.74 The principle of minimum disruption has a corollary which is worth specific mention. It will often be possible to achieve the purpose of attachment by prohibiting a defendant from improperly disposing of property, while allowing him to retain possession or control of it, so that he can continue to use it for proper purposes. For example, the purpose of attachment could be achieved by an order prohibiting the defendant from disposing of, but allowing him to retain possession of and to use a particular machine used in his business. Thus, where it is possible to do so, attachment should be achieved by a prohibitory order which allows the defendant to retain possession of and to use the attached property.[523]

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[523] It is important to note that a prohibitory order will not always allow the defendant to use the attached property. To take but one of many possible examples, an order

RECOMMENDATION No. 11

(a) An attachment order should cause no more inconvenience and disruption to the defendant than is considered by the court to be reasonably necessary in order to achieve the object of the order.

(b) Without restricting the generality of paragraph (a), an attachment order should allow the defendant to retain possession and control of the attached property so that he may use it for proper purposes, unless the court is satisfied that such an order would be unlikely to prevent the improper disposition of the defendant's property.

c. Prohibitory orders

8.75 We turn now to consider some of the details of the methods of attachment, beginning with attachment through a prohibitory order. The main advantage of a prohibitory order is its inherent flexibility. It can be made to apply to any sort of disposition of any sort of property. It can absolutely prohibit any disposition of the affected property, or allow certain dispositions while prohibiting others. Indeed, dispositions need not be simply prohibited or permitted; they may be permitted subject to certain terms or conditions. For example, rather than prohibiting the defendant from selling, say, a piece of land, the court could permit the sale to go ahead on the condition that the proceeds of sale be paid into court to the credit of the claimant's action, or be retained in a solicitor's trust account pending final disposition of the claimant's action.[524] Our proposed attachment legislation would take advantage of the inherent flexibility of the prohibitory order, giving the courts broad powers to mold this device to the particular situation. More specifically, the court would be able to prohibit any disposition of any of the defendant's property, or impose suitable terms or conditions on its disposition.

8.76 Normally, as in the case of a Mareva injunction, the wording of a prohibitory order will determine the property to which it applies. Presently, if the claimant applying for a Mareva

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[523](cont'd) prohibiting a defendant from disposing of money would effectively prevent him from using the money for its only real purpose.

[524] California has what might be described as a provisional prejudgment remedy, called a "temporary protective order" (TPO). A TPO is a prohibitory order, but it is provisional in the sense that it is simply intended to operate pending the hearing of the plaintiff's application for a full fledged writ of attachment. C.C.P. s. 486.050(b) provides that a TPO may not prohibit the defendant from transferring farm products held for sale or inventory, but may impose appropriate restrictions on the disposition of the proceeds of such transfer.

injunction knows of specific assets owned by the defendant, they may be specifically identified in the order. Otherwise, the order must apply to the defendant's property generally, or to particular kinds of property. Sometimes, the claimant may lack the detailed knowledge of the defendant's property which would allow the order to refer to specific items of property, and yet it would be better from the point of view of everyone concerned for the order to do so. We therefore think it would be useful if a prohibitory order could provide that it will apply to such property of the defendant as is subsequently identified for that purpose by the sheriff, and direct the sheriff to do so. The list of property compiled by the sheriff or his representative would be served on the defendant along with the order, and would in effect become an appendix to the order.

d. Custodial orders

8.77 We would anticipate that if our recommendations were implemented, prohibitory attachment orders would give completely adequate protection to the claimant in most situations. However, situations would undoubtedly arise in which the only prudent thing to do would be to take actual custody of all or some of the defendant's exigible property. Of course, the best method of taking custody of property will depend upon the circumstances, including especially the type of property involved. For example, the best way of taking custody of a debt would usually be through a garnishee summons, which would require the defendant's debtor to pay the money into court or the sheriff's office. Taking into account the various circumstances under which taking actual custody of the defendant's property may be necessary, we recommend that the court should be able to do any of the following: 1) require the defendant or any person in possession of the defendant's property to deliver it up to a person identified in the order; 2) authorize the claimant to issue one or more garnishee summons; or 3) appoint a receiver over any property of the defendant.

8.78 It will be noted that we have not made any reference to seizure as a means of taking custody of the defendant's property. One reason for this omission is simply that reference to the technical concept of seizure is unnecessary, given the power the court would have to order the delivery up of, or appoint a receiver over, any property. The court could order property to be delivered up to any person, but if it were thought desirable that the sheriff take custody of the attached property, the sheriff could be specified in the order.

8.79 However, it is more than the mere redundancy of the concept of seizure which persuades us to omit any reference to it as a method of prejudgment attachment. As used by lawyers, the term "seizure" applies less to a physical process than to a formal procedure which has certain legal consequences. When a claimant obtains a judgment and instructs the sheriff to seize the defendant's property, the seizure is usually accomplished without any actual change in possession of the seized property.[525] Seizure is basically a paper transaction, a formal step intended to lead eventually to the removal and sale of the attached property, but which does not itself actually deprive the defendant of possession. Instructing the sheriff to seize the defendant's property would not normally be regarded as an instruction to remove the property from his possession. Thus, to speak of seizure as an alternate means of taking custody of the defendant's property is simply confusing.

8.80 Of course, even a paper seizure affects the defendant's ability to dispose of the seized property. The defendant who violates his bailee's undertaking risks criminal charges,[526] and any purported alienation of the seized property may be denied its ordinary legal effect.[527] Assuming that these are both desirable effects of paper seizure, they can be equally well achieved with less fuss through the mechanism of the prohibitory order. In our view then, by making no reference to seizure as one of the methods of attachment we lose nothing but a possible source of confusion.

8.81 It will also be noted that we have not drawn a distinction between land and other kinds of property. As we noted in paragraph 8.68, the Ontario Commission thought that the only way of attaching land should be by registration of a copy of an attachment order in the appropriate land registry office. One argument for the Ontario Commission's position is that since land cannot be made to disappear, the claimant will have all the protection he needs if the defendant is prevented from transferring the land or any interest therein to a third person in a way that would prejudice the claimant. A prohibitory attachment order that may be registered in a land titles office, is all that is necessary to prevent this. However, although land (which of course includes buildings on land) cannot easily be made to disappear, it certainly can be destroyed or damaged, and it is certainly conceivable that a particularly stubborn defendant who is prevented from alienating his land might

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525 See *supra* para. 3.32.

526 Criminal Code of Canada, s. 285.

527 See *supra* para. 3.35.

still stymie the claimant by destroying or damaging it. Thus, although situations requiring anything more than a prohibitory attachment order in respect of land undoubtedly would be rare, we do not think that the courts should be foreclosed from making a custodial attachment order relating to land where the circumstances appear to require it.

e. Conditions and ancillary provisions

8.82 Of course, every attachment order will prescribe a method or methods of attachment. As often as not, however, it will be necessary to supplement the bare bones of the attachment order with provisions designed to ensure that the order operates fairly and effectively. The court may consider that an attachment order should only be granted on special terms designed to ensure that the defendant or some third person is not unfairly burdened by the order. For example, when making an order pursuant to Recommendation No. 6, the court might well consider it appropriate to put the claimant on terms as to the diligent prosecution of the foreign proceedings. Even in the case of a "garden variety" attachment order, the court may find it necessary or desirable to give certain directions as to how the order is to be implemented. If the proposed attachment legislation were silent as to such incidental provisions, the courts would probably assume that the power to grant attachment orders implies the power to do what is necessary to make them operate fairly and effectively for all concerned. However, to put this beyond doubt, it should be made clear that the court may include in any attachment order such terms, conditions, and ancillary provisions as are necessary to ensure that it operates fairly and effectively.

f. Registration of attachment orders

8.83 The topic of registration of attachment orders actually raises two issues. The first issue, or group of issues, is whether attachment orders should be able to be registered at all, and if so where and how. It is necessary to draw a distinction between land and personal property (other than interests in land, such as leases, which are regarded as personal property for purely historical reasons).

8.84 The Ontario Commission, it will be remembered, recommended that one of the available methods of attachment should be registration of an attachment order under the Personal

Property Security Act.[528] There is certainly something to be said for permitting the registration of attachment orders under a proper personal property security registration system, such as is in place in Ontario and several other Canadian provinces, and hopefully will be adopted in this province in the not too distant future. For the moment, though, all we have in this province is a hodgepodge of statutes and registry offices. Although it would not be impossible to provide for the registration of attachment orders in one or more of these registries, we would not recommend that this be done.

8.85 Where land is concerned, though, the present situation in this province is not as bleak. We have a land titles system which, although not without its blemishes, is at least a system. There is a centralized, coherent registration system which could without a great deal of difficulty accommodate the registration of attachment orders. We therefore recommend that a claimant who obtains an attachment order affecting an interest in land should be able to register a copy of that order against the title to that land in the appropriate Land Titles Office.[529] We shall defer our discussion of what the effect of registration should be until we come to discuss the general issue of the effect of attachment orders on third parties.

RECOMMENDATION No. 12

Subject to Recommendation No. 11 an attachment order may:

(a) prohibit any disposition of or dealing with any property of the defendant, or impose restrictions or conditions on any disposition of or dealing with such property;

(b) order the defendant or any person in possession of the defendant's property to deliver it up to a person identified in the order;

(c) authorize the claimant to issue one or more garnishee summons;

(d) appoint a receiver over any property of the defendant; and

(e) include or be subject to such terms, conditions, and ancillary provisions as the court considers necessary to ensure that the order operates fairly and effectively.

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[528] See passage quoted in para. 8.68, *supra*. The Ontario Commission did not address the question of what the effect of registration should be.

[529] This seems to be consistent with the current practice in this province in relation to Mareva injunctions.

RECOMMENDATION No. 13

An attachment order under Recommendation No. 12(a) may provide that it shall apply to such property as may be subsequently identified for that purpose by the sheriff. A list of the property so identified shall be served on the defendant.

RECOMMENDATION No. 14

A copy of an attachment order affecting an interest in land may be registered against the title to that land in the Land Titles Office.

5. How Much to Attach

a. What claims should be taken into account in determining how much to attach?

8.86 It goes without saying that the value of the defendant's property that is attached should bear some relationship to the amount of his potential liability. However, this simple statement obscures several issues which need to be resolved. Perhaps the thorniest issue is raised by the provisions of the Execution Creditors Act, by virtue of which attached property is attached not only for the claimant's benefit, but also for the benefit of anyone who is the holder of a writ of execution (enforcement order) against the defendant when the claimant gets judgment. A simple example of the situation that could arise is this. C_1 has a claim for $50,000 against D, and obtains an attachment order under which property of D having a market value of $50,000 is attached. By the time C_1 gets judgment, C_2 has also obtained judgment against D for $50,000 and has lodged a writ with the sheriff. When the proceeds of sale are distributed by the sheriff C_1 will get only $25,000, not $50,000.[530] The question we are interested in here is not whether it is fair to C_1 that he should have to share with C_2. Rather, the question is whether a claimant applying for an attachment order should be able to anticipate potential claims against the defendant which may mature into claims against the attached property, by attaching more of the defendant's property than is necessary to cover his own claim and the claims, if any, of existing execution creditors.

8.87 One possible approach is to ignore the possibility of additional execution creditors and restrict the attachment to the amount necessary to cover the claimant's claim (including an allowance

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[530] *See e.g. Deco Electric Ltd.* v. *Republic Building Systems Alberta Ltd.* (1983) 25 Alta. L.R. (2d) 347 (Q.B.). Actually, under the Execution Creditors Act, C_1 would have a preference for a portion of his costs, so he would end up getting somewhat more than $25,000.

for prejudgment interest and probable costs) and presently subsisting writs of execution.[531] The second obvious alternative is to guard against the possibility of additional execution creditors by always attaching all of the defendant's exigible property even if its value is far more than is necessary to cover the claims of the claimant and existing execution creditors.[532] A third approach, something of a compromise between the first two, would be to permit the attachment of more of the defendant's property than is necessary to cover the claimant's claim and currently subsisting writs only if there is good reason to believe that more writs of execution will be registered by the time the claimant gets judgment.[533]

8.88 Of the three approaches just mentioned, the first is obviously the most favourable to defendants, and the second, the most favourable to creditors. At first glance, the third approach commends itself as one which, unlike either of the first two, is sensitive to the particular circumstances of each case. However, the third approach is attended by several practical drawbacks. Allowing an applicant for an attachment order to raise claims which persons not before the court may have against the defendant could not help but introduce unwanted complexity into a procedure designed to deal expeditiously with emergency situations. The court would have to hear evidence as to the basis and amount of each alleged claim against the defendant. Prospective claims taken into account in determining the total value of the property to be attached might subsequently be abandoned or might not be prosecuted with any diligence. Since the persons asserting these claims would not be before the court, they could not be put on terms or be required to give an undertaking in damages or put up security. While these problems are not necessarily insurmountable, they do illustrate some of the pitfalls of attempting to make prejudgment remedies do what is properly the function of a bankruptcy statute.

8.89 On balance, we favour the first approach, in which the amount of the attachment is determined by reference only to the amount of the claimant's claim (including an allowance for prejudgment interest and costs) and existing enforcement orders. A claimant who was concerned

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[531] In Alberta a garnishee summons before judgment operates in this way: *see* Alberta Rules of Court, Form K.

[532] An attachment under New Brunswick's Absconding Debtors Act has this effect. So, arguably, does a writ of attachment under our Rules of Court: *see* Alberta Rules of Court, Form M and our discussion of this, *supra* paras. 3.27-3.29.

[533] We are not aware of any legislation that adopts this course.

that there might be other creditors "out there" who would eventually share in the fruits of the attachment would still have certain alternatives. He could resort to the federal Bankruptcy Act. Alternatively, we see no reason why two or more claimants, each of whom thinks he has grounds for obtaining an attachment order against the same defendant, should not be able to make a combined application for such relief, if they desire to do so. This would have the virtue of possibly avoiding a multiplicity of applications for attachment orders against a single defendant, and the court would be able to impose suitable terms upon each applicant whose claim is taken into account in determining how much of the defendant's property to attach.

b. Quantification of the claimant's claim

8.90 Since the amount of the claimant's claim (plus the amount of any existing writs) will determine the amount of the defendant's property to be attached, it will be necessary to determine this amount when an attachment order is granted. Naturally, the claimant will quantify the claim in the evidence submitted in support of the application for the order. Ultimately, though, the court will have to quantify the claim for the purpose of determining the value of the property to be attached. As acknowledged in paragraph 8.17, claims for unliquidated damages may require the court to come up with a rough estimate of the amount of the defendant's damages, based on the evidence available at the time of the application. We do not think that this would cast a particularly onerous burden on the court. Nor do we think that it would work to the prejudice of defendants, because judges would undoubtedly err on the side of caution when quantifying claims on applications for attachment orders.

c. Special circumstances: prohibitory attachment orders

8.91 In principle, the value of the property to be attached should be the same whether it is attached through a prohibitory order or one of the other available methods. As the Mareva cases show, it is quite possible to frame a prohibitory order in terms which allow the defendant to deal freely with his assets to the extent they exceed the value of the claimant's claim. In England such an order is referred to as a "maximum sum" order.[534] However, a simple maximum sum order may be unworkable where it is intended to serve the order on third persons who control property belonging

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[534] See *supra* para. 5.33.

to the defendant, so the English courts have retained the discretion to grant general orders or modified maximum sum orders where a simple maximum sum order would be unworkable.[535] It is our view that while prohibitory attachment orders should generally only apply to as much of the defendant's property as is necessary to cover the claimant's claim and existing enforcement orders, the court should have the discretion to dispense with any monetary limitation which in the circumstances of a case is considered likely to render the order unworkable or ineffective.

RECOMMENDATION No. 15

The value of the defendant's property to be attached shall be fixed by reference to the claimant's claim (including an allowance for prejudgment interest and costs) plus subsisting enforcement orders.

RECOMMENDATION No. 16

Two or more claimants may combine their applications for an attachment order, in which case the value of the defendant's property to be attached shall be fixed by reference to the several claims of those applicants whom the court is satisfied are entitled to attachment orders, plus subsisting enforcement orders.

RECOMMENDATION No. 17

For the purpose of Recommendations 15 and 16, the value of a claimant's claim shall be estimated by the court on the basis of the evidence before it.

RECOMMENDATION No. 18

(a) The value of the property attached under Recommendation 12(b), (c) or (d) shall not exceed the amount determined by the court under Recommendations 15 or 16.

(b) Where the court makes an attachment order under Recommendation 12(a) it may dispense with any monetary limitation on the scope of the order if such a limitation is likely to make the order unworkable or ineffective.

6. The Effect of Attachment Orders on Third Persons

8.92 An attachment order is intended to protect the claimant against the consequences of an improper disposition of property by the defendant. It is possible to increase the level of protection for claimants by placing greater burdens on third persons. For example, a rule of law that any purported transfer of property made in violation of an attachment order is absolutely void would make such orders more effective, but would do so at the possible expense of innocent third persons.

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[535] *Z Ltd.* v. *A, supra* n. 272 at 574-76 (per Kerr, L.J.).

This raises the issue of to what extent, if any, is it proper to make third persons bear part of the burden of protecting attaching claimants against improper dispositions of defendants' property.

8.93 Why should a third person who has nothing to do with the dispute between two litigants be made to bear any of the burden of the legal system's efforts to protect the claimant against improper dispositions of the defendant's property? Why, for example, should a third person who knows of an order prohibiting a defendant from selling a particular automobile be under any duty not to buy the car from the defendant if the latter offers to sell it for a "good price". After all, it is not the third person's fault that the claimant got himself into the predicament which required him to ask the court for an attachment order. The answer to this question lies, we think, in the value of a properly functioning legal system to the community at large. This value is great enough to justify the imposition on third persons of a duty not to deliberately interfere with the administration of justice in a particular case. Indeed, the administration of justice is regarded as important enough to justify the imposition of certain positive duties on third persons. To reiterate an example we used earlier, a bystander who witnesses an accident which gives rise to an action for damages can be required to testify at the trial. His testimony may be essential to the proper administration of justice, so it is irrelevant that he was in no way responsible for the accident.

8.94 Similar considerations apply with respect to attachment orders and third persons. Consider the example we gave of a third person who knows of an attachment order prohibiting a defendant from disposing of a particular automobile. It is more than plausible to suggest that the third person should be under a duty not to participate or to assist in a disposition which he knows would be inconsistent with the terms of the order. The source of this specific duty would be the more general duty not to interfere in the administration of justice.[536] We are therefore of the view that there is a defensible rationale for imposing some burdens on third parties for the purpose of making attachment orders more effective. However, this rationale cannot be carried too far. The burdens imposed on third parties must be reasonable and fair.

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[536] This rationale has been employed by the courts to explain why persons who are not parties to an action and who are not even named in an injunction, but who know of it, are not free to act in a way which would frustrate its purpose, and may be guilty of contempt of court if they do: *Z Ltd.* v. *A, supra* n. 272 at 563, 566-67; *A.G.* v. *Newspaper Publishing Plc., supra* n. 286.

8.95 There are many possible ways of categorizing the various third persons who conceivably could be affected by attachment orders. We shall divide them into four categories: 1) persons with antecedent interests in attached property; 2) judgment creditors of the defendant; 3) subsequent transferees of an interest in attached property; and 4) persons who assist or participate in a violation of an attachment order. These categories are by no means mutually exclusive. In particular, a single person could easily fall into both of categories 3 and 4. Nevertheless, the categories provide a useful framework for analysis.

a. Antecedent interests in attached property

8.96 It is quite possible that an attachment order will catch property in which persons other than the defendant have some interest. In the most extreme case, attached property might be owned outright by someone other than the defendant. Or, although the defendant is the owner, someone else might have a beneficial interest, such as a security interest, in the property. Whatever the precise nature of the antecedent interest, we have no doubt that it should be unaffected by the attachment order. Put another way, any antecedent interest of any third person in property caught by an attachment order should have priority over the order. This proposition hardly requires to be supported by argument. All we shall say in this regard is that any other conclusion would fly in the face of the fundamental principle that the purpose of attachment orders is to prevent improper dispositions of the defendant's property. This object would not be served by giving attachment orders priority over an antecedent interest of a third person in the attached property.

RECOMMENDATION No. 19

No antecedent interest of any third person in any property shall be adversely affected by an attachment order.

b. Judgment creditors

8.97 Suppose that a claimant gets an attachment order against a defendant and manages to attach enough of the defendant's property to satisfy a future judgment. However, before the claimant can get judgment, another creditor of the defendant gets judgment and registers an enforcement order in the sheriff's office. As it happens, the only property that is available to satisfy the judgment creditor's claim is the attached property. What should be the effect of the

attachment order on the judgment creditor's ability to take the usual steps to enforce his judgment against the defendant's property?

8.98 If we were to look to the existing law of this province, we would find support for two very different answers to this question. The approach taken with respect to property caught by a writ of attachment or money paid into court pursuant to a garnishee summons is that judgment creditors of the defendant cannot get at the attached property until the claimant who caused it to be attached gets judgment.[537] The claimant does not get priority over judgment creditors with respect to the attached property. What he does do is delay the commencement of enforcement proceedings against that property until he is in a position to share in a distribution of their fruits.

8.99 An alternative model is provided by the Mareva injunction. A Mareva injunction does not prevent judgment creditors of the defendant from enforcing their judgments against the property subject to the injunction.[538] To give the Mareva injunction this effect would be to give the claimant an advantage over other creditors which the remedy was not intended to give him. In our view, this reasoning is persuasive and applicable to our proposed attachment order. Allowing judgment creditors to enforce their judgments against attached property is not the least bit inconsistent with the goal of protecting claimants against improper dispositions of defendants' property. Thus, we recommend that judgments should be enforceable against attached property and the proceeds of enforcement should be distributable in the same manner and to the same extent they would be were the property not attached.

8.100 We should make it clear what we are not saying here. Suppose that a claimant obtains an attachment order by which he manages to attach some property of the defendant. Before he can get judgment against the defendant another person does, and the latter's judgment is enforced against the attached property. The property is sold by the sheriff, and its proceeds are available for distribution. At this point the attaching claimant is a member of a potentially large group. The group consists of persons who have monetary claims against the defendant which have not been reduced to judgment when proceeds of enforcement activities against the defendant are to be

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537 Alberta Rules of Court, R. 489(1); Execution Creditors Act, s. 8(1)(b).

538 There are no cases in which this point has been directly in issue, probably because the point is put beyond doubt by the reasoning of such cases as *Iraqi Ministry of Defence* v. *Arcepey, supra* n. 277; *see supra* para. 5.34.

distributed. There are arguments to be made that some, if not all, members of the group of non-judgment creditors ought to be given some consideration in the distribution of enforcement proceeds. As someone who has already convinced a judge that he has a reasonable likelihood of getting a judgment against the defendant[539] the attaching claimant would have at least as good a case for such consideration as anyone in this group. This is an issue which we shall discuss in more detail in a subsequent report in this series.[540] Hence, our present recommendation should not be taken to imply that attaching claimants or other non-judgment creditors should necessarily be ignored in the distribution of enforcement proceeds.

RECOMMENDATION No. 20

Any money judgment may be enforced against attached property, and the proceeds of enforcement distributed, as if the property had not been attached.

c. Subsequent transferees of attached property

8.101 Under our proposals many attachment orders would simply prohibit a defendant from making certain dispositions of his property, while leaving the property in his possession. Undoubtedly, most defendants would choose to obey such an order. However, some defendants might choose to ignore the order, and purport to transfer attached property to a third person. Should the purported transfer have its normal effect?

8.102 Having asked the preceding question, it is tempting to draw a distinction between transferees who know that the purported transfer violates a court order and transferees who do not. One naturally has less sympathy for those in the former category. However, we would draw attention to a different distinction, one between the question we have asked and the question we might have asked. We have asked whether the transfer should have its ordinary effect, not whether the transferee should be subject to any liability--including perhaps a liability to transfer the property back to the defendant--as a result of the offending transaction. With respect to this latter question it may well be appropriate to distinguish between transferees on the basis of their knowledge. But with respect to the former question, the one we are now considering, we would not make this

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[539] See Recommendation 4, *supra* para. 8.42.

[540] We also discuss the related issue of whether the attaching claimant, whose efforts may have preserved the property in question for everyone's benefit, should get any special consideration on the matter of costs.

distinction. We would recommend that every purported transfer of attached property have precisely the same effect that it would have had if the attachment order had not been made.

8.103 The purpose of the preceding recommendation is not so much to protect the initial transferee as to protect more remote transferees. A hypothetical example will illustrate this point. Suppose an attachment order prohibits a defendant from selling a particular machine. Nevertheless, the defendant sells the machine to a third person, with whom he is in cahoots. The third person then sells the machine to a fourth person, who has no knowledge of the order. If we were to take the position that the first sale was of no effect because of the third person's knowledge of the order, he would have no title to pass on to the innocent fourth person. The latter would thus end up without the property, and probably without any effective recourse against the third person. This would not be right; protection for claimants would be purchased at too great a cost to innocent third persons. Our recommendation would avoid this unfortunate result, but, as will become apparent momentarily, it would not prevent colluding transferees from being called to account.

RECOMMENDATION No. 21

Subject to Recommendation 22, any purported transfer of an interest in attached property shall have the same effect that it would have had if the attachment order had not been made.

d. A remedy against third persons who assist or participate in the violation of an attachment order

(i) Generally

8.104 The problem of what, if anything, to do about the collusive transferee is part of a wider problem. The problem is what attitude the law should take to persons who assist in or take part in a disposition which they know to be inconsistent with the terms of an attachment order. One possible attitude is indifference: there would be no legal sanctions against such conduct. Such an attitude--allowing third persons to frustrate court orders with impunity--would not bode well for the administration of justice, and has therefore been rejected by the courts in relation to injunctions in general and Mareva injunctions in particular. A third person who acts in a manner which he knows will frustrate the purpose of an injunction may be found to be in contempt of

court,[541] and this would be true of someone who deliberately acted so as to frustrate an attachment order.

8.105 Often, the power of the court to punish for contempt is used to coerce someone into doing something which he ought to have done in obedience to a court order, or into undoing something which he has, but ought not to have done.[542] In such cases the contempt power functions more as a remedy for the person who has been injured by the contemptuous conduct than as punishment for that conduct. When so used, the contempt power can be something of a blunt and unwieldy instrument. We would not suggest that the power of the court to punish contempts committed by third persons be eliminated or restricted in any way. However, we think that where a remedy is warranted the court should be able to provide one without having to resort to the sledgehammer of contempt proceedings. Thus, it is our view that there should be a specific statutory remedy against third persons who assist or participate in a disposition of property which violates an attachment order.

8.106 The statutory remedy we propose would be discretionary, but the discretion would only arise in circumstances clearly pointing to misconduct by a third person. More specifically we would limit the availability of the proposed remedy to cases where a third person who has notice or knowledge of an attachment order knowingly assists or participates[543] in a disposition of property which is inconsistent with the terms of the order. It will be noted that there would be two knowledge requirements: 1) knowledge of the order; and 2) knowingly assisting or participating in a disposition which is inconsistent with it. In our view, the goal of preventing dispositions of attached property is not so important as to justify the imposition of liability on a third person who is not fully aware that he is participating in a disposition which may frustrate the purpose of an attachment order. Even then the remedy should be discretionary, so that the court may take into

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541 See *supra* para. 5.28.

542 For example, someone who is guilty of civil contempt can be imprisoned until he has purged his contempt: Alberta Rules of Court, R. 704(1)(a).

543 A person to whom attached property was actually transferred would obviously assist or participate in the disposition. However, the phrase "assist or participate in" is broad enough to include, say, a person who was in possession of the defendant's property, and released it to the defendant, knowing that this was inconsistent with the terms of an attachment order.

account any mitigating circumstances.

(ii) Land

8.107 Earlier in this chapter we said that a person who obtains an attachment order affecting an interest in land ought to be able to register it in the appropriate Land Titles Office. It is here that we consider what the effect of registration should be.

8.108 One possible effect that registration of an attachment order in the Land Titles Office might have would be to give the attaching claimant priority over subsequently created or registered interests. This is the normal effect of registration under our land titles system. However, it would be inconsistent with the conclusion we have already reached that every purported transfer of attached property should have exactly the same effect that it would have had if the property were not attached. The reason we reached this conclusion was our concern that protection for attaching claimants not be purchased at the expense of innocent third persons. Admittedly, the land titles system in this province makes it unlikely that an innocent third person would acquire any interest in land without finding out about an attachment order registered against the land. But it does not make it impossible.

8.109 In our view, the legitimate interests of attaching claimants would be adequately protected if registration of an attachment order in the Land Titles Office were to give rise to a presumption that would come into play where land was disposed of in violation of an attachment order. The presumption would be this, that if the attachment order was registered against the title to the land at the relevant time, any third person who assisted or participated in the disposition (including, but not limited to a transferee) would be presumed for the purpose of the proposed remedy to have done so with knowledge of the terms of the order. However, the presumption could be displaced by evidence establishing that the third person did not in fact have such knowledge.

(iii) Conflicting obligations

8.110 It is necessary to make one final point regarding the grounds for the proposed remedy. It concerns the matter of conflicting obligations, which we have already discussed in

connection with the Mareva injunction.[544] The basic scenario is something like this. A third person who has possession of or control over property of the defendant incurs an obligation in respect of that property to someone other than the defendant.[545] After incurring the obligation, the third person is served with a Mareva injunction which under ordinary circumstances would prevent him from doing that which his obligation to the fourth person requires him to do. The courts have reached the conclusion that the third person should not be prevented from carrying out the pre-existing obligation. That is also our conclusion in relation to attachment orders. Any other conclusion would unjustifiably sacrifice the legitimate interests of third persons to the interests of attaching claimants. Thus, our proposed remedy would not be available against a third person by reason only of the fact that after receiving notice of an attachment order, he has done something which it is necessary for him to do in order to carry out a pre-existing legal duty owed to someone other than the defendant.

(iv) Nature of the statutory remedy against third persons

8.111 Having considered the circumstances under which the proposed remedy could be granted, we now consider what form or forms the remedy should take. It obviously would be useful for the court to be able to require the third person to pay any damages resulting from the improper disposition. The attaching claimant is the person who would most obviously suffer damages as a result of an improper disposition, but he is not the only person who might be harmed. We particularly have in mind other creditors of the defendant who would have been entitled to share in a distribution of proceeds on a sale of the attached property. They too would be directly injured by its improper disposition. Thus, the court should be able to consider the damages suffered by the entire class of persons who might have benefited from the attachment.[546]

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[544] See *supra* para. 5.36.

[545] The obligation could be created in any number of ways: the issuing of an irrevocable letter of credit in favour of a fourth person at the request of the defendant, and the issuing of negotiable documents of title to goods of the defendant held by the third person are but two of the possibilities.

[546] The following example illustrates our point. Suppose property worth $10,000, being all of the defendant's exigible property, is attached, but is then spirited out of the country with the assistance of a third person. The attaching claimant eventually gets judgment against the defendant for $10,000, but there is by then another judgment against the defendant for the same amount. If the attached property had been sold

8.112 This leads to a technical point regarding the distribution of the proceeds of enforcement of any monetary order granted against a third person under our proposals. The damages awarded would reflect the damages suffered by all the persons who would have benefited from enforcement proceedings against the attached property, had it not been improperly disposed of. Since these are the persons who suffer as a result of the improper disposition in respect of which the order is made, it is only fair that they should all enjoy the benefit of the order. Thus, any order requiring a third person to pay damages should be for the benefit of all creditors of the defendant who would be entitled to share in a distribution of monies in the hands of the sheriff as a result of an enforcement order against the defendant. The share of each of these creditors in any money recovered under the order would be the same as if the money had come into the hands of the sheriff as a result of enforcement proceedings against the defendant. It is worth noting that since all the creditors would have a beneficial interest in the order, they would all have a beneficial interest in money received by one of their number from the third person without going through the sheriff's office.

8.113 In some cases attached property will be transferred to a third person who knows of the attachment order. We have already concluded that the purported transfer should have its ordinary effect, notwithstanding the transferee's complicity in the improper disposition. However, the transferee could be required under our proposals to pay damages resulting from the disposition. Alternatively, and subject of course to the rights of innocent fourth persons who may have acquired an interest in the property in the meantime, we think that the court should be able to require the third person to transfer the attached property back to the defendant. Anyone who had obtained a judgment against the defendant would then be able to enforce it in the ordinary way. This does not contradict what we have said about all purported transfers of attached property being given their ordinary effect. The proposal to require the third person to transfer the attached property back to the defendant assumes the validity of the original transfer. The advantage of this approach is that an intervening transferee (a fourth person) who is not implicated in the improper conduct will be protected, which he would not be if the original transfer were deemed to be void.

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[546](cont'd) to enforce the judgment, the claimant would only have received about $5,000, so his damages would presumably be $5,000, not $10,000. However, the damages suffered by the class of persons who would have benefited from the attachment is the full $10,000.

RECOMMENDATION No. 22

(a) Any person who, having received notice or having knowledge of an attachment order, knowingly assists or participates in a disposition of or dealing with property which is inconsistent with the terms of the order may be required, in the discretion of the court,

(i) to pay compensation in respect of any loss suffered by creditors of the defendant as a result of the disposition or dealing; or

(ii) to transfer back to the defendant any attached property or interest therein acquired by that person as a result of the disposition or dealing.

(b) For the purpose of this recommendation, a person who assists or participates in a disposition of land against which an attachment order is registered in the Land Titles Office may be presumed to have done so with knowledge of the terms of the order, unless it is established that he did not have such knowledge.

(c) Where a person has incurred a legal duty in favour of someone other than the defendant prior to receiving notice or knowledge of an attachment order, nothing which it is necessary for that person to do in order to discharge that duty shall be regarded, as against him, as participating or assisting in a disposition or dealing which is inconsistent with the terms of the order.

(d) An order under clause (a)(i) shall be for the benefit of all creditors who would be entitled to share in a distribution of monies in the hands of the sheriff as a result of an enforcement order against the defendant, and the respective shares of such creditors in any amount recovered under the order shall be determined in the same manner that their respective shares in monies in the hands of the sheriff as a result of an enforcement order against the defendant would be determined.

(e) An order under clause (a)(ii) shall not affect any interest in the attached property of any person not referred to in paragraph (a).

(f) This recommendation is not intended to limit the power of the court to punish for contempt.

D. Procedure and Safeguards

8.114 In Chapter 2 we briefly discussed several cases decided by the United States Supreme Court in the late 1960's and early 1970's concerning the constitutionality of certain prejudgment remedies provided by state statutes. In none of these cases was the issue the constitutionality of prejudgment remedies *per se*. Rather, the issue in each case was whether the particular statute in question provided sufficient procedural safeguards to satisfy the due process clause of the Fourteenth Amendment to the Constitution of the United States. Some of the statutes were found to pass muster in this respect; some were not.[547]

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[547] *Supra* paras. 2.24-2.26.

8.115 The due process clause of the Fourteenth Amendment has a parallel in section 7 of the Canadian Charter of Rights and Freedoms, which reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

A crucial difference between section 7 of the Charter and the due process clause of the Fourteenth Amendment is that the former makes no reference to a right to *property*. It is therefore very arguable that a prejudgment remedy against property, such as our proposed attachment order, would not have to measure up to the standard imposed by section 7.[548] On the other hand, we have no doubt that the procedure and safeguards associated with our proposed attachment order ought to be consistent with the principles of fundamental justice, whether section 7 of the Charter would actually apply to this remedy or not. Therefore, the procedures and safeguards proposed in this section are intended to ensure that defendants would not be deprived of their property by attachment orders except in accordance with the principles of fundamental justice.

1. Getting an Attachment Order

a. To whom should the application be made?

8.116 We have no doubt that an application for an attachment order should be made to either a judge or master in chambers. The question is, to which one. At present in Alberta, an application for a Mareva injunction, or any other sort of injunction, must be made to a judge.[549] On the other hand, masters in chambers may grant leave to issue a garnishee summons before judgment and may authorize the issuing of a writ of attachment.

8.117 We are of the view that an application for an attachment order should have to be made to a judge. We have reached this conclusion on the basis of constitutional considerations. A prohibitory attachment order which could be issued by the court under Recommendation 12(1) would be, in effect, an injunction. As is acknowledged by the Court of Queen's Bench Act, the

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[548] This is by no means beyond doubt, but it is not possible to embark on a discussion of the ambit of section 7 and its possible application to property in this report.

[549] Court of Queen's Bench Act, s. 9(2)(d).

granting of injunctions historically has been within the exclusive purview of the superior court judges. Therefore, it is very likely that any attempt by a provincial legislature to give masters in chambers authority to issue injunctive-type relief would run afoul of section 96 of the Constitution Act, 1867.[550] For this reason, we recommend that the application for an attachment order always be to a judge.

RECOMMENDATION No. 23

An application for an attachment order shall be made to a judge.

b. Timing: need an action have been commenced?

8.118 A claimant who has commenced an action claiming a money judgment should be at liberty to apply for an attachment order at any time prior to final judgment. The question arises, though, whether there are any circumstances in which a claimant should be able to apply for prejudgment relief even before he has commenced an action or even if he will not be bringing an action in the Court of Queen's Bench.

8.119 As noted earlier, the two major statutory prejudgment remedies in Alberta - the writ of attachment against absconding debtors, and prejudgment garnishment - both require that the claimant commence his action before applying for prejudgment relief. In other Canadian provinces the statutory prejudgment remedies are generally available only after an action has been

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[550] Section 96 of the Constitution Act, 1867 provides that judges of the superior, district and county courts are to be appointed by the Governor-General. This section has been construed to inhibit the provinces from creating tribunals which are in effect section 96 courts. The jurisprudence which has been built up around section 96 is both extensive and complicated. Suffice it to say that cases such as *Tomko* v. *Nova Scotia Labour Relations Board* (1975), 69 D.L.R. (3d) 250 (S.C.C.) and *Reference re Residential Tenancies Act* (1981) 123 D.L.R. (3d) 554 (S.C.C.) suggest that investing masters in chambers with the power to grant non-custodial attachment orders would be to give them the powers of a superior court judge. In this regard, we would note that although the office of the master in the English Court of Chancery is an ancient one, and the masters performed many duties relating to interlocutory proceedings, the granting of interlocutory injunctions was not one of these duties. As to the duties of the masters and the procedures for obtaining injunctions, *see* 9 W.S. Holdsworth, *A History of English Law* (1926) 358-60; J. Newland, *Harrison's Practice of Chancery* (1808) 16-17, 464-66, 539-59; *Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity* (D.E.C. Yale ed. 1965) 65-69, 118-25; *see also* D.M. Kerly, *History of Equity* (1890).

commenced.[551] Similarly, under California's Code of Civil Procedure an application for an attachment order, whether made on notice or not, can only be made upon or after the filing of the complaint by which an action is commenced.[552] On the other hand, in an exceptional case an application can be made for a Mareva injunction before an action is actually commenced.[553] And in New York an attachment order may be applied for and granted before an action is commenced, but is then valid only if the summons commencing the action is served on the defendant within sixty days of the granting of the order.[554]

8.120 In its report, the Ontario Commission thought that "the interests of debtors and creditors would be best protected by allowing attachment to issue prior to the commencement of an action upon such terms and conditions respecting the commencement of an action as seem just."[555] The Commission referring to the English Payne Committee's earlier report,[556] observed that, although it would not generally be a great burden for creditors to commence an action before applying for prejudgment relief, there could be situations where a strict rule would cause unnecessary hardship. For example, a claimant might discover on Friday night that his debtor is going to move his property out of the country over the weekend. A prejudgment remedy would not do the claimant much good if he could not apply for it until the following Monday, when the court offices opened and he could commence his action by filing a statement of claim.

8.121 The "weekend absconder" scenario is perhaps the most obvious, but is not the only situation where it might be appropriate for the court to grant an attachment order in favour of a claimant who has not commenced an action. Another example of a situation in which it might be appropriate for the court to do so is where the claimant and defendant are involved in arbitration proceedings which could result in a monetary award in favour of the claimant. By virtue of section 12 of the Arbitration Act, such an award could, with leave, be enforced in the same manner as a

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551 Ontario Report, *supra* n. 53 at 87.

552 C.C.P. ss. 484.010, 485.210.

553 See *supra* para. 5.38.

554 C.P.L.R., s. 6213.

555 Ontario Report, *supra* n. 53 at 88-89.

556 *Supra* n. 74.

judgment of the Court of Queen's Bench. If there were evidence that the defendant was likely to make an improper disposition of property that would seriously hinder the claimant in collecting on an award, it seems reasonable that the latter should be able to apply to the court for an attachment order.

8.122 We do not think it necessary or desirable to attempt to enumerate the various circumstances in which it might be appropriate for the court to grant an attachment order in favour of a claimant who has not commenced an action. Instead, the court should be given a broad discretion to grant relief to claimants falling into this category. The question of whether it would be appropriate to exercise this discretion in any given case would be something to be addressed by the court. It would be up to the claimant to convince the court that an attachment order should be granted even though no action has been commenced. Naturally, a judge granting an attachment order in such circumstances might well want to make the order subject to special terms or conditions, such as a term that the claimant commence an action within a certain period. Recommendation No. 12(e) would give the judge the authority to impose such terms or conditions on the claimant.

RECOMMENDATION No. 24

The court may grant an attachment order notwithstanding that the claimant has not commenced an action.

c. The application for relief: on notice or *ex parte*?

8.123 Usually, a litigant who wants to obtain an order which could adversely affect another litigant must give notice of the application to his adversary. The latter is then entitled to attend at and oppose the application. That a person be given an opportunity to appear at and oppose any application for an order which may adversely affect him is a fundamental requirement of procedural fairness. Unfortunately, the circumstances which indicate the necessity for a prejudgment remedy are usually circumstances which indicate that giving advance notice to the defendant of the application for relief will simply defeat the object of the application. If prejudgment relief is called for, it is because the defendant is dealing, or is preparing to deal with his assets in a manner calculated to put them beyond the reach of the courts. In such circumstances, it is quite likely that giving advance notice of the application for prejudgment relief to the defendant will simply accelerate his activities. As one English judge put it, "The whole point of the Mareva jurisdiction is that the plaintiff

proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction."[557] Likewise in Alberta an application for leave to issue a prejudgment garnishee summons or an application for leave to issue a writ of attachment may be made *ex parte*, that is, without notice to the defendant.[558] In allowing prejudgment relief to be obtained on an *ex parte* basis, Alberta is in line with the legislation and rules of court of the other Canadian provinces.[559]

8.124 The situation in the United States has been complicated by the constitutional cases discussed in Chapter 2.[560] Previously, in many states writs of attachment could be obtained simply by filing an affidavit in prescribed form. In those states, even a requirement that a claimant apply *ex parte* to a judge for leave to issue a writ of attachment would have been viewed as a major concession to defendants. However, after the constitutionality of existing attachment legislation was called into question, various states imposed more onerous requirements. In California, a plaintiff must now give notice to the defendant of his application for a right to attach order unless it is demonstrated by affidavit "that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice."[561] New York's response to the constitutional problem has been somewhat different. In that state, an application can still be made *ex parte* without the need to demonstrate any special reason for dispensing with notice. However, any order issued on such an application must be confirmed within five days of levy on an application made on notice to the defendant.[562]

8.125 In considering the approach taken in California, it is important to keep in mind that attachment is available there as a matter of course in actions based on commercial contracts. Thus, attachment is available in many cases where there is no particular reason for thinking that the defendant has any intention of dealing with his assets in an improper fashion. Giving advance notice of the application for attachment to such a defendant would probably do the claimant no great

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557 *Third Chandris Shipping Corp.* v. *Unimarine S.A., supra* n. 86 at 978 (per Mustill J.).

558 Rs. 470(1), 485(b).

559 Ontario Report, *supra* n. 53 at 102-03.

560 *Supra* paras. 2.24-2.26.

561 C.C.P., s. 485.010.

562 C.P.L.R., s. 6211.

harm. In contrast to California's attachment statute, ours would only authorize attachment where there were reasonable grounds for believing that if left to his own devices, the defendant would make some extraordinary disposition of property that would seriously hinder the claimant in collecting on a judgment. Where there are reasonable grounds for such a belief, there will also be reasonable grounds for believing that the likely effect of giving prior notice of the application for an attachment order would simply be to add impetus to the defendant's efforts to make the apprehended disposition. Therefore, we recommend that a claimant should be able to apply *ex parte* for an attachment order.[563]

8.126 Allowing the claimant to apply for an attachment order without notice to the defendant is a concession to the supposed urgency of the situation. However, we should not depart any further than is necessary from the principle that the court should not make an order adverse to a litigant without first giving him an opportunity to be heard. Once an attachment order has been granted and put into effect, there will be time for a reconsideration of the claimant's case for prejudgment relief in the light of what the defendant has to say about it. Clearly, the defendant or anyone else who is adversely affected by an attachment order should be given the opportunity to challenge the order at the earliest possible moment. However, we shall defer our consideration of the procedure for such a challenge[564] until we have finished our discussing of the procedural requirements for getting an attachment order in the first place.

RECOMMENDATION No. 25

An application for an attachment order may be made *ex parte*.

d. Special evidentiary requirements

8.127 Normally, a litigant applying for an interlocutory order faces few formal constraints on the manner in which he presents his evidence to the court. The evidence generally must be set out in a properly sworn affidavit.[565] Beyond that, it is up to the litigant and his legal advisers to

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563 The same conclusion was reached in the Ontario Report, *supra* n. 53 at 103.

564 See *infra* paras. 8.149-8.157.

565 It is certainly not unheard of for an interlocutory application to be made on the basis of an unsworn affidavit, with counsel undertaking to the court to have the affidavit sworn and filed in due course.

decide what evidence is required to convince the court that the order sought should be granted, and to present the court with an affidavit that meets these requirements. On an ordinary interlocutory application, the sworn statements in the affidavit need not even be based on direct knowledge, but may be based on belief, so long as the source and grounds of the belief are disclosed in the affidavit.[566]

8.128 But an application for a prejudgment remedy is not an ordinary interlocutory application. A successful application will result in a substantial interference with the defendant's use of his property prior to judgment. Moreover, this interference will normally be the result of an application to the court of which the defendant is not given any notice. For this reason, the courts and legislatures of this and other jurisdictions have not been as permissive regarding evidence on applications for prejudgment remedies as they have been for other sorts of interlocutory application. The applicant for a prejudgment remedy has traditionally been forced to comply with a host of special evidentiary rules intended, it may be supposed, to reduce the danger of the remedy being granted where it ought not to be.

(i) Full and fair disclosure

8.129 A special evidentiary requirement commonly imposed on claimants making *ex parte* applications for prejudgment remedies is a requirement that full and fair (or "full and frank") disclosure be made of all known facts material to the application, including facts that do not favour the claimant's case for the remedy.[567] Actually, the requirement of full and fair disclosure is less a reflection of judicial concern with prejudgment remedies *per se*, than a reflection of judicial concern to ensure that *ex parte* applications of any sort are as fair as possible.[568] If the defendant had the opportunity to appear and contest the application for the remedy, he presumably would bring to the attention of the court every consideration in his favour. Where the law indulges the claimant by allowing an *ex parte* application for a prejudgment remedy, basic fairness requires that he be under a duty to make full and fair disclosure of all material facts.

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[566] Alberta Rules of Court, R. 305(3).

[567] See *infra* paras. 3.52, 5.41.

[568] *R.* v. *Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486 at 509 (C.A.).

8.130 If the proposed legislation as to attachment orders were silent as to the duty of fair and full disclosure, we have little doubt that the courts would conclude that claimants applying *ex parte* for such orders were subject to this duty. Nevertheless, we would recommend that the existence of such a duty be made absolutely clear in the legislation. Moreover, so as to make the duty as comprehensive as possible, we think it should be expressed in terms of "material information" known to the claimant, rather than the somewhat narrower formula, "material facts".

RECOMMENDATION No. 26

A claimant making an *ex parte* application for an attachment order shall make full and fair disclosure of all material information known to the claimant.

(ii) Formal requirements

8.131 The full and fair disclosure requirement requires that the evidence presented by the claimant measure up to a certain standard, compliance with which can only be determined by reference to the facts of the matter to which that evidence relates. Usually, it will not be apparent merely from studying an affidavit whether it makes full and fair disclosure of all the facts that are relevant to the issues to which it relates. Determining whether it does or does not do so requires some extrinsic knowledge of the facts.[569] Another kind of special evidentiary requirement that is often imposed in the context of applications for prejudgment remedies is a requirement as to the contents, wording or some other aspect of an affidavit, compliance with which can be determined simply by examining the affidavit. That is, whether an affidavit complies with this sort of requirement can be determined without any extrinsic knowledge of the facts to which the affidavit relates. We shall refer to requirements of this latter sort as "formal evidentiary requirements".

8.132 There is no end to the formal requirements that could be imposed on applicants for prejudgment remedies. Rule 485 of the Alberta Rules of Court contains several examples: 1) two affidavits are required; 2) the primary affidavit must be made by the plaintiff or his agent; and 3) the corroborating affidavit must be made by "some other person" who swears "that he is well acquainted with the defendant". All these requirements are matters of form; whether they have been complied with can be determined without any extrinsic knowledge of the matters sworn to in the

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[569] This explains why failure to measure up to the standard of full and fair disclosure more often comes to light on an application by the defendant to set aside an *ex parte* order than on the claimant's initial, unopposed application to get the order.

affidavit. Thus, in *Lukian* v. *Shankoff*[570] the corroborating affidavit was defective because it failed to state that the affiant was well acquainted with the defendant, even though it stated that the former was the latter's son.

8.133 Other examples of formal requirements abound in legislation, rules of procedure and reform proposals from other jurisdictions. Some of the more interesting or common requirements are worth mentioning. One popular requirement is that the affiant swear to the amount owed by the defendant to the claimant after allowing for all just credits, set-offs and counterclaims known to him.[571] The Ontario Commission, noting that California imposed a similar requirement, thought that the person seeking relief should be required to swear that the application "is made *bona fide* for the sole purpose of providing security for the enforcement of any future judgment against the debtor in the main action".[572] Nova Scotia requires the affiant to state that he is advised by the plaintiff's solicitor (naming him), and believes that the plaintiff is lawfully entitled to attach the property.[573] In Massachusetts, where the amount of any attachment is limited to the amount by which the likely judgment exceeds the amount of any liability insurance shown by the defendant to be available to satisfy the judgment, an application for an *ex parte* attachment order must be accompanied by a certificate of the claimant or his attorney of the amount of any such liability insurance which he knows or has reason to believe will be available.[574]

8.134 It is tempting to conclude that if claimants are subject to a requirement of full and fair disclosure, any superadded formal requirements would be superfluous. What more should be asked of a claimant than full and fair disclosure of all material information? On the other hand, the plethora of formal requirements that have been imposed on claimants seeking prejudgment remedies suggests that legislators have thought that they serve some useful purpose or purposes. Indeed, there are several purposes which might be served by formal requirements of one sort or another. Four which come to mind are: 1) efficiency; 2) completeness; 3) instruction and

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570 *Supra* n. 130.

571 Nova Scotia C.P.R., R. 49.02(b); Manitoba Queen's Bench Rules, R. 583(d); California C.C.P., s. 484.020(b); Ontario Report, *supra* n. 53 at 101.

572 *Id.* at 101.

573 R. 49.02(c).

574 Rules of Civil Procedure, R. 4.1(f).

deterrence; and 4) reliability. We consider below whether any of these purposes would be so well served by a particular formal evidentiary requirement that the latter should be imposed on claimants seeking attachment orders, even though they are already subject to the duty of full and fair disclosure.

8.135 *Efficiency.* Almost by definition, an affidavit which fully and fairly discloses all material information available to the claimant will contain all the information that would assist the court in deciding whether to grant an attachment order. However, if the affidavit were not well organized, it might be difficult for the court to extract and sort out the necessary information. For example, the affidavit would undoubtedly contain information regarding the amount of the claim and the amount of any counterclaims or set-offs to which the defendant might be entitled (for if it did not, there would not be full and fair disclosure), but the information necessary to calculate the claimant's net claim might be scattered through several different parts of the affidavit. It would be an unnecessary waste of a judge's time to have to piece together information which could easily have been summarized in a short statement of the claimant's net claim. Thus, although most affidavits would undoubtedly contain such a statement whether there were a formal requirement or not, we think that the efficient use of the court's time would be promoted by a requirement for a statement to the effect that the claimant's claim against the defendant is X dollars, after allowing for all just claims and counterclaims. Of course this statement should not preclude the claimant from later revising his claim upward, if his claim is honestly underestimated in the first instance.

8.136 It would, we think, be counter-productive to impose too many formal requirements for the sake of efficiency. A formal requirement for the sake of efficiency will only be worthwhile where a particular matter - such as the net amount of a claimant's claim - will inevitably be an issue in any application for prejudgment attachment, and the facts relevant to that matter always will be capable of being summarized in a simple, uniform statement. In fact, we think the amount of the claimant's net claim is the only issue likely to arise often enough and in such a predictable way as to warrant a formal requirement for the sake of efficiency.

RECOMMENDATION No. 27

An affidavit filed in support of an application for an attachment order, or at least one of the affidavits filed in support of the application where more than one is filed, shall state with as much precision as possible the net amount claimed by the claimant

> from the defendant after allowing for all just set-offs, counterclaims and credits. Such a statement shall not preclude the claimant from recovering a larger amount at the trial of the action.

8.137 *Completeness.* One possible purpose of a formal evidentiary requirement is to ensure that specially relevant information is not left out of the claimant's affidavit through inadvertence. For example, a claimant seeking prejudgment attachment and intending to make full and fair disclosure might nevertheless inadvertently fail to consider whether the defendant has liability insurance that would cover the whole or some part of his claim. A formal requirement that every affidavit in support of an application for prejudgment attachment state whether the defendant is known to have any liability insurance applicable to the claimant's claim would undoubtedly make the chances of an inadvertent failure to address this point remote. On the other hand, even if there were no such formal requirement, we think that it would be extremely unlikely that a claimant applying for an attachment order in respect of a claim which might be covered by a policy of liability insurance would inadvertently fail to address this point.

8.138 More generally, we think that if a particular circumstance, such as the existence of liability insurance, or the existence of some sort of security for the claimant's claim, is significant enough to be considered worthy of a formal evidentiary requirement to make sure it is never forgotten, it will be significant enough not to escape the attention of a claimant adherring to his duty to make full and fair disclosure of all material information. In other words, the formal requirements would be redundant to the requirement of full and fair disclosure. Therefore, we do not think it would be especially useful to adopt any formal requirements for the purpose of ensuring comprehensivness in claimants' affidavits.

8.139 *Instruction and Deterrence.* The only obvious rationale for certain formal requirements is that they are intended to deter an applicant from doing something naughty, or, at least, to educate him that something is regarded as being naughty. For example, in recommending that the claimant be required to state that the attachment is being sought solely for the purpose of providing security for the claim in respect of which the order is sought, the Ontario Commission observed that "[because] of the possiblity of perjury charges, this formality may cause some creditors, whose real motive is to coerce debtors to settle, to reconsider resort to prejudgment attachment".[575]

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[575] Ontario Report, *supra* n. 53 at 101.

The Commission could also have rationalized this requirement on the basis that the very fact of having to state that the attachment order is not being sought for some collateral purpose might help bring home to some claimants that it is not proper to obtain or use an attachment order for a collateral purpose.

8.140 We doubt that a requirement like the one suggested by the Ontario Commission would provide very much of a deterrent. We think that a much more effective way of deterring claimants from obtaining attachment orders for collateral purposes would be to make it clear that a claimant who does so may be required to compensate the defendant for any damages he suffers as a result of the attachment order. Thus, although a requirement that the claimant make a statement such as the one suggested by the Ontario Commission might have some deterrent or instructional value, we think that this value would be so marginal as not to justify an additional formal requirement.

8.141 One formal requirement which we think can be justified on the basis of its instructional and deterrent value (we would emphasize the former) is that the affiant acknowledge compliance with the full and fair disclosure requirement. That is, not only should the affiant be under an obligation *to make* full and fair disclosure, but he should also be required *to state* that he has made full and fair disclosure of all materials facts known to him. Requiring the affiant to make such a statement would hopefully help bring home to him the importance of making full and fair disclosure. And, although we are not too sanguine about this, it is always possible that fear of the consequences of being found to have made a false declaration of full and fair disclosure might persuade an affiant to disclose a material fact which he would not have otherwise disclosed. We therefore recommend that affidavits in support of an application for an attachment order be required to contain a statement to the effect that the affiant has made full and fair disclosure of all material information known to him.

RECOMMENDATION No. 28

Every affidavit filed in support of an application for an attachment order shall contain a statement that the affidavit makes full and fair disclosure of all material information known to the affiant, whether that information favours the claimant or not.

8.142 *Reliability*. Sometimes, the most plausible rationale for a particular formal requirement is that it is intended to increase the reliability of the evidence on which an attachment order might be based. The requirement in our Rule 485 that there be two affidavits, one sworn by the claimant or his agent, the other by someone well acquainted with the defendant, is apparently intended to make the evidence on which the court acts more reliable. The Nova Scotia requirement[576] that the affiant state that he has been advised by the claimant's solicitor that the claimant is lawfully entitled to attach the property seems to be intended to serve the same purpose.

8.143 In considering the advisability of using formal evidentiary requirements as a means of making the evidence in support of an application more reliable, it is worth noting that in Nova Scotia the application for an attachment order is made to the prothonotary, a court official whose function appears to be limited to ensuring that the claimant's affidavit is formally correct. It should also be kept in mind that the formal requirements found in our own Rule 485 originated at a time when the writ of attachment was automatically issued by the clerk of the court upon the filing of the required affidavit.[577] It is not surprising that legislation which allows the attachment of a defendant's property without prior judicial review would put a premium on formal requirements as the best available means of ensuring the reliability of the evidence. However, where an attachment order must be issued by a judge whose task is to assess the evidence presented in support of the application, the need for formal evidentiary rules designed to ensure reliability is less apparent. Therefore, we do not think that considerations of reliability justify the imposition of any additional formal evidentiary requirements, such as those presently contained in Rule 485, on claimants seeking attachment orders.

(iii) Effect of non-compliance with special evidentiary requirements

8.144 In the chapters dealing with the existing law we mentioned a few of the many cases in which writs of attachment or prejudgment garnishee summons have been set aside because of a failure to observe some technical requirement. There is something to be said for a "strict compliance" approach where a remedy can be obtained without the necessity of making an application to a judge.

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[576] R. 49.02(c).

[577] The formal requirements in Rule 485 existed in substantially their present form in the Northwest Territories Ordinance No. 2 of 1886. It was not until 1897 that the claimant was required to apply to a judge: see *supra* para. 3.16.

However, where a claimant must convince a judge of the need for a prejudgment remedy, it seems to us to be unnecessary and unfair to deny or to set aside the remedy because of a purely technical flaw in the claimant's application. The two formal evidentiary requirements we have recommended are, we think, useful, but we do not think that an inadvertent failure to comply with one of them should be fatal. We are therefore of the view that failure by the claimant to comply with a formal evidentiary requirement should not necessarily lead to his application for an attachment order being denied, or to the order being set aside if the slip is not discovered until after the order has been made. Of course, where such a defect is discovered the claimant might be required to remedy it through an amendment or supplementary affidavit, and should be liable to an appropriate penalty in costs where that is appropriate.

RECOMMENDATION No. 29

An attachment order may be granted or, if already granted, continued, notwithstanding any defect of form in the material relied upon in support of the application for the order.

2. Safeguards

8.145 Ideally, attachment orders would only be granted against defendants who were improperly disposing of their assets in a manner that would prevent legitimate creditors from collecting just debts. Moreover, no such order would cause any more hardship or inconvenience to the defendant than was absolutely necessary in order to achieve its proper purpose, and certainly would not seriously inconvenience any innocent third person. Realistically, though, we must expect that attachment orders will sometimes be granted against defendants against whom an omniscient judge - or even a judge with a little more information than the judge hearing the *ex parte* application had - would not have made the order. So too, an attachment order granted in proper circumstances may nevertheless be unnecessarily onerous, or may subsequently become unnecessary, or may unduly inconvenience third persons. Here, we examine possible means by which such unhappy incidents of an effective system of prejudgment relief might be detected and remedied, or at least mitigated.

a. Defendant's right to provide substitute security

8.146 As far as the claimant is concerned, the whole point of an attachment order is to make it more likely that he will be able to collect on any judgment which he gets in the action. The

attachment order functions as a sort of security device. This being the function of the attachment order, there is obviously no reason to maintain an attachment order in force if the defendant is willing to provide some other form of security that will provide the claimant with at least as much protection as the attachment order. This fact is recognized by our present Absconding Debtor Rules which allow "[t]he person from whose possession the property was seized under the writ of attachment...to have it returned to him on giving the sheriff sufficient security for or paying into Court an amount equal to its value as shown in the sheriff's return made under Rule 487".[578]

8.147 We are of the view that liberal and flexible provision should be made for defendants who wish to provide substitute security in place of some or all of the property which has been attached. This right should also be enjoyed by any person in whose possession the property was when it was attached or who claims an interest in the property. Normally, it would be possible and desirable for the claimant, the defendant, and any other interested person to agree as to the form and amount of security. However, in the event that agreement cannot be reached, the court should determine the form and amount of the security. Of course, in doing so, the court should take into account all relevant circumstances, including but not limited to, the apparent value of the defendant's interest in the attached property.[579]

8.148 One question which arises in relation to security is whether the security should simply replace the attached property, and thus be available to judgment creditors of the defendant in the same way that the attached property would have been had it remained under attachment,[580] or whether it should enure to the sole benefit of the claimant (subject only to later attack as a fraudulent preference)? This is an issue which relates to the proper scope of the sharing principle presently embodied in the Execution Creditors Act. Thus, our discussion of this issue will be found in a subsequent report in this series.

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578 R. 488.

579 We refer to the value of the defendant's interest in the attached property rather than simply to the value of the property because the attachment order is subordinate to third persons' interest in the attached property. Thus, the security would normally only have to be sufficient to cover the defendant's interest in the property.

580 See *supra* para. 8.99.

RECOMMENDATION No. 30

(a) The defendant, any person claiming an interest in attached property or the person in whose possession the property was at the time of its attachment may have it released from attachment upon providing sufficient alternative security.

(b) The form and amount of the security may be determined by agreement between all interested persons or may be determined by the court, having regard to all the circumstances, including the apparent value of the defendant's interest in the attached property.

b. Hearing the defendant: confirming the *ex parte* attachment order

8.149 We said earlier that where an attachment order is granted on an *ex parte* application, the defendant should have the opportunity to challenge the order at the earliest possible moment. Of course, it hardly needs be said - but we shall say it anyway - that the claimant should be required to serve a copy of the order on the defendant as soon as reasonably possible after it is made. But what happens next?

8.150 The practice regarding *ex parte* injunctions in this and other jurisdictions suggests two possibilities. In England and some Canadian provinces the usual practice is for the court to make any *ex parte* injunction an interim one, that is, one that will automatically expire on a specified date unless the claimant succeeds in having it continued on an application made on notice to the defendant.[581] In contrast, in Alberta and some other provinces, the usual practice is for the court to enjoin the defendant "until further order" or until trial, and to give leave to the defendant to apply on notice to set aside the order.[582] Although the onus of moving to discharge the injunction is thus placed on the defendant, once he has done so, "the burden should then be on the other party to support his injunction in the same way and to the same extent as if the motion were one by him to continue the injunction".[583]

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581 This is the practice in Ontario: *see* R. Sharpe, *Injunctions and Specific Performance* (1983), 60. *Griffin Steel Foundries Ltd.* v. *C.A.I.M.A.W.* (1977) 80 D.L.R. (3d) 634 at 639-40 (Man. C.A.) suggests that it is the Manitoba practice as well.

582 *Hart* v. *Brown, supra* n. 323; *Bank of Montreal* v. *Pelletier, supra* n. 344 at 714-5. *Gulf Islands Navigation Ltd.* v. *Seafarers International Union of North America (Canadian District)* (1959) 18 D.L.R. (2d) 216 (B.C.C.A.).

583 *Hart* v. *Brown, id.* at 561.

8.151 It is frequently asserted that the first of these approaches is the better one.[584] In its report, the Ontario Commission concluded that *ex parte* attachment orders should be temporary.[585] The Commission appears not to have considered any alternatives to this approach. Unfortunately, none of the authorities who recommend that all *ex parte* injunctions or attachment orders be given only for a short, fixed period of time fully articulate their reasons for this conclusion. Certainly, it is generally stated or implied that this is fairer to the defendant, but the reasons why it is fairer are not gone into. Indeed, it is only on the other side of the issue that we have found anything approaching a fully articulated rationale for the favoured practice. In *Hart* v. *Brown*, Chief Justice Harvey offered the following justification for departing from the English practice:

> As above indicated, the injunction, though granted *ex parte*, was not for a definite period, but simply until further order. While this is not in accordance with the usual practice in England, it is a practice which, while not universal, has become quite common in this jurisdiction, and has in my opinion certain advantages. Experience shews that a large percentage of injunctions granted *ex parte*, whether for a definite period or otherwise, are continued on the hearing of both parties. In many cases they are continued as a matter of course. The making of the order as in the present case avoids the necessity of a second application where there is no real ground of objection to the injunction.[586]

In *Bank of Montreal* v. *Pelletier*, Beck J.A. offered an additional reason for the divergence of practice between Alberta and England:

> One of the reasons for our different practice, that is, for not limiting the operation of the interim Order to a particular day with liberty to the claimant to move to continue, but making the Order effective until further Order leaving the defendant to move to vacate or vary is the much greater ease with which in this jurisdiction such motions can be brought on for hearing.[587]

Beck J.A.'s was actually a dissenting judgment, but these particular observations do not appear to have been controversial. Although the preceding points were made with reference to *ex parte*

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[584] Sharpe, *supra* n. 581 at 60; *Griffen Steel Foundries Ltd.* v. *C.A.I.M.A.W.*, *supra* n. 581 at 639-40.

[585] *Supra* n. 53 at 103-04.

[586] *Supra* n. 323 at 561. *See also Z Ltd.* v. *A*, *supra* n. 272 at 573-74 (per Kerr L.J.).

[587] *Supra* n. 344 at 115.

injunctions, they would apply equally to *ex parte* attachment orders.

8.152 However, several things could be said against adopting the Alberta practice respecting *ex parte* injunctions for *ex parte* attachment orders. Most importantly, perhaps, requiring the claimant to apply to continue a temporary order emphasizes that the burden is on the claimant to show why the attachment should be continued, rather than on the defendant to show why it should be set aside. Even if the official onus were identical in each case, a judge might feel less constrained by what has gone before if the issue were perceived as being whether to continue an *ex parte* order beyond its expiry date, instead of being whether to set aside an order which purports to be of indefinite duration.

8.153 Another consideration is that if the *ex parte* order were temporary, the claimant would have every reason to proceed expeditiously with an application to continue it. If the order were of indefinite duration, the claimant would probably not be overly anxious to expedite any application by the defendant to set it aside.

8.154 Finally, it is probable that some defendants against whom *ex parte* attachment orders would be granted would not have legal counsel. Some of these defendants might in fact have good grounds for attacking the order, but either not realize that they could apply to have the order set aside or not have the first idea how to make the application. It would be fairer to such defendants, as being more likely to allow them a real opportunity to present their side of the case to a judge, to impose on the claimant the onus of initiating the hearing.

8.155 Put shortly, the gist of the argument against requiring *ex parte* attachment orders to be temporary is that this may simply result in a waste of everyone's time and money when the defendant has no real objection to the order. But on the other side, it may be argued that even if the burden of persuasion is officially left on the claimant, requiring the defendant to apply to set aside an *ex parte* attachment order may subtly place the latter at an unfair disadvantage. Given a choice between a more convenient and a more fair procedure, we think that the proper choice is clearly the fairer procedure. Therefore, subject to the qualifications set out in the next paragraph, we recommend that every attachment order granted on an *ex parte* application should be temporary. That is, the order should expire after a date named in the order unless it is continued beyond that

date by an application made on notice to the defendant. The judge granting the *ex parte* application would determine the duration of the temporary order, but we think a presumptive maximum duration should be specified by the legislature. We think that a period of 21 days would be an appropriate presumptive maximum.[588] The court should be able to specify a longer period, but only if there are special circumstances present which make a 21 day period unrealistic.

8.156 Occasionally, a claimant who has obtained an *ex parte* attachment order may be unable, through no fault of his own, to bring on an application to continue the order before it is due to expire. Perhaps he encounters difficulty in serving the defendant, or perhaps the defendant himself requests an adjournment of the application. These are two of many possible circumstances which could justify an extension of the temporary order. We therefore recommend that the court be given a discretion to extend the operation of a temporary *ex parte* attachment order for whatever additional period of time seems necessary, if for any reason it would be impractical or inexpedient to hear the application to continue the attachment order before it is due to expire. In certain extreme cases, such as where the defendant could not be located, the court would be justified in extending the temporary attachment order indefinitely. However, an indefinite or lengthy extension without the consent of the defendant would rarely be justified.

8.157 We do not think the fact that an *ex parte* order is due to expire in, say, 10 days, should prevent a defendant from applying before that time to have the order terminated. The defendant might be under severe pressure as a result of the attachment order, and it would be unjust not to allow him to apply at the earliest possible moment to have the order terminated or modified. Thus, it should always be open for a defendant to bring his own application to terminate or modify an *ex parte* attachment order, on such notice to the claimant as is required by the Rules of Court or by the judge hearing the application.

RECOMMENDATION No. 31

Every attachment order shall be served on the defendant as soon as reasonably possible after it is made.

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[588] This would ordinarily allow the claimant plenty of time to serve the order and notice of motion on the defendant, and complete any cross-examinations on affidavits that were necessary.

RECOMMENDATION No. 32

(a) Every attachment order granted on an *ex parte* application shall specify a date after which it shall expire unless it is in the meantime continued beyond that date on an application made on notice to the defendant.

(b) The date so specified shall be not more than 21 days after the date the order is made, unless the court is satisfied that special circumstances exist which justify a later date.

(c) If it would be impractical or inexpedient to hear the claimant's application on notice to continue the *ex parte* attachment order before the order would otherwise expire, the court may extend the order on a further *ex parte* application by the claimant.

RECOMMENDATION No. 33

Notwithstanding Recommendation 32, a defendant against whom an *ex parte* attachment order has been granted may apply at any time for an order terminating or modifying the attachment order.

c. Grounds for terminating an attachment order

8.158 How should the court approach an application by a claimant to continue an *ex parte* attachment order or an application by a defendant or interested third person to have an attachment order terminated?[589]

(i) Conditions for attachment not satisfied

8.159 We have already indicated that an attachment order should not necessarily be terminated because of technical deficiencies--defects of form--in the material submitted by the claimant in support of the original, *ex parte* application. However, our conclusion about technical deficiencies is derived from a more basic point, which is this. Leaving to one side for the moment the problem of non-disclosure of material information, the issue on an application to continue or to terminate an *ex parte* attachment order should not be whether the order should or should not have been granted on the basis of the evidence before the court on the original application. Rather, the issue should be whether, on the basis of the evidence presently before the court, the continuation of

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[589] We use the term "terminate" advisedly, in the hopes of avoiding the legal baggage which comes along with such terms as "dissolve" or "discharge". For example, there is sometimes said to be a difference between dissolving and discharging an injunction: *Gulf Islands Navigation Ltd.* v. *Seafarers International Union of North America (Canadian District), supra* n. 582 at 519. A decision to terminate an attachment order would simply be a decision that it should no longer be in force.

the order is justified. If, but only if, the court is satisfied that all the threshold requirements for the granting of an attachment order are now met, and is satisfied that it would be just and equitable to do so, the *ex parte* order should be continued, with whatever modifications are considered necessary.

8.160 The general point expressed in the preceding paragraph had an additional corollary. On the application to continue or to terminate an *ex parte* attachment order, the court has to consider exactly the same issues that it would have had to consider were this the initial application for the attachment order. True, the plaintiff has already persuaded a judge on an *ex parte* application to grant an attachment order. But the issue now is not whether the judge hearing the *ex parte* application should or should not have granted the order. Short of pointing out non-disclosures of material information by the claimant, it should not avail the defendant to point out that the judge who granted the *ex parte* order did so on the basis of very thin evidence: the issue should be the present state of the evidence. The other side of the coin is that the fact that the claimant was able to obtain an attachment order on an *ex parte* application should not give rise to any presumption in his favour at the later hearing. The onus of persuading the court that all the conditions for the granting (and continuation) of an attachment order are met should remain firmly on the claimant.

RECOMMENDATION No. 34

(a) Subject to Recommendation No. 35, on an application to continue or to terminate an *ex parte* attachment order, the issue shall be whether the evidence presently before the court justifies the continuation of the order, rather than whether the *ex parte* order was properly granted in the first instance.

(b) On any such application the claimant shall have the onus of justifying the continuation of the order.

(ii) Non-disclosure of material information

8.161 We have emphasized the importance of the duty of a claimant, when making an *ex parte* application for an attachment order, to make full and fair disclosure of all material information. The obvious question is, What happens if a claimant obtains an *ex parte* attachment order without making full and fair disclosure of all material information known to him? In this regard, it is instructive to review the approach taken by the courts in the context of *ex parte* injunctions.

8.162 In one respect, the court's approach to non-disclosure of material facts on *ex parte* injunction applications has been very strict and inflexible. Non-disclosure will automatically result in the *ex parte* injunction's being set aside with costs, even if the non-disclosure was "innocent" (i.e., unintentional).[590] However, the courts' approach is not as inflexible as it appears on first glance to be. Where an *ex parte* injunction is set aside for non-disclosure of material facts, the claimant may apply on notice for another injunction. Indeed, the court may exercise its discretion to grant a new injunction at the same time as it sets aside the *ex parte* injunction, and will be more inclined to do so where the non-disclosure was innocent.[591] It may be wondered what the point is of setting aside one injunction and immediately replacing it with another. The point is that whether the *ex parte* injunction is or is not set aside affects the matter of costs, which in some cases may be a very important matter indeed.[592]

8.163 In our view, where a court finds that there has been non-disclosure of material information on an *ex parte* application for an attachment order, it should have a discretion whether to terminate the attachment order or not. Undoubtedly, the court would be influenced in exercising this discretion by the circumstances behind the non-disclosure: it obviously would be more inclined to continue the attachment order in the case of innocent than in the case of intentional non-disclosure. Where the court decides to continue the attachment order in spite of the non-disclosure, it should be able to impose an appropriate costs penalty on the claimant.[593] It should be noted that giving the court a discretion to continue the attachment order while imposing a costs penalty on the claimant achieves the same purpose as the present, more convoluted practice adopted by the courts in respect of *ex parte* injunctions. Permitting the court to award costs against the claimant without terminating the attachment order allows us to dispense with the largely pointless device of terminating the *ex parte* order and immediately replacing it with a new one.

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590 *See supra* para. 5.41.

591 See e.g., *Griffin Steel* v. *C.A.I.M.A.W., supra* n. 581 at 643-44; *Lloyds Bowmaker* v. *Britannia Arrow, supra* n. 318 at 345.

592 It is also possible that the court would direct an enquiry as to damages suffered by the defendant as a result of the *ex parte* injunction which has been set aside.

593 There would also be nothing to stop the court from awarding damages under the claimant's undertaking in damages, if that were considered appropriate: see para. 8.174 and Recommendation 38, *infra*.

RECOMMENDATION No. 35

Where a claimant has failed to disclose material information in obtaining an *ex parte* attachment order, the court may terminate or may continue the order, and in either case may make any order as to costs which the court considers appropriate.

(iii) Other reasons for terminating an attachment order

8.164 Even after an attachment order has been confirmed on an application made on notice to the defendant, circumstances may arise which make it appropriate to terminate the order before the conclusion of the proceedings. The attachment order may have been used by the claimant for an improper purpose amounting to an abuse of the court's process. Having obtained the attachment order, the claimant may not be diligently prosecuting the action, hoping instead that the disruption caused to the defendant by the order will induce him to settle on terms favourable to the claimant. Indeed, the claimant may have done nothing wrong, but a change in circumstances since the order was granted and confirmed, or the fact that it unduly interferes with the interests of a third person, may make it inappropriate for the order to continue in force.

8.165 The preceding are but examples of the great variety of circumstances which might make it appropriate to terminate an attachment order. Obviously, then, the court should be given a broad discretion to terminate an attachment order whenever it appears just to do so. But we are faced with the same sort of choice that we faced in discussing the grounds for attachment. Should the legislation attempt to assist the court in exercising its discretion by identifying some of the more likely circumstances in which termination of an order would be appropriate? For example, should the legislation specifically allow the court to terminate an attachment order where the claimant has been unreasonably dilatory in the prosecution of his action? We think not. Insofar as dilatoriness is but an obvious example of a situation in which it might be just to terminate an attachment order, the courts hardly need to have this pointed out to them by the legislature. Thus, we think it quite sufficient for the legislation to make it clear that the court has the power to terminate an attachment order on the application of any person whenever it appears just to do so.

RECOMMENDATION No. 36

The court may terminate an attachment order on the application of the defendant or any affected third person where for any reason it appears to the court that it would be just to do so.

d. Applications to vary or clarify attachment orders

8.166 By discussing variation and clarification of attachment orders separately from the matter of their termination, we do not mean to suggest that there is necessarily a fundamental difference between the grounds for varying, and the grounds for terminating an attachment order. We can readily conceive that an application by a defendant or third person to terminate an attachment order might also seek, as an alternative to outright termination, a substantial variation in the terms of the order. Moreover, the same evidence might be relied on to support alternative arguments for termination or variation of an attachment order. Nevertheless, there are enough differences between the two sorts of application to make separate discussion worthwhile.

8.167 When discussing the grounds for terminating an attachment order, we emphasized the need to leave a large measure of discretion with the judge hearing the application. If anything, this need is even greater in the case of applications to vary or clarify an attachment order, because the circumstances which may justify the variation or clarification of an order are even more numerous than those which may justify its termination. Clearly, the court should have a broad discretion to vary or clarify an attachment order where it appears just to do so.[594] However, particular attention should be drawn to the situation where an attachment order places more or tighter constraints on the defendant's dealings with his property than are reasonably necessary to prevent him from improperly dealing with it. This situation is worth singling out because our fundamental premise has been that the only proper function of an attachment order is to prevent the defendant from improperly disposing of property. In some cases it may be unavoidable that an attachment order which is to effectively prevent a defendant from making improper dispositions of his property will also cause some incidental interference with his ability to deal with it for proper purposes. However, it should be made clear that a defendant should be able to obtain a variation of any attachment order which unduly restricts his ability to deal with his property in a proper manner.

RECOMMENDATION No. 37

(a) The claimant, the defendant or any affected third person may apply at any time to have an attachment order varied or clarified, and the court may vary or clarify an attachment order in any case where it appears just to do so.

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[594] In this regard, the practice as to the variation of Mareva injunctions serves as a useful model.

(b) Without limiting the generality of the foregoing, the court may vary an attachment order so as to permit legitimate dispositions of the defendant's property.

e. Claimants' liability for "wrongful attachment"

(i) Damages

8.168 There are two objects which could be served by imposing financial liability on claimants for the consequences of what for lack of a better term we shall refer to as "wrongful attachment". The first object would be to compensate defendants or other persons who suffer damage as a result of the issuing or execution of an attachment order, where it is thought proper that the financial burden should be transferred to the claimant. The second object would be to deter abuse of prejudgment remedies by overreaching claimants.

8.169 Of course, there are certain circumstances in which no one would deny that the claimant should be required to compensate the defendant for any damages suffered by the latter as a result of an attachment order. A claimant asserting a claim he knows to be groundless who obtains an attachment order by deliberately misrepresenting the facts to the court should surely be liable to compensate the defendant for any damage caused by the order. But what of a claimant with a reasonable claim who obtains an attachment order in good faith, but is ultimately unsuccessful in his action because of an adverse ruling on a difficult point of law? Should he have to compensate the defendant if the latter has suffered any damage? This is a more difficult question.

8.170 Three different approaches to the compensation problem can be discerned in the legislation, case law and proposals for reform we have examined. The first approach is to make misconduct by the claimant an essential ingredient of any claim for compensation by the defendant. The mere fact that the claimant ultimately fails to recover a judgment against the defendant does not ground a claim for compensation. This is the case with the writ of attachment remedy in this province. As we saw in Chapter 3, the absconding debtor rules themselves do not provide a remedy in damages to a defendant who is the victim of a wrongful attachment.[595] There might be certain common law causes of action available to the defendant, but none of these would be made out by simply showing that he has suffered damage as a result of the claimant's having obtained a writ of

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[595] *Supra* para. 3.49.

attachment and then failing to recover a judgment.[596] Something more, some sort of misconduct on the part of the claimant is required, if the defendant is to recover compensation for his damages. In sum, the common law remedies take a fault-based approach to liability.

8.171 The second approach could be described as one of strict liability. Where this approach is followed, the claimant's good faith and proper conduct will not save him from having to compensate the defendant if his action is ultimately unsuccessful. In Nova Scotia, for example, the claimant is required to file a bond, one of the conditions of which is:

> The claimant shall pay to the defendant or other person the damages and costs that either of them has sustained by reason of the wrongful issue of the attachment order, or the wrongful making of any attachment thereunder, *or if the claimant fails to recover judgment against the defendant in the proceedings*, or as the Court may order.[597]
> [Italics added.]

The underlying rationale for this approach is that since the claimant chooses to ask the court to tie up the defendant's assets before his claim is determined to be valid, he should bear the ultimate financial burden of any injury caused to the defendant if the action is ultimately unsuccessful. After all, no one forces a claimant to apply for a prejudgment remedy.

8.172 A third approach is exhibited by the courts in their approach to the enforcement of undertakings in damages given by claimants in order to obtain interlocutory injunctions. The undertaking gives the court the power to require the claimant to pay any damages suffered by the defendant. But an award of damages will only be made if the court is of the opinion that the defendant's damages should be paid by the claimant. In a word, the undertaking gives the court discretion to award damages.

8.173 Of course, there are certain authoritative guidelines for the exercise of this discretion. As was pointed out in Chapter 5, if the claimant's action is ultimately dismissed, it has been held that the court should exercise its discretion in favour of requiring the claimant to pay any damages suffered by the defendant, unless special circumstances exist which would make this inappropriate.[598]

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596 *Supra* paras. 3.55-3.60.

597 Nova Scotia Civil Procedure Rules, r. 49.03(2)(b)(ii).

598 See *supra* para. 5.44.

The crucial point is that while there is a presumption in favour of damages, the court is allowed to take into account any circumstances which would argue against awarding damages in a particular case.

8.174 In our view, the discretionary approach taken by the courts to the enforcement of undertakings in damages is the proper basis for dealing with "wrongful attachments". It is only this approach which allows the court to take into account all the many circumstances which can determine whether in a particular case it would be just to require the claimant to compensate the defendant. Thus, the court should be given a broad discretion to require a claimant who has obtained an attachment order to pay any damages caused by the order.

8.175 As for mechanics, we think that the undertaking in damages is the appropriate vehicle for the discretionary remedy. Thus, the filing of an undertaking in damages in damages should be a necessary prerequisite to the obtaining of an attachment order.[599] An alternative would be to give the court a statutory discretion with respect to damages, thus obviating the need for the claimant to file an undertaking.[600] While this alternative is not without practical merit, we think that requiring the claimant to actually execute and file an undertaking could have a salutary, sobering effect. Indeed, the undertaking might have an even more salutary effect on certain claimants if it clearly indicated that the court could award exemplary as well as compensatory damages. We therefore think that the possibility of exemplary damages should be expressly mentioned in the undertaking given by the claimant.

8.176 It is not only defendants who may suffer as the result of an attachment order: third persons may feel its bite as well. An obvious possibility is that the property of a third party may be mistakenly attached. But the effect of the attachment order on a third person may be more subtle than that. A person in possession or control of the defendant's property who is given notice of an attachment order might incur expenses or liabilities, or lose income as a result of being placed under certain duties with respect to the property under his possession or control. It goes without saying that the court should have the power to order the claimant to compensate a third person who

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[599] The court's discretion would be with respect to the enforcement of the undertaking, not as to whether an undertaking should be given.

[600] This is the approach taken by R. 40.04 of the New Brunswick Rules of Court, which says that anyone obtaining an interlocutory injunction is deemed to have given an undertaking in damages.

suffers any injury as a result of the making or execution of an attachment order. Thus, the general undertaking the claimant must give in order to get an attachment order should be in favour not only of the defendant, but also any third person who might be affected by the order.

8.177 In certain circumstances the general form of undertaking--under which any compensation depends on a future exercise of the court's discretion--should be supplemented by specific undertakings in favour of third parties. Suppose, for example, that a claimant intends to serve a Mareva-type attachment order on a bank at which the defendant is suspected of having an account. It is anticipated that the bank will take steps to find out whether the defendant does have an account there, and, if he does, to prevent money from being removed in violation of the order. Doing all this may put the bank to considerable trouble and expense. It is reasonable to suggest that the bank's prospects for indemnification should not necessarily depend on a future exercise of the court's discretion. After all, if the bank is to be made an involuntary participant in the claimant's efforts to prevent the defendant from disposing of property, there should be no question that it will be compensated for its trouble.[601]

8.178 The bank account scenario is just one of many possible situations where a third person could be conscripted into the claimant's battle with the defendant by virtue of being given notice of an attachment order.[602] Thus, circumstances could often arise where the court would consider it appropriate to require the claimant, in addition to giving a general undertaking in damages (which would give the court a discretion to award damages), to undertake unconditionally to indemnify third persons served with notice of the attachment order for expenses reasonably incurred by them in giving effect to the order. Therefore, we recommend that the court be specifically authorized to require the claimant to file any additional undertakings which the court considers it appropriate for the claimant to give.

RECOMMENDATION No. 38

(a) A claimant who obtains an attachment order shall file an undertaking in favour of the defendant and third persons to pay any damages, including exemplary damages, or indemnification that the court considers the claimant ought to pay.

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601 *Searose* v. *Seatrain, supra* n. 328; *Z Ltd.* v. *A, supra* n. 272 at 564, 573.

602 *See e.g. Clipper Maritime* v. *Mineralimport, The Marie Leonhardt* [1981] 3 All E.R. 664 (Q.B.D.), where the affected third party was a port authority.

(b) The claimant may be required to file any additional undertakings which the court considers appropriate.

(ii) Costs

8.179 Alberta's Absconding Debtor Rules provide that a claimant who recovers judgment for an amount which is less than the amount of the debt, as sworn to in the affidavit upon which the writ of attachment was issued, may be deprived of his costs or may be required to pay the defendant's costs.[603] This provision supplements Rule 601(1) which provides that the costs of all parties to any proceeding are in the discretion of the Court. The general rule is that costs are awarded to the party who prevails in the action, and there must be some good reason, such as misconduct on the part of the winning party, to justify any other order as to costs. Rule 490(2) might be thought of as describing one circumstance in which it would be proper to exercise the Court's discretion against the winning party. However, we are not convinced that a provision similar to Rule 490(2) need be retained, as Rule 601(1) gives to the Courts sufficient authority to deal with overreaching claimants when it comes time to award (or not award) costs.

(iii) Security

8.180 In many jurisdictions a claimant who gets a prejudgment remedy is automatically required to furnish security for his possible liability to the defendant or third persons. Indeed, statutes or rules of court sometimes provide not only that security is to be given, but also that it is to be in a particular form and for a particular amount, calculated by reference to the value of the property to be attached.[604] On the other hand, in the case of Mareva injunctions, whether the claimant should furnish security for his undertakings is regarded as something to be decided by the court when the injunction is granted, taking into account the particular circumstances of the case.[605]

It seems to us that the necessity and appropriateness of requiring the claimant to furnish security will depend on the particular facts of each case. In our view, then, it makes good sense that the

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603 R. 490(2).

604 Nova Scotia's R. 49.03(1), for example, provides that unless the court otherwise orders, the plaintiff shall give a bond in prescribed form in an amount equal to one and one quarter times the value of the property sought to be attached, with two sufficient sureties, or some other form of sufficient security approved by the prothonotary.

605 See *supra* para. 5.46.

question of whether security should be required, and if so in what form and for what amount, should be for the court granting the attachment order to answer.

8.181 One situation which is likely to pose a dilemma for the court in the exercise of its discretion is where the foreseeable damages from a wrongful attachment are large and the claimant's resources are small. Here, the need for security is great if the defendant is to have a meaningful right to recover damages or costs, but the claimant's chances of being able to furnish adequate security are slim. The claimant's relative poverty - relative, that is, to the size of his potential liability - is both the reason for requiring him to provide security and the reason for his not being able to provide it. The unhappy choice is between denying to the claimant the remedy for which he has presumably made out a case and granting the remedy with the knowledge that anyone injured by the attachment will have no real prospect of being fully compensated. It is our view that the claimant who finds himself in the circumstances we have just described should not automatically be precluded from obtaining relief. Rather, the court should consider this circumstance, along with all other relevant circumstances, such as the apparent strength of the claimant's case against the defendant, in deciding whether, on balance, the granting of an attachment order without security is likely to serve the ends of justice.[606]

RECOMMENDATION No. 39

The court may require the claimant to provide security for his undertaking or undertakings, in such amount and in such form as the court considers appropriate.

3. Other Procedural Matters

a. Duration of the attachment order

8.182 Under the heading "Safeguards" we considered the question of under what circumstances an attachment order should be terminated before the end of its natural lifespan. We

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[606] A similar conclusion was reached in *Ominayak* v. *Norcen Energy Resources Ltd.* (1983) 24 Alta. L.R. (2d) 394 (Q.B.), where it was held that the claimants' obvious inability to make good on their undertaking in damages was not a bar to an interlocutory injunction. On further proceedings in the same case, this inability was regarded by the judge as a factor which reinforced the other reasons he found for not granting an interlocutory injunction: (1983) 29 Alta. L.R. (2d) 151; aff'd (1985) 36 Alta. L.R. (2d) 137. Leave to appeal to S.C.C. refused (1985) 61 A.R. 160.

did not there consider what an attachment order's natural lifespan should be. This is the subject to which we now turn our attention.

8.183 After noting the very great variety of approaches taken by Canadian and American attachment legislation to the duration issue,[607] the Ontario Commission recommended that, "unless the court otherwise orders, an attachment order should remain in force until final judgment is rendered in the creditor's action against the debtor".[608] This recommendation was based on the premise that "the most efficacious term for an attachment order would be one that is correlative with the creditor's need for security".[609] The unstated assumption in the Commission's argument is that final judgment generally represents the stage at which the claimant's need for security ends.

8.184 Certainly, that is a reasonable assumption to make where final judgment goes against the claimant. We would go further, however, and say that, subject to any order of the court to the contrary, an attachment order should be considered to be terminated in any case where the claimant's action concludes without a money judgment in his favour. The most obvious case, of course, is a judgment against the claimant at trial. However, other possibilities are the action's being discontinued, or dismissed for want of prosecution. These are all cases where, in the absence of an order to the contrary, an attachment order should be considered to terminate automatically.

8.185 Turning to the situation where the action concludes with a judgment in favour of the claimant, we think the claimant's need for the security provided by the attachment order is likely to end not at the moment judgment is granted, but after he has had an opportunity to take steps to enforce the judgment. The claimant will usually be able to take such steps within a short time after, but not at the very moment, judgment is granted. This is especially so when it is kept in mind that the attached property will not necessarily, or even usually, be in the actual custody of the sheriff or other officer of the court at the moment judgment is given.[610] In our view, then, the presumption should be that where the claimant does recover a money judgment, the attachment order will continue in effect until some point in time after the judgment is granted. But how and where

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607 Ontario Report, *supra* n. 53 at 112-14.

608 *Id.* at 114.

609 *Ibid.*

610 See para. 8.74.

should this point be established? We think that this point should be established by reference to two criteria: 1) it should be readily ascertainable in all cases; and 2) it should give the claimant (judgment creditor) a reasonable opportunity to secure the attached property by other means, such as by having it seized under an enforcement order.

8.186 New Brunswick's subrule 40.03, which deals with injunctions for the preservation of assets (Mareva injunctions) suggests one possible answer to our question:

> (4) Where an injunction has been granted under this subrule to remain in effect until judgment and the claimant succeeds on his claim for debt or damages, the injunction shall, without further order, continue in effect until the judgment is satisfied.

The premise underlying this rule would seem to be that the security provided by the injunction is generally required until the claimant's judgment is satisfied. Our view, keeping in mind that we are talking about a presumption that may be overridden by the court in an appropriate case, is that this goes further than is necessary to allow the claimant a reasonable opportunity to enforce his judgment. In the ordinary case, a claimant should be able to take steps to secure the attached property by other means within a short time of getting judgment. The cases where this could not be done would be the exception rather than the rule.

8.187 Our recommendation is that in cases where the claimant recovers a money judgment against the defendant, the attachment order should automatically terminate at the end of the sixtieth day following the issuing of an enforcement order in respect of the claimant's judgment. A period of sixty days from the issuing of the enforcement order would give the claimant ample time to secure the attached property by means of postjudgment enforcement mechanisms. Moreover, insofar as the issuing of an enforcement order would be a definite act done on a particular day, the point at which the attachment order expires would be readily ascertainable. We emphasize, though, that we are speaking of a presumption, which would only be operative in the absence of a contrary indication by the court.

RECOMMENDATION No. 40

Unless it is otherwise ordered by the court, and subject to Recommendation No. 32, an attachment order shall terminate:

(a) upon the dismissal, discontinuance or other termination of the claimant's

proceeding; or

(b) where the claimant recovers a money judgment against the defendant, at the end of the sixtieth day following the issuing of an enforcement order in respect of the judgment.

b. Sale of attached property

8.188 Under our proposals, most attachment orders would not result in the sheriff or anyone else taking physical possession of tangible property of the defendant. Tangible property would usually be attached by means of a prohibitory order in the nature of a Mareva injunction. Occasionally, though, it would be necessary to take actual custody of such property. When this occured, the property would normally be held until the claimant obtained judgment or the attachment order was terminated. Certainly, the attached property would not normally be sold or otherwise disposed of prior to the claimant getting judgment against the defendant.

8.189 However, it might sometimes transpire that it would be either impossible or against the best interests of everyone concerned to preserve the attached property until the action concluded. The property might be perishable; its value might be dramatically decreasing with each passing day; or the cost of preserving it until the action concluded might be much greater than its value. One would expect that in most instances the parties themselves would be able to come to an agreement as to the sale of such property. But in some cases, such as where the defendant could not be found, agreement might not be possible. Therefore, in appropriate circumstances, the court should be able to order the sale of attached property.

8.190 The Ontario Commission's recommendation on this point was as follows:

> Accordingly, we recommend that the court, upon the application of the debtor, the creditor, the enforcement office, or any person interested in the attached property, and upon notice to all concerned, should be empowered to order the sale or disposition of any property that has been attached where the property is likely to perish or to depreciate materially in value before the probable termination of the creditor's action against the debtor, or where the keeping of the property is likely to result in unreasonable loss or expense, or for any other just cause.[611]

We agree with the Commission's recommendations as to the circumstances in which the court should

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611 Ontario Report, *supra* n. 53 at 111.

be able to order the sale or disposition of attached property. The ordinary procedure of the courts would require the application be on notice to all interested persons, unless extraordinary circumstances made an *ex parte* application necessary. Of course, the court should be able to require the claimant to provide security for any damages which may be suffered by any person as a result of the sale.

8.191 The Ontario Commission also recommended that the enforcement office be authorized to sell attached property without court approval in urgent cases, that is, "where the value of any attached property would be diminished substantially as a result of any delay in its sale" occasioned by the necessity of following the procedure outlined in the passage quoted above. In our view, this is unnecessary. In an urgent case the application for permission to sell could be made *ex parte*, even over the telephone, and we find it difficult to imagine situations in which the delay involved in making a telephone call to a judge would be critical.

RECOMMENDATION No. 41

(a) The court may authorize the sale or other disposition of attached property where

(i) the property is likely, through physical deterioration or other cause, to depreciate substantially in value prior to the conclusion of the proceedings;

(ii) keeping the property under attachment pending the conclusion of the proceedings would be likely to result in unreasonable costs in relation to its value; or

(iii) for any other reason it appears just and expedient to do so.

(b) The court may require the claimant to provide security for any damages which may be suffered by any person as a result of the sale or disposition of the attached property.

c. Orders regarding the disclosure of assets

8.192 In Chapter 5, we noted that it was not uncommon for Mareva injunctions to be supplemented by "discovery orders", orders requiring the defendant to disclose the extent and whereabouts of his assets.[612] Such an order is granted only where the court is satisfied this is necessary to make the injunction effective and workable.[613] Their purpose is not evidentiary.

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[612] See *supra* para. 5.29.

[613] The English courts often seem to be satisfied on this point. In *Ashtiani* v. *Kashi*, *supra* n. 293 at 974 Dillon L.J. said that the standard form Mareva order "includes, as a matter almost of course, a direction for disclosure by the defendant

That is, they are not granted for the purpose of allowing the claimant to acquire evidence upon which to found an application for a Mareva injunction, or to continue one that has been granted on an *ex parte* application. As we also noted, the English courts have concluded that they have the power to make these orders even though there is no specific statutory provision or rule of court authorizing them to do so.

8.193 It is not only in respect of Mareva injunctions that discovery orders can be made. The following provision is found in Nova Scotia's attachment rules:

> The court may, at any time after the granting of an attachment order and prior to final judgment, order a person to disclose any information he possesses regarding any property that a claimant seeks to attach under the order.[614]

This rule gives to the court a discretion that is at least as wide as that which has been assumed by the courts in relation to Mareva injunctions.

8.194 There is something to be said for giving the court a discretion when granting an attachment order to order the defendant or even a third person to disclose information pertaining to the assets that are to be attached. In some cases, especially where the trustworthiness of the defendant is greatly in doubt, the effectiveness of an attachment order may depend on the claimant's being able to get information as to the whereabouts of the defendant's property. At the same time, there is plenty of scope for abuse of such a facility by claimants. Claimants getting a discovery order ostensibly for the purpose of making an attachment order effective could use the information gained for purposes other than that which the court had in mind in making the order. For instance, even if the claimant acted in complete good faith, information gained about the defendant's financial status could not help but give the claimant a huge tactical advantage in settlement negotiations. Arguably, a claimant who has managed to get an attachment order should not thereby become eligible for a collateral tactical advantage such as this.

8.195 In the result, we have decided not to make any recommendation regarding discovery orders. In doing so, we appreciate that if the attachment legislation were silent on this specific

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[613](cont'd) on affidavit of all his assets within the jurisdiction or outside the jurisdiction".

[614] R. 49.11. This rule is very similar to New York's C.P.L.R., s. 6220.

subject, the courts would be able to make discovery orders if they were minded to do so. The arguments by which the English courts have reached the conclusion that they may make such orders in aid of Mareva injunctions would apply equally to discovery in aid of attachment orders granted under our proposed legislation. This is perhaps another area where everything must depend on the particular factual context. If so, the decision as to whether discovery orders should be made in aid of attachment orders is best left up to the courts.

PART III

LIST OF RECOMMENDATIONS

LIST OF RECOMMENDATIONS

RECOMMENDATION No. 1

A statutory prejudgment remedy called the "attachment order" should be created. Attachment orders should only be available in the circumstances and in accordance with the procedure and safeguards set out in this report.

RECOMMENDATION No. 2

The following mechanisms by which an unsecured claimant may obtain prejudgment relief should be eliminated:

(a) writs of attachment under Rules 485-493 of the Rules of Court;

(b) garnishee summons before judgment under Rule 470(1);

(c) appointment of a receiver of proceeds of an auction sale under Rule 465;

(d) the granting of Mareva injunctions or similar relief under s. 13(2) of the Judicature Act;

(e) the various existing methods of providing security for a claimant whose default judgment is set aside pursuant to Rule 158.

RECOMMENDATION No. 3

The Court of Queen's Bench should be authorized to grant an attachment order in respect of any claim which could lead to the recovery by the claimant of a money judgment against the defendant.

RECOMMENDATION No. 4

An attachment order may be granted only where the court is satisfied that

(a) there is a reasonable likelihood that the claimant will recover a money judgment against the defendant;

(b) there are reasonable grounds for believing that the defendant is disposing of or dealing with his property, or is likely to do so (i) otherwise than for the purpose of meeting the reasonable and ordinary business or living expenses of the defendant, and (ii) in a way that is likely to seriously hinder the claimant in the enforcement of any judgment he might get against the defendant; and

(c) it would be just and equitable, taking into account the interests of the claimant, the defendant, and any affected third persons, to grant an attachment order.

RECOMMENDATION No. 5

An attachment order shall not be used as a means of acquiring jurisdiction to determine the merits of a dispute where the court would not otherwise have or be able to obtain personal jurisdiction over the defendant under the Rules of Court.

RECOMMENDATION No. 6

(a) A claimant who has commenced proceedings before a foreign tribunal may apply for an attachment order.

(b) The court shall not grant such an application unless it is satisfied that

(i) a judgment granted by the foreign tribunal would be enforceable in Alberta either by an action on the judgment or by registration of the judgment under the Reciprocal Enforcement of Judgments Act;

(ii) the defendant has attachable property in Alberta; and

(iii) the grounds for attachment as set out in Recommendation No. 4 exist.

RECOMMENDATION No. 7

The power of the court to issue the writ *ne exeat regno* in civil actions should be abolished.

RECOMMENDATION No. 8

The property potentially subject to prejudgment attachment should consist of all the defendant's exigible property. Property of the defendant which would be exempt from postjudgment execution should be immune from prejudgment attachment, but there should be no special immunities in the latter case.

RECOMMENDATION No. 9

Notwithstanding Recommendation 8, a prejudgment attachment order shall not permit the garnishment of a defendant's wages, salary or similar income unless the court is satisfied that no other remedy or combination of remedies is likely to achieve the intended purpose with less serious consequences for the defendant.

RECOMMENDATION No. 10

The property to be attached shall be determined by the court.

RECOMMENDATION No. 11

(a) An attachment order should cause no more inconvenience and disruption to the defendant than is considered by the court to be reasonably necessary in order to achieve the object of the order.

(b) Without restricting the generality of paragraph (a), an attachment order should allow the defendant to retain possession and control of the attached property so that he may use it for proper purposes, unless the court is satisfied that such an order would be unlikely to prevent the improper disposition of the defendant's property.

RECOMMENDATION No. 12

Subject to Recommendation No. 11 an attachment order may:

(a) prohibit any disposition of or dealing with any property of the defendant, or impose restrictions or conditions on any disposition of or dealing with such property;

(b) order the defendant or any person in possession of the defendant's property to deliver it up to a person identified in the order;

(c) authorize the claimant to issue one or more garnishee summons;

(d) appoint a receiver over any property of the defendant; and

(e) include or be subject to such terms, conditions, and ancillary provisions as the court considers necessary to ensure that the order operates fairly and effectively.

RECOMMENDATION No. 13

An attachment order under Recommendation No. 12(a) may provide that it shall apply to such property as may be subsequently identified for that purpose by the sheriff. A list of the property so identified shall be served on the defendant.

RECOMMENDATION No. 14

A copy of an attachment order affecting an interest in land may be registered against the title to that land in the Land Titles Office.

RECOMMENDATION No. 15

The value of the defendant's property to be attached shall be fixed by reference to the claimant's claim (including an allowance for prejudgment interest and costs) plus subsisting enforcement orders.

RECOMMENDATION No. 16

Two or more claimants may be able to combine their applications for an attachment order, in which case the value of the defendant's property to be attached shall be fixed by reference to the several claims of those applicants whom the court is satisfied are entitled to attachment orders, plus subsisting enforcement orders.

RECOMMENDATION No. 17

For the purpose of Recommendations 15 and 16, the value of a claimant's claim shall be estimated by the court on the basis of the evidence before it.

RECOMMENDATION No. 18

(a) The value of the property attached under Recommendation 12(b), (c) or (d) shall not exceed the amount determined by the court under Recommendations 15 or 16.

(b) Where the court makes an attachment order under Recommendation 12(a) it may dispense with any monetary limitation on the scope of the order if such a limitation is likely to make the order unworkable or ineffective.

RECOMMENDATION No. 19

No antecedent interest of any third person in any property shall be adversely affected by an attachment order.

RECOMMENDATION No. 20

Any money judgment may be enforced against attached property, and the proceeds of enforcement distributed, as if the property had not been attached.

RECOMMENDATION No. 21

Subject to Recommendation 22, any purported transfer of an interest in attached property shall have the same effect that it would have had if the attachment order had not been made.

RECOMMENDATION No. 22

(a) Any person who, having received notice or having knowledge of an attachment order, knowingly assists or participates in a disposition of or dealing with property which is inconsistent with the terms of the order may be required, in the discretion of the court,

(i) to pay compensation in respect of any loss suffered by creditors of the defendant as a result of the disposition or dealing; or

(ii) to transfer back to the defendant any attached property or interest therein acquired by that person as a result of the disposition or dealing.

(b) For the purpose of this recommendation, a person who assists or participates in a disposition of land against which an attachment order is registered in the Land Titles Office may be presumed to have done so with knowledge of the terms of the order, unless it is established that he did not have such knowledge.

(c) Where a person has incurred a legal duty in favour of someone other than the defendant prior to receiving notice or knowledge of an attachment order, nothing which it is necessary for that person to do in order to discharge that duty shall be regarded, as against him, as participating or assisting in a disposition or dealing which is inconsistent with the terms of the order.

(d) An order under clause (a)(i) shall be for the benefit of all creditors who would be entitled to share in a distribution of monies in the hands of the sheriff as a result of an enforcement order against the defendant, and the respective shares of such creditors in any amount recovered under the order shall be determined in the same manner that their respective shares in monies in the hands of the sheriff as a result of an enforcement order against the defendant would be determined.

(e) An order under clause (a)(ii) shall not affect any interest in the attached property of any person not referred to in paragraph (a).

(f) This recommendation is not intended to limit the power of the court to punish for contempt.

RECOMMENDATION No. 23

An application for an attachment order shall be made to a judge.

RECOMMENDATION No. 24

The court may grant an attachment order notwithstanding that the claimant has not commenced an action.

RECOMMENDATION No. 25

An application for an attachment order may be made *ex parte*.

RECOMMENDATION No. 26

A claimant making an *ex parte* application for an attachment order shall make full and fair disclosure of all material information known to the claimant.

RECOMMENDATION No. 27

An affidavit filed in support of an application for an attachment order, or at least one of the affidavits filed in support of the application where more than one is filed, shall state with as much precision as possible the net amount claimed by the claimant from the defendant after allowing for all just set-offs, counterclaims and credits. Such a statement shall not preclude the claimant from recovering a larger amount at the trial of the action.

RECOMMENDATION No. 28

Every affidavit filed in support of an application for an attachment order shall contain a statement that the affidavit makes full and fair disclosure of all material information known to the affiant, whether that information favours the claimant or not.

RECOMMENDATION No. 29

An attachment order may be granted or, if already granted, continued, notwithstanding any defect of form in the material relied upon in support of the application for the order.

RECOMMENDATION No. 30

(a) The defendant, any person claiming an interest in attached property or the person in whose possession the property was at the time of its attachment may have it released from attachment upon providing sufficient alternative security.

(b) The form and amount of the security may be determined by agreement between all interested persons or may be determined by the court, having regard to all the circumstances, including the apparent value of the defendant's interest in the attached property.

RECOMMENDATION No. 31

Every attachment order shall be served on the defendant as soon as reasonably possible after it is made.

RECOMMENDATION No. 32

(a) Every attachment order granted on an *ex parte* application shall specify a date after which it shall expire unless it is in the meantime continued beyond that date on an application made on notice to the defendant.

(b) The date so specified shall be not more than 21 days after the date the order is made, unless the court is satisfied that special circumstances exist which justify a later date.

(c) If it would be impractical or inexpedient to hear the claimant's application on notice to continue the *ex parte* attachment order before the order would otherwise expire, the court may extend the order on a further *ex parte* application by the claimant.

RECOMMENDATION No. 33

Notwithstanding Recommendation 32, a defendant against whom an *ex parte* attachment order has been granted may apply at any time for an order terminating or modifying the attachment order.

RECOMMENDATION No. 34

(a) Subject to Recommendation No. 35, on an application to continue or to terminate an *ex parte* attachment order, the issue shall be whether the evidence presently before the court justifies the continuation of the order, rather than whether the *ex parte* order was properly granted in the first instance.

(b) On any such application the claimant shall have the onus of justifying the continuation of the order.

RECOMMENDATION No. 35

Where a claimant has failed to disclose material information in obtaining an *ex parte* attachment order, the court may terminate or may continue the order, and in either case may make any order as to costs which the court considers appropriate.

RECOMMENDATION No. 36

The court may terminate an attachment order on the application of the defendant or any affected third person where for any reason it appears to the court that it would be just to do so.

RECOMMENDATION No. 37

(a) The claimant, the defendant or any affected third person may apply at any time to have an attachment order varied or clarified, and the court may vary or clarify an attachment order in any case where it appears just to do so.

(b) Without limiting the generality of the foregoing, the court may vary an attachment order so as to permit legitimate dispositions of the defendant's property.

RECOMMENDATION No. 38

(a) A claimant who obtains an attachment order shall file an undertaking in favour of the defendant and third persons to pay any damages, including exemplary damages, or indemnification that the court considers the claimant ought to pay.

(b) The claimant may be required to file any additional undertakings which the court considers appropriate.

RECOMMENDATION No. 39

The court may require the claimant to provide security for his undertaking or undertakings, in such amount and in such form as the court considers appropriate.

RECOMMENDATION No. 40

Unless it is otherwise ordered by the court, and subject to Recommendation No. 32, an attachment order shall terminate:

(a) upon the dismissal, discontinuance or other termination of the claimant's proceeding; or

(b) where the claimant recovers a money judgment against the defendant, at the end of the sixtieth day following the issuing of an enforcement order in respect of the judgment.

RECOMMENDATION No. 41

(a) The court may authorize the sale or other disposition of attached property where

(i) the property is likely, through physical deterioration or other cause, to depreciate substantially in value prior to the conclusion of the proceedings;

(ii) keeping the property under attachment pending the conclusion of the proceedings would be likely to result in unreasonable costs in relation to its value; or

(iii) for any other reason it appears just and expedient to do so.

(b) The court may require the claimant to provide security for any damages which may be suffered by any person as a result of the sale or disposition of the attached property.