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Maritime Attachment And Arrest: Facing A Jurisdictional And Procedural Due Process Attack

MARITIME ATTACHMENT AND ARREST: FACING A JURISDICTIONAL AND PROCEDURAL DUE PROCESS ATTACK

The body of substantive and procedural law governing the disposition of maritime claims in the federal courts provides the mechanism for resolution of the unique problems arising out of international sea commerce. As with any legal system, the components of admiralty law must be analyzed in terms of changing notions of fair play and substantial justice. The fact that a procedure afforded due process under an ancient legal system does not mean that the same procedure provides adequate protection to persons in a contemporary context.[1] Recent Supreme Court decisions have substantially altered traditional notions of procedural and jurisdictional due process. Initially, the Court held that certain state statutes allowing prejudgment attachment of property without prior notice or hearing or other procedural safeguards to protect the property owner violated the owner's fourteenth amendment guarantee of procedural due process.[2] A more recent decision invalidated a state court's assertion of jurisdiction based on the fortuitous presence of the defendant's property within the state.[3] The Court held that jurisdictional due process required that all assertions of state court jurisdiction, whether in personam, in rem or quasi in rem,[4] should be governed by a minimum contacts standard.[5]

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[1] Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

[2] North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (garnishment statute); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) (sequestration statute); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin statute); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wage garnishment statute). Because of the common development of fourteenth amendment procedural due process principles in these cases, this development will be referred to as the *Sniadach* line of cases. *See* text accompanying notes 41-56 *infra*.

[3] Shaffer v. Heitner, 433 U.S. 186 (1977).

[4] The *Shaffer* Court defined in rem and quasi in rem jurisdiction, stating that:

> A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a preexisting claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. (citation omitted)

Id. at 199 n.17. An in personam judgment may be rendered where the jurisdiction of the court which renders it is based on the court's power over the parties upon and in favor of whom the judgment is issued. An in personam judgment imposes a personal liability or obligation upon one or more parties. RESTATMENT OF JUDGMENTS § 34 (1942).

[5] Shaffer v. Heitner, 433 U.S. 186, 207, 212. The minimum contacts standard was first adopted in an action asserting in personam jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The *International Shoe* Court held that a state court could subject a defendant to a personal judgment if that defendant had sufficient contacts with the jurisdiction so that an assertion of personal jurisdiction would not offend modern notions of fair play and substantial justice. 326 U.S. at 320. In *Shaffer*, a Delaware court attempted to assert jurisdiction over a defendant who, although he lacked the minimum contacts necessary for a valid assertion of in personam jurisdiction, had property in the state. *See* text accompanying

Although none of the Court's recent decisions were decided in a commercial maritime context, the procedures invalidated are sufficiently analogous to the admiralty procedures of maritime attachment[6] and in rem arrest[7] of vessels to raise doubts about the constitutional validity of these ancient admiralty procedures.[8] The two-pronged inquiry required to deter-

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notes 60-74 *infra*. The *Shaffer* Court invalidated the assertion of jurisdiction emphasizing that absent adequate contacts among the forum, the defendant, and the litigation, any assertion of jurisdiction would violate modern notions of fair play. 433 U.S. at 208-09. For a discussion of modern bases of minimum contacts jurisdiction, see von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) [hereinafter cited as von Mehren & Trautman].

[6] Maritime attachment, the admiralty equivalent of foreign attachment, serves to compel a defendant's appearance and to secure a fund for satisfaction of a successful suit. *E.g.*, Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 693 (1950). The sequestration statute, DEL. CODE tit. 10, § 366 (1974), application of which was invalidated in *Shaffer*, is analogous to maritime attachment in that, as the equity counterpart of foreign attachment, 433 U.S. at 194 n.10; *see* text accompanying notes 60-63 *infra*, the Delaware sequestration procedure was also designed to compel the personal appearance of a nonresident defendant, Sands v. Lefcourt Realty Corp., 117 A.2d 365, 366 (Del. 1955); *see* Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973). The *Sniadach* line of cases considered the constitutionality of summary prejudgment attachment and garnishment statutes designed to secure funds for satisfaction of any potential judgment awarded to the plaintiff. *See* text accompanying notes 41-56 *infra*. The statutes invalidated in the *Sniadach* line of cases are analogous to maritime attachment procedure because they were summary and ex parte in nature. *See* FED. R. CIV. P. ADM., SUPP. B & E; text accompanying notes 9-13 *infra*.

[7] In rem arrest, as codified in FED. R. CIV. P. ADM., SUPP. C & E, is comparable with the statutes held unconstitutional in the *Sniadach* line of cases. The arrest procedure is ex parte, summary in nature, requires no judicial review before issuance of the writ, and contains no provisions for an immediate postseizure hearing. *See* McCreary, *Going For The Jugular Vein: Arrests and Attachments in Admiralty*, 28 OHIO ST. L.J. 19, 24 (1967) [hereinafter cited as McCreary]. For a discussion of the procedure of *Fed. R. Civ. P. Adm., Supp.* C, see text accompanying notes 25-43 *infra*.

The admiralty in rem proceeding is related to the jurisdictional issue confronted in Shaffer v. Heitner, 433 U.S. 186 (1977), because jurisdiction for an admiralty in rem proceeding is based solely on the presence of the property within the jurisdiction. Ex Parte Republic of Peru, 318 U.S. 578, 587 (1943); Dow Chemical Co. v. Barge UM-23B, 424 F.2d 307, 311 (5th Cir. 1970); *see* Rogers, *Enforcement of Maritime Liens and Mortgages*, 47 TUL. L. REV. 767, 768 (1973) [hereinafter cited as Rogers]. *Shaffer* held that assertions of jurisdiction based solely on the presence of property, without regard to contacts among the defendant, the forum, and the litigation, were invalid. 433 U.S. 186, 208-09 (1977); *see* text accompanying notes 60-72 *infra*.

[8] Three litigants have unsuccessfully attacked the procedures of maritime attachment and in rem arrest as violating the procedural due process mandates found in the *Sniadach* line of cases. Amstar Corp. v. M/V Alexandros T., 431 F. Supp. 328, 333-34 (D. Md. 1977) (actual notice to vessel owner and availability of immediate postseizure hearing, due to local court rules, afforded ship owner due process rights); Central Soya Co. v. Cox Towing Corp., 417 F. Supp. 658, 662-64 (N.D. Miss. 1976) (court held that the *Sniadach* line of cases generally required notice or hearing prior to seizure, but determined that need to seize a vessel to establish in rem liability was an extraordinary circumstance justifying seizure without prior hearing); Techem Chem. Co. v. M/T Choyo Maru, 416 F. Supp. 960, 967-70 (D. Md. 1976) (court noted that the *Sniadach* line of cases required hearing prior to attachment but indicated that maritime in rem seizure was an extraordinary situation justifying seizure without prior notice or hearing).

mine the validity of these procedures is, first, whether the summary, ex parte nature of in rem seizure and maritime attachment acts to deprive property owners of their property without according them due process rights and, second, whether these maritime procedures, which assert jurisdiction over persons with interests in the seized property, violate modern constitutional standards of jurisdictional due process.

The procedure of maritime attachment as codified in Supplemental Rule B of the Federal Rules of Civil Procedure[9] serves the dual function of vesting the court with jurisdiction over the defendant's property to compel his appearance and of securing a fund for satisfaction of the plaintiff's claim.[10] A plaintiff with a personal claim against a defendant who is not present in the district[11] may have any of the defendant's property attached.[12] The defendant must either appear and defend against the claim or default and lose the property attached.[13] Invocation of maritime attachment is summary and ex parte.[14] The plaintiff initiates the maritime at-

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The President of the Maritime Law Association of the United States has argued that the *Sniadach* line of cases and *Shaffer* should not be literally applied to the admiralty procedures of maritime attachment and in rem arrest because the decisions were not made in a commercial maritime context and the Court, therefore, never considered the effects the holdings might have on admiralty practice. Letter from David R. Owen to Members of the Maritime Law Association of the United States (August 1, 1977) (on file WASH. & LEE L. REV.).

[9] FED. R. CIV. P. ADM., SUPP. B allows both attachment of the defendant's property and garnishment of credits and effects of the defendant in the possession of third persons. Thus, intangibles such as bank accounts and insurance proceeds may be garnished. *Cf.* Federazione Italiana, D.C.A. v. Mandask Compania D. V., 158 F. Supp. 107, 108, 111 (S.D.N.Y. 1957) (garnishment of hull insurance proceeds available but failed because defendant could be "found" within the district, *see* text accompanying notes 11-12 *infra*).

[10] *E.g.*, Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 693 (1950); Manro v. Almeida, 23 U.S. (10 Wheat.) 473, 489 (1825).

[11] FED. R. CIV. P. ADM., SUPP. B; *see* note 16 *infra*.

[12] Only property within the territorial limits of the district may be attached. FED. R. CIV. P. ADM., SUPP. E(3)(a). In attaching intangibles such as debts, courts in the past have generally regarded the location of the garnishee to be determinative of the situs of the intangible. *See, e.g.*, Harris v. Balk, 198 U.S. 215, 222 (1905); Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241, 255 (1939); von Mehren & Trautman, *supra* note 5, at 1157.

[13] Attachment of a nonresident's property coerces an appearance by threatening the sale of the nonresident's property and application of the proceeds to satisfy the claim that has been brought against him. *See* Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950); Manro v. Almeida, 23 U.S. (10 Wheat.) 473, 487-89 (1825); Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303, 305 (1962). When maritime attachment is used in conjunction with an in personam claim, damages awarded cannot exceed the value of the property attached. *See* McCreary, *supra* note 7, at 20. The defendant may enter a restricted appearance, submitting to the jurisdiction of the court for the sole purpose of defending against the claim which was initiated by the attachment or arrest. FED. R. CIV. P. ADM., SUPP. E(8). By entering a restricted appearance a defendant or vessel owner can protect his property interests without subjecting himself to personal service in the jurisdiction. *See* Logue Stevedoring Corp. v. The Dalzellance, 198 F.2d 369, 372 (2d Cir. 1952).

[14] For a discussion of the procedure of maritime attachment, see McCreary, *supra* note 7. A judicial proceeding is ex parte when it is conducted at the instance and for the benefit

tachment procedure by including in his complaint a request that the defendant's property be attached[15] and by submitting an affidavit alleging that the defendant cannot be found within the district.[16] Upon receipt of these documents, Supplemental Rule B directs the clerk to issue a summons and process of attachment[17] and instructs the marshal to attach the defendant's assets.[18] The defendant generally will not receive notice of the attachment until he is served with the complaint by mail[19] and he is not able to regain possession of his property until security sufficient to equal the amount of the plaintiff's claim is posted or arrangements for the release of the property are made through negotiations with the plaintiff.[20]

Like maritime attachment, in rem seizure of a vessel[21] under Supple-

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of one party only and without notice to or contestation by any person adversely interested. Van Allen v. Superior Ct., 37 Cal. App. 696, 174 P. 672 (1918); Stella v. Mosele, 299 Ill. App. 53, 19 N.E. 2d 433 (1939). The term *summary*, used in connection with legal proceedings, means a short, concise, and immediate proceeding. Vance v. Noel, 143 La. 477, 78 So. 741 (1918).

[15] FED. R. CIV. P. ADM., SUPP. B(1). The prayer for process to attach is contained in a verified complaint. *Id.*

[16] *Id.* The affidavit may be signed by the plaintiff or his attorney and the allegation that the defendant cannot be found within the district may be based on the affiant's own knowledge or his information and belief. *Id.* Supplemental Rule B does not define the phrase "found within the district." The Advisory Committee notes indicate that unless a defendant may be personally served within the district, his property will be subject to maritime attachment. PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE, 39 F.R.D. 69, 148 (1966). FED. R. CIV. P. 4(d)(7) & (e) have expanded the jurisdictional reaches of the federal district courts by authorizing personal service of absent defendants in the manner prescribed by long-arm statutes of the state in which the court is located. The Advisory Committee, however, apparently did not intend to limit the use of maritime attachment to cases where personal jurisdiction could not be obtained by any method. On the contrary, the Committee intended to expand the use of maritime attachment by allowing attachment whenever the defendant could not be personally served with the summons and complaint within the district. *See* PROPOSED ADMENDMENTS TO RULES OF CIVIL PROCEDURE, 39 F.R.D. 69, 148 (1966); McCreary, *supra* note 7, at 34-39.

[17] FED. R. CIV. P. ADM., SUPP. B(1).

[18] FED. R. CIV. P. ADM., SUPP. E(4)(a). When it appears from the face of the documents that the defendant cannot be found within the district, the marshal is required to execute the process of maritime attachment. *Id.*

[19] FED. R. CIV. P. ADM., SUPP. B(2) provides that no default judgment may be entered unless the plaintiff has given notice of the action to the defendant by mail, served the defendant in a manner prescribed by FED. R. CIV. P. 4(d) or (i), or has been unable to give notice to the defendant despite diligent effort. FED. R. CIV. P. 4(d) authorizes service in accordance with the long-arm statutes of the state in which the federal district court is located while FED. R. CIV. P. 4(i) prescribes procedures for service upon inhabitants of foreign countries. The Advisory Committee's view of the need for notice to the defendant is reflected by its assertion that when garnishment is accomplished, no notice to the defendant is required by due process because the garnishee, under the doctrine of Harris v. Balk, 198 U.S. 215 (1905), would be required to notify the defendant that his credits had been garnished or be deprived of the right to plead the garishment judgment as a defense in a later action against him by the defendant. 5 A. KNAUTH & C. KNAUTH, BENEDICT ON ADMIRALTY 248 (rev. 6th ed. 1974).

[20] FED. R. CIV. P. ADM., SUPP. E(5)(a), (b), & (c).

[21] The right to seize a vessel or any other maritime property in rem under FED. R. CIV. P. ADM., SUPP. R. C is based on the existence of a maritime lien against the vessel or property.

mental Rule C[22] is a summary ex parte procedure.[23] When the plaintiff files a verified complaint describing the property which is the subject of the action,[24] the clerk is directed to issue a warrant for the arrest of the vessel.[25] Notice to any interested party is required only if the release of the vessel has not been arranged within ten days[26] in which case notice by publication in the district is required.[27] As with maritime attachment, the property cannot be released until arrangements for adequate security are made.[28]

The primary difference between maritime attachment and in rem seizure is the extent of jurisdictional power over seized property each procedure vests in the court. Maritime attachment is limited to use in conjunction with an in personam claim.[29] Maritime attachment of the defendant's property vests the court with jurisdiction to adjudicate the plaintiff's claim[30] against the defendant and allows the court to dispose of the property in accordance with its decision.[31] Thus a judgment adverse to the defendant and sale of his property pursuant to an action initiated by maritime attachment extinguishes only the defendant's interests in the property.[32] In contrast, the right to seize a vessel pursuant to an in rem

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See notes 33 & 34 *infra*. A maritime lienor may also seize cargo, *see, e.g.*, 4,885 Bags of Linseed, 66 U.S. (1 Black) 108 (1861), and freight monies, *see, e.g.*, United States v. Freights of S.S. Mount Shasta, 274 U.S. 466 (1927). *See* McCreary, *supra* note 7, at 27. For simplicity, the term "seizure of a vessel" will be used to indicate all property seizable by virtue of the existence of a maritime lien.

[22] FED. R. CIV. P. ADM., SUPP. C.

[23] *See* note 14 *supra*.

[24] FED. R. CIV. P. ADM., SUPP. C(2). The complaint must also state that the property to be seized is in the district or is expected to be in the district during the pendency of the action. *Id.*

[25] FED. R. CIV. P. ADM., SUPP. R. C(3).

[26] FED. R. CIV. P. ADM., SUPP. R. C(4).

[27] *Id.*

[28] If the parties cannot agree on the value of a bond to release the property seized, the court is authorized to fix bond for the release of the property. FED. R. CIV. P. ADM., SUPP. E(5).

[29] *See* FED. R. CIV. P. ADM., SUPP. B(1).

[30] *See* Manro v. Almeida, 23 U.S. (10 Wheat.) 473 (1825). There is no requirement that the property attached have any relationship to the plaintiff's claim. *See, e.g.*, Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950) (vessel attached owned by same company owning vessel which damaged plaintiffs cargo); Federazione Italiana, D.C.A. v. Mandask Compania D.V., 158 F. Supp. 107 (S.D.N.Y. 1957) (bank account attached in a suit for nondelivery of cargo).

[31] Although a court has no jurisdiction over a person against whom a personal claim is asserted, the court may, by proper service of process, acquire jurisdiction to apply to the satisfaction of the personal claim, interests in property belonging to the person against whom the claim is asserted which is subject to the jurisdiction of the court. *See* Pennoyer v. Neff, 95 U.S. 714 (1877); RESTATEMENT OF JUDGMENTS § 34 (1942).

[32] In a proceeding begun by attachment or garnishment, the judgment is only conclusive as to the defendant's interests in the thing attached or in the obligation of the garnishee to the defendant. RESTATEMENT OF JUDGMENTS § 76 (1942). Because a purchaser of attached property at a judicial sale will take only the defendant's interest and will remain subject to all other claims on the property, the prudent buyer is less likely to purchase the property at its market value.

action depends on the existence of a maritime lien[33] against the vessel.[34] Seizure of the vessel, which initiates the in rem action to enforce the maritime lien, gives the court power to adjudicate the validity of the lien.[35] The court is vested with jurisdiction to issue a binding judgment affecting the interests of all persons in the property[36] whether or not they were parties to the action.[37] Thus, the judicial sale of a vessel pursuant to an in rem decree passes good title to the purchaser[38] free from all other interests in the property.[39] Therefore, maritime attachment and in rem seizure are clearly differentiated by the extent of jurisdictional power they vest in the court. While maritime attachment allows a court to adjudicate a personal claim against an absent defendant and affect his interests in the attached property accordingly, an in rem seizure gives a court the power to adjudicate all interests in the seized property and pass good title to the property

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[33] FED. R. CIV. P. ADM., SUPP. C(1)(a); *see* The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 215 (1867). Maritime liens arise as a result of numerous maritime occurrences including a seamen's claims for wages, *see, e.g.*, The Merchant, 17 F. Cas. 31 (S.D.N.Y. 1847) (No. 9,434), salvage claims, *see, e.g.*, The Sabine, 101 U.S. 384 (1880), tort claims, *see, e.g.*, North Am. Dredging Co. v. Pacific Mail S.S. Co., 185 F. 698 (9th Cir. 1911), and claims in favor of a cargo owner for the safe transport of his goods, *see, e.g.*, The Maggie Hammond, 76 U.S. (9 Wall.) 435 (1869). *See generally* G. PRICE, THE LAW OF MARITIME LIENS (1940); Harmon, *Discharge and Waiver of Maritime Liens*, 47 TUL. L. REV. 786 (1973); Toy, *Introduction to the Law of Maritime Liens*, 47 TUL. L. REV. 559, 560 (1973).

[34] FED. R. CIV. P. ADM., SUPP. C.

[35] *See* The Gazelle, 10 F. Cas. 127 (D. Mass. 1858) (No. 5,289); Rogers, *supra* note 8, at 768. The continued custody of the property by the appellate court is necessary for an exercise of appellate jurisdiction. *See, e.g.*, Martin v. The Bud, 172 F.2d 295 (9th Cir. 1949). *But see* Inland Credit Corp. v. M/T Bow Egret, 556 F.2d 756 (5th Cir. 1977) (fact that funds from in rem sale were released from court's custody did not deprive court of continued jurisdiction).

[36] An in rem judgment in admiralty is binding on the entire world. *See, e.g.*, Point Landing, Inc. v. Alabama Dry Dock & Ship Bldg. Co., 261 F.2d 861, 866 (5th Cir. 1958); The Trenton, 4 F. 657 (E.D.Mich. 1880). *See generally* Rogers, *supra* note 7, at 768.

[37] Penhallow v. Doane, 3 U.S. (3 Dall.) 54 (1795); Loud v. United States, 286 F. 56, 60 (6th Cir. 1923); United States v. Steel Tank Barge H 1651, 272 F. Supp. 658, 662 (E.D. La. 1967); Morrisey v. S.S. A. & J Faith, 238 F. Supp. 877, 879 (N.D. Ohio 1964). The RESTATEMENT OF JUDGMENTS states:

> A valid judgment in rem cannot be collaterally attacked. It is in accordance with public policy that when the rights have once been finally determined, the question of the existence of the rights cannot be again litigated. It is in the interest of the successful party and of the public that the matter should be finally determined in the proceeding in which it is decided. . . . [I]t is immaterial whether the persons whose rights in the thing were affected did or did not avail themselves of an opportunity to object to the judgment. It is immaterial that a person whose rights in the thing were affected did not have actual knowledge of the proceeding, provided that a proper method of notification was employed.

RESTATEMENT OF JUDGMENTS § 2, comment a (1942).

[38] *See, e.g.*, Rounds v. Cloverport Foundry & Mach. Co., 237 U.S. 303 (1915). The rights of a purchaser of a vessel pursuant to an in rem decree have long been recognized in admiralty. "That the sale of a vessel, made pursuant to the decree of a foreign court of admiralty, will be held valid in every other country, and will vest a clear and indefeasible title in the purchaser, is entirely settled, both in England and in America." The Trenton, 4 F. 657, 659 (E.D. Mich. 1880).

[39] *See, e.g.*, Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 647 (1900).

at a judicial sale enforcing the maritime lien. Procedurally, however, maritime attachment and in rem seizure are similar because both are initiated prior to judgment and are summary and ex parte in nature.[40]

Prior to 1969, summary prejudgment creditor remedies, similar to maritime attachment and in rem seizure, had never been successfully challenged on procedural due process grounds. In *Sniadach v. Family Finance Corp.*,[41] however, the Supreme Court sustained a constitutional challenge to the summary ex parte nature of a prejudgment garnishment statute.[42] The *Sniadach* Court held that fourteenth amendment procedural due process required notice or an opportuniity for a hearing prior to the garnishment of a defendant's wages to safeguard against wrongful seizure.[43] *Fuentes v. Shevin*[44] broadened the scope of *Sniadach*. Invalidating two summary, ex parte prejudgment replevin statutes,[45] the *Fuentes* Court held that due process guaranteed a defendant an opportunity for a hearing prior to *any* deprivation of property.[46] The Court reasoned that statutory provisions requiring the plaintiff to post bond before seizure and the limited duration of the seizure did not lessen the need for an opportunity for a hearing prior to any deprivation, to protect the defendant against wrong-

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[40] *See* McCreary, *supra* note 7, at 19-21; text accompanying notes 9-28 *supra*.

[41] 395 U.S. 337 (1969).

[42] In *Sniadach*, the Supreme Court invalidated Wisconsin's wage garnishment procedure. The procedure allowed a plaintiff, by simply requesting a summons from the court clerk, to prevent payment of the defendant's wages. *Id.* at 338.

[43] The *Sniadach* Court reasoned that the right to be heard is of little worth unless a party is informed of the proceeding against him, *id.* at 339, and that grave injustices occur where prejudgment garnishment is allowed without prior hearing, *id.* at 340. *See* Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem*, 9 GA. L. REV. 589 (1975) [hereinafter cited as Hansford]; Comment, *Foreign Attachment After Sniadach and Fuentes*, 73 COLUM. L. REV. 342 (1973); 8 AKRON L. REV. 360 (1975). Lower courts have varied in their interpretation of the *Sniadach* opinion. *Compare, e.g.*, Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971) (notice or hearing before prejudgment attachment of real property is not required) *and* American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150 (D. Hawaii 1970) (notice or hearing before garnishment of corporate checking account not required) *with* Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972) *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973) (summary repossession and sale violated *Sniadach* mandates) *and* Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (replevin statute allowing seizure without hearing or notice unconstitutional).

[44] 407 U.S. 67 (1972).

[45] The statutes involved in *Fuentes* allowed a plaintiff, on ex parte application to the court clerk, to seize property purchased by the defendant under a conditional sales contract. The Court emphasized that the right to a hearing was designed to protect the individual against arbitrary encroachment and minimize mistaken deprivations of property. *Id.* at 81. The *Fuentes* Court reasoned that the opportunity for a hearing had to be provided at a time when the deprivation could still be prevented in order for such opportunity to be meaningful, *id.* at 81, and thus an individual must be given an opportunity for a hearing *before* he is deprived of his property. *Id.* at 82.

[46] In holding that the Constitution required notice and opportunity for a hearing prior to any deprivation of property, the *Fuentes* Court refused to draw a distinction between various types of property. *Id.* at 88-90; *see* Hansford, *supra* note 43, at 593; note 45 *supra*.

ful replevin.[47] The Supreme Court qualified the sweeping holding of *Fuentes* in *Mitchell v. W. T. Grant Co.*[48] There, the Court upheld a sequestration statute which allowed summary, ex parte seizure of property.[49] The *Mitchell* Court reasoned that a prior hearing was not required when the procedural safeguards in the statute sufficiently minimized the possibility of mistaken deprivation.[50] Subsequently, the Court in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[51] continued the apparent retreat from the *Fuentes* requirement that all deprivations of property be preceded by notice and a hearing.[52]

The *Di-Chem* decision nominally reaffirmed *Fuentes*,[53] but the Court cited *Fuentes* for the general proposition that deprivations of property violated the fourteenth amendment "[b]ecause the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession."[54] Significantly, the Court failed to mention a preseizure hearing requirement. The ambiguity of the *Di-Chem* opinion concerning the constitutional necessity of a hearing prior to attachment indicated a retreat from the full thrust of *Fuentes*.[55] The

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[47] The requirement that the plaintiff post bond before seizure was not considered a viable substitute for a prior hearing as a preventative measure against wrongful or mistaken repossession. Fuentes v. Shevin, 407 U.S. at 83; *see* note 46 *supra*.

[48] 416 U.S. 600 (1974).

[49] The Louisiana sequestration procedure had a number of safeguards to protect the property owner against wrongful seizure. To obtain the writ, a plaintiff filed an affidavit setting forth specific facts surrounding the claim and posted a bond to indemnify the defendant in the event of wrongful seizure. The debtor had a right to an immediate postseizure hearing in which the plaintiff had the burden of justifying the continued deprivation of property. The writ also was issued by a judge. LA. CODE CIV. PRO. ANN. arts. 282, 283, 325, 2373, 3501, 3504, 3506-8, 3510, 3571, 3574, & 3576 (West 1960).

[50] 416 U.S. at 605.

[51] 419 U.S. 601 (1975).

[52] The Georgia garnishment statute invalidated by the *Di-Chem* Court allowed issuance of a writ based on an affidavit containing only conclusory allegations. The statute also failed to provide for any postseizure hearing and did not provide for judicial intervention in the issuance of the writ. *Id.* at 607. The Court reasoned that the Georgia statute was unconstitutional because it had the faults of the statutes invalidated in *Fuentes* and lacked the procedural safeguards of the Louisiana sequestration statute upteld in *Mitchell. Id.* at 606-07; *see* notes 46 & 49 *supra*.

[53] *See* text accompanying notes 45-57 *supra*.

[54] North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 606.

[55] The assertion that the *Di-Chem* Court retreated from the strict *Fuentes* requirement of an opportunity for hearing prior to seizure is supported by the reasoning of the Court. If prior hearing were an absolute requirement, the Court could have invalidated the procedure on that basis alone. Instead, the Court considered the total effect of the procedural safeguards provided in the statute. *Id.* at 606-08. By extension of the Court's analysis, the statute would have been upheld even though it failed to provide preseizure notice or hearing if it had contained the procedural safeguards found in *Mitchell. See* Hansford, *supra* note 43, at 605-07; Kay & Lubin, *Making Sense of the Prejudgment Seizure Cases*, 64 KY. L.J. 705, 712-17, 717-18 nn. 53 & 54 (1954); Note, *Foreign Attachment Power Constrained—An End to Quasi In Rem Jurisdiction?*, 31 MIAMI L. REV. 419, 435 (1977). *See generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

language of *Di-Chem* implied that a hearing prior to seizure is not constitutionally required if other procedural safeguards provide sufficient protection against wrongful seizure.[56]

The *Sniadach* line of cases concerned the constitutional requirements of procedural due process in the context of domestic attachments for security purposes.[57] None of these decisions dealt with foreign attachment statutes. Foreign attachment, like domestic attachment, secures a fund for satisfaction of a favorable judgment; however, the procedure is also used to obtain jurisdiction over out-of-state defendants.[58] Thus, constitutional analysis of a foreign attachment statute involves two issues. First, since foreign attachment statutes, like domestic attachment statutes, are summary and ex parte in nature they must be analyzed in terms of the procedural due process mandates of the *Sniadach* line of cases.[59] Second, because foreign attachment is also a means of exerting jurisdiction, it must not exceed the limits of jurisdictional due process.

The Supreme Court recently considered a jurisdictional and procedural due process attack on a state's foreign attachment statutes deciding the case on jurisdictional grounds. In *Shaffer v. Heitner*,[60] the plaintiff, in a stockholder's derivative action against Greyhound Corporation and twenty-eight of its directors, sequestered[61] the stock holdings[62] of twenty-one of the directors in order to compel their general appearance.[63] The Court invalidated Delaware's assertion of jurisdiction and held that all assertions of jurisdiction by a state court must be evaluated according to

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[56] 419 U.S. at 606.

[57] Each of the *Sniadach* line of cases presented a creditor-debtor relationship in which the creditor, seeking to insure preservation of property for the satisfaction of a judgment in his favor, sought to bring property in the possession of the debtor into the custody of the court by means of state prejudgment seizure remedies. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 603-04; Mitchell v. W.T. Grant Co., 416 U.S. at 601; Fuentes v. Shevin, 407 U.S. at 70-72; Sniadach v. Family Fin. Corp., 395 U.S. at 337-38.

[58] Foreign attachment is used where the defendant is a nonresident or beyond the territorial limits of the jurisdiction. His goods, realty, or other property within the jurisdiction are attached. Attachment of his property will either compel him to appear or allow the court to dispose of the property attached. *See, e.g.*, Bray v. McClury, 55 Mo. 128 (1874); Megee v. Beirne, 39 Pa. 50 (1861); DEL. CODE tit. 10, § 366 (1974); note 14 *supra*.

[59] See text accompanying notes 41-56 *supra*.

[60] 433 U.S. 186 (1977).

[61] DEL. CODE tit. 10, § 366 (1974). The sole purpose of Delaware's sequestration statute is to compel the appearance of a nonresident. Hughes Tool Co. v. Fawcett Publications, Inc., 290 A.2d 693 (Del. Ch. 1972). Sequestration in Delaware is analogous to foreign attachment at law. Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 117 A.2d 365 (1955).

[62] While the stock certificates were not physically located in Delaware and, therefore, could not be attached, a Delaware statute provides that the situs of the stock of Delaware corporations is regarded as being in Delaware for purposes of attachment, garnishment, and jurisdiction of all courts in the state. DEL. CODE tit. 8, § 169 (1974).

[63] If the defendant appears in Delaware to defend the claim initiated by the sequestration procedure, his liability is not limited to the value of the property seized. Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 117 A.2d 365, 367 (1955). If the defendant does not appear to defend on the merits, any judgment entered is effective only to the extent of the value of the property seized. Cantor v. Sachs, 18 Del. Ch. 359, 162 A. 73 (1932).

the minimum contacts standard previously confined to assertions of personal jurisdiction.[64] The *Shaffer* Court indicated that this holding would have the greatest effect in cases where the property, which served as the basis for jurisdiction, was unrelated to the controversy.[65] The Court held that, while the presence of property in a state might suggest other contacts among the defendant, the forum, and the litigation, the presence of property *alone* would no longer necessarily support jurisdiction.[66] Noting that the express purpose of the Delaware sequestration statute was to compel the defendant to enter a general appearance,[67] the Court stated that where a direct assertion of personal jurisdiction over the defendant would violate constitutional standards of fair play and substantial justice, an indirect assertion of jurisdiction, by exercising judicial power over his property, would also violate those standards.[68]

The jurisdictional scheme adopted in *Shaffer* does not expressly eliminate attachment as a means of acquiring jurisdiction. *Shaffer* does require, however, that the validity of a court's jurisdiction to adjudicate a controversy be based on an inquiry into the relationship among the defendant, the forum, and the litigation and a consequent determination that ajudication in that forum is fair.[69] The *Shaffer* Court indicated that where the controversy concerns rights of the property itself, the new analysis would not generally affect present practice.[70] The most significant impact of

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[64] 433 U.S. at 212-17. The *Shaffer* Court reasoned that an assertion of jurisdiction over property was simply another way of referring to jurisdiction over the interests of persons in that property. *Id.* at 2581-82; *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, introductory note (1971). Therefore, the Court concluded that to justify an assertion of jurisdiction over a person's property, the basis for the assertion should be sufficient to justify exercising jurisdiction over the interests of the person in the property. The constitutional standard for assertion of jurisdiction over the interests of a person is the minimum contacts standard of International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See* Shaffer v. Heitner, 433 U.S. at 207. *See generally* Note, *Shaffer v. Heitner: The Supreme Court Establishes a Uniform Approach to State Court Jurisdiction*, 35 WASH. & LEE L. REV. 131 (1978).

[65] 433 U.S. at 208-09. The *Shaffer* Court cited Harris v. Balk, 198 U.S. 215 (1905) as an example of the type of quasi in rem action that would be affected by the decision. 433 U.S. at 208, 212 n.39. In *Harris*, Epstein, a Maryland resident, had a debt claim against Balk, a North Carolina resident. When Harris, who owed Balk money, visited Maryland, Epstein garnished Harris' debt and proceeded to litigate his claim against Balk. The *Harris* Court held that the garnishment of the debt gave the state court the power to adjudicate Epstein's claims against Balk. 198 U.S. at 217.

[66] 433 U.S. at 208-09.

[67] *Id.* at 209.

[68] *Id.; see* note 64 *supra*.

[69] Evaluation of the fairness or reasonableness of assertions of state court jurisdiction is made according to the standards set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The *International Shoe* fairness test is based on a determination of whether the quality and nature of the defendant's contact with or activity in the forum is such that an assertion of jurisdiction comports with the fair and orderly administration of the laws. *Id.* at 319. Thus, the minimum contacts standard is not quantitative but qualitative and its application can lead to considerable uncertainty. *See* Shaffer v. Heitner, 433 U.S. at 211.

[70] 433 U.S. at 207-09. By way of example, the *Shaffer* Court noted that where claims to the property itself were the source of controversy, it would be unusual for the state where the

Shaffer will be realized in cases where the property attached is unrelated to the cause of action.[71] In such instances, attachment should be quashed if the defendant lacks other contacts with the forum sufficient to sustain an assertion of jurisdiction under the minimum contacts standard.[72] *Shaffer* does not invalidate prejudgment attachment of property unrelated to the cause of action for purposes of security.[73] If a dissolution or dissipation of assets to satisfy a judgment becomes probable, a plaintiff may petition any forum to exercise judicial power over property within its territorial jurisdiction for the limited purpose of creating a security fund to satisfy a judgment being sought in another forum.[74]

As both a creditor security remedy and a jurisdictional device, maritime attachment, like other foreign attachment statutes, must adhere to the constitutional requirements of both procedural and jurisdictional due process. The constitutionality of assertions of jurisdiction based on the presence of property is controlled by *Shaffer*. While the *Shaffer* Court did not discuss the effect of its decision on maritime procedures,[75] the minimum contacts analysis advanced by the Court logically cannot be limited to land law. The *Shaffer* reasoning was broad in that the Court recognized an assertion of jurisdiction over a thing was actually an assertion of jurisdiction over the interests of persons in that thing.[76] Therefore, the minimum contacts standard governing jurisdiction over persons should govern all assertions of jurisdiction.[77] Maritime attachment of a defendant's property, like the sequestration procedure in *Shaffer*, often is used by a plaintiff to establish jurisdiction to litigate a personal claim against an absent defendant.[78] Thus, maritime attachment, by asserting judicial power over

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property is located to lack jurisdiction. The Court cited a state's strong interest in assuring the marketability of land and the likelihood that important records and witnesses would be located in the state as policy reasons for a state's continued need to adjudicate rights to property within its boundaries. *Id.*

[71] *Id.*, *see* note 65 *supra*.

[72] *See* 433 U.S. at 209.

[73] The *Shaffer* Court asserted that, under the minimum contacts analysis, a wrongdoer would not be able to avoid his obligations by moving his assets to a jurisdiction where he was not subject to an in personam suit. Any state where the property was located would have the power to attach the property, in conformance with *Sniadach* procedures, to create a fund to satisfy a claim against the owner being litigated in a forum where minimum contacts existed. 433 U.S. at 210. Further, the *Shaffer* Court noted that the full faith and credit clause would allow enforcement in any sister state of a judgment obtained in a minimum contacts forum. *Id.*

[74] *Id.* Commentators have stated that application of the minimum contacts standard to all assertions of jurisdiction would eliminate actions like Harris v. Balk, 198 U.S. 215 (1905), *see* note 63 *supra*, and leave a state, having no relation to a defendant or controversy, with the limited jurisdictional power to attach the defendant's assets within the state to protect them against dissipation and concealment while the controversy was being litigated in an appropriate forum. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 282. [hereinafter cited as Hazard]; von Mehren & Trautman, *supra* note 5, at 1178.

[75] *See* note 8 *supra*.

[76] Shaffer v. Heitner, 433 U.S. at 207; *see* text accompanying notes 60-74 *supra*.

[77] 433 U.S. at 207; *see* note 65 *supra*.

[78] *See, e.g.*, Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S.

attached property, is actually asserting jurisdiction over the defendant's interests in the attached property. Similarly, in rem seizure acts to vest a court with jurisdiction to adjudicate the maritime lien interests of all persons in the seized vessel.[79]

Since maritime attachment and in rem seizure are used to assert jurisdiction over the interests of persons in seized property, application of the minimum contacts standard appears mandatory. The breadth of the theory underlying the minimum contacts standard, that notions of fairness, reasonableness, and justice govern all assertions of jurisdiction,[80] also indicates that the standard should not be limited to a land context but should apply equally to maritime assertions of jurisdiction.[81] Finally, the fact that the maritime jurisdictional devices of maritime attachment and in rem seizure function in an international commercial context should not prevent the application of the minimum contacts standard to these procedures. A system of jurisdiction based on minimum contacts can be applied in an international as well as a federal context.[82]

Under a minimum contacts analysis, maritime attachment of property will no longer confer jurisdiction over a defendant's interests in property absent sufficient contacts among the defendant, the forum, and the litigation.[83] Thus, a maritime plaintiff should not be able to assert jurisdiction over an absent defendant's property and litigate a personal claim against the defendant by attaching his property within the district unless the

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684, 693 (1950); Manro v. Almeida, 23 U.S. (10 Wheat.) 473, 489 (1825).

[79] *See* text accompanying notes 33-40 *supra*.

[80] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 24 & 56 (1971); note 69 *supra*.

[81] That all assertions of jurisdiction should be reasonable was the basic contention of Shaffer v. Heitner, 433 U.S. 186 (1977). *See* text accompanying notes 60-74 *supra*. The authors of the RESTATEMENT OF CONFLICT OF LAWS noted the inconsistency between notions of reasonableness and certain quasi in rem actions:

> A state may exercise judicial jurisdiction to affect interests in a chattel situated within its territory . . . . Nevertheless, as applied in situations where the chattel is situated in a state which has no other relation to the parties or to the occurrence in question, the rule might be thought inconsistent with the basic principle of reasonableness which underlies the field of judicial jurisdiction . . . .

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 60, comment a (1971).

[82] *See* von Mehren & Trautman, *supra* note 5, at 1121. "No fundamental distinction needs to be drawn between jurisdictional problems raised by litigation involving international elements arising in an American court, state or federal, and those raised by litigation in which the nonlocal elements are connected with sister states." *Id.* at 1122. While theoretically a minimum contacts system of jurisdiction is applicable in an international context, the difficulty and expense of enforcing a judgment in a foreign country justify summary procedures designed to secure a fund for satisfaction of a favorable judgment. Generally, a valid judgment rendered by a foreign nation after a fair trial will be recognized in the United States. *See, e.g.*, Cherun v. Frishman, 236 F. Supp. 292, 298 (D. D.C. 1964); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971). The enforcing court can, however, inquire into the procedures and jurisdictional power of the rendering court. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971). *See generally* von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968).

[83] *See* text accompanying notes 60-74 *supra*.

defendant has sufficient contacts with the jurisdiction to make the assertion of jurisdiction reasonable.[84] The minimum contacts analysis will not influence cases where attachment is accomplished in a jurisdiction where the controversy arose[85] or where the defendant engages in extensive and continuous activities[86] because these are generally sufficient contacts to sustain jurisdiction.[87] Where property is attached in a jurisdiction having no substantial relation to the defendant or the controversy, however, adjudication on the merits would generally violate jurisdictional due process.[88]

While application of the minimum contacts standard to maritime attachment results in significant change where property is attached in a jurisdiction lacking contacts with the controversy and the litigants,[89] the nature and purpose of admiralty's in rem action precludes significant change of maritime in rem jurisdictional theory. Unlike maritime attachment which serves as the jurisdictional basis of an in personam claim leading to a judgment affecting the interests of only one person in the attached property,[90] enforcement of a maritime lien against a vessel in an

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[84] *See* Shaffer v. Heitner, 433 U.S. at 207-12; text accompanying notes 64-74 *supra*.

[85] Courts have increasingly recognized that due process allows an assertion of jurisdiction over a nonresident based on a single contact with the jurisdiction which gave rise to the controversy to be litigated. *See, e.g.*, OHIO REV. CODE ANN. § 2307.382 (Page Supp. 1977). The Supreme Court has recognized that isolated transactions which give rise to the cause of action are sufficient bases of an exercise of jurisdiction. McGee v. International Life Ins. Co., 355 U.S. 220 (1957). In a maritime context, a single transaction unrelated to the cause of action has been recognized as a valid basis of personal jurisdiction. Mackensworth v. American Trading Transp. Co., 367 F. Supp. 373, 375 (E.D. Pa. 1973). Nonresident water-craft statutes, *see, e.g.*, OHIO REV. CODE ANN. § 1547.36 (Page Supp. 1977), which base jurisdiction on a single transaction in the state's waters have been uniformly upheld under minimum contacts standards. *See, e.g.*, S.S. Philippine Jose Abad Santos v. Bannister, 335 F.2d 595 (5th Cir. 1964); Valkenburg K.-G. v. S.S. Henry Denny, 295 F.2d 330 (7th Cir. 1961). Therefore, an assertion of jurisdiction by maritime attachment in a jurisdiction where the controversy arose would be valid because the assertion would be reasonable under the minimum contacts standard. *See also* von Mehren & Trautman, *supra* note 5, at 1148.

[86] Even if the defendant's activities in the forum did not give rise to the cause of action, if a plaintiff can show that a nonresident defendant engaged in extensive activities within the state, a state court may assert jurisdiction over the nonresident, without violating the limits of jurisdictional due process, with respect to a cause of action not related to his activities. *See* Del Monte Corp. v. Everett S.S. Corp., 402 F. Supp. 237 (N.D. Cal. 1973); OHIO REV. CODE ANN. § 2307.382 (Page Supp. 1977); von Mehren & Trautman, *supra* note 5 at 1147; *cf.* Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (pre-*International Shoe* case holding establishment of office in a state is submission to jurisdiction).

[87] Hypothetically, if property having no relationship to the cause of action is attached and the defendant receives notice of the action, a court could constitutionally assert jurisdiction over the defendant, at least to the extent of the value of the attached property, if minimum contacts exist between the defendant and the forum. *See* Shaffer v. Heitner, 433 U.S. at 213-14 & n.40.

[88] *Id.* at 208-09. The *Shaffer* Court held that "although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction." *Id.* at 209.

[89] *See* text accompanying notes 83-88 *supra*.

[90] *See* The Morning Star, 5 F. Supp. 502, 503 (E.D.N.Y. 1933); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66, comment b (1971); text accompanying notes 33-35 *supra*.

in rem action adjudicates all rights and interests in the vessel.[91] Because an in rem action adjudicates all interests, whether they are known or "secret"[92] and whether or not the owner of the interest has notice of or is a party to the action,[93] the in rem action necessarily involves an indeterminate number of parties. Like other in rem actions that adjudicate the interests of an indeterminate number of persons,[94] jurisdiction to adjudicate and foreclose all interests in property must be vested in the jurisdiction where the property is located and cannot generally be based on minimum contacts between all interested parties and the forum.[95] The existence of an indeterminate number of parties necessarily prevents a determination of the contacts of all interested parties with the jurisdiction.[96] Even limiting in rem seizures to jurisdictions having minimum contacts with all ascertainable interested parties would make seizure impracticable because many interested parties would have no contact with the jurisdiction other than the transient presence of the ship. Thus, in a great number of in rem actions there would exist no forum in which all interested persons would be amenable to jurisdiction under the minimum contacts standard.

Many of the practical advantages which the unique system of maritime

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[91] *See* The Susana, 2 F.2d 410 (4th Cir. 1924); text accompanying notes 40-42 *supra*.

[92] The validity of a maritime lien generally does not depend on either possession or notice to third parties through filing, Thus, the maritime lien is often called a "secret" lien. Vanderwater v. Mills, 60 U.S. (19 How.) 82 (1857). Only a preferred ship mortgage, which is statutory, must be recorded. G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 482 (1957).

[93] *See* Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co., 261 F.2d 861, 866 (5th Cir. 1958); Zimmern Coal Co. v. Coal Trading Ass'n. 30 F.2d 933 (5th Cir. 1929); The Trenton, 4 F. 657, 659 (E.D. Mich. 1880); text accompanying notes 36-39 *supra*.

[94] A judicial settlement of accounts of a common trust fund is binding and conclusive on everyone having any interest in the trust whether known or not. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950). A decree of registration made after appropriate findings quiets title to property and eliminates all known and unknown claims against the property. *See, e.g.*, American Land Co. v. Zeiss, 219 U.S. 47, 63 (1911).

[95] The essential purpose of an in rem proceeding is to adjudicate all known claims to the property as well as all unknown claims. *See, e.g.*, Tyler v. Court of Registration, 175 Mass. 71, 73, 55 N.E. 812, 813, *appeal dismissed*, 179 U.S. 405 (1900). In fact, certainty against unknown claims may be said to be the in rem action's chief purpose. *Id.* Since unknown claims cannot be dealt with by personal service upon the claimant, a judicial proceeding based on the presence of the property is the only practical basis for a judgment binding against the world. *Id.; cf.* Educational Studios, Inc. v. Consolidated Film Indus., 112 N.J. Eq. 352, 164 A. 24 (1933) (court settled conflicting equitable liens of parties, some of whom were nonresidents, concerning a chattel not permanently located in state). Commentators suggest that it is generally unreasonable to force property owners to defend their property interests in a chattel in a forum where the chattel is only located temporarily. However, where the claim asserted arises from, or relates to, the use or possession of the thing against which the action is directed, in rem jurisdiction is analogous to obtaining personal jurisdiction over a person temporarily within a jurisdiction and thus is arguably more reasonable. Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of* Pennoyer v. Neff, 43 BROOKLYN L. REV. 600, 614-619 (1977); von Mehren & Trautman, *supra* note 5, at 1155-57.

[96] Unknown parties with claims could always exist and appear at a later date to contest a judgment unless that judgment was binding against the world. *Cf.* Tyler v. Court of Registration, 175 Mass. 71, 74, 55 N.E. 812, 815 (1900) (sustaining constitutionality of state in rem proceeding to quiet title).

liens and in rem decrees provides plaintiffs would also be limited by application of the minimum contacts standard to all suits in admiralty. A vessel, due to the mobile nature of maritime commerce, invariably visits places where her owners are either unknown or inaccessible. This characteristic mobility underlies the practice of holding the ship itself as security for demands against the owner.[97] Thus, even though the owner of a vessel and his assets cannot be reached, maritime law, by impression of a maritime lien,[98] allows an aggreived party to proceed against the ship itself for compensation.[99] Further, because a sale pursuant to an in rem decree passes good title to the purchaser,[100] a larger fund can be created by the sale of the vessel to compensate the plaintiff. Application of the minimum contacts standard would limit the efficacy of this procedure. If, for example, a plaintiff was tortiously injured by defendant's ship on the high seas the plaintiff would be forced to travel to a state or country where the defendant had contacts and property to litigate and satisfy his claim. The plaintiff, under minimum contacts theory, would be unable to seize the vessel and proceed against it for satisfaction of his claim in most of the ports in which it could be found because the presence of the ship alone would not provide sufficient contacts with the forum to sustain jurisdiction.[101] Thus assuming an inaccessible defendant, most jurisdictions would lack the requisite contacts with the controversy or the defendant necessary for an exercise of jurisdiction. The in rem procedure should continue to allow the plaintiff to pursue his remedy wherever the ship may be found.[102]

While in rem jurisdiction must continue to be based upon the presence of the ship within the jurisdiction, exercise of the doctrine of forum non conveniens[103] could substantially mitigate the inconvenience caused by

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[97] *See* Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 8-10 (1920); United States v. The Malek Adhel, 43 U.S. (2 How.) 210, 233-35 (1844); The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409, 415-17 (1824); 2 I. HALL & A. SANN, BENEDICT ON ADMIRALTY § 21 (rev. 7th ed. 1975).

[98] *See* text accompanying notes 33-35 *supra*.

[99] *See* text accompanying notes 33-39 *supra*.

[100] *See* note 38 *supra*.

[101] Minimum contacts theory is based on the relationship among the forum, the controversy, and the defendant. *See* text accompanying notes 64-66 *supra*. In the case of a maritime accident, the controversy concerns the relative liabilities of the parties not ownership of the property, although determination in favor of the plaintiff in an in rem action would give the plaintiff property rights in the vessel. *See* text accompanying notes 60-68 *supra*.

[102] *See* text accompanying notes 33-39 *supra*.

[103] The doctrine of forum non conveniens presupposes at least two forums in which the defendant is subject to jurisdiction and furnishes criteria, *see* note 105 *infra*, for a choice between them. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947). The doctrine is based on the discretionary power of the court. Langnes v. Green, 282 U.S. 531, 541 (1931). The court must decide whether interests of convenience and justice would best be served by retention of jurisdiction. *E.g.*, Del Monte Corp. v. Everett S.S. Corp., 402 F. Supp. 237, 242 (N.D. Cal. 1973). *See generally* Canada Malting Co. v. Paterson Steam Ships, Ltd., 285 U.S. 413 (1932); Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L. Q. 12 (1949); Note, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

seizure of a vessel in a forum lacking any contacts with the controversy or the interested parties. Under this doctrine, an in rem action could be transferred to a forum where an in personam action on the same issues is already pending or could be dismissed based on an agreement among the parties that the action be litigated in a more convenient forum.[104] Application of the doctrine of forum non conveniens to mitigate the inconvenience of litigation in a forum lacking contacts with the controversy or the chief parties is particularly appropriate because the doctrine is based upon the same considerations of convenience and fairness[105] which underlie the minimum contacts analysis.[106]

Although *Shaffer* held that a state court could not obtain jurisdiction over a non-resident solely by means of attaching property fortuitously present in the jurisdiction,[107] it did not limit the power of state courts to attach property for security purposes.[108] Nevertheless, the exercise of the power to attach property prior to judgment must comply with the procedural due process requirements of the *Sniadach* line of cases.[109] As presently constituted, the procedures of maritime attachment and in rem seizure codified in Supplemental Rules B, C, and E fail to provide the minimum procedural safeguards required by procedural due process and are therefore unconstitutional. The *Sniadach* line of cases requires that statutes which deprive persons of property prior to judgment must provide certain minimum procedural safeguards to protect the property owner against wrongful seizure.[110] The Supplemental Rules exhibit most of the procedural faults contained in the statutes found unconstitutional in the *Sniadach* line of cases. Rules B and C lack any mechanism to insure the property owner is indemnified in the event of wrongful seizure.[111] The Rules

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[104] Transfer of suits between federal district courts is facilitated by 28 U.S.C. § 1404 (1970). *See* Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960). If a foreign country would serve as a better forum, a court has the power to dismiss an action based on the stipulation that the respondents should appear and file security in any action that might be instituted against them in the foreign jurisdiction. *See* Canada Malting Co. v. Paterson Steamships Ltd., 285 U.S. 413 (1932).

[105] The specific factors for determining which of two forums would better suit the interests of fairness and convenience include the personal desires of the litigants, access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, and possibility of difficulty in application of foreign law. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Del Monte Corp. v. Everett S.S. Corp., 402 F. Supp. 237, 242 (N.D. Cal. 1973).

[106] *Compare* Del Monte Corp. v. Everett S.S. Co., 402 F. Supp. 237, 243 (N.D. Cal. 1973) *with* Buckeye Boiler Co. v. Superior Ct., 71 Cal. 2d 893, 80 Cal. Rptr. 113, 118, 458 P.2d 57, 62 (1969).

[107] *See* text accompanying notes 60-72 *supra*.

[108] *See* text accompanying notes 72-73 *supra*.

[109] *See* text accompanying notes 41-56 *supra*. The *Shaffer* Court noted that attachment for security purposes must comply with procedural due process as outlined in the *Sniadach* line of cases. 433 U.S. at 210 n.34.

[110] *See* text accompanying notes 41-56 *supra*.

[111] The requirement of posting bond by the plaintiff prior to seizure or attachment assures the defendant a means of indemnification for costs incurred contesting meritless or vexatious seizures and deters unwarranted actions. Mitchell v. W.T. Grant Co., 416 U.S. 600,

also fail to provide a procedure whereby the property owner can promptly contest the validity of the seizure.[112] Finally, the Supplemental Rules make no attempt to mitigate the dangers inherent in an ex parte procedure to issue a writ such as the possibility that facts in the complaint or affidavit are erroneous[113] or the complaint itself is frivolous.[114]

The maritime attachment and in rem seizure rules, Supplemental Rules B and C respectively, could be amended to provide more protection to the property owner without impairing the effectiveness of either procedure. First, both Rules should require a more specific factual showing of the nature of the claim[115] in order that an evaluation of the right to seize or attach could be made before issuance of a warrant or a writ.[116] The affidavit[117] alleging that the defendant could "not be found within the district" should be required to contain specific facts indicating the basis for this conclusion.[118] Second, while the mobile context of the shipping

608 (1974). Presently, the court is authorized to require any party to post bond at any time during the pendency of the action. FED. R. CIV. P. ADM., SUPP. E(2)(b). Since the court does not supervise issuance of the process to attach or seize, however, *see* text accompanying notes 9-28 *supra*, a wrongful seizure could be accomplished before the court has an opportunity to order the posting of a bond.

[112] *See* FED. R. CIV. P. SUPP. R. B,C, & E; *cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974) (debtor entitled to immediate postseizure hearing). The provision for an immediate postseizure hearing was a significant factor in the *Mitchell* Court's decision to uphold Louisiana's ex parte sequestration statute. *Id.* Lack of notice or opportunity for an *early* hearing was a defect in Georgia's garnishment statute. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 606. *But see* Amstar Corp. v. M/V Alexandros T., 431 F. Supp. 328 (D. Md. 1977) (local court rule allowing a party to meet with "on duty" judge at any time mitigated need for provision in rule allowing immediate postseizure hearing).

[113] The affidavit which must accompany an in personam complaint and prayer for attachment need only state that, to the best of the affiant's knowledge, the defendant cannot be found within the district. FED. R. CIV. P. ADM., SUPP. B(1); *see* note 16 *supra*; notes 117-23 *infra*.

[114] A meaningful review of the grounds relied on for attachment is a means of protecting against wrongful seizure. Judicial review of the application for Louisiana's sequestration writ was commended by the *Mitchell* Court. 416 U.S. at 608, 617-18. Lack of judicial intervention in issuance of Georgia's garnishment writ was one of the factors creating an unacceptable danger of wrongful seizure of property. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 607.

[115] Georgia revised their prejudgment garnishment laws after they were invalidated in *Di-Chem*. The new garnishment procedure requires enumeration of specific facts relied on to show the existence of one of the permissible grounds for issuance of a prejudgment garnishment writ. This revision is designed to correct the conclusory nature of the invalid statutes. *Compare* GA. CODE ANN. § 46-202 (Harrison Supp. 1977) (enacted 1976) *with* GA. CODE ANN. § 46-101 (Harrison 1974) (superseded 1976).

[116] A warrant is issued in the in rem procedure to arrest the vessel. FED. R. CIV. P. ADM., SUPP. C(3). A writ of attachment is issued in a maritime attachment procedure. FED. R. CIV. P. ADM., SUPP. B(1).

[117] *See* note 16 *supra*.

[118] The possibility exists that the plaintiff has not made a diligent effort to determine whether the defendant can be found within the district and an unjustified seizure could occur as a result. *Cf.* Federazione Italiana D.C. v. Mandask Compania D.V., 158 F. Supp. 107 (S.D.N.Y. 1957) (facts leading to conclusion that plaintiff failed to make bona fide effort to "locate" defendant within the district justified dissolution of attachment).

industry makes the safeguard of a hearing prior to seizure impractical, a provision for an immediate postseizure hearing to allow the defendant to contest the validity of the seizure could be readily implemented.[119] Third, prior to issuance of a writ or warrant, Rules B and C should provide for a meaningful evaluation of the right of the plaintiff to resort to attachment or seizure.[120] Finally, the Supplemental Rules should require that a plaintiff post bond before issuance of the writ or warrant to insure the defendant compensation against wrongful seizure.[121] Effecting these procedural changes would make Supplemental Rules B, C, and E comport with procedural due process as defined in the *Sniadach* line of cases without compromising the effectiveness of the procedures as creditor remedies.

Due to the international, commercial, and mobile nature of the maritime industry, summary ex parte attachment and seizure provisions are a necessary element of effective creditor remedies.[122] The *Sniadach* line of cases do not mandate preseizure notice and opportunity for a hearing,[123] but they do require a sufficient measure of procedural safeguards to protect the debtor against wrongful or mistaken deprivations of property.[124] Currently, Supplemental Rules B, C, and E do not contain sufficient safeguards to meet the procedural due process requirements of the *Sniadach* line of cases.[125] Maritime attachment and in rem seizure, as methods of vesting admiralty courts with jurisdiction over an action, will, in most cases, be unaffected by *Shaffer*. Maritime attachment, however, will no longer vest a court with jurisdiction over a controversy concerning a nonresident defendant unless minimum contacts exist among the defendant,

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[119] Georgia, responding to the *Di-Chem* decision, implemented a provision in their garnishment procedure providing a method for the defendant to immediately contest the seizure in a hearing to be scheduled no later than 10 days after the defendant's objection. *See* GA. CODE ANN. § 46-206 (Harrison Supp. 1977).

[120] In response to the due process mandates of the *Di-Chem* decision, Georgia's new statutory prejudgment garnishment scheme provides that a judge must consider the plaintiff's application for garnishment before a writ is issued. *See* GA. CODE ANN. § 46-203 (Harrison Supp. 1977). Subsequent to *Fuentes*, Florida added provisions to their replevin procedure requiring judicial scrutiny of applications for writs of replevin before issuance. *See* FLA. STAT. ANN. §§ 78.045, 78.068 (West Supp. 1976).

[121] Mr. Justice Powell stated in *Di-Chem*, "In my view, procedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security . . . ." North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 611 (Powell, J., concurring).

[122] Attachment must be executed prior to a hearing because if a ship were notified of impending seizure it could simply leave the jurisdiction. If adequate security could not be obtained in the United States, American plaintiffs could have difficulty enforcing United States judgments abroad because foreign sovereigns have broad discretion in deciding whether to enforce another sovereign's decree. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971); RESTATEMENT (SECOND) OF FOREIGN RELATION LAW OF THE UNITED STATES §§ 146-154 (1965).

[123] *See* Hansford, *supra* note 43, at 593; text accompanying notes 42-56 *supra*.

[124] *See* text accompanying notes 55-56 *supra*.

[125] *See* text accompanying notes 110-121 *supra*.

the forum, and the controversy.[126] The *Shaffer* holding should not effect the jurisdictional basis of in rem proceedings, which, because of their utility in providing maritime plaintiffs with a speedy and effective means of recovery, should be based on the court's possession of the vessel, the value of which will satisfy any judgment of the court.[127]

GREGG J. BORRI

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[126] *See* text accompanying notes 83-88 *supra*.
[127] *See* text accompanying notes 90-102 *supra*.