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Foreign Attachment Power Constrained-An End to Quasi In Rem Jurisdiction?

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NOTES

Foreign Attachment Power Constrained—An End to Quasi In Rem Jurisdiction?

Pennsylvania's foreign attachment procedures were held to be an unconstitutional violation of due process by the United States Court of Appeals for the Third Circuit. This note analyzes the evolving concept of due process in its relation to summary seizures and places the instant decision within that framework. The author attempts to evaluate the court's attack of the attachment statute's constitutionality based on a balancing test for procedural due process as well as the concurring opinion's contention that a minimum contacts test should replace quasi in rem jurisdiction.

Elmer J. Jonnet, Jonnet Development Corp., and Jonnet Enterprises, Inc. (collectively Jonnet) brought an action against Dollar Savings Bank of the City of New York (Dollar) in the United States District Court for the Eastern District of Pennsylvania.[1] Jonnet claimed damages in excess of $1,000,000, alleging that Dollar wrongfully failed to honor a mortgage commitment.[2] Utilizing Pennsylvania's foreign attachment procedures[3] to obtain jurisdiction,[4] Jon-

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1. Jurisdiction in the federal district court was based on diversity of citizenship, 28 U.S.C. § 1332 (1970). Dollar is a New York corporation organized under the Banking Law of New York whose principal place of business is in the Bronx, New York, and is not registered to do business in Pennsylvania. Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1125 n.4 (3d Cir. 1976); Brief for Appellant at 3.

2. The $1,100,000.00 commitment was to be secured by a mortgage on a shopping center in Monroeville, Pennsylvania. Jonnet claimed $1,285,394.74 in damages. Brief for Appellee at 1-2; Brief for Appellant at 3.

3. In Lebowitz v. Forbes Leasing & Finance Corp., 326 F. Supp. 1335, 1340-41 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir. 1972), the court described the attachment procedures under PA. R. CIV. P. §§ 1252-66 as follows:

> A foreign attachment may be issued to attach property of a defendant not exempt from execution. Where the defendant is subject to such action, any person owing a debt to defendant, having property of the defendant in his custody, possession or control, holding fiduciary property in which the defendant has an interest, or holding legal title to property of the defendant may be made a garnishee. The attachment is commenced by filing a praecipe for a writ with the prothonotary which directs the sheriff to attach such items as are set forth in the praecipe and all other property of the defendant. The prothonotary immediately enters the attachment against the defendant in the judgment index. . . . The attachment extends to the property after acquired by the garnishee . . . to any form of property not exempt from execution. The rules authorize manual seizure by the sheriff. No bond or security is required of the plaintiff commencing the foreign attachment by the sheriff except for the actual or estimated cost of obtaining possession

net garnished two Pennsylvania accounts owed to Dollar.[5] After securing dissolution of the attachment,[6] filing an answer, and conducting discovery, Dollar moved to dismiss for lack of jurisdiction.[7] The district court granted the motion holding Pennsylvania's foreign attachment procedures unconstitutional.[8] On appeal,[9] the

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of the property. Plaintiff is required to file a complaint setting forth his cause of action but not until five days after the filing of the foreign attachment proceedings.

4. The 1963 amendments to FED. R. CIV. P. 4(e) provided for the commencement of an action in federal court by the use of state attachment procedures. For a general discussion of FED. R. CIV. P. 4(e), *see* Notes of Advisory Committee on 1963 Amendment to Rules; 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1070, 1119-23. Furthermore, FED. R. CIV. P. 64 authorizes the use of provisional remedies, including seizure of property, to secure satisfaction of a subsequent judgment as provided by the law of the state in which the district court sits. Such use, however, is subject to constitutional limitations. *See* 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2931, 2932, 2934. Foreign attachment was the only jurisdictional basis for suit in Pennsylvania since the state "long-arm" statute, 42 PA. C.S.A. §§ 8301 *et seq.* (Supp. 1976), excepted acquiring mortgages from its definition of "doing business." 42 PA. C.S.A. § 8309 (c) (Supp. 1976).

5. Jonnet commenced the action by filing a "Complaint in Assumpsit with Foreign Attachment" and several days later filed a praecipe for writ of foreign attachment in accordance with PA. R. CIV. P. 1255. The United States Clerk of Court, as prothonotary, issued the writs, and the United States Marshall served them on two Pennsylvania corporate garnishees, Chrysler Realty Corporation owing Dollar $599,657.00 and A-1 Builders, Inc. owing Dollar $763,654.11. The subsequent monthly installment from each garnishee was not paid to Dollar. 530 F.2d at 1125; Jonnet v. Dollar Sav. Bank, 392 F. Supp. 1385, 1391 (W.D. Pa. 1975).

6. Upon motion, hearing, and subsequent posting of $50,000.00 security by Dollar, the district court dissolved the attachments in accordance with PA. R. CIV. P. 1272 (c), 530 F.2d at 1125.

7. Dollar argued that the foreign attachment procedures failed to comport with procedural due process and thus could not sustain jurisdiction. Jonnet argued that Dollar, by filing the security and conducting extensive discovery for over a year, waived the jurisdictional issue. The court of appeals found, however, that the constitutional claim had been raised and preserved at the initial motion for dissolution and in the answer to Jonnet's complaint. 530 F.2d at 1125 n.5.

8. Jonnet v. Dollar Sav. Bank, 392 F. Supp. 1385 (W.D. Pa. 1975). The district court judge applied a three-part test derived from Fuentes v. Shevin, 407 U.S. 67, 92 (1972), and also compared the Pennsylvania prejudgment procedures to the doctrine enunciated in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). Applying the *Fuentes* test, he found: (1) the foreign attachment statute too broad since it could reach foreign defendants within Pennsylvania's long-arm jurisdiction; (2) there was no need for prompt action; and (3) that a clerk performing a purely ministerial function provided insufficient state control. Furthermore, the Pennsylvania statute had none of the saving characteristics enumerated in the *Mitchell* decision. He noted the lack of: (1) judicial approval of the order; (2) the setting forth of facts in support of the application; (3) a requirement of bond from the attaching creditor; and (4) a right in the debtor to regain possession by posting bond. In summation, the procedures lacked the requirement that there be a showing of the validity of the claim.

> Due process is not served when one party to a dispute may, by mere unexamined application to an official whose function is solely ministerial bring to bear the state's enormous confiscatory power on its behalf.

392 F. Supp. at 1392-93.

9. The district court order of dismissal for lack of jurisdiction was final and appealable under 28 U.S.C. § 1291 (1970).

United States Court of Appeals for the Third Circuit *held;* affirmed: Pennsylvania's foreign attachment procedures serve only the potential plaintiff's interests and provide insubstantial protection to the prospective defendant against wrongful attachment, and thereby deny fourteenth amendment procedural due process. *Jonnet v. Dollar Savings Bank,* 530 F.2d 1123 (3d Cir. 1976).

Location of a defendant's property within the forum state's boundaries has been a well established foundation for limited general jurisdiction.[10] Although attachment procedures existed in the English common law, the process of foreign attachment adopted in the United States is statutory in nature and is based upon the "Custom of London of Foreign Attachment."[11]

A territorial concept of jurisdiction, substantiating a state's exclusive control over property within its border,[12] led to the development of quasi in rem jurisdiction.[13] Justified by a state's interest in providing its citizens with a remedy for legal wrongs committed by nonresidents, quasi in rem actions provided the citizens of a state with a method of subjecting the "furtive defendant"[14] to liability to the extent of his property interest within the state.

The establishment of quasi in rem jurisdiction through foreign attachment varies among the states,[15] but a coincident historical

10. Limited general jurisdiction is jurisdiction to adjudicate any controversy but limited in effectiveness to the property involved. It is a compromise necessitated by the balancing of the unfairness to a defendant in compelling him to litigate in a remote forum under a threat of default with the interest of a state in providing a forum for its citizens against defendants who, absenting themselves from the state, have thwarted in personam jurisdiction. Carrington, *The Modern Utility of Quasi in Rem Jurisdiction,* 76 HARV. L. REV. 303, 304-05 (1962). Any procedures which do not allow a limited appearance are highly suspect. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1139 n.38 (1966). *But see* Note, *Developments in the Law—State Court Jurisdiction,* 73 HARV. L. REV. 909, 953 (1960).

11. Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt,* 27 HARV. L. REV. 107, 111 (1913). For a discussion of the differences between attachment at common law and the "Custom of London," see C. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT 1-8 (7th ed. 1891); R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 485-99 (1952).

12. The basic principle that a state court's action is limited to persons and things physically related to the state's territory has been implemented through the "full faith and credit" and "due process" clauses of the Constitution. The evolution of jurisdictional theory has brought this territorial conception and those procedures it has justified under recent attack. *See* notes 76-80 *infra* and accompanying text.

13. Quasi in rem jurisdiction is neither in personam nor in rem. Jurisdiction is based on the court's power over the tangible or intangible property, but it does not deal with the property because of any right asserted in the property itself. 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1070.

14. For an example of the continued vitality of this reasoning see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 comment (a) (1969).

15. For this reason authorities from other states and general statements in text books

background permits several generalizations. Attachment, the process by which tangible and intangible property is brought into the custody of the court,[16] is typically accomplished, with regard to intangibles, by personal service of a writ of garnishment upon an obligor of the nonresident defendant. The writ may be attacked by the garnishee by denying the obligation or by the defendant on the grounds that the property is not subject to attachment.[17] In practice, the process of foreign attachment has effectively served the two-fold purpose of establishing jurisdiction in a desired forum and securing the property attached for satisfaction of any subsequent judgment. However, since ratification of the fourteenth amendment in 1868, states have been required to proceed under the constitutional prohibitions against depriving any person of his property without due process of law.

Recently, the traditional precepts of due process[18] under the fifth and fourteenth amendments have been substantially restructured. The two fundamentals of due process, notice and an opportunity for a hearing,[19] had generally been deemed satisfied if afforded before *final* deprivation of property, especially where an important governmental or public interest demanded immediate seizure of private property.[20] Prior to 1969, summary seizure for a pri-

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must be specifically related to the statute of the particular state in which the action is contemplated in order to put the particular procedure in its proper perspective.

16. The requirement of seizure was enunciated in Pennoyer v. Neff, 95 U.S. 714 (1877), as a necessary prerequisite to establishing and maintaining jurisdiction and to fulfilling the notice requirements of due process. The argument has been advanced that prior attachment is unnecessary since the state has continuing power over the property found within its territory at the commencement of an action and since notice can be served without seizure of the property. Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 268-69, 277.

17. Comment, *A New Expansion of Jurisdiction?*, 6 TEX. TECH. L. REV. 105, 123 (1974).

18. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

The concept of due process was designed to prevent arbitrary deprivation of property by the government and, as currently interpreted, derives from conformity to natural principles of justice. Reasonableness of the notion is achieved through the process of adjustment by balancing the conflicting interest involved in light of present social, economic, and philosophical norms. *See id.* at 163; 1970 WISC. L. REV. 181, 185.

19. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Baldwin v. Hale, 68 U.S. (1 Wall) 223, 233 (1863).

20. Balancing the interest of the property owner in continued possession and use of the property against the interest of the state in summary seizure, the Supreme Court of the United States held that due process did not require a hearing before seizure, provided that the interests of the property owner were adequately protected by a post-seizure hearing. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (confiscation of misbranded

vate purpose was considered directly by the United States Supreme Court in *McKay v. McInnes*[21] which upheld the Maine attachment procedure permitting seizure without a prior hearing, and indirectly in *Ownbey v. Morgan*[22] which sustained the Delaware foreign attachment statute's requirement that a nonresident defendant, whose property had been attached, post bond as a prerequisite to court access.

In *Sniadach v. Family Finance Corp.*,[23] the Court unveiled a new perspective on procedural due process by holding Wisconsin's garnishment statute unconstitutional. The statutory procedures allowed a clerk of the court to issue a summons at the request of the creditor's lawyer and, prior to a hearing on the merits, the wage earner was deprived of his earned wages. Finding that the wage garnishment involved was a deprivation of property,[24] the Court concluded that the procedures utilized, in failing to provide the defendant with notice and a *prior* hearing, did not comport with due process requirements.[25] Aside from the factual uniqueness of the

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pharmaceutical products); Fahey v. Mallonee, 332 U.S. 245 (1947) (control of a federal savings and loan association to protect the public from a bank failure); Yakus v. United States, 321 U.S. 414 (1944) (upholding price and rent controls during a war); Phillips v. Comm'r, 253 U.S. 589 (1931) (enforcement of a federal tax lien to provide needed revenue); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (protecting the public from unwholesome food); Lawton v. Steele, 152 U.S. 133 (1894) (confiscation of illegal fishing equipment).

21. 279 U.S. 820 (1929). The per curiam opinion relied on Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) and Ownbey v. Morgan, 256 U.S. 94 (1921). These authorities appear to be of dubious value. *Coffin Bros.* dealt with an attachment involving a governmental public interest rather than a private interest following a bank failure. *Ownbey* is discussed in note 22 *infra* and accompanying text.

22. 256 U.S. 94 (1921). Ownbey, unable to post bond, constitutionally attacked the denial of access, not the validity of summary foreign attachment as a jurisdictional device, although this was necessarily assumed in the Court's decision. The decision was based on the "ancient lineage" of foreign attachment, *id.* at 108-09, the right of a state to condition the conversion of a quasi in rem proceeding into an in personam proceeding upon such bond, *id.* at 107-08, and a theory of implied consent by the nonresident property owner, *id.* at 111. It has been suggested that the rationales of *Ownbey* are no longer valid and that the case would be decided differently today. *See* Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 25 CONN. L. REV. 399, 401 (1972-73); Comment, *Foreign Attachment After Sniadach and Fuentes*, 73 COLUM. L. REV. 342, 345 (1973).

23. 395 U.S. 337 (1969).

24. The prejudgment deprivation of wages was described as one that "may as a practical matter drive a wage earning family to the wall." *Id.* at 341-42. As one commentator observed, Justice Douglas appeared to put property on a continuum making "suspect" any seizure of property vital to life. Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Fin. Corp.*, 17 U.C.L.A.L. REV. 837, 840-41 (1970).

25. The decision is unclear as to the test used to strike down the statute. The Court appears to somewhat side step the normal balancing approach implicit in the natural law view of due process by focusing on the deprivation aspect. *See also* Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986, 998 (1970).

case, the scope of the decision was limited by an "extraordinary situations" exception which left open the possibility that other such summary procedures could be upheld.[26]

The implications of *Sniadach's* holding could not logically be confined to wages. Consequently, consumer debtors successfully assailed other pre-judgment summary seizure practices.[27]

The challenge to foreign attachment tactics materialized in *Lebowitz v. Forbes Leasing & Finance Corp.*[28] In responding to the *Sniadach* decision, the district court weighed the competing interests and found a sufficiently valid state interest in providing a forum for in-state creditors if a debtor had property within the state. Even though the statute was perceived to suffer from the same infirmity denounced in *Sniadach, i.e.,* that it encompassed situations where in personam jurisdiction would be available, the court felt constrained by *Ownbey* and *McKay* to uphold the statute.

Ironically, the court of appeals affirmed[29] the district court decision, although upon a different theory. The court refused to find that the statute was too broad and stated that the presence of a long-arm statute would not necessarily obviate a need for foreign attachment. An in-state creditor could be prejudiced by prolonged litigation regarding the applicability of the long-arm statute,

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26. In *Sniadach* the Court did not find a situation requiring special protection of either a state or creditor interest. The Court also found that the statute did not narrowly encompass an "extraordinary situation." It did find that in personam jurisdiction was available. 395 U.S. at 339. The references to availability of in personam jurisdiction and *Ownbey* would appear to place foreign attachment outside the *Sniadach* doctrine. *See The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 113, 116 (1969); Comment, *supra* note 24, at 843 n.45; Note, *supra* note 25, at 1003.

27. *E.g.,* Swarb v. Lennox, 405 U.S. 191 (1972) (confession of judgment against debtors earning less than $10,000 per year, without prior notice and hearing held unconstitutional); Bell v. Burson, 402 U.S. 535 (1971) (requiring uninsured motorist involved in an automobile accident to post bond or forfeit driver's license prior to trial on the merits held unconstitutional); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (prior notice and hearing required before labeling a person a public drunk and precluding him from purchasing liquor); Goldberg v. Kelley, 397 U.S. 254 (1970) (welfare benefits could not be terminated without prior notice and hearing). For a discussion of the liberal interpretation given to *Sniadach* by the federal and state courts in various areas of the law see West & Berman, *The Issue of Sniadach,* 79 COM. L.J. 49 (1974). For a compilation of lower federal court cases applying *Sniadach* see Comment, *supra* note 22 at 343 nn.7 & 8.

28. 326 F. Supp. 1335 (E.D. Pa. 1971). A Pennsylvania resident filed a state court action against his former corporate employer alleging wrongful discharge. The employer, a foreign corporation not entitled to do business in Pennsylvania, responded to the attachment of its two Pennsylvania bank accounts, totaling approximately $75,000, by removing the case to federal district court on diversity grounds and arguing that the attachments violated due process. Pursuant to PA. R. CIV. P. 1251-79, 1285-92, the attachments had been issued without notice or a hearing.

29. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (3d Cir.), *cert. denied,* 409 U.S. 843, *rehearing denied,* 409 U.S. 1049 (1972).

whereas foreign attachment provided a certain basis for jurisdiction.[30] Although expressing reservations regarding post-appearance attachment, the Third Circuit evidently also felt bound by *Ownbey* and *McKay*.[31]

The United States Supreme Court specifically ratified a broad reading of *Sniadach* when pre-judgment replevin statutes were found to violate procedural due process in *Fuentes v. Shevin*.[32] In rejecting the grounds relied upon by the district courts[33] to uphold the statutes, the Court attempted to clarify its view of due process.[34] In dicta it pronounced three factors which were to circumscribe the "extraordinary situations" justification for postponing notice and opportunity for a hearing: (1) a necessity that the seizure secure an important governmental or general public interest; (2) a necessity for very prompt action; and (3) strict state control through a government official determining the necessity and justification for the seizure according to the standards of a narrowly drawn statute.[35] De-

30. *Id.* at 982.

31. *Id.* For a view contrary to the jurisdictional premise of the court of appeals in *Lebowitz*, see Tucker v. Burton, 319 F. Supp. 567, 577 (D.D.C. 1970) (Wright, J., dissenting). Judge Wright found that the unavailability of in personam jurisdiction was an "extraordinary situation" justifying attachment.

32. 407 U.S. 67, *rehearing denied*, 409 U.S. 902 (1972). By a vote of 4-3, the Court struck down the Florida and Pennsylvania replevin statutes. The statutes permitted a private party, without having to make a convincing pre-seizure showing that the property was wrongfully held, to obtain a writ of replevin by applying to a court clerk and posting a double-value bond. The property held by the defendant would then be seized by a sheriff at the same time the defendant received the complaint. *Id.* at 73-78.

33. The district court opinions are found at Fuentes v. Faircloths, 317 F. Supp. 954 (S.D. Fla. 1970) and Epps v. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971). They had relied on a narrow interpretation of *Sniadach* and Goldberg v. Kelley, 397 U.S. 254 (1970) in holding that the household items under the replevin statutes were not items of necessity requiring due process protection.

34. The due process rights to notice and hearing are required to prevent arbitrary encroachment and to minimize unwarranted deprivation of property. They are not created to determine whether the seizure is necessary to secure an important governmental interest or whether there is a need for very prompt action. Therefore, notice and a hearing must be granted when deprivation can still be prevented. A later hearing and compensation would not correct even a temporary deprivation that would have been subject to the right of procedural due process. 407 U.S. at 81-82. Distinctions based upon the "necessity" of the property to the debtor would not allow an objective application of the principle behind procedural due process. *Id.* at 90. Therefore, it is clear that the requirement of a pre-seizure hearing does not depend on the remedy sought, the property involved, the length of deprivation, or the severity of collateral consequences. Unfortunately, the Court did not stipulate a set of minimum standards with regard to the nature of the pre-seizure hearing but rather reserved the area for legislation. *Id.* at 96-97.

35. 407 U.S. at 91. The Court indicated that it had drawn these criteria from Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (attachment necessary to protect the public from bank failure); Ownbey v. Morgan, 256 U.S. 94 (1921) (attachment necessary to secure jurisdiction in state court, clearly a most basic and important public interest); and McKay v. McInnes, 279 U.S. 820 (1929) (which the Court limited to the doctrines established in *Coffin Bros.* and

spite these standards and the theoretical due process clarification, the Court's approach remained obtuse.[36] Apparently avoiding a balancing test, the Court only looked to see if a constitutionally significant deprivation was involved, and once one was found looked to the adequacy of the procedures.

Within 2 years, the theory of due process espoused in *Fuentes* was eclipsed by the Court's recognition of a creditor's interest in secured property in *Mitchell v. W. T. Grant Co.*[37] In sustaining Louisiana's sequestration (seizure of goods) procedures,[38] the Court applied a balancing test and thus reaffirmed the traditional notion

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Ownbey). *Id.* at 91 n.23. These cases would not appear to support a requirement that all three factors be met, but the Court did list examples of all three in a reference to seizure under a search warrant. *Id.* at 93 n.30. One commentator suggests that only the third criteria is essential. Even so, he concludes that as a practical matter, a situation involving private creditors and debtors will fail to qualify as an "extraordinary situation" regardless of the number of criteria applied. 48 WASH. L. REV. 646, 658-59 (1973). For the view that summary foreign attachment procedures suffer from the same deficiencies as the replevin statutes see Comment, *supra* note 22 at 347-49. That author also suggests that by the *Fuentes* criteria, nonresidence of a defendant would not justify foreign attachment if other means of jurisdiction were available and continued post-appearance attachment would require an unusual threat to a creditor's security. *Id.* at 352. *See also* Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973).

36. The dissenters stated their theory:

> "[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

407 U.S. at 101-02 *citing* Cafeteria Local 473 v. McElroy, 367 U.S. 886, 895 (1961). The Court, retreating from its apparent willingness to apply an "extraordinary situations" exception, specifically refused to allow notions of efficiency and cost to limit the hearing requirement. *Id.* at 90-91 n.22. For an economic analysis of the ramifications of *Fuentes* see Brownstein, *Sniadach and Fuentes: The Challenge and the Aftermath*, 78 COM. L.J. 13, 15 (1973). Although the creditors in *Fuentes* had a legal interest in the seized property through conditional sales contracts, the Court refused to discuss it as a factor. This led the Court subsequently in Morrissey v. Brewer, 408 U.S. 471 (1972), to state that the test to be applied with regard to procedural due process protection:

> [I]s not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation . . . of the Fourteenth Amendment.

Id. at 481. At the very least, the Court's approach would seem to further indicate a shift in emphasis begun in *Sniadach*.

37. 416 U.S. 600 (1974).

38. LSA-C.C.P. arts. 281-83, 3501, 3571. Sequestration (seizure of goods) was allowed upon an ex parte claim of ownership, where the nature of the claim and the grounds for issuance of the writ clearly appeared from specific facts set forth in a verified petition if the debtor had any opportunity to jeopardize the claimant's interest. 416 U.S. at 605. The judge was required to issue the writ of sequestration in Orleans Parish, where the case arose. *Id.* at 606 n.5. The creditor was required to post bond and the debtor could seek immediate dissolution, which had to be ordered absent creditor proof of the grounds, and the debtor could repossess, in any event, by posting bond. *Id.* at 606-07.

of procedural due process.[39] *Fuentes* was not overruled[40] except to the extent that it required notice and hearing *prior* to *any* deprivation of property.[41] For guidance, the *Mitchell* decision enumerated several safeguards within the sequestration process found to be important in the balancing framework: (1) judicial control; (2) the amount and nature of information necessary to clearly establish grounds for seizure; (3) bond posted by the creditor; (4) a prompt post-seizure hearing at which continued enforcement issues could be resolved; and (5) burden of probable cause for seizure on the creditor.[42]

Calero-Toledo v. Pearson Yacht Leasing Co.[43] decided after

39. "Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." 416 U.S. at 604, *quoting* Cafeteria Local 473 v. McElroy, 367 U.S. 886, 895 (1961). The Court criticized the *Fuentes* approach: "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." 416 U.S. at 610. Quoting from Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950), the Court retreated from the *Fuentes* rule: "It is sufficient where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." 416 U.S. at 612. For further support the Court cited to *Coffin Bros.*, *Ownbey*, and *McKay*. *Id.* at 613. However, the validity of the prejudgment remedies supported in those cases cannot be considered determined by the *Mitchell* decision because the Court indicated that its present decision did not control the situation where creditors had no present interest in the property to be seized. *Id.* at 604. This lends credence to the view that the *Mitchell* holding is quite limited in scope. For a discussion supporting the limited view of *Mitchell*, see 41 BROOKLYN L. REV. 380, 388 (1974). For staunch support of the *Mitchell* approach to due process, in so far as it appears that the Court will not vindicate its abstract or subjective notions of due process, but rather will leave the social, economic, and political questions to the legislators, see Phillips, *Revolution and Counterrevolution: The Supreme Court on Creditor's Remedies*, 3 FORD URB. L.J. 1, 29-30 (1974).

40. The Court attempted to distinguish *Fuentes* on the basis of procedures involved in the replevin statutes rather than overruling the prior decision on due process concepts. This suggests that *Fuentes* would have been decided similarly by the *Mitchell* Court. Unfortunately, upon close analysis, the saving characteristics attributed to the sequestration procedures (see note 42 *infra* and accompanying text) appear to be constitutionally indistinguishable from the procedures struck down in *Fuentes*. *See* Justice Stewart's dissent, 416 U.S. at 632-34; 88 HARV. L. REV. 71, 76-82 (1974); Comment, *Commercial Transactions: The Future of Self-Help Repossession*, 8 J. MAR. J. OF PRAC. & PROC. 96 (1974). Furthermore, the seller's security interest was found sufficient for state protection in *Mitchell*, whereas *Fuentes* had denied protection to a stronger interest of legal title. The policy of preventing violent self-help measures referred to in *Mitchell* was equally applicable in *Fuentes*.

41. Both the *Mitchell* conceptual view of procedural due process and the fact that the sequestration process did not meet the governmental/general public interest requirement of *Fuentes'* "extraordinary situation" exception support this conclusion. *See also* Justice Powell's concurring opinion, 416 U.S. at 623.

42. 416 U.S. at 615-18. It appears that the Court modified the governmental/general public interest requirement of *Fuentes* to include individual creditor interest but retained the other two *Fuentes* criteria. (See text preceding note 35 *supra* for the *Fuentes* criteria.)

43. 416 U.S. 663, *rehearing denied*, 417 U.S. 977 (1974). The Court, through Justice Brennan, reversed the district court which had found that the Puerto Rican Seizure Act, 34 L.P.R.A. § 1722 (1971), did not meet due process requirements since there were no provisions whereby the seizure could be contested before it had been made. *See* Pearson Yacht Leasing

Mitchell, presented the Court with a further opportunity to clarify its due process doctrine. Perplexingly, however, the Court purported to rely on *Fuentes*[44] in upholding the seizure and forfeiture, under Puerto Rican law, of a pleasure yacht carrying marijuana. The *Calero* decision consequently failed to enlighten the lower courts in their search for the correct interpretation of United States Supreme Court precedents.[45]

The most recent pronouncement by the United States Supreme Court relating to due process in the area of summary prejudgment remedies is *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[46] The Court struck down the Georgia garnishment statute[47] on due process grounds similar to those propounded in *Fuentes.*[48] The Court dis-

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Co. v. Massa, 363 F. Supp. 1337, 1342 (D.P.R. 1973).

44. The Court analyzed the seizure with reference solely to the *Fuentes* "extraordinary situations" criteria. Concurring, Justices White and Powell agreed with the *Fuentes* analysis of the Puerto Rican statutes but, citing *Mitchell,* added that the existence of an important public interest was only one of the situations not requiring a prior hearing. 416 U.S. at 691. Justice Douglas, however, the sole dissenter, indicated the weakness of the *Fuentes* analysis. He found no need for prompt action since the seizure had taken place 2 months after discovery of the marijuana aboard the yacht. *Id.* In essence, it appeared that the Court was willing to be liberal in its interpretation of the *Fuentes* criteria, suggesting an overlap in principle of the *Mitchell* and *Fuentes* decisions, since any other attempt at reconciling the *Fuentes* result with that in *Mitchell* would find reference to *Fuentes* redundant.

45. The lower federal courts appeared to apply a mechanical comparison of the statute at issue with those in *Fuentes* and *Mitchell. See, e.g.,* Garner v. Tri-State Dev. Co., 382 F. Supp. 377 (E.D. Mich. 1974); Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974). The weight ascribed to the safeguards listed in *Mitchell* has varied. *See, e.g.,* Guzman v. Western State Bank, 381 F. Supp. 1262 (D.N.D. 1974) (replevin statute upheld without a requirement for judicial control); Woods v. Tennessee, 378 F. Supp. 1364 (W.D. Tenn. 1974) (replevin statute upheld without a requirement for an immediate post-seizure hearing).

46. 419 U.S. 601 (1975).

47. 46 GA. CODE ANN. §§ 101-05 (1973). The statute authorized a plaintiff to make an affidavit to a court clerk asserting the amount due and claiming apprehension that loss would be sustained if garnishment did not issue. Plaintiff was required to file double bond and defendant could dissolve the garnishment by filing bond. 419 U.S. at 602-03. This was a typical post-*Sniadach* garnishment statute exempting wages. In *Di-Chem,* a court clerk issued a summons of garnishment upon *ex parte* allegations of an amount owed from a sale of goods, whereby defendant's bank account was garnished. After filing a release bond, the defendant moved to dismiss the writ on constitutional due process grounds.

48. The Georgia court had upheld the statute, distinguishing *Sniadach* as a wage earner's exception to a general rule of garnishment statute validity. North Georgia Finishing, Inc. v. Di-Chem, Inc., 231 Ga. 260, 264, 201 S.E.2d 321, 323 (1973). The Supreme Court of the United States indicated that the Georgia court's narrow view of *Sniadach* had not considered *Fuentes.* Justice White concluded that the Georgia procedures suffered from the same vulnerability as those found unconstitutional in *Fuentes.* The Court reaffirmed the principle espoused in *Fuentes* that even a temporary deprivation is constrained by notions of due process requiring protection against wrongful action. 419 U.S. at 605-06. However, as in *Mitchell,* there is no reference to the *Fuentes* rule requiring a hearing before *any* deprivation. Justice White reaffirmed the *Fuentes* rule with the *Mitchell* gloss that "other safeguards" would satisfy due process. *Id.* This may indicate that only *Fuentes'* conclusion remains. However, Justice Stewart's and Justice Powell's concurring opinions, 419 U.S. at 608 and

carded the balancing approach and distinguished *Mitchell* through a mechanical comparison of Georgia garnishment procedures with the safeguarding characteristics of the Louisiana sequestration procedures.[49] Reaffirming the factors it considered salient, the Court observed that under the Georgia garnishment statute the supporting affidavit need only be conclusory, the writ could be issued without judicial participation, and there was no provision for a prompt post-seizure hearing.[50] The *Di-Chem* decision removed the consumer debtor status as a boundary for due process attack on prejudgment remedies.

These developments in interpreting due process standards in prejudgment seizures were the foundation for the majority decision in *Jonnet* declaring Pennsylvania's foreign attachment statute unconstitutional. This decision was founded upon two separate theories based on divergent lines of due process analysis.[51] The majority phrased the issue as:

Justices Blackmun's and Rehnquist's dissent, 419 U.S. at 614 suggest that *Fuentes* has been revitalized.

49. The Court referred to *Mitchell* almost as the second step of a two step test by first finding the garnishment statute constitutionally suspect under *Fuentes*, and then secondarily looking for *Mitchell's* saving characteristics. However, the Court made no attempt to balance the creditor's interest in prejudgment garnishment—an approach strongly suggested in *Mitchell*. Rather, the Court returned to the *Fuentes* approach when confronted by the garnisher's argument that the pre-*Di-Chem* precedents stood for constitutional protection of a consumer debtor's status and not property rights as such. In such a context, the garnisher argued, the rationale of those cases would be inapplicable to the instant commercial setting involving no inordinate leverage. In response, the Court stated it would not distinguish among different kinds of property. 419 U.S. at 608. If this indicates that the same due process standards will be applied to all forms of deprivation, it would suggest a retreat from the return to traditional notions of due process marked by *Mitchell*. It has been suggested that a "factual ad hoc determination of realities may no longer be necessary in each case" and that such an approach will be a two-edged sword with regard to debtors as well as creditors. Comment, *The Evolving Definition of Procedural Due Process in Debtor-Creditor Relations: From Sniadach to North Georgia Finishing*, 8 LOY. OF L.A.L. REV., 339, 358-59 (1975). The dissent in *Di-Chem* applied a balancing test and found a "constitutional accommodation" of the interests in the Georgia procedural requirements that a suit be filed, double bond be posted, and apprehension of loss be sworn to by the creditor since the deprivation involved produced no suffering and little inconvenience. 419 U.S. at 619. One commentator has viewed the *Di-Chem* analysis as a shift of focus in balancing from the creditor's interest to the state's interest as a factor in the equation, such that due process limitations embrace only procedural fairness and not substantive regulation of the creditor-debtor relationship suggested by *Sniadach* and *Fuentes*. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 832, 865 (1975).

50. 419 U.S. at 606-07.

51. *Jonnet* was decided by a three-member panel with two judges, Chief Judge Seitz and Judge Gibbons, having participated in the *Lebowitz* decision. *See* notes 26-31 *supra* and accompanying text. Judge Rosenn delivered the *Jonnet* majority opinion, basing his analysis on the recent Supreme Court procedural due process precedents in the area of summary seizures. Judge Gibbons, in his concurring opinion, attacked quasi in rem attachment as a

> [W]hether Pennsylvania summary procedures for jurisdictional attachment of property of a corporation not registered and having no regular place of business in the Commonwealth in a suit by a resident plaintiff comports with fundamental fairness, in the absence of notice to the defendant prior to attachment, an opportunity for prompt hearing to challenge the attachment, and other procedural safeguards against wrongful seizure.[52]

After a brief review of the above referenced prejudgment seizure decisions, the court concluded that the implications from those decisions were applicable to foreign attachment.

Initially, the court believed it necessary to decide the current precedential value of *Ownbey v. Morgan*.[53] It concluded that the Supreme Court's current concern for fair procedures to protect a debtor from any period of unjustified deprivation cast doubt upon the current validity of *Ownbey*. Thus, the *Jonnet* court would limit *Ownbey* to the proposition that due process does not require attachments to be preceeded by notice and a hearing.[54]

Specifically stating that its analysis was drawn from *Mitchell* and *Di-Chem*, the court proceeded to balance the interests[55] at stake in jurisdictional attachments to determine whether "other safeguards" within Pennsylvania's procedures minimized the risk of wrongful deprivation. It found insubstantial protection against this risk in that: (1) the praecipe was not required to sufficiently establish the basis for the action or the colorability of the underlying claim; (2) the seizure process was entirely ministerial;[56] (3) the statute failed to provide for indemnification of a wronged defendant; (4)

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valid basis for jurisdiction. Furthermore, the Pennsylvania foreign attachment procedure, as applied, violated the equal protection clause because it was based on an arbitrary classification—the property of nonresidents could be attached while that of residents was protected from seizure.

52. 530 F.2d at 1125-26.

53. 256 U.S. 94 (1921). Appellants had argued that *Ownbey* was controlling. Furthermore, the court felt constrained by *Ownbey* in upholding the same procedures in *Lebowitz*. 530 F.2d at 1128. For a brief discussion of *Ownbey* see note 22 *supra* and accompanying text.

54. 530 F.2d at 1128. "[T]he rationale of *Ownbey* is no longer in harmony with the principles of *Fuentes* and *its* progeny." (emphasis supplied). This also indicates the court's view that *Fuentes* is still of major precedential value. *See also id.* at 1129 n.13.

55. The court indicated that the same result would be reached by applying the *Fuentes* "extraordinary situation" criteria of strict judicial control but that it felt bound to apply the balancing approach. 530 F.2d at 1129 n.13. The interests enumerated were: (1) plaintiff's interests in establishing jurisdiction in a desired forum and security for satisfaction of the judgment; and (2) the potential defendant's interests in absolute control over the property and in not having to litigate in an inconvenient forum. *Id.* at 1129.

56. The court interpreted *Mitchell* as not requiring judicial participation in all cases, however. "Due process requires at a minimum that the sworn statement be presented to an official with sufficient legal competence to make those determinations . . . ." *Id.* at 1130.

there was no provision for a prompt, adequate post-seizure hearing;[57] and (5) there were no means by which a defendant could dissolve the attachment without prejudicing a plaintiff's interests.[58]

The court appears to be correct both in its determination that a balancing of interests test[59] was required and in its analysis of the form[60] of Pennsylvania's foreign attachment procedures. Although the court was aware of the competing creditor and debtor interests and the realities of foreign attachment leverage,[61] it appears that it completely ignored the interests of the state.[62] Unfortunately, rather

57. It was stipulated that there need not be an immediate trial but that plaintiff should at least demonstrate the probable validity of his claim. *Id.* at 1130.

58. Reasonable bond, substitution of other property, and dissolution upon entry of a general appearance were given as examples. *Id.*

59. The test for procedural due process differs from that for substantive due process. In the latter the court would uphold a statute if it was reasonable in relation to its subject and adopted in the interests of the community. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Buck v. Bell, 274 U.S. 200 (1927); Jacobson v. Massachuetts, 197 U.S. 11 (1905). However, this approach has fallen into disrepute. Ferguson v. Skrupa, 372 U.S. 726 (1963). Furthermore, neither *Fuentes, Mitchell,* nor *Di-Chem* were attacked on the basis of the substance of the statute.

60. The Court in *Fuentes,* viewing the due process clause as protecting an important personal right, 407 U.S. at 86, indicated that timing was crucial and that all other factors were to be balanced merely to determine the form of the pre-seizure hearing. The view of the current Supreme Court, however, suggests that the protection is one of a property right and that the form and quality of safeguards are critical. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 611 (1974). This difference in theory has been characterized as a shift in focus from constitutional control of creditor behavior to a constitutional supervision of state dispute resolution mechanisms. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process,* 61 VA. L. REV. 807, 812 (1975). That author suggests that an explanation for the Supreme Court's failure to explicitly identify the variables that determine appropriate procedural standards can be found in the Court's unwillingness to undertake substantive regulation of the bargaining process, its uncertainty that procedural mechanisms can be adjusted more accurately by constitutional adjudication than by legislative enactment, and an awareness of the error reduction costs involved if the additional procedures were applied to all defaulting debtors. *Id.* at 813.

Another commentator has suggested that the Court's present balancing test fails to properly take account of the functional characteristics of particular procedures and that even if corrected it would be inappropriate, because it transforms the right to procedural due process from a necessary constitutional limitation upon the total power of government over an individual into merely a check upon the state's procedural policies purportedly advancing the general welfare. The commentator further suggests that due process analysis should focus on the quality of the treatment accorded the individual rather than on the importance of asserted governmental interests in summary action. Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510 (1975).

61. *See* note 55 *supra.* The court recognized that threat of suit in an inconvenient forum could considerably prejudice a defendant's negotiating position.

62. For an article extensively analyzing competing interests in the area of foreign attachment see Note, *Provisional Remedies and Due Process in Default — Mitchell v. W. T. Grant Co.*, 1974 WASH. U.L.Q. 653, 716-24. It has been suggested that whereas the early due process cases involved an accommodation of private property interests vis-a-vis the public welfare, the test from *Mitchell* and *Di-Chem* equates the creditor's interest in debt collection with

than attempting to balance the noted factors, the court parroted the mechanistic comparison approach of *Di-Chem.* This analysis automatically, and probably incorrectly, assumes that the *Mitchell* standards are a concrete constitutional boundary for the "other safeguards" requirement of protection against wrongful deprivation.[63]

A parallel unfolding of due process strictures upon a state's exercise of jurisdiction led Judge Gibbons, in concurring with the majority's procedural due process analysis in *Jonnet,* to examine the constitutionality of quasi in rem jurisdiction.[64] He concluded that the due process considerations of *International Shoe Co. v. Washington*[65] defined limitations on jurisdictional power that would not encompass the quasi in rem action authorized by Pennsylvania's foreign attachment procedures.

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the public welfare for purposes of balancing. Such an approach would seem to further the chances of allowing summary seizure. 28 VAND. L. REV. 908, 918 (1975).

The court, having cited to Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510 (1975), 530 F.2d at 1126 n.6 may be indicating *sub silentio* its acceptance of the suggestion contained therein that the interest balancing analysis be foresaken in cases where the government can not demonstrate that withholding procedural safeguards is necessary to protect the rights of others. The article suggests that a court should ask whether the state's treatment of the individual is consistent with basic notions of procedural decency and fair dealing rather than whether the state's procedural policy objectives are socially desirable. 88 HARV. L. REV. at 1543. The court stated: "We require only that Pennsylvania provide procedures consistent with fundamental fairness for the respective interests of creditor and debtor alike." 530 F.2d at 1130.

63. This approach was criticized by the dissenters in *Di-Chem.* 419 U.S. at 614, 620. *See also* Note, *The Evolving Definition of Procedural Due Process in Debtor-Creditor Relations: From Sniadach to North Georgia Finishing,* 8 LOY. OF L.A.L. Rev. 339, 357-59 (1975). In foreseeing this approach in subsequent cases, that author suggests the pathway to successful attack of a summary prejudgment remedy. The debtor must establish crucial indices of constitutionality from among: (1) judicial participation in the attachment procedure; (2) a clear demonstration of grounds for attachment; (3) bonding by the creditor; (4) provision for post-seizure hearing at which grounds are proven or all issues pertaining to continued enforcement of the attachment are resolved; (5) probable cause burden of proof on the creditor; (6) initiation of suit on the debt underlying the attachment; and (7) an unconditional right in the debtor to challenge the attachment. A further factor, opportunity for dissolution of the writ, could be added.

The Supreme Court has recently indicated the continuing vitality of this method of analysis. Curtis Circulation Co. v. Sugar, 96 S. Ct. 1208 (1976). The Court remanded the case to the District Court for the Southern District of New York which had struck down the New York attachment procedures because the hearing available on motion to vacate would not require plaintiff to sustain a showing that there was probable cause for the seizure—a "requirement" of *Mitchell.* The Court believed the issue, as a matter of construction, was sufficiently unclear, such that the New York courts should be allowed to make that determination. The Court indicated, however, that if it were true that the procedures do not require a showing of probable cause, they would be unconstitutional.

64. Neither party argued the issue. However, Judge Gibbons' immediate analysis was foreshadowed by his concurring opinion in Lebowitz v. Forbes Leasing Fin. Corp., 456 F.2d 979, 982 (1972).

65. 326 U.S. 310 (1945).

The issue, as seen in this context, was whether due process would be satisfied when judicial power was exercised with reference to a fictional situs of property rather than a minimum contacts analysis.[66] Judge Gibbons found that the pre-fourteenth amendment precedents for quasi in rem jurisdiction were concerned with sovereignty rather than fairness, and therefore would not support the contemporary due process philosophy espoused by *International Shoe*.[67] Limiting *Pennoyer v. Neff*[68] to stand solely for the immutable principle that judicial power of the states is delimited by the due process clause of the fourteenth amendment, he suggested that the artificiality of the reasoning in *Harris v. Balk*,[69] the cornerstone of foreign attachment, would not comport with today's notions of fair play and substantial justice.[70] Refusing to confine the minimum contacts analysis to in personam jurisdiction, Judge Gibbons stated that the same limitations of fundamental fairness should apply to any exercise of the state's judicial power.[71]

An analysis of the relevant contacts revealed that the defendant was not doing business in Pennsylvania and that all of the important events occurred outside Pennsylvania.[72] The mere fact that all

66. 530 F.2d at 1139. With respect to in personam jurisdiction, the Court in International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945), stated that due process "may be met by such contacts . . . with the state of the forum as make it reasonable . . . to require [defense of] the particular suit which is brought there."

67. The precedents arose from attacks based on the full faith and credit clause of the Constitution. U.S. CONST. art. IV, § 1. Citing Milliken v. Meyer, 311 U.S. 457, 463 (1940), he found that the Court had abandoned notions of sovereignty, which had confined process to state borders. For the proposition that the fictional situs of intangibles was no substitute in a quasi in rem case for a minimum contacts analysis Judge Gibbons cited Aldrich v. State Tax Comm'n, 316 U.S. 174 (1942) (local contacts analysis with respect to jurisdiction to tax intangibles); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311-13 (1950) (local contacts analysis with respect to jurisdiction to adjudicate trust obligations); Texas v. New Jersey, 379 U.S. 674, *final decree entered*, 380 U.S. 518 (1965) (escheat cases recognizing due process limitations on chartering states to insist upon the fiction of a local situs for corporate securities and debts). 530 F.2d at 1137-38.

68. 95 U.S. 714 (1877).

69. 198 U.S. 215 (1905).

70. Futhermore, Judge Gibbons stated that jurisdictional analysis up to *International Shoe* had been defined more by "reference to common law rules than by probing analysis of constitutional precepts." 530 F.2d at 1132. As a final retort he stated that even if quasi in rem jurisdiction comports with due process, the precedents do not support the use of foreign attachment in federal courts. *Id.*

71. In phrasing the *International Shoe* holding as a redefinition of "the due process limitations upon the exercise of judicial power over disputes foreign to the forum," Judge Gibbons refused to limit the holding to in personam jurisdiction. 530 F.2d at 1131. Citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-13 (1950) and Hanson v. Denckla, 357 U.S. 235, 245-46 (1958), he found support for his belief that the content of constitutional due process would not vary between a litigant defending title to property and one defending from liability in personam. 530 F.2d at 1137.

72. The loan commitment had been entered into in New York. 530 F.2d at 1131. The

plaintiffs were Pennsylvania residents was irrelevant without there being a significantly closer relationship to the underyling dispute. Thus, Judge Gibbons decided that Pennsylvania's exercise of jurisdiction was fundamentally unfair to the defendant and an encroachment upon the sovereignty of a sister state.[73]

The postulation that the scope of quasi in rem jurisdiction is coextensive with in personam jurisdiction would convert Pennsylvania's foreign attachment procedures pro tanto into a domestic attachment device. Since Pennsyvlvania had abolished the attachment of property of persons not foreign to the forum,[74] Judge Gibbons found a violation of the fourteenth amendment equal protection clause.[75]

The modern utility and validity of quasi in rem jurisdiction has been examined extensively by the commentators.[76] The territorial approach to jurisdiction has been greatly eroded.[77] With the evolution of alternative methods of securing jurisdiction over persons not

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Pennsylvania long-arm statute was inapplicable.

73. He found that *International Shoe* stood for two due process limitations on state judicial power: (1) Out of respect for federalism, a state must have an interest in adjudicating that is rationally connected to its public policy so as not to abridge the sovereign rights of a sister state; (2) the plaintiff's state cannot coerce defense of a suit in a forum which, because of its remoteness from defendant's residence, witnesses, and proof, would be fundamentally unfair. 530 F.2d at 1140.

74. PA. R. CIV. P. 1480 (a).

75. Judge Gibbon reasoned that since the purpose of prejudgment attachment is to insure satisfaction of a subsequent judgment, there was no rational basis for finding nonresidents more likely to circumvent plaintiff's recovery. 530 F.2d at 1142-43.

76. *See, e.g.*, R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971); Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913); Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Note, *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Comment, *Foreign Attachment after Sniadach and Fuentes*, 73 COLUM. L. REV. 342 (1973); 14 ST. LOUIS U.L.J. 548 (1970).

77. This approach, which was the rationalizing principle in *Pennoyer*, permitted the presence of property in the forum to be utilized as a generally affiliating basis for jurisdiction over a defendant's interest in the property. The physical power reference limited a state's process to its territorial boundaries. The erosion occurred primarily because of the need, under that approach, that every res have a situs. A very mechanistic approach to jurisdiction developed with courts attempting to fit situations into the categories of in rem, quasi in rem, or in personam jurisdiction. Consequently, the true interests a forum had in opening its courts to litigation were ignored. *Harris* was a good example of this approach and has been attacked as combining two of the worst features of American jurisdictional law—transient personal presence as a generally affiliating basis and attachment of an interest in property to confer limited general jurisdiction. R. WEINTRAUB, note 76 *supra*, at 147. The growth of the United States brought about the dominance of corporations as interstate commercial persons and intangibles as wealth. Moreover, persons in one jurisdiction began to vitally affect those in other jurisdictions. This set the stage for a rethinking of jurisdictional principles which culminated in *International Shoe*.

amenable to personal service,[78] the need for the concept of quasi-in rem jurisdiction has passed.[79] The focus is shifting from a question of power over persons and things, to a functional analysis of the relationship of the parties and controversy to the forum.[80] Absent extraordinary circumstances, the mere fortuitous presence of a defendant's property in the forum is not a reasonable basis for jurisdiction.

Foreign attachment procedures are not unconstitutional, per se, under the *Sniadach/Di/Chem* due process formulation. The principle remaining from that line of decisions is that there must be an opportunity for adequate adjudication at an appropriate time. In the limited number of situations justifying dispensation with the normal due process requirements of prior notice and hearing, other procedural safeguards must be provided to minimize the risk of arbitrary deprivation. These safeguards will vary with the nature of the interests involved and the functional utility of the procedures acting on these interests. Application of a functional balancing of interests test remains uncertain because of the Supreme Court's mechanistic approach in *Di-Chem.* Consequently, summary seizure procedures attacked will probably continue to be placed in the de facto continuum between *Fuentes* and *Mitchell,* reflecting to a certain extent a court's subjective attitude toward creditor remedies. To be assured of constitutionality, state statutes would appear to have to contain all of the saving factors of *Mitchell,* which may be impossible. Furthermore, the vitality of quasi in rem jurisdiction is questionable due to the development of specific jurisdiction

78. For an excellent synoposis of the cases representing the progression of this rational approach to jurisdiction begun by *International Shoe* see Comment, *A New Expansion of Jurisdiction?* 6 TEX. TECH. L. REV. 105, 108-15 (1974).

79. *But see* Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979 (1972); Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in Light of the English Experience,* 5 CONN. L. REV. 399 (1972-73) suggesting arguments for the continued use of quasi in rem jurisdiction.

80. An excellent example of this is Judge Traynor's decision in Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957). The approach has, as its core, justice and fair play as a general theory of jurisdiction. It analyzes and balances conflicting interests to reach a result that comports with fundamental fairness. This functional approach is analogous to the current emphasis with regard to choice of law. *See generally* R. WEINTRAUB, note 76 *supra.* Numerous factors to be regarded in the balancing test have been suggested: (a) defendant's ownership of tangible property within the state; (b) applicability of the state's law to the dispute; (c) domicile of the plaintiff within the state; (d) unavailability of another forum in which the controversy can be fully adjudicated; (e) risk of multiple liability if jurisdiction is denied; (f) availability of evidence in the state; (g) expectations of the parties as to the place of suit; (h) the relationship between the state or the defendant's property in the state and either the transaction or occurrence giving rise to the suit or the objective of the action; (i) the relationship of the proceeding in question to another action pending in the same state; and (j) the nature of the relief sought against a nonresident defendant. Note, *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 965-66 (1960).

based upon indirectly affiliating circumstances.[81] It is hoped that the Supreme Court will soon confront this issue and will invalidate the use of the quasi in rem concept. Even if the concept continues to withstand attack, current due process standards of fair play suggest that quasi in rem jurisdiction should not be a sufficiently compelling state interest to override the requirements of prior notice and hearing.

JAMES S. CARMICHAEL

Postal Employees Are Not Protected From Garnishment

The doctrine of sovereign immunity no longer protects the wages of postal employees from garnishment. The traditional ban on garnishment on the grounds of immunity of the government from suit is no longer applicable to the United States Postal Service after the Postal Reorganization Act which created an independent federal agency amenable to suit.

In each of three district court cases, a garnishment summons directed to the United States Postal Service (USPS) to effect judgments in state courts was challenged by the federal government. The district court quashed the garnishment summons in each case on the basis that the USPS, as an independent establishment of the executive branch of the federal government performing a governmental function, was immune to suit. On appeal brought by the judgment creditors, the United States Court of Appeals for the Seventh Circuit *held*, reversed per curiam: The Postal Reorganization Act created an independent postal business and contains an implied Congressional waiver of governmental immunity thus subjecting the Postal Service to garnishment procedures to effect judgments in state courts. *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201 (7th Cir. 1975).

With the increasing role played by the federal government in our society and with the resulting increase in the number of public

81. Specific jurisdiction is the assertion of power to adjudicate, limited to matters arising out of or intimately related to affiliating circumstances on which the jurisdictional claim is based. The indirectly affiliating circumstances supporting jurisdiction have been categorized into (a) the continuous relationship of the defendant to the forum and (b) isolated events or transactions. *See* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-48 (1966).