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Congress and the Supreme Court, acting discretely, have together cast doubt on the continuing viability of initiating an action against a nonresident defendant by means of a writ of foreign attachment. The congressional enactment is Subchapter II[1] of the Consumer Credit Protection Act.[2] The judicial decisions are *Sniadach v. Family Finance Corp.*[3] and *Fuentes v. Shevin.*[4]

Subchapter II imposes a ceiling on the portion of wages vulnerable to garnishment.[5] Unfortunately, neither the statute nor its legisla-

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1. 15 U.S.C. §§ 1671-77 (1970).
2. 15 U.S.C. §§ 1601-81 (1970).
3. 395 U.S. 337 (1969).
4. 407 U.S. 67 (1972).
5. The ceiling imposed is

   (1) 25 per centum of his disposable earnings [per week], or

   (2) the amount by which his disposable earnings [per week] exceed thirty times the Federal minimum hourly wage . . . in effect at the time the earnings are payable, whichever is less.

15 U.S.C. §§ 1673(a)(1), (2) (1970). Disposable earnings "means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld." 15 U.S.C. § 1672(b) (1970).

The ceiling is not applicable to garnishments flowing from

   (1) any order of any court for the support of any person.

   (2) any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act.

   (3) any debt due for any State or Federal tax.

15 U.S.C. §§ 1673(b)(1), (2), (3) (1970).

In addition to imposing a ceiling on the portion of wages vulnerable to garnishment, the statute prohibits employers from discharging any employee "by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness." 15 U.S.C. § 1674(a) (1970). Willful violation of that prohibition is punishable by a fine not to exceed $1,000, or

tive history[6] indicates whether the ceiling is applicable only to domestic garnishments or if it applies as well to wage attachments effected pursuant to a writ of foreign attachment. The statute does

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imprisonment for not more than one year, or both. 15 U.S.C. § 1674(b) (1970).

The Secretary of Labor, charged with enforcement of Subchapter II (15 U.S.C. § 1676 (1970)),

> [m]ay . . . exempt from the provisions of section 1673(a) . . . garnishments issued under the laws of any State . . . [which] provide restrictions on garnishment . . . substantially similar to those provided in section 1673(a) . . . .

15 U.S.C. § 1675 (1970).

State laws affording employees greater protection than Subchapter II in terms of prohibiting, or imposing lower ceilings on wage garnishments, or prohibiting discharge based on garnishment for more than one indebtedness, remain unaffected by Subchapter II. 15 U.S.C. § 1677 (1970).

Subchapter II has been held applicable to a post-judgment garnishment of wages. First Nat'l Bank v. Columbia Credit Corp., 499 P.2d 1163 (Colo. 1972).

6. *See generally* 1968 U.S. CODE CONG. & AD. NEWS 1962 *et seq.*

> The Committee on Banking and Currency, to whom was referred the bill [*i.e.*, the entire Consumer Credit Protection package] . . . report favorably thereon . . . .

Id. at 1962.

> Title II restricts the garnishment of wages, which the committee finds to be a frequent element in the predatory extension of credit, resulting, in turn, in a disruption of employment, production, and consumption.

Id. at 1963.

> While consumer credit has enjoyed phenomenal growth over the past 20 years, so have personal bankruptcies. Title II of your committee's bill restricting the garnishment of wages, will relieve many consumers from the greatest single pressure forcing wage earners into bankruptcies.

Id.

> Hundreds of workers among the poor lose their jobs or most of their wages each year as a result of garnishment proceedings. In many cases, wages are garnished by unscrupulous merchants and lenders whose practices trap the unwitting workers.

Id. at 1966, *quoting* message from President Lyndon B. Johnson transmitting recommendations on urban and rural poverty, H.R. DOC. NO. 88, 90th Cong., 1st Sess. 10 (1967).

> [T]itle II is concerned with mitigating the harsh and burdensome effects on both employers and employees of the garnishment of employees' wages . . . .

1968 U.S. CODE CONG. & AD. NEWS 1966.

> Testimony and evidence received by your committee clearly established a causal connection between harsh garnishment laws and high levels of personal bankruptcies . . . . In States such as Pennsylvania and Texas, which prohibit the garnishment of wages, the number of nonbusiness bankruptcies per 100,000 population are nine and five respectively, while in those States having harsh garnishment laws, the incidents of personal bankruptcies range between 200 to 300 per 100,000 population . . . .

Id. at 1978-79.

> [T]he House-passed bill restricted garnishment to an amount not exceeding 10 percent of gross earnings in excess of $30 per week, and contained no provision for the exemption of any State from the applicability of this rule. [The Senate version, S. Res. 5, "ha[d] no provisions dealing with garnishment; the original House bill called for outright prohibition of the practice." *Id.* at 2016 (Supplemental Views of Congressman Seymour Halpern on H.R. 11601)]. The restrictions . . . of the conference substitute

state explicitly the congressional determinations which led to (and simultaneously provided an appropriate peg for) the federal legislation:

> (1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.
> (2) The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.
> (3) The great disparities among the laws of the several states relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.[7]

In addition, the statute provides its own definition of garnishment: "The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."[8]

Does Subchapter II apply to those cases in which plaintiff sues a nonresident defendant, apparently not susceptible to in personam jurisdiction in the forum state, by attaching wages due the defendant in the hands of an employer doing business within the forum

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are related to "disposable earnings" defined as earnings remaining after deduction of any amounts required by law to be withheld. No garnishment is allowed which would exceed either 25 percent of disposable earnings, or the amount by which the weekly disposable earnings exceed 30 times the Federal minimum hourly wage, whichever is less.

Section 305 authorizes the Secretary of Labor to exempt from the limitation just described any State whose laws provide sustantially similar restrictions on garnishment. The remaining provisions . . . of the conference substitute are unchanged, in terms of intended substantive effect, from the provisions of title II of the House Bill.

Id. at 2029 H.R. CONF. REP. No. 1397, 90th Cong., 2d Sess. (1968).

Under the bill as passed by the House, the disclosure provisions were to take effect on the first day of the ninth calendar month beginning after enactment, and all other provisions were to take effect on enactment. The Senate bill's effective date was July 1, 1969.

The conference substitute provides that the disclosure provisions become effective July 1, 1969, the garnishment provisions become effective July 1, 1970, and all other provisions become effective on enactment.

Id. at 2030.

7. 15 U.S.C. §§ 1671(a)(1), (2), (3) (1970).
8. 15 U.S.C. § 1672(c) (1970).

state? A logical way to begin to answer that question is to determine whether or not the evils Congress intended to correct exist in such a foreign attachment action.

Would the availability of such a foreign attachment action tend to encourage "the making of predatory extensions of credit"? In many cases, neither the loan shark nor the unscrupulous "easy terms" merchant would seem to be relying on the possibility of securing quasi in rem jurisdiction in an action against a nonresident debtor by attaching his wages in the creditor's home state. Rather, to the extent that each may be contemplating the potential availability of debtor's wages as a means of satisfying the obligation, each would seem to be relying primarily on that availability to satisfy a domestic judgment against the debtor secured in a local in personam action. Yet, in many other cases, both shylock and merchant may be contemplating the assignment of the paper evidencing the obligation to those institutions and organizations which purchase such commercial paper at discount and effect its collection. To the extent that the lender and the merchant can reasonably anticipate discounting the paper to institutions doing business in states other than the debtor's domicile, each will contemplate an easier time so discounting a substantial volume of such commercial paper. Those institutions doing business in states other than the debtor's domicile may be more willing to purchase the paper if they have an opportunity to effect collection by actions initiated in their home states. The availability of quasi in rem jurisdiction over the wages of nonresident defendants, through foreign attachment actions initiated by serving defendants' employers doing business in the home states of the collecting institutions, provides a means of effecting collection locally. Consequently, the availability to the collecting institutions of such foreign attachment actions may have the ultimate effect of encouraging lender and merchant to make predatory extensions of credit.

Would the foreign attachment action, initiated by attaching nonresident defendant's wages in the hands of an employer doing business in the forum state, create a risk of loss of employment by defendant? A presumption underlying and explicitly protected against in the statute[9] is that employers may become disenchanted with those employees whose wages are garnished with some degree

9. *See* note 5 *supra*.

of frequency. The garnishment proceedings and their concomitant obligations upon the employers to withhold a portion of wages due certain employees, thus complicating the work of employers' payroll departments, could persuade some employers that it would be cheaper to find replacement employees than to depart from normal bookeeping techniques. Moreover, relatively substantial deductions from an employee's wages, resulting from garnishments, could cause the employee to become disenchanted with his work and, at least from the point of view of the employer, make him a less conscientious, thus less desirable, employee. Both of those employer reactions seem as likely to result from wage attachments in foreign attachment actions as from garnishments arising from wholly local proceedings.

Do great disparities exist among the foreign attachment laws of the several states which may frustrate the desired uniformity of the bankruptcy laws? In New York, there is a statutory ceiling on the percentage of wages vulnerable to domestic garnishment.[10] The New York Court of Appeals has read that same ceiling into the state's foreign attachment laws.[11] In Pennsylvania, wages for personal services are wholly exempt from domestic garnishment[12] and the Pennsylvania courts have imposed that exemption on foreign attachment actions initiated in that state.[13] In Delaware, "100% of the defendant's wages [are] subject to garnishment under the writ [of foreign attachment.]"[14] Apparently, the disparities among the foreign

10. N.Y. Civ. Prac. Law § 5231 (McKinney Supp. 1973); *id.* § 6202 (McKinney 1963). Section 5231 imposes the ten percent ceiling on the portion of wages vulnerable to post-judgment execution, and section 6202 makes the same ceiling applicable to pre-judgment attachment.

11. Morris Plan Indus. Bank v. Gunning, 295 N.Y. 324, 67 N.E.2d 510 (1946). In *Morris*, the court interpreted section 684 of the New York Civil Practice Act, statutory predecessor of the current N.Y. Civ. Prac. Law § 5231 (McKinney Supp. 1973). For comment on the relationship between existing section 5231 and *Sniadach*, *see* Siegel, Supplementary Practice Commentary to N.Y. Civ. Prac. Law § 5231 (McKinney Supp. 1973).

12. Pa. Stat. Ann. tit. 42, § 886 (1966). Although the statutory exemption existed under the title of "Justices of the Peace, Aldermen and Magistrates," the Supreme Court of Pennsylvania made the exemption available to all Pennsylvania judgments. Catlin v. Ensign, 29 Pa. 264 (1857).

13. Morris Box Board Co. v. Rossiter, 30 Pa. Super. 23 (1906). Pennsylvania feels so strongly opposed to the attachment of wages, that it has granted injunctive relief against an Ohio foreign attachment of wages due a Pennsylvania employee in the hands of an employer doing business in Ohio. Urey v. Horchler, 180 Pa. Super. 482, 119 A.2d 859 (1956).

14. Mills v. Bartlett, 265 A.2d 39, 40 (Del. Super. Ct. 1970). In *Mills*, no discussion of the potential applicability of Subchapter II to foreign attachments appears, perhaps because the attachment was made on December 11, 1969, and the effective date of the garnishment limitations is July 1, 1970; *see* note 6 *supra*.

attachment laws of the several states are as significant as the differences among the various domestic garnishment laws, and they would seem to possess the same potential for frustrating uniform application of the bankruptcy laws.

Those evils which Subchapter II was intended to remedy exist as a consequence of foreign attachments of wages as well as of wholly domestic salary garnishments. To that extent, therefore, one would conclude that the statute is applicable to both judicial methods of wage intercession. However, because the statute contains its own definition of "garnishment," a condition precedent to a determination of the act's applicability to foreign attachment of wages is a determination of whether or not that definition encompasses such a foreign attachment.

The definition includes "any legal or equitable procedure through which the earnings of any individual are required to be withheld *for payment of any debt.*"[15] The italicized portion of that definition indicates that the purpose of the withholding is critical. In a foreign attachment action there may be alternative purposes in attaching nonresident defendant's wages: (1) to induce the defendant to enter a general appearance, thus providing in personam jurisdiction to the court, or (2) to accumulate an amount equal to the plaintiff's claim, thus furnishing security for the satisfaction of any judgment that plaintiff may recover. Where only the first purpose exists, it could be asserted that the wages were not being withheld for payment of any debt. Where it is determined that the second purpose exists, either because of explicit statutory or decisional language or because of the practical consequences of the attachment, the withholding of wages would be for the payment of the debt asserted.

In New York, a nonresident defendant whose wages have been attached in a foreign attachment proceeding may, after entering a general appearance, move to vacate the order of attachment.[16] However, the statute providing that right also imposes an obligation on the court to vacate the attachment only if "the court determines that the attachment is unnecessary to the security of the plaintiff . . . . "[17] Rather clearly, the statute contemplates both of the alternative purposes of a foreign attachment. That legislative contem-

15. 15 U.S.C. § 1672(c) (1970) (emphasis added).
16. N.Y. Civ. Prac. Law § 6223 (McKinney 1963).
17. *Id.*

plation is realized in the judicial opinions. The New York Court of Appeals has concluded that "the ultimate purpose of procuring this [foreign] attachment is to collect the judgment, when and if entered, out of [nonresident defendant's] wages."[18] A federal district court sitting in New York and required to apply the statute permitting nonresident defendant to move to vacate the attachment after entering a general appearance, although noting that defendant's general appearance provided the court with personal jurisdiction over him, thus assuring that any judgment ultimately secured by the plaintiff would be entitled to full faith and credit in all sister states, nonetheless declined to vacate the attachment.[19] After emphasizing that "[t]he personal appearance of a non-resident defendant does not require that an attachment . . . be vacated,"[20] the court reduced the attachment order from $200,000 to $50,000, an amount which the court apparently concluded was necessary "to the security of the plaintiff." In New York, "[p]rospective earnings and other future accruing income are subject to an order of [foreign] attachment, and a levy thereunder operates as a continuing levy until an amount sufficient to satisfy plaintiff's demand has been accumulated."[21] New York, then, views its foreign attachment procedure as one directed, at least in substantial part, toward assuring payment of the debt claimed by the plaintiff. Consequently, an attachment of wages under that procedure would be within the Subchapter II definition of a "garnishment."

Although Pennsylvania permits no attachment of wages, the manner in which it has viewed the function of foreign attachment is informative. In 1931, the Supreme Court of Pennsylvania drew a sharp distinction between the functions of foreign attachment and post-judgment execution attachment.[22] "The object of seizing the property of a nonresident defendant by a writ of foreign attachment is to compel an appearance . . . ."[23] By contrast, in an execution attachment, "There the purpose is to collect a judgment . . . ."[24] Yet, just eight years later, the same court affirmed per curiam[25] an

18. Morris Plan Indus. Bank v. Gunning, 295 N.Y. 324, 325, 67 N.E.2d 510, 511 (1946).
19. Gitlin v. Stone, 262 F. Supp. 500 (S.D.N.Y. 1967).
20. *Id.* at 501.
21. Glassman v. Hyder, 52 Misc. 2d 618, 619, 276 N.Y.S.2d 453, 454 (Sup. Ct. 1966).
22. Rankin v. Culver, 303 Pa. 401, 154 A. 701 (1931).
23. *Id.* at 403, 154 A. at 702.
24. *Id.* at 404, 154 A. at 702.
25. Sniderman v. Nerone, 336 Pa. 305, 9 A.2d 335 (1939).

opinion of the Superior Court of Pennsylvania[26] containing the following language:

> The primary purpose of a foreign attachment is to compel a foreign non-resident to appear within the jurisdiction and to defend the plaintiff's claim; a secondary purpose is by attaching the foreign defendant's goods and property to secure a fund or property out of which the plaintiff's claim, when reduced to judgment, may be made.[27]

Much more recently, a federal district court sitting in Pennsylvania found that "secondary purpose" independently sufficient to justify the foreign attachment of local property of a foreign corporation defendant, despite the defendant's vulnerability to personal jurisdiction under Pennsylvania's long-arm statute and notwithstanding the entry of a general appearance by defendant.[28] The state interest which the court found sufficient was "the securing of execution in advance of judgment by freezing property subject to the attachment until the conclusion of the suit and rendering it available for satisfaction of the judgment obtained."[29]

A similar "metamorphosis"[30] of the principal functions of a foreign attachment has been noted in California, where wages are susceptible to attachment.[31]

> Although modern long-arm statutes . . . have substantially reduced the need for foreign attachment as a means to obtain jurisdiction over the debtor and his property, the increased mobility of persons and property across state lines has transformed what was originally an incidental benefit of attachment into what the *Ownbey* court implied had now becomes its

26. Sniderman v. Nerone, 136 Pa. Super. 381, 7 A.2d 496 (1939).

27. *Id.* at 385, 7 A.2d at 498.

28. Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir. 1972), *cert. denied*, 409 U.S. 843, *reh. denied*, 409 U.S. 1049 (1972). In *Lebowitz* the court, although expressing its own doubt as to the propriety of a pre-hearing attachment in a foreign attachment proceeding where nonresident defendant was susceptible to personal jurisdiction under the state's long-arm statute and had entered a general appearance, permitted the attachment because of the language in *Sniadach* apparently approving *Ownbey*. *See* text accompanying note 41 *infra*.

29. 326 F. Supp. at 1349.

30. *Id.* at 1338.

31. Property Research Financial Corp. v. Superior Court, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (Ct. App. 1972). Relying on that language in *Sniadach* apparently approving *Ownbey*, the court determined that a pre-hearing attachment effected in a foreign attachment action against a nonresident defendant was constitutionally permissible.

> primary purpose—to insure the collectibility of plaintiff's judgment.[32]

And, in a different opinion by the same court:

> The basic purpose of the remedy of attachment [generally] . . . is to aid in the collection of a money demand by seizure of property in advance of trial and judgment, as security for eventual satisfaction of the judgment . . . . In the case of nonresident defendants, it has been said that attachment has the additional function of obtaining jurisdiction quasi *in rem*, thereby giving the court power to render a personal judgment which may be satisfied out of the property attached.[33]

In every jurisdiction in which the res attached serves "as security for eventual satisfaction of the judgment" it must be concluded that the foreign attachment seizes the nonresident defendant's property for the purpose (at least in part) of assuring payment of the obligation asserted by the plaintiff. Where the res so attached consists of wages due the nonresident defendant, the attachment must be viewed as a "legal or equitable procedure through which the earnings of [an] individual are required to be withheld for payment of [a] debt." Thus, in every such case, the attachment of nonresident defendant's wages comes within the Subchapter II definition of "garnishment." The author has discovered no jurisdiction in which the entry of a general appearance by nonresident defendant requires the immediate release of the wages attached. To the contrary, the general approach manifested is that, even after entry of such a general appearance (and a fortiori without it), the res retained by the court enlarges as additional wages in the control or possession of garnishee-employer become due the defendant. In that manner, the foreign attachment serves significantly to withhold wages from defendant for the purpose of paying the debt asserted by plaintiff.

Since each of the evils intended to be remedied by Subchapter II exists in a foreign attachment of nonresident defendant's wages as

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32. *Id.* at 419, 100 Cal. Rptr. at 237.

33. National Gen. Corp. v. Dutch Inns of America, Inc., 15 Cal. App. 3d 490, 495, 93 Cal. Rptr. 343, 346 (Ct. App. 1971). The court approved the foreign attachment even though plaintiff's claim was secured, notwithstanding that domestic attachment requires an unsecured claim. As to defendant's oral argument that the state's long-arm statute eliminated the jurisdictional function of foreign attachments, the court commented, "We are inclined to disagree, but need not so hold." 15 Cal. App. 3d at 496 n.4, 100 Cal. Rptr. at 347 n.4. *See* note 77 *infra*.

well as in a wholly domestic garnishment of those wages, and since the statute's definition of "garnishment" encompasses such a foreign attachment of wages, one is compelled to the conclusion that Subchapter II is applicable to those foreign attachment actions where the res attached consists of wages due the defendant, and that therefore, the statutory ceiling on the portion of wages vulnerable to garnishment is applicable to earnings seized in a foreign attachment proceeding.

That determination of applicability, however, may have only a limited inhibiting effect on those contemplating initiation of foreign attachment actions by attaching wages due nonresident defendants. The ceiling on the portion of wages which may be attached obviously will not defeat the quasi in rem jurisdiction so obtained; rather, it will simply reduce the dollar value of the res originally attached. Moreover, where the attachment results in the withholding of a portion of the earnings due the nonresident defendant throughout the pendency of the proceedings, that accretion process will continue, only at a slower rate than would be the case absent Subchapter II's applicability. Thus, while Subchapter II's application will afford some relief to the nonresident defendant wage-earner, in terms of assuring him a potentially greater portion of his salary during pendency of the action (and some protection against discharge from his employment),[34] it is not likely to dissuade plaintiffs from using wages due nonresident defendants as the res in foreign attachment proceedings. Therefore, it becomes appropriate and necessary to determine to what extent *Sniadach* and *Fuentes* may inhibit or preclude foreign attachment actions generally.

In *Sniadach*, the Court found Wisconsin's procedure for effecting a pre-hearing garnishment of the defendant's wages violative of due process,[35] and in *Fuentes*, the Court arrived at the same conclusion

34. *See* note 5 *supra*.

35. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). After this article was written, the Second Circuit decided Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974). New York lenders filed with borrowers' employers wage assignments which had been executed by borrowers to secure loans, thus attaching wages in the hands of the employers then due to the borrowers. Borrowers asserted that such an attachment of their property violated their due process rights. The court concluded that the wage intercession effected by the lenders was private, not state, action and therefore not susceptible to due process attack. Chief Judge Kaufman, dissenting, found "the requisite 'state action' in the [lenders'] performance of the uniquely public function of adjudication . . . ." *Id.* at 314. The "adjudication" referred to was that of "unilaterally determin[ing] that the assignor-debtor is in default . . . and then tak[ing] the drastic step of seizing a significant property interest . . . . " *Id.* at 312.

with regard to the Florida and Pennsylvania procedures permitting a pre-hearing repossession of goods purchased by defendants on credit.[36] In both cases, the determination of unconstitutionality was bottomed on the deprivation of property suffered by defendants without prior recourse to judicial process. In every foreign attachment action, seizure of the defendant's property—the very means of initiating the proceedings—precedes any judicial determination; in that respect, therefore, the opinions in *Sniadach* and *Fuentes* have significant relevancy. In both of those cases, however, the defendants were domiciled in the forum states and amenable to the in personam jurisdiction of those courts. In the typical foreign attachment case, the nonresident defendant is not susceptible to the

36. Fuentes v. Shevin, 407 U.S. 67 (1972). After this article was written, the Supreme Court decided Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974). Grant sold Mitchell a refrigerator, range, stereo set and washing machine on credit. Subsequently, Grant sued Mitchell for the overdue balance of the purchase price in the amount of $574.17. The complaint was accompanied by an affidavit, executed by the seller's credit manager, asserting that the purchaser would " 'encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises.' " *Id.* at 1897. After presentation to the court in Orleans Parish, pursuant to Louisiana law, the affidavit led the court to order that the property be sequestered and that Grant furnish a bond in the amount of $1,125. Mitchell asserted that the pre-hearing attachment of property was unconstitutional under *Sniadach* and *Fuentes*. In a 5-4 decision, the Court held that the attachment was not unconstitutional. The majority distinguished *Sniadach* on the ground that that opinion had dealt with wages, a unique form of property. *Fuentes* was distinguishable, according to the majority, because in the instant case (1) the attachment occurred only after a court order, (2) the affidavit asserted specific grounds in support of the attachment, and (3) under Louisiana law, the purchaser was assured the opportunity of a prompt post-attachment hearing.

Mr. Justice Stewart, dissenting, used surprisingly sharp language to criticize the majority's result and reasoning:

> In short, this case is constitutionally indistinguishable from Fuentes v. Shevin, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent.

Id. at 1913.

> The only perceivable change that has occured since the Fuentes case is in the makeup of the Court.
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> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

Id. at 1914 (footnotes omitted).

> Although Mr. Justice Powell and Mr. Justice Rehnquist were Members of the Court at the time that Fuentes v. Shevin was announced, they were not Members of the Court when that case was argued, and they did not participate in its "consideration or decision."

Id. at 1914 n.8.

Both Mr. Justice Powell and Mr. Justice Rehnquist voted with the majority in *Mitchell.*

assertion of in personam jurisdiction by the forum; it is the res attached (nonresident defendant's property within the forum state) which affords the court jurisdiction, and that jurisdiction has been characterized as quasi in rem. The dollar value of the jurisdiction so acquired does not exceed the dollar value of the res. The general immunity of the nonresident defendant from personal jurisdiction by the court in which the foreign attachment action is initiated distinguishes, at least factually and conceivably legally and constitutionally as well, that proceeding from the wholly domestic garnishment and replevy of *Sniadach* and *Fuentes*. Moreover, in each of those opinions the Court explicitly noted situations in which a pre-hearing attachment of the defendant's property might be constitutionally permissible.[37] More specifically, the Court included within those situations a writ of foreign attachment "necessary to secure jurisdiction in state court—clearly a most basic and important public interest."[38] Relying, substantially, on those explicitly stated situations and the precise reference to foreign attachment proceedings, courts confronted with constitutional challenges to foreign attachments have, with but one exception discovered by the author,[39] found the procedures permissible.[40] Unfortunately, some of

37. Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254; *Ewing* v. *Mytinger & Casselberry, Inc.*, 399 U.S. 594, 598-600; *Ownbey* v. *Morgan*, 256 U.S. 94, 110-112; *Coffin Bros.* v. *Bennett*, 277 U.S. 29, 31. 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.

Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). In *Fahey*, the Court approved the pre-hearing appointment of a conservator for a federal savings and loan association. 332 U.S. 245 (1947). In *Ewing*, the Court approved the pre-hearing seizure of misbranded articles by a federal official. 339 U.S. 594 (1950). As to *Ownbey* and *Coffin Bros.*, *see* note 38 *infra*.

38. Fuentes v. Shevin, 407 U.S. 67, 91 n.23 (1972).

In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Bros. & Co. v. Bennett* . . . . Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan* . . . . It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Bros.* and *Ownbey*. *McKay v. McInnes*, 279 U.S. 820 . . . . As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely.

Id.

39. Mills v. Bartlett, 265 A.2d 39 (Del. Super. Ct. 1970). The res attached consisted of wages due the nonresident defendant. Reading *Sniadach* as precluding any pre-hearing attachment of wages, the court characterized plaintiff's effort to distinguish this foreign attachment from that domestic garnishment as "irrelevant and immaterial" since "it is the defendant's wages which have been frozen." *Id.* at 41.

those opinions have offered little more in support of that conclusion than the Court's apparently approving references to *Ownbey v. Morgan*,[41] a 1921 opinion affirming the validity of the then existing Delaware foreign attachment procedure. While such judicial obeisance to language in opinions of the Supreme Court is wholly understandable, it does little to test and elaborate on the constitutional legitimacy of the state interest involved in foreign attachment actions and tends to overlook and, perhaps, even obscure the legal fact that the Court's references to *Ownbey* in *Sniadach* and *Fuentes* were dicta. To determine the due process propriety of a foreign attachment action, as the Supreme Court may be persuaded to do in the near future, one must identify the state interest served by such a proceeding and weigh the significance of that interest against the jeopardy imposed on the nonresident defendant whose in-forum property is attached without a prior judicial hearing.

When such a case is presented to the Supreme Court, the Court will be confronted with three basic alternatives: (1) characterize the jurisdiction acquired by the attachment as in personam and find that in personam jurisdiction constitutionally permissible; (2) char-

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In Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973), the court concluded that pre-hearing attachments of Maine realty owned by defendants violated the due process clause. However, the attachments in *Gunter* apparently were not foreign attachments affected to secure quasi in rem jurisdiction. The court distinguished the attachments before it from that in *Ownbey* which was "necessary to secure quasi in rem jurisdiction." *Id.* at 1090; *cf.* American Fidelity Fire Ins. Co. v. Paste-Ups Unlimited, Inc., 368 F. Supp. 219, 230 (S.D.N.Y. 1974).

In Lynch v. Household Fin. Corp., 360 F. Supp. 720 (D. Conn. 1973), the court found prejudgment attachments violative of due process and characterized the challenged statute as "the Connecticut pre-judgment foreign attachment or garnishment statute, Conn. Gen. St. § 52-329." *Id.* at 721. However, the court's opinion makes it clear that the cases before the court were not foreign attachment actions. "It may well be that garnishment necessary to secure jurisdiction in the state courts is an exception justifying the postponement of notice and hearing, *Fuentes*, *supra*, at 91, n.23 . . . ; Ownbey v. Morgan, 256 U.S. 94 . . . (1921)." *Id.* at 723 n.5.

40. United States Indust., Inc. v. Gregg, 348 F. Supp. 1004 (D. Del. 1972); Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335 (E.D. Pa. 1971); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970); Lefton v. Superior Court, 23 Cal. App. 3d 1018, 100 Cal. Rptr. 598 (Ct. App. 1972); Property Research Financial Corp. v. Superior Court, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (Ct. App. 1972); National Gen. Corp. v. Dutch Inns of America, Inc., 15 Cal. App. 3d 490, 93 Cal. Rptr. 343 (Ct. App. 1971).

In Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972), the court found a prehearing attachment violative of due process, but noted that "no hearing would be required where attachment was necessary to secure quasi in rem jurisdiction . . . ." *Id.* at 744.

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

acterize the jurisdiction thus acquired as quasi in rem and find it constitutionally permissible; or (3) find such quasi in rem jurisdiction constitutionally impermissible. Each of these alternatives, and subsidiary determinations related to each, will be here considered.

For some time, it has seemed to this author that the principal legal significance flowing from an attachment of property belonging to a nonresident defendant is the virtually certain knowledge of the cause of action asserted against him which such an attachment will effect.[42] In *Pennoyer v. Neff*,[43] the Court stated that

> The law assumes that [real] 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.[44]

Yet, more realistically, the nonresident defendant who receives notice of the attachment, a summons and a copy of the plaintiff's complaint will be on notice not only of the seizure and possible condemnation of his property but, also, of the cause of action asserted against him. Since a form of constructive service reasonably calculated to give the defendant actual notice of the action asserted against him and an opportunity to defend is a *sine qua non* to in personam jurisdiction (absent personal service of process within the forum state), and such a form of service does result from an attachment of nonresident defendant's property within the forum state in an action initiated by foreign attachment, that critical first step toward in personam jurisdiction is satisfied.

It is the second necessary step which creates a substantial obstacle to a finding of in personam jurisdiction in a foreign attachment action. That second requisite may be stated in terms of "minimum contacts"[45] between nonresident defendant and forum state, out of which the cause of action arises, or as "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and

42. Seidelson, *Seider v. Roth, et seq.: The Urge Toward Reason and the Irrational Ratio Decidendi*, 39 GEO. WASH. L. REV. 42 (1970); Seidelson, *Full Faith and Credit: A Modest Proposal . . . Or Two*, 31 GEO. WASH. L. REV. 462, 483 (1962).

43. 95 U.S. 714 (1878).

44. *Id.* at 727.

45. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

protections of its laws."[46] Presumably, that purposeful act, like the earlier coined "minimum contacts," must be one out of which the plaintiff's cause of action arises. If the Supreme Court retains that second requirement—some nexus between nonresident defendant and forum state out of which plaintiff's cause of action arises—proceedings initiated by foreign attachment will not provide the forum with in personam jurisdiction, *i.e.*, jurisdiction coextensive with the cause of action asserted. Rather, the jurisdiction so acquired will continue to be quasi in rem and its breadth will continue to be limited by the dollar value of the res attached. In those cases in which the attached res has a dollar value in excess of the asserted cause of action, the forum will remain able to provide the plaintiff with complete relief. However, where the fortuitous relationship between dollar value of the res and dollar value of the cause asserted "favors" the cause, the court will remain able to afford the plaintiff relief only to the extent of the res attached.

Why the Supreme Court has required a cause-of-action stimulating nexus between nonresident defendant and forum state—as a due process right of the defendant—would seem to be explicable primarily in terms of precluding an undue imposition on the nonresident defendant. The undue imposition to be avoided, one would assume, is that which might arise from distant or inconvenient litigation. There are, however, two basic weaknesses inherent in that conclusion.

First, the availability of a *forum non conveniens* motion to dismiss (in state or federal court)[47] or a 1404(a) motion to transfer (in federal court)[48] would seem to provide adequate assurance that defendant would not be unduly imposed upon in terms of distant or inconvenient litigation. The Court, itself, has noted:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresident de-

46. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

47. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

> The enactment of 28 U.S.C. § 1404(a) in 1948 did not . . . deprive Federal District Courts of the power to dismiss, rather than transfer, an action for forum non conveniens when the alternative forum is a state court or a court in a foreign country to which, obviously, transfer is impossible. Fitzgerald v. Westland Marine Corp., 369 F.2d 499 (2d Cir. 1966); C. Wright, Federal Courts § 44, at 165 (2d ed. 1970).

Domingo v. States Marine Lines, 340 F. Supp. 811, 813 n.2 (S.D.N.Y. 1972); *accord*, McCarthy v. Canadian Nat'l Rep., 322 F. Supp. 1197 (D. Mass. 1971).

48. 28 U.S.C. § 1404(a) (1970).

> fendants has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff . . . to the flexible standard of International Shoe Co. v. Washington . . . .[49]

The legal availability of *forum non conveniens* or transfer motions complemented by the factual diminution of the burden of defending in a foreign tribunal impel one toward the conclusion that subjecting a nonresident defendant who has been the object of a mode of constructive service reasonably calculated to provide him with actual notice of the proceedings and an opportunity to defend before a presumably competent court to in personam jurisdiction by that court would not deprive such a defendant of property without due process of law, even absent a nexus between defendant and forum state out of which the asserted action arises.

Second, the Court, itself, seems to have recognized, at least tacitly, that undue imposition on a nonresident defendant, in terms of distant or inconvenient litigation, may no longer justify a due process bar to in personam jurisdiction, even in the absence of minimum contacts. In *Hanson*, immediately following the indented quotation set forth in the preceding paragraph, this language appears:

> But it is a mistake to assume that this trend [toward broader personal jurisdiction] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.[50]

That language implies that those "territorial limitations on the power of the respective States" have supplanted, or, at the very least, become more critical than, the concern over subjecting defendant to inconvenient litigation as an explanation of or justification

49. Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).
50. *Id.* at 251.

for the due process bar. That, in turn, requires an examination of the genesis and continuing validity of those territorial limitations.

The historical reasons for those limitations seem to be inextricably entwined with the political concept of national sovereignty and the procedural device of a writ of *capias ad respondendum*. The *capias* writ commanded

> the sheriff to *take* the defendant, and him safely keep, so that he may have his body before the court on a certain day, to *answer* the plaintiff in the action . . . . It notifies defendant to defend suit and procures his arrest until security for plaintiff's claim is furnished.[51]

Quite a way to initiate a lawsuit! It isn't difficult to imagine the degree of circumspection the *capias* imposed on an English law court asked by an English plaintiff to assert jurisdiction over a cause of action against a French national. Were an English sheriff to attempt to execute the writ in France by seizing the defendant and effecting his presence in England (in an English gaol), there to await trial or post appropriate security to satisfy the plaintiff's asserted claim, France might very well feel that its sovereign dignity had been violated. The English court, sensitive to that predictable French reaction, would hardly have felt that the plaintiff's asserted claim justified the potential adverse consequences.

Rather strangely, that same concern seems to have manifested itself in the Court's opinion in *Pennoyer*. Strange because even at the time of *Pennoyer* the *capias ad respondendum* was an anachronism, having been supplanted by simple service of process,[52] and because in *Pennoyer* the forum was in Oregon and the nonresident defendant's domicile was in California,[53] so that conflicting nation-states were not involved. The Court did note that "[t]he several States of the Union are not . . . in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution."[54] Yet the Court also stated that, "except as restrained and limited by that instrument, they possess and exercise the authority of independent

51. BLACK'S LAW DICTIONARY 262 (rev. 4th ed. 1968).

52. Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 68 & n.75, 69 n.84, 97 (1968).

53. 95 U.S. at 717.

54. *Id.* at 722.

states."[55] For Oregon to assert personal jurisdiction over nonresident defendants, absent personal service of process, would constitute an "encroachment upon the independence of the State in which the [nonresident defendants] are domiciled . . . ."[56] Apparently, the *Pennoyer* Court was sensitive to considerations of national sovereignty, and the potential of offending that sovereign dignity inherent in the *capias ad respondendum*, long after the stimuli for those considerations had lost their practical efficacy as among states of the United States. Stranger still, the language last quoted above from *Hanson* reflects a continuing concern that the assertion of in personam jurisdiction over a nonresident defendant would exceed the power of the forum state and offend the sovereign dignity of the state of the defendant's domicile.

One must, therefore, inquire how in fact the assertion by a court sitting in Oregon of in personam jurisdiction over a New York[57] defendant would offend the sovereign dignity of New York to such an extent that it should be deemed constitutionally impermissible. Any answer to that question must be one capable of subsisting in the face of existing law that such personal jurisdiction is constitutionally permissible if (1) minimum contacts exist between the nonresident defendant and the forum state, out of which the cause of action arises, or (2) the nonresident defendant is served personally while in Oregon for a purpose (for example, a weekend of fishing) wholly unrelated to the cause of action asserted. The answer thus produced reposes in a concept of sovereign dignity which will inure to New York as a consequence of its capacity to assure its domiciliaries that they will enjoy immunity from in personam jurisdiction asserted by a court in any other state so long as they avoid personal service within that other state or cause-of-action producing minimum contacts with that state. That aspect of sovereign dignity, and the assumed prestige arising therefrom, it is respectfully suggested, are too tenuous to serve as an appropriate basis for constitutionally limiting in personam jurisdiction, or so intimately related to the capacity of the New York domiciliary to render himself susceptible to or immune from such jurisdiction that they deserve no separate

55. *Id.*

56. *Id.* at 723.

57. The author selected a New York domicile for the nonresident defendant (rather than the California domicile which existed in *Pennoyer*) in order to avoid undue geographical proximity between forum and defendant's home state.

recognition under the guise of sovereign dignity. Moreover, one suspects that whatever affront New York might experience from a failure to preserve that arcane aspect of sovereignty would be more than adequately mitigated by that state's realization that it would then be able to afford its domiciliaries in personam jurisdiction over defendants domiciled in Oregon and every other state in the United States.

Preservation of that aspect of sovereign dignity is an awkward basis for limiting in personam jurisdiction for another rather basic, if mechanical, reason. In the Supreme Court decisions from *Pennoyer* through *International Shoe*[58] to *Hanson*, the specific constitutional bar to personal jurisdiction over nonresident defendants—absent minimum contacts with or a purposeful act directed toward the forum state—has been the due process clause. That clause is uniquely intended to serve as a shield available to individuals against improper state action. When the foundation for limiting personal jurisdiction shifts from protection of the defendant from inconvenient litigation to the preservation of the sovereign dignity of the defendant's domicile state, the due process clause, by its own language, becomes inapplicable. What is needed is some constitutional provision assertable on behalf of the state. Perhaps the nearest on point is the tenth amendment's reservation to the States of those powers not delegated to the United States.[59] Does the tenth amendment provide an appropriate vehicle for a constitutionally compelled preservation of the sovereign dignity of defendant's home state by limiting personal jurisdiction over defendant by other states?

"The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress, on the 25th of September 1789."[60] Thereafter, from November 20, 1789, to December 15, 1791, they were ratified by eleven states.[61] Thus the tenth amendment was ratified more than 85 years before *Pennoyer*. Yet nowhere in *Pennoyer* does the Court indicate that the limitations on jurisdiction asserted therein rest

58. 326 U.S. 310 (1945).

59. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. CONST. amend. X.

60. PA. STAT. ANN. CONST. amend. I, n.1 (1969).

61. The legislatures of Connecticut, Georgia, and Massachusetts ratified them on April 19, 1939, March 24, 1939, and March 2, 1939, respectively. *Id.*

upon the tenth amendment. On the contrary, despite its a priori reasoning "that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory"[62] and that it "follows from [that] . . . that no state can exercise direct jurisdiction and authority over persons or property without its territory,"[63] the opinion specifies the following constitutional basis:

> Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments 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.[64]

"[The fourteenth amendment to the Constitution of the United States] was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 16th of June, 1866. On the 21st of July, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution, declaring that ' . . . ' three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States' . . . . "[65] It seems extraordinarily unlikely that the Su-

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62. 95 U.S. at 722.

63. *Id.*

64. *Id.* at 733. It could be suggested that the fourteenth, rather than the tenth amendment was invoked by the Court because the original Oregon judgment was subsequently asserted in a federal court in Oregon rather than in a court in some other state. Since no other state court became involved, it could be asserted, the tenth amendment's preservation of state rights was inapplicable. There are a couple of responses to such a suggestion. First, the conflict between the state whose court had issued the judgment and the national sovereignty whose court was asked to recognize the validity of the judgment would seem to be of the kind generally contemplated by the tenth amendment. Indeed, the *Pennoyer* Court characterized the status of federal courts in such a context in this manner:

> Whilst they are not foreign tribunals in their relations to the State Courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State Courts only the same faith and credit which the courts of another State are bound to give them.

Id. at 732-33. Presumably, then, had the Court found the tenth amendment applicable to the obligation *vel non* of a state court to extend full faith and credit to the Oregon judgment, it would have found it similarly applicable to a federal court confronted with the judgment.

Second, the Court's consistent abstention from invocation of the tenth amendment and its continued application of the fourteenth to determine the propriety of an asserted jurisdiction over a nonresident defendant in the cases subsequent to *Pennoyer*, including *Hanson*, where the original judgment was presented to a different state court, indicate that *Pennoyer's* nonuse of the tenth is not explicable in terms of a state to federal court judgment distinction.

65. PA. STAT. ANN. CONST. amend. XIV, note (1969).

preme Court would have specified as a constitutional foundation for its holding in *Pennoyer* the then 10-year-old fourteenth amendment had it considered the much older tenth amendment an appropriate basis. That conclusion of constitutional history is corroborated by the fact that each Court opinion since *Pennoyer* dealing with the limitations on personal jurisdiction over nonresident defendants has been predicated on the due process clause, not the tenth amendment.[66]

The awkward amalgam of concern over the imposition of inconvenient litigation on nonresident defendant and sensitivity to the sovereign dignity of the defendant's home state, manifested in *Hanson*, becomes explicable, if not acceptable. Recognition of the availability of *forum non conveniens* and transfer motions effectively meets and factually puts to rest concern over inconvenient litigation; consequently, the shift to "territorial limitations" and a reversion to *Pennoyer's* stated sensitivity to preserving the sovereign dignity of defendant's state of domicile is impelled. But the due process clause, the explicit constitutional basis for *Pennoyer*, is not available to defendant's home state, and *Pennoyer* and every subsequent Court opinion treating the constitutional limitations on personal jurisdiction over nonresident defendants have invoked that clause, and have, at least tacitly, determined that the tenth amendment has no function in such a context. Of course, *Hanson*, too, invoked the fourteenth and not the tenth amendment. Consequently, one is compelled to conclude that: (1) concern over the imposition of distant or inconvenient litigation on nonresident defendant no longer justifies a due process bar to the assertion of personal jurisdiction over such a defendant when he has been the object of a form of constructive service reasonably calculated to provide actual notice of the proceedings and has been afforded an opportunity to defend; (2) the due process bar is not available as a constitutional foundation for preserving the unique aspect of sovereign dignity alluded to in *Pennoyer* and *Hanson*; and (3) the tenth amendment is inapposite to such cases. Therefore, an appro-

66. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Milliken v. Meyer, 311 U.S. 457 (1940); Hess v. Pawloski, 274 U.S. 352 (1927). Where the propriety of the jurisdiction asserted by the issuing court must be examined to determine whether its judgment is entitled to extrastate recognition, the due process clause is complemented by the full faith and credit clause. *Hanson, McGee, Milliken.* In *Hess*, the Court considered the privileges and immunities clause along with due process.

priate mode of constructive service and the availability of a *forum non conveniens* or transfer motion should be deemed adequate to provide the forum in personam jurisdiction over a nonresident defendant.

Since attachment of the nonresident defendant's property in the forum state initiates a mode of constructive service reasonably calculated to afford defendant actual notice of the proceedings and an opportunity to defend, foreign attachment actions should be deemed to provide the forum with in personam jurisdiction coextensive with the cause of action asserted. Should that suggestion be accepted by the Court (a premise admittedly presumptuous on the part of the author), there would remain the question of whether the res attached should continue in the control of the court or be released to the defendant, now personally before the court. Intimately related to that issue is this question: Assuming that the res remains with the court, should additional property of the defendant which becomes amenable to attachment during the pendency of the action be available to enlarge the res before the court?

It is tempting to suggest immediately that affording the court in personam jurisdiction is a sufficient quid pro quo to justify a compelled release of the property of the defendant earlier attached. To do so, however, would be to recognize only one existing judicial aspect of such an attachment—providing the court with some basis of jurisdiction—and to ignore that other aspect of attachment—enhancement of the likelihood that the court's judgment will be meaningful, *i.e.*, capable of providing satisfaction to the potentially successful plaintiff. It becomes necessary to determine how significant the presence of the res really is in terms of assuring efficacy to the judgment if the court is deemed to have personal jurisdiction over the defendant. One critical consequence which would flow from a determination of in personam jurisdiction would be the full faith and credit recognition which the court's (potential) money judgment for the plaintiff would enjoy. That recognition would assure the plaintiff and the issuing court that the judgment, to the extent to which it remained unsatisfied, would serve as a means of permitting the plaintiff to secure a judgment in any sister state in which the plaintiff had property susceptible to execution and sale for the purpose of satisfying a money judgment. That would enhance substantially the likelihood that the original judgment would be satisfied. Thus, to a significant extent, the issuing court's concern over the efficacy of its judgment would be ameliorated. Still, some of

that concern could linger. It is possible, of course, that the defendant (now judgment debtor) would have no property susceptible to execution and sale other than the res originally attached. It is possible, too, that that attached property, if released to the defendant, could be seized by some earlier judgment creditor of the defendant and sold to satisfy that earlier judgment. That would leave the foreign attachment court and the plaintiff who had initiated the foreign attachment action with an unsatisfied judgment. Does that possibility justify retention of the res throughout the judicial proceedings initiated by the attachment?

Where the res attached is property of the defendant within the forum state with the express or implied consent of the defendant, it is possible to assert that the defendant has "invok[ed] the benefits and protections of its laws."[67] After all, the defendant's property was protected by the forum's laws—and the ordered society assured by those laws—prior to its attachment. And precisely the same thing can be said of any additional property of the defendant which comes into the forum state during the pendency of the proceedings with the express or implied consent of the defendant. Thus, as to the res originally attached and as to any enlargement of the res effected by subsequent attachment pendente lite, it may be said that some justification exists for the court's retention of the totality of the res through the conclusion of the judicial process. The court would be assuring a degree of efficacy to its judgment exactly equal to the extent to which defendant had enjoyed that protection of his property assured by the laws of the forum state. There is an appealing sense of equilibrium to that conclusion. Yet, as with the earlier stated contrary conclusion, that permitting the attachment to serve as a means of acquiring in personam jurisdiction might provide an adequate quid pro quo for requiring release of the property attached, further consideration may be appropriate.

To permit the foreign attachment court to assert in personam jurisdiction over nonresident defendant, and, simultaneously, to retain the res originally attached (and any enlargement thereof acquired by attachment pending termination of the proceedings), would provide that court, and the plaintiff in those proceedings, with a distinct advantage over a court asserting in personam jurisdiction as a result of personal service within the forum or construc-

67. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

tive service coupled with defendant's domicile within the forum, and the plaintiff in those proceedings, in terms of assuring satisfaction of any judgment ultimately entered for the plaintiff. In those domestic proceedings against the defendant, no attachment of the defendant's property prior to judgment would be available, absent conduct on the part of the defendant manifesting an intention to act affirmatively to frustrate the judicial proceedings and any potentially adverse judgment.[68] *Sniadach* and *Fuentes* underscore the general unavailability of such pre-judgment attachments. Consequently, permitting the foreign attachment court both in personam jurisdiction and continuing custody of the res would encourage potential plaintiffs to sue defendant in those states in which (1) defendant was not domiciled, (2) defendant was not susceptible to personal service, and (3) defendant had property vulnerable to attachment. Such a selection by the "discriminating" plaintiff would provide him with a significant priority in the property of defendant. As to that portion of defendant's property attached, the plaintiff would have primary and potentially exclusive access to satisfy a judgment secured in those proceedings. That priority would exist without regard to the relative chronology between the operative facts underlying plaintiff's cause of action and the operative facts underlying other causes of action asserted against the defendant in other courts, without regard to the relative chronology between the plaintiff's judgment in the attachment proceedings and the judgments secured against defendant in other courts, and without regard to the qualitative distinctions between the nature of the claim asserted in the attachment proceedings and the claims asserted against the defendant in other courts. Predictably, that priority would result in litigation caseloads more the product of a state's capacity to attract property of nonresident defendants than of the state's population. "Retirement paradises" would tend to become plaintiffs' beehives;

68. A fraudulent debtor's attachment may be issued to attach personal property of the defendant within the Commonwealth and not exempt from execution, upon any cause of action at law or in equity in which the relief sought includes a judgment or decree for the payment of money, when the defendant with intent to defraud the plaintiff

(1) has removed or is about to remove property from the jurisdiction of the court;

(2) has concealed or is about to conceal property;

(3) has transferred or is about to transfer property; or

(4) has concealed himself within, absconded, or absented himself from the Commonwealth.

PA. R. CIV. P. 1286.

"recreation centers" would tend to become litigation centers. Every "second home" purchased for ultimate retirement or current weekend or summer-long occupancy, and all of the usual accoutrements of such a home, in some state other than the defendant's domicile would invite would-be plaintiffs to forsake litigation in the defendant's home state, or plaintiff's home state, or the state where the operative facts (or any part thereof) occurred in favor of the initiation of a foreign attachment action in the state of the "second home," thus assuring the plaintiff priority in the res attached. In turn, every potential defendant (an all-inclusive category) might be dissuaded from acquiring property in any state other than his domicile. This parade of horribles[69] suggests that, if in personam jurisdiction is deemed an appropriate consequence of a foreign attachment, the court in which the action is initiated should be compelled to release the res and deny any claim to an enlargement of the res secured by subsequent pre-judgment attachment. In that manner, all courts having the capacity to assert personal jurisdiction over the defendant (and all plaintiffs in those courts) would have equitably determined opportunities to secure satisfaction of any money judgments against the defendant through the usual combination of domestic post-judgment execution and extrastate post-judgment execution following conversion of the "foreign" judgment into a domestic one via the full faith and credit clause.[70]

There is an additional prophylactic justification for requiring ju-

69. Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970), indicates that the horribles are not wholly imaginary. In *Tucker*, a Maryland plaintiff sued a Maryland defendant in the District of Columbia, where the defendant worked, in a foreign attachment action initiated by attaching wages due the defendant in the possession of the District of Columbia employer. As was noted in the dissenting opinion,

> The sole reason why this action was brought in a District of Columbia court—as counsel for Household Finance were frank enough to admit in oral argument—was to take advantage of the District's prejudgment garnishment provisions, since Maryland's prejudgment garnishment law, like the District's, is not available against residents. At a minimum such forum-shopping, especially in an action in which neither party resides in our jurisdiction, should be discouraged.

Id. at 577.

In *Tucker*, the existence of quasi in rem jurisdiction in the District or Columbia was sufficient stimulus to persuade the plaintiff to forsake action in Maryland, the common domicile of plaintiff and defendant. Were in personam jurisdiction *and* continuing judicial control over the res attached afforded the attachment court, it is suggested that the horribles referred to in the text would result.

70. *Cf.* American Fidelity Fire Ins. Co. v. Paste-Ups Unlimited, Inc., 368 F. Supp. 219 (S.D.N.Y. 1974).

dicial release of the res. After that release is compelled, still assuming in personam jurisdiction, the defendant will be required to determine whether to attempt to effect a settlement of plaintiff's asserted claim or to decline negotiation efforts and simply contest the pleadings and, ultimately, await trial on the merits. Once the res is released, the defendant will be able to make that decision without the urgency and coercion inherent in a continuing judicial attachment of his property. And, if the defendant endeavors to effect a negotiated settlement, his attempt to place a reasonable dollar value on the claim asserted will be uncomplicated by the natural desire to regain control over property denied him by the attachment.

Thus, the first alternative available to the Supreme Court (and the one suggested by this author) is that, in determining the propriety and consequences of a foreign attachment action in the light of *Sniadach* and *Fuentes*, the Court may conclude that the jurisdiction so acquired is in personam and that the res attached as a means of effecting constructive service on the defendant must be released once that service function has been fulfilled. Given that conclusion, no serious problem as to the constitutional propriety of the prehearing attachment would remain.

Should the Court decline the invitation to characterize the jurisdiction arising out of the foreign attachment as in personam, and, instead, retain the present characterization of such jurisdiction as quasi in rem, it will be confronted with the necessity of determining the constitutional propriety of such jurisdiction in light of the teaching of *Sniadach* and *Fuentes*. In the foreign attachment, as in *Sniadach* and *Fuentes*, the defendant's property will have been subjected, significantly, to a pre-hearing attachment. Unlike the situation in *Sniadach* and *Fuentes*, however, the attachment may be the only means of acquiring any kind of jurisidction over the defendant in the forum state, since the defendant will be a nonresident of that state. The Court's opinions in *Sniadach* and *Fuentes* indicate that the determinative factor will be whether or not that conceivably exclusive method of acquiring jurisdiction over the nonresident defendant satisfies some significant state interest of sufficient magnitude to justify the imposition on defendant of a prehearing attachment of his property. Necessarily, then, the state interest must be identified and elaborated on. That process may be initiated by asking, what is the interest of a state in asserting quasi

in rem jurisdiction over a nonresident defendant based on the attachment of defendant's property within the forum state?

One potential—and nearly Pavlovian—response to that question is the state interest in providing a home forum for those of its domiciliaries having a cause of action against the nonresident defendant. There are, however, a couple of difficulties with that response, one a mixture of fact and state law, the other a mixture of state law and the Federal Constitution. Factually and legally, the quasi in rem jurisdiction presently afforded by a foreign attachment action is generally available to plaintiffs domiciled in states other than the forum as well as to the forum's own domiciliaries.[71] And where that may not be the case,[72] because of the state's foreign attachment

71. *See, e.g.*, Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970); CAL. CIV. PRO. CODE § 537.3 (West Supp. 1974); D.C. CODE ANN. 16-501 (1973); OHIO REV. CODE ANN. § 2715 (1970) (the 1970 amendments exempted personal earnings from foreign attachment, made them available to post-judgment garnishment only, and prohibited employee discharge "solely by reason of such employee's personal earnings . . . having been attached through no more than one action in garnishment in any twelve-month period." *Id.* at § 2715.01); and PA. R. CIV. P. 1252.

72. In New York, there appears to be at least a surface ambiguity. N.Y. CIV. PRAC. LAW § 6201 (McKinney 1963) sets forth no requirement that plaintiff be a New York domiciliary. Still, a few New York cases could be read as refusing to permit a foreign attachment where plaintiff, as well as defendant, is a nonresident. Anderson v. N. V. Transandine Handelmaatschappij, 28 N.Y.S.2d 547 (Sup. Ct. 1941), *aff'd*, 31 N.Y.S.2d 194 (Sup. Ct., App. Div. 1941), *aff'd*, 289 N.Y. 9, 43 N.E.2d 502 (1942); Rzeszotarski v. Co-Operative Ass'n Kasa Polska, 139 Misc. 400, 247 N.Y.S. 471 (Sup. Ct. 1931); Swift & Co. v. Karline, 220 N.Y.S. 933 (Sup. Ct., App. Div. 1927), *aff'd per curiam*, 245 N.Y. 570, 157 N.E. 861 (1927). However, the result in *Anderson* appears to be more the product of the "act of state" doctrine applied to the challenged act of the Netherlands government in exile than of plaintiff's nonresidence in New York, and in both *Rzeszotarski* and *Swift & Co.* the results seem to be more the product of the then existing limitations on suits by nonresidents against foreign corporations contained in N.Y. GEN. CORP. LAW §§ 224, 225 (McKinney 1943), than of any residence requirement related specifically to foreign attachment actions. Similar limitations appear in the existing N.Y. BUS. CORP. LAW § 1314 (McKinney 1963).

Judge Friendly, writing for the Second Circuit in Farrell v. Piedmont Aviation, Inc., 411 F.2d 812, 815, *cert. denied*, 396 U.S. 840 (1969), found that "[n]othing in the New York attachment statute, CPLR § 6201(1), limits that remedy to residents." But, because jurisdiction in *Farrell* rested on *Seider* grounds, *see* text at note 82 *infra*, the attachment was vacated upon a showing that the wrongful death actions asserted arose out of the deaths of decedents who had been nonresidents of New York and the personal representatives (nominal plaintiffs), though residents of New York, were unrelated to decedents and had no interest in their estates. That result seems to have been imposed on Judge Friendly by his concern "that the constitutional doubt with respect to applying Seider v. Roth in favor of nonresidents would be exceedingly serious." 411 F.2d at 817.

> Appellants urge that limitation of Seider v. Roth to New York residents may itself create a constitutional problem. For reasons indicated in Minichiello v. Rosenberg, . . . 410 F.2d at 110, n.6, we see no basis for this where, as in that case, the only persons

statute (or applicable rule of procedure) or its judicial decisions construing the statute (or rule of procedure), a serious constitutional question arises as to the capacity of a state to deny such quasi in rem jurisdiction to nonresident plaintiffs. Basically, initiation of an action by writ of foreign attachment requires only that there be property of the nonresident defendant within the forum which is amenable to attachment. Once such a res is identified, a judicial reaction that it is unavailable to a nonresident plaintiff smacks of a kind of legal legerdemain—now you see it, now you don't—which may be precluded by the equal protection clause.[73] The facile equation of physical power over the res with concern over providing some means of affording resident plaintiffs at least a limited jurisdiction in actions against nonresident defendants set forth in *Pennoyer*[74] may be difficult to accept today. The "progress in communications and transportation"[75] and the "technological progress [which] has increased the flow of commerce between States"[76] may have rendered unpalatable the parochial implication of *Pennoyer* that a legally cognizable res may be withheld from foreign attachment simply because the plaintiff is identified as a nonresident of the forum state. That kind of Balkanization seems uniquely inappropriate to the facts of life in twentieth century America. One may concede the constitutional propriety of a state making in personam jurisdiction over nonresident defendants more readily available to resident than nonresident plaintiffs[77]—in terms of providing a convenient home

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injured were residents or where, as here, nonresidents have invoked *Seider* but no resident has. We have reserved the question of constitutionality where a resident seeks to utilize *Seider* to obtain what amounts to a preference over a nonresident. See Minichiello v. Rosenberg, 410 F.2d at 119 (*en banc*).

Id. at 817 n.5.

73. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. *See* excerpt from Farrell v. Piedmont Aviation, Inc., note 72 *supra*.

74. So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them . . . .

95 U.S. at 723.

75. Hanson v. Denckla, 357 U.S. 235, 251 (1958).

76. *Id.* at 250-51.

77. This approach has been followed in a number of long-arm statutes. *See, e.g.*, IOWA CODE ANN. § 617.3 (1973); MINN. STAT. § 303.13(3) (1969); MISS. CODE ANN. § 13-3-57 (1972); TEX. REV. CIV. STAT. art. 2031(b)(4) (1964). On the other hand, long-arm statutes in some states do not require that plaintiff be a forum domiciliary. *See, e.g.*, CAL. CIV. PRO. CODE § 410.10 (West 1973); MO. ANN. STAT. § 355.375(2) (Vernon 1966); R.I. GEN. LAWS ANN. § 9-5-33 (1969). For a suggestion that long-arm statutes should explicitly provide for

forum—and still object to the propriety of attempting a similar feat through quasi in rem jurisdiction arising from a foreign attachment. The latter effort is at best legally awkward, because of the resulting "here it is, here it isn't" treatment of the res, and at worst constitutionally precluded by the equal protection clause. Consequently, the suggestion that foreign attachment actions serve a significant state interest in providing resident plaintiffs with a convenient home forum seems fallible legally, constitutionally and as a matter of practicality.

There is another state interest which may be discerned in foreign attachment actions. It may be that the presumed benefits to the nonresident defendant flowing from the protection afforded his in-forum property by the forum's laws and the ordered society thereby effected give rise to an interest on the part of the beneficent state in having that property susceptible to the judicial power of that state and available to satisfy causes of action successfully asserted against the defendant by plaintiffs (resident or nonresident) in that state's courts. It was suggested earlier, in examining (and ultimately rejecting) the propriety of extending to the attachment court in personam jurisdiction *and* the right to retain control of the res, that, in those instances in which the nonresident defendant's property is within the forum state with the express or implied consent of the defendant, the defendant has "invok[ed] the benefits and protections of [that state's] laws,"[78] at least with regard to the attached property. That invocation by the nonresident defendant may justify

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jurisdiction coextensive with constitutional limits, see Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. L. REV. 221, 241 (1968).

For a judicial interpretation suggesting a means of avoiding an apparent requirement of the long-arm statute that plaintiff be a forum domiciliary, see Williams v. Connolly, 227 F. Supp. 539 (D. Minn. 1964). In *Williams*, the court concluded that the statutory requirement that nonresident defendant enter into a contract with a forum domiciliary, to be performed in whole or in part by either party within the forum, would be satisfied where nonresident plaintiff's cause of action arose out of an implied warranty attaching to the contract between nonresident defendant and forum domiciliary.

Because of the author's belief that foreign attachment actions are intended to be and generally are in fact available to nonresident, as well as resident plaintiffs, and the fact that a number of long-arm statutes provide in personam jurisdiction for the benefit of resident plaintiffs only, the author finds it difficult to accept the assertion that the existence of long-arm statutes negates the jurisdictional significance of foreign attachment actions. *Compare* Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973), *with* National Gen. Corp. v. Dutch Inns of America, Inc., 15 Cal. App. 3d 490, 496 n.4, 93 Cal. Rptr. 343, 347 n.4 (Ct. App. 1971).

78. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

the forum's conclusion that, in return, that state's courts may assure, at least partially, the efficacy of any judgment entered against the defendant by attachment and retention of the res, if the foreign attachment results only in quasi in rem jurisdiction. Similarly, the forum may conclude that any enlargement of the res effected by pendente lite attachment of defendant's property, which is within the forum state with the express or implied consent of defendant, should remain available to satisfy a judgment for the plaintiff. Presumably, thus asserting its judicial power over the in-forum property and assuring some degree of efficacy to its judgments serves a legitimate interest of the forum state. Since the degree of efficacy so assured (the dollar value of the res) coincides precisely with the degree to which nonresident defendant has invoked the benefits and protections of the state's laws with regard to his property, there is struck a neat quid pro quo bargain. Because the "invocation" language comes from the Court's opinion in *Hanson* spelling out the justification for and the extent of in personam jurisdiction which a court may assert over a nonresident defendant, that language assumes a unique, perhaps even an a fortiori, significance when used to describe the justification for and the extent of quasi in rem jurisdiction which a court may assert over the attached property of a nonresident defendant, for the specific purpose of assuring at least partial efficacy to the court's judgment and the state's interest in that assurance. Where, as here, the jurisdiction being considered is only quasi in rem and not in personam, the state's need for such assurance is enhanced since the judgment, to the extent to which it exceeds the dollar value of the res, will receive no full faith and credit in sister states; the in-forum execution potential of the judgment will determine its total dollar efficacy. Consequently, the state interest identified is not only realistic, but significant as well, and the imposition on the nonresident defendant will go no further than the extent to which he benefited from the forum's protective laws.

It is suggested, therefore, that (failing a determination that the attachment court acquires in personam jurisdiction over nonresident defendant) the Court should conclude that there exists a significant state interest sufficient to justify the pre-hearing attachment of a nonresident defendant's property in an action initiated by foreign attachment and that the attachment court may constitutionally retain the res (and any enlargement thereof) as a means of satisfying its judgment, should that ultimate money judgment favor the plaintiff.

There remains a related and troubling issue: How should the Court react to those foreign attachment actions where the attached res consists of property of a nonresident defendant, but the presence of the property within the forum state is not explicable in terms of any consent, express or implied, on the part of the defendant? *Harris v. Balk*[79] and *Seider v. Roth*[80] are examples of the problem.

Much of the judicial discomfiture[81] occasioned by *Harris v. Balk*

79. 198 U.S. 215 (1905). Epstein sued Balk, a resident of North Carolina, for $344 in a Maryland court. The action was initiated by serving Harris, a resident of North Carolina, while he was temporarily in Maryland. Epstein asserted that Harris (garnishee) owed Balk $180. Harris admitted the obligation, whereupon the Maryland court directed him to pay the $180 to Epstein. Harris complied with the order. Subsequently, Balk sued Harris in North Carolina seeking to recover the $180 debt. Harris asserted the earlier Maryland decree as a defense. Finding that the foreign attachment had provided the Maryland court with quasi in rem jurisdiction to the extent of the obligation attached, the Court required that North Carolina extend full faith and credit to the Maryland decree.

80. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Plaintiffs, New York domiciliaries injured in a three-car collision in Vermont, sued Lemiux, a resident of Quebec and the driver of one of the cars, in a New York proceeding. The action against Lemiux was initiated by serving Hartford Accident & Indemnity Co., Lemiux's liability insurance carrier which was doing business in New York. The Court of Appeals of New York decided that the carrier's duty to defend its insured constituted an attachable res and, thus, service on the carrier (garnishee) in New York gave the court quasi in rem jurisdiction. Subsequently, the court of appeals determined that the dollar value of the res attached coincided with the liability policy limits. Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *motion for reargument denied per curiam*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968). That transfiguration of the res from a duty to defend to a duty to indemnify is explicable to the extent that one is willing to characterize the latter duty as "additional property" of nonresident defendant which comes into the possession of carrier-garnishee at the instant final judgment is entered for plaintiff and against the nonresident defendant. The court of appeals apparently recognized the futility of limiting the res to the carrier's duty to defend. Once a final judgment for plaintiff and against nonresident defendant were entered —the instant when the dollar value of the res becomes critical—the duty to defend would be exhausted.

Seider jurisdiction has been asserted in California, Turner v. Evers, 31 Cal. App. 3d 11, 107 Cal. Rptr. 390 (Super. Ct. App. Dep't 1973), and in Minnesota, Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

81. Even granting the availability of the doctrine of forum non conveniens as an assuaging tool in these instances, were we faced today with a case like the *Harris v. Balk* of old, in which a defendant's debtor wanders across a border line and thereby subjects the defendant to the process of a strange and distant state, the tendency to call a halt would be strong.

Steele v. G.D. Searle & Co., 483 F.2d 339, 348-49 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3501 (U.S. Mar. 4, 1974).

In *Steele*, plaintiff, a Kansas resident, sued defendant, a Delaware corporation having its principal place of business in Illinois, to recover damages for "a serious and debilitating stroke," *id.* at 341, allegedly caused by plaintiff's use of defendant's birth control pills. The action was initiated in a Mississippi state court by serving three drug companies doing

arises from the factual inability of Balk to have prevented Harris from traveling to Maryland. Since Harris's presence in Maryland was all that was required to give the Maryland court quasi in rem jurisdiction over the debt owed by Harris to Balk in the foreign attachment action initiated by Epstein against Balk, the nonresident defendant found himself bound by the Maryland judgment to the extent of the res attached (the debt owing from Harris to Balk) absent any volitional conduct on his part with regard to the presence of the res in Maryland. That kind of quasi in rem jurisdiction seems extraordinarily difficult to justify constitutionally. After all, the nonresident defendant did nothing, expressly or impliedly, to invoke the benefits of the forum's laws in a manner protective of his property. Two basic alternatives exist: characterize the jurisdiction as in personam and attempt to justify that conclusion, or retain the quasi in rem characterization and declare it unconstitutional.

Personal jurisdiction could be found and approved in the manner suggested earlier in regard to foreign attachment actions generally. The significance of the attachment would lie in its capacity to apprise nonresident defendant of the proceedings against him and to afford him an opportunity to defend. "Minimum contacts" between the nonresident defendant and the forum state, giving rise to the cause of action, would no longer be required to justify the in personam jurisdiction because (1) the concept of independent sovereignty and the *capias ad respondendum*—historical foundations for the requirement—no longer have significance as between states of the United States, and (2) the defendant's continuing capacity to

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business in Mississippi and owing defendant a total of $2,458,996.17. Defendant removed the case to federal court and moved to dismiss the action on the alternative grounds that (1) the foreign attachment was not permissible under Mississippi's foreign attachment statute, or (2) if permissible under the statute, the foreign attachment was violative of due process in that Mississippi had had no contract with the operative facts underlying the cause of action asserted. The Fifth Circuit concluded that the foreign attachment statute was applicable and that quasi in rem jurisdiction to the extent of the res attached was constitutionally permissible. The court's opinion indicates that its uneasiness with *Harris* was dissipated by the facts before it:

> However, we are not here presented with the Case of the Peripatetic Debtor. [Searle] can hardly claim to be a stranger to Mississippi or its laws. It has regularly dealt with companies incorporated or licensed to do business in Mississippi. In the course of these transactions Searle both expected and received the protection of Mississippi law. The prospect of having to defend a suit in that state, albeit on a foreign cause of action, cannot fairly be seen as a rude and unbelievable shock to a company . . . that ships several hundred thousand dollars worth of merchandise into Mississippi each year.

Id. at 349.

utilize a *forum non conveniens* motion to dismiss or a 1404(a) motion to transfer provides appropriate and adequate protection against unduly inconvenient litigation. Once the jurisdiction acquired was identified as in personam, the court would be required to release the attached property (the attachment having served its function as a means of effecting constructive service) and the res would not remain uniquely vulnerable to a judgment issued by the attachment court. There would then be no need to attempt to justify judicial retention of the res; therefore, the absence of the nonresident defendant's consent, express or implied, to the presence of his property within the forum state would be immaterial. Should that view of in personam jurisdiction prove to be unsatisfactory to the Court, and the jurisdiction arising out of a foreign attachment action continue to be characterized as quasi in rem, then, in those cases where the presence of nonresident defendant's property within the forum state is without the consent of the defendant, such a proprietary assertion of judicial control over defendant's property should be deemed unconstitutional.

In the *Seider* cases,[82] as in *Harris*, the "obligations" owing to the nonresident defendant—his liability carrier's duties to defend and indemnify[83]—are within the forum state only because of the presence of the garnishee (carrier) and that presence is beyond the control of the defendant (insured).[84] Therefore, the basic alternatives available are to characterize the jurisdiction as in personam and justify that conclusion or to characterize the jurisdiction as quasi in rem and conclude that, absent any volition on the part of nonresident defendant with regard to the presence of the res within the forum, the court in that state cannot constitutionally assert control over the res.

Each of the considerations favoring a determination of in personam jurisdiction in foreign attachment actions set forth earlier is

82. *Compare* Vaage v. Lewis, 288 N.Y.S.2d 521 (Sup. Ct., App. Div. 1968), *with* McHugh v. Paley, 63 Misc. 2d 1093, 314 N.Y.S.2d 208 (Sup. Ct. 1970). In *Vaage*, the court determined that *Seider* jurisdiction was unavailable to nonresident plaintiffs. In *McHugh*, the court permitted nonresident plaintiff to assert *Seider* jurisdiction in light of the unique hardship which would otherwise have been imposed on plaintiff; *see* Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2nd Cir. 1969).

83. *See* note 80 *supra*.

84. Even if insured were uniquely sophisticated in the nuances of the law and assiduously avoided purchasing liability insurance from a carrier doing business in New York—as a means of avoiding *Seider* jurisdiction—he could not prevent the carrier from opening a New York office during the term of the policy.

applicable to a *Seider* type case. In addition, what occurs in the attachment court even under existing law—a defense on the merits conducted by counsel selected by the liability carrier—is precisely what would occur were the action initiated by personal service of process. Consequently, a determination of personal jurisdiction would do no violence to the defendant's due process rights legally or factually.

In those cases in which the res attached consists of wages due the nonresident defendant in the possession of a resident employer (garnishee), it seems fair to conclude that the presence of the res within the forum is, as was true in *Harris* and *Seider*, without the consent, express or implied, of defendant. Even if the defendant accepted a job with an employer having places of business in a number of different states, it would be contrary to common sense and economic reality to conclude that the employee had "consented" to the presence of his wages in any state in which employer engages in business. Therefore, those foreign attachment actions initiated by an attachment of the nonresident defendant's wages in the hands of an employer doing business in the forum should be treated as giving rise to in personam jurisdiction or no jurisdiction at all. If in personam jurisdiction is approved, the wage attachment, once having fullfilled its notice function, should be released.

In summary, the following suggestions are respectfully offered to the Supreme Court for its consideration, when the Court deems it appropriate to determine the constitutional validity of a pre-hearing attachment as a means of initiating a foreign attachment action and to determine the applicability of Subchapter II to such actions:

1. The Court should conclude that Subchapter II of the Consumer Credit Protection Act is applicable to wage attachments effected to initiate foreign attachment actions.[85]

2. The Court should conclude that the property attachment effected to initiate a foreign attachment action operates as a form of constructive service and affords the attachment court in personam jurisdiction over nonresident defendant to the full extent of the cause of action asserted against him, and, the attachment, having fulfilled its function once notice to the defendant is effected, must be released by the court.

85. Should the Court accept suggestion 2, the significance of this conclusion would lie in imposing the statutory ceiling on the portion of wages attached in the first and temporary and only attachment. Should the Court accept suggestion 4, this conclusion would be without significance.

3. If the Court is unwilling to accept that conclusion of in personam jurisdiction, it should conclude that the foreign attachment action affords the court quasi in rem jurisdiction and that the court may assert continuing control over the res (and any pendente lite enlargement thereof) as a means of assuring efficacy to its judgment, in those cases where the presence of the res within the forum is the product of consent, express or implied, on the part of the nonresident defendant.

4. In those cases where the presence of the res within the forum is without the consent of the nonresident defendant (still assuming the Court's unwillingness to accept in personam jurisdiction as a consequence of the foreign attachment), the Court should conclude that the attachment court has no interest sufficient to justify either the assertion of quasi in rem jurisdiction or the retention of the res as a means of assuring efficacy to its judgment.