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THE CONFLICT BETWEEN THE SUPREME COURT ADMIRALTY RULES AND SNIADACH-FUENTES: A COLLISION COURSE?

JOSHUA M. MORSE, III*

A collision at sea can ruin your entire day.

—Thucydides**

I. INTRODUCTION

Without hesitation, any layman could recognize that the terms "maritime lien," "maritime attachment," and "arrest of a vessel" must belong to the field of maritime law. He would not, however, realize as quickly that these terms describe doctrines forming an integral part of that body of law. Nor would a landlubber be likely to know that, from its inception, maritime law has never been a part of the more familiar common law but has retained its identity as a distinct body of law concerned exclusively with the legal problems of ships, seamen, and the sea.

The reasons for the existence of a separate body of law called maritime law and of a system to enforce and administer it called maritime jurisdiction are not immediately apparent. Society seemed to feel that it needed such a unique system of laws to control sea-related legal issues.1 The continuance of this system today indicates that there is still a felt need for a distinct maritime jurisdiction to apply this law and to mold new laws of the sea.

The purpose of this article is to focus upon threats to that jurisdiction presented by current social and economic conditions. The article questions (1) whether maritime in rem and quasi in rem seizures of vessels really serve the ends for which they were designed, and (2) whether it is appropriate to accept a system that is inconsistent with recent decisions of the Supreme Court—decisions that challenge the justification for maritime arrests of vessels and maritime attachment.

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** Quoted in R. HEINL, DICT. OF MILITARY AND NAVAL QUOTATIONS 56 (1966).

1. This is strictly true at least as to international ocean commerce.
In particular, the article explores the threat to procedures for executing maritime liens and to maritime attachment in admiralty posed by the line of cases holding that some prehearing seizures violate the due process clause of the fourteenth amendment. The article also considers the threat posed by these cases to the jurisdiction of the federal courts as constitutional admiralty and maritime courts.

Because prejudgment seizure of property was such common legal procedure for centuries, until recently any effective challenge to its continued use seemed impossible. Sniadach v. Family Finance Corp. which held that attachment of a debtor's wages before a hearing violated the due process clause of the fourteenth amendment, was the first Court opinion to challenge these seizures directly. In Fuentes v. Shevin the Supreme Court clarified and extended the basic holding in Sniadach, applying the Sniadach rule to all property, not just wages or "necessaries." These two decisions now constitute a challenge to

2. The specific rules dealing with in rem actions to execute maritime liens are Fed. R. Civ. P. Supp. R. C, E.


For a view that the unification of the rules of civil procedure with admiralty procedure creates a threat to the continued existence of the in rem action and thus to separate maritime law, see Wiswall, Admiralty: Procedural Unification in Retrospect and Prospect, 35 Brooklyn L. Rev. 36, 46 (1968).


4. Admiralty and maritime matters are one of the specific constitutional grants of jurisdiction to courts of the United States. U.S. Const. art. III, § 2. The in rem action is exclusively within the admiralty jurisdiction of the United States District Courts. The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867).


6. Id. at 339-42.

7. The pre-Sniadach cases merely hold that "a hearing must be had before one is finally deprived of his property . . . ." Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974). See also id. at 611 n.10.


9. In extending the Sniadach rule to include all types of property, the Court stated: [T]he root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions [between types of property and gradations in
all prejudgment seizures of property,\textsuperscript{10} including foreign attachments\textsuperscript{11} or any other form of seizure used to acquire jurisdiction.

The concept of the maritime lien as the source of exclusive admiralty jurisdiction in rem is unique.\textsuperscript{12} Moreover, the character of the transactions occurring in worldwide ocean commerce is entirely different from that of the transactions discussed in \textit{Sniadach} and \textit{Fuentes}. This article isolates and examines these differences to determine whether they are sufficiently substantial to permit a prejudgment seizure of property to acquire jurisdiction in admiralty despite the limitations imposed by \textit{Sniadach-Fuentes}.

\section*{II. Admiralty and Maritime Jurisdiction}

\subsection*{A. Historical Summary}

The definition of maritime actions has been subject to frequent change. In the jealous competition among the early English courts, the common law judges restricted maritime matters to ridiculously narrow limits.\textsuperscript{13} The scope of maritime jurisdiction has expanded great-

\begin{footnotesize}
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\item [12.] The statute implementing the constitutional grant of admiralty jurisdiction includes a clause "saving to suitors in all cases all other remedies to which they are otherwise entitled." See notes 31-34 and accompanying text infra. As a result, the state courts are considered to have concurrent jurisdiction for in personam actions. Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 648 (1900). In \textit{Madruga v. Superior Court}, 346 U.S. 556, 560 (1954), the Court restricted exclusive jurisdiction to in rem actions, "that is, where a vessel or thing is itself treated as the offender and made the defendant . . . ."
\item [13.] For example, to come within admiralty jurisdiction, contracts had to be both
\end{itemize}
\end{footnotesize}
ly in the intervening years, passing through phases like the ebb and flow of the tides, until it has approached the point that a fact situation having a reasonably substantial effect upon maritime affairs or commerce invokes maritime or admiralty jurisdiction. For example, contracts are subject to this jurisdiction if they are of a maritime nature; torts are similarly subject if they are caused by a ship, or have a relationship with traditional maritime activities and occur within a maritime locale, even if the maritime locale is ill-defined. Maritime jurisdiction is not limited to the sea—it extends to navigable waters, even those lying wholly within one state, and to navigable vessels.

There were several factors that distinguished admiralty jurisdiction in English legal history. The English rules restricting admiralty jurisdiction to cases possessing a nexus with ocean commerce were soon rejected in this country. Those rules that restricted admiralty jurisdiction to matters occurring on the high seas and not under seal have been so stretched and amended that now a nexus with water transportation suffices to satisfy them.

related to and executed on the sea. See Morse v. Slue, 86 Eng. Rep. 159 (1672), where the rules of admiralty did not apply because the ship was infra corpus comitatus.


19. Id.


21. See, e.g., letters patent issued to Dr. Godolphin, Judge of the Admiralty Court in 1658, covering, e.g., "all causes of contract made beyond the seas concerning shipping or navigation or dammadges . . . ." R. Marsden, Marsden's Admiralty Cases 340, 342 (1885).

22. The generally accepted beginning for the expansion of federal maritime jurisdiction in this country is the opinion of Justice Story in De Lovio v. Boit, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815), which interpreted the constitutional grant to cover the broadest delegation of jurisdiction. This interpretation was extended to inland water commerce in Ex parte Boyer, 109 U.S. 629 (1884); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1866); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847). For resistance to this change, see generally The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837); Ramsay v. Allegre, 25 U.S. (12 Wheat.) 611 (1827); The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825).


24. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); Note,
Development of maritime jurisdiction in England began with the establishment of the office of Lord High Admiral and the creation of a centralized court for admiralty. This court replaced the courts of various ports, but when it became a threat to the power of the common law courts, its jurisdiction was severely limited. Admiralty jurisdiction survived, nevertheless, and, during the colonial period, courts of Vice-Admiralty in British North America possessed extensive jurisdiction.\(^5\)

When the British colonies in North America achieved independence, the founding fathers had centuries of experience upon which to pattern maritime jurisdiction in the new nation. Even with this precedent to guide them, they still had to resolve the inconsistency of incorporating a single, uniform law of the sea into a constitution intended for a nation to be composed of thirteen federated states. Surprisingly, however, discussion or dissent was almost totally lacking\(^6\) when the Constitutional Convention decided to extend the judicial power of the United States to "all cases of admiralty and maritime jurisdiction."\(^7\) The selection of the words "admiralty and maritime" was a fortunate choice; while the meaning of "admiralty" has been disputed, the term "maritime" encompasses continental sea law that might not be considered part of English Admiralty.\(^8\)

B. The Constitutional Grant of Maritime Jurisdiction

Section 9 of the Judiciary Act of 1789 gave effect to the constitutional grant of jurisdiction. Federal district courts were given exclusive and original jurisdiction over admiralty and maritime matters, "saving to suitors, in all cases, the right to a common law remedy where the common law is competent to give it."\(^9\) Thus district courts have cognizance of any admiralty or maritime action even when the familiar requirement of diversity of citizenship or federal question is not met.\(^10\) But the Judiciary Act of 1789, while professing to give "exclusive" admiralty and maritime jurisdiction to the federal district courts, erased...
much of this exclusiveness with the saving clause. As revised in 1948, that section now provides that:

The district courts shall have original jurisdiction exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.31

This saving clause controls any in personam action,32 and such an action may be brought in federal or state courts. Maritime law does not include equitable remedies.33 Only with respect to in rem actions to execute maritime liens and concursus proceedings to limit a shipowner’s liability is the jurisdiction of admiralty exclusive.34

1. The Maritime Lien.—Today, almost every suit or ground for relief in admiralty creates a maritime lien.35 This alone shows how different this lien is from a “shoreside” lien both in theory and in effect. Other major differences between actions brought in federal courts under the “exclusive” grant of admiralty jurisdiction36 and those brought in state courts37 include: (1) article III, section 2 of the United States Constitution grants jurisdiction in all admiralty and maritime cases to the federal courts;38 (2) the fifth, rather than the fourteenth, amendment delimits due process requirements in admiralty; (3) exclusive federal admiralty jurisdiction requires the existence of a maritime lien, which must be executed by an in rem action in admiralty;39 (4) under the personification theory of in rem jurisdiction

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34. “The maritime lien can be ‘executed’ (which is the admiralty terminology for ‘foreclosed’) only by an Admiralty Court acting in rem.” G. GILMORE & C. BLACK, supra note 18, at 482.
35. Id. at 512. Some of the claims listed by Gilmore and Black as not having lien status under the general maritime law have been given lien status by state or federal statute. See, e.g., Master's lien for wages against vessel, 46 U.S.C. § 606 (1970); Ship Mortgages Act, 46 U.S.C. §§ 911-84 (1970). “[W]here no lien is conferred by the general maritime law the state can confer a lien in rem provided there is a maritime cause of action. To illustrate, state statutes creating liens in rem for marine insurance premiums are enforceable in admiralty since the contract is maritime in nature.” Varian, Rank and Priority of Liens, 47 Tul. L. Rev. 751, 763 (1973).
36. See note 29 supra.
37. The term “state court” here includes the federal district courts exercising diversity jurisdiction.
38. See note 4 supra.
a vessel is a jural entity; 
(5) comity, rather than the full-faith-and-credit clause, governs international recognition of judgments; and (6) the Supreme Court has prescribed by rule the procedures for arrest of a vessel before notice to the owner.

It is generally accepted that the modern maritime lien was judicially created to meet the needs of early nineteenth century ocean commerce. The modern lien first appears in the opinion of the Privy Council in *The Bold Buccleugh*, a case involving the conflicting rights of a shipowner for collision damages and of a bona fide purchaser with no notice of the collision lien. The claims were caught in the tangled procedural net of an in rem action in England and a quasi in rem action in Scotland. From this suit emerged the following definitive characteristics of a maritime lien, still valid today: (1) the lien is secret, attaching to the vessel and remaining with it without notice to anyone; (2) the lien is "indelible" in the sense that a purchaser other than one who takes by execution or foreclosure in rem in admiralty receives imperfect title; (3) to be enforceable the lien does not require that the lienor possess the vessel; (4) a collision results in a lien on the ship itself and gives rise to an action in rem; if the owners do not appear, the lien may be enforced against the vessel as a jural entity; (5) "[a] maritime lien is the foundation of the proceeding in rem, . . . that [is] in all cases where a proceeding in rem is the proper course, there a maritime lien exists . . . "; and (6) because a proceeding in rem against a vessel differs from a foreign or maritime attachment against the owners, "it follows, that the two suits being

vessel was seized by foreign attachment in state court when a seaman attempted to arrest the vessel in a state in rem proceeding to execute a maritime lien for seamen's wages. The Court held that the state court could not sell the vessel free of the maritime lien since an admiralty proceeding in rem was necessary for the execution of the lien, and admiralty jurisdiction meant exclusion. See also *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866). The distinguishing feature of the in rem proceeding is that the sale of the vessel clears the vessel of all existing maritime liens and "conveys title free and clear of all encumbrances . . . ." D. Robertson, *Admiralty and Federalism* 131 (1970), citing Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303, 306 (1915); Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 647-48 (1899).

44. *Id.* at 884-85.
45. *Id.* at 890-91.
46. *Id.* at 884, 891.
47. *Id.* at 890.
48. *Id.* at 889-90.
49. *Id.* at 890.
in their nature different, the pendency of the one cannot be pleaded in suspension of the other."  

2. The In Rem Action.—The concept of a maritime lien has become increasingly intertwined with the in rem action by which the lien is executed: an in rem action lies only to execute a maritime lien and, conversely, a maritime lien can be executed only in an in rem proceeding. Thus the "exclusive in rem jurisdiction" of the federal district courts requires a maritime lien to support it.

There are two theories of in rem jurisdiction, the personification theory and the procedural theory. Under the personification theory, the court views the vessel as a jural person and arrests the vessel to start an in rem proceeding that fixes the liability of the vessel rather than the liability of the owner. The procedural theory treats the seizure of the vessel as a device to coerce the owner to answer; the suit then is metamorphosed into an in personam action against the owner, just as in a quasi in rem action in equity.

50. Id. at 891.
52. "The only object of the proceeding in rem . . . [is] to carry [the maritime lien] into effect. It subserves no other purpose. "The lien and the proceeding in rem . . . are, therefore, correlative—where one exists, the other can be taken, and not otherwise." The Rock Island Bridge, 73 U.S. (6 Wall.) 213, 215 (1867). To the same effect, see Justice Story's opinion in The Nestor, 18 F. Cas. 9, 11 (No. 10,126) (C.C.D. Me. 1831). While a petitory libel is brought against a vessel and may seem to be an exception to this rule, the process also runs against the adverse parties and claimants. Fed. R. Civ. P. Supp. R. D.
53. G. GILMORE & C. BLACK, supra note 18, at 482.
55. G. GILMORE & C. BLACK, supra note 18, at 483.
56. We now proceed to discuss the liability in Admiralty of the ship by the negligent navigation of which the damage was occasioned. In dealing with this branch of the subject it is almost impossible to avoid personifying the ship and speaking of her as the actual wrongdoer. . . . But it must not be forgotten that in speaking of a ship as a wrongdoer or "in fault" for a collision, we are using a figure of speech which is apt to be misleading. There are . . . cases which . . . countenance . . . the doctrine that . . . the ship is the real defendant . . . But it is submitted that this view of the liability of the ship in Admiralty is not well founded, and that at the present day it would not be followed. . . . The process of Admiralty Courts against the ship seems clearly to have originated . . . simply as a ready and effectual means of compelling the wrongdoer to appear and defend the action, or to make recompense.
57. The personification theory adopted by the English courts in The Bold Buccleugh, 166 Eng. Rep. 944 (K.B. 1850), and followed in this country until the last two decades has been rejected now by the English courts. For an extensive attack on the English courts
The English courts now follow the procedural theory, but early in its history the United States adopted the personification theory. Legal writers and historians have speculated about the origin of the latter theory. Prominent writers have alternately hoped for and predicted its early demise, but The Steamship Yaka indicates that the doctrine retains some vitality. In Yaka, a longshoreman, precluded by a federal statute from suing his employer, brought his action for personal injury against the ship. The court of appeals had held that, since neither the shipowner nor the employer could be personally liable for the injury, the in rem action failed because it was unsupported by personal liability. The Supreme Court evaded the question by deciding that the employer-charterer was personally liable. While most recent cases have found concurrent personal and in rem liability, some interpret Yaka to mean that the Court accepted the personification theory.

In Continental Grain Co. v. Barge FBL-585, the Court considered in rem jurisdiction arising from an order to transfer venue. The owner of damaged cargo had sued the vessel in rem and the owner in personam. Although the vessel could not have been arrested in the Western District of Tennessee, the owner could be sued there. The district court ordered a transfer. The Supreme Court, treating the two suits as one and regarding the personality of the vessel as a fiction, upheld the transfer. While the Court cited with apparent approval critics of the personification doctrine, it did so guardedly:

in their use of authority, as well as the validity of the authorities cited, see F. Wiswall, The Development of Admiralty Jurisdiction and Practice Since 1800, 155-208, especially 198-203 (1970). Still, Wiswall recognizes that the English rule was announced in The Dictator, [1892] P. 304, which held that an in rem proceeding was a procedural device for obtaining personal jurisdiction over the shipowners and that the shipowner by submitting to the jurisdiction of the court is liable in personam for any judgment rendered even though greater than the value of the vessel and the bond given for its release. F. Wiswall, supra, 158-61.

60. Id. The Longshoremen's and Harbor Workers' Compensation Act applies to employees on navigable waters of the United States, excluding masters and members of the crew, and makes the remedy provided by the Act exclusive and in place of all other liability of the employer. 33 U.S.C. §§ 902(3)-(4), 905 (1970).
61. 373 U.S. at 411.
62. Id. at 412. The record owner was Waterman Steamship Corporation, but the plaintiff's employer, Pan Atlantic Steamship Corporation, was the bareboat charterer. The bareboat charterer as owner pro hac vice was the one held personally liable (a bareboat charterer bears liability similar to a common law independent contractor).
63. Toy, supra note 51, at 564.
64. 364 U.S. 19 (1960).
65. Id. at 20. The action was transferred from the Eastern District of Louisiana to the Western District of Tennessee.
The fiction is one that certainly had real cause for its existence in its context and in the day . . . in which it was created. A purpose of the fiction . . . has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still.66

There are still a substantial number of circumstances in which the vessel is regarded as liable although the owner is not. Negligent acts of compulsory pilots neither chosen nor controlled by the owner can create a lien on the vessel67 but cannot create personal liability for the owner. Demise or bareboat charterers with similar legal relations to the owner can also create maritime liens on the vessel68 without giving rise to personal liability for the owner. The Yaka Court, while professing to base its decision on personal liability, made the vessel liable for the act of an employer-charterer to whom the Longshoremen’s and Harbor Workers’ Compensation Act69 granted immunity and who was neither the owner of the vessel nor the agent of the owner.70

III. THE CHALLENGE TO MARITIME ATTACHMENTS AND ARRESTS OF VESSELS

A. The Sniadach-Fuentes Limitations

In Sniadach v. Family Finance Corp.,71 the Supreme Court fired the opening salvo of a successful attack upon prejudgment seizures of property.72 Sniadach held that if a debtor was not given notice and opportunity to be heard, garnishment of his wages violated the due process clause of the fourteenth amendment.73 While the Sniadach opinion emphasized the coercion and hardships experienced by the debtor in a garnishment proceeding,74 the Court rested its holding on the lack of notice to the debtor and of opportunity for him to be

66. Id. at 23 (emphasis added).
67. The China, 74 U.S. (7 Wall.) 53 (1868); Logue Stevedoring Corp. v. The Dalmellance, 198 F.2d 369 (2d Cir. 1952).
72. The pre-Sniadach cases dealing with this area held only that “a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing . . . .” Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974).
73. 395 U.S. at 339, 342.
74. Id. at 340-42.
heard before seizure of his property. The opinion stressed that wages were "a specialized type of property presenting distinct problems in our economic system." Seizing upon these words some judges refused to apply the holding of Sniadach to cases in which the property taken was not a necessity.

In Fuentes v. Shevin the Supreme Court interpreted Sniadach broadly and invalidated Florida and Pennsylvania replevin statutes. Calling the lower courts' restriction of Sniadach to "necessities of life" a "very narrow reading," the Court chose to ignore that not all the chattels in Fuentes were necessities. Thus Fuentes extended Sniadach to seizures of any property. The Court, however, reiterated its statement in Sniadach that in certain "extraordinary situations" seizures without notice or opportunity to be heard would still be valid. Three factors had to be present before a seizure without an opportunity for hearing could be valid: (1) the seizure must be necessary "to secure an important governmental or general public interest”; (2) prompt action must be necessary; and (3) the state must maintain control

75. Id. Justice Harlan's concurring opinion is largely devoted to this issue. Id. at 342-44.
76. Id. at 340.
79. Id. at 85-90, 93, 97.
80. Id. at 88.
81. In Fuentes the chattels were a gas stove and a stereophonic phonograph. Id. at 70. In the Pennsylvania cases consolidated with Fuentes, three of the appellants claimed household goods while the fourth claimed child's clothes, furniture, and toys. Id. at 71-72.
82. Id. at 86, 89-90. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 22, 1975), the Supreme Court spoke on this precise issue. The Court said:

It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.

Id. at 4194.
84. 407 U.S. at 91 n.23.
through a governmental agent who initiates the seizure under the standards of a "narrowly drawn statute." 85

These three factors were echoed in Mitchell v. W. T. Grant Co., 86 where the Court upheld the Louisiana sequestration procedure. This procedure allowed a lienholder upon a verified affidavit to seek sequestration of the encumbered property without prior notice or opportunity for a hearing. In upholding the procedure, the Mitchell Court noted that (1) the resolution of conflicting property rights is an important state interest; (2) prompt action was necessary because the debtor, by transferring possession of the property, could defeat the seller's vendor's lien; and (3) Louisiana required that a judge authorize the writ. 87

Any new course set by Mitchell has been altered by North Georgia Finishing, Inc. v. Di-Chem, Inc., 88 in which the Court came back on the Sniadach-Fuentes course. The North Georgia Court reaffirmed its adherence to Sniadach-Fuentes principles and refused to limit application of those principles to certain types of contracts or property. 89 The Mitchell deviation was carefully boxed: the court delimited the Mitchell exception to Sniadach-Fuentes to cases where (1) the statute was carefully drawn to require factual rather than conclusory allegations warranting sequestration; (2) the writ was subject to judicial scrutiny and control before issuance; and (3) the debtor was entitled to an "immediate hearing" after the seizure and to dissolution of the writ if the creditor-plaintiff failed to prove the facts alleged in support of the writ. 90

B. Foreign Attachment—An "Extraordinary Situation"?

In Calero-Toledo v. Pearson Yacht Leasing Co., 91 decided two days after Mitchell, the Court again referred to the three Fuentes factors in upholding Puerto Rico's seizure of a yacht pursuant to a forfeiture statute. The significant governmental interest was "[to prevent] continued illicit use of the property and [to enforce] criminal sanctions." 92 Prompt action was necessary; otherwise, the yacht could be removed

85. Id. at 91.
87. Id. at 604-609. The Court specifically reserved decision on whether a court functionary could authorize sequestration. Id. at 606 n.5.
89. Id. at 4193-94.
90. Id. at 4194. See also opinion of Powell, J. (concurring in the judgment but not in the opinion), setting forth his ideas of the requirements of due process. Id. at 4195.
92. Id. at 679. The nature of the interest makes Pearson Yacht analogous to the public weal cases. See notes 110-15 and accompanying text infra.
easily from Puerto Rico's jurisdiction. The final requirement—that the state maintain control of the proceedings—was also satisfied; the Court noted that the seizure was initiated by Commonwealth officials acting pursuant to statute, not by "self-interested private parties."\(^9\)

Whether a foreign attachment without notice or opportunity for a hearing will fall within the exception to the Sniadach-Fuentes rule is questionable. In *Pearson Yacht* the Court treated the seizure of property in order to conduct forfeiture proceedings as a significant governmental interest. One might think that this question had been resolved by *Sniadach* and *Fuentes*. Both *Sniadach* and *Fuentes* seemed to cite with approval those cases upholding foreign attachments,\(^4\) but neither case explained how existing foreign attachment procedures could be reconciled with the three prerequisites for a valid prejudgment seizure imposed by *Fuentes*. This apparent conflict has led commentators\(^5\) and courts\(^6\) to different opinions about the validity of prejudgment seizures of property to acquire jurisdiction.

In both *Sniadach* and *Fuentes* the Court cited *Ownbey v. Morgan*\(^7\) to illustrate that a foreign attachment necessary for jurisdiction was an exception to the Sniadach-Fuentes rule.\(^8\) *Ownbey*, however, only challenged the requirement that the defendant post bail before he could present a defense.\(^9\) The Court's opinion was limited to this

\(^9\) See note 94 *supra*. It was the defendant who argued that seizure without notice or hearing was constitutional if he were allowed a hearing before his property was condemned. 256 U.S. at 104.

\(^9\) See note 94 *supra*. It was the defendant who argued that seizure without notice or hearing was constitutional if he were allowed a hearing before his property was condemned. 256 U.S. at 104.

\(^9\) See note 94 *supra*. It was the defendant who argued that seizure without notice or hearing was constitutional if he were allowed a hearing before his property was condemned. 256 U.S. at 104.
narrow issue; prehearing seizures were neither challenged nor ruled upon. Therefore, the reliance of the Fuentes Court on Ownbey for this exception to the rule seems misplaced.

McKay v. McInnis\textsuperscript{100} is another case that is usually interpreted by commentators and courts as holding that a foreign attachment necessary for jurisdiction is valid. But McKay was concerned only with a prejudgment seizure of property to preserve resources for satisfying judgments.\textsuperscript{101} The seizure was not necessary to acquire jurisdiction; defendant McKay had been served with a summons.\textsuperscript{102} The only issue in that case was whether the Maine statute, which allowed attachment without an affidavit showing the reason for the seizure or prima facie proof of good faith, deprived the defendant of property without due process of law.\textsuperscript{103} The influence of McKay, a one line memorandum opinion, has also been weakened by Justice Harlan's concurring opinion in Sniadach\textsuperscript{104} and his comments in Fuentes,\textsuperscript{105} in which he questioned the vitality of the Court's per curiam opinion in McKay.

To say that Ownbey-McKay hold that a seizure to acquire jurisdiction does not violate due process requirements is to ignore the facts and opinions of these two cases. Ownbey-McKay should not be used to justify such seizures. Yet many courts rely upon the reference

\textsuperscript{100} 279 U.S. 820 (1929), af'g 141 A. 699 (Me. 1928).
\textsuperscript{101} 141 A. at 701. The Maine statute was a rescript of a colonial statute of Massachusetts. The court stated that the right of attachment here did not arise from the common law but "rests solely on statute." Id. The statute in question authorized the commencement of any action except special writs by 1) "attach[ing] the goods and estate of the defendant," and 2) "for want thereof to take the body [of the defendant]" or 3) by "an original summons, with or without an order to attach goods and estate." Id. While the statute had no express provisions on the point, the courts had interpreted the statute to allow attachment without affidavit or bond so that this interpretation was said to be law by "the statutes now in force." 141 A. at 701, quoting from Bond v. Ward, 7 Mass. 128 (1810).
\textsuperscript{102} 141 A. at 701.
\textsuperscript{104} 395 U.S. at 343-44 (Harlan, J., concurring).
\textsuperscript{105} 407 U.S. at 91 n.23: "It is much less clear what interests were involved in [McKay v. McInnis], decided with an unexplicated per curiam opinion simply citing Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) and Ownbey v. Morgan, 256 U.S. 94] . . . 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." Coffin Bros. & Co. v. Bennett, supra, involved the levy by a state superintendent of banks to protect depositors of a bank which had closed its doors. This case more nearly satisfies the three requirements of Fuentes: (1) governmental or public interest, (2) need for prompt action, and (3) state action based on a narrowly drawn statute (407 U.S. at 91), than any other case cited.
to Ownbey in Sniadach and Fuentes to uphold foreign attachments used to acquire jurisdiction.106 These courts ignore the restrictions placed upon Ownbey and McKay by the Court in Fuentes.107 In Fuentes the Court vitiated McKay and limited Ownbey to those cases where foreign attachment is "necessary" to "secure jurisdiction."108 Consequently a seizure to acquire jurisdiction should be upheld only as an "extraordinary exception" subject to the qualifying rules of Fuentes.109

Except for Ownbey, all of the "extraordinary situation" cases cited in Fuentes involved the public weal. Contaminated food,110 bank failures in the great depression era,111 misbranded drugs,112 tax collection,113 and wartime price regulations are all issues of vital concern to the public and the government. But even in these areas of govern-

106. See, e.g., Lebowitz v. Forbes Leasing & Finance Corp., 456 F.2d 979 (3d Cir.), cert. denied, 409 U.S. 843 (1972). "It is quite apparent that notice as a pre-condition to an attachment might well defeat the primary purpose behind an attachment, i.e., to compel an appearance." Id. at 981. "[F]oreign attachment provides an immediate and certain basis on which to exercise jurisdiction over a nonresident defendant. It thereby constitutes a greater inducement for such a defendant to appear and consequently accomplishes one of the principal objectives underlying enactment of foreign legislation." Id. at 982. See also U.S. Industries, Inc. v. Gregg, 348 F. Supp. 1004, 1021 (D. Del. 1972): "This is not a case like Fuentes where the statutes allowed 'summary seizure' when no more than [a] private gain is directly at stake . . . . As previously noted a state has a legitimate interest in the exercise of judicial jurisdiction . . . . Seizure for the purpose of securing such jurisdiction in a state court, accordingly, serves, in the words of the Supreme Court, 'a most basic and important public interest.' " See also Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971); Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970); Property Research Financial Corp. v. Superior Court, 100 Cal. Rptr. 233 (Ct. App. 1972); Robinson v. Loyola Foundation Inc., 236 So. 2d 154 (Fla. 1st Dist. Ct. App. 1970); City Finance Co. v. Williams, 4 CCH CON. CR. GUIDE § 99,893 (D.C. Ct. Gen. Sess. 1969).

107. The restrictions were spelled out by reference to the cases:
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, 277 U.S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. [citing Ownbey] 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 cannot stand for any more than was established in the . . . . cases on which it relied completely.

407 U.S. at 91 n.23.

108. Id.

109. Id. at 90-91.


mental concern the limitations listed in *Fuentes* apply.\textsuperscript{114} Usually courts balance the interests of the parties and the public to decide if a procedure satisfies the requirements of due process.\textsuperscript{115} Now, in the case of seizures, they must also require that the *Fuentes* qualifications are satisfied.

\textbf{C. Seizures “Necessary” To Secure Jurisdiction}

Seizures necessary to secure jurisdiction were given as one example of the exception to the *Sniadach-Fuentes* rule. Citing *Ownbey*, the *Fuentes* opinion said that a seizure of property “necessary to secure jurisdiction” was “clearly a most basic and important public interest.”\textsuperscript{116} The Court’s use of the limiting word “necessary” requires a determination of what seizures are “necessary to secure jurisdiction.”\textsuperscript{117}

With the adoption of the fourteenth amendment, a state no longer was able to choose its own definition of jurisdiction. Thereafter, due process limitations were applied to proceedings in the forum state. In *Pennoyer v. Neff*\textsuperscript{118} the Court, recognizing that conflicting interests usually require a balancing test, allowed the plaintiff to sue but limited the defendant’s quasi in rem liability to the value of the seized property. A plaintiff no longer had to chase elusive defendants across state lines if he could attach or garnishee property within the state.\textsuperscript{119}

\begin{footnotes}
\textsuperscript{114} See 407 U.S. at 90-91.
\textsuperscript{116} 407 U.S. at 91 n.23; accord, Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (a defendant should “be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”)
\textsuperscript{117} 407 U.S. at 91 n.23.
\textsuperscript{118} 95 U.S. 714 (1878).
\textsuperscript{119} Compare “So long as the Courts insisted on a restrictive concept of personal jurisdiction and required service of process as a requisite of a valid default judgment, the quasi in rem jurisdiction served the useful purpose of mitigating the rigors of securing personal jurisdiction,” Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 305 (1962), with “[W]here the action is brought to enforce a personal liability of the defendant . . . [t]he existence of property within the [forum] state . . . will not of itself be a basis for jurisdiction to enter a judgment . . . upon
In the past, intangible property posed jurisdictional problems despite Pennoyer because the situs of the res was not concrete. While there has been considerable discussion concerning this issue, courts tend to regard the location of the garnisheed defendant as the situs of an intangible. Thus, a foreign corporation indebted to the defendant or holding a defendant's assets may be garnisheed in any jurisdiction in which it does business. The development of "long-arm jurisdiction" has led to the garnishment of intangible and unliquidated choses in action if held by nonresident corporations having sufficient minimum contacts with the forum state.

the personal claim. There must be either personal jurisdiction or the property must have been attached or seized in some way at the beginning of the suit. Where there is seizure, and the requirement of reasonable notice has been met, the court has jurisdiction to adjudicate the merits of the in personam claim and to render judgment upon it. But if personal jurisdiction has not also been acquired, the effect of this judgment must be limited to the property attached and cannot be satisfied out of any other property." F. JAMES, CIVIL PROCEDURE 630-31 (1965).


121. See, e.g., Harris v. Balk, 198 U.S. 215 (1905), where the Court allowed the garnishment of a debt owed by a transient nonresident of the forum state and upheld the resulting judgment as valid against the property seized.

122. In Seider v. Roth, 216 N.E.2d 312 (N.Y. 1966), the court upheld the garnishment of the policy limits of an automobile liability insurance policy as a debt reachable by the plaintiff, though unliquidated and though no judgment of negligence or liability had been obtained against the insured. Garnishment was upheld even though the accident occurred in Vermont. Accord, Barrios v. Dade County, 310 F. Supp. 744 (S.D.N.Y. 1970) (attaching unliquidated proceeds of liability insurance policy covering Dade County, Florida, so as to give the court jurisdiction of the defendant to the extent of the policy coverage). See also Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1969). For an outline of some of the undesirable consequences of extension of this jurisdiction so as to allow attachment of unfixed liability under liability insurance policies, see Rosenberg, One Procedural Genie Too Many or Putting Seider Back into Its Bottle, 71 COLUM. L. REV. 660 (1971); Stein, Jurisdiction by Attachment of Liability Insurance, 43 N.Y.U.L. REV. 1075 (1968); Note, Seider v. Roth: The Constitutional Phase, 43 ST. JOHN'S L. REV. 58 (1968).


125. Atkinson v. Superior Court, 316 P.2d 960 (Cal. 1957), cert. denied, 357 U.S. 569 (1958). A group of musicians sued their employers, their labor union, and a New York trustee who oversaw funds collected from their wages by their employer and diverted to the trustee. Personal service was had upon the employer and personal jurisdiction was obtained over the union. Jurisdiction was sought over the trustee by service in the State of New York. The court held that the intangible obligation on the part of the employer had no situs in fact, and felt that "the solution must be sought in the
Atkinson v. Superior Court\textsuperscript{126} eliminated some of the differences between quasi in rem and in personam jurisdiction. Ignoring the fictitious situs of the res\textsuperscript{127} and without acquiring possession, control of, or "power" over the funds owed, the Atkinson court upheld its quasi in rem jurisdiction by using the "minimum contacts"\textsuperscript{128} criterion the Supreme Court developed in International Shoe\textsuperscript{129} to justify in personam jurisdiction. The Atkinson holding is one more step toward unifying the jurisdictional criteria justifying in personam jurisdiction and those justifying quasi in rem jurisdiction.

Except in unusual circumstances the states have reached an accommodation that permits a much freer use of personal jurisdiction.\textsuperscript{130} Thus the "necessity" for quasi in rem jurisdiction is now significantly diminished.\textsuperscript{131} Some commentators believe that Sniadach-Fuentes limits quasi in rem attachments to acquire jurisdiction by the same factors that limit other exceptional seizures: general public concern, need for prompt action, and strict governmental control.\textsuperscript{132}

general principles governing jurisdiction over persons and property rather than in an attempt to assign a fictional situs to intangibles." 316 p.2d at 964. "The relevant contacts [of the trustee] with this state are significant, however, in deciding whether due process permits exercising a more limited or quasi in rem jurisdiction . . . ." Id. at 965. "[T]he multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question." Id. at 966.

\textsuperscript{126} 316 P.2d 960 (Cal. 1957), cert. denied, 357 U.S. 569 (1958).
\textsuperscript{127} Id. at 964.
\textsuperscript{128} Id. at 966.
\textsuperscript{129} International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
\textsuperscript{132} "[T]he seizure of property for jurisdictional purposes is only justified in very
Attachments to secure jurisdiction in federal courts are subject to the same requirements as other provisional remedies, such as garnishment and replevin. Since International Shoe there is less need for seizures to obtain jurisdiction. If the courts can obtain personal jurisdiction, there seems to be neither need nor justification for seizure of property without prior hearing. Both the California cases and the Wisconsin practice eliminate the real need for seizure without notice and hearing except in truly unusual and extraordinary cases. Even against a nonresident, the jurisdictional requirements imposed by Pennoyer have been so weakened that seizure is no longer necessary to give a court jurisdiction to render a judgment enforceable in any other state. If (1) property of the nonresident is within the court's jurisdiction, and (2) the court has notified the defendant-owner that an enforceable claim against the property has been asserted, a judgment in the forum state, at least to the value of the property, will be given full faith and credit in any other state.

limited circumstances which conform to the 'extraordinary situations' criteria listed in Fuentes. And where seizure does result in jurisdiction, a hearing must be held promptly . . . . " Note, Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L.J. 1023, 1032 (1973) (footnote omitted). See also Clark & Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution, 59 Va. L. Rev. 355, 366-72 (1973); Comment, Foreign Attachment After Sniadach and Fuentes, 73 Colum. L. Rev. 342, 352, 356-58 (1973). These views are supported by the Court's application of Fuentes in Pearson Yacht. See notes 91-93 and accompanying text supra.

133. "Seizure is not justified where the quasi in rem device is not necessary to secure jurisdiction in state court, nor where jurisdiction cannot be defended as 'an important governmental or general public interest.' " Note, supra note 132, at 1032.

134. See note 129 supra.

135. Carrington, supra note 119, at 306.


137. Prior to Pennoyer v. Neff, the courts in a number of states did not require any seizure and rendered purported personal judgments against the nonresident. In response to the case, most of these states came to require some form of seizure prior to judgment in cases involving a personal claim . . . . But the Wisconsin courts have continued to treat seizure as unnecessary for jurisdiction. The Wisconsin requirement remained unchanged: the property must be within the state at the commencement of the action but need only be specifically described in the affidavit . . . or . . . the complaint, for the court to have jurisdiction to issue a judgment binding as to that property [citing Disconto Gesellschaft v. Umbreit, 106 N.W. 821, 826-27 (Wis. 1906), aff'd on other grounds, 208 U.S. 570 (1908)]. If the property is removed from the state or sold to an "innocent" purchaser before judgment is rendered, the judgment is void. . . . [This is] not an element which affects jurisdiction.


Since seizure usually is unnecessary for jurisdiction,\textsuperscript{139} nothing remains to support general public or governmental interest, a necessary element in the Sniadach-Fuentes exception that permits prehearing seizures. The need for prompt action, a second element of the exception, also vanishes. The last element, that of a narrowly drawn statute administered by an official who also determines the necessity, is nearly always absent.\textsuperscript{140} Nearly all foreign attachment statutes parallel equity practice and allow seizures to secure jurisdiction over nonresidents\textsuperscript{141} or absconding debtors. The nonresident may still be subject to such a statute even though he does business in the state, has the required "minimum contacts," or has agreed to be sued in the jurisdiction.\textsuperscript{142} While attachment was once used only to coerce a defendant to appear and to answer,\textsuperscript{143} it no longer dissolves when an appearance is entered.\textsuperscript{144} Moreover, appearance is no longer even a jurisdictional necessity.

This article contends that attachment to secure jurisdiction satisfies due process requirements only if the debtor has insufficient contacts within the state to support a personal judgment; if there is real danger that the defendant's assets will be moved from the jurisdiction before a possible hearing;\textsuperscript{145} and, only then, if the court takes a parochial view and requires enforcement within the state rather than in another state under the full-faith-and-credit clause.\textsuperscript{146}

Carrington's thesis that quasi in rem jurisdiction has outlived its usefulness and is no longer needed\textsuperscript{147} now has received additional support from the constitutional prohibition.\textsuperscript{148} If a court takes the broadest view of personal and quasi in rem jurisdiction there will rarely be either necessity or justification for a prehearing seizure to secure jurisdiction in a suit based upon law or equity.

\textsuperscript{139} Id.
\textsuperscript{141} See, e.g., Aldridge v. First Nat'l Bank, 144 So. 469 (Miss. 1932).
\textsuperscript{142} See, e.g., Gulf Refinishing Co. v. Mauney, 3 So. 2d 844 (Miss. 1941); Aetna Ins. Co. v. Robertson, 88 So. 883 (Miss. 1921); Imperial Cotton Oil Co. v. Allen, 35 So. 216 (Miss. 1903).
\textsuperscript{143} "Originally the goods of a defendant who failed to respond to a summons could be seized, but solely in order to compel his appearance." Note, Some Implications of Sniadach, 70 Colum. L. Rev. 942, 945 (1970).
\textsuperscript{144} Clark & Landers, supra note 132, at 368.
\textsuperscript{146} Hazard, supra note 130.
\textsuperscript{147} Carrington, supra note 119, at 303.
\textsuperscript{148} Note, Quasi In Rem Jurisdiction and Due Process Requirements, supra note 132, at 1082.
IV. RESOLVING THE CHALLENGE IN ADMIRALTY

This article endorses the legal principles announced in Sniadach-Fuentes, and supports the position that seizures to secure jurisdiction meet constitutional standards only if a personal judgment could not be constitutionally supported or if there is a present danger that the res will be removed from the national jurisdiction. The Sniadach-Fuentes restrictions would apply only to cases involving citizens or residents subject to the jurisdiction of the United States and its courts because no judgment of the United States will be enforced in the courts of another nation unless that nation agrees. The mobility of ships—the reason for their existence—explains the difference between criteria used to judge acceptable notice and hearing for United States citizens and criteria used in admiralty to judge adequate notice and hearing for persons who neither live nor have assets within the United States.

149. Restatement of Judgments § 5 (1942).

150. One treatise notes:
As regards judgments, it is to be noted that for a very long period their effectiveness was limited to the territory of the country where they were made. As the successful plaintiff could not enforce the judgment outside the country where it had been rendered, he was obliged to institute a fresh action before the courts of the country where the property of the defendant was situated.

The refusal was based on an exaggerated conception of sovereignty. When the judges of a country give an order to enforce a foreign judgment they makes themselves the servants of the judges who have given that judgment.

The effects of a foreign judgment never operate directly. Recognition can only be obtained after examination, the form and conditions of which vary as much according to the nature and effects of the judgments as according to the country. Some States admit a review over a very wide field: it covers questions of law (conflict rules, substantive law applied by the foreign judge, rules of procedure followed by him) as much as questions of fact.

As an example of States with written provisions which refuse in principle to enforce foreign judgments one can cite the Netherlands.

Another example in which as a general rule foreign judgments are neither recognized nor enforced is the Scandinavian countries subject to exceptions.


151. It is commonly held under the principles of private international law that the mere physical presence of an asset confers upon states a competence to apply policy with respect to events occurring elsewhere. It is arguable in relation to events having no connection with the use of internal waters or even the oceans—the mere transient presence of a vessel within the effective control of a state might be treated differently from the presence of other assets. Vessels are instruments whose primary value arises from their mobility, and there appear to be sound reasons for preferring that interference with that mobility be reduced...
The ultimate goal of any state participating in maritime activities should be to use its maritime jurisdiction to obtain the maximum benefit for itself, its citizens, and the domiciliaries of other participating states. The rules it prescribes may reflect the enforcement problems that can arise when a judgment is entered against a nonresident, but these should be uniformly applied. The proposed procedures put forward here would meet this goal and provide significant economic benefits. But Sniadach-Fuentes do not compel a finding that existing practice is unconstitutional.

A. Alternative I: Rationalization of the Status Quo

The Court could resolve the conflicts between Sniadach-Fuentes and present procedure by applying both the concept that power over the res is jurisdiction, and the in rem concept of personification of the vessel. If Sniadach-Fuentes exempt from their rules seizures necessary for jurisdiction, the Court could declare, a priori, that in all in rem actions seizure of the res is necessary for jurisdiction to attach. Such a conclusion would be consistent with the Supreme Court rule governing an in rem action to enforce a maritime lien. That rule requires that the initial step be issuance of a writ arresting the vessel; the Court's own rule makes arrest necessary to secure jurisdiction.

For a lover of legal fictions, it is arguable that arrest is required by due process. If a vessel is regarded as a jural person—as it is only in...
an in rem action\textsuperscript{150}—effective notice to that vessel is a prerequisite for jurisdiction.\textsuperscript{160} Arrest provides that notice to the only legal entity being sued—the vessel. Therefore no notice to the owner is necessary.

There are other arguments to support the view that notice to the owner prior to seizure of his vessel is not required in an in rem action against the vessel. The Limitation of Liability Act\textsuperscript{161} acknowledges that a ship is a separate legal entity and permits the owner of a vessel to limit his liability to the value of the vessel and freight immediately after the voyage.\textsuperscript{162} If the vessel owner reaps the benefits of limited liability because of the personification theory, then he should bear the burden that accompanies the adoption of this theory: that is, the possibility of an in rem proceeding including the seizure or arrest of his ship without prior notice to him. Even if notice to the owner were required, precedent provides another barrier to change.\textsuperscript{163} There is an established maritime rule that considers the plaintiff-lienor of an in rem action to be part owner of the vessel.\textsuperscript{164} Hence an "owner" has notice. Finally, advocates of change must

\textsuperscript{159} See notes 40, 57 supra.


\textsuperscript{162} 46 U.S.C. § 183 (a) (1970). See also The Titanic, 223 U.S. 718 (1914). However, § 183(b) provides that if this amount is insufficient to pay all losses in full, then the owner of a seagoing vessel shall be liable in respect of loss of life or bodily injury for the payment of $60 per ton of the vessel's tonnage.

This is similar to the limited liability enjoyed by a corporation. There are some differences, but the basic rationale is the same in each case. The owner in each case is shielded from personal liability unless he is personally at fault. See 46 U.S.C. § 183(a) (1970) (removing the owner's right to limit liability where the loss is occasioned with the "privity of knowledge" of the owner). See also Spencer Kellogg & Sons, Inc. v. Hicks, 285 U.S. 502 (1932); O. Holmes, The Common Law 6-7 (1881).

\textsuperscript{163} "The life of the law has not been logic: it has been experience. . . . [The law's] form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past." O. Holmes, The Common Law 1-2 (1881). The comment of Mr. Justice Douglas in Sniadach—"The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms"—seems to slightly weaken this argument. 395 U.S. at 340.

\textsuperscript{164} "Under the 'proprietary interest' rule a maritime lienor becomes a part-owner and must bear the risk of any loss that may follow." Varian, Rank and Priority of Maritime Liens, 47 Tul. L. Rev. 751 (1973). See also The John G. Stevens, 170 U.S. 113, 115, 116, 122, 123 (1898); Harmer v. Bell (The Bold Buccleugh), 13 Eng. Rep. 884 (P.C. 1851). But it had been thought by some that a creditor's interest in property under retained title contracts would have influence upon the court in replevin cases. These hopes were dashed. Hawkland, The Seed of Sniadach: Flower or Weed?, 78 Com. L.J. 245, 249-50 (1973).
recognize that the Supreme Court is unlikely to hold unconstitutional the rules for prejudgment arrest promulgated by the Court itself.\footnote{165}

Doctrinal and historical arguments like these offered to justify maintaining the status quo have not saved other categories of prejudgment seizures.\footnote{166} They should not be successful in this case either; some modification of in rem arrests is necessary so that they conform to standards of fundamental fairness imposed by Sniadach-Fuentes.

\section*{B. Alternative II: Modification of Present Procedure}

1. \textit{Proposals}.—Realistically, the mobility of ships and the transitory associations that some ships and shipowners share with a state require a provision for seizures to protect the state’s jurisdictional powers over them. The rule of international law that allows foreign states to choose which judgments they will enforce increases the credence of this argument.\footnote{167} If the vessel cannot be seized when there is no other property

\footnote{165. The Court’s power to promulgate admiralty rules did not flow from the Enabling Act, 28 U.S.C. §§ 2071-73 (1948), Ch. 646, 61 Stat. 961, but rather from the Permanent Process Act of 1792, Ch. 36, § 2, 1 Stat. 276, under which the Court promulgated admiralty rules in 1845. Until the enactment of 28 U.S.C. § 2073 (1948), a difference existed between the power of the Court to promulgate rules in admiralty and at law and equity. The power to change an Act of Congress was not given in the Act of August 23, 1842, Ch. 188, § 6, 5 Stat. 518. But with the enactment of §§ 2072 & 2073 in 1948, law, equity, and admiralty were on equal footing and ready for union. Section 2072 was amended to include admiralty and maritime cases and § 2073 was repealed. Act of Nov. 6, 1966, 80 Stat. 1323, 28 U.S.C. § 2072 (1970).

While the Supreme Court does entertain challenges to the rules it promulgates, “it will be a rare case where the challenge can succeed.” \textit{7A J. Moore, Federal Practice} ¶ .02[3], at 24 (2d ed. 1972).


167. See \textit{Restatement (Second) of Foreign Relations Law of the United States} § 9, comment a at 26 (1965). See also \textit{Restatement (Second) of Conflicts of Laws} § 98 (1969) for the United States rules which allow nonrecognition and nonenforcement if: the judgment is invalid as measured by standards set by the enforcing state; proceedings are not “regular”; there is no “opportunity for a full and fair trial abroad before a
of the vessel owner within the jurisdiction, a successful plaintiff might find that his judgment was unenforceable in the domicile of the vessel owner. Even if a foreign state will enforce a judgment, the expense of additional lawyers and more litigation may effectively discourage the plaintiff from seeking to satisfy the judgment.168

Nonresident shipowners169 and United States shipowners170 must

The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol (reproduced 15 AM. J. COMP. L. 362 (1967)) allows a state to refuse to enforce any judgment of a foreign state if the court did not have jurisdiction, art. 4(1). Enforcement may also be refused as to judgments incompatible with public policy or due process, or if either party had no opportunity to "fairly" present his case, art. 5 (1); judgments obtained by fraud, art. 5 (2); and judgments lis pendens in the enforcing state, art. 5 (3). Several nations having a large number of vessels flying their flag are not parties to the Convention—e.g., Liberia and Panama.


Most legal scholars today, in recognition of this national choice, classify the enforcement of foreign judgments as a domestic choice of laws or conflicts question rather than as a part of the body of international law. H. Steiner & D. Vagts, supra, at 686-87.

Since reciprocity is one basis for enforcement of foreign judgments, many nations rely upon international agreements to insure minimal reciprocity. The United States is not a signatory party to any treaty requiring this country to enforce foreign judgments. There are constitutional and political problems that probably will effectively bar any such treaty. The federal structure is a bar to federal encroachment upon state court or "strictly domestic" matters. The author favors such treaties and believes that the enforcement of judgments regarding international commerce is never a "strictly domestic" issue. While Missouri v. Holland, 252 U.S. 416 (1920), upheld the migratory bird treaty against attack on similar grounds, the Court specifically found that "[h]ere a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transistorily within the State and has no permanent habitat therein." Id. at 435.

In Reid v. Covert, 354 U.S. 1 (1957), the Court struck down an executive agreement with Great Britain that allowed servicemen's wives to be tried by courts-martial under the Uniform Code of Military Justice. The Court specifically recognized the supremacy of the Constitution over a treaty.

168. The provisions of Article 13 of The Hague Convention, supra note 167, provide a fairly convenient mode of procedure. However, even this model requires authenticated copies of the decision, translations of necessary documents, and sufficient documents to establish that the decision fulfills the conditions of the Convention. See art. 13, ch. 3 of the Hague Convention.

169. "Nonresident shipowners" means shipowners who are not citizens, residents, or domiciliaries of the United States.

170. "United States shipowners" means shipowners who are residents, citizens, or
be treated differently. While nonresidents, foreigners, and aliens should receive the rights and benefits of due process, a distinction must be made between those cases in which enforcement of a judgment can be satisfied within the United States and those in which it cannot. For residents, domiciliaries of the United States, and persons or corporations having substantial property in the United States, the general rule should be that no prejudgment seizure can be made before notice to the owner and a hearing. Admiralty rule B presently provides that quasi in rem maritime attachments may occur only when the plaintiff certifies on oath that "the defendant shall not be found in the district." This restriction, however, should be extended to in rem arrests under rules C and E, and the phrase "found in the district" should mean only that the defendant or his insurer is amenable to suit within the district under modern long-arm statutes. The plaintiff should be allowed to pursue his claim under both in rem and in personam principles against any defendant so "found."

domiciliaries of the United States.

171. "(An alien) may not be deprived either by the National Government or by any state of life, liberty, or property without due process of law. Nor may he be denied the equal protection of the laws." Harisiades v. Shaughnessy, 342 U.S. 580, 598 (1952) (Douglas, J., dissenting).

172. The United States presently discriminates against foreign vessels and shipowners in another area of maritime liens. In 1954, the Congress granted to the district courts the power to execute preferred ship mortgages on foreign ships. The Act contained this discriminatory language:

[S]uch "preferred mortgage lien" in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries, performed or supplied in the United States.


173. This would be subject to the exceptions made explicit in Fuentes, i.e., the public weal or where there was a clear and present danger that the res would be removed from the jurisdiction and that a real threat existed that any judgment rendered would be uncollectible unless from the res in question.


These recommendations can easily be implemented; they have been used informally in the past. In Canadian Aviator, an in rem action, the Court used reasoning which supports this position. Because the Public Vessels Act of 1925 allows suits in personam against the United States for negligent operation of government-owned vessels, the plaintiffs sued invoking both in personam and in rem principles. The Court held that although the Public Vessels Act and the Suits in Admiralty Act prohibited the vessel’s arrest, they authorized recovery based upon both in rem principles of admiralty and traditional in personam principles. Recognizing that the personification theory created additional liability on in rem principles, the Court relied on that theory to permit recovery despite lack of either an arrest or a maritime lien.

Several cases have ignored the requirement of seizure or arrest when the parties filed agreements, appearances, or stipulations. In United States v. Freights of S.S. Mount Shasta, a libel in rem against pending freight was allowed although the money allegedly owed was not arrested nor taken into custodia legis. Justice Holmes, though proceeding under the “power is jurisdiction” theory then in vogue,

180. 324 U.S. at 217.
183. The United States contended that since there was no collision and the ship was not the efficient causative agent, the accident being caused by the “personal and independent negligence of (the ship’s) officers,” there was no liability. 324 U.S. at 218. The Court found liability by specifically recognizing the “personal” liability of the ship, saying: “[P]ersonification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court.” 324 U.S. at 224.
184. In Continental Grain Co. v. Federal Barge Lines, Inc., 268 F.2d 240 (5th Cir. 1959), the parties proceeded under a letter of undertaking stipulating that the proceeding should be in rem and any judgment rendered would be paid. Acceptance of service of process by the owners’ attorneys was held to have the force and effect of seizure in Anglo-American Grain Co., Ltd. v. The S/T Mina D’Amico, 169 F. Supp. 908 (E.D. Va. 1959). In Booth S.S. Co. v. Tug Dalzell No. 2, 1966 A.M.C. 2615 (S.D.N.Y. 1966), the filing of a general appearance was held to waive the question of whether the vessel was within the jurisdiction of the court. For a contrary view see Rogers, Enforcement of Maritime Liens and Mortgages, 47 Tul. L. Rev. 767, 769-71 (1973) (taking the traditional view that there is no jurisdiction without an arrest and seizure of the vessel).
185. 274 U.S. 466 (1927).
186. Id.
found a basis for asserting jurisdiction by observing that jurisdiction "begins before actual seizure" since "[h]ere the debtor is within the power of the court and therefore the debt, if there is one, is also within it."187

An additional recommendation is that the presence of the ship (the res) within the district should confer jurisdiction to render a judgment enforceable throughout the nation.188 Recently the Supreme Court of Florida created by decision a right of direct action against the insurer of the defendant.189 This rule should also be adopted by the United States Supreme Court for all maritime in rem actions; this would help to assure a successful plaintiff that his judgment will be satisfied. While the Court could use this theory to give a constitutionally acceptable and enforceable judgment against a nonresident190 or

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187. Id. at 471. New and different concepts of the nature of property have weakened the underlying basis of the power theory. See, e.g., Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Philbrick, Changing Conceptions of Property in Law, 86 U. Pa. L. Rev. 691 (1938); Reich, The New Property, 73 Yale L.J. 733 (1964).

188. "It is commonly held under the principles of private international law that the mere physical presence of an asset, movable or immovable, confers upon states a competence to apply policy with respect to events occurring elsewhere." Moreover, "[t]he competence claimed may be asserted against owners or vessels or both. The events giving rise to controversy and assertions of competence may occur within the territorial bounds of the coastal state, or beyond its bounds, as on the high seas or within the territory of other states." M. McDougal & W. Burke, The Public Order of the Oceans 127 (1962) (footnote omitted).

In Kane v. Union of Soviet Socialist Republics, 394 F.2d 131 (3rd Cir. 1968), the S.S. Mikhail Kutuzov, operated by The Black Sea State Steamship Line, was in the Port of Philadelphia in 1946. A ship’s agency agreement was in effect between Black Sea and a U.S. stevedoring concern. In 1949, a longshoreman injured while working on the vessel sued the U.S.S.R., Black Sea, and others for his injuries while the Mikhail Kutuzov was in port. Service was had upon the stevedoring concern as agent. Black Sea did not appear, and default was entered. A final decree was entered on the default. Later Black Sea moved to set aside service and default and open the judgment. In denying the relief, the Court said:


Id. at 132.


Plaintiff found defendant had a ship here in June '72, but defendant says that ship's business is through. Asserting that process is amiss, it has filed a motion to dismiss. Plaintiff's counsel, whose name is Harry Lore,
his insurer, no seizure should be permitted before a hearing unless all the *Fuentes* prerequisites are met.\textsuperscript{101}

If the present liberal prerequisites for a defendant to be "within the power of the court" were complemented by such a rule permitting direct actions against insurers,\textsuperscript{192} rarely would a case require an arrest

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read defendant's brief and found it a bore.

Instead of a reply brief, he acted pretty quick
and responded with a clever limerick:

"Admiralty process is hoary
With pleadings that tell a sad story
Of Libels in Rem—The bane of sea-faring men
The moral:
Better personally served than be sorry."

... .

The first question is whether, under the facts,
defendant has done business here to come under Pennsylvania's long arm acts.
If we find that it has, we must reach question two,
whether that act so applied is constitutional under Washington v. International Shoe.

...

And we hold that the recent visit of defendant's ship to Philadelphia's port
is doing business enough to bring it before this Court.
We note, however, that the amended act's grammar,
is enough to make any thoughtful lawyer stammer.
The particular problem which deserves mention,
is whether a single act done for pecuniary gain also requires a future intention.
As our holding suggests, we believe the answer is no,
and feel that is how the Pa. appellate cases will go.

...

The visit of defendant's ship is not yet very old,
and so we feel constrained to hold that under traditional notions of substantial
justice and fair play,
defendant's constitutional argument does not carry the day.

...

Finding that service of process is bona fide,
the motion to dismiss is hereby denied.
So that this case can now get about its ways,
defendant shall file an answer within 21 days.

*Id.* at 374-77 (footnotes omitted).

191. The presence of the ship as res in the jurisdiction should be regarded as
"the transactional event that provides a legitimate basis for plenary jurisdiction pursuant to the minimum-contacts rule." Hazard, *A General Theory of State-Court Jurisdiction*, 1965 *Sup. Cr. Rev.* 241, 282. See also the agreed bases for jurisdiction in Supplementary Protocol to The Hague Convention, *supra* note 167. The protocol, reproduced in 15 *A.M. J. Comp. L.* 369 (1967), includes among grounds for jurisdiction: "(a) \[T\]he presence in the territory of the State of origin of property belonging to the defendant, or the seizure by the plaintiff of property situated there . . . ." *Id.* at 370 (emphasis added).

192. The right to bring a direct action against a marine insurer under state procedures was recognized by the Court in *(The Jane Smith)* Maryland Cas. Co. v. Cushing, 347 U.S. 409 (1954), even though the ship and its owner might escape liability because of the Limitation of Liability Act, 46 U.S.C. §§ 181-96 (1970). *See also* Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S.
or seizure before the court possessed power to render an enforceable judgment against a United States resident. To prevent fraudulent transfers or removals from the jurisdiction, the "secret" maritime lien should be sustained until satisfaction of the judgment.

2. Benefits.—There are several economic benefits to be had by resolving the challenge in this fashion. Reduction in the costs of arrest—the time lost from commerce, the expenses incurred to free a vessel held in a distant port, and the achievement of a more equitable judicial system—would more than compensate for a plaintiff's apparent loss of leverage in specific cases. A nearly complete elimination of prehearing arrests or seizures of vessels accompanied by acceptance of the principles of long-arm jurisdiction and direct action against the vessels' insurers should also substantially increase economic benefits to the nation.

It is true that preferred ship mortgages are foreclosed in admiralty by an in rem proceeding, but for these cases, a summary hearing before seizure to show default should suffice. The cost of this hearing should not appreciably increase the expense of the already elaborate foreclosure procedure. Moreover, because most ships are financed by fleet mortgage arrangements, a single hearing would usually settle the disposition of all the ships in the fleet.

It is also important to remember that arrest and attachment of a vessel are expensive for both the plaintiff and the defendant. Before he serves process, the marshal must collect from the plaintiff a deposit sufficient to cover the costs of arresting and maintaining the seized vessel. In comparison with other court costs, those collected for a


195. For a discussion of the enforcement of such liens, see Rogers, Enforcement of Maritime Liens and Mortgages, 47 Tul. L. Rev. 767 (1973).


197. 28 U.S.C. § 1921 (1970). Fed. R. Civ. P. Supp. R. E(4)(e) specifically states that its provisions neither alter nor change the effect of 28 U.S.C. § 1921 (1970) upon delegation of the expense of seizing and keeping the property arrested or attached, or "the requirement of deposits to cover such expenses." The costs secured include keepers' fees, the expenses for routine servicing of the vessel, guards' fees, and insurance. The statute requires the marshal to collect, in advance, a deposit sufficient to cover initial costs, and to charge, at subsequent intervals, additional amounts as they become necessary.
vessel seizure are substantial. The vessel owner must post a bond to obtain the release of his ship before the dispute is resolved.

Technological advances in communications have diminished the need to impose liens for master's contracts to furnish supplies and services "on the credit of the ship." The appearance of ship agents and brokers, the development of an international credit system, and a general improvement in shipping administration have also contributed to the decline in the popularity of these liens. The 1967 convention almost eliminated master's contract liens and actually did subordinate those that remained to preferred ship's mortgages.

The secret nature of maritime liens is regarded by bankers as a threat to long-term, high-level mortgage credit. Restricting the scope of these liens would encourage the flow of money from the bankers to finance national and international fleet expansion.

V. CONCLUSION

The Supreme Court should amend the Supplemental Admiralty Rules to acknowledge the restrictions of prejudgment seizures and to reconcile the conflict between the rules and those restrictions. The difference between seizures necessary for jurisdiction and seizures to preserve a res to satisfy a judgment should be made explicit. The

198. As to what the individual marshal's office considers an adequate deposit to cover the various expenses likely to be incurred, these amounts vary from district to district, currently ranging as high as $2,000 for ten days' expenses.

The principal expenses confronting the marshal in his custody of a vessel are for insurance, wharfage, and guards.

The insurance procured by the marshall is under a master policy arranged by the Government and providing $1,000,000 liability protection, as well as standard hull and P & I coverage, all of which inure to the benefit and protection of the Government, as bailee of the property, not to the benefit of the shipowner or claimants, who must provide their own additional coverage if desired.

Rogers, Enforcement of Maritime Liens and Mortgages, 47 Tul. L. Rev. 767, 775 (1973) (footnote omitted).

199. Fed. R. Civ. P. Supp. R. E(5)(a) provides for release on giving bond or stipulation in an agreed amount or, failing that, an amount sufficient to cover plaintiff's claim or the appraised value of the property, whichever is smaller. 28 U.S.C. § 2464 (1970) provides for release in all cases except forfeitures under the laws of the United States upon giving bond in double the amount claimed by the libelant. Since the effect is the same, the procedure provided by the rule seems cheaper and, hence, more desirable.


201. Id.


203. Sandström, supra note 200, at 684-85.
Court should still recognize that, although jurisdiction requirements may be satisfied without a seizure, a real necessity for seizure may remain because of insolvency, fraud, or international conflicts of law.

The rules should also recognize that the presence of the ship within the jurisdiction gives the court in personam jurisdiction over the owner. Insurers should be subject to direct actions either jointly with the defendant or as substitute defendants. Like suits against the United States, these suits should be based on both in personam and in rem principles. Through suits based on in rem principles, the owner could then be made responsible for the actions of charterers and others who otherwise might insulate him from liability.

The adoption of these suggestions would facilitate maximum use of the nation's maritime assets. The economic waste caused by the detention of arrested vessels would be substantially reduced. Absent would be the fundamental unfairness of coercive seizures that "'shock the conscience' of the Court and 'offend the community's sense of fair play and decency' because of the 'ignoble short cut' of legal process and 'the stealthy encroachment' on . . . constitutional rights . . . ." Codification of these suggestions would reduce the impact of "one of the . . . most drastic remedies known to modern civil law; . . . [the] arrest of property by an admiralty proceeding in rem."207

204. That expeditious legal procedures were an aid to a nation's sea power was recognized early on in England. W. Welwod, An Abridgement of All Sea-Lawes 17 (1613).

205. It is arguable, however, that for the application of policy generally—that is, in relation to events having no connection with the use of internal waters or even the oceans—the mere transient presence of a vessel within the effective control of a state might be treated differently from the presence of other assets. Vessels are instruments whose primary value arises from their mobility, and there appear to be sound reasons for preferring that interference with that mobility be reduced to the minimum compatible with providing security for claims connected with maritime matters or the shipping business. Such a policy . . . would preclude attachment of a vessel for obtaining jurisdiction or security in respect of disputes arising out of events wholly extraneous to the use of the oceans. M. McDougal & W. Burke, The Public Order of the Oceans 127-28 (1962) (footnote omitted).


207. Id.