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Attachment and Garnishment--Constitutional Law--Due Process of Law--Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The *Sniadach* Case and Its Implications for Related Areas of the Law

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NOTES

ATTACHMENT AND GARNISHMENT—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The *Sniadach* Case and Its Implications for Related Areas of the Law

Americans today enjoy an unprecedented level of material wealth, attributable in part to the great expansion of the modern consumer credit industry.[1] Unfortunately, readily available credit has had numerous victims as well as many beneficiaries. Congress, worried that the exploitation of consumers by unscrupulous creditors was a contributing cause of such diverse phenomena as consumer bankruptcies,[2] urban riots,[3] and even suicide,[4] passed reform legislation in 1967 to "safeguard the consumer."[5]

One hotly disputed portion of the consumer protection bill was that dealing with wage garnishment. The most ambitious proposal on this matter sought the total abolition of wage garnishment.[6] Fac-

1. Consumer debt outstanding rose from a level of $5.665 billion in 1945 to $63.821 billion in 1962. By July 1969 it had risen further to a level of $116.597 billion. 55 FEDERAL RESERVE BULL., Sept. 1969, at A54.

2. *Hearings on H.R. 11,601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. pt. 1, at 502 (1967) (statement of Sidney Margolius) [hereinafter *Hearings*]: "As is well known, there are more consumer bankruptcies today than in the big depression of the 1930's. Such personal bankruptcies . . . have jumped 240 per cent in the past ten years."

3. *Hearings* pt. 2, at 661 (statement of David Caplovitz): "Numerous newspaper accounts have quoted ghetto residents as rationalizing the looting on the grounds that they have been victimized and robbed by the merchants for many years."

4. Gannon, *Seizing Pay—Unions, Firms, Lawyers Seek To Curb Garnishing as Its Incidence Rises*, Wall St. J., March 15, 1966, at 1, col. 6, reprinted in *Hearings* pt. 1, at 71:

> One payday in January, auto worker Carl W. Clark discovered his entire week's take-home pay of $112.39 had been turned over to the state of Indiana for delinquent state income taxes. Beset by debts, he asked officials at Ford Motor Co.'s plant in suburban Chicago Heights, Ill., for his accrued vacation pay to tide him over.
>
> Next payday, he learned [that] Indiana—the state where he used to live—had received $208.84 out of his $363.93 in wages and vacation pay. The 24 year-old father of a young boy, not knowing how much he owed Indiana tax collectors (the two deductions actually satisfied the claim) became despondent over the pay loss. Two days later, Carl Clark placed a .22 calibre rifle under his chin and shot a bullet into his brain.
>
> This suicide has spurred anew wide-ranging inquiries into the consequences of consumer debt problems.

5. Preamble to H.R. 11,601, 90th Cong., 1st Sess. (1967), reprinted in *Hearings* pt. 1, at 3. The bill as enacted—the Consumer Credit Protection Act—may be found in 15 U.S.C. §§ 1601-77 (Supp. IV, 1965-1968).

6. *See* H.R. 11,601, 90th Cong., 1st Sess. tit. II (1967), reprinted in *Hearings* pt. 1, at 35-36. At least two states—Pennsylvania and Texas—now have statutes which outlaw wage garnishment entirely. PA. STAT. ANN. tit. 42, § 886 (1966); TEX. REV. CIV. STAT. art. 4099 (Supp. 1966). In addition, wage garnishment prior to judgment is prohibited by UNIFORM CONSUMER CREDIT CODE § 5.104, now in force in Oklahoma [OKLA. STAT. ANN. tit. 14A (1969)], Utah [UTAH CODE ANN. tit. 70A (1967)], and Guam.

tors advanced in support of that proposal included the demonstrated correlation between the number of consumer bankruptcies and the harshness of garnishment laws,[7] the fact that wage garnishment often results in loss of employment,[8] the need to alleviate the burden on the courts that is created by the large number of garnishment cases,[9]

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7. *Hearings* pt. 1, at 419 (testimony of Estes Snedecor, Referee in Bankruptcy, D. Ore.):

> [T]he one overriding cause precipitating consumer bankruptcies is the garnishment or threat of garnishment of wages coupled with an unrealistic wage exemption. This is dramatically demonstrated by comparing the number of consumer bankruptcies in States permitting garnishment of wages with those prohibiting garnishment entirely or restricting it to only a small portion of wages.

Hearings pt. 1, at 506 (statement of Sidney Margolius):

> It is noticeable that the states with the toughest garnishment laws [that is, those that operate most harshly against the debtor] have the highest bankruptcy rates including California, Ohio, Virginia, Michigan and Minnesota. Colorado, with much less population, had about 4300 bankruptcies and wage-earner plans in one recent year, compared to only about 1000 in Texas and Pennsylvania which do not permit garnishees. Virginia, with less population than Florida which does not permit garnishees, has eight times as many bankruptcies. Ohio with about the same population as Texas, has about 50 times the bankruptcies.

Figures for bankruptcy filings for the fiscal year ending June 30, 1968, yielded an important comparison between the number of filings in states which have harsh garnishment laws and the number of filings in states which prohibit or strictly limit garnishment of wages. The states with harsh laws had the following number of bankruptcy filings during that year:

Alabama	10,214	Minnesota	3,175
California	38,327	Ohio	17,680
Colorado	4,306	Oregon	4,685
Michigan	7,492	Tennessee	9,384
Virginia	4,844		

The states with mild garnishment laws, on the other hand, had far fewer filings:

Alaska	208	South Carolina	160
Florida	1,416	South Dakota	182
Pennsylvania	1,601	Texas	1,330

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, TABLES OF BANKRUPTCY STATISTICS ENDING JUNE 30, 1968, table F-1. *See also* Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965); Snedecor, *Why So Many Bankruptcies in Oregon?*, 40 REF. J. 78 (1966).

8. *Hearings* pt. 1, at 433 (statement of James E. Moriarty, Referee in Bankruptcy, C.D. Cal.):

> The effect of a garnishment can be devastating to a debtor. Most employers dislike garnishments because of the extra work and cost. As a matter of policy many employers will fire an employee after the second garnishment. Since California law permits multiple levies a worker could be fired within an eight-day period, the time necessary to cover two weekly pay periods. Not only does this challenge the ability of the worker to provide for the family needs, but a worker who has been fired because of garnishment can become a faceless person in the army of the unemployed. He may be a well-qualified machinist whose talents are in demand, but he is unemployable.
>
> At a time when skilled employees are in great demand we must conclude that the exclusion of such a worker from our work force is a great waste of manpower.

For a discussion of the relationship of wage garnishment to job loss, see Kerr, *Wage Garnishment Should Be Prohibited*, 2 PROSPECTUS 371 (1969).

9. *Hearings* pt. 1, at 104 (comment by Representative Frank Annunzio):

> I would also like to point out to you . . . the untold thousands—millions, I'll go that far—of dollars it is costing the local governments, local courts . . . , the judges that have to be paid, the process servers, the bailiffs, bringing these people before the court, having government take a part in settling these credit problems is a very, very costly procedure.

and the theory that the availability of the garnishment remedy promotes improvident extension of credit on irresistible terms to people who are unable to repay voluntarily.[10] Those arguing against abolition maintained that the beneficial aspects of easy credit outweigh the evils[11] and that wage garnishment is necessary to protect the creditor.[12] The garnishment provision finally enacted into law was a compromise measure. It exempts a minimum of seventy-five per cent of the debtor's wages from garnishment,[13] and it prohibits an employer from discharging an employee whose wages have been garnished to satisfy any single debt.[14]

This modest provision was the extent of congressional efforts to effect national reform of wage garnishment laws when the Supreme

10. In this regard, Representative Leonor Sullivan has commented:

> May I say . . . that this is a part of the reason why a prohibition of garnishment of wages is in this bill—to make the seller just a little more careful about the kind of credit they give to people who have great desires but not the financial ability to fulfill these desires by paying for them. If they can buy what they desire so easily without worrying about how to repay then it is enticing them into buying something which they are too weak to resist.

Hearings pt. 1, at 195.

> But a law of this kind on garnishment might have some effect with those who give too freely of this easy credit, and make it possible for those of us who do pay our bills to pay lower prices and not to have to continue to pay prices which make up the debts of those who are just buying and using and never paying.

Hearings pt. 1, at 264. Robert C. Weaver, Secretary of Housing and Urban Development, quoted a statement on this point from the Governor's Report on the Los Angeles riot:

> Another problem is "easy credit" which can become harsh indeed if the disadvantaged person defaults on his installment obligations. The debtor may experience the loss of his property through repossesion, or the loss of his job through repeated garnishments of his wages. While it is easy to say that the improvident debtor brought this state upon himself, we deplore the tactics of some merchants and lenders who help induce low-income persons to become heavily debt-burdened.

Hearings pt. 1, at 302.

11. *Hearings* pt. 1, at 278 (statement of Robert C. Moot, Administrator, Small Business Administration):

> Credit purchasing . . . is good for our economy and it is good for the purchaser, particularly those with moderate or low incomes. Credit makes it possible for these people to own and enjoy the increasing variety of products and services supplied by our free enterprise system, products and services designed to make life easier and more bountiful.

12. *Hearings* pt. 1, at 279 (statement of Robert C. Moot, Administrator, Small Business Administration): "Garnishment is very often the only legitimate means available to a businessman for final satisfaction of debts due him."

13. The Consumer Credit Protection Act § 1673, 15 U.S.C. § 1673 (Supp. IV, 1965-1968) (effective July 1, 1970), provides that garnishment may reach the lesser of 25% of the debtor's weekly disposable earnings or the amount by which his weekly earnings exceed thirty times the current federal minimum wage.

14. Consumer Credit Protection Act § 1674, 15 U.S.C. § 1674 (Supp. IV, 1965-1968) (effective July 1, 1970), provides:

> (a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.
>
> (b) Whoever wilfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both.

This provision may prove largely ineffective, since it provides no protection for the employee who has previously had his wages garnished for a seperate debt.

Court, in *Sniadach v. Family Finance Corporation*,[15] handed down a decision which greatly accelerated the reform process. In *Sniadach*, a finance company, acting in accordance with Wisconsin law,[16] had initiated garnishment proceedings in the circuit court for Milwaukee County against a debtor and against her employer as garnishee, alleging a claim of $420 on a promissory note. Pursuant to the procedure established by state statute,[17] the garnishee answered that he held $63.18 in wages owed to the debtor and that he would pay half of that sum to her and retain the other half subject to the order of the court. The debtor, who had been served with a summons and a copy of the complaint on the same day as the garnishee,[18] moved for dismissal of the garnishment proceedings, alleging that the Wisconsin procedure violated her right to due process of law, as guaranteed by the fourteenth amendment, by failing to provide her with notice and an opportunity to be heard prior to the seizure of her wages. The county court rejected that contention and held that the Wisconsin statute was constitutional; the Wisconsin supreme court affirmed that decision.[19] The United States Supreme Court reversed the decision of the Wisconsin supreme court and held that "*the interim freezing of wages* without a chance to be heard violates procedural due process."[20]

The question of the constitutionality of prejudgment wage garnishment had never before reached the Supreme Court, although

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15. 395 U.S. 337 (1969), *noted in* 1969 DUKE L.J. 1285 *and* 64 NW. U. L. REV. 750 (1969).

16. WIS. STAT. ANN. §§ 267.01-.24 (Supp. 1969).

17. WIS. STAT. ANN. § 267.11(6) (Supp. 1969) provides:

> [I]f the garnishee is indebted to or under any liability to the defendant for wages or salary, the garnishee answer shall state the amount of the subsistence allowance paid over or to be paid over to the principal defendant and the balance held by the garnishee.

WIS. STAT. ANN. § 267.18(12)(a) (Supp. 1969) provides for a subsistence allowance:

> When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents: but in no event in excess of 50 percent of the wages or salary owing. Said subsistence shall be applied to the first wages or salary earned in the period subject to garnishment action.

18. WIS. STAT. ANN. § 267.07 (Supp. 1969) allows a plaintiff ten days after service on the garnishee within which to serve the principal defendant with notice of such service.

19. Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

20. 395 U.S. 337, 340 (1969) (emphasis added). However, the Court left unanswered the question whether the required prior hearing must be a full trial culminating in judgment or whether a hearing with fewer procedural safeguards is sufficient. Although Justice Harlan's concurring opinion contains language which might suggest the latter, it seems more consistent with the majority opinion that a full trial is required. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 115 (1969). Indeed, a hearing without full procedural safeguards cannot be effective to protect a debtor's rights unless the creditor's claim can be clearly seen as frivolous.

in *McKay v. McInnes*,[21] a 1929 memorandum decision, the Court had upheld a statute providing for prejudgment attachment.[22] *McKay*, which was cited as controlling by the Wisconsin court in its disposition of the constitutional argument in *Sniadach*,[23] involved an attachment of realty and stock to satisfy a debt. Justice Douglas, writing for the Court in *Sniadach*, distinguished that case from one involving wage garnishment with the statement that "[a] procedural rule that may satisfy due process for attachments in general . . . does not necessarily satisfy procedural due process in every case."[24] The *Sniadach* Court's refusal to apply the holding of *McKay* to a case involving wage garnishment suggests that the Court may be in the process of re-evaluating the entire area of prejudgment attachment and garnishment. In addition, the *Sniadach* decision may have implications for other areas of law which concern the poor debtor. This Note will analyze the foundations, express and implied, of the Court's wage garnishment decision, and it will suggest possible applications of that decision to other problems.

I. Sniadach and Due Process of Law

It is generally accepted as fundamental to procedural due process that a person be afforded "notice and an opportunity to be heard" before he may be deprived of life, liberty, or property.[25] Although

21. 279 U.S. 820.

22. In *McKay*, the Supreme Court affirmed a decision of the Supreme Judicial Court of Maine which had also upheld the statute. McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928). The Court did so on the basis of Ownbey v. Morgan, 256 U.S. 94 (1921), in which the prejudgment attachment of the property of an out-of-state defendant had been upheld even though the attachment statute required the defendant to post security in order to defend the action, and on the basis of Coffin Bros. v. Bennett, 277 U.S. 29 (1928), which had sustained the prejudgment attachment of property of stockholders in an insolvent bank. These cases may be distinguished from *Sniadach* because of the uniqueness of wages. Moreover, those cases were decided forty years ago, before the concept of due process had reached its present level of development.

23. 37 Wis. 2d at 169, 154 N.W.2d at 262. The Wisconsin supreme court also refused to consider many of the alleged constitutional defects with a potential for producing injustice, because petitioner herself had shown no hardship.

24. 395 U.S. at 340.

25. The Supreme Court relied on this principle at least as early as 1863 when, in Baldwin v. Hale, 68 U.S. (1 Wall.) 233, it held that a discharge under a state insolvency law was ineffective against an out-of-state creditor: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence." 68 U.S. (1 Wall.) at 233. Since that time, notice and an opportunity for a hearing have frequently been held to be fundamental requirements of procedural due process. Anderson Natl. Bank v. Luckett, 321 U.S. 233, 246 (1944): "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which the constitutional protection is invoked." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 (1963): "Due process . . . implies notice and a hearing." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950): "[T]he Due Process Clause . . . at a minimum . . . require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

the Supreme Court has occasionally sustained a conditional prejudgment deprivation of a constitutionally protected right, pending the outcome of the case, it has usually done so only in cases involving some compelling governmental interest, such as safeguarding national security,[26] protecting public health,[27] or maintaining economic stability.[28] Most of the recent cases involving notice and hearing requirements have not disputed the general proposition that the opportunity for a hearing is essential.[29] In the few cases in which the requirement for a hearing has itself been questioned, the determinative issue has most often been whether or not there was a deprivation of a constitutionally protected right.[30]

With regard to prejudgment attachment, the last time prior to *Sniadach* that the Supreme Court considered the constitutionality of such a procedure was forty years ago, and at that time it summarily rejected the argument that prejudgment attachment results in a denial of procedural due process.[31] In *Coffin Brothers v. Ben-*

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26. In Cafeteria & Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961), the Court held valid the summary discharge of a cafeteria employee in a Navy munitions factory.

27. In Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), the Court upheld § 304(a) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 334(a) (1964), allowing seizure of misbranded articles without a prior hearing.

28. In Fahey v. Mallonee, 33 U.S. 245 (1947), the Court held constitutional § 5(d) of the Home Owners' Loan Act of 1933, ch. 64, § 5(d), 48 Stat. 132, *as amended*, 12 U.S.C. § 1464(d) (1964). That section authorized the Federal Home Loan Bank Board to prescribe by regulation the terms and conditions upon which a conservator may be appointed to take possession of a federal savings and loan association prior to the statutory hearing. *See also* Coffin Bros. v. Bennett, 277 U.S. 29 (1928), in which the Court upheld a Georgia statute allowing the establishment of prejudgment liens on the property of stockholders of insolvent banks.

29. With regard to notice, see, *e.g.*, Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Both of these cases held that notice by publication is inadequate when the names and addresses of interested parties are known. With regard to the opportunity to be heard, see, *e.g.*, Armstrong v. Manzo, 380 U.S. 545 (1965), in which the petitioner was not given notice of proceedings initiated by his former wife and her husband for the adoption of the petitioner's son. When the adoption proceedings were successful, the petitioner moved to annul the adoption, but his motion was rejected by the lower court. The Supreme Court reversed, holding that the hearing on this motion was inadequate, since the petitioner was forced to assume burdens of proof which, had he been accorded notice in the adoption proceedings, would have been borne by the opposing parties. *See also* Holt v. Virginia, 381 U.S. 131, 136 (1965): "The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues."

30. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960), which held that the right to future social security benefits is not a property right protected by the due process clause; English v. English, 117 S.2d 559 (Fla. Dist. Ct. App. 1960), which held that the right to accrued but unpaid alimony is a property right protected by the due process clause; Siegall v. Solomon, 19 Ill. 2d 145, 166 N.E.2d 5 (1960), which held that the rights of a husband to his wife's society and affections are not "property" rights protected by the due process clause from state control.

31. The Court in the 1920's upheld prejudgment attachment in three cases: Ownbey v. Morgan, 256 U.S. 94 (1921); Coffin Bros. v. Bennett, 277 U.S. 29 (1928); and McKay v. McInnes, 279 U.S. 820 (1929). *See* note 22 *supra*.

nett, for example, Justice Holmes disposed of that argument by noting that "nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit."[32] In the years during which the Supreme Court remained silent on the issue of the constitutionality of prejudgment attachment and garnishment procedures, state courts were faced with the problem of reconciling the decision that such procedures do not deny due process with the general notion that procedural due process requires notice and an opportunity for a hearing. One approach employed to uphold prejudgment attachments and garnishments was to assume that no interest protected by the due process clause is involved in prejudgment attachment procedures since such procedures deprive a defendant merely of the possession or use of his property pending the outcome of the litigation, and to conclude that therefore the defendant is technically not deprived of any "property" without an opportunity to be heard.[33] A second theory recognized that the use of property constitutes a protected property right, but concluded that since attachment only temporarily withdraws that right, the procedure does not result in a "deprivation" within the meaning of the due process clause.[34] Neither of these attempts to rationalize the decision to uphold prejudgment attachment procedures is very persuasive, since, in the context of other issues involving the due process clause, the use of property has long been recognized as a property right protected by the Constitution from even temporary deprivation.[35] How-

32. 277 U.S. 29, 31 (1928).

33. An example of the language commonly used comes from a foreign attachment case, Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932), in which the court stated: "In the meantime there has been no deprivation of property. The attachment, quasi [in] rem in nature, has operated only to detain the property temporarily, to await final judgment." 112 W. Va. at 198, 163 S.E. at 848.

34. In McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), the court applied this rationale:

> The legal right to use and derive a profit from land or other things is property. . . . And the power of disposition at the will of the owner is property. Deprivation does not require actual physical taking of the property or the thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will are affected.
>
> But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution.

In a more recent case, Shell Oil Co. v. Milne, 246 A.2d 837 (Vt. 1968), the court expressly invoked both this reasoning and that of Byrd v. Rector, 112 W. Va. 192, 163 S.E. 845 (1932), discussed in note 33 *supra*.

35. In United States v. Causby, 328 U.S. 256 (1946), for example, the Supreme Court held that low and regular flights of government aircraft over a chicken farm, which rendered the land useless, constituted a taking for which the owner must be compensated under the fifth amendment. The Court considered the fact that the taking may have been only temporary, relevant solely for the purpose of determining the damages and not for the purpose of determining whether or not there had actually

ever they sought to rationalize their decisions, state courts may in fact have upheld the constitutionality of prejudgment attachment and garnishment procedures largely on the basis of the Supreme Court's recognition of the traditional acceptance of those procedures.[36] In *Sniadach*, however, the Supreme Court recognized that, because of vast changes in the American economy, rules which were developed years ago to govern a broad range of attachments are inappropriate for the special category of wage garnishments. Thus, the fact that there was precedent for upholding the constitutionality of prejudgment attachments did not dictate the decision of the case.[37]

In addition to refusing to uphold prejudgment wage garnishment on the ground that attachment is an historically accepted procedure, the *Sniadach* Court considered and rejected other grounds on which wage garnishment might have been upheld. As stated previously, the prejudgment deprivation of property can normally be sustained if such deprivation is necessary to protect a vital governmental interest, or if the court finds that the procedure involved does not constitute a deprivation of a constitutionally protected right.[38] Both Douglas' majority opinion and Harlan's concurrence rejected any applicability of the first theory.[39] The Court saw nothing in prejudgment wage garnishment "requiring special protection for a state or creditor interest."[40] The second theory, however, received more extensive consideration, resulting in a determination that prejudgment wage garnishment does deprive the debtor of his constitutionally protected right to property and thus requires adherence to standards of procedural due process.

After defining the interest of which the garnishment defendant is deprived as "his enjoyment of earned wages," the Court con-

been a taking. In Griggs v. Allegheny County, 369 U.S. 84 (1962), the Court declared similar action by a state to be a violation of the due process clause of the fourteenth amendment. The Supreme Court has also held that an unreasonable restraint on the use of property imposed by a zoning ordinance may be repugnant to the due process clause of the fourteenth amendment. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).

36. *See* text accompanying note 32 *supra*.

37. 395 U.S. at 340: "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." For an account of the origins of attachment procedures, see G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 64 (rev. ed. 1940). *See also* Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968).

38. *See* notes 25-30 *supra* and accompanying text.

39. Justice Douglas stated that "[s]uch summary procedure may well meet the requirements of due process in extraordinary situations." 395 U.S. at 339. Similarly, Justice Harlan stated: "Apart from special situations . . . , I think that due process is afforded only by . . . 'notice' and 'hearing' . . . *before* [one] can be deprived of his property or its unrestricted use." 395 U.S. at 343.

40. 395 U.S. at 339. It is not clear what kind of "special creditor interest" would be so compelling as to validate garnishment without the necessity of balancing opposing private debtor interests as well. *See* notes 26-28 *supra* and notes 51-56 *infra* and accompanying text.

sidered in detail the problem of wages, "a specialized type of property presenting distinct problems in our economic system."[41] Speaking for the majority, Justice Douglas stated that the use of wages must be protected by the due process clause because there are "grave injustices made possible by prejudgment garnishment whereby the sole opportunity to be heard comes after the taking."[42] He concluded that, since the result of prejudgment wage garnishment is often the loss of employment,[43] forced bankruptcy,[44] or the coerced payment of false or inflated claims,[45] the "procedure violates the fundamental principles of due process."[46] The Court thus relied on the substantive evils resulting from wage garnishment as a basis for its determination that prejudgment wage garnishment cannot constitutionally be tolerated.[47]

The majority opinion, however, left several of the underlying assumptions of the decision unclear. It failed, for example, to explain fully how the temporary denial of the use of wages constitutes a deprivation of property for purposes of the due process clause. In addition, it does not seem to have applied the balancing test normally used in cases in which the issue is whether there has been a deprivation of a constitutionally protected right so that notice and an opportunity for a hearing are required.[48] Rather, the Court focused entirely on the individual's interest in obtaining his wages without delay and ignored the public interests favoring prejudg-

41. 395 U.S. at 340.

42. 395 U.S. at 340.

43. *See* note 8 *supra*.

44. *See* note 7 *supra*.

45. Project, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 753 (1968):

> The debtor whose wages are tied up by a writ of garnishment, and who is usually in need of money, is in no position to resist demands for collection fees. If the debt is small, the debtor will be under considerable pressure to pay the debt and collection charges in order to get his wages back. If the debt is large, he will often sign a new contract or "payment schedule" which incorporates these additional charges.

46. 395 U.S. at 342.

47. It must be remembered that the holding of *Sniadach* struck down only that wage garnishment which occurs prior to a hearing. While the creditor is thus denied the ability to exert pressure on the defendant prior to trial on the merits, he may still have available his postjudgment remedies. Indeed, postjudgment wage garnishment was upheld in Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed per curiam*, 395 U.S. 825 (1969). The use of postjudgment garnishment by a creditor may in some circumstances render *Sniadach*'s prohibition of prejudgment garnishment nugatory. If, for example, the creditor uses a device by which the debtor never gets notice of the hearing and thus loses the judgment by default (*see* note 111 *infra* and accompanying text), then that creditor can garnish the debtor's wages through a postjudgment garnishment without ever confronting the debtor and yet without violating the principles established in *Sniadach*. It is arguable that such deprivation of a debtor's funds without his having a *meaningful* hearing comes within the prohibition of *Sniadach*. *See* note 95 *infra*.

48. *See* note 51 *infra* and accompanying text.

ment wage garnishment. The Court thus failed to articulate fully the theoretical bases for its decision. Yet those bases must be understood before the impact of *Sniadach* can be accurately gauged.

Although the Court based its holding on the distinct character of wages, it failed to elucidate fully why the immediate enjoyment of wages merits protection by full due process guarantees. As noted previously, the use of property has been recognized in other contexts as a property right protected by the Constitution from even temporary deprivation.[49] Similarly, when the property involved is wages, there are persuasive reasons for concluding that the deprivation of the use of such property pending the outcome of a lawsuit results in the deprivation of a constitutionally protected right. The primary value of wages lies in the ability of the wage earner to exchange them for goods and services. To the many families that are dependent upon the immediate use of wages to buy the staples of everyday life, a temporary "freezing" of those funds strips them of much of their value. Loss of the ability to purchase necessities for one week is not wholly counterbalanced by double buying power in some week thereafter.[50] Economic realities, then, compel the conclusion that depriving a person of the use of his wages, even temporarily, constitutes a deprivation of a significant, if quantitatively elusive, property right.

In previous cases in which the hearing requirement has been questioned and the determinative issue has been whether or not there was a deprivation of a constitutionally protected right, the courts have usually employed a balancing test to weigh countervailing public and private interests.[51] The Court in *Sniadach*, however,

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49. *See* note 35 *supra* and accompanying text.

50. Even though most families can obtain necessities without cash by means of credit arrangements of various kinds, the argument advanced in the text retains its force. There will always be a group of wage-earning families with a credit rating so poor that no credit at all is available. Moreover, many other families will have already reached the limit of credit available to them. Indeed, for the wage-earner whose wages are a likely target of garnishment, credit will be *necessarily* limited. The plight of the defendant in a wage garnishment case may be more easily understood through an illustration. Assume that a spurious claim is brought. Assume further that the defendant must forgo, instead of half of his wages, half of the goods and services for which he normally exchanges them. What can he do without: housing? groceries? transportation? Surely it is not unrealistic to assume that a significant number of wage earners—particularly those most susceptible to wage garnishment—have their entire paychecks budgeted in advance. If these goods and services are not made available to the defendant until months later when his claim is vindicated, they will hardly be of equal value.

51. *See, e.g.*, Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967) (expulsion of cadet from Merchant Marine Academy requires a fair hearing): "to determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and the government interest involved . . . ." Frank v. Maryland, 359 U.S. 360, 363 (1959): "Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need

appears to have avoided such a balancing test. The Court thus ignored the public interests that may be served by prejudgment wage garnishment, that is, the interest in ensuring that valid claims will be collectible and the interest in promoting the extension of credit. The public interest in ensuring the collectibility of debts is evidenced by the many statutes and rules providing creditors' remedies[52] and by the court facilities and personnel provided by public funds to enforce creditors' claims against their debtors.[53] In fact, many statutes authorize prejudgment attachment specifically in order to prevent a debtor from transferring his property, with intent to defraud creditors, during the pendency of litigation to collect a debt.[54] It is argued that permitting wages to be garnished prior to a

in which the demand rests." Zemel v. Rusk, 381 U.S. 1, 14 (1965): "The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction." *See also* Finfer v. Caplin, 344 F.2d 38, 41 (2d Cir. 1965). The decisions have often relied on the language of Justice Frankfurter in Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 163 (1951) (concurring opinion):

> Due process is . . . a delicate process of adjustment . . . .
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> . . . .
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> . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed . . . , the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

E.g., Cafeteria and Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (cafeteria cook in Navy munitions plant not denied due process when required to turn in her security badge without a hearing); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 155 (5th Cir. 1961) (expulsion of students from state university without a hearing held a violation of due process clause).

52. Statutes and rules provide numerous devices besides attachment and garnishment procedures to facilitate the collection of claims. All states, of course, provide procedures for execution against the debtor's property to satisfy claims that have been reduced to judgment. *E.g.*, PA. R. CIV. PRO. 3101-215. In addition, the default provisions of article 9 of the Uniform Commercial Code permit creditors secured by personal property to repossess and to liquidate their interests in the collateral without judgment upon the debtor's default. UNIFORM COMMERCIAL CODE §§ 9-501 to -507. A number of states also permit devices such as the cognovit note, in which any attorney is authorized to appear on the debtor's behalf to confess judgment against him. *E.g.*, OHIO LEGISLATIVE SERVICE COMMN., CREDITOR-DEBTOR LAWS IN OHIO 11-13 (1959). *See also* CREDITORS' RIGHTS IN TEXAS (J. McKnight ed. 1963). Although there are additional policies underlying the Federal Bankruptcy Act, 11 U.S.C. §§ 1-500 (1964), that Act also manifests a policy of maximizing the size of the estate available for distribution to general creditors. *See* Bankruptcy Act §§ 60, 67, 70c, 70e, 11 U.S.C. §§ 96, 107, 110(c), 110(e) (1964), *as amended*, 11 U.S.C. §§ 107, 110(c) (Supp. IV, 1965-1968).

53. *See* note 9 *supra*.

54. *See* G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 67 (rev. ed. 1940). One sample statute is in force in Michigan:

> The circuit courts of the state shall have the power by attachment to apply to the satisfaction of a claim due or to become due any interest in things which are subject to the judicial jurisdiction of the state and belonging to the person against whom the claim is asserted whether or not the person himself is subject to the judicial jurisdiction of the state. The courts may exercise the jurisdiction granted in this section only if action is taken in accordance with court rules promulgated to protect the parties and it is asserted that 1 or more of the following situations exists:

hearing prevents the debtor from defrauding his creditor, because it keeps the debtor from dissipating the fund which may ultimately be used to satisfy the debt. Recent studies, however, have challenged the thesis that wage garnishment is an effective means of promoting the collectibility of claims. Figures for collection agencies show that "[i]n New York where the creditor can only garnishee 10% of a man's wages, or New Jersey or Nebraska where he is limited to 20% there is a higher percentage of recovery of debts than in California where the creditor can get 50% . . . ."[55] The public also has an interest in promoting the easy availability of consumer credit, since that availability helps the economy to expand and at the same time allows consumers to enjoy a standard of living that would otherwise be unattainable. The enhancement of economic growth and material comfort may come at too high a cost, however, if the availability of a facile collection device encourages extension of credit to persons unable to pay and destined therefore to suffer garnishment with its often tragic consequences. For these reasons, it appears likely that, even if the Court had applied a balancing test in *Sniadach*, it would have found that the public interests were outweighed by the "grave injustices"[56] resulting from prejudgment wage garnishment.

Nevertheless, the Court can be criticized for its failure even to discuss the relative weight of the public interests. The most probable explanation for that failure is that the Court decided that the well-documented effects of wage garnishment made application of the usual balancing standard unnecessary, even though some legitimate public interests may be advanced by prejudgment wage garnishment. The Court seemed to feel that the substantive "evils" resulting from wage garnishment are so clear and so likely to occur

(1) that the defendant has absconded or is about to abscond from the state or is concealed therein to the injury of his creditors;
(2) that the defendant has assigned, disposed of, or concealed any of his property with intent to defraud his creditors;
(3) that the defendant is about to assign, dispose of, or conceal any of his property with intent to defraud his creditors;
(4) that the defendant has removed or is about to remove any of his property from the state with intent to defraud his creditors;
(5) that the defendant has fraudulently contracted the debt or fraudulently incurred the obligation respecting which the suit is brought;
(6) that the defendant is not a resident of the state and has not resided therein for 3 months immediately preceding;
(7) that the defendant is a foreign corporation.

MICH. COMP. LAWS ANN. § 600.401 (1968).

55. Friedman, *The Repossessed*, NEW REPUBLIC, April 27, 1968, at 10. This data can be misleading, however, since it focuses only on collection agencies, with no explanation of the extent to which they use garnishment. *See also* Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214, 1236-42 (1965). Brunn attempts to show that consumer lending is unrelated to the availability of garnishment. But his assumptions and conclusions are questioned by Homer Kripke, who argues that the public is not in a better position without prejudgment remedies. *See Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1 (1969).

56. 395 U.S. at 340.

that balancing was not required. But that feeling was itself highly subjective and required an implicit weighing of interests on the part of the Court. As Justice Black argued in his dissenting opinion in *Sniadach*, the Court seems to have been acting as a superlegislature in striking down prejudgment wage garnishment on account of its bad effects.[57] Indeed, the majority opinion does appear to be quite heavily underscored by a value judgment concerning the impropriety of such garnishment. Thus, it is arguable that, while the Court claimed to base its decision solely on grounds of a denial of procedural due process, it was also motivated by the old concept of substantive due process.

The principal contribution of *Sniadach*, then, seems to lie in its recognition that a temporary deprivation of the use of property may be prohibited by the due process clause even when the deprivation will be brief and the debtor will eventually receive a hearing on the merits.[58] In the remainder of this Note, that constitutional concept will be discussed in terms of its implications for four areas of the law: other forms of prejudgment attachment and garnishment, procedural rules that discriminate against poor litigants, the doctrine of relievable duress, and postjudgment garnishment.

II. Implications of Sniadach for Other Forms of Attachment and Garnishment

The Court's emphasis in *Sniadach* on the well-proved evils resulting peculiarly from wage garnishment raises the question how it will treat other types of prejudgment attachment and garnishment. Clearly it cannot ignore them completely and return, without explanation, to the pre-*Sniadach* position that all attachments and

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57. 395 U.S. at 344-50. Justice Black stated:

> [T]he Court . . . strikes down this state law . . . because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make.

395 U.S. at 344.

> The Wisconsin law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight. Arguments can be made for outlawing loan sharks and installment sales companies but such decisions, I think, should be made by state and federal legislators, and not by this Court.

395 U.S. at 345.

> In the first sentence of the argument in her brief, petitioner urges that this Wisconsin law "is contrary to public policy"; the Court apparently finds that a sufficient basis for holding it unconstitutional. This holding savors too much of the "Natural Law," "Due Process," "Shock-the-conscience" test of what is constitutional for me to agree to the decision.

395 U.S. at 350.

58. Of course in situations not involving attachment, the courts have long recognized that the due process clause protects against deprivation of the use of property as well as of the ownership of the property itself. *See* note 35 *supra*.

garnishments unrelated to wages are permissible;[59] such a course of action would be precluded by the Court's recognition in *Sniadach* that the historical acceptance of attachment procedures will no longer suffice to support the conclusion that those procedures comply with the due process clause. On the other hand, it is unlikely that the Court will act against other forms of attachment and garnishment with the same one-sided, summary method which it employed in *Sniadach*. There are no comparable data demonstrating the adverse effects of those procedures, and any data that could be assembled would probably have less emotional impact.[60] Indeed, the majority opinion in *Sniadach* spoke of wages as a "specialized" form of property.[61] Thus, the best prediction seems to be that the Court will use the normal due process balancing test in order to determine whether the temporary deprivation in the particular case amounts to a deprivation of a constitutionally protected property right and thus will not be allowed prior to a hearing. That approach, it is submitted, is the most desirable, since it recognizes the important rationale of *Sniadach* that a temporary denial of the use of property during the pendency of a civil action may be a deprivation forbidden by the Constitution, and since at the same time it avoids a subjective judgment, such as that apparently made in *Sniadach*, that the gravity of the deprivation is so clear as to obviate the need for consideration of the public interests.

In evaluating due process arguments concerning other attachment and garnishment procedures, it is helpful to separate the various forms of prejudgment seizures into three major categories: attachment or garnishment of tangible real and personal property, garnishment of intangibles, and foreign attachment.

In general, prejudgment attachment is a creditor's remedy involving seizure of the alleged debtor's property prior to adjudication of the creditor's claim on the merits.[62] The chief public interests in favor of summary seizure of tangible real and personal property are those discussed above with regard to wages—to promote the extension of credit and to ensure a fund from which to collect valid claims—although these interests must be offset by the public interests in favor of the debtor.[63] In order for a court to hold that pre-

59. *See* notes 31-35 *supra* and accompanying text.

60. Justice Harlan, on the other hand, apparently believes that all prejudgment deprivations are unconstitutional. *See* note 39 *supra*. The Wisconsin supreme court appears to agree, at least partially, with Harlan, for it has held a prejudgment deprivation other than that of wages unconstitutional. Larson v. Fetherston, 172 N.W.2d 20 (Wis. 1969). *See* note 75 *infra*. *But see* note 64 *infra* and text accompanying notes 63-89 *infra*.

61. 395 U.S. at 340.

62. H. OLECK, CREDITORS' RIGHTS 2 (1948).

63. *See* text accompanying notes 51-56 *supra*.

judgment attachment of tangible property unconstitutionally deprives a defendant of a protected property interest, the court must be persuaded that the alleged debtor's interests outweigh the substantial public concerns supporting seizure.[64] Since the relative strength of the public interests in the summary procedure and that of the individual interests infringed differ for various types of attachment, the opposing interests are best evaluated by analyzing separately the attachment of realty, the attachment of personalty, and the garnishment of personalty.

Prejudgment attachment of realty and immovable personal property should raise no serious constitutional question. Since generally prevalent procedures do not involve the dispossession of the owner of the attached property prior to adjudication, this type of attachment does not deprive him of the property's beneficial use until there has been a hearing on the merits. It merely places on the property a lien which restricts that property's alienability.[65] Moreover, except in extraordinary circumstances, the temporary loss of the right to sell or encumber one's land free from a creditor's inchoate lien is a deprivation of only a fraction of the value of the land.[66] On the other hand, the public interest favoring the prejudgment attachment of realty is quite strong. Indeed, there is often justification for the fear that, absent prejudgment attachment, a debtor may transfer his land without consideration, hoping to make himself judgment proof and thus to leave the creditor to absorb the debt without a remedy.[67] Attachment of realty therefore usually amounts to only a slight inconvenience to the debtor, and that nominal infringement of his interest should not outweigh the public interest in promoting the collectibility of accounts.

Prejudgment attachment of movable personal property, however,

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64. At least one court has indicated its unwillingness to determine the question of the constitutionality of attachment and garnishment procedures in the absence of the specific factual context of a particular case. Although the Supreme Court of California has held in two cases that California's prejudgment wage garnishment procedures do not comply with the requirements of procedural due process [Cline v. Credit Bureau, 83 Cal. Rptr. 669, 464 P.2d 125 (1970); McCallop v. Carberry, 83 Cal. Rptr. 666, 464 P.2d 122 (1970)], it has refused to decide a case in which the attorney general of the state sought to have all prejudgment attachments declared unconstitutional. The court held that since the case presented neither a party in interest nor a concrete set of facts, the attorney general's complaint constituted a request for an advisory opinion, which the court does not have jurisdiction to render. People *ex rel.* Lynch v. Superior Court, 83 Cal. Rptr. 670, 464 P.2d 126 (1970). *See* notes 73, 88 *infra.*

65. C. NADLER, CREDITOR AND DEBTOR RELATIONS 77 (1956).

66. One exception might be the case of the attachment defendant who is a real estate dealer.

67. *See* note 54 *supra* and accompanying text. If a conveyance is made by a debtor to hinder, delay, or defraud creditors, they may avoid it. But by fraudulently conveying his property, the debtor may harass his creditors and increase the cost of collecting their debts. *See generally* G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 58-62b, at 79-103 (1940).

ordinarily results in immediate seizure and removal by an officer of the court.[68] The individual thus loses possession and all beneficial use of his property prior to adjudication. If the personalty is of everyday importance, such as a piece of furniture, an appliance, or an automobile, the individual may suffer substantial injury when he is deprived of its use.[69] Moreover, the public interest in ensuring that a fund is available for collection purposes is only slightly advanced by allowing attachment of personalty prior to adjudication, since a defendant would seldom be moved to transfer a necessity in order to defraud a creditor.[70] Therefore, at least when the use of the attached personalty is of everyday importance, the interests of the alleged debtor should prevail, and a hearing should be required prior to attachment.

Prejudgment garnishment is a specialized form of attachment that may be used to reach tangible personal property owned by the defendant but in the possession of a third party, as well as to reach debts owed to a defendant by a third party.[71] Garnishment of tangible property normally should not affect a debtor's interest, since the possession and beneficial use of the property involved are in the third party and the alleged debtor is deprived only of his right to alienate the property.[72] That restriction on alienation is necessary to protect the public interest in ensuring a collectible fund, since the defendant who is not using his property may be presumed more

68. *See* C. NADLER, *supra* note 65, at 77.

69. This discussion, of course, applies only to consumers, and not to businesses or corporations whose assets might be attached. The hardship recognized in *Sniadach* is the temporary loss of the necessities of life; corporations, while technically persons, do not eat or require the use of consumer goods for their existence. Moreover, this discussion does not apply with regard to property of the debtor which is exempt from attachment. For a discussion of state exemption statutes, see Karlen, *Exemptions from Execution*, 22 BUS. LAW. 1167 (1967).

70. In certain circumstances, it may be possible for a debtor to transfer title to a necessity while retaining the use of the property. A debtor might, for example, transfer title to his automobile to a relative without forgoing either possession or use of the car. Similarly, certain appliances might be transferred to a relative or friend living nearby with the understanding that the debtor could continue to use the property. Except in cases such as these, however, it is unlikely that the debtor would transfer a necessity in order to defraud his creditor. If a debtor should fraudulently transfer such property, creditors may, of course, avoid the transfer (*see* note 67 *supra*), although they are much less likely to discover a transfer of movable personal property than a transfer of real property.

71. H. OLECK, CREDITORS' RIGHTS 3 (1948).

72. This analysis becomes somewhat more complicated if the defendant, at the time of garnishment, retains the right to recover his property on demand from the third party. In that situation, the garnishment denies the defendant that right as well as the power to alienate. Since the defendant would, except for the garnishment, be able to recover and enjoy full use and possession of his property, he is placed in much the same situation by garnishment as he would be by an attachment suit in which no third party is involved. The validity of attachment of tangible property has been discussed previously, in the text accompanying notes 65-70 *supra*, and the same conclusions should apply to garnishment in this special situation.

likely to transfer it to defraud his creditors than would a defendant who is actually using the property. Thus the public interest should prevail and garnishment of tangible personal property in the hands of a bailee should be allowed prior to adjudication.

In summary, attachment or garnishment of tangible property prior to a hearing should generally be found to be violative of the due process clause only when the property of which the owner is temporarily deprived is property that is important to daily life. It seems that these conditions would be fulfilled solely when movable personal property is attached.[73]

A second general category of prejudgment seizure is that of the garnishment of intangible assets—that is, the attachment of funds which are in the possession of a third party, but which are allegedly owed to the defendant. Wages owed to a defendant are one such type of funds; *Sniadach* established the proposition that a defendant may be deprived of the use of his wages only after he has been adjudged liable for a debt.[74] Other funds may invoke considerations similar to those in *Sniadach* if the defendant has both the expectation of prompt receipt of the money and an immediate need for it—such as when he has no other income. Examples of such funds are a bank account and the income from a life trust. *Sniadach* should be controlling in a case in which such funds are the defendant's sole or primary liquid assets and are garnished prior to a hearing. In such a case, the defendant's significant interest in the use of the funds—an interest which is analogous to the wage earner's interest in the use of his wages—is not outweighed by the public interests in debt collection and in economic expansion.[75]

For the more common type of garnishable debt or chose in action, however, the defendant's interest in the use of the garnished fund seems to be relatively slight. For example, a defendant with

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73. *But see* text accompanying note 88 *infra*. If courts in particular jurisdictions are unwilling to undertake the burdensome factual examinations necessary to define the parameters of due process in the attachment or garnishment context (*see* note 64 *supra*), the legislatures might solve the problem by enacting realistic exemption statutes to cover exceptional or hardship situations. *See* note 89 *infra* and accompanying text. *But see* note 78 *infra*.

74. The supreme courts of Arizona and California have recently held, on the basis of *Sniadach*, that prejudgment wage garnishment is unconstitutional. Termplan, Inc. v. Superior Court, 463 P.2d 68 (Ariz. 1969); Cline v. Credit Bureau, 83 Cal. Rptr. 669, 464 P.2d 125 (1970); McCallop v. Carberry, 83 Cal. Rptr. 666, 464 P.2d 122 (1970). In *Termplan*, however, the court carefully limited its decision to the garnishment of wages.

75. The Supreme Court of Wisconsin, in a recent opinion based on *Sniadach*, held unconstitutional the prejudgment garnishment of bank accounts. Larson v. Fetherston, 172 N.W.2d 20 (1969). The court included in its opinion dicta to the effect that all prejudgment garnishments violate the due process clause: "We think that no valid distinction can be made between garnishment of wages and that of other property." 172 N.W. at 23.

accounts receivable which he neither needs[76] nor expects to be paid immediately has little cognizable interest in the "use" of those accounts—a use which is temporarily denied him by prejudgment seizure.[77] Similarly, the defendant with a chose in action has no substantial, immediate interest which is abridged by prejudgment seizure. Moreover, the public interest in ensuring the existence of a fund for debt collection seems strongest in cases in which the only assets available for execution upon judgment are elusive cash funds. Thus, in general, prejudgment garnishment of intangible assets should not be held to deny a defendant due process of law except when such a defendant has both an immediate expectation of, and an immediate need for, the garnished fund.[78]

The third general category of prejudgment attachments is that involving the immediate seizure of a defendant's property for the purpose of establishing quasi in rem jurisdiction when the defendant resides outside the court's territorial jurisdiction. Quasi in rem jurisdiction extends to any attachable tangible or intangible property of the defendant which is located in the forum state,[79] and in most states, the defendant may make a personal appearance and still limit such jurisdiction to the value of the property that is actually attached.[80] Thus, in order to determine whether the due process clause requires notice and an opportunity for a hearing prior to seizure in a foreign-attachment case, the same public and private interests that are discussed above with regard to other kinds of attachment and garnishment should be weighed,[81] and the same balancing process should apply.[82] It is also necessary, however, to determine whether any considerations unique to foreign attachment should alter the balance.

The chief public interests advanced in support of prejudgment

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76. It should be reiterated here that for purposes of analysis in light of *Sniadach*, the only need for funds which is constitutionally cognizable is a need for their use to obtain necessities.

77. *But see* Arnold v. Knettle, 460 P.2d 45 (Ariz. Ct. App. 1969), in which the court, relying on *Sniadach*, held that the garnishment both of wages and of accounts receivable violates the due process clause.

78. It may be difficult to draft a statute to exclude garnishment in these exceptional situations. One solution may be to provide the defendant with notice at the same time that it is provided to the garnishee, and to allow release of the garnished funds upon defendant's sworn statement that he meets the criteria for the exception.

79. For the purpose of obtaining jurisdiction by means of the garnishment of a chose in action, the "location" of such an intangible is any place at which the garnishee is subject to in personam jurisdiction. Harris v. Balk, 198 U.S. 215 (1905).

80. *See generally Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 948-55 (1960).

81. For a discussion of the competing considerations in cases which do not involve foreign attachment, see text accompanying notes 62-78 *supra*.

82. *See* note 51 *supra* and accompanying text.

foreign attachment are the state's right to control controversies arising within its borders and the state's interest in providing the protection of state courts to its citizens in their dealings with nonresidents.[83] The use of prejudgment foreign-attachment procedures to achieve these goals, however, has been severely criticized in light of modern developments in the law relating to personal jurisdiction.[84] The critics contend that, since long-arm statutes make personal jurisdiction generally available in cases in which the nonresident defendant has sufficient contacts within the forum state to create a genuine state interest, quasi in rem jurisdiction established by prejudgment foreign attachment is likely to be used only when the state has no legitimate interest in the dispute.[85] If this criticism is valid, assertion of jurisdiction by foreign attachment advances no state interests that are not already fully protected.[86] Hence, the determination of the constitutionality of various forms of prejudgment attachment and garnishment should be unaffected by the fact that the attachment is used to establish jurisdiction, at least if there are long-arm statutes that make personal jurisdiction readily available.

In summary, the application of the Court's reasoning in *Sniadach* to other forms of prejudgment attachment and garnishment should result in a finding of a denial of due process only in isolated instances, such as those involving the attachment and removal of personal property essential to the defendant, or those involving the garnishment of intangible assets which the defendant needs in order to purchase daily necessities. In analyzing the constitutionality of the various forms of prejudgment attachment, however, it has been necessary to deal in generalities rather than in specifics. Thus, the resultant conclusions, while valid for most situations, may be invalid

83. Beale, *The Exercise of Jurisdiction In Rem To Compel Payment of a Debt*, 27 HARV. L. REV. 107 (1913). *See also* note 80 *supra* and note 84 *infra*.

84. *See, e.g.*, Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

85. *See, e.g.*, Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550 (1967); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Comment, *Podolasky v. Devinney and the Garnishment of Intangibles: A Chip Off the Old Balk*, 54 VA. L. REV. 1426 (1968). An example of the results which can occur when foreign attachment is used to gain jurisdiction in a place in which personal jurisdiction is unavailable is the New York rule of Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). The controversy in that case involved an automobile crash in Vermont, with a Quebec resident as defendant. The New York court held that a New York liability insurer's obligation to defend the action is a "debt" sufficient to assert foreign-attachment jurisdiction.

86. This conclusion depends on the existence of comprehensive long-arm statutes. An example of the current trend in this direction can be found in California. Prior to 1969 California had one of the least comprehensive long-arm statutes, permitting the exercise of personal jurisdiction by California courts over only nonresident motorists [CAL. VEHICLE CODE § 17451 (West Supp. 1969)] and fliers [CAL. PUB. UTIL. CODE § 21414 (West 1965)]. In 1969 the California legislature adopted a new statute permitting personal jurisdiction in California whenever constitutional requirements are satisfied. CAL. CIV. PRO. CODE § 410.10 (West 1969).

in the extraordinary case. For example, although the attachment of an automobile could cause severe hardship and thus require a full hearing if the defendant had no alternative means of transportation to and from work, the same type of attachment would be a mere inconvenience and should not require a full hearing if the defendant has a second car.

Since the normal manner in which one whose property has been attached may raise objections based on the due process clause is upon motion for dismissal of the attachment,[87] it may be argued that the extension of the Court's reasoning in *Sniadach* to the prejudgment attachment of property other than wages would impose a great burden on the courts. In every case, there would be the potential for objections based on the due process clause. Even in cases in which such objections are ordinarily not well founded—such as cases involving the attachment of real estate—the defendant might attempt to show that his is a special case, requiring dissolution of the attachment on the ground of individual hardship. The great majority of these motions, however, would be susceptible of summary disposition. Only those motions involving a substantial probability of individual hardship should occupy much of the court's time. Moreover, a body of case law indicating the circumstances in which attachments would normally be dissolved should develop fairly rapidly. When that case law has developed, it is likely that motions would be made only in cases similar to those in which prejudgment attachments have previously been dissolved. Indeed, the net effect of applying *Sniadach* to the attachment of other kinds of property could even be to conserve courts' time, since creditors might be discouraged from attaching property in situations in which it has become clear that the attachment would be dissolved on the defendant's motion.

To the extent that there remains some danger of clogging the courts, that result may best be avoided by the drafting of comprehensive new attachment and garnishment statutes.[88] The drafting of such statutes, however, may prove to be extremely difficult, because the constitutionality of a particular prejudgment attachment procedure may depend on the distinctive facts of a particular case.

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87. Mrs. Sniadach raised her claim under the due process clause in this manner. 395 U.S. at 346. Since a claim under the due process clause centers around the allegation that the loss of the use of property pending a hearing deprives the debtor of necessities and causes hardship, the issue would be largely rendered moot by waiting until the hearing on the merits to raise it. *Cf., e.g.*, MICH. CT. R. 738.16, quoted in note 89 *infra*.

88. In addition, if courts in a particular jurisdiction are reluctant to engage in the difficult and time-consuming factual analysis required to determine what property is "essential" or which assets the defendant actually "needs"—determinations necessary to a constitutional decision in a particular case—the legislature may be able to enact statutes to deal with these problems. *See* note 73 *supra* and note 89 *infra* and accompanying text.

The best solution seems to lie in devising a statute with broadly phrased provisions that are in line with the general conclusions of this Note. Such a statute would seem to be fair in the great majority of cases. In order to deal with exceptional cases, the statute could provide some speedy preliminary procedure for dissolution of the attachment on a defendant's showing of individual hardship. Because the public interests do not vary with the defendant's situation, they can be considered without argument in every case, and an ex parte hearing would be sufficient to deal with the hardship claim.[89]

III. Procedural Rules That Discriminate Against Poor Litigants

While the Supreme Court has broadly interpreted the equal protection and due process clauses of the fourteenth amendment to protect the rights of indigent criminal defendants,[90] it has failed to take comparable action on behalf of indigent civil litigants.[91] Many

89. For an example of a method currently in use for alleviating exceptional hardship in garnishment situations, see MICH. CT. R. 738.16:

Dissolution of Garnishment without Bond.

(1) In exceptional circumstances, on notice and hearing, the court may, in the interests of justice, set aside a garnishment in whole or in part upon the furnishing of a bond in an amount less than prescribed in sub-rules 738.14 and 738.15, conditioned as therein provided. The court should give full consideration to the following factors:
   (a) The nature of the plaintiff's claim, whether it is liquidated or unliquidated;
   (b) The solvency of the principal defendant;
   (c) The likelihood of loss to the plaintiff if garnishment is terminated;
   (d) The relative priorities of the claims of employees and other persons;
   (e) The likelihood of irreparable harm to the garnishee defendant if garnishment is not terminated.

(2) Garnishment shall not be set aside under (1) if the garnishment is based on a judgment against the principal defendant.

The Michigan rule, however, calls for an adversary hearing. The time needed to comply with this requirement may defeat the purposes of providing a preliminary dissolution procedure. *But see* note 78 *supra*.

90. *See* Griffin v. Illinois, 351 U.S. 12 (1956), in which the Court held that the practice of charging defendants for trial transcripts which are necessary to prepare an appeal violates the due process and equal protection clauses of the fourteenth amendment. *See also* Gideon v. Wainwright, 372 U.S. 335 (1963), in which the Court held that the due process clause guarantees a right to counsel in criminal cases regardless of ability to pay.

91. *See* Williams v. Shaffer, 385 U.S. 1037 (1967), in which the Court refused to consider a Georgia summary-eviction statute requiring that the tenant defendant post bond in order to defend the action [GA. CODE ANN. § 61-303 (1966)]. Justice Douglas, in an opinion joined by Chief Justice Warren, dissented, arguing that serious issues based on the equal protection clause were raised. The same Georgia bond requirement is before the Court again. State v. Sanks, 225 Ga. 88, 166 S.E.2d 19 (1969), *prob. juris. noted*, 395 U.S. 974 (1969). This case has been argued before the Court and its decision is pending. 38 U.S.L.W. 3220 (1969). In a case argued the same day, Simmons v. West Haven Housing Authority, 5 Conn. Cir. 282, 250 A.2d 527, *prob. juris. noted*, 394 U.S. 957 (1969), the Court has been asked to reverse a holding of the Circuit Court of Connecticut, Appellate Division, that a Connecticut statute requiring a tenant to post a bond in order to appeal an adverse decision in an eviction action does not violate the equal protection clause even when applied to indigents. In Sandoval v. Rattikin,

states continue to enforce rules that put the poor litigant in a civil action at an unfair disadvantage.[92] But the *Sniadach* holding that prejudgment wage garnishment is a violation of the due process clause may be helpful in developing arguments which, in conjunction with those developed under the equal protection clause, may be used to expand the rights of indigent civil litigants.

One practice which might be halted on the basis of the reasoning implicit in *Sniadach* is that which requires litigants to post a bond in order to defend or bring an action.[93] Requiring a poor person to post a bond as a prerequisite to engaging in a civil action is similar to a prejudgment garnishment of his wages in that both practices deprive the person of the use of his funds before he has been afforded a hearing in which to vindicate his claim. In both cases, the funds will be returned to the defendant if he wins. Of course, the bond requirement differs somewhat from prejudgment wage garnishment, since in the latter situation the defendant is directly deprived of the use of his funds, while in the former the poor litigant has the alternative of failing to post a bond and thus forefeiting his legal rights. But in both cases, the property interest involved is the use of funds which may be needed to purchase the necessities of life. Rights are of little value without remedies; and so if a poor litigant wishes to enforce his rights, he is compelled to post the bond and thus frequently to forgo the basic necessities because

395 S.W.2d 889 (Tex. Civ. App. 1965), *cert. denied*, 385 U.S. 901 (1966), the Texas Court found that denying indigent defendants free counsel in a civil trespass-to-try-title action was not a denial of due process. Of course, the Court has acted against prejudgment wage garnishment (*Sniadach*); and it has required that notice of trial must, whenever practicable, be more effective than that given through newspaper publication [Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)].

But cf. In re Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), in which the Supreme Court of California held that the due process clause requires that an indigent defendant imprisoned under the process of mesne civil arrest be provided appointed counsel.

92. *See* note 91 *supra* and notes 93-94 *infra*.

93. For an example of a procedural requirement that a bond be posted in order to defend an action, see the Georgia statute discussed in note 91 *supra*. Numerous state laws and court rules require the posting of a bond in order to bring an action. A New York court rule, for example, requires the posting of a bond of not less than $250 in order to bring an attachment suit. N.Y.R. CIV. PRAC. 6212(b). An Ohio statute provides that a private action in equity for the abatement of a nuisance may be brought only upon the posting of a bond of not less than $500. OHIO REV. CODE ANN. § 3767.03 (Page 1954). Under Michigan law, a plaintiff may be required to post a bond in order to bring suit against a nonresident defendant [MICH. COMP. LAWS ANN. § 600.741 (1968)], while California law requires a nonresident to post a bond in order to bring suit [CAL. CIV. PRO. CODE § 1030 (West 1954)].

There is no need to distinguish defendants and plaintiffs for purposes of this due process analysis, since in either case the poor person is faced with deciding between waiver of a legal right or the present use of his funds. The situation of a defendant who suffers a default judgment, however, seems more compelling than that of the plaintiff who cannot afford to file suit.

he cannot afford to pay for both. The bond requirement, then, not only has a chilling effect on the litigant's right to bring or defend an action, but it can clearly deprive the litigant of needed funds before he has had an opportunity for a hearing. The rationale of *Sniadach* might well be applied to prevent such a deprivation.[94]

If *Sniadach* is interpreted to require a *meaningful* hearing before a person may be deprived of the use of needed property,[95] then its underlying reasoning might also be useful in arguing that the due process clause requires extension of the right to counsel to civil litigants. Since a litigant's right to a hearing is often worthless unless he has counsel,[96] the civil litigant today must pay for counsel in order to have a meaningful hearing; and the poor litigant frequently cannot do so unless he gives up the necessities of life. Thus, the

94. In addition, many states have requirements that a litigant pay a fee in order to engage in a civil action. For example, Connecticut and twenty-six other states do not exempt indigents from a general requirement that court fees and costs be paid in order to obtain divorce. CIVIL LIBERTIES, April 1969, at 6, col. 3. In Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968), a three-judge district court upheld this practice against a class action brought on behalf of indigent women in Connecticut who alleged that the requirement was violative of the equal protection clause and the due process clause. The Supreme Court noted probable jurisdiction, 395 U.S. 974 (1969). *But cf.* Jeffreys v. Jeffreys, 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. 1968), in which the court held that a statute requiring service of summons by publication in divorce actions based on abandonment operated as an effective barrier to indigent plaintiffs' access to the courts and thus constituted a denial of equal protection. Fee requirements are also a problem to indigents in bankruptcy cases. The United States District Court for the District of Massachusetts recently rejected an attack on the constitutionality of fee requirements in the bankruptcy situation. It refused to review a referee's order denying the bankrupt's motion to vacate the order for payment of filing fees and to proceed in forma pauperis. 44 REF. J. 5 (1970). For a criticism of fee requirements in bankruptcy cases, see Shaeffer, *Proceedings in Bankruptcy In Forma Pauperis*, 69 COLUM. L. REV. 1202 (1969).

Since fee requirements deprive a litigant of the property itself and not merely of the use of it, *Sniadach* does not apply directly. When poor litigants are involved, however, such fees should be subject to challenge on the same rationale as that in *Sniadach*. Since the fee requirement forces a poor person to choose between purchasing necessities and exercising his legal rights in a meaningful way, it requires that an indigent who wishes to pursue his rights sacrifice needed funds before he has had a hearing. The rationale of *Sniadach* would, at least arguably, prohibit such a deprivation. Moreover, since the fee requirement is arguably a permanent taking of property, it would seem to present even a stronger case than would a bond requirement.

95. The Court has stated in previous cases that a fundamental requirement of the due process clause is the opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965), discussed in note 29 *supra*. *See also* Gonzales v. United States, 348 U.S. 407, 415 (1955); Ohio Bell Tel. Co. v. Public Util. Commn., 301 U.S. 292, 302 (1937) (The hearing must provide for "the protection of the individual against arbitrary action."). With respect to the procedural safeguards which constitute a meaningful hearing in the garnishment context, and with respect to the question whether *Sniadach* requires a full trial-type hearing, see note 20 *supra*. Of course, the Court has also required meaningful *notice* of a hearing. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), discussed in note 29 *supra*.

96. *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); *In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968).

failure to provide free counsel to the indigent civil litigant deprives him of needed funds before he can have a meaningful hearing.[97] *Sniadach* may be helpful in arguing that such deprivation is a deprivation of property without due process of law and that therefore the poor litigant should be assigned counsel in civil cases.[98]

In determining the validity under the due process clause of procedural practices that discriminate against poor litigants, the courts should again employ a balancing test;[99] but the interests to be balanced in this context are somewhat different from those previously considered with regard to attachment and garnishment procedures.[100] The principal individual interest which the practices of requiring the litigant to post a bond and to bear the initial costs of litigation may offend is the interest in retaining the use of funds needed to buy the essentials of life during the pendency of an action in which one is seeking to pursue or to defend his legal rights. In addition to this substantial individual interest, there is a public interest in providing all persons easy access to the courts in order to promote the peaceful resolution of private disputes.

The basic argument in favor of the present procedural practices is that they discourage the litigation of spurious claims. It might be argued that the elimination of this obstacle for indigents would grant the poor litigant free rein to utilize the courts for harassment purposes; his former position of unfair disadvantage would arguably be exchanged for one of unfair advantage. This problem can be avoided, however, by requiring the indigent to make a preliminary showing of good faith before granting his motion for waiver of a bond requirement or for appointed counsel. With respect to bond requirements, there is an additional interest in providing a fund

97. Here again, as in the fee requirement situation, the deprivation is of the property itself and not merely of the use of it. *See* note 94 *supra.*

Although poor plaintiffs may be able to get representation by working out a contingent-fee arrangement, that option is not generally available to low-income *defendants.* Moreover, much of the litigation in which the poor are likely to become involved as plaintiffs, such as divorce actions and eviction suits, do not result in a monetary award if successful, and thus no contingent fee can be generated. B. SELIGMAN, POVERTY AS A PUBLIC ISSUE 183-91 (1965); Note, *The Right to Counsel in Civil Litigation,* 66 COLUM. L. REV. 1322, 1324 (1966).

98. The Federal Trade Commission has recently ruled that indigent respondents in hearings before the FTC are entitled to have counsel provided by the Government. The Commission stated: "We can think of nothing less conducive to fairness and due process in administrative procedures than to pit the power of the state . . . against a single individual and then to deny that individual the right to counsel . . . ." *In re* American Chinchilla Corp., 38 U.S.L.W. 2386 (FTC Dec. 23, 1969); *cf. In re* Harris, 69 Cal. 2d 486, 446 P.2d 148, 72 Cal. Rptr. 340 (1968), discussed in note 91 *supra*; Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale,* 22 STAN. L. REV. 20, 55 (1969).

99. *See* note 51 *supra* and accompanying text.

100. *See* text accompanying notes 62-89 *supra.* Some of the interests previously discussed, such as the interest in promoting the extension of credit, are irrelevant outside the field of debt collection.

from which a successful adversary may receive reimbursement if he is ultimately awarded costs. That interest may be protected, however, by scrutinizing requests for the waiver of bond requirements more carefully than requests for the waiver of other procedural requirements.[101] Finally, a potentially great financial burden on the government may result from modifying present procedures. In addition to the direct cost of providing counsel to indigent civil litigants, the cost of administering the court system could rise sharply if the elimination of some of the present barriers should lead to increased litigation.

While the arguments favoring the present procedures are not insignificant, they do not seem compelling. The most important interests which present practices seek to protect may be protected by alternative means; and the other interests do not weigh heavily in the balance in comparison with the combination of the strong individual interest in the immediate use of needed funds—an interest which was recognized in *Sniadach*—and the public interest in freely accessible courts.

IV. The Doctrine of Relievable Duress

Relievable duress is a doctrine which provides relief to a defendant who, under the pressure of coercive tactics, has settled a spurious claim or has paid an inflated settlement for a legitimate claim. The issue of duress may be raised either as a defense in a suit to enforce the settlement or else in a separate action to obtain restitution of excess money paid.[102] Unfortunately, courts have been extremely reluctant to recognize the pressure exerted through prejudgment attachment or garnishment as the type of coercion that gives rise to a claim or defense under the duress doctrine, at least in the absence of proof that the creditor knew that his original claim was unfounded. Rather, the decisions have generally adopted the view that it cannot be considered duress to do what one has a legal right to do.[103] Although the vast majority of opinions have denied defendants relief on that ground, the few courts which have applied the duress doctrine to attachment problems have employed a ratio-

101. Unlike bond requirements, fee requirements serve to protect the adversary only to the extent that they discourage the institution of spurious claims. Instead of indemnifying the adversary, fees are used to offset the administrative expense of the judicial system. Thus, fee requirements should be freely waived. *See also* note 94 *supra.*

102. Dawson, *Economic Duress—An Essay in Perspective*, 45 Mich. L. Rev. 253, 256 (1947).

103. Remington Arms Union Metallic Cartridge Co. v. Feeney Tool Co., 97 Conn. 129, 132, 115 A. 629, 630 (1921): "If . . . the payment is made under the stress of lawful process lawfully used, the party can obtain no relief . . . . Lawful compulsion is no duress." *See also* Kohler v. Wells, Fargo & Co., 26 Cal. 606 (1864); Paulson v. Barger, 132 Iowa 547, 109 N.W. 1081 (1906).

nale similar to that used in *Sniadach* and have found particular prejudgment procedures unduly coercive. In two cases the duress doctrine was used to abate the injustice of prejudgment wage garnishment.[104] In a third case relief was granted on the ground of duress when the plaintiff garnished cash debts owed to the defendant, knowing that the defendant badly needed the funds.[105]

In the future, courts confronted with the duress issue in attachment cases will have to consider the impact of the *Sniadach* opinion. The recognition in *Sniadach* of the pressure that can be exerted through prejudgment wage garnishment[106] should spur a complete re-evaluation of the relievable duress doctrine as it is applied to attachments generally. In particular, it should cause courts to take a critical look at the maxim of current duress law that denies relief to the defendant under any circumstances in cases in which the plaintiff has a legal right to bring the attachment suit.[107]

In addition to providing a more rational legal process, a modernized duress doctrine could be of substantial practical benefit to a defendant who is wrongfully subjected to prejudgment attachment procedures. When a defendant's property is attached prior to a hearing, the customary manner in which the defendant may raise objections based on the due process clause is upon motion for dismissal of the attachment. But it is impractical for many defendants to adopt that course, since a hearing upon such a motion often involves more lengthy court action than does proceeding to a trial on the merits,[108] and that extended length of time prior to resolution of the dispute increases the injury resulting from loss of the use of the attached property. For example, a defendant who is left without a means of transportation when his automobile is attached will probably be unwilling to give up the use of his car for the extended period required to litigate a claim under the due process clause. Thus, if the motion-for-dismissal procedure remains the only means available to challenge prejudgment attachment on the basis of the due process clause, extension of the reasoning of *Sniadach* into the area of attachments generally may be very slow. A modern duress doctrine, however, might alleviate this largely practical impediment to asserting claims under the due process clause. If relief on the ground of duress were made available in these cases, a defendant

104. American Medical & Dental Assn. v. Brown, 140 Colo. 341, 344 P.2d 189 (1959); Kelley v. Osborn, 86 Mo. App. 239 (1900).

105. Vine v. Glenn, 41 Mich. 112, 1 N.W. 997 (1879).

106. *See* text accompanying notes 42-47 *supra*.

107. *See* note 103 *supra* and accompanying text.

108. The best example of the time involved in litigating the due process issue on a motion to dismiss the attachment is *Sniadach* itself. The defendant in that case filed the motion to dismiss December 23, 1966, and waited until June 9, 1969, for final resolution of the issue by the Supreme Court. 395 U.S. at 346.

would be able to agree to a settlement, procure dissolution of the attachment, and thereafter bring a suit for restitution of the amount alleged to be excessive and extracted through coercion.[109] Under this suggested procedure, the claim under the due process clause would be litigated in the suit for restitution, and any prejudgment attachment or garnishment found not to comport with due process of law would be declared to be per se coercive.

In summary, the Court's recognition in *Sniadach* of the coercive effect of wage garnishment should greatly affect the doctrine of relievable duress, which has almost consistently denied that any "legal" procedure can be found to be illegally coercive. If the doctrine is expanded to include coercive attachment practices that have traditionally been considered beyond its purview, debtors, by alleging duress, will be able to litigate the constitutionality of various forms of attachment without a continued loss of the use of their property.

V. Postjudgment Garnishment

Another significant role which both *Sniadach* and a re-evaluated duress doctrine could play in expanding the scope of debtors' rights lies in the area of postjudgment garnishments. Of course, it might be argued that, since *Sniadach* is primarily a case involving procedural due process, it is inapplicable to attachments and garnishments that take place after a hearing has been provided and a decision has been reached by a competent court.[110] But unfair treatment of poor debtors may be a problem in cases involving postjudgment garnishments as well as in cases involving prejudgment garnishments. Indeed, the *Sniadach* proscription of prejudgment wage garnishment could arguably be illusory unless some type of relief is fashioned to aid those debtors injured by abuses of postjudgment garnishment.

Creditors can make the provision for a hearing a sham by employing such procedures as sewer service, in which the debtor never gets notice of the hearing and does not even learn of the proceedings until after a default judgment has been entered.[111] Even though the

109. Although duress may also be raised as an affirmative defense to a suit on a settlement agreement, such a suit might well be initiated through another attachment, and thus the defendant will have gained nothing.

110. *See* Endicott Johnson Corp. v. Encyclopedia Press, 266 U.S. 285 (1924), in which the Court held that the due process clause does not require that notice and an opportunity for a hearing be afforded to a judgment debtor before issuance of a writ of garnishment. *See also* Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed per curiam*, 395 U.S. 825 (1969), which is discussed in notes 119-25 *infra* and accompanying text and in note 127 *infra* and accompanying text.

111. The phrase "sewer service" describes the practice whereby a local process server swears in an affidavit that he has personally delivered a summons to the named defendant at the specified address, when in reality he has thrown it away—that is, "into the sewer"—or left it under a door, in a mailbox, or with a person known not

failure to give notice to the defendant is a ground for opening a default judgment,[112] it is questionable whether or not the debtor may thereby be returned to his former position if the judgment creditor has already filed a garnishment in execution of the judgment. In those states in which no notice is required prior to a postjudgment garnishment,[113] for example, the debtor may remain unaware of the entire proceeding until his wages have actually been paid to his creditor. In order to recover, he must then successfully maintain a suit for restitution from his creditor.[114] Pending the outcome of that claim, the alleged debtor will have been deprived of the use and enjoyment of his wages without an opportunity for a hearing. It was precisely this situation which was held in *Sniadach* to be an unconstitutional deprivation of property.[115] In order to comply with the mandate of *Sniadach*, then, courts must provide

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to be the defendant named. *Abuse of Process: Sewer Service*, 3 COLUM. J.L. & SOC. PROB. 17 (1967). This article quotes a New York assistant attorney general and local defense attorneys as testifying that sewer service "virtually permeates the service of legal process in the Civil Court in the City of New York" and that its extent is "very widespread," "epidemic," and "pervasive in consumer and landlord-tenant cases." *Id.* at 18. The authors further report that in most cases, the judgment debtor is not notified by the court of the default judgment rendered against him and that the first notice which he has of any of the proceedings comes at the time that his employer notifies him that his wages have been garnished. *Id.* at 20. *See also* Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. Rev. 1, 37 (1969).

The creditor also has available other legal methods of placing the debtor at a disadvantage. One method is by manipulation of the secured sales transaction under article 9 of the Uniform Commercial Code. An example of such a transaction is the secured installment credit sale of automobiles. *See* Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969). Another method is to require confession of judgment as a condition of credit. *See* Note, *Confessions of Judgment*, 102 U. PA. L. REV. 524 (1954). A third method, closely analogous to wage garnishment, is to require a wage assignment as a condition of credit. *See* Note, *Prejudgment Wage Garnishment and the Right To Be Heard*, 64 NW. U. L. REV. 750, 761-64 (1969).

112. *See, e.g.*, Stubbs v. McGillis, 44 Colo. 138, 96 P. 1005 (1908); Harralson v. McArthur, 87 Ga. 478, 13 S.E. 594 (1894); Edson v. Edorn, 108 Mass. 590 (1867); Lowman v. Ballard, 168 N.C. 16, 84 S.E. 21 (1915); Shanholtzer v. Thompson, 29 Okla. 198, 103 P. 595 (1909). In New York, default judgments obtained following sewer service are so frequently opened that collection lawyers will agree to open a default judgment upon receiving a telephone call from the debtor's lawyer. Kripke, *supra* note 111, at 38.

113. New Mexico, for example, permits postjudgment garnishment without requiring notice and a hearing. Moya v. DeBaca, 286 F. Supp. 606, 607 (D.N.M. 1968), *appeal dismissed per curiam*, 395 U.S. 825 (1969). The United States Supreme Court has held that the due process clause does not require notice prior to postjudgment garnishment. Endicott-Johnson Corp. v. Encyclopedia Press, 266 U.S. 285 (1924), discussed in note 110 *supra*.

114. New York, for example, provides that a court setting aside a judgment may also direct and enforce restitution. N.Y. CIV. PRAC. LAW § 5015 (McKinney 1969).

115. Moreover, even if the original claim is genuine, the debtor without notice prior to judgment is denied the opportunity to pay the debt prior to judgment. The judgment will generally include collection fees that could have been avoided, and the debtor's ability to obtain credit in the future will very likely be decreased.

restitution of the garnished wages when the debtor files a motion to open the judgment on the ground of lack of notice. It is therefore submitted that the courts should grant restitution on a preliminary showing by the wage earner that his motion has some chance of success.[116] In states in which notice is required prior to a wage execution,[117] less extreme measures are necessary. The courts may protect the wage earner by simply enjoining a levy of execution pending the hearing on the motion to open the judgment.[118]

Some of the other possible evils of postjudgment garnishment are demonstrated by *Moya v. DeBaca*.[119] In that case judgment was entered against a debtor in a suit instigated by his creditor to recover a debt. The debtor sought to arrange a method of paying the judgment and offered to make installment payments greater than those which the creditor could have obtained through garnishment.[120] The creditor refused that offer and demanded cash payment of an amount that exceeded the value of the judgment.[121] In order to gain leverage, the creditor threatened to garnish the debtor's wages and thus cause him to be fired.[122] The debtor sought injunctive relief on the basis of the due process clause, but a three-judge federal district court upheld the constitutionality of the postjudgment wage garnishment procedure.[123] The Supreme Court dismissed the debtor's appeal without explanation in a per curiam opinion,[124] with Justices Harlan and Brennan arguing that the case should be remanded in light of *Sniadach*.[125]

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116. Since the time during which the wage earner is deprived of the enjoyment of his wages should be kept to a minimum, the courts should expedite the initial screening either through the use of sworn affidavits, or by use of an ex parte hearing. The penalty of perjury should be sufficient to safeguard against abuse of this procedure by the wage earner.

117. New York, for example, generally provides for notice to the judgment debtor twenty days prior to levying against his wages in the hands of his employer. N.Y. CIV. PRAC. LAW § 5231 (McKinney 1969).

118. In a case in which notice is "required" prior to execution, but nevertheless not provided, the courts should invoke the procedure suggested above for states with no notice requirement. *See* notes 114-16 *supra* and accompanying text.

119. 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed per curiam*, 395 U.S. 825 (1969).

120. 286 F. Supp. at 610 (Judge Theis, dissenting).

121. The creditor's demand also included other claims against the debtor that were not reduced to judgment. 286 F. Supp. at 610 (Judge Theis, dissenting).

122. 286 F. Supp. at 610 (Judge Theis, dissenting).

123. Judge Theis dissented, however, and argued that wage garnishment statutes deny low-income wage earners equal protection and hence are unconstitutional on that ground. 286 F. Supp. at 610-14. In particular, see the discussion at 613.

124. 395 U.S. 825 (1969). It is unclear exactly what the Supreme Court's dismissal means. If the Court felt that no substantial federal question was presented, then the decision probably was on the merits. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 358 (1968).

125. 395 U.S. at 825.

It is submitted that Justices Harlan and Brennan were correct—that, although procedural due process may not be denied in a case dealing with postjudgment garnishment, such a case should be reviewed in light of *Sniadach*. As *Moya* itself indicates, postjudgment garnishment procedures can be used to exert extreme pressure on debtors: a judgment creditor may be able to garnish the wages of the debtor and thereby force him to lose his job if the latter refuses to pay the judgment on the creditor's terms. To the extent that *Sniadach* reflects some considerations of substantive due process,[126] that case may indicate a willingness on the part of the Court to proscribe this type of pressure.[127] A fair solution to this problem would be to refuse to enforce postjudgment garnishment in cases in which the debtor has in good faith offered a payment plan with installments equal to, or greater than, the amount obtainable through garnishment.[128]

A further problem demonstrated by *Moya* is that a creditor may threaten postjudgment garnishment in order to coerce the debtor to pay an inflated amount that includes additional claims not reduced to judgment.[129] The availability of this type of leverage to force the settlement of inflated claims was one of the evils of wage garnishment expressly cited by the Court in invalidating prejudg-

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126. *See* text accompanying note 57 *supra*.

127. On the other hand, the Court's dismissal of the appeal in *Moya* may indicate the opposite—that the Court is not willing to review the validity of postjudgment garnishment. That indication is strengthened by the fact that the lower court in *Moya* had specifically refused to hear testimony regarding the effect of either pre- or postjudgment wage garnishment:

> The questions of whether the garnishment laws work a hardship upon the economically depressed, and whether or not the statutes need revision, are for the Legislature and not for this Court. It need not be testified to that the present provisions are oppressive, or that their effect upon low-income families is disastrous and that reasonable men might find this unacceptable. However, "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." Mr. Justice Holmes, dissenting in Adkins v. Children's Hospital . . . , 261 U.S. 525, 570, ... We may not declare a statute unconstitutional solely upon the ground that it is unjust and oppressive and will work hardship upon the poor.

286 F. Supp. 606, 609 (1968). Nevertheless, in the last analysis, the Court's silence in *Moya* leaves unresolved the question whether or not its decision was in fact on the merits. If the Court is willing in the future to recognize explicitly the considerations of substantive due process that it only hinted at in *Sniadach*, it might also be willing to overcome its reticence to deal on those grounds with the issue of postjudgment garnishment.

128. At first glance this solution seems unfair to the creditor. However, the leverage to force settlements which is arguably desirable for prejudgment garnishment has no application after judgment. Postjudgment garnishment is solely a method for execution of a judgment. If the debtor offers a payment plan in good faith, that is, if he cannot offer a lump-sum payment, the creditor is in no worse position if he accepts this plan than he would be if he were to garnish the debtor's wages, and he may be spared some incidental costs of collection.

129. If garnishment actually occurs, the unadjudicated portion of the claim is simply a prejudgment garnishment. This garnishment fits squarely within the holding of *Sniadach* and may readily be dissolved on that ground.

ment wage garnishment in *Sniadach*.[130] Although this type of abuse of postjudgment garnishment is probably not prevalent enough to induce the Court to proscribe the postjudgment procedure entirely, the doctrine of relievable duress, as re-evaluated in light of *Sniadach* to apply to attachments and garnishments, could afford relief to the coerced debtor. In such a situation, a modern duress doctrine could afford either restitution of the excess payment or a valid defense to a suit for nonpayment of an inflated settlement.[131]

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130. *See* note 45 *supra*.

131. While this Note covers some of the most important areas in which the *Sniadach* ruling could have impact, it has by no means covered all the areas which may be affected by this important case. It is probable that *Sniadach* principles will be used to challenge many other procedures now in force. In at least three separate suits, for example, state procedures which can result in the prejudgment deprivation of various forms of property have recently been challenged under the due process clause. In Hebing v. Household Fin. Corp. (N.Y. Sup. Ct., Onondaga County), a suit that has been dropped from the docket, the plaintiff argued that N.Y. PERS. PROP. LAW §§ 46 to 49-b (McKinney 1962), which deals with wage assignments, denied them due process of law under the principles of *Sniadach*, because that section provides for deductions under a wage assignment without prior notice and an opportunity for a hearing. 3 CLEARINGHOUSE REV. 194 (1969). In Lawson v. Mantell, (N.Y. Sup. Ct., Albany County, filed Aug. 20, 1969), buyers challenged the constitutionality of N.Y. CIV. PRAC. LAW art. 71 (McKinney 1969), which allows a seller to repossess merchandise upon the posting of a bond in an amount twice the value of the property to be seized. The buyers argued that this provision denies them due process under the principles of *Sniadach*, since it affords buyers no opportunity to present a defense prior to seizure of the property. 3 CLEARINGHOUSE REV. 105 (1969). The lower court opinion was adverse to plaintiffs. When the Appellate Division refused to stay the implementation of article 71 pending appeal, the plaintiffs filed suit in federal district court and obtained a temporary restraining order. The case has been argued before a three-judge court, but the court has not yet rendered its decision. In Klim v. Jones, No. 52, 332 (N.D. Cal., filed Sept. 30, 1969) a three-judge federal district court has been convened to decide the constitutionality in light of *Sniadach*, of the California Innkeepers Baggage-Lien Law, CAL. CIV. CODE § 1861(a) (West 1969), which allows California hotel keepers to seize personal property of tenants upon an unverified claim that rent is owing.