THE BILL OF RIGHTS AND THE BILL COLLECTOR

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The Anglo-Saxon system of debt collection has frequently been described as one of "grab law" where the race is to the swift. He who grabs last may find himself with an empty fist. A number of methods are available for making the grab. Unsecured creditors, under one of a variety of legal writs, may have the sheriff levy on property of the debtor. Secured creditors may repossess their collateral, with or without judicial proceedings. Many of these creditors' remedies—and, in particular, many of the prejudgment remedies—find their antecedents in English practices. This in itself is not surprising. But many of those English practices date back to a very early and, from the debtor's viewpoint, rigorous time, and some of them we have continued to nourish long after they were abandoned by the English.

One decision, *Sniadach v. Family Finance Corp.*,[1] has proven to be the turning point from which each of these archaic remedies must be reassessed and redirected, or in some cases discarded. This article will evaluate *Sniadach* and the cases interpreting and expanding it. The impact of the decision upon the remedies of attachment, replevin, cognovit, repossession and distraint, and imprisonment for debt will be considered.

ATTACHMENT

English Antecedents

One of the early English remedies, the writ of attachment, was created not by the common law or by English statutes but by the Custom of London and the customs of other trading centers in England.

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1. 395 U.S. 337 (1969).

By the London Custom of the 1400's, a writ of foreign attachment was available to a citizen of the city against both nonresidents of the city and against residents who had absconded, since neither could be personally served with process. The writ issued after the defendant had been formally summoned three times and had failed to appear. Under the writ third persons indebted to or holding goods of the defendant could be summoned as garnishees. The defendant could appear and contest the plaintiff's claim against him, but only by posting special bail for the satisfaction of any judgment the plaintiff might recover or by surrendering himself into custody. In either event the attachment ended, since its only purpose was supposed to be to compel the defendant's appearance.

If the defendant did not appear, however, the only issue litigated was the garnishee's liability to the defendant or the defendant's ownership of the goods in the hands of the garnishee, and if the plaintiff prevailed he had judgment on his asserted but unlitigated claim against the defendant. This judgment could be satisfied out of the garnishee's obligation to the defendant or out of the defendant's goods held by the garnishee, but only after the plaintiff provided sureties to indemnify the garnishee in case the defendant appeared within a year and a day after the judgment and disproved the plaintiff's claim against him.[2]

By the 1800's the availability of the writ had expanded—it was no longer confined to plaintiffs who were citizens of London. The practice had also grown loose. While it was still necessary to allege issuance of a summons to the defendant and three defaults by him, these recitals had become fictions unsupported by facts.[3]

So matters continued until curtailed by two decisions of the House of Lords in the latter part of the nineteenth century. In the first, *Mayor & Aldermen of London v. Cox*,[4] it was held that the territorial jurisdiction of the Mayor's Court of London would not support the garnishment of one found in the city when neither he, the plaintiff, nor the defendant were residents of London and when neither the defendant's debt to the plaintiff nor the garnishee's debt to the defendant was incurred in London. In the second decision, *Mayor & Aldermen of London v. London Joint Stock Bank*,[5] it was held that the Custom

2. For a discussion of the early history of attachment, see W. BOHUN, PRIVILEGIA LONDONI; OR, THE RIGHTS, LIBERTIES, PRIVILEGES, LAWS, AND CUSTOMS OF THE CITY OF LONDON 253-89 (3d ed. 1723); R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 481-83 (1952); A. PULLING, THE LAWS, CUSTOMS, USAGES AND REGULATIONS OF THE CITY AND PORT OF LONDON 187-92 (2d ed. 1854).
3. R. MILLAR, *supra* note 1, at 483-84; A. PULLING, *supra* note 1, at 189-91.
4. L.R. 2 H.L. 239 (1867).
5. L.R. 6 App. Cas. 393 (1887).

of London did not authorize the garnishment of corporations. Two of the three opinions in this case were also at pains to condemn the "very improper practice [that had] existed for a long while in the City of *London*"[6] of falsely alleging issuance of a summons to and efforts to serve the defendant. These opinions clearly did not mean to "throw any doubt upon the validity of that custom, if duly and properly followed,"[7] however, and the actual decisions in this and the *Cox* case seem to have left a large area for employing foreign attachment. Nonetheless, following these decisions its use was discontinued and the remedy of attachment is no longer used in England today.

American Acceptance and Modification

Long before the foreign attachment writ withered away in England, it had been transplanted to this country through colonial and state statutes. And by the beginning of the eighteenth century it was no longer confined to foreign attachment nor designed merely to compel the defendant's appearance. The state statutes made the writ available against local or foreign defendants even though process could be personally served. They also authorized the attachment of any nonexempt property and commonly provided that the property attached could be held for any judgment the plaintiff might recover, even though the defendant appeared, unless he posted a discharging bond to secure the judgment or a forthcoming bond to secure return of the attached property in response to a judgment. Usually, but not invariably, the plaintiff was required before the writ issued to post a bond to indemnify the defendant for any loss incurred by the attachment in case judgment on the merits went for the defendant.[8] The statutes of the New England states provided for such attachment in almost any money action. While some states followed that pattern, others limited the availability of the writ to cases where the plaintiff alleged by affidavit—and established by proof in the event that the defendant moved to quash the attachment—that statutorily prescribed grounds for attachment existed.[9] In general, the statutory grounds covered one of three situations: (1) where personal service on the defendant could not be obtained because he was a nonresident or was absent from the state or concealing himself; (2) where the defendant was about to conceal or

6. *Id.* at 413.
7. *Id.* at 398.
8. *E.g.*, ARIZ. REV. STAT. ANN. § 12-1524 (1956).
9. In this respect, the Arizona attachment statute is a hybrid form. Attachment is authorized for matured contract claims without alleging special grounds, but special grounds must be alleged for unmatured claims and tort claims. *Id.* §§ 12-1521 -1523 (1956).

dispose of property in order to put it beyond the reach of his creditors or had already done so; and (3) where the nature of the plaintiff's underlying claim was thought to entitle him to special treatment, as where the debt sued on was fraudulently contracted or was contracted for necessities. In some states a garnishee was summoned under the attachment writ, while in others a separate writ of garnishment (or "trustee process" in the New England states) was served on him. When property was not in the possession of a third party, attachment was effected by the sheriff's levy on the property. If the property was tangible personalty, the levy consisted of physical seizure of the property by the sheriff. For intangibles, the writ was served on the defendant. For realty, levy was usually made by posting a notice on the premises or filing it in the real estate records. The levy gave the plaintiff a lien on the property attached. So, in most states, did service of the writ on a garnishee.[10]

Perhaps the most amazing thing about this modified English transplant is that it survived consitutional challenge for as long as it did. At the very least, even when the defendant was personally served in the action, he was frequently deprived of the use of the attached property until the trial of plaintiff's claim unless he incurred the expense of a discharging or forthcoming bond. Furthermore, this deprivation was imposed at the instance of a plaintiff who had not yet demonstrated that he had, or even that he probably had, a valid claim which entitled him to collect from the defendant's property. At its worst, when attachment was employed against a nonresident defendant who could not be personally served, he would be permanently deprived of his property by the entry of a default judgment in a proceeding of which he had no notice. Most of the early challenges to the attachment device focused on its use for this purpose—to confer what lawyers call "quasi in rem jurisdiction" on a court which could not acquire in personam jurisdiction over the defendant.[11]

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10. For a general discussion, see V. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR 9-13, 32-33 (1964); R. MILLAR, *supra* note 1, at 481-97.

11. FED. R. CIV. P. 64 provides:

> At the commencement of and during the course of an action, all remedies providing for seizure of . . . property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held.

The rule specifically provides that these remedies include attachment and garnishment. Prior to 1963, however, suits could not be commenced in federal court by attachment or garnishment unless the defendant appeared or could be personally served, so that the writs could not be used to establish quasi in rem jurisdiction, Big Vein Coal Co. v. Read, 229 U.S. 31 (1913), although a quasi in rem suit originating in a state court might be removed to a federal court under 28 U.S.C. § 1450 (1948). In 1963, FED. R. CIV. P. 4(e) was amended to authorize the initiation of quasi in rem suits

Expanding the Concept of Attachment

In *Cooper v. Reynolds*,[12] which arose before the fourteenth amendment provided a due process clause applicable to the states, the Supreme Court considered a now-familiar fact pattern. Plaintiff in a Tennessee state court, on allegations that defendant had fled the state or concealed himself so that he could not be served, attached defendant's land and took a default judgment on a tort claim. After the land had been sold on execution to satisfy the judgment, defendant brought an ejection action against the execution purchaser in a federal court sitting in Tennessee. Defendant persuaded the federal court below that the state judgment was void for want of jurisdiction because the allegations of plaintiff's affidavit on which the writ had been issued were insufficient under the state attachment statute and because defendant had not been given notice by publication as required by that statute. The United States Supreme Court thought otherwise. It found that the levy on the real estate under the attachment writ was sufficient to give the state court jurisdiction of the *res*, and that was all that was required. Failure to follow the requirements of the attachment statute, while perhaps sufficient error to require reversal had the state judgment been appealed, did not deprive the state court of jurisdiction so as to permit a collateral attack on its judgment. Additionally, failure to give notice by publication was no more serious than the defective allegations in plaintiff's attachment affidavit.

In the course of reaching this conclusion the Court elaborated on the nature of the judgment entered in a case where jurisdiction is based solely on attachment of property:

> If the defendant appears the cause becomes merely a suit *in personam*, with this added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.
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> That such is the nature of the proceeding in this latter class of cases, is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment

in federal courts according to the procedures of the state in which the court is located.

12. 77 U.S. (10 Wall.) 308 (1870). *See also* Voorhees v. Jackson *ex dem.* Bank of the United States, 35 U.S. (10 Pet.) 449 (1836).

> against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.[13]

All of this was affirmed by Justice Field's learned and renowned dictum in *Pennoyer v. Neff*.[14] That case held only that with mere service by publication a state court could not acquire jurisdiction over a nonresident that would enable it to enter a judgment collectible out of his land, either by the fact that the land was located in the state or by a later levy on the land under a writ of execution issued after judgment. The property must be "in the first instance brought under the control of the court by attachment or some other equivalent act."[15] Where that has not be done, neither the judgment of the court nor the subsequent sale of the land on execution in the state proceeding is entitled to full faith and credit. While this decision was put on "well-established principles of public law respecting the jurisdiction of an independent State over persons and property,"[16] the rule for the future was to be based on the fourteenth amendment which took effect 2 years after Pennoyer's case arose:

> Since the adoption of the Fourteenth Amendment . . . the validity of . . . judgments [of the courts of another state] may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power

13. Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 318-19 (1870). *See also* Paper Co. v. Shyer, 108 Tenn. 444, 67 S.W. 856 (1902), which construed later Tennessee attachment statutes to authorize execution against other property of the defendant on a judgment for $299 entered in an action based on garnishment of a Tennessee resident's $85 obligation to defendant in which defendant was not personally served, but held that this feature of the statutes violated the due process clause of the fourteenth amendment.

14. 95 U.S. 714 (1877).

15. *Id.* at 727.

16. *Id.* at 722.

> affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to these rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.
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> [T]he substituted service of process by publication . . . where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem.*
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> . . . Such are cases commenced by attachment against the propery of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. . . .[17]

The next Supreme Court decision to consider the attachment of property of a nonresident, *Chicago, Rock Island & Pacific Railway v. Sturm*,[18] indicated that this procedure could be employed by the plaintiff to achieve more than a jurisdictional base for suit. Defendant, a resident of Kansas, was employed in that state by an interstate railroad incorporated in Iowa. Plaintiff, a resident of Iowa, sued defendant in Iowa, garnished his employer there for $77 in wages owned to defendant and served defendant by publication. The employer notified defendant of the garnishment, but defendant did not appear in the Iowa action. Instead, he promptly sued his employer for his wages in Kansas and obtained judgment despite the employer's plea of the pending Iowa garnishment proceeding. Thereafter, plaintiff secured a judgment in Iowa against defendant and the garnishee for $77 despite the garnishee's contention that defendant's wages were exempt under Kansas

17. *Id.* at 733-34. For a discussion of the later expansion of the concept of in personam jurisdiction, see Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970), where an extensive bibliography is collected. *Id.* at 300-02 n.3.

18. 174 U.S. 710 (1899). Some of the facts are taken from the opinions of the state courts involved in the case. Willard v. Sturm, 96 Iowa 555, 65 N.W. 847 (1896); Chicago, Rock Island & Pac. Ry. Co. v. Sturm, 5 Kan. App. 427, 49 P. 337 (1897), *aff'd per curiam*, 58 Kan. 818, 51 P. 1100 (1897). *See also* Louisville & Nashville R.R. Co. v. Deer, 200 U.S. 176 (1906); Rothschild v. Knight, 184 U.S. 334 (1902); King v. Cross, 175 U.S. 396 (1899).

law. The garnished railroad appealed from both the Iowa and the Kansas judgments and had lost its appeal in the Iowa supreme court by the time its Kansas appeal reached the Supreme Court of the United States. There the garnishee won. The situs of the employer's obligation, the Supreme Court ruled, was at the employer's "domicile" in Iowa, so that the Iowa court acquired quasi in rem jurisdiction over defendant when the employer was garnished there. And while the Kansas courts were required to give the Iowa proceedings full faith and credit, the Kansas statute exempting defendant's wages from garnishment, being "not a part of the contract" but "part of the remedy," did not have to be given full faith and credit in Iowa.[19] Thus foreign attachment could be used to avoid the exemption laws of the debtor's residence.[20]

Harris v. Balk[21] disposed of any inference that might be drawn from *Sturm* that only domiciliaries could be garnished. There a North Carolina citizen indebted to a North Carolina defendant temporarily went to Maryland on business and was garnished there by a Maryland plaintiff with notice by publication being given to the defendant. Judgment was entered against the garnishee for the amount of his admitted debt to defendant and he paid it to plaintiff. The full faith and credit clause was held to require the courts of North Carolina to recognize these events as a defense when defendant later sued the garnishee in North Carolina. By this time the Supreme Court did "not see the materiality of the expression '*situs* of the debt,' when used in connection with attachment proceedings." It was sufficient that the garnishee's debt to defendant was an "ordinary debt," subject to no special limitation as to place of payment, so that defendant could have sued the garnishee in Maryland, and that Maryland's attachment law authorized plaintiff to

19. Interestingly enough, the Iowa supreme court held that an Iowa statute, enacted after the Iowa garnishment proceeding had been initiated and providing that wages exempt to a nonresident by the laws of his state were also exempt in Iowa, could not be applied retroactively because it would impair the obligation of plaintiff's contract, despite the garnishee's contention that exemption laws "relate to the remedy." Willard v. Sturm, 96 Iowa 555, 65 N.W. 847 (1896). The court's ruling on this point finds precise, if not persuasive, support in W.B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); Bank of Minden v. Clement, 256 U.S. 126 (1921); Edwards v. Kearzey, 96 U.S. 595 (1877); Gunn v. Barry, 82 U.S. (15 Wall.) 610 (1872). *See* Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 726-27 (1960).

20. *See generally* Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934), holding that a court of the debtor's residence is required by the full faith and credit clause to recognize a garnishment lien on the cash surrender value of a life insurance policy acquired in the state of the creditor's residence even though the property was exempt by the law of the debtor's residence.

Efforts by some courts of the defendant's residence to enjoin, and by some legislatures to penalize, resident plaintiffs who resort to attachment or garnishment in other states for the purpose of evading local exemption laws are described in COUNTRYMAN, *supra* note 10, at 21-23.

21. 198 U.S. 215 (1905).

sue the garnishee there as "representative" of defendant. "Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues."[22] Admittedly, the garnishee's right not to pay the debt twice (a right apparently also rooted in the full faith and credit clause) might be lost by negligence which caused damage to the defendant, and the garnishee here had apparently given no notice to the defendant of the garnishment in time for the defendant to appear and defend the North Carolina action before judgment was entered there. The Maryland statute, however, following the Custom of London, provided that plaintiff could not execute his judgment unless he gave bond to make restitution to the garnishee in the event that defendant should, within a year and a day, appear in the Maryland action and show that plaintiff's claim against defendant was invalid. Although the garnishee in this case had paid the Maryland judgment without awaiting issuance of execution, the statute was treated as establishing defendant's right to challenge the Maryland judgment for a year and a day after its issuance. Since defendant received notice of the garnishment well within that time by the garnishee's pleading it as a defense when sued by defendant in North Carolina, the defendant showed no damage from the garnishee's negligence. Moreover, the defendant admitted that he was indebted to plaintiff for more than the amount of the Maryland judgment against the garnishee.

In *Sturm* and *Balk* the defendants subjected to foreign attachment were served by publication; in *Baltimore & Ohio Railroad v. Hostetter*[23] the defendant was not. There is a more significant difference between the cases, however, because Hostetter, while a resident of Virginia, had a *judgment* for $35 entered against him in a justice court there, based on a summons served on him by leaving it with his wife at his usual place of abode. After Hostetter had moved to West Virginia, the judgment plaintiff garnished his employer in Virginia and obtained a judgment against the garnishee for wages owed to Hostetter. Virginia law at that time provided for notice by publication to defendants in most *prejudgment* garnishment cases.[24] And the Supreme Court of Virginia had indicated that it took the publication requirement seriously, having previously held that a prejudgment garnishment was void—even though the statutory notice by publication was

22. *Id.* at 222.
23. 240 U.S. 620 (1916). Some of the facts are taken from the record in the case.
24. Va. Code Ann. § 2979 (1904) required notice by publication whenever a defendant in a prejudgment attachment or garnishment was not personally served, unless the grounds for attachment were that the defendant had removed or intended to remove his "effects" from the state or that a tenant liable for rent had removed or intended to remove his "effects" from the leased premises. These two exceptions to the publication requirement have since been removed. *Id.* § 8-531 (1957).

given to a New York defendant during the Civil War—since the defendant would have been incapable of responding to it by crossing Confederate lines.[25] As for *postjudgment* garnishment, Virginia law then, as now, required notice by publication to nonresidents in all cases except those where the judgment was rendered by a justice court,[26] which was the situation in *Hostetter*. In its unsuccessful appeal of the garnishment order from the justice court to a city court in Virginia, at which time it notified defendant of the garnishment, the garnishee contended that failure to give notice by publication to defendant was a denial of due process. The appellate court, however, ruled that publication was not required since all rights between plaintiff and defendant had been resolved by the earlier judgment which was entered on personal service. The highest West Virginia court to rule on the point, in Hostetter's later West Virginia suit against his employer for the same wages that had been garnished in Virginia, held that the Virginia court's garnishment judgment was void since it could only have obtained jurisdiction by "personal service on [defendant] within the state of the forum or his voluntary appearance."[27]

In defense of this decision before the United States Supreme Court, Hostetter contended that before the Virginia garnishment court could acquire jurisdiction, "notice of some kind, either actual or constructive, personal or by publication, would first have to be given [to] Hostetter; the provision of the Virginia Code to the contrary notwithstanding."[28] The Supreme Court, however, treated the case as one presenting the "exact situation" dealt with in *Sturm* and *Balk* and held that the West Virginia courts must give full faith and credit to the Virginia judgment. In doing so it quoted the statement of the West Virginia court below that no "formal notice was given to . . . Hostetter of the garnishment proceedings for the reason that the statute of Virginia . . . does not require notice to be given to a nonresident of . . . the garnishment. . . ."[29] Unfortunately, the Court did not specifically consider the question of service by publication, and the Virginia and West Virginia proceedings were not reported. Hence, one court in a *prejudg-*

25. Dorr's Adm'r v. Rohr, 82 Va. 359 (1886). In this case, the court followed Earle v. McVeigh, 91 U.S. 503 (1875) (in personam judgment based on service left at defendant's usual place of abode in occupied Virginia after defendant had vacated it and gone behind Confederate lines). Lasere v. Rochereau, 84 U.S. (17 Wall.) 437 (1873) (mortgage foreclosure on notice by publication to mortgagor behind Confederate lines); *accord*, Dean v. Nelson, 77 U.S. (10 Wall.) 158 (1869).

26. Va. Code Ann. § 3609 (1904); *Id.* § 8-441 (Supp. 1972).

27. The West Virginia case is unreported, but the substance of the defendant's argument is presented in 240 U.S. at 621.

28. Brief for Appellee at 15, Baltimore & O.R.R. v. Hostetter, 240 U.S. 620 (1916).

29. 240 U.S. at 624.

ment garnishment case has interpreted *Hostetter* to mean that "[i]t is no impediment to the validity of a judgment in garnishment that there was no service, constructive or otherwise, on the debtor of the plaintiff in garnishment, when the state statute does not require it."[30] Unfortunately also, the Supreme Court in *Hostetter* did not concern itself with the question of whether the garnishee in a *post*judgment garnishment has any obligation to notify the defendant and, if so, whether the notice which the garnishee gave the defendant 5 months after the garnishment and 4 months after the entry of judgment in the garnishment action was sufficient.

Matters still stand in this rather confused state so far as constitutional requirements for the use of attachment or garnishment to establish quasi in rem jurisdiction are concerned. Regarding the use of attachment or garnishment for other purposes, until recently the Supreme Court had rarely considered the matter, and then rather perfunctorily.

Due Process Considerations

The first case to be considered is relevant because the Court's decision was based in part upon distinguishing the matter before it from attachment. *Coe v. Armour Fertilizer Works*[31] used the due process clause to invalidate a statute providing that when a judgment creditor's execution against a corporate debtor was returned unsatisfied, he could execute against the property of corporate stockholders to the extent of any unpaid stock subscriptions. Acting under this statute, the judgment creditor had made a "formal" levy on a stockholder's realty which neither interfered with his possession nor gave him any notice. While the statute did not require notice to the stockholder, if notice was obtained the stockholder was entitled to a hearing on the question whether the execution against him had been issued "illegally." Although the stockholder learned of the levy before his land was sold, he was held entitled to have the statute invalidated because of its failure to require notice:

> [B]efore a third party's property may be taken to pay [the judgment] upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of

30. United States Rubber Co. v. Poage, 297 F.2d 670, 673 (5th Cir. 1962).

31. 237 U.S. 413 (1915). Earlier, the Supreme Court had found no denial of due process or equal protection in a statute requiring plaintiff to post a bond for attachment against a resident, but not for attachment against a nonresident, since it was "obvious" that the distinction between the two would justify allowing attachment against nonresidents while denying it entirely against residents. Central Loan & Trust Co. v. Campbell, 173 U.S. 84 (1899).

> jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself. . . .
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> . . . .
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> The writ of execution cannot of itself be treated as a writ of attachment, establishing a lien upon the stockholder's property, but going no further until he has had an opportunity to show cause why that property should not be applied to the payment of the corporation's debt. Not only is such a purpose wholly unexpressed in the [execution] writ, but such is not its normal function or effect, no day in court is named, and there is no provision for notice or monition by service, publication, mailing, or otherwise.[32]

The next case dealt directly with attachment. In *Ownbey v. Morgan*, the executors of J. Pierpont Morgan's estate brought suit in Delaware against a Colorado resident for $200,000 for money lent, goods sold and services rendered.[33] The defendant's shares of stock in a Delaware corporation were attached under the Delaware rule that the situs of such shares in a domestic corporation is in Delaware regardless of the location of the stock certificates and that they can be attached by serving the corporation.[34] The Delaware foreign attachment law, patterned after the Custom of London, provided that a defendant could enter an appearance that would dissolve the attachment only by giving special bail, and bail in this case was fixed at $200,000. Defendant attempted to enter a general appearance without posting bail, alleging that he had a good defense to the action, that the attached corporate shares constituted substantially his only assets and that the corporation was engaged in coal mining in Colorado and New Mexico and had valuable properties there, but that the plaintiffs in the Delaware action had also put the corporation into receivership in Colorado with the consequence that the value of its shares was temporarily destroyed so that he could not obtain the required bail. Accordingly, he urged that he should be allowed to appear without posting bail and that the lien of the attachment on the stock should be preserved instead. When his attempted appearance was denied by the Delaware court's ruling that the Delaware statute did not authorize either an appearance without bail or the preservation of the attachment lien after an appearance, de-

32. Coe v. Armour Fertilizer Works, 237 U.S. 413, 423, 425 (1915).

33. 256 U.S. 94 (1921). Some of the facts are taken from the record in the case and the opinion below. Morgan's Ex'rs v. Ownbey, 29 Del. 379 (1916). Morgan was not shown to have been a resident of Delaware, apparently for the very good reason that he died a resident of New York.

34. DEL. CODE ANN., tit. 5A § 8-317 (1971). UNIFORM COMMERCIAL CODE § 8-317 (1964), provides that a levy on shares of stock or other investment securities outstanding is invalid unless the certificate or other instrument is actually seized. When this section was revised for adoption in Delaware, however, the rule in that state was left unchanged.

fendant asserted that he had been denied due process of law. The United States Supreme Court, after noting the ancestry of the Delaware law in the Custom of London and the adoption of similar laws in other states, rejected the due process argument:

> A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense. The condition imposed has a reasonable relation to the conversion of a proceeding *quasi in rem* into an action *in personam*; ordinarily it is not difficult to comply with—a man who has property usually has friends and credit—and hence in its normal operation it must be regarded as a permissible condition; and it cannot be deemed so arbitrary as to render the procedure inconsistent with due process of law when applied to a defendant who, through exceptional misfortune, is unable to furnish the necessary security; certainly not where such defendant—as is the case now presented, so far as the record shows—has acquired the property-right and absented himself from the State after the practice was established, and hence with notice that his property situate there would be subject to disposition under foreign attachment by the very method that afterwards was pursued. . . .[35]

Ancient process was due process, except perhaps in the unlikely event of retroactive application. Ownbey was denied the opportunity to defend an action that he professed to be ready and able to defend because he could not provide bail. A comparable result is obtained by the rule of some state and lower federal courts that a defendant subjected to a foreign attachment cannot enter a special appearance solely for the purpose of contesting the attachment. If he appears at all, he must enter a general appearance giving the court in personam jurisdiction.[36]

In *Endicott Johnson Corp. v. Encyclopedia Press*,[37] decided soon

35. Ownbey v. Morgan, 256 U.S. 94, 111 (1921).

36. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1123 (1969); *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 953-55 (1960); *cf.* York v. Texas, 137 U.S. 15 (1890). There the defendant in a Texas action was served outside the state and attempted to make a limited appearance to challenge jurisdiction. No violation of due process was found when he was treated as having made a general appearance conferring in personam jurisdiction. It was considered to be sufficient that he could refrain from appearing, bring an action to enjoin enforcement of the Texas judgment and in that action could attack the jurisdiction of the Texas court. *See also* Western Life Indem. Co. v. Rupp, 235 U.S. 261 (1914); Kauffman v. Wootters, 138 U.S. 285 (1891).

37. 266 U.S. 285 (1924).

after *Ownbey*, the Court held that a judgment debtor was not denied due process when his wages were garnished under execution after judgment with no prior notice to him.

> [T]he established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. . . . [A]fter the rendition of the the judgment he must take 'notice of what will follow,' no further notice being 'necessary to advance justice.'[38]

A few years later the Supreme Court disposed of an easier case, which is relevant here only because it was decided by analogy to the law of attachment. *Coffin Brothers v. Bennett*[39] found no due process infirmity in a state statute which authorized the superintendent of banks to issue execution and thereby acquire a lien on all nonexempt property of stockholders of insolvent state banks who had failed to pay assessments levied by the superintendent. Since the stockholder received personal notice of the issuance of the execution and could obtain a full judicial hearing by filing an affidavit denying liability before the lien was enforced, this was merely an instance of allowing the establishment of a lien before judgment, and "nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of suit."[40]

At about the same time the Supreme Court of Maine in *McKay v. McInnes*[41] considered an attack on that state's attachment statute. The Maine statute[42] followed the New England pattern authorizing attachment against residents as well as nonresidents in "all civil actions" without requiring any showing of special grounds for attachment or the posting of a bond by the plaintiff, and provided that the attached property should be held to answer for any judgment recovered by the plaintiff. The plaintiffs, Canadian barristers and solicitors, brought an action for fees and disbursements and attached real estate and corporate stock of the defendant. Defendant, who was personally served, entered a special appearance and contended that "such general attachment in advance of judgment" without an affidavit showing special cause or a bond deprived him of his property without due process of

38. *Id.* at 288.
39. 277 U.S. 29 (1928).
40. *Id.* at 31.
41. 127 Me. 110, 141 A. 699 (1928), *aff'd per curiam*, 279 U.S. 820 (1929). Some of the facts are taken from the record in the case.
42. ME. REV. STAT. ch. 86, § 2 (1916).

law. The Maine court, while conceding that the effect of the attachment was to impose a lien which would remain although the defendant sold the attached property and, in the case of tangible personalty, would also deprive the defendant of the possession and use of the property, concluded that there was no deprivation of property within the meaning of the fourteenth amendment; or, if there was, that it was not a deprivation without due process of law because it was "a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment."[43] On appeal, the Supreme Court affirmed per curiam on the authority of *Ownbey* and *Coffin*.[44]

The constitutional limitations on the use of attachment remained in this state for the next 40 years, except for a few decisions, in different contexts, which seemed to find the requirements of due process more rigorous—at least for notice, if not for hearing. *Mullane v. Central Hanover Bank & Trust Co.*,[45] for example, held that a New York court could not settle the accounts of a New York trustee of a common trust fund, and thus foreclose the rights of nonresident beneficiaries to question the trustee's performance of his duties and the allowance of his fees, in a proceeding where the only notice given was by publication in a local newspaper. Such notice was sufficient for beneficiaries whose interests or addresses were unknown to the trustee. "However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable."[46] For beneficiaries whose names and addresses were on record with the trustee, however, due process required notice "at least by ordinary mail."[47]

Mullane was found to be controlling in a later case holding that in a proceeding on notice by publication in a city newspaper, a city could not condemn real property and fix the amount of compensation to the owner, a resident of the state, when the owner's name was on official city records.[48] Due process required that "if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests"[49] and, here,

43. 127 Me. at 116, 141 A. at 702.
44. McKay v. McInnes, 279 U.S. 820 (1929).
45. 339 U.S. 306 (1950).
46. *Id.* at 317.
47. *Id.* at 318-20.
48. Walker v. City of Hutcheson, 352 U.S. 112 (1956). Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889), upholding notice by publication in condemnation cases against nonresidents, was held inapplicable. "Since the appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which *Mullane* may have undermined the reasoning of the *Huling* decision." Walker v. City of Hutcheson, *supra* at 116.
49. 352 U.S. at 115.

"even a letter" would have given the owner such notice.[50] *Mullane* was also decisive in *Schroeder v. City of New York*,[51] which held unconstitutional land condemnation proceedings where notice by publication was supplemented by notice posted in the vicinity of, but not on, the vacant land of the owner, which notice did not specify the owner although her name and address were on the city's tax records.

In some circumstances, the Supreme Court has held that even meeting the requirements of *Mullane* will not be sufficient. Notice of town real estate tax foreclosure proceedings by publication, posting and mailing will not satisfy due process as against a lifelong resident of the town known to "officials and citizens" of the town to be incompetent, where "no attempt was made to have a Committee appointed for her person or property until after entry of the judgment of foreclosure."[52] Similarly, where an automobile owner had been arrested for armed robbery and lodged in the county jail and "immediately thereafter" the state instituted forfeiture proceedings against his automobile, mailed notice of the proceedings to the owner's home address was held insufficient. "[T]he State knew that appellant was not at the address to which the notice was mailed and, moreover, knew also that appellant could not get to that address . . . Under these circumstances, it cannot be said that the State made any effort to provide notice 'reasonably calculated' to apprise appellant of the pendency of the forfeiture proceedings."[53]

Sniadach—Constitutional Requirement for Notice and Hearing

All but the last of these cases had been decided when the Supreme Court considered *Sniadach v. Family Finance Corp.*[54] There, a small loan company suing on a note for $420 used the Wisconsin garnishment

50. *Id.* at 116.

51. 371 U.S. 208 (1962). Nothing was said about the residence of the owner and Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889), *discussed in* note 48 *supra,* was not mentioned. The City of New York had earlier succeeded in an argument that notice to it by publication in the Wall Street Journal of the time within which to file claims in a railroad reorganization case pending in a federal court in Connecticut was not "reasonable notice" within section 77c(8) of the Bankruptcy Act. Its tax lien claim therefore could not be barred because of the city's failure to file within the prescribed time. Notice had been mailed to all creditors who had appeared in the case, but the court had not complied with section 77c(4) by requiring "proper persons to file in the court a list of all known creditors . . . and their last known post office addresses." City of New York v. New York, N. Hav. & Hart. RR., 344 U.S. 293 (1953).

52. Covey v. Town of Somers, 351 U.S. 141, 146 (1956). Notice by mail is sufficient for a sale of land by a city to foreclose a lien for unpaid water charges even though the mailed notice is received and concealed by the landowner's "trusted bookkeeper" who also concealed the fact that the water charges had not been paid. Nelson v. City of New York, 352 U.S. 103, 107 (1956). *See also* Balthazar v. Mari Ltd., 301 F. Supp. 103 (N.D. Ill. 1969), *aff'd,* 396 U.S. 114 (1969).

53. Robinson v. Hanrahan, 409 U.S. 38, 40 (1972).

54. 395 U.S. 337 (1969).

law to serve defendant's employer and thereby froze in the employer's hands until final judgment the nonexempt $31.59 of the $63.18 in wages owed to defendant.[55] While defendant could have filed a discharging bond,[56] she instead filed a motion to dismiss the garnishment which the Wisconsin courts denied. The garnishment was not employed to establish quasi in rem jurisdiction, since the defendant had been personally served on the same day her employer was garnished. The Wisconsin garnishment statute followed the New England model in authorizing garnishment in any contract action without the allegation of special grounds and in not requiring the plaintiff to post a bond before obtaining the writ.[57] Except for the discussion in the dissenting opinion of Mr. Justice Black,[58] the Court did not mention these features of the Wisconsin statute.

In an opinion by Mr. Justice Douglas, the Court held that the Wisconsin statute denied due process of the law to the defendant by depriving her of the use of one-half of her wages in the interim between garnishment and decision on the merits of the plaintiff's claim "without any opportunity to be heard and to tender any defense [she] may have, whether it be fraud or otherwise."[59] Such a result was considered to be contrary to the teachings of *Mullane*[60] and *Schroeder*.[61]

The holding appeared to be a narrow one, perhaps turning in part on the property involved. "A procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case. . . . We deal here with wages —a specialized type of property presenting distinct problems in our economic system."[62] Until enactment of the federal Consumer Credit Protection Act of 1968[63] after this case arose, "garnishment often meant

55. WIS. STAT. ANN. § 267.18(2)(a) (1965), which provided that when wages are garnished the garnishee shall pay over to the defendant a "subsistence allowance" of $25 for a defendant without dependents or $40 for a defendant with dependents, but in no event in excess of 50 percent of the amount owing.

56. *Id.* § 267.20 (1957).

57. *Id.* § 267.02.

58. 395 U.S. at 344. Nor, except for Justice Black's dissent, did the opinion mention several rulings of the Wisconsin supreme court which severely limited the defendant in presenting her case. *See* Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1968).

59. 395 U.S. at 339.

60. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), *discussed in* text accompanying note 45 *supra*.

61. Schroeder v. City of New York, 371 U.S. 208 (1962), *discussed in* text accompanying note 51 *supra*.

62. 395 U.S. at 340 (citation omitted). As an example of a procedural rule that would satisfy due process requirements for attachments in general, the Court cited McKay v. McInnes, 279 U.S. 820 (1929) (attachment of realty and corporate stock). For a discussion of *McKay*, see text accompanying note 41 *supra*.

63. 82 Stat. 146 (1968), *as amended*, 84 Stat. 1127 (1970), 15 U.S.C. §§ 1601-1681t, 18 U.S.C. §§ 891-896. Section 303 of this Act, 15 U.S.C. § 1673, forbids garnishment of more than 25 percent of disposable net earnings (less in the case of low income workers), and § 304, 15 U.S.C. § 1674, prescribes criminal penalties for

the loss of a job." Moreover, prejudgment garnishment "[might] as a practical matter drive a wage-earning family to the wall"[64] and compel the wage earner to undertake new and onerous obligations to free his wages.

There was also a suggestion that due process might be satisfied by restricting the availability of the prejudgment garnishment writ to "extraordinary situations." For this proposition the Court cited the old decisions in *Ownbey*[65] and *Coffin*[66] and also more recent cases, which are of little comfort to private creditors, approving summary governmental appointment of conservators for savings and loan associations[67] and summary governmental seizure of misbranded food.[68] "But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and *in personam* jurisdiction was readily obtainable."[69]

Mr. Justice Harlan, concurring, gave other examples of permissible action prior to hearing which also offer small comfort to private creditors—governmental promulgation of rent-fixing orders during wartime[70] and summary governmental seizure of unwholesome food.[71] But, apart from such "special situations," he thought 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."[72]

In the 3-year interregnum between this and the next Supreme Court decision shedding light on the problem, state and lower federal courts were concerned with the possible ramifications of *Sniadach*.[73]

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the employer who discharges an employee "by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."

64. 395 U.S. at 341, 342.

65. Ownbey v. Morgan, 256 U.S. 94 (1921), *discussed in* text accompanying note 33 *supra*.

66. Coffin Bros. v. Bennett, 277 U.S. 29 (1928), *discussed in* text accompanying note 39 *supra*.

67. Fahey v. Mallonee, 332 U.S. 245 (1947).

68. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

69. 395 U.S. at 339.

70. Bowles v. Willingham, 321 U.S. 503 (1944).

71. North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

72. 395 U.S. at 343.

73. Federal jurisdiction in this area was ultimately aided by Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), deciding that the 1866 federal Civil Rights Act, now 42 U.S.C. § 1983 (1964), forbidding deprivation of federal constitutional rights under color of state law, applies to "property" as well as to "personal" rights, and sustaining a class action on behalf of consumers to challenge prejudgment garnishment of checking and savings accounts. *Lynch* also held that 28 U.S.C. § 2283 (1948) (forbidding a federal court to "stay proceedings in a State court except as ex-

Prejudgment garnishment of wages without a prior hearing of any kind was held unconstitutional[74] by some courts, even though the plaintiff was required to post a bond before the writ was issued.[75] As one court put it, "the debtor cannot live on the creditor's bond while he is waiting for the claim against him to be tried."[76] One state, whose statute required special grounds for attachment or garnishment, sought to save at least as much of the statute as authorized wage garnishment when the debtor was concealing himself to avoid process, contending that this was a situation requiring "special protection" for the creditor within the meaning of *Sniadach*. The federal court, however, was not impressed with the plight of the hypothetical creditor who "must simultaneously aver that the debtor has 'concealed himself' (thereby making service unfeasible) *and* that the debtor is employed and receiving wages at a

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pressly authorized by Act of Congress"), was inapplicable because Connecticut law authorized plaintiffs' attorneys, rather than court clerks, to issue their own writs of garnishment and attachment to the sheriffs who levy under them, so that no injunction against a court was involved. Later, in a case not involving attachment, the Supreme Court decided that the Civil Rights Act itself was an Act of Congress expressly authorizing a stay of proceedings in a state court. Mitchum v. Foster, 407 U.S. 225 (1972).

The best discussion of the ramifications of *Sniadach*, written shortly after the case was decided, is Kennedy, *Due Process Limitations on Creditors' Remedies: Some Reflections on Sniadach v. Family Finance Corp.*, 19 AM. U. L. REV. 158 (1970).

74. Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971). *See also* Heaton Hosp., Inc. v. Emrick, 124 Vt. 405, 264 A.2d 806 (1970). Under VT. R. CIV. P. 4.1(b)(2) (1971), the attachment writ, for property other than real estate, issues on court order only after the plaintiff has shown, after an *ex parte* hearing, that there is "probable ground to support plaintiff's claim" and that "there is good cause for the attachment." At any time before judgment, defendant may have the attachment quashed by showing, after notice and hearing, that "there is no probable ground to support plaintiff's claim or that there is not good cause for the attachment or its continuance." *Id.* § 4.1(e).

75. *E.g.*, McMeans v. Schwartz, 330 F.Supp. 1397 (S.D. Ala. 1971); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969); McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970). *See also* Cline v. Credit Bureau, 1 Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 619 (1970).

One court concluded that the garnishment of wages was unconstitutional even though it was necessary to establish quasi in rem jurisdiction, Mills v. Bartlett, 265 A.2d 39 (Del. Super. 1970), but the decision was reversed and the case remanded for consideration of the garnished employer's standing to raise the question. Mills v. Trans Caribbean Airways, Inc., 272 A.2d 702 (Del. 1971).

Another court avoided the question by applying the doctrine of *forum non conveniens* to dismiss the action of a nonresident against a nonresident on a note executed in another jurisdiction where plaintiff sought to garnish the nonresident employer of the defendant by serving his resident local agent. Midland Fin. v. Green, 279 A.2d 518 (D.C. App. 1971). The court also indicated its belief that the constitutional problem had been solved by a new District of Columbia Superior Court Rule, D.C. SUPER. CT. R. 64-1, requiring notice to defendant by mail in all attachments and garnishments where defendant's address is known to plaintiff, and an expedited hearing on "the validity or probable validity of the underlying claim and the existence of the ground for issuing" the writ on defendant's motion to quash. For garnishment of personal earnings of nonresidents, the rule provides that the garnishment shall be ineffective except for establishing priority of liens until 14 days after notice is mailed, unless the court finds that special protection of a creditor interest is necessary. The rule requires personal service on the nonresident defendant if he is employed or may be found in the District, and sets standards for applying the doctrine of *forum non conveniens* when both plaintiff and defendant are non-residents.

76. McMeans v. Schwartz, 330 F. Supp. 1397, 1400 (S.D. Ala. 1971).

stated location."[77] One court avoided the issue by noting that the garnished employer promptly notified the Maryland defendant of a District of Columbia garnishment, and by construing the garnishment statute to authorize, at the defendant's request, a hearing on 3 days' notice on both the merits of the plaintiff's claim against him and the allegation in plaintiff's affidavit that defendant was a nonresident who could not be personally served.[78]

Some courts limited the application of *Sniadach* to the garnishment of wages and sustained attachment and garnishment of other kinds of property.[79] Other courts disagreed. The Wisconsin court that had been reversed in *Sniadach* refused to distinguish between wages and other property and invalidated prejudgment garnishment of a businessman's bank account.[80] In Minnesota, *Sniadach* was held to forbid prejudgment garnishment of a small businessman's accounts receivable, since "[t]he hardship and injustice stressed . . . in *Sniadach* [were] equally applicable to the laborer, artisan, or merchant, whose livelihood depends on selling customers his service or his goods . . . . [T]he fortuity of a debtor's being self-employed should not insulate a creditor from according the debtor procedural due process."[81] A court in Washington found that prejudgment attachment of an automobile also ran afoul of *Sniadach*.[82] A federal court in Georgia refused to allow garnishment of the debtor's $145 bank account which he intended to use to pay his next tuition bill at junior college, and which represented

77. Reeves v. Motor Contract Co., 324 F.Supp. 1011, 1015 (N.D. Ga. 1971).

78. Tucker v. Burton, 319 F.Supp. 567 (D.D.C. 1970). The District of Columbia attachment procedure has since been revised as indicated in note 75 *supra*.

79. American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970) (permitting garnishment of a businessman's checking accounts and accounts receivable); *cf.* Cinerama, Inc. v. District Court, 436 F.2d 977 (9th Cir. 1971); Frank K. Fasi Supply Co. v. Wigwam Co., 308 F.Supp. 59 (D. Hawaii 1969); First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971) (permitting foreign attachment of the bank account of a California businessman by a California plaintiff suing on a debt incurred in California in order to give an Arizona court quasi in rem jurisdiction); Termplan, Inc. v. Superior Court, 105 Ariz. 270, 463 P.2d 68 (1969) (permitting attachment of a wage earner's "property other than wages"); Andrew Brown Co. v. Painters Warehouse, Inc., 11 Ariz. App. 571, 466 P.2d 790 (1970) (permitting garnishment of a businessman's accounts receivable); Michaels Jewelers v. Handy, 6 Conn. Cir. 103, 266 A.2d 904 (1969) (permitting foreign attachment of defendant's bank account).

In one of the most predictable rulings of the year, Williams v. United States, 336 F.Supp. 1392, 1394 (D. Minn. 1972), a federal court held that *Sniadach* does not apply to a jeopardy assessment of tax liability and an administrative levy by the Internal Revenue Service on money found in a taxpayer's safe, because the money did not represent wages and because "special protection" was required for "the Internal Revenue's Jeopardy Assessment procedure" to prevent "the possible and . . . very likely transfer or attempt to transfer the money here seized beyond the reach of the government." *Cf.* Phillips v. Commissioner, 283 U.S. 589 (1931).

80. Larson v. Fetherston, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

81. Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 210, 176 N.W.2d 87, 90 (1970); *cf.* American Oil Co. v. McMullin, 433 F.2d 1091, 1096 (10th Cir. 1970), holding *Sniadach* inapplicable to writs which were "neither attachments of business property nor garnishments of wages."

82. Lucas v. Stapp, 6 Wash. App. 971, 497 P.2d 250 (1972).

$130 given to him by an aunt for that purpose and $15 of his personal earnings. The funds were held to be "a specialized type of property" within the meaning of *Sniadach*.[83]

Courts that might have been disposed to extend *Sniadach* beyond the garnishment of wages, however, made an exception for the attachment of real estate, even of the defendant's home, where the attachment consisted solely of a filing in the real estate records and where it was not shown that his "livelihood [was] threatened by the deprivation of the right to freely transfer the realty."[84]

The Court of Appeals for the Third Circuit expressly considered the use of foreign attachment to obtain quasi in rem jurisdiction as implementing an "important state policy of according resident plaintiffs access to the state forum in actions against nonresidents"[85] and thus justifying a departure from *Sniadach*'s requirements. There, a Pennsylvania resident sued a foreign corporation not registered to do business in Pennsylvania for wrongful discharge from his employment. Using a Pennsylvania foreign attachment statute similar to the Delaware statute involved in *Ownbey*,[86] he garnished the corporation's checking accounts in Pennsylvania, thereby freezing them until final judgment unless the defendant entered a general appearance and posted bond to secure any judgment plaintiff might recover. The court concluded that Pennsylvania's "compensating governmental interest" in providing a local forum for its citizens justified this procedure despite defendant's allegation that the garnishment had tied up 40 percent of its assets and despite the availability of a "long-arm" statute which plaintiff might have used "after extended litigation" to acquire in personam jurisdiction over the defendant.[87] In fact, the defendant had entered a general appearance before moving to quash the garnishment as unconstitutional, so that the compensating governmental interest

83. Aaron v. Clark, 342 F.Supp. 898, 901 (N.D. Ga. 1972).

84. Black Watch Farms v. Dick, 323 F.Supp. 100, 102 (D. Conn. 1971); *accord,* Robinson v. Loyola Foundation, Inc. 236 So. 2d 154 (Fla. App. 1970) (realty attached to establish quasi in rem jurisdiction). In an analysis of *Sniadach* which anticipated this result, it is also suggested that *Sniadach* should not apply to prejudgment attachment or garnishment of the defendant's nonpossessory interest in personalty. 68 MICH. L. REV. 986, 1000-01 (1970).

85. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 981-82 (3d Cir.), *cert. denied,* 409 U.S. 843 (1972).

86. Ownbey v. Morgan, 256 U.S. 94 (1921), *discussed in* text accompanying note 33 *supra.*

87. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 981, 982 (3d Cir.), *cert. denied,* 409 U.S. 843 (1972). Except for Mills v. Bartlett, 265 A.2d 39 (Del. Super. 1970), *discussed in* note 75 *supra,* cases involving the use of attachment or garnishment to acquire quasi in rem jurisdiction have not focused on the significance of that use. See Tucker v. Burton, 319 F.Supp. 567 (D.D.C. 1970); First Nat'l Bank & Trust Co. v. Pomona Machinery Co., 107 Ariz. 286, 486 P.2d 184 (1971); Michaels Jewelers v. Handy, 6 Conn. Cir. 108, 266 A.2d 904 (1969); Midland Fin. Co. v. Green, 279 A.2d 518 (D.C. App. 1971); Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. App. 1970).

which supported the foreign attachment had lost its vitality.[88] In view of the Supreme Court's decisions in *Ownbey* and *McKay*,[89] however, the court did not feel "free to adopt [its] own view as to post-appearance attachment."[90]

The most sweeping post-*Sniadach* decision was *Randone v. Superior Court*[91] in which the California supreme court held that the prejudgment garnishment of the bank account of an unemployed foreman operator of a trucking business was unconstitutional on the basis of the due process clauses of both the state and federal constitutions. The opinion went beyond this determination, furthermore, to indicate the invalidity of the state's attachment and garnishment statutes for virtually all purposes, except possibly the attachment of real estate and the establishment of quasi in rem jurisdiction. Reading *Sniadach* as not confined to wage garnishment but as returning "the entire domain of prejudgment remedies to the long-standing procedural due process principle which dictates that, except in extraordinary circumstances, the individual may not be deprived of . . . property without notice and hearing,"[92] the court announced that an attachment or garnishment statute, to satisfy due process: (1) must exempt all "necessities of life" as "an initial matter"—even if exemption laws were adequately drawn to cover all such necessities, it would not do to allow plaintiff to attach first and defendant to assert and litigate his exemption claim later; (2) might permit attachment without notice "in exceptional cases where, for example, the creditor can additionally demonstrate before a magistrate that an actual risk has arisen that assets will be concealed or that the debtor will abscond;" and (3) must, in all other cases, permit attachment only after notice and hearing "on the probable validity of a creditor's claim."

Following this decision, an intermediate appellate court in Cali-

88. Lebowitz v. Forbes Leasing & Fin. Corp., 456 F.2d 979, 982 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972).

89. McKay v. McInnes, 279 U.S. 820 (1929), *discussed in* text accompanying note 41 *supra*. Ownbey v. Morgan, 256 U.S. 94 (1921), *discussed in* text at note 33 *supra*.

90. 456 F.2d at 982.

91. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied sub nom.*, Northern California Collection Serv., Inc. v. Randone, 407 U.S. 924 (1972). After this decision the California attachment and garnishment law was revised to limit its application to actions for $500 or more against business debtors, nonresidents and those who cannot be personally served, to limit issuance of the writ without notice to the exceptional cases suggested in the court's opinion, and otherwise to require an advance hearing at which the plaintiff must establish "the probable validity of his claim and the absence of any reasonable probability that a defense can be asserted." During the hearing a temporary restraining order will forbid the defendant from disposing of his assets except for limited withdrawals from his bank account and dispositions in the ordinary course of business. CAL. CODE CIV. P. §§ 537-542c (5 West. Cal. Leg. Serv. ch. 550 (1972)).

92. 5 Cal. 3d at 547, 488 P.2d at 19, 96 Cal. Rptr. at 715.

fornia held that neither *Sniadach* nor *Randone* forbids protection of a "creditor interest" by preventing attachment of unimproved real estate of a foreign corporation even though the corporation can be and is personally served in California.

> The creditor's need to safeguard the collectibility of a judgment is substantially greater when the debtor is a non-resident than when he is a resident, for a non-resident has contacts and roots outside the state which make it far more likely that he will be willing and able to transfer assets [realty?] outside the state to defeat his creditor's recovery than is true in the case of a resident debtor. Prior notice and hearing inevitably provide the non-resident debtor with opportunity to defeat the primary purpose of foreign attachment by transferring his assets to his home state before the desired attachment can take effect.[93]

Another division of the same court agreed on that point and also sustained another provision of the attachment law allowing attachment of property in an action to recover public funds paid to a defendant by policemen or informers for the purchase of narcotics. Because of "the ease and rapidity with which narcotics sellers may transfer both assets and themselves out of the state," this was an instance calling for "special protection" of public funds.[94] Following this decision, the California legislature demonstrated its concern for this form of protection of public funds by repealing the statutory provision which the court had upheld.[95]

As long as *Endicott Johnson Corp. v. Encyclopedia Press*[96] stands, *Sniadach* apparently does not protect the defendant after the plaintiff has obtained judgment on the merits in a proceeding where defendant had an opportunity for hearing. Additional notice and hearing are not thereafter required to be accorded to the defendant when plaintiff resorts to a writ of execution[97] or to garnishment in aid of execution[98] to collect his judgment. But questions may still arise in a postjudgment proceeding where a garnishee or other third party asserts an interest in property garnished while in his hands or levied on under execution.[99]

93. Property Research Financial Corp. v. Superior Court, 23 Cal. App. 3d 413, 419, 100 Cal. Rptr. 233, 237 (1972).
94. Damazo v. MacIntyre, 26 Cal. App. 3d 18, 24, 102 Cal. Rptr. 609, 612 (1972).
95. *See* note 91 *supra.*
96. 266 U.S. 285 (1924), *discussed in* text accompanying note 37 *supra. See also* Chonowski v. Bonucci, 47 Ill. 2d 519, 267 N.E.2d 671 (1971); *cf.* 68 MICH. L. REV. 986, 1012-16 (1970).
97. Lenske v. Shobe, 488 P.2d 852 (Ore. App. 1971) (levy on automobile).
98. Credit Serv. Co. v. Linnerouth, 290 Minn. 256, 187 N.W.2d 632 (1971) (garnishment of wages); Hehr v. Tucker, 256 Ore. 254, 472 P.2d 797 (1970) (garnishment of wages and bank account after registration of California judgment pursuant to Uniform Enforcement of Foreign Judgments Act). *See also* Milne v. Shell Oil Co., 129 Vt. 375, 278 A.2d 741 (1971) (garnishment of wages).
99. A garnishee may also deny that he is indebted to the defendant, but the statutes now provide for a hearing on that issue. *See, e.g.,* ARIZ. REV. STAT. ANN.

This problem is illustrated by a recent Arizona decision.[100] There, before the plaintiff initiated his action, the defendant transferred all of his real and personal property to a trustee for the benefit of defendant and his family. After the plaintiff obtained a judgment and while the defendant's appeal was pending, but without the posting of a supersedeas bond which would have stayed execution, the plaintiff served a writ of garnishment on the trustee and caused execution to be levied on the real estate held in trust, contending that the creation of the trust constituted a fraudulent conveyance. The trustee, in response to the garnishment, denied that he was indebted to or held any personalty of the defendant. He sought to have the garnishment dismissed and the execution levy vacated, invoking *Sniadach* and contending that he would be deprived of the use of the property while the fraudulent conveyance issue was being litigated. But the Arizona supreme court held that *Sniadach* was inapplicable to "executions after judgment."[101] The trustee held "only the naked legal title for the benefit of [the defendant] as expressed in the trust." He was simply a stakeholder, like the employer-garnishee in *Sniadach*, and the "principle invoked in *Sniadach*" did not have "the same compulsive force when applied to a garnishee."[102]

Assuming that any interference with the trustee's possession was involved,[103] as it would have been if the execution writ had been levied on any tangible personalty, this result may be defensible if confined to an allegedly fraudulent conveyance under which the transferee holds the property in trust solely for the defendant. But what if the effect of garnishment or execution would be to deprive defendant's wife and children of the use of trust property? Or if the transfer had not been in trust, but had given the transferee the right to use the property for his own purposes? In that case combining *Sniadach* with the principle of *Coe v. Armour Fertilizer Works*[104] requiring that the statute give notice to such third parties would indicate that the posses-

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§ 12-1581 (1956) (may deny indebtedness in answer and if the answer is not controverted, garnishee may be dismissed); *id.* § 12-1590 (if controverted, set for trial); CAL. CODE CIV. P. § 545, *as amended*, 1969 (Supp. 1972) (hearing provided for garnishee).

100. Sackin v. Kersting, 105 Ariz. 464, 466 P.2d 758 (1970), *on rehearing*, 105 Ariz. 566, 468 P.2d 925 (1970). Some of the facts are taken from the opinion below. Sackin v. Kersting, 10 Ariz. App. 340, 458 P.2d 544 (1969).

101. Sackin v. Kersting, 105 Ariz. 464, 466, 466 P.2d 758, 760 (1970).

102. Sackin v. Kersting, 105 Ariz. 566, 468 P.2d 925 (1970).

103. The garnishee under a writ of garnishment designed to reach personalty of the defendant in the garnishee's hands is not required to surrender it to the sheriff holding an execution writ unless it appears "from the answer of the garnishee or otherwise" that it is "property of the defendant." ARIZ. REV. STAT. ANN. § 12-1586 (1956). Levy on realty under a writ of execution is made by recording a copy of the writ in the real estate records. *Id.* § 12-1559 (Supp. 1972-73).

104. 237 U.S. 413 (1915), *discussed in* text accompanying note 31 *supra.*

sory rights of third parties could not be infringed without according them notice and hearing.

Moreover, the rule that notice to a judgment defendant is not required for postjudgment garnishment and execution levies may itself be in some jeopardy. In 1968 the Supreme Court granted certiorari in a case where the petitioner asked it to overrule or limit *Endicott Johnson Corp v. Encyclopedia Press*[105] and to invalidate an Arizona postjudgment execution levy on and sale of real estate without prior notice to the defendant. Thereafter, however, and over the dissents of Chief Justice Warren and Justices Black, Brennan and Douglas, with Warren, Black and Douglas indicating that they were ready to overrule *Endicott,* the Court dismissed the writ as improvidently granted.[106]

Before the ramifications of *Sniadach* could be further explored by the state and lower federal courts, the Supreme Court considered modern versions of another ancient writ and that decision casts new light on the problems of attachment.

REPLEVIN—AND MORE ABOUT ATTACHMENT

Derivation and American Alteration

The common law writ of replevin originated at least as early as the beginning of the thirteenth century. Ironically, in light of later developments, it seems to have originated as a device to protect feudal tenants whose manor lords resorted illegally to the self-help device of distraint to collect alleged rent and other claims from the tenants' chattels. Originally, the writ of replevin was issued by the sheriff and executed by his seizure and return of the goods to the tenant. If the landlord asserted good title to the goods before the sheriff seized them, the dispute was summarily and preliminarily resolved by the sheriff. If the sheriff resolved the issue in favor of the landlord, that ended the replevin action. If he resolved it in favor of the tenant, the goods were turned over to the tenant and the case proceeded to trial. One seeking replevin had to post pledges to prosecute the action. By the Statute of Westminister II,[107] these pledges were also required to stand for the return of the goods if the replevin action was ultimately unsuccessful. In the middle 1800's the sheriff's authority to issue the writs and resolve title disputes was transferred to the courts, but the writ was still confined to cases of illegal distraint or other wrongful taking of per-

105. 266 U.S. 285 (1924), *discussed in* text accompanying note 37 *supra.*
106. Hanner v. DeMarcus, 390 U.S. 736 (1968); *see* Kennedy, *supra* note 73, at 173-76.
107. 13 Edw. 1, ch. 2 (1285).

sonalty. Due to the existence of a modernized action of detinue in England, replevin is now rarely used there.

Again the device was transferred to this country by colonial and state statutes, which now provide for replevin[108] or for "claim and delivery," as it is called in many states. And as with the writ of attachment, the process of transplanting the remedy wrought changes. Under present American statutes the writ of replevin is available for any form of unlawful detention, whether or not the property was tortiously taken in the first instance. Thus, the remedy became a means by which secured creditors could repossess their chattel security on default. Additionally, under these statutes there is no preliminary ruling before seizure on the defendant's claim of rightful possession. The plaintiff is still required to post a bond before the writ issues or before it is executed, and most of the statutes[109] also allow the defendant to recover the property by posting a redelivery bond to secure any judgment the plaintiff may recover. Many of the statutes expressly authorize the sheriff to make a forcible entry of the defendant's premises if that is necessary to obtain the property.[110]

The Testing of Replevin Under Sniadach

The possible analogy between the sheriff's seizure of property without a hearing under an attachment writ, as in *Sniadach*, and the seizure of property without a hearing under a writ of replevin or its statutory equivalent, did not escape all members of the bar. Hence, soon after *Sniadach*, state and lower federal courts were afforded the opportunity to determine whether the analogy was sufficiently close in cases involving the use of replevin by secured parties to repossess collateral. Some courts escaped the problem by distinguishing between wages and the equipment of a bowling alley operator[111] or wages and household furniture,[112] by finding another defense for the defendant[113]

108. *E.g.*, ARIZ. REV. STAT. ANN. §§ 12-1301 *et seq.* (1956).

109. *E.g.*, *id.* § 12-1304.

110. J. COBBEY, LAW OF REPLEVIN Ch. I (2d ed. 1900); 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 283-85 (6th ed., rev. 1934); F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 408 (1936); R. MILLAR, *supra* note 1, at 498-509; S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 95-96 (1969); 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 575-76 (1895); Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and The Consumer, A Legal and Empirical Study*, 4 TEX. TECH. L. REV. 23, 29-31 (1972).

FED. R. CIV. P. 64 specifically incorporates the state replevin remedy. See note 11 *supra*.

111. Brunswick Corp. v. J&P, Inc., 424 F.2d 100 (10th Cir. 1970).

112. Epps v. Cortese, 326 F.Supp. 127 (E.D. Pa. 1971), *rev'd sub nom.*, Fuentes v. Shevin, 407 U.S. 67 (1972). Fuentes v. Faircloth, 317 F.Supp. 954 (S.D. Fla. 1970), *rev'd sub nom.* Fuentes v. Shevin, 407 U.S. 67 (1972). *See also* Jernigan v. Economy Exterminating Co., 327 F.Supp. 24, 30 (N.D. Ga. 1971), *appeal dismissed*, 407 U.S. 934 (1972), upholding repossession of an automobile under the Georgia "trover-bail" statute because an automobile is not a necessity of life and because the

or by simply holding *Sniadach* inapplicable without bothering to explain why.[114]

On the other hand, a three-judge federal district court in *Laprease v. Raymours Furniture Co.*,[115] entertaining an action under the 1866 Civil Rights Act[116] which forbids denial of constitutional rights under color of state law, held that repossession of household furniture under the New York replevin statute, which authorized the sheriff to make a forcible entry, constituted both a denial of due process and an unreasonable search and seizure. Thereafter the New York statute was amended to authorize a court order for seizure of property only "upon such terms as may be required to conform to the due process requirements" of the fourteenth amendment, and to require the plaintiff's affidavit, if he seeks a provision in the order authorizing the sheriff to make forcible entry, to state "facts sufficient under the due process of law requirements" of the fourteenth amendment to authorize such a provision.[117] Alternatively, the court may merely enter an order restraining defendant from moving or disposing of the property.

Under the amended statute, New York courts have held that a seizure order for machinery and tools will not issue on an affidavit alleging, on information and belief, that the defendant is about to abscond with or fraudulently convey the property,[118] and that a plaintiff may have an injunction but not a seizure order for household furniture on an affidavit "which merely claimed that in a conversation with de-

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statute requires the plaintiff, before the sheriff may seize the property, to file with the court clerk an affidavit that he has reason to believe that the property "has been or will be concealed or moved away or will not be forthcoming to answer the judgment."

113. Grossman Furniture Co., Inc. v. Pierre, 119 N.J. Super. 411, 291 A.2d 858 (1972).

114. Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J. Super. 65, 280 A.2d 862 (1971); Lawson v. Mantell, 62 Misc. 2d 307, 306 N.Y.S.2d 317 (1969). *See also* Wheeler v. Adams Co., 322 F. Supp. 645 (D. Md. 1971).

115. 315 F.Supp. 716 (N.D.N.Y. 1970); *accord*, Dorsey v. Community Stores Corp., 346 F.Supp. 103 (E.D. Wis. 1972). Fuentes v. Faircloth, 317 F.Supp. 954 (S.D. Fla. 1970), which was reversed on other grounds by the Supreme Court, reached a contrary conclusion on the search and seizure point, holding that the defendant had consented to the sheriff's entry of his premises by the terms of his security agreement. Similarly, Epps v. Cortese, 326 F.Supp. 127 (E.D. Pa. 1971), also reversed on other grounds by the Supreme Court, reached a contrary conclusion because the Pennsylvania replevin statute does not authorize forcible entry and there had been none.

116. *See* note 73 *supra*.

117. N.Y. CIV. PRAC. § 7102 (Supp. 1972). *See* Gardner, *Fuentes v. Shevin: The New York Creditor and Replevin*, 22 BUFFALO L. REV. 17 (1972). Vermont was also inspired by *Sniadach* and *Laprease* to revise its procedure so that the replevin writ issues only on court order after an *ex parte* hearing in which plaintiff shows "that there is probable ground to support plaintiff's claim." After the sheriff has seized the property, a copy of the writ is served on the defendant with the summons and complaint. VT. R. CIV. P. 64 (1971); *cf.* the revised Vermont attachment procedure described in note 74 *supra*.

118. Cedar Rapids Eng'r Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (1971), *aff'd*, 39 App. Div. 2d 275, 333 N.Y.S.2d 953 (1972); *cf.* General Elec. Corp. v. Fred Pistone, Jr., Inc., 68 Misc. 2d 475, 326 N.Y.S.2d 898 (Sup. Ct. 1971).

fendants the affiant was advised that defendants intended to return to Puerto Rico."[119] And one New York court indicated that the affidavit required for a forcible entry order must show "probable cause," which

> must at the very least include a showing that the property is on the premises claimed; that plaintiff has [an] undisputed right to it . . . and . . . that the seizure is necessary for the protection of the property during the pendency of the replevin action, or that the interest of the plaintiff in obtaining the property during the action is greater than the interest of the defendant in this interim use.[120]

The Supreme Court of California again entered the broadest ruling. Entertaining a taxpayers' suit to enjoin the sheriff from taking action in any case under the California claim and delivery statute, it held, under both the state and federal constitutions, that any seizure of property as authorized by the statute without a prior hearing would deny due process unless there was a showing of real danger that the debtor might abscond with the property. The court also held that any entry to seize the property as authorized by the statute would constitute an unreasonable search and seizure unless supported by a warrant issued by a magistrate on a showing of probable cause to believe that the property was at the location to be searched and that defendant was wrongfully detaining it. It added that neither constitutional objection could be waived in a "contract of adhesion."[121]

Fuentes v. Shevin—Dénouement of Sniadach and Its Progeny

In *Fuentes v. Shevin*,[122] 3 years after the decision in *Sniadach*, the Supreme Court reconsidered the due process limitations on prejudgment remedies when it ruled on the constitutionality of the Florida

119. Finkenberg Furniture Corp. v. Vasquez, 67 Misc. 2d 154, 162, 324 N.Y.S.2d 840, 849 (Civ. Ct. N.Y.C. 1971). *See also* Kosches v. Nichols, 68 Misc. 2d 795, 327 N.Y.S.2d 968 (Civ. Ct. N.Y. C. 1971).

120. Finkenberg Furniture Corp. v. Vasquez, 67 Misc. 2d 154, 158-59, 324 N.Y.S.2d 840, 846 (Civ. Ct. N.Y. C. 1971).

121. Blair v. Pitchess, 5 Cal. 3d 258, 275, 281, 486 P.2d 1242, 1255, 1258-59, 96 Cal. Rptr. 42, 54, 58-59 (1971). Since this decision, the California claim and delivery statute has been amended to require that notice and a hearing be given to a defendant before seizure of the property. After the hearing the court is to make a preliminary determination as to "which party, with reasonable probability, is entitled to possession, use, and disposition of the property" pending final decision, and to act accordingly. Notice and hearing are not required if the plaintiff persuades the court, *ex parte*, that it is probable that defendant gained possession by theft, that the property consists of negotiable instruments or credit cards, that the property is perishable or that defendant threatens to remove, conceal, dispose of or injure the property. Alternatively, the court may in any case enjoin the defendant from concealing, removing, disposing of or injuring the property. If seizure of the property is ordered, the sheriff cannot be authorized to enter private premises unless the court is persuaded that there is probable cause to believe the property is located therein. CAL. CODE CIV. P. §§ 509-521 (5 West. Cal. Leg. Serv. ch. 855 (1972)).

122. 407 U.S. 67 (1972).

and Pennsylvania replevin laws as used to repossess household furniture. These statutes differed in two substantial respects: only the Florida law[123] expressly authorized forcible entry by the sheriff, and only the Pennsylvania law[124] provided that the plaintiff might replevy without bringing an action, leaving it to the defendant to bring a lawsuit to recover his goods. Both laws required the plaintiff to file a bond and both authorized the defendant to recover his property by posting a redelivery bond within 3 days of the sheriff's seizure.

Putting aside argument of unlawful search and seizure, the Court held, in a 4-to-3 decision with Justices Powell and Rehnquist not participating, that both statutes violated the due process clause by depriving a defendant of his goods without a prior hearing.[125] The majority opinion adopted the description in Justice Harlan's concurring opinion in *Sniadach* of the kind of hearing required for a valid garnishment: one "aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor."[126]

Fuentes appears to resolve matters about attachment and garnishment left unresolved in *Sniadach*. First, the bond required of the plaintiff was no substitute for a hearing before a neutral official; it tested "no more than the strength of the [plaintiff's] own belief in his rights."[127] Second, nor would the provision for release of the property on defendant's posting of a redelivery bond save the statutes; when the sheriffs "seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property, whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision."[128] Third, it made no difference whether some of the debtors had fallen behind in their payments on their furniture or whether another was mistaken in her belief that defaults by the seller entitled her to stop making payments; the "right to be heard does not depend upon an advance showing that one will surely prevail at the hearing."[129] Fourth, nor did it make any difference whether the household furnishings involved, which included a bed, a table, a stove and a stereo, were "absolute necessities"[130] of

123. FLA. STAT. ANN. § 78.10 (Supp. 1972-73).
124. PA. STAT. ANN., tit. 12, § 1821 (1967). *See also* 12 PA. S. APP. R.C.P. 1073, 1077 (1962).
125. Apparently to demonstrate that it was not yet holding ancient process to be less than due process, the Court distinguished the now extinct English practice under which replevin was limited to cases where the original taking was wrongful and where defendant's claim of good title prior to seizure led to a summary preliminary hearing before the sheriff. 407 U.S. at 78-80.
126. *Id.* at 97.
127. *Id.* at 83.
128. *Id.* at 85.
129. *Id.* at 87.
130. *Id.* at 88.

life; the requirement of due process is not "limited to the protection of only a few types of property interests."[131]

Although "extraordinary situations" were again recognized which might justify postponing notice and hearing, they were, with one exception, described as instances where summary action was necessary "to secure an important governmental or general public interest." In this formulation, *Coffin Brothers v. Bennett*[132] was described, fairly enough, as a case of attachment to protect the public against the consequences of bank failure, and *Ownbey v. Morgan*[133] as a case involving "attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest,"[134] although that interest was not explicated. That left *McKay v. McInnes*,[135] which sustained attachment in a purely private dispute between nonresident plaintiffs and a resident defendant who had been personally served, and where it was "much less clear what interests were involved." That case had been decided per curiam simply by citing *Coffin* and *Ownbey*, however, so that *"McKay* [could not] stand for any more than was established in . . . *Coffin* and *Ownbey*."[136] In any event, no "important governmental or general public interest" was involved in *Fuentes*, which only presented instances of summary seizure where mere private gain was directly at stake. Replevin statutes which are not narrowly drawn to limit the seizure "to special situations demanding prompt action," as where "a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods,"[137] are therefore invalid under the due process clause.

In response to the sellers' argument that the buyers had waived their due process rights by provisions in the installment sales contracts allowing the sellers to repossess in the event of default in payments, the Court suggested that there might be two answers, although it gave only one of them. It was unnecessary to decide whether voluntary and intelligent waivers could be found in what were obviously contracts of adhesion, since, at the least, a waiver must be clear. Here, the alleged waivers merely recognized the seller's right to repossess on default without indicating *"how* or *through what process."*[138] Hence they did not, by their terms, amount to a waiver of the right to a hearing before repossession.

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131. *Id.* at 89.
132. 277 U.S. 29 (1928), *discussed in* text accompanying note 39 *supra.*
133. 256 U.S. 94 (1921), *discussed in* text accompanying note 35 *supra.*
134. 407 U.S. at 91n.23.
135. 279 U.S. 820 (1929), *discussed in* text accompanying note 41 *supra.*
136. 407 U.S. at 91n.23.
137. *Id.* at 91-93.
138. *Id.* at 96.

The narrowness of this last ruling may give some, but not very compelling, support to the dissenting opinion which, while disagreeing on the merits of the constitutional question, suggested that a creditor could simply avoid the waiver problem by expressly drafting his security agreement to authorize repossession without hearing. The dissent drew support for its position on the merits from the combined judgments of the proponents of the *Uniform Commercial Code* (UCC) and the state legislatures that have adopted it, since section 9-503 of the UCC goes beyond replevin to authorize a secured party on default of the debtor to repossess the collateral by self-help if he can do so "without breach of the peace."[139] The dissent could have added that section 9-504 also authorizes the secured party to sell the collateral at private sale if he proceeds in a "commercially reasonable" manner.[140] In most cases, notice to the debtor is required before the sale,[141] but the only function that this notice serves under the scheme of the UCC is to enable the debtor to redeem the collateral under section 9-506 by "tendering fulfillment of all obligations secured by the collateral" plus the secured party's expenses. If, as is almost invariably the case, the security agreement "contains a clause accelerating the entire balance due on default in one installment, the entire balance would have to be tendered."[142]

It is not surprising that a dissenting opinion that would find replevin without a hearing constitutional should rely on the UCC for support, since its provisions appear to be in some jeopardy under the majority opinion in *Fuentes*. In all respects the treatment of the debtor under the UCC is worse than his treatment under the replevin statutes invalidated in *Fuentes*.[143] The opportunity to recover property by redemption under the UCC is more onerous than the opportunity to recover it by posting a redelivery bond under the replevin statutes. Perhaps, apart from the UCC, the debtor could, with or without redemption, maintain a conversion action against the secured party and litigate such questions as whether he was in default, whether his defaults were excused by the actions of the secured creditor and whether the security agreement was valid. If so, he would be in approximately the same position as a debtor in Pennsylvania whose goods are replevied by a plaintiff with no action pending, and who must then bear the burden

139. UNIFORM COMMERCIAL CODE § 9-503 (1962 version) [hereinafter cited as UCC].
140. *Id.* § 9-504.
141. Such notice is required by *id.* § 9-504(3) unless "the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market."
142. *Id.* § 9-506, Comment.
143. *See* Comment, *Prejudgment Replevin and Self-Help Repossession—Creditor Remedies of the Past: A Constitutional Plan of Assault*, 17 ST. LOUIS U. L.J. 127 (1972).

of litigating the propriety of the replevy—except that the creditor proceeding by self-help under the UCC is not required to post a bond to secure any judgment the debtor might recover in a potential conversion action.

The difficult question, of course, is whether the necessary state action is involved to make the due process clause of the fourteenth amendment applicable to the self-help provisions of the UCC. In three pre-*Fuentes* decisions, federal district courts had considered this question in actions for declaratory and injunctive relief brought by debtors under the Civil Rights Act forbidding deprivation of federal constitutional rights under color of state law.[144] The actions were brought after a secured party had repossessed, or had both repossessed and sold, the collateral. In two of these cases the courts found in effect no state action in the constitutional sense by holding that they did not have jurisdiction under the Civil Rights Act because the repossessing creditor had not acted under color of state law. One court reached this conclusion because the security agreement expressly authorized the secured party to resort to his Code remedies on default,[145] the other because repossession was authorized by "a commonly accepted contractually-based and judicially-sanctioned practice" prior to the adoption of the UCC.[146] *Adams v. Egley*,[147] however, reached the opposite conclusion. There, the court held that the repossessing creditor acted under color of state law since the UCC "served as state encouragement" of contractual provisions authorizing private repossession on default, just as California had "encouraged" racial discrimination in *Reitman v. Mulkey*[148] by amending its constitution to prohibit any action by the state to deny its citizens the right to discriminate in the sale of property. Having made that determination, the court concluded that the action taken denied due process under *Sniadach* and that an effective waiver of the right to a hearing could not be found in a "standard-form" contract.

Since the *Fuentes* decision, four more courts have considered the matter. One found no state encouragement of private repossession in the enactment of section 9-503 of the UCC,[149] two found no state action because self-help in various forms was recognized at common

144. *See* note 73 *supra.*
145. McCormick v. First Nat'l Bank, 322 F.Supp. 604 (S.D. Fla. 1971). The further suggestion in this case that the Civil Rights Act protects only "personal" and not "property" rights was later rejected in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), *discussed in* note 73 *supra.*
146. Oller v. Bank of America, 342 F. Supp. 21, 22 (N.D. Cal. 1972).
147. 338 F.Supp. 614 (S.D. Cal. 1972), *appeal docketed,* No. 72-1484 (9th Cir. Oct. 1972).
148. 387 U.S. 369 (1967).
149. Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972).

law[150] and one found that the fourteenth amendment is not applicable to "passive" state action—there must be "active and direct state action" before the Constitution applies.[151]

The treatment of the state action question, or of the closely related question whether the repossessing creditor acted under color of state law, seems less than satisfactory in all of these cases.[152] But perhaps the question was not put in its best posture in any of them. Although it was the state legislature that had prescribed the self-help remedy, no state official had yet acted in any of the cases. Suppose that, before attempting to raise the due process question, the debtor had first involved the state courts,[153] in either of two ways. First, after the secured creditor had repossessed by self-help and sold by private sale, the debtor could have sued for damages in a state court on the ground that the creditor's interference with his possession before a right to do so had been established in a proceeding in which the debtor was given an opportunity for hearing constituted a conversion, and that insofar as state law purported to make the creditor's action nontortious, it violated the due process clause. Would not a state court decision holding that the creditor's action was licensed by state law and therefore nontortious, and that the state law was valid, present sufficient evidence of state action? Second, if the secured creditor repossessed and sold the collateral, and then brought an action in a state court for a deficiency judgment pursuant to section 9-504(2) of the UCC, could not the debtor raise the same question by contending that the repossession and sale were tortious and therefore the sale price should not be treated as conclusive in measuring the amount of the deficiency as contemplated by section 9-504(2)? If the state court upheld state law authorizing the repossession, sale and deficiency, would not that be sufficient evidence of state action?[154] If state action is present when a state court grants a plaintiff injunctive relief[155] or damages[156] for breach of a ra-

150. Kipp v. Cozens, 11 UCC REP. SERV. 1067 (Cal. Super. 1972); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (Chan. Div. 1972).

151. Greene v. First Nat'l Exch. Bank, 348 F.Supp. 672, 675 (W.D. Va. 1972).

152. *See* Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor*, 24 CASE W. RES. L. REV. 7, 56-63 (1972); Comment, *Creditors' Prehearing Remedies and Due Process*, 14 ARIZ. L. REV. 834, 839-45 (1972).

153. This is not to suggest that state *judicial* action is necessary to establish state action under the Constitution any more than it is necessary to establish action under color of state law under the Civil Rights Act. See Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), *discussed in* note 73 *supra*. But it would help the state action argument to involve state officials on behalf of the creditor in the particular case, and no ready means is apparent for involving nonjudicial officials.

154. *See* Clark, *Default, Repossession, Foreclosure and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302, 342 (1972), where the UCC procedure is characterized as a "deficiency judgment machine."

155. Shelley v. Kraemer, 334 U.S. 1 (1948).

156. Barrows v. Jackson, 346 U.S. 249 (1953).

cially restrictive covenant sanctioned by state law, can it be absent when a state court denies relief to a plaintiff in tort because defendant's conduct is licensed by state law, or treats the results of the creditor's licensed conduct as conclusive of the amount of the debtor's remaining liability?[157]

Regardless of the ultimate resolution of these questions, *Fuentes* seems to have removed most of the supposed limitations on *Sniadach* so far as attachment and garnishment are concerned. At least this was the conclusion of a three-judge federal district court in *Schneider v. Margossian.*[158] Although the action was brought by a plaintiff whose bank account had been attached under the Massachusetts prejudgment "trustee process" statute, the court invalidated the statute by reading *Fuentes* as expanding *Sniadach* to "all property whose use is restricted to any degree," except in exceptional circumstances such as where attachment is necessary to secure quasi in rem jurisdiction.[159] Similarly, a federal district court in Arizona invoked the broadening of *Sniadach* to invalidate, in less sweeping terms the Arizona prejudgment garnishment statute as applied to a businessman's bank account.[160] The Supreme Court of Arizona also seems to have read *Fuentes* to mean that the Arizona garnishment and attachment statutes are unconstitutional even where wages are not involved, but has refused to follow *Fuentes* on the remarkable ground that it is not bound by a 4-to-3 decision of the Supreme Court of the United States.[161]

The Delaware Chancellor,[162] in justifiable reliance on dictum in *Sniadach* and *Fuentes,* has held that the due process clause does not invalidate attachment of corporate stock of a nonresident to obtain quasi in rem jurisdiction under a statute, long ago upheld in *Own-*

157. *See also* Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), holding that by granting a franchise to a privately owned transit company, Congress had conferred "a substantial monopoly" in the District of Columbia, and that by refusing to forbid radio broadcasting in the company's passenger vehicles, a federal regulatory commission had "sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments . . . applicable." *Id.* at 461.

158. 349 F. Supp. 741 (D. Mass. 1972); *cf.* W.T. Grant Co. v. Mitchell, 269 So. 2d 186 (La. 1972).

159. 349 F. Supp. at 744.

160. Western Coach Corp. v. Shreve, 344 F.Supp. 1136 (D. Ariz. 1972). *See also* McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D.R.I. 1972) (attachment of automobile).

161. Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1972). This case involved a mandamus action against a county court clerk who had refused to issue writs of attachment and garnishment to the plaintiff in connection with another suit. The county board of supervisors has decided not to appeal to the United States Supreme Court, but an action has been filed in the federal district court of Arizona, Manning v. Palmer (Civil No. 73-71), to enjoin all clerks of court and justices of the peace from issuing prejudgment writs of attachment and garnishment. Letter from William Carter, Deputy Maricopa County Attorney, January 29, 1973; *cf.* Mitchell v. Tennessee, 351 F. Supp. 846 (W.D. Tenn. 1972).

162. Gordon v. Michel, 297 A.2d 420 (Del. Ch. 1972).

bey,[163] which has since been amended to permit defendant to enter an appearance without posting bail. The Delaware action establishing quasi in rem jurisdiction was apparently brought by nonresident plaintiffs against nonresident defendants, as was apparently the situation in *Ownbey*. The Chancellor found "a particularly valid governmental interest in compelling appearance" by the defendant, who had been charged with a breach of fiduciary duty, because the plaintiffs had brought a derivative action on behalf of the Delaware corporation whose shares had been attached,[164] which was not true in *Ownbey*.

It is difficult to identify any such important governmental interest, however, when a nonresident seeks to establish quasi in rem jurisdiction over another nonresident, in an ordinary action in contract or tort arising outside the state, by attaching the defendant's property in the state, or by garnishing his account with a local bank which does not deny its liability to the defendant as the Arizona court recently permitted.[165] Indeed, the Supreme Court in *Fuentes* was unable to identify any such interest in *McInnes v. McKay*[166] in which nonresident lawyers in pursuit of their fees attached the real estate and corporate stock of a resident defendant—although in that case the attachment was not necessary to obtain quasi in rem jurisdiction.[167] Additionally, the Court of Appeals for the Second Circuit, in order to avoid "exceedingly serious" constitutional questions, has refused to construe the New York attachment law as authorizing garnishment in New York of insurance carriers for airlines not subject to personal service in New York by the New York executors of nonresident decedents seeking to establish quasi in rem jurisdiction for wrongful death actions arising out of an accident occurring outside New York.[168] The due process clause may yet be held to impose limits, based on considerations similar to those underlying the doctrine of forum non conveniens, on the use of attachment or garnishment to establish quasi in rem jurisdiction in a forum whose contacts with the action are minimal.[169]

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163. Ownbey v. Morgan, 256 U.S. 94 (1921), *discussed in* text accompanying note 33 *supra*.

164. Gordon v. Michel, 297 A.2d 420 (Del. Ch. 1972).

165. First Nat'l Bank & Trust Co. v. Pomona Machinery Co., 107 Ariz. 286, 486 P.2d 184 (1971), *discussed in* note 79 *supra*; *cf.* Midland Fin. Co. v. Green, 279 A.2d 518 (D.C. App. 1971), *discussed in* note 75 *supra*.

166. 279 U.S. 820 (1929), *discussed in* text accompanying note 41 *supra*.

167. *See* text accompanying note 135 *supra*.

168. Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969).

169. *See* Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962); "Garnishment and The Validity of Quasi in Rem Jurisdiction," 14 ARIZ. L. REV. 409 (1972); *cf.* United States Indus., Inc. v. Gregg, CCH CORP. L. GUIDE ¶ 11.588 (D.C. Del. 1972).

Moreover, where the quasi in rem action survives, the accepted belief that notice by publication is sufficient should be reexamined in light of the *Mullane* line of decisions[170] holding that such notice does not satisfy due process when the address of the property holder is known so that he can be given notice by mail. True, the Supreme Court in *Mullane* undertook to explain why the same rule did not apply to attachment of realty or chattels (the property involved in *Mullane* being intangible interests in a common trust fund):

> It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts . . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.
> . . .
> . . . It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence . . . attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized. . . .[171]

This explanation failed at the time to reconcile foreign attachment on notice by publication with the rule applied in *Mullane* that, "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[172] It is certainly inconsistent with later decisions extending *Mullane* to require notice by mail to landowners whose addresses were known to the government initiating condemnation proceedings.[173] If such notice is required when the state condemns tangi-

170. *See* text accompanying notes 45-53 *supra*.
171. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315-16 (1950).
172. *Id.* at 315.
173. Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutcheson, 352 U.S. 112 (1956).

ble property, why should it not also be required when a creditor employs the machinery of the state to do essentially the same thing? And the rule should not be different when a creditor seeks to reach intangibles by prejudgment garnishment, even though *Harris v. Balk*[174] may have imposed some obligation on the garnishee to notify the defendant. The plaintiff should not be able to shift the duty to give notice to the garnishee so that the defendant's only remedy, if the notice is not given, depends on the garnishee's ability to compensate the defendant for the resulting damage.

COGNOVIT

English Origin

As indicated previously,[175] due process has not been deemed to require prior notice and hearing for a judgment debtor when his property is seized after an in personam judgment pursuant to an execution or garnishment in aid of execution. The same would apparently be true of the judgment lien on a defendant's realty which the plaintiff may acquire in most states either by docketing the judgment or by filing a transcript of it in the real estate records.[176] The basis for this determination is that the defendant has already had notice and an opportunity for hearing before the in personam judgment was entered. He will have this opportunity if personally served, even though he defaults, or if he enters a general appearance, even though not personally served.

Early English common law recognized another means of conferring in personam jurisdiction which provided a defendant with neither prior notice nor opportunity for a hearing. This was the cognovit note or power of attorney, executed by the debtor when he originally incurred his debt, authorizing the creditor both to enter an appearance and to confess judgment on the debtor's behalf. When the defendant learned of the judgment, he could move to open it and thereby undertake the burden of persuading the court that he had a valid defense against the creditor's claim. Since the cognovit was viewed primarily as a security device, it fell into disuse in England after statutes of the 1860's provided that a judgment would no longer automatically operate as a charge on land. Once more, however, the device had emigrated to this country before its demise in England. Absolute statutory prohibitions or onerous restrictions render its use unfeasible in perhaps

174. 198 U.S. 215 (1905), *discussed in* text accompanying note 21 *supra*.
175. *See* text accompanying notes 37, 96-106 *supra*.
176. V. COUNTRYMAN, *supra* note 10, at 64-65.

half of the states[177] and it is rarely employed in most of the others, but it has flourished in Pennsylvania, Delaware, Ohio and Illinois.[178]

Constitutional Assessment

Constitutional objections to cognovit had been anticipated before *Sniadach*.[179] Almost a month after *Sniadach*, but without mention of it, the New York Court of Appeals considered the matter and refused to enforce Pennsylvania judgments confessed under cognovit, after an alleged default, against guarantors of the debt who were nonresidents of Pennsylvania.[180] Since the judgments were entered by a court clerk whose duties were "purely ministerial," it was held that their entry was "without certain minimums of judicial process" and hence were not the product of "judicial proceedings" entitled to enforcement under the full faith and credit clause. Moreover, enforcement as a matter of comity would have been "repugnant to New York policy." Alternatively, the court considered the provisions in the particular cognovit permitting "any attorney of any court of record within the United States of America, or elsewhere" to appear and confess judgment to be so unreasonably broad as to violate the due process clause.[181]

Thereafter, a three-judge federal district court considered the constitutionality of the Delaware cognovit provision[182] in light of *Sniadach* and found it wanting, but on an extremely narrow ground. The authorizing statute provided "no method of judicially determining whether or not a particular debtor knowingly and intelligently signed the judgment note thereby waiving his 14th amendment rights."[183]

Two cases involving cognovit reached the Supreme Court before its decision on replevin in *Fuentes v. Shevin*. In *D. H. Overmyer Co. v. Frick Co.*,[184] a corporate debtor who, with the advice of counsel,

177. *E.g.*, ARIZ. REV. STAT. ANN. § 44-143 (1956) forbids the use of a power of attorney to confess judgment on an instrument unless the power is executed and acknowledged after maturity.

178. Osmond v. Spence, 327 F.Supp. 1349 (D. Del. 1971), *vacated and remanded*, 405 U.S. 971 (1972). *See* R. MILLAR, *supra* note 1, at 373-77; J. WILLIAMS, PERSONAL PROPERTY 247 n.c. (18th ed. 1926); Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111, 126-28 (1961); Note, *Cognovit Judgments: Some Constitutional Considerations*, 70 COLUM. L. REV. 1118, 1129-30 (1970); Note, *Confession of Judgment*, 102 U. PA. L. REV. 524 (1954).

In Pennsylvania and Illinois the cognovit note may even authorize confession of judgment before maturity, although at the sacrifice of negotiability. V. COUNTRYMAN & A. KAUFMAN, COMMERCIAL LAW 352 (1971).

179. Hopson, *supra* note 178.

180. Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 212, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).

181. *Id.* at 230-31, 250 N.E.2d at 481-82, 303 N.Y.S.2d at 391-92.

182. Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971).

183. *Id.* at 1359. After its decisions discussed in text accompanying notes 184 and 186, *infra*, the Supreme Court vacated and remanded this decision for reconsideration. 405 U.S. 971 (1972).

184. 405 U.S. 174 (1972).

had given a cognovit note in exchange for the release of mechanic's liens and surrender of prior notes which did not contain a cognovit provision but did have earlier maturities and higher interest rates, challenged the constitutionality of cognovit as employed in Ohio. The Court refused to hold the cognovit "*per se* violative" of the due process clause, but determined that the question of waiver must be examined on a case-by-case basis. Assuming "that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowingly, and intelligently made,"[185] the Court found that standard satisfied when there was no inequality of bargaining power as between the corporate defendant and the corporate plaintiff, and the defendant had signed the cognovit with advice of counsel and in return for substantial benefits.

In a companion case, *Swarb v. Lennox*,[186] consumers in Pennsylvania who had signed cognovits brought a class action in a three-judge federal district court seeking to enjoin the court clerk responsible for entering and the sheriff responsible for executing confessed judgments from entering or enforcing such judgments. That court concluded that the Pennsylvania statute authorizing the cognovit was not unconstitutional on its face but would deny due process under *Sniadach* to any debtor who did not knowingly and voluntarily waive his right to notice and hearing; that the class action could be maintained only as to Pennsylvania residents earning less than $10,000 per year; and that as to any debtor in that class, creditors should be enjoined from entering confessed judgments, recording judgment liens or levying execution unless they first bore the burden of proving an effective waiver by the debtor. The defendant state officials did not appeal, but the plaintiffs appealed from the trial court's refusal to declare the Pennsylvania statute invalid on its face. Although the relief that plaintiffs did obtain was attacked by intervening finance companies and other lending institutions as amici, the majority of the Supreme Court, in an unrestrained exercise of judicial self-restraint, refused to consider any issue not raised by plaintiff's appeal. Accordingly, the Court decided only that, since *Overmyer* had held that the waiver question was to be resolved on a case-by-case basis, the court below correctly ruled that the Pennsylvania statute was not unconstitutional on its face. Thus the other rulings of the district court, and its injunction, represent the law in Pennsylvania only.

Three months after these decisions, and without mention of them,

185. *Id.* at 185.
186. 405 U.S. 191 (1972).

a three-judge federal district court in Illinois[187] considered that state's cognovit practice and elected to follow a route similar to that taken earlier by its Delaware counterpart.[188] It held unconstitutional the use of the Illinois statute authorizing confession of judgment without prior notice and hearing, when followed by use of the Illinois garnishment statute to make a postjudgment garnishment of defendant's bank account without prior notice and hearing. The garnishment statute failed "to provide a means of determining whether or not the debtor has 'knowingly and voluntarily' waived his right to notice and hearing at the time that the garnishment summons issued."[189] Cognovit thus seems consigned to a case-by-case appraisal which it will not often survive when a consumer debtor is involved.

LANDLORD AND TENANT

Self-help was the order of the day for the landlord at early common law—both for regaining possession of his land on default by the tenant and for seizing the tenant's goods in satisfaction of unpaid rent. While the *Sniadach* decision has prompted a consideration of the constitutionality of both remedies as practiced in this country, it has clearly had a greater impact on the right to seizure than it has on the right to repossession of the leasehold.

Repossession

By proper draftsmanship, which conditioned the term on payment of rent when due, and by following an elaborately technical formula for making a formal demand for payment of rent, the landlord became entitled to terminate the leasehold by reentry. Despite resulting breaches of the peace, the development of the slow and costly action of ejectment as an alternative and the willingness of equity in some cases to provide relief from forfeitures, this self-help remedy seems to have survived in England with the later restriction that the reentry must be accomplished peaceably. In this country it has been largely replaced by statutes—many entitled "forcible entry and unlawful detainer" acts—that provide for recovery of possession by the landlord through a summary judicial proceeding in which the tenant has an opportunity for hearing, although under many of the statutes the sole issue to be tried is whether rent is

187. Scott v. Danaher, 343 F. Supp. 1272 (N.D. Ill. 1972).
188. *See* text accompanying note 183 *supra.*
189. 343 F.Supp. at 1274. The court distinguished Endicott Johnson Corp. v. Encyclopedia Press, 266 U.S. 285 (1924), *discussed in* text accompanying notes 37, 96 and 105 *supra,* which upheld postjudgment garnishment without notice and hearing, on the ground that the defendant in that case had notice and an opportunity for hearing before the judgment was entered.

unpaid.[190] These statutes have also come under attack since *Sniadach* but, for the most part, have withstood the challenge.

One three-judge federal district court held, without elaboration, that the California unlawful detainer statute did not violate the due process or equal protection clauses.[191] The statute afforded the tenant a hearing on the landlord's allegation of nonpayment of rent but did not allow him to assert as defenses that the landlord was also in default under the lease or that the premises were not in compliance with the building code. A state court, however, struck down another provision of the California statute that entitled the landlord to an order for immediate possession pending final judgment if he could persuade the court, after notice and hearing for the tenant, that the tenant did not have sufficient property to satisfy the damages sought by the landlord for unlawful detainer.[192] The court reached its decision on the basis of *Sniadach* because the preliminary hearing on possession did not provide for a determination of whether the landlord was entitled, or probably entitled, to possession. The provision was held also to deny equal protection since the distinction between propertied and nonpropertied tenants had no relation to the main object of the proceeding, which was to recover possession of the premises, the recovery of damages being merely incidental.

Several features of the New York unlawful detainer law have survived constitutional attack. A provision for posting the landlord's notice of the action conspicuously on the premises and mailing a copy to the tenant by registered or certified mail, if no one can be found on the premises to receive the notice, was sustained even though the tenant claimed never to have seen or received the notice.[193] "Nailing and

190. B. ADKIN, LANDLORD AND TENANT 221-22 (16th ed. 1967); C. BERGER, LAND OWNERSHIP AND USE 360-61 (1968); J. CASNER & W. LEACH, PROPERTY 451 (2d ed. 1969); G. CHESHIRE, REAL PROPERTY 391-96 (10th ed. 1967); H. FOA, LANDLORD AND TENANT 673-80 (8th ed. 1957); 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 268 (2d ed. 1937); H. LESAR, LANDLORD AND TENANT § 3.94 (1957). The Arizona statute appears to make the summary procedure available as an alternative to the landlord's right of reentry. ARIZ. REV. STAT. ANN. § 33-361 (1956). *See generally* Baird, *A Study of Arizona Lease Terminations*, 9 ARIZ. L. REV. 187 (1967).

191. Hutcherson v. Lehtin, 313 F.Supp. 1324 (N.D. Cal.), *appeal dismissed*, 399 U.S. 522, *order vacated & case remanded*, 400 U.S. 923 (1970).

192. Mihans v. Municipal Court, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970). Thereafter, this provision of the statute was repealed. CAL. CODE CIV. P. § 1166a (West 1972).

193. Velazquez v. Thompson, 321 F. Supp. 34 (S.D.N.Y. 1970), *aff'd*, 451 F.2d 202 (2d Cir. 1971). The court held that there was no unconstitutional search and seizure, no invasion of any "right of housing" under the ninth amendment, and no denial of equal protection because the law applied only to New York City in view of the critical housing shortage there. *Cf.* 300 West 154th St. Realty Co. v. Department of Buildings, 26 N.Y.2d 538, 260 N.E.2d 534, 311 N.Y.S.2d 899 (1970), considering city regulations which provided that the Board of Health may declare premises a nuisance and order the condition abated and, if it is not done, the city may make the necessary repairs and order the tenant to pay his rent to the city to the extent necessary to pay the cost. The regulations were held invalid in authorizing notice of the abatement or-

mailing" was deemed sufficient. If an instance of "sewer service" was involved, the tenant's remedy was said to be to move in the state court to vacate the repossession order entered by default. It was held also that due process does not require that the state court inquire into the merits of the landlord's petition alleging nonpayment of rent where the tenant did not appear, or that the nonappearing tenant be given notice of a repossession order so that he could pay the rent due before the order was executed.

In *Lindsey v. Normet*[194] the Supreme Court considered the constitutionality of the Oregon unlawful detainer law in an injunction action brought by a tenant who was unwilling to pay rent after the city had declared the premises unfit for habitation and the landlord had refused to make repairs. Under the Oregon statute, the landlord was authorized to bring his action 10 days after nonpayment of rent when due, on not less than 2 or more than 4 days notice to the tenant. The tenant could obtain a continuance of more than 2 days only by posting security for any rent that might accrue if judgment was entered for the landlord. The only issue to be tried in the proceeding was nonpayment of rent and the only relief which could be afforded was a repossession order. The Supreme Court found these provisions unexceptionable under the due process clause. The short notice provisions were permissible since the only issue was whether rent was unpaid and "[t]enants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease [and] whether they have paid their rent."[195] Moreover, the tenant could obtain more time by posting security for the rent that would accrue during the continuance, a requirement that "is hardly irrational."[196] Nor was there a denial of due process in excluding from the action the defenses of the tenant that the landlord was in default under the lease and in violation of the building code. The landlord was also barred from claiming rent due or asserting other claims against the tenant in the unlawful detainer action; the tenant was free to bring his own action for damages or other relief against the land-

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der by publication only, at least as to a nuisance not created by the landlord and of which he might have no notice (a blocked toilet), but valid in authorizing the city to act without prior judicial hearing for the landlord, because he could obtain a prior administrative hearing if properly notified or could sue the city to recover the rents collected and contest his liability in that action, and because the procedure did not impose the same economic hardship as the wage garnishment in *Sniadach*.

194. 405 U.S. 56 (1972).

195. *Id.* at 65.

196. *Id.* In fact, the trial court in the injunction action had ordered the tenant to make his rent payments into an escrow account during the pendency of the proceeding. Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970), approved such a requirement in a landlord's unlawful detainer action in very limited circumstances. *Cf.* Amanuensis, Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (1971).

lord; and due process did not require that rent payments be suspended "while the alleged wrongdoings of the landlord are litigated."[197]

The Supreme Court also decided that the Oregon statutes pertaining to trial of the relevant issues did not deny equal protection. The laws were not discriminatory merely because the time between complaint and trial was substantially shorter and the range of issues that might be tried was narrower than in other civil litigation. The detainer statute applied "to all tenants, rich and poor, commercial and noncommercial," and "classifying tenants of real property differently from other tenants for purposes of possessory actions" was permissible since the state had a legitimate interest in the "peaceful resolution of disputes over the possession of real property," as an alternative to the violence that frequently resulted from the exercise of the landlord's former common-law remedy for self-help, and the procedure prescribed was closely related to that end. The Court also rejected the tenant's argument that the "need for decent shelter" and the "right to retain peaceful possession of one's home" were such "fundamental" interests that the equal protection clause in this case required not merely that the classification be "rational" but that it be "necessary to promote a compelling governmental interest."[198] The Court was unable to find in the Constitution any "guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord . . . without the payment of rent."[199]

One feature of the Oregon detainer law was held to be unconstitutional. As a prerequisite for an appeal from a repossession order, the tenant was required to post a bond in addition to the ordinary appeal bond (as distinguished from a *supersedeas* bond) required of all other civil litigants in Oregon. This additional bond was conditioned to pay the landlord twice the amount of the rental value of the premises from the time the action was commenced if the appeal was unsuccessful.[200] The state sought to justify this requirement as a means of barring frivolous appeals, but the Court pointed out that "it not only bars nonfrivolous appeals by those who are unable to post bond but

197. 405 U.S. at 66.

198. For a discussion of this new equal protection dichotomy, see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

199. 405 U.S. at 74.

200. For a similar statute, see ARIZ. REV. STAT. ANN. § 33-361 (1956). It has been held that the double-rent bond is not required where the tenant vacates the premises prior to appeal. Lane v. Hognason, 12 Ariz. App. 330, 470 P.2d 478, *rev'd on other grounds*, 13 Ariz. App. 120, 474 P.2d 839 (1970). It is unclear, however, whether the posting of the double-rent bond relieves the tenant of the bond for costs on appeal required for all civil cases by ARIZ. R. CIV. P. 73(b), *as amended*, 1961 (Supp. 1972-73).

Since the Supreme Court's decision in *Lindsey* was 5-2, it presumably is applicable in Arizona; *cf.* text at note 161 *supra*.

also allows meritless appeals by others who can afford the bond," and held that the double-rent bond requirement violated the equal protection clause, although it suggested that a bond conditioned to pay only the rent accrued and accruing during the appeal would not.[201]

Shortly before the *Lindsey* decision, the Illinois supreme court held that the requirement in its detainer statute of an appeal bond conditioned to pay all rent due regardless of the outcome of the appeal and to pay all of the landlord's damages and costs if the appeal was unsuccessful was a violation of a provision of the state constitution guaranteeing a right of appeal. The court granted a *supersedeas* to the appealing tenant conditioned on payment of rent to the landlord as it came due.[202] Nonetheless, the Court of Appeals for the Seventh Circuit has, since *Lindsey*, reversed an order dismissing a complaint challenging other aspects of the appellate procedure under the Illinois statute, as applied to one purchasing land under an installment contract, and ordered a three-judge federal district court to hear the case.[203] Thereafter, the Illinois supreme court, relying upon *Lindsey*, held that there was no denial of equal protection in the requirement of the state's detainer law that appeals be taken within 5 days although 30 days is given for appeal in other civil cases.[204] In another case a three-judge federal district court easily distinguished *Lindsey* in order to invalidate a Florida statute authorizing apartment owners, without legal process or official assistance, to lock out tenants for nonpayment of rent, finding the necessary state action in the fact that the statute vested the owner with "authority that is normally exercised by the state."[205]

Distraint

As early as the thirteenth century, the common law recognized the right of a landlord, without legal process, to distrain his tenant's goods on the demised premises in order to compel payment of rent or performance of services owed by the tenant. Initially, the landlord merely held the goods to compel performance, but the Sales of Distress Act of 1689[206] authorized him, when the distraint was for rent and a notice was left on the tenant's premises, to have the sheriff sell

201. An earlier appeal challenged the constitutionality of a provision in the Georgia unlawful detainer law requiring the tenant, as a condition to defending the action, to post a bond conditioned to pay the landlord twice the amount of rent due in the event that judgment went for the landlord. But the appeal was dismissed after the tenant vacated the premises and the bond requirement was repealed. Sanks v. Georgia, 401 U.S. 144 (1971).
202. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).
203. Starks v. Klopfer, 468 F.2d 796 (7th Cir. 1972).
204. Hamilton Corp. v. Alexander, —Ill. 2d —, 290 N.E.2d 589 (1972).
205. Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972).
206. 2 W. & M. 1, c.5 (1690).

the goods if the rent was not paid within 5 days after distraint. If the tenant considered the distraint wrongful, he was forced to post bond and bring an action of replevin to regain possession of his property.[207] Subsequently, actions of trespass and trover became available where the tenant sought damages rather than possession.[208]

In the United States the remedy of distraint has been abolished in some states, while in others it has survived as a part of the common law. In many states it is provided for by statute.[209] Under some of these statutes the landlord may seize and sell the tenant's property without official writ or assistance.[210] Under others, a writ and the assistance of the sheriff are required for either a seizure or a sale or both.[211] Many of the distraint statutes also give the landlord a statutory lien dating from the beginning of the term.[212] These statutes have not fared well under *Sniadach* in state and federal courts.

Where the seizure and sale are made by the sheriff under writ without prior hearing, *Sniadach* has been read to mean that due process is violated even when the tenant, if he learned of the seizure, could arrest the sale by posting a replevin bond.[213] Likewise, where the landlord seized without legal process but on personal, posted or mailed notice, and the sheriff sold the property if the tenant did not post a replevin bond within 5 days, the sale, if not the levy, has been held to violate due process under *Sniadach*.[214]

In those situations where legal process or official assistance is not required, the courts have reached the same conclusion. The state action problem emerges again, as in the cases involving self-help repossession and sale under the UCC,[215] but the courts have surmounted it

207. *See* text accompanying note 107 *supra*.

208. J. EDDY, DISTRESS 1-3 (2d ed. 1939); F. ENEVER, HISTORY OF THE LAW OF DISTRESS 72-74 (1931), 3 W. HOLDSWORTH, *supra* note 110, at 281-87; S. MILSOM, *supra* note 110, at 95-96; 2 F. POLLOCK & F. MAITLAND, *supra* note 110, at 573-75.

209. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-361, -362 (1956).

210. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-362(B) (1956).

211. *E.g.*, PURDON'S PA. STAT. ANN. tit. 68, § 322 (1953).

212. H. LESAR, LANDLORD AND TENANT § 3.72 (1957); 2 R. POWELL, REAL PROPERTY ¶ 230[2] (1967).

213. Musselman v. Spies, 343 F.Supp. 528 (M.D. Pa. 1972); Holt v. Brown, 336 F.Supp. 2 (W.D. Ky. 1971); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971).

214. Musselman v. Spies, 343 F.Supp. 528 (M.D. Pa. 1972); Sellers v. Contino, 327 F.Supp. 230 (E.D. Pa. 1971); Santiago v. McElroy, 319 F.Supp. 284 (E.D. Pa. 1970). The Supreme Court of Delaware, confronting a similar statute in a tenant's damage action against the landlord and the constable, held that it need not decide whether the statute was unconstitutional since the defendants were entitled to rely on it even if it was invalid. The court called to the attention of the legislature, however, "the possible effect [of *Sniadach*] upon the validity of the Delaware Landlord Distress Law." Downs v. Jacobs, 22 A.2d 706, 708 (Del. 1970). The law was then amended to require, after seizure by the landlord but before sale by the constable, 10 days' notice and a hearing for the tenant at which he can raise any defense he may have. DEL. CODE ANN. Ch. 25, § 5115 (Supp. 1970).

215. *See* text accompanying notes 144-57 *supra*.

(1) by ignoring it;[216] (2) by pointing out that the statute gives the landlord "authority that is normally exercised by the state" and that the only difference from *Sniadach* in this respect is that there a court clerk had issued the garnishment writ to plaintiff's attorney who served it on the garnishee;[217] (3) or by invoking *Reitman v. Mulkey*[218] and the theory that the state had "encouraged" the seizure.[219] One court even had the bad grace to point out that the invalidation of the Pennsylvania replevin action by *Fuentes v. Shevin* had deprived the tenant of his former ability to regain possession of the distrained property by posting a replevin bond.[220]

Finally, the Court of Appeals of California, without concerning itself with the state action question, partially invalidated a section of the California unlawful detainer law.[221] The statute in question[222] provided that, if a tenant did not remove his property within 5 days after his landlord secured an order for repossession of the premises, the landlord could hold the property for 30 days, during which time the tenant could redeem it by paying reasonable storage costs plus any rent adjudged to be due in the detainer action. After the redemption period had expired, the landlord was authorized to sell the property at public auction and apply the proceeds to storage costs and the rent claim. The provision for payment of storage costs was held to be valid under the due process and equal protection clauses since the detainer action had already provided the tenant his hearing on his right to occupy the premises, and since both the tenant's interests and those of the state were served by this alternative to the earlier practice of putting the tenant's property out in the street. Insofar as the statute entitled the landlord to hold and sell the property as security for his rent claim, however, it was held to violate both clauses because, there being no levy on the property which would trigger the exemption laws, it allowed the landlord to satisfy his judgment out of exempt property—

216. Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972) (action to enjoin landlords from distraining property under a statute which authorized the sheriff to sell the property).

217. Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), *on rehearing*, 468 F.2d 845 (1972). *See also* Barber v. Rader, 350 F.Supp. 183 (S.D. Fla. 1972), *discussed in* text accompanying note 205 *supra*.

218. 387 U.S. 369 (1967), *discussed in* text accompanying note 148 *supra*.

219. Collins v. Viceroy Hotel Corp., 338 F.Supp. 390 (N.D. Ill. 1972) (hotel keeper's possessory lien on personal effects of tenant locked out for nonpayment of rent); *accord*, Klim v. Jones, 315 F.Supp. 109 (N.D. Cal. 1970). *Contra*, Blye v. Globe-Wernicke Realty Co., 68 Misc. 2d 948, 328 N.Y.S.2d 257, *appeal dismissed*, 30 N.Y.2d 749, 284 N.E.2d 158, 333 N.Y.S.2d 174 (1972).

220. Gross v. Fox, 349 F. Supp. 1164 (E.D. Pa. 1972).

221. Gray v. Whitmore, 14 Cal. App. 3d 784, 92 Cal. Rptr. 505, *on rehearing*, 17 Cal. App. 3d 1, 94 Cal. Rptr. 904 (1971).

222. CAL. CODE CIV. P. § 1174 (West. 1971). The statute had been recently amended several times, and the opinion is unclear as to which amended version was involved.

something that other creditors with judgments could not do under a writ of execution.

IMPRISONMENT FOR DEBT

While some of the modern versions of ancient creditors' remedies considered above seem remarkably harsh, an even harsher one has not yet been considered. As every reader of Charles Dickens knows, the common law sanctioned imprisonment for debt.[223] In the thirteenth century the writ of *capias ad respondendum* was available to arrest the debtor in certain actions and to hold him in custody pending suit, while the writ of *capias ad satisfaciendum* was available to retain him in custody until the judgment was paid. By the end of the fifteenth century these legal writs were available in practically all cases, and equity followed the law most of the way. If the creditor could persuade the court that there was a danger that the debtor might flee the jurisdiction, he could obtain a writ of *ne exeat* under which the debtor would be arrested and held in custody pending the outcome of the suit unless he posted bond.[224] For the debtor who did not pay a money decree, there was a contempt sentence. Under these ancient practices, the creditor was not responsible for the debtor's subsistence while incarcerated. As one kindly seventeenth century judge put it:

> If a man be taken in execution and lie in prison for debt, neither the plaintiff at whose suit he is arrested nor the sheriff who took him, is bound to find him meat, drink, or clothes, but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God . . . .[225]

Body attachment before judgment was abolished in England in 1838; body execution after judgment was abolished in 1869 for all contract debtors, except those guilty of fraud or of contemptuously refusing to pay a judgment despite ability to do so.[226]

It is not particularly surprising that a country whose employers imported labor under indentured service should have imported the English practice of imprisonment for debt. But a wave of reform in the 1830's led to state constitutional provisions forbidding it, and today such prohibitions appear in the constitutions of nearly all states and in the statutes of several where the constitution is silent.[227] Many of

223. *See, e.g.*, C. DICKENS, DAVID COPPERFIELD (1850). A more complete and documented account of the practice may be found in V. COUNTRYMAN, *supra* note 10, at 74-81.

224. *See* National Auto. Cas. Ins. Co. v. Queck, 1 Ariz. App. 595, 405 P.2d 905 (1965).

225. Manby v. Scott, 1 Mod. 124, 132, 86 Eng. Rep. 781, 786 (Ex. 1659).

226. 1 & 2 Vict. c. 110 (1838); 32 & 33 Vict. c. 62 (1869).

227. *See* V. COUNTRYMAN, *supra* note 10, at 78. ARIZ. CONST. art. 2, § 18. In Arizona, as elsewhere, this prohibition is not interpreted to forbid imprisonment for

these prohibitions are limited to contract debtors, and many of them make exception for debtors guilty of fraud. In other words, the prohibitions do not exist in all states and are not complete where they do exist. In a few states, mostly in New England, imprisonment for debt is still employed until the debtor is ransomed by family or friends or until the creditor grows weary of paying the debtor's board bill as is now usually required. Thus in Maine, as recently as 1966, two deputy sheriffs reponsible for execution of *capias* writs estimated that they handled a total of more than 700 cases per year.[228] Both deputies also reported, however, that they occasionally persuaded a creditor's attorney that jailing of the debtor would be pointless, and that they frequently negotiated an agreement between the debtor and the creditor's attorney under which the debtor would pay as little as $1 per week on the judgment. From the creditor's point of view, this was generally preferable to paying the jailed debtor's board bill of $1.75 per day and adding that amount to his judgment. As a consequence, less than half of the debtors for whom *capias* writs were issued were actually jailed.

The Aftermath of Sniadach

Unless the concept of substantive due process is to be resurrected, as it has not been in this area, the fourteenth amendment will not provide a prohibition against imprisonment for debt where the states have not provided one. But the requirements of procedural due process have been found to provide some protection for debtors.

Even before *Sniadach* was decided, the California supreme court in *In re Harris*[229] considered that state's version of body attachment and found it wanting. The California constitutional prohibition of imprisonment for "debt in any civil action" contains exceptions for fraud and for torts involving wilful injuries to persons or property.[230] In an apparent attempt to work within these exceptions, the legislature had authorized arrest before judgment in a limited class of cases including an action to recover possession of personal property unlawfully de-

contempt in disobeying an alimony decree, Stone v. Stidham, 96 Ariz. 235, 393 P.2d 923 (1964), or to invalidate bad check laws. State v. Meeks, 30 Ariz. 436, 247 P. 1099 (1926).

ARIZ. REV. STAT. ANN. § 12-1539 (1956) makes it a crime to hold a dead body for debt, a practice not unknown under Roman law, but one undetected by the historians of the common law.

228. Interviews with Cumberland County Deputy Sheriff Everett Tinsman, Portland, Maine, July 28, 1966, and with Penobscott County Deputy Sheriff Thomas Scanlon, Bangor, Maine, Aug. 12, 1966. These interviews were conducted in connection with a study of bankruptcy administration by The Brookings Institution resulting in the publication of D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM-PROCESS-REFORM (1971).

229. 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968).

230. CAL. CONST. art. I, § 15.

tained where the plaintiff persuaded the court, *ex parte*, that the property had been concealed, removed or disposed of to prevent its being taken by the sheriff. A secured creditor, attempting to repossess a truck by a claim and delivery action where the sheriff could not find the debtor or the truck, had so persuaded the court. When the debtor later came to the sheriff's office to report that his truck had been stolen, he was arrested under court order which fixed his bail at $20,000. The California court concluded that this procedure could not be squared with the requirements of due process. The court was outraged that the debtor had not been advised of his right to counsel and to have his bail reduced and that he had served 5 weeks in jail due to his inability to raise the $20,000 bail before a public defender learned of his plight and had the bail reduced to $1250. Athough not explicitly stated, the opinion appears to regard due process as requiring an opportunity for hearing assisted by counsel before the defendant is jailed.

In Maine, which has no constitutional prohibition against imprisonment for debt, the procedure departed somewhat from that of the early English practice. While *capias* writs were authorized before judgment, they were unavailable immediately after judgment. Instead, the judgment creditor would initiate disclosure proceedings before a commissioner who issued a subpoena to the debtor to "appear and make disclosure" of his assets. If the debtor appeared, made a disclosure which satisfied the commissioner and relinquished his nonexempt assets or persuaded the commissioner that he had none, he was administered a "poor debtor oath" and released. If he did not satisfy the commissioner, a *capias* writ was issued under which the debtor was imprisoned by the sheriff. If he failed to appear before the commissioner in response to the subpoena, the *capias* writ also issued for his imprisonment if the creditor so requested.

After the *Sniadach* decision, a three-judge federal district court held that this procedure, as applied to debtors who failed to appear before the commissioner, did not "meet even the minimum demands of due process."[231] While wilful failure to obey a court subpoena is unquestionably contempt of court, inability to comply with the subpoena is a defense to the contempt charge. And the Maine statute involved appeared to be *"sui generis* even in Maine law" in "denying the debtor any opportunity to explain his absence at the disclosure hearing" be-

231. Desmond v. Hachey, 315 F. Supp. 328, 332 (D. Me. 1970). The record in this case reveals that, during the 3 preceding years in Cumberland and Kennebec Counties, disclosure commissioners had issued 470 *capias* writs, of which 367 were for failure of the debtor to appear. A total of 179 debtors had spent 1,754 days in debtor's prison in the two counties during the 3-year period.

fore he was jailed. Nor was the constitutional defect cured by a 1970 amendment to a law otherwise substantially unchanged since 1831, which required the sheriff to notify the nearest court within 2 to 10 days of the debtor's incarceration and required the court to conduct a hearing immediately to determine whether the debtor could qualify for the "poor debtor oath" and hence for release. Just as due process in *Sniadach* required a hearing *before* property was seized, due process here required a hearing *before* the debtor was jailed.

Since this decision the Maine statutes have been amended so that, except for alimony and support orders, the only function of the *capias* writ is to bring into court for examination a debtor who fails to respond to a subpoena for the disclosure hearing. The debtor now goes to jail only if, thereafter, he fails to comply with an order of the court to make his nonexempt property available to a judgment creditor and if, after a hearing, he is found to be in contempt of court.[232]

In Pennsylvania the constitutional proscription against imprisonment for debt, in effect since 1790, seems to allow some leeway both for body attachment and body execution.[233] One rule of civil procedure, however, presently forbids body execution except "in an action for fines and penalties . . . or as punishment for contempt,"[234] and another forbids body attachment except in the same instances "or upon a writ of ne exeat."[235] Within these excepted areas, Pennsylvania statutes allow body attachment without any showing of special grounds and with release obtainable only by posting bail.[236] A three-judge federal district court, considering the arguments of defendants arrested under body attachment in an action to collect Philadelphia tax fines and penalties, ruled that this procedure would not satisfy due process except as supplemented by a local court rule.[237] The local rule provided that a plaintiff could obain an attachment writ from a court by a petition showing cause which must be served on the defendant personally or by certified mail and that a defendant arrested under body attachment who does not post bail shall be brought forthwith before a judge "for a determination as to whether or not he shall be released without the posting of said bail."[238] The court also concluded

232. ME. REV. STAT. ANN., tit. 14, §§ 3121-3137, 3701 (Supp. 1972-73). *Id.*, tit. 19, § 722 still provides for body execution under alimony and support orders. *But see* text accompanying note 244 *infra*.

233. "The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivery up of his estate for the benefit of his creditors in such manner as shall be prescribed by law." PA. CONST. art. 1, § 16.

234. PA. R. CIV. P. 1481 (1967).

235. *Id.* 3250.

236. PURDON'S PA. STAT. ANN. tit. 12, §§ 171 *et seq.* (1953).

237. Non-Resident Taxpayers Ass'n v. Murray, 347 F. Supp. 399 (E.D. Pa. 1972).

238. *Id.* at 403.

that the defendants were not denied equal protection merely because minors, married women and owners of real estate who had resided in the state for 2 years were exempted from arrest. Agreeing that in a case of civil arrest the state must show a compelling interest for the classification,[239] the court gave that test a new twist by ruling that the "dire financial needs" of the city justified the refusal to give the same exemption from arrest to men and single women over 18 who did not own real estate and have 2 years residence in Pennsylvania.[240]

As this case demonstrates, the demands of the fisc move the government, including its courts, to extraordinary measures.[241] The federal government is no exception. Draftsmen of the *Internal Revenue Code* apparently rediscovered an ancient common law writ, *ne exeat regnum*, employed to compel a citizen to remain within the realm to aid in the defense of his country. They adapted it, and by a provision in the *Code* authorized federal district courts to issue writs of *ne exeat republica* "as may be necessary and appropriate for the enforcement of the internal revenue laws."[242] The government recently invoked the writ against a taxpayer who, while his tax returns were under investigation, sold his home in Maryland for $190,000, borrowed $80,000 on other real estate, placed most of the proceeds of both transactions in trust with Boston lawyers, and moved his household furnishings to London and his family and himself to Rome. After his departure the government made jeopardy assessments for some $450,000. When the taxpayer later returned to the United States to attend a bail hearing in connection with a pending federal criminal charge unrelated to the tax matter, the government obtained a writ of *ne exeat republica* on an *ex parte* application. Originally, the writ authorized imprisonment unless the taxpayer posted a $450,000 bond, which he was unable to do, but on emergency application the Court of Appeals for the Seventh Circuit held that the record did not warrant either incarceration or confinement within the federal district. Accordingly, it ordered the taxpayer released from jail without prejudice to the continuing restraint of the writ against his departure from the United States. Later, reviewing an order denying a motion to quash the writ, the court held that even his departure from the United States could not be restrained. While *ex parte* issuance of the writ might be justified for a few days to keep him within the court's jurisdiction, the government must promptly conduct an evidentiary hearing on notice to the taxpayer and

239. *Id.*
240. *Id.*
241. *See* Williams v. United States, 336 F. Supp. 1392 (D. Minn .1972), *discussed in* note 79 *supra.*
242. 26 U.S.C. § 7402(a) (1954).

must bear the burden of showing both its probable success on the merits of the tax claim and that continued restraint on the taxpayer's freedom to travel, or the posting of security as a condition to unrestricted travel, was an absolute necessity and "not merely [a] coercive and convenient, method of enforcement." Since the government had not met this burden, which the court fashioned in reliance at least in part on *Sniadach*, the writ was ordered quashed.[243]

Recently, the teaching of *Sniadach* has also been invoked in favor of another type of debtor who is usually as badly treated as the taxpayer. The Supreme Courts of Rhode Island and Maine have found a denial of due process where debtors in default under alimony and support orders are jailed under body execution without prior notice and a hearing on their ability to pay.[244] And the Supreme Court of Vermont has ruled that, in view of *Sniadach*, the power to punish for contempt in such circumstances must be exercised with great circumspection even after a hearing.[245]

MISCELLANY

The full ramifications of *Sniadach* on debt collection practices have not yet been explored. Its impact is apparent in a variety of other cases and will doubtless continue to be felt in cases not yet decided and under statutes not yet enacted.

One court has read *Sniadach* to mean that a city hospital may not, without prior judicial hearing, offset a patient's bill against money which was in the patient's possession when she was admitted to the hospital.[246] If this rather plausible decision is to stand, does it mean that only the government's right to set-off is restricted, or that the same restrictions apply to set-offs by private creditors which are now permitted, or "encouraged," by the common law?

Another court has invoked *Sniadach* in holding that the city may not, without prior judicial hearing, terminate water service for nonpayment of charges, noting that "water is an absolute necessity of life."[247] Other courts have held that the state has so involved itself, by regula-

243. United States v. Shaheen, 445 F.2d 6, 11 (7th Cir. 1971). *See also* United States v. Robbins, 235 F. Supp. 353 (E.D. Ark. 1964).

244. Mills v. Howard, — R.I. —, 280 A.2d 101 (1971); Yoder v. County of Cumberland, — Me. —, 278 A.2d 379 (1971).

245. Randall v. Randall, — Vt. —, 282 A.2d 794 (1971). VT. R. CIV. P. 4.3 (1971) abolishes "writs of capias ad respondendum and ne exeat and all other forms of civil arrest before final judgment, except upon process for contempt of court or for failure to obey a subpoena." Rule 69 requires a prior notice and hearing for body execution and forbids its use entirely in contract cases except against absconding debtors.

246. McConaghley v. City of New York, 60 Misc. 2d 825, 304 N.Y.S.2d 136 (Civ. Ct. N.Y. City 1969).

247. Davis v. Weir, 328 F. Supp. 317, 321 (N.D. Ga. 1971).

tion and otherwise, in the operation of a public utility that, when the utility elects to terminate a customer's service for nonpayment of charges, state action is involved and due process requires notice and hearing before the termination.[248] If these decisions are to stand, are they to be confined to the government and to government licensed monopolies,[249] or are they to be extended to all suppliers of goods and services whose freedom of contract is recognized, or "encouraged," by the law?

One court has also decided,[250] without concerning itself with the state action problem, that a statute authorizing power of sale clauses in real estate mortgages, under which the mortgagee on default can sell the property without judicial proceedings, but requiring 30 days notice to the mortgagor prior to sale, does not violate due process. This result was reached because the mortgagor had agreed to the clause and thus waived his right to a hearing in a judicial foreclosure proceeding, and because his property was not to be taken during the 30-day notice period during which he could seek an injunction if he believed he had a valid defense. In view of what has been decided since, however, the question of waiver is apparently to be decided on a case-by-case basis[251] and notice of an opportunity to invest in a lawsuit to prevent the morgagee's proposed sale would not satisfy due process if, as *Fuentes* held, notice of an opportunity to invest in a lawsuit to recover property seized under writ of replevin does not provide such protection. If this decision does not stand, due process problems exist in a number of states where power of sale clauses are permitted,[252] to say nothing of some of the New England states where statutes authorize the mortgagee to resort to self-help without a power of sale clause.[253]

Finally, another court has found no due process problem where a tenant, on the eve of eviction from his apartment, stored his furniture in a public warehouse, only to have the warehouseman notify him later that he intended to sell the property at nonjudicial sale to enforce his

248. Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated with instructions to dismiss as moot*, 409 U.S. 815 (1972); Bronson v. Consolidated Edison Co., 350 F.Supp. 443 (S.D.N.Y. 1972); Stanford v. Gas Serv. Co., 346 F Supp. 717 (D. Kan. 1972); Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972). *See also* Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972) (retaliatory eviction of tenant's mobile home by town-licensed operator of mobile home park). *Contra*, Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972); Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir), *cert. denied*, 396 U.S. 846 (1969).

249. *See* Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), *discussed in* note 157 *supra*.

250. Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970).

251. *See* text accompanying note 184 *supra*.

252. G. OSBORNE, MORTGAGES § 337 (2d ed. 1970).

253. *Id.* § 314.

statutory lien for storage charges as authorized by section 7-210 of the *Uniform Commercial Code*.[254] Assuming that state action was involved, the court found no violation of due process under *Sniadach* because that case was confined to wages, the owner of the furniture received notice and could have brought an action to enjoin the sale if he had a good defense,[255] and the owner had voluntarily delivered the property to the warehouseman. Any validity that the first and second points may have had would appear to have dissolved after the decision in *Fuentes*,[256] and the third seems wildly irrelevant. Moreover, all of the decisions invalidating a landlord's distraint seem to point in the other direction.[257] And if this decision does not stand, what is the fate of a great variety of statutory and common law possessory liens under which the lienor is authorized on default to sell at nonjudicial sale, with or without notice?[258]

CONCLUSION

It is apparent that *Sniadach* and decisions following it have cast serious doubt on the constitutional validity of any procedure which enables a creditor to deprive his debtor of possession of or of nonpossessory rights in property, or of his personal liberty, without notice and a prior opportunity for hearing.[259] *Sniadach* may also have led some state courts and legislatures to impose more limitations on the creditor than the Federal Constitution requires. Many, including this author, regard this as a long overdue scrapping of ancient and one-sided practices. Others, without venturing a defense on the merits of the practices now scrapped or under attack, take a different view. Their position is essentially the position taken by Justice White in his dissent from the invalidation of replevin in the *Fuentes* case: the entire enterprise will prove to be an episode in futility since creditors will simply rewrite their contracts to include an explicit waiver of the right

254. Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd*, 460 F.2d 1064 (2d Cir.), *cert. denied*, 406 U.S. 961 (1972).

255. For the indigent owner, the court thought that the "simple answer . . . is that access to the courts cannot be conditioned upon ability to pay the costs." The court derived this answer from Boddie v. Connecticut, 401 U.S. 371 (1971), holding that indigents could not be barred from divorce courts because of their inability to pay filing fees. *Boddie* now seems to be confined to divorce cases under the later decision in United States v. Kras, 409 U.S. 434 (1973), holding that indigents may be barred from the bankruptcy court because of their inability to pay filing fees.

256. *See* text accompanying notes 124-131 *supra*.

257. *See* text accompanying notes 213-20 *supra*.

258. *See* UCC § 7-308 (carrier's lien); Note, *The Application of Sniadach to Banker's and Garagemen's Liens*, 4 S.W. UNIV. L. REV. 285 (1972).

259. For some suggestions as to new procedures which might be devised to satisfy constitutional requirements, see Comment, *supra* at note 152, at 848-51.

to prior notice and hearing and since most debtors will simply default if they are given prior notice of an opportunity for hearing.

It seems to me that Justice White is only partially right, however, and that he would be wholly wrong if we could somehow accomplish another needed improvement in our legal system. No doubt, creditors will undertake to write their contracts to include very explicit waivers of constitutional rights to notice and hearing and these waivers will include not only self-help repossession and confession of judgment but also attachment, garnishment, distraint and imprisonment for debt to the extent that state law permits such practices. But if the requirement of a voluntary and intelligent waiver[260] is vigorously imposed by the courts, almost any consumer without significant business experience who acts without competent legal advice in signing a contract drafted by the creditor's attorney should be able to defeat the waiver argument—if he obtains competent legal advice when the creditor takes action against him.

It is probably also true today that most debtors will default on any opportunity the law gives them for a prior hearing before they are deprived of their property or their liberty. But many of them would not if, when they received notice of that opportunity, they had competent legal counsel to advise them as to whether they were in default and whether they had any defenses based on the creditor's default or the creditor's violation of the strictures of a growing body of legislation designed for the protection of consumers. In other words, all legal rights are of little value to a class of people (most of us) who operate without competent legal assistance. But that is not a sufficient reason for refusing to recognize the existence of those legal rights. It is, rather, a reason for renewing our efforts to deliver competent legal assistance to the many who do not currently receive it.

260. While the Court only assumed, without deciding, that the requirements for waiver of constitutional rights would be the same in civil as in criminal cases in D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), *discussed in* text accompanying note 184 *supra*, it seems highly unlikely that it will ultimately conclude that a waiver in civil cases may be either involuntary or unintelligent.

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