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Quasi in Rem Jurisdiction and Due Process Requirements

In the name of constitutional due process requirements—as articulated in Sniadach v. Family Finance Corp.1 and Fuentes v. Shevin2—lower courts have recently upset a wide range of legal practices.3 Thus far, the doctrine of quasi in rem jurisdiction has remained unscathed, although by the logic of Sniadach and Fuentes it should be severely limited. For quasi in rem jurisdiction requires precisely that which due process prohibits, namely, a seizure of property4 prior to giving the defendant notice and the opportunity for a hearing.5

3. Practices declared unconstitutional on the basis of the Sniadach-Fuentes line of cases include:
4. This Note confines itself to personal property. To obtain quasi in rem jurisdiction over real property, a lis pendens is filed at the commencement of the suit. It is questionable whether this is a taking of "use and possession," Fuentes v. Shevin, 407 U.S. 67, 81 (1972), sufficient to bring into play the due process requirements discussed at pp. 1024-25 infra.
5. The doctrine of lis pendens states that a person who deals with property while it is in litigation does so at his peril, see, e.g., Mackenzie v. Engelhard Co., 260 U.S. 131, 142-44 (1923); Thompson v. Baker, 141 U.S. 648 (1891), thereby preventing effective disposal of the property. It has been argued that lis pendens and related devices constitute sufficient restriction of property use to bring the due process requirement into play. See Note, Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp., 34 ALBANY L. REV. 426, 444 (1970). The contrary position was taken in Black Watch Farms, Inc. v. Dick, 323 F. Supp. 109 (D. Conn. 1971):
The defendant is neither deprived of the use or enjoyment of the property pending a trial on the merits, nor is his livelihood threatened by the deprivation of the right to freely transfer the realty.
Id. at 102. See Note, The Sniadach Case and Its Implications for Related Areas of the Law, 68 Mich. L. Rev. 986, 1000 (1970). The latter position is probably preferable, as long as it takes into account the normal use of the property to the defendant. The requirements of Sniadach and Fuentes would only apply to a lis pendens placed on real property if the defendant were holding the land as a real estate agent or speculator, since a lis pendens would severely limit the land's usefulness to the defendant as a commodity for sale. See Note, The Sniadach Case and Its Implications for Related Areas of the Law, 68 Mich. L. Rev. 986, 1000 n.66 (1970).
5. The need for such prior seizure was decreed in Pennoyer v. Neff, 92 U.S. 714 (1877), see note 8 infra, and has generally been assumed ever since. However, the validity of this assumption is open to criticism. The problem of service of process has been
I. The Present State of the Law

The present theoretical structure of quasi in rem jurisdiction originated with Pennoyer v. Neff in 1877. Since a state was deemed to have exclusive jurisdiction over property within its territory, and since property may be owned by non-residents, the question arose as to the extent of the state's power in cases which are not, strictly speaking, in rem. Justice Field concluded that, in such a situation, the local court must limit its inquiry to the disposition of property over which it had control. This presented the difficulty, however, that control would be lost if the property were removed from the state once proceedings had begun but before final judgment. To relieve this uncertainty, and also to fulfill due process notice requirements, the Court determined that an immediate seizure of the property was necessary as a prerequisite to jurisdiction.

The practice of jurisdictional attachment must now be reconsidered in light of Sniadach v. Family Finance Corp. and Fuentes v. Shevin, which respectively invalidated wage garnishment and replevin statutes on the constitutional basis that the Due Process Clause requires notice and the opportunity to the defendant for a hearing before there can be any taking of his property. Fuentes, if not earlier cases, settled by the long-arm statutes. Since the state has power over property in its territory, and since notice can be served without seizure of the property, it is conceivable that jurisdiction quasi in rem no longer requires prior attachment. See Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 268-69, 277.

6. 95 U.S. 714 (1877).
7. Id. at 728.
8. Immediate seizure of the property is required, because otherwise: the validity of the proceedings and judgment [would] depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of his property. Id. at 728.
9. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Id. at 727.
12. For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified." Baldwin v. Hale, 68 U.S. 223, . . . If the right to notice and a hearing is to serve its full purpose . . . it is clear that it must be granted at a time when the deprivation can still be prevented. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). See also Boddie v. Connecticut, 401 U.S. 371, 578-79 (1971).
13. The first cases seemed to involve a narrow definition of property. In Sniadach v. Family Finance Corp., 395 U.S. 337 (1968), the Supreme Court invalidated Wisconsin's garnishment statute which permitted the attachment of wages without affording prior notice and hearing to the defendant. The opinion characterized wages as a "specialized type of property." Id. at 340, the taking of which "may as a practical matter drive a
mined the breadth of this rule's application by effectively defining property in terms of any "possessory interest." Since a seizure of personal property for the purposes of obtaining jurisdiction quasi in rem entails a physical taking of property, it would appear to be subject to the strictures of the Due Process Clause.

However, there is a recognized exception to the rule established by *Sniadach* and *Fuentes*: notice and the opportunity for a hearing may be *postponed* until after seizure in "extraordinary situations." The question, then, is whether a taking of property for the purposes of quasi in rem jurisdiction always constitutes such an exception to the requirement of prior notice and hearing. Most courts facing this issue have answered in the affirmative because of *Sniadach*’s citation to *Ownbey v. Morgan* as presenting an example of an extraordinary situation.

But such a reliance on the *Ownbey* citation appears to involve a wage-earning family to the wall." *Id.* at 341-42. Only Justice Harlan, in a concurring opinion, clearly emphasized the broad scope of the term "property." *Id.* at 342-43. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court held unconstitutional the termination or suspension of welfare payments before giving the recipient notice and the opportunity for a hearing. The Court again stressed the immediate and desperate harm of such a termination. Beginning with *Bell v. Burson*, 402 U.S. 532 (1971), however, the Court's language was broader. It declared Georgia's automobile financial responsibility statute unconstitutional on the ground that, absent a prior determination of the reasonable possibility of judgment against an individual involved in an accident, requiring him to post a bond or else have his driver's license suspended was the taking of a property interest without due process of law. *See also* *Lynch v. Household Finance Corp.*, 403 U.S. 538 (1971), in which the Court invalidated the pre-hearing attachment of a bank account, noting that "rights in property are basic civil rights." *Id.* at 552. A number of state and federal courts continued to read *Sniadach* and *Goldberg* as applying narrowly to "hardship" takings of property. *See cases collected in Fuentes v. Shevin*, 407 U.S. 67, 72-73 n.5 (1972). This reading was rejected by the Supreme Court in *Fuentes*, which invalidated the replevin statutes of Florida and Pennsylvania because they involved summary authorizations (by a court clerk and prothonotary, respectively) to seize property without provision for prior notice and hearing for the defendants. The Court, which adopted Justice Harlan's de minimis standard, *id.* at 90 n.21, pointed out that "the Fourteenth Amendment speaks of 'property' generally," *Id.* at 90. Referring to those cases evidencing a narrower interpretation, the Court said:

They reasoned that *Sniadach* and *Goldberg*, as a matter of constitutional principle, established no more than that a prior hearing is required with respect to the deprivation of such basically "necessary" items as wages and welfare benefits. . . . They did not.

*Id.* at 88.


17. 256 U.S. 94 (1921).

18. 395 U.S. at 339.
misinterpretation of both Ownbey and Sniadach. The constitutionality of the jurisdictional attachment in Ownbey was never challenged; indeed, the plaintiff argued for its continuation. Hence, it is unclear on what basis the courts can now use the citation of that case in Sniadach to justify quasi in rem seizure in all situations. Still, this is precisely what the Pennsylvania federal courts recently did in Lebowitz v. Forbes Leasing & Finance Corp. And while the courts acknowledged their position to be inconsistent with a broad interpretation of the Sniadach doctrine, the Supreme Court denied certiorari.

The current confusion of the law cannot be resolved unless the Court confronts the central issue. Since quasi in rem jurisdiction requires a taking of property prior to notice and hearing, it must either qualify the Sniadach-Fuentes rules or be qualified by them. This Note argues that the latter view is correct. An examination of the "extraordinary situations" formula and a more thorough examination of Ownbey v. Morgan in its historical context indicate the necessity of restricting quasi in rem jurisdiction to certain narrowly defined classes of situations.

II. The "Extraordinary Situations" Exception

The Court has carefully limited the scope of the "extraordinary situations" exception under which the notice and hearing required by due process may be postponed until after seizure of property. Citing

21. The district court defended jurisdictional attachment reluctantly, and apparently expected the Supreme Court to review its decision. 326 F. Supp. at 1353. The court's attitude, prevalent throughout its opinion, is reflected in these passages:
[B]ecause the case has been a difficult one for us and because it is on the frontier of a rapidly developing field of law, we have set forth not only our reasons for denying the motion, but also our views as to countervailing considerations which we consider to be of substance, in considerable detail.
326 F. Supp. at 1337.
The broad sweep of the [non-resident seizure] rules encompasses within its grasp virtually every type of claim, every type of property and every type of defendant without procedural safeguard.
Id. at 1350.
We have expressed our grave doubts as to whether Sniadach can be narrowly read, and as to whether the Pennsylvania foreign attachment procedure is sufficiently narrowly drawn to pass procedural due process muster under the broader interpretation of Sniadach.
Id. at 1350. See also Fuentes v. Shevin, 407 U.S. 67, 72 n.5 (1972), where the Court approves this court's evaluation of Sniadach as stating a broad rule of procedural due process.
prior Supreme Court cases\(^2\) which had dealt with such situations, the Fuentes opinion emphasized the existence of the following common elements:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a need for very prompt action. Third, the State has kept very strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.\(^2\)

A closer examination of the types of creditor and governmental interests which are protected by the “extraordinary situations” exception and permitted a hearing postponement emphasizes the limited nature of that rule.

A. General Creditor Interest

Creditors may never qualify under the “extraordinary situations” exception on the basis of their creditor status alone. This is because the primary creditor interest, security, is not sufficient to place creditors in an “unusual” situation. Although most of the creditors in Fuentes had such an interest,\(^2\) the Court held that prior notice and hearing were required.\(^2\) Nor does it help to allege that the defendant has refused to pay his bill. Such a situation presents a commonplace, not unusual,\(^2\) creditor-debtor relationship.\(^2\) Finally, the creditor may not invoke the exception with a perfunctory allegation that the debtor


\(^2\) The exception was Mrs. Washington, one of the appellants from Pennsylvania who was in a custody struggle with her husband, a local sheriff, over their son. The husband replevied the boy's toys, clothing and furniture. 407 U.S. at 72.

\(^2\) 407 U.S. 67, 92-93, 96 (1972). The Court pointed out that the Fourteenth Amendment's protections extend to the debtor's "interest in the continued possession and use of the goods," id. at 86, even though the creditor may be able to show that he has retained legal title.

\(^2\) See Bell v. Burson, 402 U.S. 535 (1971) (protecting a claimant's possible judgment "is not . . . justification for denying the due process of its citizens." Id. at 540); Lucas v. Stapp, 6 Wash. App. 971, 497 P.2d 250 (Ct. App. 1972) (refusal of a person to pay a repair bill is in the nature of "a commonplace rather than an extraordinary situation." 497 P.2d at 252).

will abscond;\textsuperscript{29} rather, he must \textit{prove} to the court that this is sufficiently likely to occur.\textsuperscript{30}

The only situations which are so extraordinary as to permit a pre-hearing attachment are those which involve a strong probability of flight by the defendant, or of his fraudulent concealment, conveyance or waste of the property.\textsuperscript{31} Since the state must retain tight control over the legitimate seizure process, its rules must be narrowly drawn to allow such use of force only in those situations where the creditor proves this special need for protection.\textsuperscript{32}

\textbf{B. Governmental or General Public Interest}

The explicit situations actually sanctioned by the Supreme Court for postponing notice and hearing have all exhibited threats to important government or public interests.\textsuperscript{33} With the possible exception of \textit{Ownbey},\textsuperscript{34} cases cited by the Court in \textit{Sniadach} and \textit{Fuentes} all have involved immediate, irreparable, grave and widespread harm. Protect-

\begin{itemize}
\item[29.] \textit{See Cedar Rapids Eng. Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 655 (Sup. Ct. Sullivan Cty. 1971), aff'd, 333 N.Y.S.2d 953 (1972) (even the filing of an affidavit based upon information and belief that the debtor would abscond lacks any probative force). A major problem which runs throughout the considerations in these situations is the deterioration of pleadings into a ritual incantation of magical words, and the filling in of blanks on a standard form. \textit{See Kosches v. Nichols, 68 Misc. 2d 795, 797, 327 N.Y.S.2d 968, 970 (Civ. Ct. City of N.Y. 1971).} ("Most affidavits are pro forma, based on hearsay and speculation.")\textsuperscript{30}
\item[30.] \textit{See, e.g., Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), which observed that ample opportunity to abscond exists for the debtor, before the creditor makes any application to the court since, under normal circumstances, the creditor tries other collection devices first. Id. at 277-79, 486 P.2d at 1256-57, 96 Cal. Rptr. at 56-57. See also Cedar Rapids Eng. Co. v. Haenelt, 68 Misc. 2d 206, 210, 326 N.Y.S.2d 653, 657-58 (Sup. Ct. Sullivan Cty. 1971), aff'd, 333 N.Y.S.2d 953 (1972); Kosches v. Nichols, 68 Misc. 2d 795, 797, 327 N.Y.S.2d 968, 970 (Civ. Ct. City of N.Y. 1971). The courts have felt that a hearing "will not substantially increase the risk that [debtors] 'Shall fold their tents, like Arabs, and as silently steal away.'" \textit{Blair v. Pitchess, supra, 5 Cal. 3d at 298, 486 P.2d at 1256, 96 Cal. Rptr. at 56.}
\item[31.] Innkeeper liens have been invalidated, despite the creditors' arguments that transients are obviously more likely to leave the jurisdiction than the normal debtor. Klim v. Jones, 315 F. Supp. 109, 124 (N.D. Cal. 1970); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972).\textsuperscript{31}
\item[32.] Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods.
\item[34.] In the earlier case, \textit{Sniadach v. Family Finance Corp.}, 395 U.S. 337 (1969), the Court spoke of "a state or creditor interest." \textit{Id. at 339} (emphasis added). All such cases cited in Fuentes v. Shevin, 407 U.S. 67 (1972), however, were characterized as involving "a government or general public interest." \textit{Id. at 91-92} (emphasis added). This change in language clarifies the broad nature of the interests necessary before a debtor will be denied notice and a prior hearing:

The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health. \textit{Id. at 92-93.}
\end{itemize}

\textsuperscript{34} \textit{Ownbey v. Morgan, 256 U.S. 94 (1921), discussed at pp. 1029-32 infra.}
Quasi in Rem Jurisdiction and Due Process Requirements

...ing the public from a bank failure's economic consequences during the depression,\(^3\) from misbranded drugs\(^3\) and from contaminated food\(^3\)—all met this criterion in the fact situations at issue, as did protecting the government during a national war effort\(^3\) and in its attempts to collect the internal revenue when the assets might otherwise have been lost.\(^3\)

On the other hand, protection of “fiscal and administrative resources” has been held not sufficiently extraordinary, particularly if the government may protect itself in ways other than through a pre-hearing seizure.\(^4\) Similarly, measures which bear no rational relationship to valid areas of governmental concern have been judged inadequate to justify a denial of due process.\(^4\)

In effect, therefore, the rules governing exceptions for government interest are no less strict than those for the creditor. The only practical difference, experience indicates, is that the government is more likely than the individual creditor to meet the necessary requirements.

C. A Special Jurisdictional Exception

These strict criteria have been virtually ignored in recent foreign attachment cases\(^4\) evidently adopting the view that all seizures of property incident to the obtaining of quasi in rem jurisdiction fall within the “extraordinary situations” exception. The error of this position, based on Sniadach’s ambiguous reference to Ownbey,\(^4\) may be seen

41. In cases involving automobile financial responsibility statutes, e.g., Bell v. Burson, 402 U.S. 535 (1971), the state typically advanced its interests in protecting the community from threats to safety. This is obviously a matter within the state’s concern. But the Court, ruling the statutes unconstitutional, pointed out that the interests of the community are not served by suspending the licenses of those not likely to be held liable for the accidents. And insofar as the statutes were designed to protect a claimant’s possible judgment, this is in the nature of a creditor interest and “is not . . . justification for denying the due process of its citizens.” Id. at 540.
42. See note 16 supra.
from the clearer reference to that case in *Fuentes* and by an examination of *Ownbey's* historical setting.

In a footnote, the *Fuentes* opinion referred to *Ownbey* as a "case involv[ing] attachment necessary to secure jurisdiction in state court." Since this footnote appears in the same paragraph with other cases involving the governmental and public interests in immediate seizure discussed above, and since the sentence containing this reference is immediately transitional to the mentioning of the common elements of extraordinary situations, *Ownbey* was clearly intended to be understood in the context of the limited due process exception which *Fuentes* outlines. The Supreme Court must therefore have cited *Ownbey* only for its factual situation which, *at the time*, was an example of an extraordinary interest requiring special protection.

The *Ownbey* plaintiffs, executors of J. P. Morgan's estate, attached non-resident *Ownbey's* shares in a Delaware corporation. State law required the posting of a special bail by a non-resident defendant as a prerequisite to filing a general appearance. Since *Ownbey* could not raise the bail, he argued that either the court should, by its equitable powers, waive the bail requirement on due process grounds, or alternatively, that the attachment—which under existing law would dissolve when a general appearance was filed—should be permitted to continue as a substitute for the bail. The court denied this motion, and the Delaware and United States Supreme Courts affirmed.

To appreciate the significance of these decisions it is necessary to understand the law in Delaware in 1915, the year when the *Ownbey* suit was instituted. Delaware had no personal jurisdiction over *Ownbey* since he was a non-resident. Under *Pennoyer v. Neff*, Delaware

45. See pp. 1027-29 supra.
47. 95 U.S. 714 (1877).
Quasi in Rem Jurisdiction and Due Process Requirements

(whatever its interests in the suit might be) could only obtain jurisdiction by attaching the defendant's local property, thereby satisfying due process notice requirements, and creating an action quasi in rem.53 This was accomplished when J. P. Morgan's executors attached Ownbey's shares in the Delaware corporation.

Neither in the state court nor in the United States Supreme Court did Ownbey contest this jurisdiction or the attachment of his property. Rather, his arguments centered on the right to file a general appearance, even if that meant a continuation of the attachment.54

Since 1915, Ownbey and Pennoyer have been overtaken by important changes in the law.55 Seizure alone, for example, may no longer be sufficient to satisfy the Due Process Clause.56 And Boddie v. Connecticut57 casts doubt upon the legality of limiting access to the civil courts, the principal issue in the Ownbey case.58 Most importantly, a court now may obtain in personam jurisdiction over a non-resident defendant, as long as he has certain "minimum contacts" with the forum state.59 This is a fundamental modification of the Pennoyer rule, and means that it is no longer necessary to attach a non-resident's property to obtain jurisdiction in all cases.

Therefore, when the Supreme Court in 1972 said that Ownbey v. Morgan "involved attachment necessary to secure jurisdiction in state court,"60 it could only have meant that such attachment was "necessary" under the law in 1915, and not that it is always necessary today.

53. See p. 1024 supra, for a discussion of the Pennoyer conceptual framework for jurisdiction. See also Hazard, supra note 5, at 245-72.
54. See p. 1030 supra.
55. See generally Hazard, supra note 5.
56. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 305 (1950) (sufficient notice to beneficiaries lacking where a trust was in court for settlement and notice was, under statute, by publication). "[W]ithin the limits of practicability notice must be such as is reasonably calculated to reach interested parties." Id. at 318.
58. [A] State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. . . . [T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals. Id. at 379-80.
59. Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 723. . . . But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Milliken v. Meyer, 311 U.S. 457, 463 . . . .
60. 407 U.S. at 91 n.23.
or that, even when necessary, jurisdictional considerations always justify postponement of the due process requirements.

III. Specific Limitations on Quasi in Rem Jurisdiction

It is the contention of this Note that the seizure of property for jurisdictional purposes is only justified in very limited circumstances which conform to the "extraordinary situations" criteria listed in Fuentes. Seizure is not justified where the quasi in rem device is not necessary to secure jurisdiction in state court, nor where jurisdiction cannot be defended as "an important governmental or general public interest." And where seizure does result in jurisdiction, a hearing—which Fuentes only postpones, not eliminates—must be held promptly on the merits should the defendant so desire.

A. Quasi in Rem as an Unnecessary Basis of Jurisdiction

Foreign attachment serves two distinct purposes for the creditor: it establishes jurisdiction in a desired forum, and it renders the property attached available as security for the claimed debt. The former purpose is served equally well, without seizure, when in personam jurisdiction is available through the minimum contacts approach and service of process by the use of a long arm statute. Fuentes, it must be remembered, cited Ownbey as a case in which attachment had been necessary to obtain jurisdiction; attachment is not justified where jurisdiction could be established in personam.

The creditor's only remaining interest, therefore, is in obtaining security without affording the defendant prior notice and a hearing. But this is no different from his interest in a suit against a resident defendant, which both Sniadach and Fuentes ruled is not valid grounds

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61. See p. 1024 supra.
63. Id. at 91.
65. It can be argued that in personam jurisdiction is actually more advantageous to the plaintiff, since the defendant is then liable for the entire claim. On the other hand, one court has suggested that quasi in rem jurisdiction avoids the possibility of a protracted litigation over the availability of long-arm process, pointing out that the ultimate determination might be that jurisdiction does not exist. Lebowitz v. Forbes Leasing & Finance Corp., 456 F.2d 979, 982 (3d Cir. 1972). But Fuentes does not justify such a rationale:

A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. 407 U.S. 67, 90 n.22 (1972). If the result of the litigation is a loss of jurisdiction, it is difficult to see the importance of the state's interests in the suit. See pp. 1034-35 infra.
for an exception to the due process requirements. The creditor, in certain instances, may be able to argue successfully to the court in an ex parte application that the non-residency of the debtor makes it likely that the defendant will dispose of his property before a hearing can be held. But a showing of non-residency alone will not sustain the creditor's burden of proving an unusual need for a preliminary seizure. Furthermore, the creditor may make his allegations equally well in an in personam suit, and, if he succeeds, may attach property without prior notice and hearing.

The distinction, therefore, between proceeding in personam and quasi in rem is that the former insures that the court's attention will focus on the defendant's due process rights. The creditor forced to accept in personam jurisdiction is at no disadvantage not envisioned by the Sniadach-Fuentes decisions. He has the forum of his choice, and he may attach the defendant's property after notice and a hearing, or earlier if summary seizure is "justified in the particular instance."

Tucker v. Burton illustrates the abuses of the present practice. Mrs. Tucker, a Maryland resident employed in Washington, D.C., was guarantor on a contract signed in Washington with a local corporation. Upon alleged default, the company assigned its rights to Household Finance Corporation. HFC obtained quasi in rem jurisdiction in Washington by garnishing Mrs. Tucker's wages. The attachment was upheld by the District Court on the ground that she was a non-resident. However, as Judge Wright pointed out in a forceful dissent, HFC could easily have proceeded in personam in Washington. Since the contract was signed there and with a local corporation, sufficient

66. See pp. 1027-28 supra.
67. See note 31 supra; Lebowitz v. Forbes Leasing & Finance Corp., 326 F. Supp. 1335, 1349 (E.D. Pa. 1971). Even in cases where the creditor is not able to sustain the burden of proof required to obtain an authorized seizure of the debtor's property, he may still obtain protection against the dissipation of the property which is the subject of the dispute. There is no reason why the courts could not issue a temporary restraining order as a lis pendens-type substitute for immediate seizure of personality. See Finkenberg Furniture v. Vasquez, 67 Misc. 2d 154, 162, 324 N.Y.S.2d 840, 850 (Civ. Ct. City of N.Y. 1971), which ordered notice and hearing to the defendants before permitting seizure of household goods, but which in the interim "enjoined and restrained [defendants] from removing . . . , transferring, selling, assigning or otherwise disposing of said property, and from permitting it to be subjected to any security interest or lien." See note 4 supra for a discussion of the probable validity of the lis pendens device.
minimum contacts existed,\textsuperscript{74} and service of process was possible either by use of the long-arm statute\textsuperscript{72} or by personally serving Mrs. Tucker at her place of employment. If this had been done, however, jurisdiction would not have been available as an excuse for the garnishment,\textsuperscript{73} and HFC would have had to proceed within the due process guidelines dictated by \textit{Sniadach}.

The result of the ruling in this case was to permit a creditor to dictate the uses of state power. It is an anomaly that, by asserting an unnecessary ground for jurisdiction, plaintiff is able to violate the rule that the state must keep “very strict control over its monopoly of legitimate force.”\textsuperscript{74} In cases of this sort, the “non-resident” category serves no other purpose than to improve the creditor’s position at the expense of the debtor’s constitutional rights.\textsuperscript{75}

B. \textit{Quasi in Rem as the Sole Basis of Jurisdiction}

Cases exist where the quasi in rem device is necessary for state court jurisdiction, but where it fails to serve an important governmental, creditor or general public interest. In such situations, seizure without prior notice and hearing is unjustified\textsuperscript{76} and, it is submitted, the \textit{Fuentes} decision should require the state court to dismiss the suit for want of jurisdiction.\textsuperscript{77}

Our court system is predicated on the theory that a state does not

\textsuperscript{71} D.C. Code § 13-423 (Supp. 1971) states in relevant part:

\textit{(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly, or by an agent, as to a claim for relief arising from the person’s—

\textit{(l) transacting any business in the District of Columbia; . . .}

\textsuperscript{72} See id., § 13-424:

When the exercise of personal jurisdiction is authorized by this subchapter, service may be made outside the District of Columbia.

\textsuperscript{73} The sole reason why this action was brought in a District of Columbia Court—as counsel for Household Finance were frank to admit in oral argument—was to take advantage of the District’s prejudgment garnishment provisions . . .


\textsuperscript{76} Mills v. Bartlett, 265 A.2d 39 (Super. Ct. Del. 1970), supports this interpretation. The Delaware Superior Court in that case sustained a jurisdictional objection by a non-resident defendant. Plaintiff had obtained quasi in rem jurisdiction in Delaware by attaching defendant’s wages through his Delaware corporate employer. Since defendant actually worked and lived in Massachusetts, and also since the cause of action arose there, in personam jurisdiction over him was not available in Delaware. The court held on appeal of the default judgment that in cases involving an in rem seizure, the due process requirements of \textit{Sniadach} must apply, regardless of whether the attachment is foreign or domestic.

\textsuperscript{77} It is again assumed that quasi in rem jurisdiction \textit{requires} a prior seizure of property. \textit{But see note 5 supra.}
have an interest per se in asserting its jurisdiction over all cases. The legitimacy of jurisdiction stems from the ends it might serve, by, for example, providing citizens of the state with a forum or preserving the integrity of its state's laws. The doctrine of minimum contacts is liberal in allowing in personam jurisdiction under such circumstances. If these justifications are lacking, the court loses no important interest in denying jurisdiction.

Likewise, the creditor has no legitimate interest in being able to bring suit in any court of his choice. If in personam jurisdiction is not available through the assertion of minimum contacts, the plaintiff's only remaining possible interests are, first, the necessity caused by an "extraordinary situation," and second, the desire to secure an immediate attachment of the debtor's property. The former is a justifiable basis for jurisdiction since immediate seizure is the only adequate remedy available to the creditor. In the latter cases, however, necessity does not accompany plaintiff's desire for attachment. He is in no different position from his counterpart in *Fuentes*, and should not be permitted to circumvent due process requirements merely by "forum shopping."

Thus, where in personam jurisdiction is not available, the state must make a preliminary evaluation of the creditor's interests to insure that prior seizure is "necessary and justified in the particular instance." For example, a showing that, through no lack of diligence on the part of the plaintiff, in personam jurisdiction over the defendant is also lacking in every other forum may constitute sufficient justification; a showing that other forums are merely inconvenient will not. Present jurisdictional doctrine is consistent with this position. When two or more legal forums are available for settling a dispute, plaintiff gener-

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79. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).
82. For example, if the debtor has fraudulently concealed his assets in the forum state. See p. 1028 supra.
83. See, e.g., *Finkenberg Furniture v. Vasquez*, 67 Misc. 2d 154, 324 N.Y.S.2d 840 (Civ. Ct. City of N.Y., 1971) (such a showing would suffice, but the court found the proof in the case before it insufficient).
84. See p. 1027 supra.
ally has the right to make the choice, but this is not absolute.\textsuperscript{80} A court may decline to exercise its jurisdiction\textsuperscript{87} on the ground of forum non conveniens where, in the balance, the interests of the defendant strongly urge it to do so.\textsuperscript{88} Protection of the defendant’s due process rights is such a sufficiently strong reason if the plaintiff’s own interests are not “extraordinary.”\textsuperscript{89}

C. The Post-Seizure Hearing

Assuming that an alternate form of jurisdiction is not available, and assuming also that the creditor by an \textit{ex parte} application has been able to justify seizure in order to establish jurisdiction quasi in rem, due process still demands notice and a hearing once the defendant’s property has been taken.\textsuperscript{90} As soon as is reasonably possible, the defendant must be given the opportunity for a hearing wherein he may move to quash the attachment on the basis of any defenses or counter-claims he might have regarding the underlying cause of action.\textsuperscript{91} Since no recent Supreme Court decision has dealt in detail with such a situation, it is less clear whether, as a matter of due process, the defendant has a right to challenge the basis of the seizure itself, although one might expect this to be so.\textsuperscript{92}

88. \textit{See} Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947), and cases cited therein. It is often said that the plaintiff may not, by choice of an inconvenient forum, “vex,” “harass,” or “oppress” the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.
\textit{Id.} at 508.
89. Initial appearances to the contrary, First Nat’l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971) is consistent with this position. In that case, where a non-resident plaintiff attached the reserve assets in Arizona of a non-resident defendant in a suit on a foreign cause of action the court upheld jurisdiction quasi in rem, reversing the lower court. It apparently refused to apply forum non conveniens, 107 Ariz. at 290, 486 P.2d at 188, because of its earlier decision limiting the Sniadach doctrine to wages. Termplan, Inc. v. Super. Ct. of Maricopa Co., 105 Ariz. 270, 463 P.2d 68 (1969) (this case is noted in \textit{Fuentes} as reading the applicability of \textit{Sniadach} too narrowly, 407 U.S. at 73, n.5). Since it is now settled that such an interpretation is erroneous, see note 13 \textit{supra}, the court should have affirmed the decision. \textit{See} 107 Ariz. at 290, 486 P.2d at 188.
90. \textit{Fuentes} is careful to state that even “extraordinary situations” only justify “postponing” a hearing. 407 U.S. at 90.
91. [D]ue 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. . . . \textit{Fuentes} v. Shevin, 407 U.S. 67, 97 (1972), quoting \textit{Sniadach} at 343. \textit{See} Bell v. Burson, 402 U.S. 535, 540 (1971); Goldberg v. Kelly, 397 U.S. 254, 267 (1970). This is not to say, however, that the debtor may raise defenses which would not be available to him in a trial on the merits. \textit{See} Lindsey v. Normet, 405 U.S. 56 (1972); Hutcherson v. Lehtin, 315 F. Supp. 1324 (N.D. Cal. 1970), \textit{appeal dismissed}, 399 U.S. 522 (1970) (where a landlord’s breach of a covenant to repair is extraneous to eviction or recovery of rent due, that breach may not be raised by defendant in the hearing).
92. Whether based on constitutional grounds or not, it is customary to permit the defendant to make a special appearance to challenge jurisdiction. \textit{See} \textit{Restatement}
Quasi in Rem Jurisdiction and Due Process Requirements

Under present practice, when a defendant is faced with an action quasi in rem, most states give him the choice of defaulting in rem (thereby losing the seized property but avoiding any further estoppel effect) or appearing generally in personam (thereby being able to make his defense, but only at the risk of losing on the entire underlying claim rather than just the seized property).93

On the other hand, some courts and commentators, either on principles of fairness94 or fundamental due process,95 have concluded that a court which does not have a right to in personam jurisdiction may not blackmail the defendant by requiring an in rem default if he does not submit to the general jurisdiction; they argue the defendant has a right to his day in court to defend his property without being forced to forego his right to be free from the personal jurisdiction of a foreign forum.

The Sniadach and Fuentes decisions tend to support this right of the defendant to appear specially in the hearing on constitutional grounds. It is important to note that the hearing required by the Court in those two cases is a consequence of the seizure, and is therefore limited to determining whether the seizure shall continue. Although the defendant may raise defenses going to the merits of the cause of action,96 the outcome is not a judgment on those merits.97 It is a ruling only

(Second) of Conflict of Laws § 81 (1971). Since challenging the ex parte application upon which the right of seizure was granted is the same as a challenge of jurisdiction in quasi in rem cases, it would appear to come under this rule. In fact, under the common law it is customary to use the motion to quash as a challenge to jurisdiction. See D. Louisell & G. Hazard, Cases and Materials on Pleading and Procedure 431 (2d ed. 1968). This is also the procedure followed in federal courts. See, e.g., Grace v. McArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

94. See, e.g., Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916), which noted "the injustice of requiring a non-resident to surrender himself wholly to the jurisdiction of the courts of a foreign state, in order to defend his property there attached . . ." Id. at 18, 112 N.E. at 502. While the court did not decide the case on constitutional grounds, the influence of the Due Process Clause was clearly present in its opinion. Id. at 17-18, 112 N.E. at 501-02.
96. The Fuentes decision states that "it is axiomatic that the hearing must provide a real test." 407 U.S. at 97.
97. An analogy may be drawn between the motion to quash an attachment and a motion for a temporary injunction, since in both cases a question of the merits of the case may arise. In the temporary injunction, see, e.g., Dalmo Sales Co. v. Tyson Corner Reg. Shop. Ctr., 308 F. Supp. 988 (D.D.C. 1970), aff'd, 429 F.2d 296 (D.C. Cir. 1970); Iowa City v. Muscattine Dev. Co., 258 Iowa 1024, 141 N.W.2d 565 (1962):

The general rule is that the denial of a temporary injunction, or its dissolution if granted, does not deprive plaintiff of the right to a trial on the merits of his petition seeking a permanent injunction, nor is it an adjudication against such right. Even though temporary relief is properly denied, a permanent injunction may be granted where trial on the merits justifies such a decree. Id. at 1033, 141 N.W.2d at 591.
on an in rem motion. Therefore a state may not condition the defendant's right to such a hearing on his submission to the general jurisdiction of the court on the ground that it is being asked to render a judgment wholly or partly in personam.

If the defendant chooses to file a general appearance, the suit becomes one in personam. The debtor is in the court to defend against the underlying claim, and he is liable to a judgment for the underlying debt. Continued attachment is thereafter superfluous to the question of jurisdiction. As Fuentes makes clear, the defendant has the right to a hearing on the attachment, at which time he may challenge the plaintiff on the merits. Under these circumstances, the attachment should be dissolved unless the creditor can provide the court with a justification for its continuance that survives the securing of in personam jurisdiction.

This rule should have been applied by the Pennsylvania federal courts in Lebowitz v. Forbes Leasing & Finance Corp. There, a Pennsylvania resident (Lebowitz) sued a Delaware corporation (Forbes) not registered to do business in Pennsylvania. The action commenced with a writ of foreign attachment served on two banks in Philadelphia, where Forbes kept some checking accounts. The case was removed to the federal district court, and Forbes entered a general appearance, at the same time moving to quash the attachment. The motion was denied without a hearing on the merits of the case, and this decision was affirmed by the Court of Appeals.

There was no compelling reason for the attachment to continue. Once the general appearance was filed, Forbes stood to Lebowitz in the same relationship as a good-faith resident defendant to a local plaintiff creditor. Neither the District Court nor the Court of Appeals considered a continuing attachment justified. Nevertheless, both courts felt compelled to deny the motion to quash solely on the basis of the

100. It is true that execution on the judgment will not run outside the state, and it is possible that the defendant will have insufficient property in the forum state to satisfy adverse judgment. But his situation will then be no worse than if his debtor had been a resident: He may bring suit on the judgment in a state where there is property, or, where possible, he may register his judgment under the Uniform Enforcement of Foreign Judgments Act, 9 U.L.A. 376 (1951).
103. 456 F.2d 979 (3d Cir. 1972).
104. 326 F. Supp. at 1352-53; 456 F.2d at 982. Note particularly 456 F.2d at 982-83 (Gibbons, J., concurring).
Quasi in Rem Jurisdiction and Due Process Requirements

Supreme Court's references in *Sniadach* to *Ownbey v. Morgan*.  

The error of relying on *Ownbey* to justify unnecessary jurisdictional attachment has already been demonstrated. The *Lebowitz* decisions, however, contain a second and more serious error: not even the most "extraordinary situation" will eliminate the due process requirement of notice and hearing after seizure. *Sniadach* and *Fuentes* only authorize an occasional *postponement* of the hearing on the merits. Once the attachment is secured and jurisdiction thereby attained, the reasons for postponing the hearing disappear.

IV. Conclusion

The Supreme Court decisions since 1968 in the due process area, whether they have built a new construct or are simply faithful to old principles, require a re-evaluation of any state-sanctioned practice which results in a seizure of property without prior notice and a hearing. Subjecting jurisdictional attachment to such scrutiny reveals that the quasi in rem device, as presently employed in many cases, violates fundamental requirements of due process.

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The reference to this case in *Sniadach* is ambiguous at best: A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnis*, 279 U.S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system.

95 U.S. at 340. The Court said in *Fuentes* that "[a]s far as essential procedural due process doctrine goes, *McKeny* cannot stand for any more than was established in the *Coffin Brothers* and *Ownbey* cases on which it relied completely." 407 U.S. 67, 91 n.23 (1972). Concerning *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928), see pp. 1028-29 *supra*.

106. See pp. 1029-32 *supra*. Both the district court and the court of appeals in *Lebowitz* conceded that Forbes was subject to in personam jurisdiction through its "minimum contacts" with Pennsylvania, and hence the attachment was not necessary to secure jurisdiction. Nevertheless, the attachment was said to be legitimate (under *Ownbey*) on jurisdictional grounds. 326 F. Supp. at 1348-49; 456 F.2d at 981-82. See PP. 1032-33 *supra*.


To be sure, the *result* reached in *Sniadach* constituted a departure from earlier decisions which had upheld summary prejudgment attachment and garnishment; the change, however, resulted not from an alteration of principles of due process but instead from a reevaluation of the potential and actual effect of prejudgment seizure upon debtors.

Id. at 551, 488 P.2d at 22-23, 96 Cal. Rptr. at 718-19.