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## New York: The Next Mecca for Judgment Creditors? An Analysis of *Koehler v. Bank of Bermuda Ltd.*

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## COMMENT

### NEW YORK: THE NEXT MECCA FOR JUDGMENT CREDITORS? AN ANALYSIS OF *KOEHLER v.* *BANK OF BERMUDA LTD.*

*Damien H. Weinstein\**

*New York may have just become a great place to be a judgment creditor. In the summer of 2009, the Court of Appeals of New York handed down its decision in Koehler v. Bank of Bermuda Ltd. In Koehler, the court upheld a turnover order directing a garnishee to transfer a nonresident judgment debtor's assets, deposited in a Bermuda bank, into New York. Under Koehler, assets anywhere in the world may now be garnishable in New York so long as the garnishee is subject to the state's jurisdiction. This decision greatly broadens New York courts' power to enforce judgments by reaching property located outside of New York. Accordingly, the decision is an incredible victory for judgment creditors, yet a serious defeat for judgment debtors. Because of New York's status as a financial and corporate capital—and the concomitant number of institutions doing business within the state—this decision has a potentially far-reaching impact. Perhaps not surprisingly, the Koehler decision raises some serious constitutional and policy concerns. As some commentators fear, the decision may ultimately turn New York courts into a “mecca” for judgment creditors seeking to reach assets located anywhere in the world. This Comment seeks to explore the issues raised by the Koehler decision. In doing so, this Comment analyzes theories of due process and state power in the realm of postjudgment garnishments. This Comment ultimately concludes that the Koehler decision was correctly decided, particularly because it will afford judgment creditors an incredibly useful tool in satisfying their judgments.*

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#### INTRODUCTION

My mind is made up. I will have no more to do with this class of business. I can do business in Court, but I can not, and will not, follow executions all over the world.

– Abraham Lincoln, as a practicing attorney, expressing his frustration over his inability to collect on a judgment.<sup>1</sup>

Imagine a typical lawsuit. The suit takes place in Maryland. The plaintiff is from Maryland. The defendant is from Bermuda. The events leading to the suit—say, breach of contract—took place in Maryland. Maryland's jurisdiction is not an issue. At trial, the plaintiff prevails.

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1. Letter from Abraham Lincoln to Samuel C. Davis & Co. (Nov. 17, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1858–1860, at 338 (Roy P. Basler ed., 1953).

Armed with this judgment and seeking a court to enforce it, the plaintiff—now a judgment creditor—goes to . . . New York? Why New York?

Next, imagine that the defendant—now a judgment debtor—has stock certificates deposited in a bank in Bermuda which itself has a subsidiary in New York. Can the judgment creditor garnish the bank’s subsidiary in New York and compel it to bring the stock certificates from Bermuda into the state?

Such were the facts in a recent case before the New York Court of Appeals. A deeply divided Court of Appeals, in *Koehler v. Bank of Bermuda Ltd.*,<sup>2</sup> held that a “New York [court] may order a bank over which it has personal jurisdiction [as garnishee] to deliver stock certificates” into the state, even when those certificates are located outside New York.<sup>3</sup> This decision has incredible implications for the practice of enforcing judgments. Specifically, the *Koehler* decision makes assets located all over the world subject to garnishment in New York if they are held by a corporation doing business directly or indirectly within the state.<sup>4</sup> Under *Koehler*, judgment creditors seeking to enforce a judgment in New York no longer have to prove that the judgment debtor has assets located within the state. Judgment creditors may use the *Koehler* decision as a weapon against judgment debtors seeking to shield foreign assets from garnishment. Accordingly, the decision is a serious blow to judgment debtors: their assets located throughout the world may potentially be vulnerable to garnishment in New York.

As one could imagine, the majority’s opinion prompted a stern dissent.<sup>5</sup> The dissenters cautioned that the ruling raises serious constitutional and policy concerns.<sup>6</sup> Thus far, at least some commentators seem to share the dissent’s misgivings. For example, one commentator has recently noted that the *Koehler* decision, by vastly broadening New York’s garnishment reach, will create an opportunity for forum shopping.<sup>7</sup> In his article, Professor David D. Siegel notes that the decision’s broad reach may invite

2. 911 N.E.2d 825 (N.Y. 2009).

3. *See id.* at 827.

4. The reach of this decision cannot be understated: New York maintains a unique status as a global financial center and is home—either directly or through subsidiaries or branches—to many financial institutions and large corporations. As a recent article on the decision states, New York’s status as a financial capital of the world also already makes it a “key enforcement venue.” James E. Berger, *New York Court of Appeals Permits Extraterritorial Seizure of Assets in Aid of Judgments*, PRATT’S J. BANKR. L., Sept.–Oct. 2009, at 433, 434.

5. *See Koehler*, 911 N.E.2d at 831 (Smith, J., dissenting); *infra* Part II.D.

6. *See Koehler*, 911 N.E.2d at 831 (Smith, J., dissenting) (“Its policy implications are troubling, and it may well be unconstitutional in many of its applications.”).

7. *See* David D. Siegel, ‘*Koehler*’: *Creating Mecca for Creditors or Anti-mecca for Garnishees?*, N.Y. L.J., July 28, 2009, at 4.

judgment creditors to New York or, conversely, scare off garnishees such as banks from doing business within the state.<sup>8</sup>

Equally important is the concern regarding the constitutional validity of the exercises of state power sanctioned by *Koehler*. Although judicial analysis of state jurisdiction has changed shapes over the years, it is limited by vague concepts such as “fairness.”<sup>9</sup> Accordingly, as extraterritorial postjudgment garnishments inherently raise jurisdictional concerns, real questions might exist about the fairness of permitting a judgment debtor’s assets to be garnished in a jurisdiction other than where the assets are located.<sup>10</sup>

A proper analysis of the *Koehler* decision, and its possible implications, requires a background understanding of the issues the decision raises. Part I of this Comment discusses the evolution of the U.S. Supreme Court’s jurisdictional analysis. This will be relevant in order to understand fully the due process and state power concerns raised by the *Koehler* case. Part I also explains the garnishment procedure and how different courts have interpreted the jurisdictional basis for such proceedings. Part II details the factual background of the *Koehler* decision, the arguments and rationales put forth by both parties, and the court’s majority and dissenting decisions. Part III dissects the *Koehler* holding into two issues: postjudgment due process considerations and extraterritorial garnishments. This Comment concludes that the majority’s holding in *Koehler* was correct in finding that typical prejudgment due process concerns should not apply to postjudgment garnishment proceedings. Further, *Koehler* properly held that New York courts may garnish property outside of their territorial borders.

## I. BACKGROUND ON STATE JURISDICTIONAL ANALYSIS AND POSTJUDGMENT GARNISHMENTS

Part I.A briefly discusses the constitutional origins of due process concerns. Part I.A.1 specifically discusses the Supreme Court’s in personam jurisdictional analysis. Part I.A.2 discusses the Supreme Court’s in rem jurisdictional analysis. Part I.B describes the postjudgment garnishment procedure and how different courts and commentators have differed in its definition and classification. Part I.C discusses the distinction authorities draw between prejudgment and postjudgment procedures and how, if at all, the distinction changes a court’s due process analysis.

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8. *Id.* (noting that the *Koehler v. Bank of Bermuda Ltd.* decision “can make New York a mecca for judgment creditors—or, on the contrary, a badlands for garnishees”). A somewhat analogous concern has been recognized by the U.S. Supreme Court in the context of child visitation rights. *See Kulko v. Superior Court*, 436 U.S. 84, 93 (1978) (finding that a state’s broad exercise of jurisdiction over an absent parent would “discourage parents from entering into reasonable visitation agreements”).

9. *See infra* Part I.A.1–2.

10. *See, e.g., infra* notes 187–90 and accompanying text.

A. *Piecing Together Jurisdiction: The Supreme Court's "Thousand-Piece Jigsaw Puzzle"*<sup>11</sup>

Understanding the jurisdictional and due process concerns raised by the *Koehler* decision requires a closer look at the basic themes of the area. The Supreme Court has established the proper analysis of state court jurisdiction. Jurisdictional analysis, however, may be as difficult to understand as a "thousand-piece jigsaw puzzle," at least in part, because the method of evaluating and determining a state's exercise of jurisdiction has taken different shapes over time.<sup>12</sup> Yet, the consistent overriding concern has been to permit states only to exercise jurisdiction in a manner that comports with the U.S. Constitution. Although not expressly stated, the Due Process Clause of the Fourteenth Amendment, which ensures that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law,"<sup>13</sup> has been understood to limit the valid exercise of state jurisdiction.<sup>14</sup> Thus, the Supreme Court's historical treatment of the Due Process Clause, as it pertains to jurisdictional matters, is directly relevant to the arguments of the *Koehler* parties highlighted in this Comment.<sup>15</sup> In *Koehler*, the parties differed as to whether the garnishing

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11. Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 20 (1990).

12. See David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 1 (1987) ("Even after numerous Supreme Court decisions spanning the past several years, the subject remains imponderable."); see also *infra* Part I.A.1–2.

13. U.S. CONST. amend. XIV, § 1.

14. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."); LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, *CIVIL PROCEDURE: THEORY AND PRACTICE* 64 (2d ed. 2006); Borchers, *supra* note 11, at 23 n.11 (listing authorities understanding jurisdictional analysis to be limited by the Due Process Clause of the U.S. Constitution); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 209–22 (2004); Note, *The Requirement of Seizure in the Exercise of Quasi In Rem Jurisdiction: Pennoyer v. Neff Re-examined*, 63 HARV. L. REV. 657, 670 (1950) ("The basic principle that in our federal system the courts of a state must confine their action to persons or property having some physical connection with its territory has been embedded in the due-process and full-faith-and-credit clauses of the Federal Constitution."). Equally as relevant to the enforcement of sister state judgments is the fact that the Full Faith and Credit Clause of the Constitution guarantees valid judgments from one state will be recognized in another state. See U.S. CONST. art. IV, § 1; *Nevada v. Hall*, 440 U.S. 410, 421 (1979); see also *Botz v. Helvering*, 134 F.2d 538, 544 (8th Cir. 1943) (noting that the Full Faith and Credit provision is applicable in federal courts). Accordingly, a judgment rendered by a court lacking jurisdiction over a defendant is invalid and may not be enforced in a sister state. *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1850).

15. This Comment will focus on particular Supreme Court decisions in the area of due process and jurisdiction. For a more thorough history of the jurisprudence in the field, see Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam*

court needed jurisdiction over just the garnishee, or whether the court must also have jurisdiction over the debtor's property.<sup>16</sup> In order to provide context for the debate, a detailed overview and discussion of the development of both in personam and in rem jurisdictional analysis will be helpful.

### 1. In Personam Analysis: From "Is It There?" to "Is It Fair?"<sup>17</sup> The Supreme Court's Road from *Pennoyer* to *International Shoe* and Beyond

For many years the case of *Pennoyer v. Neff*<sup>18</sup> was the fundamental jurisprudence on the issue of state court jurisdiction.<sup>19</sup> In *Pennoyer*, the Supreme Court distinguished between two types of jurisdictional proceedings: in rem and in personam.<sup>20</sup> Suits "where the entire object of the action is to determine the personal rights and obligations of the defendants" are considered proceedings in personam.<sup>21</sup> On the other hand, suits in which "the object of the action is to reach and dispose of property in the State, or of some interest therein" are considered proceedings in rem.<sup>22</sup>

The Supreme Court's decision in *Pennoyer* stood for the proposition that a state's valid exercise of its jurisdiction was limited by its territorial boundaries.<sup>23</sup> Therefore, control over the person or his property, satisfied

*Jurisdiction of State Courts: From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); Weinstein, *supra* note 14.

16. See *infra* notes 148, 179–81 and accompanying text.

17. *Arizona v. W. Union Fin. Servs., Inc.*, 208 P.3d 218, 221 (Ariz. 2009) (en banc).

18. 95 U.S. 714 (1877). For helpful background information on the *Pennoyer v. Neff* decision, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987); Linda J. Silberman, Shaffer v. Heitner: *The End of An Era*, 53 N.Y.U. L. REV. 33, 44–53 (1978).

19. See, e.g., LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 24 (1986) ("Any discussion of the due process clause and personal jurisdiction must begin with *Pennoyer v. Neff*, the foundation of Supreme Court discourse on the subject.").

20. See *Pennoyer*, 95 U.S. at 727.

21. *Id.*

22. *Id.*; see also BRILMAYER, *supra* note 19, at 21 ("An action in rem is a lawsuit that establishes a party's ownership of property against the claims of all others."). For a more focused analysis of in rem jurisdiction, and the leading cases, see Part I.A.2. Quasi in rem jurisdiction is a third type of jurisdiction. Although not defined in the *Pennoyer* decision, quasi in rem jurisdiction concerns "the interests of particular persons in designated property." *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958).

23. *Pennoyer*, 95 U.S. at 720. "[N]o State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* at 722 (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS ch. 2 (6th ed. 1865); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW pt. 2 ch. 2 (3d ed. 1846)); see also BRILMAYER, *supra* note 19, at 23 (noting that "[t]he original due process limit was based on the finite power of the state court: the forum had no power to adjudicate a matter unless the person or property was somehow physically present"). A second and equally important principle set forth in *Pennoyer* was that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Pennoyer*, 95 U.S. at 722. Thus, territorial boundaries not only limited a state's jurisdiction, but also served as a shield from the reach of sister states. However, at least one author has criticized the common understanding that

by a presence within the jurisdiction, was required.<sup>24</sup> Accordingly, any exercise of jurisdiction beyond state lines was inherently void and unconstitutional.<sup>25</sup> Only if the person or property could be found in the state, the Court held, could it properly be acted upon by the courts of that jurisdiction.<sup>26</sup> If it were not present, “there is nothing upon which the tribunals can adjudicate.”<sup>27</sup> This rule became known as the “power theory.”<sup>28</sup>

In 1945, the Supreme Court changed the focus of analyzing state court jurisdiction in the landmark case of *International Shoe Co. v. Washington*.<sup>29</sup> In *International Shoe*, the appellant, a Delaware corporation with its principal place of business in Missouri, sold shoes in various states across the country.<sup>30</sup> Although the company sold shoes in the state of Washington, it maintained no offices there nor made any contracts within

the Supreme Court in *Pennoyer* was limiting the power of state court jurisdiction based upon the Due Process Clause. See Patrick J. Borchers, *Pennoyer's Limited Legacy: A Reply to Professor Oakley*, 29 U.C. DAVIS L. REV. 115, 118 (1995) (arguing that the decision in *Pennoyer* “did not clearly link due process and jurisdiction” and that “[t]here are strong pragmatic justifications for rejecting constitutionalized state court jurisdiction”). This argument, however, seems to ignore that the Supreme Court has since expressly stated the contrary. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987) (“The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant.”).

24. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him.” (citing *Pennoyer*, 95 U.S. at 733)); David H. Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997, 999 (1978) (noting that *Pennoyer's* power doctrine made the physical presence of property in the forum sufficient for the state to exercise jurisdiction over it).

25. *Pennoyer*, 95 U.S. at 720 (citing *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 165 (1850)).

26. See *id.* at 723.

27. *Id.* at 723–24.

28. See Holly S. Haskew, Comment, *Shaffer, Burnham, and New York's Continuing Use of QIR-2 Jurisdiction: A Resurrection of the Power Theory*, 45 EMORY L.J. 239, 239 (1996); Silberman, *supra* note 18, at 45.

29. 326 U.S. 310 (1945); see also *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (noting that the Supreme Court responded to the increased commerce between the states by changing the requirements of personal jurisdiction from the “rigid rule” of *Pennoyer* to the more “flexible” approach of *International Shoe Co. v. Washington*); *Avery Dennison Corp. v. UCB SA*, No. 95 C 6351, 1997 U.S. Dist. LEXIS 2931, at \*7 (N.D. Ill. Mar. 11, 1997) (noting that “*International Shoe* . . . replaced *Pennoyer's* ‘presence’ test with the minimum contacts approach”); Borchers, *supra* note 11, at 54 n.215 (listing commentaries noting how *International Shoe* represented a change in course from the existing *Pennoyer* analysis); Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on Burnham v. Superior Court*, 22 RUTGERS L.J. 689, 694 (1991) (noting that *International Shoe* was a “landmark departure” from existing jurisprudence). For a detailed analysis of the facts and opinion of the *International Shoe* case, see Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769 (1995); Kurland, *supra* note 15, at 586–93.

30. *Int'l Shoe*, 326 U.S. at 313.



the state.<sup>31</sup> Instead, the company employed approximately a dozen salesmen in the state to solicit orders, which would then be received and processed in Missouri.<sup>32</sup> When sued in the state of Washington, the company insisted that it was not present within the state and thus could not be subject to its jurisdiction.<sup>33</sup>

In holding that the shoe company was subject to Washington's courts' jurisdiction,<sup>34</sup> the Supreme Court set forth what has become known as the "minimum contacts" test for exercising jurisdiction. This test, in certain cases, permits the extension of state court jurisdiction beyond the territorial borders to persons located outside the state.<sup>35</sup> The decision in *International Shoe* undeniably expanded the jurisdictional reach of state courts.<sup>36</sup>

The Court began its opinion by referencing its previous decision in *Pennoyer* and its holding that jurisdiction was defined by a state's territorial limits.<sup>37</sup> However, in noting that methods of personal service had since changed, the Court held,

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>38</sup>

The Court elaborated that not just any contact with the forum state would suffice.<sup>39</sup> Instead, courts should focus on the quality and quantity of the contacts.<sup>40</sup>

Since *International Shoe*, the Court has continued to elaborate upon its minimum contacts analysis. In addition to assessing the nature of the contacts, courts must also consider (1) the inconvenience of hailing the defendant into the state to defend himself,<sup>41</sup> (2) the forum state's interest in

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31. *Id.*

32. *Id.* at 313-14.

33. *Id.* at 315.

34. *Id.* at 320.

35. See *infra* notes 38-45 and accompanying text. The Court was, perhaps, reacting to the fact that times had changed. In reality, the Court realized, large corporations and entities could essentially have a "presence" in whichever jurisdiction their activities reached. See *Int'l Shoe*, 326 U.S. at 316. This is certainly true for bigger corporations, such as the Bank of Bermuda, the garnishee in *Koehler*. As discussed below, the fact that such corporations may be "present" in multiple jurisdictions at the same time makes them, and their customers, vulnerable to garnishment in many different locations. See *infra* notes 191-92 and accompanying text.

36. Borchers, *supra* note 11, at 54.

37. See *Int'l Shoe*, 326 U.S. at 316.

38. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

39. *Id.* at 319.

40. *Id.* ("Whether Due Process is satisfied must depend rather upon the quality and nature of the activity.")

41. *Id.* at 317.

adjudicating the dispute,<sup>42</sup> (3) the plaintiff's interest in obtaining convenient and effective relief,<sup>43</sup> (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies,"<sup>44</sup> and (5) the interest of the states collectively in furthering fundamental social policies.<sup>45</sup>

Particularly, the Court has held that due process requires there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>46</sup> This concept has resonated from another element of the minimum contacts analysis: the defendant's contacts with the forum state must not be accidental, fraudulent, or the result of someone else's actions.<sup>47</sup> Instead, whether due process is satisfied depends upon the

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42. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (noting that a state has a "manifest interest in providing effective means of redress for its residents").

43. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

44. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

45. See *Kulko*, 436 U.S. at 98.

46. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319); see also *Asahi Metal Indus. Co.*, 480 U.S. at 108–09 ("[T]he determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established minimum contacts in the forum State.'" (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985))) (internal quotation marks omitted).

47. See *Burnham v. Superior Court*, 495 U.S. 604, 613 (1990) (citing *Wanzer v. Bright*, 52 Ill. 35 (1869)) (noting the exceptional cases where in-state presence is insufficient to establish jurisdiction, such as where individuals were brought into the state by force or fraud); *Rush v. Savchuk*, 444 U.S. 320, 328–29 (1980) (noting that "adventitious" contacts are insufficient); *Wyman v. Newhouse*, 93 F.2d 313, 315 (2d Cir. 1937) (noting that presence fraudulently induced makes judgment null and void (citing *Thompson v. Thompson*, 226 U.S. 551 (1913); *Lucy v. Deas*, 52 So. 515 (Fla. 1910))); *Tickle v. Barton*, 95 S.E.2d 427, 432–33 (W. Va. 1956) (noting that service upon a party obtained by "fraud, trickery, artifice or wrongful device, is invalid"). But see *Grace v. MacArthur*, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (holding that the service of a passenger while in an airplane passing over Arkansas is sufficient presence to establish jurisdiction). In *Burnham v. Superior Court*, the Supreme Court sanctioned jurisdiction over individuals temporarily within the jurisdiction. 495 U.S. at 628. In upholding the exercise of jurisdiction, the Court cited to cases spreading over the past two centuries that had held that physical presence within the state was sufficient to support jurisdiction even if the person was only temporarily in the state and the cause of action was totally unrelated to his presence there. *Id.* at 612–13. The *Burnham* decision has been criticized by many as both irreconcilable with the Supreme Court's decision in *Shaffer v. Heitner*, see *infra* notes 69–80 and accompanying text, and returning to *Pennoyer's* old territorial reasoning. See, e.g., Daniel O. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 61 (1979) (arguing that transient jurisdiction violates the *Shaffer* decision); Barbara Surtees Goto, Note, *International Shoe Gets the Boot: Burnham v. Superior Court Resurrects the Physical Power Theory*, 24 LOY. L.A. L. REV. 851, 851 (1991) (noting that the *Burnham* decision "reverses the thirteen-year trend away from presence-based jurisdiction"); Haskew, *supra* note 28, at 254 (noting that the *Burnham* decision "resurrected the power theory of jurisdiction"). The *Burnham* decision also impacted the decisions of lower courts, which had held that personal service upon defendants temporarily present did not confer personal jurisdiction absent other meaningful contacts with the forum. See, e.g., *Nehemiah v. Athletics Cong. of the U.S.*, 765 F.2d 42 (3d Cir. 1985); *Harold M. Pitman Co. v. Typecraft Software Ltd.*, 626 F. Supp. 305 (N.D. Ill. 1986). As one author has stated, the concern over transient jurisdiction can perhaps be summed up by one question: "[H]ow

affirmative acts by the defendant.<sup>48</sup> Requiring minimum contacts and purposeful availment ensures “a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>49</sup>

Although the Court’s decision in *International Shoe* broke free, in some sense, of *Pennoyer*’s power theory, the language of the opinion was strictly focused on jurisdiction over persons, not things.<sup>50</sup> Thus, while in personam jurisdiction would be evaluated according to the Court’s “minimum contacts” analysis, in rem jurisdiction appeared to remain subject to *Pennoyer*’s “territorial” rule.<sup>51</sup> In *Hanson v. Denckla*,<sup>52</sup> the Supreme Court reiterated this point very clearly.<sup>53</sup>

## 2. In Rem Analysis: *Shaffer v. Heitner* and *Harris v. Balk*

In *Koehler*, the garnishee Bank argued that New York could not garnish the judgment debtor’s assets in Bermuda because garnishments require in rem jurisdiction.<sup>54</sup> In rem jurisdiction is “[a] court’s power to adjudicate the rights to a given piece of property, including the power to seize and hold it.”<sup>55</sup> Thus, as the Supreme Court stated, the proper exercise of in rem jurisdiction is premised upon “the subject property within the territorial jurisdiction of the forum State.”<sup>56</sup>

In rem jurisdictional analysis has been greatly shaped by two Supreme Court decisions: *Harris v. Balk*<sup>57</sup> and *Shaffer v. Heitner*.<sup>58</sup> In *Harris*, plaintiff Harris owed defendant Balk a certain sum of money.<sup>59</sup> Both men

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‘fair’ is it for a state to subject a person to suit merely because she spent half an hour there on her way to somewhere else?” BRILMAYER, *supra* note 19, at 34.

48. See *Hanson*, 357 U.S. at 253 (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.” (citing *Int’l Shoe*, 326 U.S. at 319)).

49. *World-Wide Volkswagen*, 444 U.S. at 297. For a more thorough assessment of the minimum contacts analysis, see Earl M. Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 BYUL REV. 1043, 1051–68.

50. See generally *Int’l Shoe Co.*, 326 U.S. at 310–22.

51. See, e.g., *State v. W. Union Fin. Servs., Inc.*, 208 P.3d 218, 221–22 (Ariz. 2009); Suzanne T. Marquard, *Quasi In Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits . . .*, 46 FORDHAM L. REV. 459, 459 (1977) (noting that *International Shoe*’s decision “did not reach other bases of jurisdiction such as in rem, quasi in rem, or physical presence.” (citing *Int’l Shoe Co.*, 326 U.S. at 316)).

52. 357 U.S. 235.

53. *Id.* at 246 (“The basis of the [in rem] jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.”).

54. See *infra* notes 179–81 and accompanying text.

55. BLACK’S LAW DICTIONARY 929 (9th ed. 2009).

56. *Hanson*, 357 U.S. at 246.

57. 198 U.S. 215 (1905).

58. 433 U.S. 186 (1977).

59. *Harris*, 198 U.S. at 216.

were residents of North Carolina.<sup>60</sup> Balk himself was indebted to a Mr. Epstein of Maryland.<sup>61</sup> When Harris visited Maryland, Epstein served him with documents attaching the debt due to Balk.<sup>62</sup> In challenging Maryland's exercise of jurisdiction over him, Harris claimed that the debt he owed to Balk was in North Carolina and out of reach of Maryland courts.<sup>63</sup>

The Court disagreed.<sup>64</sup> Noting that a state law provided for the attachment of such debt, the Court reasoned that "if the garnishee be found in [the] State . . . the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff."<sup>65</sup> In so holding, the Court declared that "[t]he obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."<sup>66</sup> This became known as the "debt-follows-the-debtor" rule.<sup>67</sup> Accordingly, under this rule, the debt—or property—owed to a judgment creditor by a judgment debtor could be "found" wherever the judgment debtor, or his garnishee, may be.<sup>68</sup>

Years later, however, the Court decided the case of *Shaffer v. Heitner*,<sup>69</sup> which vastly changed the conceptual framework of determining a state's valid exercise of in rem jurisdiction.<sup>70</sup> The Court in *Shaffer* was asked to determine the constitutionality of a state statute that allowed the state's courts to obtain jurisdiction over a non resident defendant by securing his property within the state.<sup>71</sup> In this case Heitner brought suit against Shaffer, a non resident of Delaware, for acts which took place in Oregon.<sup>72</sup> Along with his complaint, Heitner sought to obtain jurisdiction over Shaffer by sequestering stock he held in a Delaware corporation.<sup>73</sup>

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 221.

64. *See id.* at 222.

65. *Id.*

66. *Id.*

67. *See, e.g.,* *Miss. Chem. Corp. v. Chem. Constr. Corp.*, 444 F. Supp. 925, 943 (S.D. Miss. 1977); Comment, *Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation*, 67 COLUM. L. REV. 550, 550 (1967).

68. This theory was significant in the *Koehler* decision because it would place the judgment debtor's assets to be garnished in New York. Accordingly, the concern regarding extraterritorial garnishments would be moot. *See infra* Part III.C.

69. 433 U.S. 186 (1977).

70. *See, e.g.,* Silberman, *supra* note 18 at 71 ("Perhaps even in its most limited aspects, the *Shaffer* decision can be deemed revolutionary.")

71. *Shaffer*, 433 U.S. at 189.

72. *Id.* at 190–91.

73. *Id.* at 190. Although this stock was not physically located in Delaware, a state statute considered such stock to be present there and thus subject to attachment. *See id.* at 192.

The Court began by examining the evolution of in personam jurisdictional jurisprudence since its earlier opinion in *Pennoyer*.<sup>74</sup> However, the Court noted, “[n]o equally dramatic change ha[d] occurred in the law governing jurisdiction *in rem*.”<sup>75</sup> The Court then explained that asserting jurisdiction over a thing is really, in a way, asserting jurisdiction “over the interests of persons in a thing.”<sup>76</sup> In declaring the Delaware law unconstitutional, the Court extended *International Shoe*’s “minimum contacts” analysis to determinations of in rem jurisdiction.<sup>77</sup> Accordingly, the Court stated, “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”<sup>78</sup> In doing so, the Court held that the decisions in *Harris* and *Pennoyer*, to the extent they were inconsistent with the *Shaffer* standard, were overruled.<sup>79</sup>

The opinion of *Shaffer* thus makes it very clear that whether or not a proceeding is considered in rem or in personam, the standard for jurisdiction is the same: the defendant’s connection with the adjudicating forum must be sufficient to satisfy the “minimum contacts” standard set forth in *International Shoe*.<sup>80</sup> While this particular language is relatively

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74. See *id.* at 196–204.

75. *Id.* at 205; see also *State v. W. Union Fin. Servs., Inc.*, 208 P.3d 218, 221 (Ariz. 2009) (“*International Shoe* and the cases immediately following it addressed only in personam jurisdiction. Thus, the sole constitutional issue when a state sought to exercise either in rem or quasi in rem jurisdiction continued to be the one posed by *Pennoyer* . . .”).

76. *Shaffer*, 433 U.S. at 207 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 introductory note (1971)).

77. See *id.*

78. *Id.* at 212. The Court also noted that, while the presence of defendant’s property within a state may indicate his or her contacts with that state, it alone is insufficient to exercise jurisdiction. *Id.* at 209.

79. *Id.* at 212 n.39; see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980) (noting that *Shaffer* “abandoned the outworn rule of *Harris v. Balk*”); Robert Laurence, *The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments*, 22 AM. INDIAN L. REV. 355, 368 (1998) (noting that *Harris*’s “debt-follows-the-debtor” rule “does not survive modern constitutional analysis”). Relevant to the parties in *Koehler*, however, some courts have considered the *Harris* “debt-follows-the-debtor” rule as still viable in postjudgment garnishment proceedings. See *Levi Strauss & Co. v. Crockett Motor Sales, Inc.*, 739 S.W.2d 157, 158 (Ark. 1987) (noting that a debt is located wherever the garnishee is located); *Goodyear Tire & Rubber Co. v. Ruby*, 540 A.2d 482 (Md. 1988); *Bianco v. Concepts “100”, Inc.*, 436 A.2d 206 (Pa. Super. Ct. 1981); DAVID D. SIEGEL, *NEW YORK PRACTICE* § 487, at 825–26 (4th ed. 2005) [hereinafter *NEW YORK PRACTICE*] (suggesting that *Harris* applies in postjudgment proceedings and that intangible property may be located wherever the garnishee is); see also *Land Mfg., Inc. v. Highland Park State Bank*, 470 P.2d 782, 784–85 (Kan. 1970) (noting that the situs of debt in garnishment proceedings “is of little importance” and citing to *Harris*); 6 AM. JUR. 2D *Attachment and Garnishment* § 29 (2008). If this is true, the *Koehler* court could have avoided the extraterritorial issue merely by finding the judgment debtor’s assets located in New York with the garnishee. Accordingly, this theory, if valid, would provide another avenue of reasoning for courts faced with the same issue. See *infra* Part III.C.

80. See *Shaffer*, 433 U.S. at 207 (“[I]n order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising ‘jurisdiction over the

straightforward, a footnote in the opinion has created much confusion and speculation. In this footnote, the Court stated,

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.<sup>81</sup>

Footnote thirty-six has become incredibly relevant in the analysis of postjudgment jurisdiction. A literal reading of the footnote suggests that a judgment creditor may garnish a judgment debtor's property wherever it may be, regardless of whether or not the judgment debtor maintains the requisite minimum contacts with the garnishing forum. Many courts and commentators have adopted this interpretation.<sup>82</sup> As one commentator believes, footnote thirty-six recognizes the long-standing concept in U.S. jurisprudence that one may enforce a judgment in a jurisdiction other than that which rendered the judgment.<sup>83</sup>

But does the language "where the defendant has property" mean that an enforcing court must actually have the property to be executed upon within

interests of persons in a thing.' The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.")

81. *Id.* at 210 n.36. For general background information on footnote thirty-six, see Aristides Diaz-Pedrosa, *Shaffer's Footnote 36*, 109 W. VA. L. REV. 17 (2006).

82. *See, e.g.,* *Williamson v. Williamson*, 275 S.E.2d 42, 45 (Ga. 1981) (citing footnote thirty-six for support of the proposition that enforcing jurisdictions need not have personal jurisdiction over the judgment debtor); *Oregon ex rel. Dep't of Revenue v. Control Data Corp.*, 713 P.2d 30, 32 (Or. 1986) (same); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. h (1987) ("[A]n action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum."); *see also* *Vernon*, *supra* note 24, at 1007 (citing *Shaffer's* footnote thirty-six as evidence that "[t]he Court in *Shaffer* specifically provided that proceedings to realize on sister state judgments are exempt from the minimum contacts standard of *International Shoe*"). Federal circuits, however, have disagreed as to whether or not footnote thirty-six requires that the property or assets with the jurisdiction be related to the underlying cause of action. *Compare* *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1127 (9th Cir. 2002) (noting that *Shaffer's* footnote thirty-six indicates that relatedness is not required), *with* *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 213 (4th Cir. 2002) (noting that relatedness is required (citing *Shaffer*, 433 U.S. at 209)).

83. *See* *Maltz*, *supra* note 49, at 1046. Earl Maltz states,

One of the difficulties with Marshall's analysis is that on its face it threatens a mainstay of American jurisprudence—the concept that one can always enforce a judgment obtained against a defendant in one state by levying against property located in another state. . . . The body of the *Shaffer* opinion suggests that in such a case the judgment could be enforced only if the judgment debtor has minimum contacts with the state where the property is located. Such a rule would represent a radical change from current practice.

Marshall brushed off this problem rather cavalierly in [footnote thirty-six].

*Id.*

its jurisdiction? This may seem like a fair reading. However, as this Comment discusses below, courts have interpreted the footnote as allowing judgment debtors to be ordered to turn over their extraterritorial assets to satisfy the existing judgment.<sup>84</sup> This discrepancy demonstrates the ambiguity in the *Shaffer* footnote. This confusion may be further inflated when it is difficult to locate precisely certain property. For example, certain types of intangible property, such as stock or wages, are not as easy to locate as real property.<sup>85</sup>

As one commentator has stated, the *Shaffer* Court in footnote thirty-six was probably imagining a relatively standard execution of a judgment against real property.<sup>86</sup> But the author fairly addresses a more interesting and complex scenario.<sup>87</sup> Incredibly, this scenario is, in large part, the issue presented in *Koehler*. To paraphrase his hypothetical: Imagine if a judgment debtor lives in New York, where he works at a branch of the ABC Corporation, which is incorporated in Delaware and has its principal place of business there, but also has branches in numerous states, including Florida. May a judgment creditor garnish the debtor's wages in Florida?<sup>88</sup> Put another way: If that same judgment debtor maintains a checking account with Chase Bank in New York, may the creditor garnish this account at a local Chase branch in, say, Kentucky?

This scenario raises a variety of questions and concerns. To begin, it is unclear whether or not such garnishment proceedings are in personam or in rem. Further, it is further unclear whether this even matters after *Shaffer*.<sup>89</sup> Perhaps one could argue that in light of the Supreme Court's jurisdictional jurisprudence, it would not be "fair" to permit such garnishments. This, however, assumes that fairness is a concern in postjudgment proceedings,

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84. See, e.g., *infra* notes 149–52 and accompanying text. It is important to note that these cases all dealt with judgment debtors directly, not garnishees. This is in part why the *Koehler* decision, which dealt with a garnishee, is groundbreaking. This distinction was a point of debate between the parties in *Koehler*. See *infra* notes 155–61, 182–83 and accompanying text; see also *infra* notes 206–09, 280–84 and accompanying text.

85. See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 246–47 (1958); *McCarthy v. Wachovia Bank*, No. CV 08–1122, 2008 WL 5145602, at \*5 (E.D.N.Y. Dec. 4, 2008) (noting that "such assets are located both everywhere, and nowhere"); see also *Pac. Decision Sci. Corp. v. Superior Court*, 18 Cal. Rptr. 3d 104, 109 (Ct. App. 2004) (noting that "[a]n intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." (quoting *In re Waits' Estate*, 146 P.2d 5, 8 (Cal. 1944))). As Chief Judge Benjamin Cardozo once stated, the location of intangible property should be determined based upon "a common sense appraisal of the requirements of justice and convenience in particular conditions." *Severnec Sec. Corp. v. London & Lancashire Ins. Co.*, 174 N.E. 299, 300 (N.Y. 1931). For a collection of commentary concerning the complexities of determining the situs of intangible properties, see Silberman, *supra* note 18, at 49 n.73.

86. See Laurence, *supra* note 79, at 369.

87. *Id.* at 370.

88. *Id.*

89. See *supra* notes 69–80 and accompanying text.

and *Shaffer's* footnote thirty-six seems to indicate that it is not.<sup>90</sup> These questions present an even larger and more complex issue: the distinction, if any, between prejudgment and postjudgment proceedings.<sup>91</sup> Although this topic understandably receives little academic attention,<sup>92</sup> it was at the heart of the debate between the parties in *Koehler*.<sup>93</sup> For example, if typical prejudgment fairness concerns restrain courts in postjudgment proceedings, it might hardly seem “fair” to permit a New York court to garnish a Bermuda resident’s assets located in Bermuda.<sup>94</sup>

Understanding the issues that are raised by postjudgment extraterritorial garnishments inherently demands a basic overview of the garnishment procedure. As will be evident, how courts and practitioners understand garnishments to operate has an immense impact on the possible reach of such garnishments. The next section of this Comment will explore the themes and issues in the area that are relevant to the *Koehler* decision.

### B. The “Giant” in the Enforcement Procedure: What Is a Garnishment?<sup>95</sup>

In litigation, the declaration of a judgment does not essentially end the dispute. Once the plaintiff wins and a judgment is rendered, the judgment must now be enforced. This, unfortunately, is not always an easy process.<sup>96</sup> Garnishments are a useful tool to assist judgment creditors in collecting on their judgments. A garnishment is a proceeding brought by a judgment creditor to collect a debt—or enforce an existing judgment—when such a judgment is not voluntarily paid.<sup>97</sup> A judgment creditor may seek to collect

90. See *supra* notes 81–82 and accompanying text.

91. See *infra* Part I.C.

92. See Lawrence W. Newman, *Jurisdiction To Enforce Foreign Judgments*, N.Y. L.J., Apr. 30, 2001, at 3 (“There is far more written and thought about by courts and lawyers with respect to issues arising out of the commencement of a lawsuit than there is with respect to procedural issues arising out of occurrences that take place near the end of lawsuits.”).

93. See generally *infra* Part II.B.1–2.

94. This argument appears to have been endorsed by Justice Stevens in the context of prejudgment attachment. See *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring) (“One who purchases shares of stock on the open market can hardly be expected to know that he has thereby become subject to suit in a forum remote from his residence and unrelated to the transaction.”).

95. Siegel, *supra* note 7 (noting that a garnishee is a “giant” in the field of enforcement). The term garnishment is confusingly used by courts to describe both a prejudgment tool used to attach property and a postjudgment remedy to satisfy an existing judgment. Accordingly, the term has very different meanings and requires completely different analyses depending on how it is used. For the purpose of this Comment, unless otherwise stated, any mention of garnishment refers to the postjudgment context.

96. See Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. DAVIS J. INT’L L. & POL’Y 111, 113 (2007) (“Collecting on the judgment or otherwise enforcing a judgment is often laborious and time consuming.”).

97. See Laurence, *supra* note 79, at 356–57. Garnishments, in a sense, reflect the reality that many judgment debtors may take evasive measures to avoid the enforcement of judgments against them. See, e.g., Henry E. Rakowski, *Enforcing Judgments*, J. NASSAU COUNTY B. ASS’N, Oct. 2002, at 3, 22 (“It is very unlikely that a debtor will ‘hold still’ and



the debt due by either attaching the debtor's property directly, or by proceeding against a third party—a garnishee—who owes a debt to the debtor or is in lawful possession of the debtor's property.<sup>98</sup> Garnishment proceedings are an entirely new suit—or, a “lawsuit within a lawsuit.”<sup>99</sup> In that sense, garnishments are a type of attachment,<sup>100</sup> which may be brought wherever the property of the debtor is found, regardless of the connection, if any, between the underlying action, the debtor, and the forum state.<sup>101</sup>

The parties in *Koehler* disagreed as to whether garnishment proceedings require in personam or in rem jurisdiction.<sup>102</sup> Some courts have considered garnishments to require in rem jurisdiction.<sup>103</sup> Some courts have defined postjudgment garnishment proceedings as a cross between in personam and in rem.<sup>104</sup> At least one court has described such proceedings to be “the nature of a proceeding *in rem* although it moves against a garnishee *in personam*.”<sup>105</sup> Accordingly, not only must the garnishee be within the jurisdiction of the enforcing court but so must the property.<sup>106</sup>

allow his bank accounts to be restrained. The debtor should be presumed to actively engage in tactics designed to conceal his assets.”)

98. See SILBERMAN, ET AL., *supra* note 14, at 802; Laurence, *supra* note 79, at 356–57 (“[G]arnishment may issue upon anyone owing money to or having possession of the defendant’s property.”). Determining who a proper garnishee is, however, may not always be so simple. For a further explanation, see *New York Practice*, *supra* note 79, § 491. Additionally, choosing the proper garnishee may depend upon which assets of the judgment debtor the garnishee holds, as not all assets or property are subject to garnishment. See *id.* §§ 486–487, 490.

99. *Bianco v. Concepts “100”, Inc.*, 436 A.2d 206, 209 (Pa. Super. Ct. 1981) (quoting 9 GOODRICH AMRAM 2d § 3144(a):1 (1977)).

100. *Nat’l Bank of Wilmington & Brandywine v. Furtick*, 42 A. 479, 481 (Del. 1897).

101. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. h (1987). This is, in some sense, what *Shaffer*’s footnote thirty-six seems to say. See *supra* notes 81–83.

102. See *infra* notes 148, 179–81 and accompanying text.

103. See *Cole v. Randall Park Holding Co.*, 95 A.2d 273, 279 (Md. 1953); *Grissum v. Soldi*, 108 S.W.3d 805, 808 (Mo. Ct. App. 2003) (“[G]arnishment is a proceeding in rem that brings within the jurisdiction and power of the trial court a debt . . . i.e., a ‘res,’ . . .” (citing *Antonacci v. Antonacci*, 892 S.W.2d 365, 367 (Mo. Ct. App. 1995))).

104. See *Bianco*, 436 A.2d at 209 (“‘It is true that the attachment process i[s] a proceeding *in rem*, but it is equally true that it is something more. It is also a proceeding against the garnishee *personally* . . . . The summons, the judgment, and execution contain the bones and sinews of a proceeding *in personam* against the garnishee.” (quoting *Breading v. Stegworth*, 29 Pa. (5 Casey) 396, 399 (1857))). In a way, the court noted, they are “a species of *in personam* actions.” *Id.*; see also *APR Energy, LLC v. Pak. Power Res., LLC*, No. 3:08-cv-961-J-25MCR, 2009 U.S. Dist. LEXIS 17194, at \*4–5 (M.D. Fla. Feb. 20, 2009).

105. *Robbins, Coe, Rubinstein & Shafran, Ltd. v. Ro Tek, Inc.*, 320 N.E.2d 157, 161 (Ill. App. Ct. 1974) (citations omitted).

106. *Id.* But see *infra* notes 148–54 and accompanying text.

*C. Prejudgment vs. Postjudgment: Some Obvious and Not-So-Obvious Differences*

In *Koehler*, the parties disputed the extent, if any, to which typical prejudgment due process concerns exist in postjudgment proceedings.<sup>107</sup> This is an incredibly important disagreement. For example, if the enforcement of a judgment requires that the judgment debtor be afforded typical prejudgment due process protections, it would hardly seem fair to allow a Bermuda resident's stock certificates, located in a Bermuda bank, to be garnished by a Maryland creditor in New York. Put more simply, if due process considerations as to the judgment debtor restrict postjudgment garnishments, the *Koehler* decision may very well be unconstitutional.<sup>108</sup>

Judge William Houston Brown has noted that "there are some obvious differences between postjudgment and prejudgment garnishment."<sup>109</sup> To begin, as one court has vaguely stated, jurisdiction in postjudgment proceedings is "wider."<sup>110</sup> This should, however, be rather obvious: a court's role differs significantly depending upon whether a valid judgment already exists.<sup>111</sup> In such cases, the court is then only being asked to enforce the judgment, rather than to determine whether or not the defendant has in some way wronged the plaintiff.<sup>112</sup> Accordingly, "the procedural impediments faced by a creditor seeking prejudgment garnishment of the debtor's property or debts are in large part removed."<sup>113</sup>

This was the case in *Koehler*. The validity of the judgment against the judgment debtor was not at issue.<sup>114</sup> Instead, the judgment creditor was merely asking the court to assist him in satisfying his judgment.<sup>115</sup> Thus, the role of the court is one way in which there is an obvious difference between prejudgment and postjudgment proceedings.

107. See *infra* notes 162–68, 187–90 and accompanying text.

108. This is because the judgment debtor and his property likely did not meet the minimum contacts requirements of prejudgment due process analysis. See generally Part I.A.1–2. This was the argument made by the dissent in *Koehler*. See *infra* notes 213–28 and accompanying text.

109. 1 WILLIAM HOUSTON BROWN, *THE LAW OF DEBTORS AND CREDITORS* § 6:55, at 6-145 to -146 (rev. ed. 2002).

110. *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874, 884 (Mich. Ct. App. 2003) (noting that such a rationale was in "no doubt drawn" from *Shaffer's* footnote thirty-six).

111. See Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 114–115 (1992).

112. *Id.* at 115.

113. 1 BROWN, *supra* note 109, § 6.55, at 6-146 (citing *Schneider v. Feeder's Grain & Supply, Inc.*, 24 S.W.3d 739 (Mo. Ct. App. 2000)). Accordingly, "the judgment creditor basically needs only to establish the existence of an unsatisfied judgment and the reasonable belief that a third party possesses assets of the judgment debtor or owes a debt to the judgment debtor." *Id.* (citing *Dunn v. Bemor Petrol.*, 737 S.W.2d 187 (Mo. 1987) (en banc)).

114. See *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825 (N.Y. 2009).

115. See generally *id.*

Another—and perhaps more important—distinction, however, may not be so obvious. It is not clear whether in postjudgment garnishment proceedings the enforcing court's jurisdiction must comport with the typical prejudgment due process analysis. *Shaffer's* footnote thirty-six seems to indicate that, at the very least, due process considerations are somewhat different postjudgment.<sup>116</sup> Another earlier Supreme Court case also seems to demonstrate this.<sup>117</sup> However, at least one court has considered it necessary to analyze a non resident judgment debtor's contacts with the enforcing state before permitting a garnishment.<sup>118</sup> This approach has garnered the support of at least one commentator.<sup>119</sup> Some courts and commentators, on the other hand, have explicitly opposed the use of a due process inquiry in postjudgment garnishment proceedings.<sup>120</sup> New York has adopted this approach with respect to foreign-country money

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116. See *supra* notes 81–83 and accompanying text.

117. See *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 288–90 (1924) (noting that due process does not require that a judgment debtor be given notice and the opportunity to be heard before a garnishment may proceed against his assets). For a thorough discussion regarding the treatment of the *Endicott Johnson Corp. v. Encyclopedia Press, Inc.* decision and the subsequent judicial treatment of postjudgment garnishment constitutional concerns, see Diana Gribbon Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 MD. L. REV. 61 (1986); see also Thomas W. Logue, Note, *Due Process, Postjudgment Garnishment, and 'Brutal Need' Exemptions*, 1982 DUKE L.J. 192 (discussing the judicial treatment of postjudgment garnishment notice requirements).

118. See *Fraser v. Littlejohn*, 386 S.E.2d 230, 234–37 (N.C. Ct. App. 1989) (applying the *International Shoe* minimum contacts analysis to a postjudgment garnishment proceeding).

119. See Laurence, *supra* note 79, at 372 (“‘Fair play and substantial justice’ should function as the hallmark of postjudgment enforcement process . . .”). Therefore, the author noted, “a garnishment is only proper in a jurisdiction which has the constitutionally minimum contacts with both the garnishee and the defendant.” *Id.* at 370. The author also notes that while requiring a due process inquiry for postjudgment proceedings would be “cumbersome,” it would limit the amount of forum shopping. *Id.* at 381.

120. See *Smith v. Lorillard, Inc.*, 945 F.2d 745, 746 (4th Cir. 1991) (“*Shaffer* sets limits only on the original assertion of *in rem* and *quasi in rem* jurisdiction over non-resident defendants, not on the imposition of an ancillary order of garnishment flowing from a judgment . . . .”); *Huggins v. Deinhard*, 654 P.2d 32, 36 (Ariz. Ct. App. 1982) (distinguishing *Shaffer* as applicable only to prejudgment cases); *Levi Strauss & Co. v. Crockett Motor Sales, Inc.*, 739 S.W.2d 157, 159 (Ark. 1987) (noting that the due process minimum contacts analysis is not required for postjudgment collection proceedings (citing *Oregon ex rel. Dep’t of Revenue v. Control Data Corp.*, 713 P.2d 30, 32 (Or. 1986))); *Bank of Babylon v. Quirk*, 472 A.2d 21, 23 (Conn. 1984) (citing to footnote thirty-six and noting that no minimum contacts analysis is required postjudgment); *Tabet v. Tabet*, 644 So. 2d 557, 559 (Fla. Dist. Ct. App. 1994) (same); *Hexter v. Hexter*, 386 N.E.2d 1006, 1007–08 (Ind. Ct. App. 1979) (same); *Cappalli, supra*, note 111, at 115 (“The executing court should not do a full contacts probe because that body is exercising such limited power against the judgment debtor. That court is not assessing liability and measuring compensation but merely making property available to satisfy the liquidated claim.”); *Vernon, supra* note 24, at 1008 (“The exemption of proceedings to realize on judgments from the minimum contacts standard of *International Shoe* is pragmatically necessary if judgment debtors are to be prevented from shielding their assets from judgment creditors by shipping the assets to a state with which the underlying litigation had no prior connection.”).

judgments.<sup>121</sup> Accordingly, one commentator argues that the *Shaffer* Court had a “very different view of what is ‘fair’ in postjudgment attachment actions and ‘greatly relaxed’ the minimum contacts requirement in such actions.”<sup>122</sup> The author then argues that the proper analysis for an enforcing court is a “rear view mirror” test to determine if the rendering court had proper jurisdiction over the defendant.<sup>123</sup> If so, no further inquiry is required by the enforcing court.<sup>124</sup>

How, if at all, the *Shaffer* opinion may change postjudgment garnishment analysis has yet to be fully realized. This is, in part, because enforcement proceedings do not garner much attention in the legal community.<sup>125</sup> Instead, and perhaps understandably, most attention is focused on the events leading up to the judgment.<sup>126</sup> This has led to a degree of uncertainty regarding the proper analysis of these proceedings.<sup>127</sup> Moreover, this uncertainty is perhaps fitting with the continuously evolving fabric of jurisdictional analysis. For, as Justice Scalia has stated, “This American jurisdictional practice is . . . not merely old; it is continuing.”<sup>128</sup>

## II. KOEHLER v. BANK OF BERMUDA: A CASE ANALYSIS

As seen, states have disagreed as to whether postjudgment garnishment proceedings require in rem or in personam jurisdiction.<sup>129</sup> Courts have also disagreed as to whether or not the due process considerations which exist

121. See, e.g., *Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285, 286 (App. Div. 2001) (noting that “neither the Due Process Clause of the United States Constitution nor New York law requires” a New York court have jurisdiction over the judgment debtor before recognizing and enforcing the judgment against him). Such a holding, the *Lenchyshyn v. Pelko Electric, Inc.* court noted, was dictated by “[c]onsiderations of logic, fairness, and practicality.” *Id.* at 291. Requiring the judgment debtor be subject to the enforcing state’s jurisdiction, the court continued, “would unduly protect a judgment debtor and enable him easily to escape his just obligations.” *Id.* at 292; see also *supra* note 97; *infra* notes 169–73, 259 and accompanying text.

122. Díaz-Pedrosa, *supra* note 81, at 31 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 309 n.14 (1980) (Brennan, J., dissenting)).

123. *Id.*

124. The author continues to argue that if the rendering court had proper jurisdiction over the defendant, “all that is needed in the enforcing state is the presence of defendant’s assets.” *Id.* Thus, although the author argued that a due process inquiry is not necessary postjudgment, the presence of the judgment debtor’s assets within the forum is. Presumably then, Díaz-Pedrosa would disagree with the New York court’s decision in *Koehler*. This is supported by the author’s later point that a court enforcing a foreign arbitral award must have “‘something’ within its jurisdiction . . . to satisfy the award.” *Id.* at 41 (citing *Rush v. Savchuk*, 444 U.S. 320, 332–33 (1980)).

125. Newman, *supra* note 92.

126. *Id.*

127. See Laurence, *supra* note 79, at 383 (“All the parameters of postjudgment due process analysis—including precisely where the garnishment of an intangible asset must occur—are yet to be worked out and, given *Shaffer*’s footnote 36, it may be a while before they are.”).

128. *Burnham v. Superior Court*, 495 U.S. 604, 615 (1990).

129. See *supra* notes 103–06 and accompanying text.

prejudgment are also relevant postjudgment.<sup>130</sup> However, even authorities that do not require a minimum contacts inquiry postjudgment have seemed to require, at least by implication, that the property to be garnished be within the garnishing jurisdiction.<sup>131</sup> Nonetheless, in *Koehler*, the New York Court of Appeals perhaps paved its own course by holding that a court with jurisdiction over a garnishee but not the judgment debtor may order the garnishee to transfer extraterritorial assets in its possession into the state.<sup>132</sup> Such a holding raises serious due process and policy concerns.<sup>133</sup>

A better understanding of both the reasoning of the *Koehler* decision, as well as its potential impact, demands a closer look at the case itself. Part II.A details the factual and procedural background of the case. Part II.B.1 explores the arguments put forth by judgment creditor Lee N. Koehler in his briefs. Part II.B.2 explores the arguments put forth in the Bank of Bermuda's briefs. Part II.C discusses the court's majority decision and Part II.D discusses the dissenting opinion.

#### A. *Statement of the Case*

Although the *Koehler* case was decided by the New York Court of Appeals in June of 2009, the events comprising the facts of the decision actually began almost sixteen years earlier. In 1993, Koehler, a citizen of

130. See *supra* notes 81–83, 116–24 and accompanying text.

131. See *Huggins v. Deinhard*, 654 P.2d 32, 37 (Ariz. Ct. App. 1982) (noting there is “no unfairness in allowing appellee to realize on that debt in Arizona where appellant has property”); 30 AM. JUR. 2D *Executions and Enforcement of Judgments* § 572 (2005) (“Judgment creditors seeking examination in aid of attachment are generally limited to property within the situs jurisdiction, since a state has no power to reach property beyond its borders.” (citing *Pac. Decision Sci. Corp. v. Superior Court*, 18 Cal. Rptr. 3d 104, 109 (Ct. App. 2004))); *Diaz-Pedrosa*, *supra* note 81, at 31. Even New York, in *Lenchyshyn*, implied that the property to satisfy the judgment must be present within the state. See *Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285, 291 (App. Div. 2001) (“[E]ven if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the . . . money judgment . . . and thereby should have the opportunity to pursue all such enforcement steps *in futuro*, whenever it might appear that defendants are maintaining assets in New York . . .”). Such language seems to imply that the judgment-creditors could register their judgment against the debtor in New York, but could not act on it until some property of the debtor was within the state. See *id.*; see also *Mones v. Commercial Bank of Kuwait, S.A.K.*, 399 F. Supp. 2d 310, 317 (S.D.N.Y. 2005) (noting that “[c]ourts have repeatedly held . . . that [CPLR 5225’s] power is limited to ordering the delivery of property that is located within the court’s jurisdiction”), *vacated on other grounds*, 204 F. App’x 988 (2d Cir. 2006). This, after all, is the language of *Shaffer*’s footnote thirty-six. See *supra* note 81 and accompanying text (noting that the judgment may be enforced wherever the judgment debtor “has property”).

132. *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825, 827 (N.Y. 2009).

133. See, e.g., Daniel L. Brown & Elizabeth M. Rotenberg-Schwartz, *Judgment Secured: Now What? ‘Koehler’ Provides Greater New York State Access to Banks for Collection*, N.Y. L.J., July 20, 2009, at S8 (noting that the ramifications of the decision are “potentially staggering”); Siegel, *supra* note 7, at 9 (asking if the decision will hurt New York by “prompting garnishees like banks, indulgent of their customers . . . to stay out of New York entirely”).

Maryland, won a default judgment in a Maryland court against A. David Dodwell, a resident of Bermuda.<sup>134</sup> At the time, Dodwell owned shares of a Bermuda company's stock, which he deposited in a Bank of Bermuda branch in Bermuda.<sup>135</sup>

In that same year, Koehler registered his Maryland judgment in the U.S. District Court for the Southern District of New York.<sup>136</sup> Shortly thereafter, Koehler began a garnishment proceeding by serving a writ of execution upon the Bank of Bermuda (New York) Limited (the Bank), the Bank's New York subsidiary.<sup>137</sup> Specifically, Koehler filed a petition for the "payment or delivery of property of judgment debtor" pursuant to New York's Civil Practice Laws and Rules (CPLR).<sup>138</sup> CPLR fifty-two permits a judgment creditor to obtain satisfaction of his or her judgment against either the judgment debtor or a garnishee of the judgment debtor.<sup>139</sup> After

134. *Koehler v. Bank of Berm. Ltd.*, Nos. M18-302, 931745, 2002 WL 519740, at \*1 (S.D.N.Y. Apr. 5, 2002). Although immaterial to this Comment's discussion, Lee N. Koehler's actual state of residency is not entirely clear. Although the lower court listed Koehler as a resident of Maryland, *see id.*, the New York Court of Appeals listed Koehler as a resident of Pennsylvania. *See Koehler*, 911 N.E.2d at 827.

135. *Koehler*, 2002 WL 519740, at \*1. The parties in *Koehler* did not dispute that the certificates were physically located in Bermuda, not New York. *Id.* This seems to be in accord with New York law. *See Dyer v. Dyer*, 247 N.Y.S. 540, 541-42 (App. Div. 1931) (noting that "[s]hares owned by a nonresident defendant in a foreign corporation are not property within the state of New York, even though the corporation be doing business here, unless the stock certificates themselves are found within the state").

136. *Koehler*, 911 N.E.2d at 827. A federal statute permits the registration of a valid judgment in another district. *See* 28 U.S.C. § 1963 (2006).

137. *Koehler*, 911 N.E.2d at 827.

138. *Id.* Postjudgment execution proceedings in federal court are governed by the procedural law of the state in which the federal court is located. *See* FED. R. CIV. P. 69(a).

139. New York's C.P.L.R. 5225 says, in part,

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. . . .

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.

N.Y. C.P.L.R. 5225 (McKinney 1997).

much litigation, the Bank eventually consented to the personal jurisdiction of New York's courts.<sup>140</sup>

In 1993, the district court issued an order that directed the Bank to turn over the stock certificates in Bermuda to Koehler.<sup>141</sup> However, in 2005, the district court dismissed Koehler's petition, basing its decision upon the "crucial fact" that the stock certificates were located outside the court's territorial jurisdiction, and reasoning that New York could not attach property located outside the state.<sup>142</sup> Accordingly, the court found that it lacked jurisdiction over the judgment debtor's stock certificates.<sup>143</sup>

Koehler appealed to the U.S. Court of Appeals for the Second Circuit,<sup>144</sup> which observed that it was unclear whether or not New York was permitted to order a garnishee subject to its jurisdiction to deliver assets that are in its possession but not located in New York.<sup>145</sup> Although it perceived that nothing in the statutory text would prohibit such an order,<sup>146</sup> the court, by certified question, asked the New York Court of Appeals to determine "whether a court sitting in New York may . . . order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor . . . when those stock certificates are located outside New York."<sup>147</sup>

The next section will examine the arguments made by the parties in their respective briefs.

## B. Arguments from the Briefs

### 1. Koehler

In his brief, Koehler pointed to several cases and commentaries interpreting section 5225(a) for support of the proposition that garnishment proceedings are proceedings in personam, requiring only jurisdiction over

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140. *Koehler*, 911 N.E.2d at 827. The parties had litigated the issue for nearly ten years. *Id.*

141. *See Koehler v. Bank of Berm. Ltd.*, No. M18-302 (CSH), 2005 WL 551115, at \*1 (S.D.N.Y. Mar. 9, 2005), *vacated*, 577 F.3d 497 (2d Cir. 2009).

142. *Id.* at \*1, \*11.

143. *Id.* at \*7.

144. *See Koehler v. Bank of Berm. Ltd.*, 544 F.3d 78, 80 (2d Cir. 2008).

145. *Id.* at 85–86 ("It seems clear that a court sitting in New York, that has personal jurisdiction over a judgment debtor, may order the judgment debtor himself to deliver property into New York. It is less clear that courts have the authority to order a person or entity other than the judgment debtor to deliver assets into New York, when that person or entity is located in a foreign jurisdiction." (citing *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 836 N.Y.S.2d 4, 9 (App. Div. 2007); *Starbare II Partners, L.P. v. Sloan*, 629 N.Y.S.2d 23 (App. Div. 1995))).

146. *See id.* at 86 ("[W]e see no principled reason why a court in New York should not be able to order a garnishee that has submitted to its personal jurisdiction to deliver property within its control.").

147. *Id.* at 87.

the person—that is, the garnishee.<sup>148</sup> Furthermore, Koehler noted, it was established law that judgment debtors may be ordered to turn over out-of-state property.<sup>149</sup> For example, in *Miller v. Doniger*,<sup>150</sup> the judgment debtor maintained several bank accounts outside the state of New York.<sup>151</sup> Despite the fact that some of the accounts were in the possession of relatives, the court ordered that they be transferred into the state in order to satisfy the existing judgment.<sup>152</sup> More importantly, however, Koehler pointed to the decision in *Morgenthau v. Avion Resources Ltd.*<sup>153</sup> In *Morgenthau*, the court noted, although in dicta, that garnishees could be ordered to transfer assets in their possession into the state.<sup>154</sup>

Although these decisions all involved the court's power over a judgment debtor, not a garnishee, Koehler argued that such a distinction was inappropriate.<sup>155</sup> For support, Koehler asserted that nothing in section 5225(b) prohibits a court from reaching property located outside the state.<sup>156</sup> Moreover, looking at the language of the CPLR statute, Koehler

148. See Brief for Petitioner-Appellant Lee N. Koehler at 12–13, *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825 (N.Y. 2009) (No. 05-2378).

149. *Id.* This was not disputed by the Bank. See *Koehler*, 911 N.E.2d at 830. This, Koehler argued, was the court's decision in *Gryphon Domestic VI, LLC v. APP Int'l Finance Co., B.V.* See *Gryphon*, 836 N.Y.S.2d at 9 (noting that a “court could order the defendant judgment debtor to turn over property because it had personal jurisdiction over [him]” (citing *Starbare II*, 629 N.Y.S.2d at 23)); see also *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 410 (2d Cir. 1985) (stating that, in a bankruptcy proceeding, a court may order defendant “and all persons holding property for her” to transfer the property into the state); *Lozano v. Lozano*, 975 S.W.2d 63 (Tex. App. 1998) (upholding lower court's order that judgment debtor turn over property located in Mexico). These holdings flow from the general rule that a court has the power to order a person subject to its jurisdiction to obey its orders, even if that requires the performance of an act in another jurisdiction. See *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (1971)); *Gresov v. Shattuck Denn Mining Corp.*, 215 N.Y.S.2d 98, 100 (Sup. Ct. 1961) (“Where jurisdiction of the parties is assumed, this court may render an injunctive decree having extraterritorial effect in appropriate circumstances.” (citing *Newmark v. C & C Super Corp.*, 3 A.D.2d 823 (N.Y. App. Div. 1957))).

150. 814 N.Y.S.2d 141 (App. Div. 2006).

151. *Id.* at 141.

152. *Id.* In its brief, the Bank asserted that *Miller v. Doniger* should not be interpreted to mean that relatives were third-party garnishees. Brief for Respondent the Bank of Bermuda Ltd. at 24, *Koehler*, 911 N.E.2d 825 (No. 05-2378-cv). In *Miller*, the Bank argued, the court treated the debtor's relatives as his “alter ego.” *Id.*

153. Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 13 (citing *Morgenthau v. Avion Resources Ltd.*, 849 N.Y.S.2d 223, 226 (App. Div. 2007)).

154. *Morgenthau*, 849 N.Y.S.2d at 226 (noting that the “plaintiff correctly notes that the New York courts have the power to command a garnishee present in the state to bring out-of-state assets under the garnishee's control into the state” (citing *Gryphon Dom. VI, LLC*, 836 N.Y.S.2d 4; *Miller*, 814 N.Y.S.2d 141; *Starbare II Partners, L.P. v. Sloan*, 629 N.Y.S.2d 23 (App. Div. 1995))).

155. See Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 18 (noting that this was a “distinction without a difference”).

156. *Id.* at 11; see also N.Y. C.P.L.R. 5225(b) (McKinney 1997). The location of the property, Koehler asserted, is “ultimately immaterial.” Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 11. Moreover, Koehler argued, it would be wrong to presume



noted that section 5225(a), dealing with judgment debtors, is “identical” to section 5225(b), dealing with garnishees.<sup>157</sup> The only distinction, Koehler asserted, is that section (a) proceeds by motion whereas section (b) requires a special proceeding to establish jurisdiction over the garnishee.<sup>158</sup> Other than that, Koehler noted, the operational language is the same.<sup>159</sup> Thus, if it was well-established that judgment debtors could be ordered to turn over out-of-state property,<sup>160</sup> so too could garnishees.<sup>161</sup>

Citing to *Shaffer*'s footnote thirty-six,<sup>162</sup> Koehler noted that “there is an important distinction between pre-judgment attachment and post-judgment collection proceedings.”<sup>163</sup> As an example, Koehler pointed to the court's decision in *Lenchyshyn v. Pelko Electric, Inc.*,<sup>164</sup> which held that an

that the statute has “certain premises, presuppositions, or postulates, which are not articulated anywhere in the statute.” Appellant's Reply to *Amicus Curiae* Brief of the Clearing House Association L.L.C. at 9, *Koehler*, 911 N.E.2d 825 (No. 05-2378).

157. Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 16–17; *see also* N.Y. C.P.L.R. 5225(b).

158. Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 16–17; *see also* N.Y. C.P.L.R. 5225(b); NEW YORK PRACTICE, *supra* note 79, § 510 (“If a third person (garnishee) has it, a special proceeding is used; if the judgment debtor has it, motion practice is used.”).

159. Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 16–17.

160. *See supra* notes 149–54 and accompanying text.

161. Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 18–19 (“As a general principle of statutory construction, ‘whenever a word is used in a statute in one sense and with one meaning, and subsequently the same word is used in a statute on the same subject matter, it is understood as having been used in the same sense.’” (quoting *Riley v. County of Broome*, 742 N.E.2d 98, 104 (N.Y. 2000))). The U.S. Court of Appeals for the Second Circuit, before certifying the question to the New York court, also endorsed this argument. *See Koehler v. Bank of Berm. Ltd.*, 544 F.3d 78, 86 (2d Cir. 2008). Moreover, Koehler argued, this would merely reflect the theory that a garnishee in such proceedings “stands-in-the-shoes” of the judgment debtor. Reply Brief for Petitioner-Appellant Lee N. Koehler at 19, *Koehler*, 911 N.E.2d 533 (No. 05-2378). Professor David Siegel has explained this theory as permitting courts to find the assets' situs wherever the garnishee is located. *See* NEW YORK PRACTICE, *supra* note 79, § 491 (“Finding the garnishee is just another way of finding the asset's ‘situs’: if the garnishee has a New York presence, the debtor's asset in the garnishee's hands will usually be found to have a New York situs, too.”). If this were so, the *Koehler* court could have relied upon this theory to explain that the debtor's assets were really located—with the garnishee—in New York. This perhaps would have simplified the reasoning and allowed the court to resolve the issue without really addressing it directly. This reasoning, however, mirrors the outmoded “debt-follows-the-debtor” theory of *Harris v. Balk*. *See supra* notes 59–68 and accompanying text. While some courts have suggested that *Harris*'s “debt-follows-the-debtor” theory still applies postjudgment, *see supra* note 79, this raises some serious practical concerns. *See* Laurence *supra* note 79, at 375, 383–84 (noting that such a rationale would essentially create a situs for such debts anywhere the garnishee is present and impose serious practical complications for nationally operating entities).

162. *See supra* notes 81–83 and accompanying text.

163. Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 9; *see also supra* notes 116–24 and accompanying text.

164. 723 N.Y.S.2d 285 (App. Div. 2001).

enforcing court need not have jurisdiction over the judgment debtor.<sup>165</sup> Accordingly, Koehler argued, the Bank could not rely upon prejudgment cases to support its proposition that the debtor, or his property, must be within the garnishing jurisdiction.<sup>166</sup> Thus, Koehler noted, applying *Shaffer's* decision to postjudgment garnishments would be contradictory: not only would it conflict with the statutory language of the CPLR,<sup>167</sup> but it would also directly contradict the holding in *Lenchyshyn*.<sup>168</sup>

Koehler also cited several policy considerations in support of permitting such garnishments. First, Koehler noted, requiring that the judgment debtor's property be located within the enforcing state would merely permit the debtor to evade the enforcement of the judgment.<sup>169</sup> All the debtor would need to do is move his property to a state other than the one being asked to enforce the judgment.<sup>170</sup> This would impede the courts' desires to see that all valid judgments are enforced.<sup>171</sup> Also, Koehler argued, courts should automatically favor the interests of the judgment creditor over the judgment debtor.<sup>172</sup> After all, a court has already determined that the judgment debtor has in some way harmed the judgment creditor.<sup>173</sup>

165. See *id.* at 289 (listing over a dozen court decisions nationwide and noting that these courts "have cited the *Shaffer* footnote [and] have held uniformly that no jurisdictional basis for proceeding against the judgment debtor need be shown before a foreign judgment will be recognized or enforced in a given state"); see also *supra* notes 120–24.

166. Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 10–11 (distinguishing cases relied upon by the Bank as addressing prejudgment attachments).

167. See *supra* note 139.

168. Appellant's Reply to *Amicus Curiae* Brief of the Clearing House Association L.L.C., *supra* note 156, at 24.

169. See Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 19; see also Vernon, *supra* note 24, at 1008.

170. This concern seems to be in accord with what courts have understood the *Shaffer* opinion to prevent in the prejudgment context. See, e.g., *Soc'y of Lloyd's v. Byrens*, Civ. No. 02CV449-J (AJB), 2003 U.S. Dist. LEXIS 26719, at \*13 (S.D. Cal. May 29, 2003) ("The due process requirements are not aimed at helping a defendant escape enforcement of a judgment if that defendant, for example, removes the subject property to a forum that does not have personal jurisdiction over the defendant." (citing *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977))). Such evasive maneuvers by the judgment debtor, we may assume, are likely. See Rakowski, *supra* note 97.

171. Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 24–25 (noting that "[e]very court has an interest in the enforcement of its judgments" and that "[r]ules or requirements that create impediments to the enforcement of judgments should be carefully examined"); see also *Fraser v. Littlejohn*, 386 S.E.2d 230, 237 (N.C. Ct. App. 1989) ("[The state] has an interest in assisting out-of-state creditors who seek to collect from debtors who come within the reach of our courts. No state benefits when debtors are allowed to escape their financial obligations."); NEW YORK PRACTICE, *supra* note 79, § 491 (noting that a "construction that aids enforcement should, as between competing possibilities, be the one selected").

172. Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 25. As one commentator has argued, to the extent that "fairness" matters in the postjudgment context, it should be "fairness to the garnishee, not the defendant." John T. Hundley, *Long Arms and Foreign Pockets: Can Multinational Financial Organizations Be Used To Subject Alien Defendants to the Enforcement of Illinois Judgments?*, CHI. B. ASS'N REC., Sept. 1990, at 24, 27. Moreover, Hundley argues, "the traditional fairness analysis does not apply because the

Nor, Koehler argued, would an order requiring the Bank to turn over the assets located in another territory “violate the sovereignty” of that territory.<sup>174</sup> While a prejudgment attachment would require a New York sheriff to enter the other state and secure the property, a clear violation of state sovereignty,<sup>175</sup> turnover orders merely act against the garnishee who is already present within New York and subject to its jurisdiction.<sup>176</sup> The court would only be ordering the garnishee, over which it already has jurisdiction, to bring property in the garnishee’s possession into the state.<sup>177</sup> And, as a result of its “presence” within New York, Koehler argued, the Bank was legally obligated to obey the turnover order.<sup>178</sup>

## 2. The Bank

The Bank asserted that garnishment proceedings are “in the nature of actions in rem, and are especially so when they proceed without jurisdiction of the person of the debtor.”<sup>179</sup> Furthermore, the Bank asserted, it was well-established law in New York that in prejudgment attachment proceedings the property must be within the jurisdiction of the court.<sup>180</sup> Thus, the Bank asserted, the court lacked jurisdiction to enforce the judgment because it lacked jurisdiction over the assets.<sup>181</sup> Moreover, the

post-judgment action cannot be intended to force the defendant to litigate the original lawsuit; there already is a judgment.” *Id.*

173. Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 25–26. And, Koehler argued, “having been already afforded a judicial hearing on the merits and lost . . . no further process is due.” Appellant’s Reply to *Amicus Curiae* Brief of the Clearing House Association L.L.C., *supra* note 156, at 49–50.

174. Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 20 (quoting *Gryphon v. Dom. VI, LLC v. APP Intern Fin. Co., B.V.*, 41 A.D.3d 25, 31 (N.Y. App. Div. 2007)); *see also supra* note 23.

175. Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 20 (quoting *Gryphon*, 41 A.D.3d at 31).

176. *Id.*

177. *Id.* Accordingly, Koehler argued, there is no reason to imply a geographic limitation on the statutory language. Appellant’s Reply to *Amicus Curiae* Brief of the Clearing House Association L.L.C., *supra* note 156, at 10.

178. Appellant’s Reply to *Amicus Curiae* Brief of the Clearing House Association L.L.C., *supra* note 156, at 25; *see also supra* note 149.

179. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 11 (quoting *Nat’l Broadway Bank v. Sampson*, 179 N.Y. 213, 222 (1904)) (citing *Hotel 71 Mezz Lender LLC v. Falor*, Nos. 601175/07, 4043N, 4043NA, 4043NB, 2008 N.Y. App. Div. LEXIS 9466, at \*5 (App. Div. Dec. 16, 2008)).

180. *Id.* at 13 (quoting *Nat’l Broadway Bank*, 179 N.Y. at 222); *see also* *Capital Distrib. Servs., Ltd. v. Ducor Express Airlines, Inc.*, 440 F. Supp. 2d 195, 209 (E.D.N.Y. 2006) (noting that the court knew of no authority “that supports a court’s power to attach property that lies outside of its territorial jurisdiction”); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 67 (1971) (“A state has power to exercise judicial jurisdiction to apply to the satisfaction of a claim a chattel belonging to the person against whom the claim is asserted, but which is in the possession or control of another person, if . . . (b) the chattel to be applied is within the state.”).

181. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 12–13.

Bank asserted, the cases cited by Koehler in support of its position<sup>182</sup> were inapposite because they dealt with judgment debtors, not garnishees.<sup>183</sup>

Nor, the Bank asserted, did anything in the language of the CPLR statute indicate that it was intended to have extraterritorial reach.<sup>184</sup> In fact, canons of construction would indicate that no such language should be read into the statute.<sup>185</sup> Simply, if the legislature had intended section 5225(b) to have extraterritorial reach it would have added such language to the statute.<sup>186</sup>

Permitting such garnishments, the Bank also warned, would raise serious due process concerns.<sup>187</sup> Specifically, the Bank cited to the Supreme Court's decisions in both *International Shoe* and *Shaffer*.<sup>188</sup> In these cases, the Bank noted, the Supreme Court had made it clear that all exercises of judicial jurisdiction must satisfy the minimum contacts test.<sup>189</sup> The facts, the Bank argued, proved that New York's contacts with this matter were "weak, at best."<sup>190</sup>

Lastly, allowing the garnishment of out-of-state property would create serious policy implications.<sup>191</sup> Particularly, the Bank cautioned, any financial property held by banks worldwide would be vulnerable to garnishment in New York if that bank had a branch or subsidiary in the

182. See *supra* notes 149–54 and accompanying text.

183. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 22–23 ("The fundamental flaw of Koehler's argument is that it fails to recognize the distinction between the broad, plenary power a court has when the judgment debtor is subject to personal jurisdiction, as compared to the more limited power it has in a special proceeding to garnish property.").

184. *Id.* at 16.

185. *Id.* at 16–17 ("An intention of making an innovation in a long established rule of law is not imputed to the Legislature in the absence of a clear manifestation of such intention. This rule has ever greater validity in cases where . . . jurisdictional questions are concerned." (quoting N.Y. STAT. LAW § 153 (1971))); see also *Phillips v. Consol. Supply Co.*, 895 P.2d 574, 577 (Idaho 1995) ("Absent a statute granting extraterritorial rights, '[s]tatutes are intended to apply and be confined in their operation to persons, property and rights which are within the territorial jurisdiction of the law-making power.'" (quoting *Ore-Ida Potato Prods., Inc. v. United Pac. Ins. Co.*, 392 P.2d 191, 195 (Idaho 1964))).

186. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 17 n.5. Interestingly, the *Koehler* majority implied the exact opposite. See *infra* notes 204–05 and accompanying text. The Bank's argument, however, is not entirely without merit. For a similar argument made successfully, see *Desert Wide Cabling & Installation, Inc. v. Wells Fargo & Co.*, 958 P.2d 457 (Ariz. Ct. App. 1998) (refusing to give garnishment statute extraterritorial effect, assuming legislature would have done so if intended).

187. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 28.

188. *Id.*; see also *supra* notes 29–49, 69–80 and accompanying text.

189. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 28; see also *supra* notes 29–49 and accompanying text.

190. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 28. This argument, however, ignores the *Shaffer* Court's clarification in footnote thirty-six, which arguably removes due process considerations from postjudgment proceedings. See *supra* notes 81–83 and accompanying text.

191. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 35.

state.<sup>192</sup> Secondly, such garnishments may harm other creditors of the judgment debtor who may have claims to the same property.<sup>193</sup> Lastly, permitting such garnishments would create significant burdens on the courts.<sup>194</sup> Specifically, courts would have to undergo a costly and time-consuming analysis of considerations regarding due process and state sovereignty.<sup>195</sup>

### C. *The Koehler Decision*

On June 4th, 2009, the New York Court of Appeals, split four to three, answered the certified question before it in the affirmative.<sup>196</sup> The Bank, as garnishee, could be ordered to transfer the property from Bermuda into New York.<sup>197</sup>

The Court began its analysis by distinguishing prejudgment attachment proceedings from postjudgment enforcement proceedings.<sup>198</sup> Prejudgment attachments, the court noted, require jurisdiction over the property.<sup>199</sup> Postjudgment attachments, on the other hand, are proceedings in personam

192. *Id.* at 35–36. This point was strongly reiterated by the Clearing House Association in an amicus brief in support of the Bank. *See* Brief of the Clearing House Association L.L.C. as *Amicus Curiae* in Support of Respondent at 22–24, *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825 (N.Y. 2009) (No. 05-2378-cv) (noting that such garnishments would deter “foreign customers who do not wish their assets to be exposed in New York” and “would further increase the pressure on . . . banks not to operate in the State”). The Clearing House also expressed concern that such garnishments would create “a rush on the New York courts to obtain such orders,” essentially flooding the courts “with proceedings arising from controversies and debts that have nothing to do with New York.” *Id.* at 26. Forum shopping would be even more likely, Clearing House asserted, because allowing such garnishments would create a serious conflict with decisions in several other states. *See id.* at 27–28 & n.15. These concerns have been recognized in recent commentaries on the case. *See* Brown & Rotenberg-Schwartz, *supra* note 133; Siegel, *supra* note 7.

193. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 36; *see also* NEW YORK PRACTICE, *supra* note 79, § 485 (“A judgment creditor may find that she is not alone in pursuit of the debtor, who may be in such financial extremis that his creditors are legion. At this point the topic becomes what law school curricula often denominated ‘creditors’ rights’, a battleground that determines priorities in the assets of a declining debtor.”).

194. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 37. This decision perhaps comes at a troubling time, as a recent article has highlighted the fact that New York courts ended 2009 with the highest number of cases ever. *See* William Glaberson, *The Recession Begins Flooding into the Courts*, N.Y. TIMES, Dec. 28, 2009, at A1.

195. Brief for Respondent the Bank of Bermuda Ltd., *supra* note 152, at 37. This concern has been addressed by at least one commentator. *See* Laurence, *supra* note 79, at 381 (noting that “[r]eversing footnote 36 to require a due process inquiry” postjudgment would be “cumbersome,” but supporting the idea regardless). For arguments against requiring such due process analysis postjudgment, *see* Cappalli, *supra* note 111, at 114–15; Vernon, *supra* note 24, at 1007–8.

196. *See Koehler*, 911 N.E.2d at 827.

197. *Id.*

198. *Id.* at 828–29.

199. *Id.* at 829 (“[I]t is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction.” (quoting *Nat’l Broadway Bank v. Sampson*, 71 N.E. 766, 769 (N.Y. 1904))).

and thus only require jurisdiction over the person.<sup>200</sup> Once jurisdiction has been established over the person, the court explained, it may order the adherence to its orders by proceeding in personam against the person.<sup>201</sup> Accordingly, since the Bank had consented to the jurisdiction of the court,<sup>202</sup> that was all that was necessary to order it to turn over the assets.<sup>203</sup>

Turning to the CPLR statute, the court noted that section fifty-two “contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York.”<sup>204</sup> It would be improper to read such a restriction into the statutory language, the court noted, because it would have been “easy” for the legislature to have added such a restriction into the statutory language.<sup>205</sup>

The majority then proceeded to address the alleged distinction between garnishees and judgment debtors. The court acknowledged the settled rule that judgment debtors may be ordered to bring their out-of-state assets into the state.<sup>206</sup> The court then dismissed the Bank’s assertion that, absent jurisdiction over the judgment debtor, courts are limited by their in rem jurisdiction over the debtor’s property.<sup>207</sup> Nothing in the CPLR statute, the court explained, supported such a proposition.<sup>208</sup> In fact, the court noted, the statute contemplates, in identical language, that a defendant subject to the court’s jurisdiction—regardless of whether he is a judgment debtor or garnishee—could be ordered to turn over property.<sup>209</sup>

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200. *Id.* (stating that “article 52 postjudgment enforcement involves a proceeding against a person—its purpose is to demand that a person convert property to money for payment to a creditor”).

201. *Id.* (citing *Douglass v. Phenix Ins. Co. of Brooklyn, N.Y.*, 138 N.Y. 209, 219 (1893)).

202. *See supra* note 140 and accompanying text.

203. *See supra* note 149.

204. *Koehler*, 911 N.E.2d at 829.

205. *Id.* For support, the court pointed to a recent amendment to section 5224 of the CPLR that gave it extraterritorial reach. *Id.* The court saw this as support for the proposition that the remainder of section fifty-two was intended to have the same extraterritorial effect. *Id.* Interestingly, however, the majority failed to recognize, and the dissent failed to argue, that this recent amendment may indicate that the legislature purposely left the language of 5225 as is because it did not wish for it to have any extraterritorial reach. Similarly, just as a limitation could not be read into the statute, the majority ignores the fact that such an expansion could not either.

206. *Id.* at 830; *see also supra* notes 149–52 and accompanying text.

207. *See Koehler*, 911 N.E.2d at 830.

208. *Id.*

209. *Id.* at 830–31; *see also supra* note 139. The majority in *Koehler* did not really address the jurisdictional due process concerns fervently debated by the parties. In fact, the majority’s only reference to such concerns was merely in dictum, noting that the *Shaffer* decision only restricts prejudgment jurisdictional exercise. *See Koehler*, 911 N.E.2d at 828–29.

#### D. *The Dissent*

In a strong dissent, three judges expressed concern over the majority's expansive interpretation.<sup>210</sup> Such a reading, the dissent warned, "is unsupported by any precedent in New York or, apparently, in any other jurisdiction."<sup>211</sup> Perhaps even more importantly, the dissent noted, the majority decision's "policy implications are troubling, and . . . may well be unconstitutional."<sup>212</sup>

The dissent expressed concern that the majority's interpretation of the garnishment statute may exceed the State's jurisdictional powers as limited by the Due Process Clause of the Federal Constitution.<sup>213</sup> Particularly, the dissent relied upon the holdings in *International Shoe* and *Shaffer*.<sup>214</sup> The dissent pointed to *Shaffer*'s footnote thirty-six as indication that postjudgment garnishments focus on the location of the property, and thus are proceedings in rem.<sup>215</sup> Although the dissenters conceded that the Supreme Court has never applied *International Shoe* to postjudgment proceedings,<sup>216</sup> they argued that the majority's approach might very well fail the standard set forth in *International Shoe*.<sup>217</sup>

For support, the dissenters pointed to the recent decision by the Court of Special Appeals of Maryland in *Livingston v. Naylor*.<sup>218</sup> In *Livingston*, the judgment creditor had obtained a money judgment against the judgment debtor, a resident of North Carolina, in a North Carolina court.<sup>219</sup> The judgment debtor had been employed by Marriott Hotels in both North Carolina and Maryland.<sup>220</sup> After enrolling his judgment in Maryland, the judgment creditor sought to garnish the wages of the debtor in Maryland by garnishing the Marriott Hotel there.<sup>221</sup> The *Livingston* court first dismissed the judgment debtor's claim that the court lacked power to issue the garnishment because it lacked jurisdiction over him.<sup>222</sup> Thus, the court

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210. See *Koehler*, 911 N.E.2d at 831 (Smith, J., dissenting).

211. *Id.*

212. *Id.*

213. *Id.* at 833; see also *supra* notes 13–14 and accompanying text.

214. See *supra* notes 29–49, 69–80 and accompanying text.

215. See *Koehler*, 911 N.E.2d at 833.

216. *Id.* In fact, courts and commentators have supported the notion that *International Shoe*'s minimum contacts analysis does not apply to postjudgment proceedings. See *supra* notes 82–83, 120–24 and accompanying text.

217. *Koehler*, 911 N.E.2d at 833.

218. 920 A.2d 34 (Md. Ct. Spec. App. 2007). *Koehler* dismissed the *Livingston v. Naylor* decision as an "anomaly" and limited to wage garnishments. See Reply Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 161, at 14.

219. *Livingston*, 920 A.2d at 35–36.

220. *Id.* at 36. This case is factually significant because, like the bank in *Koehler*, Marriott hotels maintain a presence in numerous different jurisdictions. See *id.* at 53.

221. *Id.* at 37.

222. *Id.* at 41 (referencing *Shaffer*'s footnote thirty-six); see also *supra* notes 120–24, 165 and accompanying text.

determined that the debtor's assets within the state, if any, were subject to garnishment.<sup>223</sup>

The *Livingston* court distinguished, however, between the wages earned by the judgment debtor while employed within Maryland and those earned while employed within North Carolina.<sup>224</sup> The court expressed "little concern" about garnishing the debtor's wages earned by him while employed within Maryland.<sup>225</sup> However, the court noted that the wages earned by the judgment debtor, while a resident of North Carolina and while employed in North Carolina, were not within Maryland's jurisdiction, even though the garnishee employer was.<sup>226</sup> Because the wages were not within its jurisdiction, the court held that due process prohibited it from garnishing the North Carolina wages.<sup>227</sup> Thus, to garnish the wages earned by the debtor while employed in North Carolina, the court held, the judgment creditor would have to go to that state's courts.<sup>228</sup>

Nor could the *Koehler* dissenters find any support for the majority's decision in the language of the CPLR statute. Looking at the statute, the dissenters noted that the relevant sections in no way provided for an extraterritorial interpretation.<sup>229</sup> The power to conduct such extraterritorial garnishments, the dissent noted, is simply a question "that the text of the statutes does not answer."<sup>230</sup>

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223. *Livingston*, 920 A.2d at 49–50.

224. *See id.* at 51.

225. *Id.*

226. *Id.* at 53–54. The court also rejected the judgment creditor's argument that *Harris*'s "debt-follows-the-debtor" rule still applies to postjudgment garnishments and that the judgment debtor's wages could be garnished anywhere and everywhere that Marriott Hotels did business. *See id.* at 52–53. For support, the court cited an analogous holding in *Williamson v. Williamson*, which prohibited a garnishment of the debtor's wages because the wages due to the debtor by the garnishee could not practically be located everywhere the garnishee-employer, the U.S. Army, was. 275 S.E.2d 42 (Ga. 1981). Some courts, however, have applied *Harris*'s rule to postjudgment garnishments, permitting the assets to be found wherever the garnishee or debtor himself is. *See supra* note 79.

227. *Livingston*, 920 A.2d at 51 ("With respect to wages that are earned by a North Carolina resident while working at facilities that are wholly within the State of North Carolina . . . and in the absence of some other connection between Maryland and either the North Carolina wage-earner or the underlying controversy that resulted in the original North Carolina judgment, we recognize a lack of fair play and substantial justice in permitting such wages to be garnished by operation of a Maryland court order."). This holding seems to be in accord with a literal reading of the Restatement's law on international judgment enforcement. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. h (1987) ("[O]nce a judgment has been rendered in a forum having jurisdiction, the prevailing party is entitled to have it satisfied out of the judgment debtor's assets wherever they may be located." (emphasis added)). Interestingly, the *Livingston* court conceded that *Shaffer* was a prejudgment decision. *Livingston*, 920 A.2d at 47. Citing to footnote thirty-six, the court also admitted that this language indicated that prejudgment and postjudgment analysis would differ. *Id.*

228. *Livingston*, 920 A.2d at 53.

229. *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825, 832 (N.Y. 2009) (Smith, J., dissenting); *see also supra* notes 185–86 and accompanying text.

230. *Koehler*, 911 N.E.2d at 832 (Smith, J., dissenting).



The dissent then distinguished several cases that Koehler had relied upon.<sup>231</sup> Every one of those cases, the dissenters noted, only required judgment debtors, not garnishees, to bring their property into New York.<sup>232</sup> This, the dissent explained, made sense: judgment debtors, who can physically control the property in ways garnishees cannot, could otherwise move their property around in order to frustrate the enforcement of the judgment.<sup>233</sup> Garnishees, such as the Bank, on the other hand, would have no such interest in doing this.<sup>234</sup>

The dissent also looked to a somewhat analogous case decided by the Second Circuit.<sup>235</sup> In *United States v. First National City Bank*,<sup>236</sup> the United States sought to garnish a Uruguayan corporation's assets from a New York bank.<sup>237</sup> The assets were deposited in the bank's branch outside of the United States.<sup>238</sup> The Second Circuit refused to permit such a garnishment on the grounds that a "garnishor obtains no greater right against the garnishee than the garnishee's creditor had."<sup>239</sup> Thus, if the corporation could not require the overseas deposits be paid in New York, neither could the United States as creditor.<sup>240</sup> Analogizing to the present case, the dissent noted that there was no reason to believe that the judgment debtor here could have forced the Bank to deliver the stock certificates into New York.<sup>241</sup>

Additionally, the dissent warned, the majority's decision created a chance that judgment creditors would flood to New York in order to enforce their judgments.<sup>242</sup> All that would be required now is that the garnishee institution have a branch or subsidiary operating in New York.<sup>243</sup> It would be, as the dissenters said, "irrelevant whether New York has any relationship with the judgment creditor, the judgment debtor or the dispute

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231. *See id.* at 832–33.

232. *Id.* at 832; *see also supra* notes 149–52 and accompanying text.

233. *Koehler*, 911 N.E.2d at 832 (Smith, J., dissenting).

234. *Id.*

235. *Id.*

236. 321 F.2d 14 (2d Cir. 1963), *rev'd*, 379 U.S. 378 (1965).

237. *Id.* at 16–17.

238. *Id.* at 16.

239. *Id.* at 19 (citing *Harris v. Balk*, 198 U.S. 215, 222 (1905); *Karno-Smith Co. v. Maloney*, 112 F.2d 690, 692 (3d Cir. 1940); *Wheeler v. Thomas*, 31 F. Supp. 702 (D.D.C. 1940)).

240. *Id.*

241. *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825, 832–33 (N.Y. 2009) (Smith, J., dissenting).

242. *Id.* at 831. This was also stressed by both the Bank and the Clearing House in their briefs, *see supra* note 192 and accompanying text, and recent commentary on the decision. *See Brown & Rotenberg-Schwartz, supra* note 133; *Siegel supra* note 7.

243. *Koehler*, 911 N.E.2d at 831 (Smith, J., dissenting).

between them.”<sup>244</sup> Such an opportunity, the dissent cautioned, would be a “recipe for trouble.”<sup>245</sup>

As this Comment should make clear, the debate between the parties in *Koehler*—which is in large part echoed by the majority and dissenting opinions—reflects a significant disagreement about how postjudgment garnishments should be analyzed. This disagreement, on such an important step in the litigation process, is worrisome. Incredibly, much of the confusion and debate can properly be traced back to a single footnote in the Supreme Court’s *Shaffer* opinion.<sup>246</sup> Accordingly, the *Koehler* decision can be seen as an opinion synthesizing some of the main issues in postjudgment jurisprudence. And, while the court’s dismissal of due process concerns is in accord with an established reading of the footnote, the sanction of an extraterritorial garnishment breaks ground from a similarly established understanding.

Part III of this Comment takes a closer look at the holdings of the *Koehler* decision and the issues it addressed. Specifically, this Comment will address the *Koehler* court’s treatment of two issues: postjudgment due process considerations and extraterritorial garnishments. This Comment concludes that the *Koehler* decision was correctly decided, as it reflects both a continuing trend in jurisdictional jurisprudence and realistically addresses—and certainly ameliorates—the impediments faced by judgment creditors in collecting on their judgments.

### III. A “RECIPE FOR TROUBLE”?<sup>247</sup> WILL *KOEHLER* LEAVE A BAD TASTE IN OUR MOUTHS?

Being a recent decision, the *Koehler* opinion’s impact has yet to be determined. However, the possible implications have already been recognized by several commentators.<sup>248</sup> For example, less than two months after the decision, an article in the *New York Law Journal* stated that the decision “is already being hailed as a landmark for judgment creditors.”<sup>249</sup> This can hardly be contested—under *Koehler*, enforcing judgments in New York just got a lot easier. However, as may be predictable, the *Koehler* decision is likely to create disagreements within the legal community. One article even suggests that the issue is ripe for Supreme Court review.<sup>250</sup>

244. *Id.*

245. *Id.* The dissenters seemed particularly worried about the burden this would have on larger banks. *See id.*

246. This is, of course, *Shaffer*’s footnote thirty-six. *See supra* notes 81–83 and accompanying text.

247. *Koehler*, 911 N.E.2d at 831 (Smith, J., dissenting).

248. *See* Brown & Rotenberg-Schwartz, *supra* note 133; Newman, *supra* note 92; Siegel, *supra* note 7.

249. Brown & Rotenberg-Schwartz, *supra* note 133.

250. *See* Berger, *supra* note 4, at 439 (“Given the dissent’s articulation of federal constitutional concerns, further appellate practice in the case seems likely, and the issue may ultimately land before the U.S. Supreme Court.”).

Despite these concerns, the *Koehler* decision was correctly decided. First, the decision follows the trend of broadening jurisdictional analysis. Second, the decision serves the noble purpose of assisting judgment creditors in satisfying their rightfully earned judgments.

The *Koehler* decision can properly be divided as addressing two separate, yet intertwined, issues: postjudgment due process and extraterritorial garnishments. A closer look at each issue separately will make clear that the *Koehler* decision was founded upon sound legal and practical considerations.

A. *Postjudgment Jurisdictional Due Process Considerations: A "Greatly Relaxed" Approach*<sup>251</sup>

The majority correctly, although surprisingly, refrained from engaging in an extensive due process analysis in its decision.<sup>252</sup> This is justified: typical prejudgment due process concerns should be irrelevant in postjudgment garnishment proceedings. This holding has a legal basis in *Shaffer's* footnote thirty-six, which implicitly recognizes the different roles between adjudicating courts and enforcing courts.<sup>253</sup> The plain language of this footnote indicates that the Supreme Court did not intend enforcement proceedings to be subject to typical prejudgment due process scrutiny.<sup>254</sup> Since *Shaffer*, many courts and commentators have adopted this approach.<sup>255</sup>

Policy considerations strongly support putting aside prejudgment due process concerns in postjudgment garnishment proceedings. To begin, courts must understand their role in a garnishment proceeding—to satisfy the judgment that the judgment creditor won against the judgment debtor in a previous action.<sup>256</sup> That is, there already exists a judgment against the defendant for some wrongdoing against the plaintiff. Accordingly, courts

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251. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 309 n.14 (1980) (Brennan, J., dissenting).

252. See *supra* note 209. It may be fair to assume that the majority's lack of focus on this issue reflects its belief that this is, although disputed amongst the parties, a settled issue.

253. See *supra* notes 81–83, 120–24 and accompanying text.

254. See *supra* note 81. This is also evident from the Supreme Court's *Endicott* decision. See *supra* note 117 and accompanying text.

255. See *supra* notes 82–83, 120–24 and accompanying text. For counterarguments, see Laurence, *supra* note 79; Díaz-Pedrosa, *supra* note 81. In his article, Aristedes Díaz-Pedrosa argues that the debtor's assets in a jurisdiction serve as a proxy for fair warning that the debtor's activities may subject him to garnishment in that jurisdiction. See Díaz-Pedrosa, *supra* note 81, at 45 ("If I . . . acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property." (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring))). Presumably, the author would disagree with the *Koehler* decision and perhaps would argue that by depositing stock certificates in the Bank of Bermuda the debtor had no warning or expectation that those certificates could be garnished in New York. This argument has been endorsed in the prejudgment attachment context. See *supra* note 94.

256. See Cappalli, *supra* note 111, at 115.

should favor the interests of judgment creditors in satisfying their outstanding judgment against the judgment debtor.<sup>257</sup> This lends favor to permitting courts to satisfy the existing judgment without delay caused by the debtor's due process concerns.

Moreover, requiring that a judgment debtor be subject to the personal jurisdiction of the enforcing court would enable judgment debtors to evade enforcement.<sup>258</sup> First, a judgment debtor could easily distance himself and his property from any connection to the enforcing state.<sup>259</sup> Essentially, the judgment debtor would tailor his contacts in a manner to avoid being subjected to the enforcing state's jurisdiction. Second, judgment debtors would be able to essentially relitigate the jurisdictional basis of the existing judgment. Litigating over the judgment debtor's contacts with the enforcing state would require the time and money of the litigants and the court. It would be burdensome on the courts because it is a fact-specific and time-consuming task.<sup>260</sup> This would further delay the satisfaction of the existing judgment and unfairly hinder the creditor's ability to satisfy his judgment. Judgment debtors deserve no such second bite at the apple.<sup>261</sup> Enforcing courts should therefore adopt the "rearview mirror" approach: so long as the existing judgment was rendered by a court properly exercising jurisdiction, no further due process considerations are necessary.<sup>262</sup>

#### B. Extraterritorial Garnishment

The *Koehler* decision greatly expanded the reach of New York's postjudgment garnishment procedure to assets in the possession of a present garnishee but located outside of the state. While this holding may raise concerns about valid state powers,<sup>263</sup> the decision is justified upon both legal and practical considerations. First, the Supreme Court's jurisdictional jurisprudence has indicated a shift away from the traditional understanding of territorial boundaries as a limit of state power.<sup>264</sup> Second, it has been settled law in numerous jurisdictions, including New York, that judgment

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257. See *supra* notes 172–73 and accompanying text.

258. See *supra* notes 97, 121, 169–70 and accompanying text.

259. See *Vernon*, *supra* note 24, at 1008 ("The exemption of proceedings to realize on judgments from the minimum contacts standard of *International Shoe* is pragmatically necessary if judgment debtors are to be prevented from shielding their assets from judgment creditors by shipping the assets to a state with which the underlying litigation had no prior connection."). The Supreme Court in *Shaffer* also expressed such a concern that judgment debtors would try to avoid paying off the judgment. See *Shaffer* 433 U.S. at 210 (noting that a judgment debtor "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit" (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (1971))).

260. See *supra* Part I.A.1–2.

261. *Bank of Babylon v. Quirk*, 472 A.2d 21, 23 (Conn. 1984); *Berger v. Berger*, 417 A.2d 921, 922 (Vt. 1980).

262. See *supra* notes 122–24 and accompanying text.

263. See *supra* Part I.A.1–2.

264. See *supra* Part I.A.1–2.

debtors may be ordered to turn over extraterritorial assets.<sup>265</sup> The *Koehler* decision correctly held that it should make no difference whether the court is directing a garnishee or judgment debtor subject to its jurisdiction to turn over assets in its possession. Third, policy considerations, such as the courts' interests in enforcing judgments, strongly support the use of extraterritorial garnishments.

### 1. State Power and Sovereignty

Early doctrinal foundations of state power were based upon territorial considerations.<sup>266</sup> This was *Pennoyer's* "power theory."<sup>267</sup> However, since *Pennoyer*, the Supreme Court's jurisdictional analysis has shifted to reflect modern technological and commercial realities—in today's economy, the lines of jurisdictional borders have been somewhat blurred.<sup>268</sup> This is demonstrated by the Supreme Court's more recent jurisprudence, starting with *International Shoe*, which greatly expanded the potential reach of states to property and persons beyond their borders.<sup>269</sup> This jurisprudence reflects a decreasing concern with limiting state power to persons and things solely within their borders. Accordingly, *Pennoyer's* power theory no longer really defines a state court's power.<sup>270</sup>

This expanding jurisdictional theory has reflected the reality that, in a modern economy, the interests of courts may extend to persons or properties beyond their borders.<sup>271</sup> This is particularly the case in the postjudgment context, where a state court's power is considered to be greater than if it were exercising prejudgment power.<sup>272</sup> Moreover, postjudgment garnishments are procedurally different than prejudgment attachments.<sup>273</sup> Postjudgment garnishments, as is evident from the *Koehler* case, merely order the garnishee who has submitted itself to the enforcing court's jurisdiction, and is legally obligated to obey the enforcing court's orders, to transfer assets *already in its possession* in another state into the enforcing state.<sup>274</sup> Accordingly, such procedures do not require an agent or officer of the enforcing state to cross state lines, enter the territory where the assets are located, physically seize them, and bring them back to the enforcing state. This would, no doubt, raise serious state sovereignty issues.<sup>275</sup> No such concerns exist in garnishment proceedings. The

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265. See *supra* notes 149–52 and accompanying text.

266. See *supra* notes 23–28 and accompanying text.

267. See *supra* notes 18–28 and accompanying text.

268. See *supra* note 35.

269. See *supra* Part I.A.1–2. Admittedly, the *Burnham* decision, *supra* note 47, can be seen as a bump in the road.

270. See *supra* note 29.

271. See *supra* note 35.

272. See generally *supra* Part I.C.

273. See *supra* notes 175–78 and accompanying text.

274. See *supra* notes 175–78 and accompanying text.

275. See *supra* notes 175–78 and accompanying text; see also *supra* note 23.

*Koehler* court recognized this important distinction and permitted the extraterritorial garnishment.

## 2. Garnishees and Judgment Debtors: “A Distinction Without a Difference”<sup>276</sup>

It is established law that courts may order a judgment debtor to turn over out-of-state property.<sup>277</sup> While no New York court has permitted this for garnishees,<sup>278</sup> *Koehler* argued and the court rightly agreed that nothing should prohibit such an order.<sup>279</sup> Thus, the *Koehler* decision correctly dismissed this alleged distinction between judgment debtors and garnishees.<sup>280</sup> Courts should be able to order a party in postjudgment proceedings, whether the party is a judgment debtor or garnishee, to act upon assets in its possession but in another jurisdiction. Thus, if courts can order judgment debtors to transfer such assets, there is no reason to prohibit garnishees from doing the same. After all, parties subject to a court’s jurisdiction are legally obligated to obey its orders.<sup>281</sup>

This certainly makes sense when one considers the nature of a garnishment proceeding. Garnishments are independent suits that name the garnishee as the defendant.<sup>282</sup> Accordingly, the garnishee is a real defendant and should be treated as such. And, if the judgment debtor as a real defendant in the initial litigation could be ordered to transfer extraterritorial assets, so too should the garnishee as a real defendant in the garnishment proceeding.<sup>283</sup> The Supreme Court has also indicated that courts need not be concerned about the judgment debtor in postjudgment garnishment proceedings—essentially, it is all about the garnishee.<sup>284</sup>

## 3. Policy and the Need To Enforce Judgments

Every court has an interest in seeing all valid judgments enforced.<sup>285</sup> This is a desire that the entire legal community should share. However, the

276. Brief for Petitioner-Appellant Lee N. Koehler, *supra* note 148, at 18.

277. *See supra* notes 149–52 and accompanying text.

278. The closest a New York court had come, before *Koehler*, was in dicta in an earlier case. *See supra* notes 153–54 and accompanying text.

279. *See supra* notes 155–61, 206–09 and accompanying text.

280. *See supra* notes 206–09 and accompanying text.

281. *See supra* notes 149, 201–03 and accompanying text.

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

283. *See United States v. Omar, S.A.*, 210 F. Supp. 773, 775 (S.D.N.Y. 1962) (“It is well established that once the court has obtained personal jurisdiction over a party it may compel performance of acts with respect to property located within or without its jurisdiction.” (citing *United States v. Ross*, 302 F.2d 831 (2d Cir. 1962); *First Nat’l City Bank of N.Y. v. I.R.S.*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960))).

284. *See supra* note 117. This is true, admittedly, to the extent that courts require judgment debtors be given notice of the garnishment before it is done. *See NEW YORK PRACTICE, supra* note 79, § 510.

285. *See supra* note 171 and accompanying text.

enforcement of judgments is a problem that has disturbed the legal system for a long time, as seen in Abraham Lincoln's expression of frustration almost a century-and-a-half ago.<sup>286</sup> Similarly frustrated judgment creditors throughout the nation, and particularly in New York, have longed for a decision like *Koehler*.

The *Koehler* decision is an incredibly powerful tool for judgment creditors to use in order to satisfy their judgments. Particularly, it has the potential to assist judgment creditors in reaching the assets of judgment debtors who have shielded their assets from garnishment by evasive maneuvering. If courts cannot reach assets outside of their jurisdiction, judgment debtors will simply relocate their assets every time a judgment creditor begins a garnishment proceeding in the jurisdiction where the assets are located. This is even more likely for intangible property, which can be relocated much easier and is more difficult to locate.<sup>287</sup> No judgment debtor should be able to get away with this.<sup>288</sup> The *Koehler* decision prevents this.

To be fair, the recent critics of the *Koehler* decision are not entirely misguided. First, as commentators have argued, this decision certainly makes New York courts more attractive for judgment creditors seeking satisfaction of their judgments.<sup>289</sup> However, if there is in fact a judgment creditor "gold rush" upon the courts, it would be a reflection of a much deeper problem: there are anxious judgment creditors out there who have been unable to satisfy their judgments. The *Koehler* decision, for better or worse, may be their savior. And, the satisfaction of valid and hard-earned judgments far outweighs the slight possible increase of foot traffic in New York's courts.

The second concern of these commentators is that the *Koehler* decision, by making corporations within New York's jurisdiction the possible garnishees of assets worldwide, might make New York a less attractive place for corporations to do business.<sup>290</sup> While maintaining the continuance of New York as a corporate and commercial headquarters is vital to the state's economy, the concern expressed is somewhat exaggerated. Put simply, it is very unlikely that corporations will close up their operations in New York because of this decision. The loss to the

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286. See *supra* note 1 and accompanying text.

287. See *supra* note 85 and accompanying text. With online banking, for example, a simple click of the mouse could transfer a judgment debtor's assets.

288. This has long been a concern of the courts. See *supra* note 171; see also *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977) (noting that a judgment debtor "'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit'" (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (1971))). Although the *Shaffer* Court was addressing the postjudgment due process requirement, the theory is analogous to a judgment debtor removing his assets to a jurisdiction where an enforcing court cannot reach them.

289. See *Brown & Rotenberg-Schwartz, supra* note 133; *Siegel, supra* note 7.

290. See *Brown & Rotenberg-Schwartz, supra* note 133; *Siegel, supra* note 7.

corporations of the advantages of doing business within New York would far outweigh the occasional inconvenience of being a garnishee of out-of-state property.

C. *Don't Balk Too Soon: Can Harris v. Balk Help Us?*

Some courts have perhaps crafted their own solution to this problem. These courts still apply *Harris*'s "the-debt-follows-the-debtor" rule to postjudgment enforcement proceedings.<sup>291</sup> If the rule still applies to postjudgment garnishments, courts can avoid the issues litigated by the parties in *Koehler* merely by finding that such assets have a "presence" wherever the garnishee may be found. Thus, so long as the garnishee is subject to the enforcing court's jurisdiction, so too are the assets. This theory may make sense when applied to assets such as bank deposits, which might be "located" at any place they may be accessed, such as a bank branch or automated teller machine.

This theory, however, is too much of a legal fiction. Although it perhaps simplifies the role for a court addressing this issue, it does so in a vague and illusory way. A Texas resident's bank deposits in a Houston branch of a bank are not "located" in that same bank's New York branch once the Texan becomes a judgment debtor and the bank a garnishee.<sup>292</sup> To reason otherwise would demand an unreasonable stretch of the imagination, one that, at least for prejudgment purposes, was rejected by the Supreme Court in *Shaffer* when it overruled *Harris*.<sup>293</sup> The satisfaction of judgments must be founded upon practical and sound doctrine, for, as Siegel has stated, "[t]he enforcement of judgments is ruled by pragmatists. Theoreticians have no fun at this party."<sup>294</sup>

Thus, *Koehler* must be recognized for what it clearly stands for—a significant decision that bravely charts its own course in the area of postjudgment garnishments. And, for better or for worse, it will certainly be exciting to see what, if any at all, impact the decision has. Also, given the numerous legal and practical issues raised by the majority's decision, it will be interesting to see if, and how, *Koehler* is welcomed in other states.<sup>295</sup> Moreover, if the decision is ripe for further judicial review—either by sister-state courts or the Supreme Court—the issues raised by *Koehler* deserve greater academic attention.

291. See *supra* note 79.

292. Such a theory would lead to the bizarre conclusion that the judgment debtor's assets are located in multiple places simultaneously. For example, if the assets are "present" wherever the garnishee is, they are simultaneously present at every branch or subsidiary of that garnishee institution. This creates serious problems when the garnishee is a multistate, or even a multinational, institution. See, e.g., *supra* note 226.

293. See *supra* note 79.

294. NEW YORK PRACTICE, *supra* note 79, § 485.

295. New York may continue as a rogue state on the issue, or may convince other states to similarly change their garnishment procedure.



Yet, as of now, it is too early to prophesize the impact of the decision. Thus, only until judgment creditors come flocking to New York courts, as some fear, can we say for sure that New York has become a "mecca" for creditors. What we may conclude, however, is this: The *Koehler* decision is an incredible one, arming judgment creditors with a significantly powerful tool to enable them to reach judgment debtors' assets located all over the world. And though it may have taken quite some time, perhaps now Abraham Lincoln's call that judgment creditors "must be somehow paid" will have finally fallen upon concerned ears.<sup>296</sup>

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296. See Letter from Abraham Lincoln to Samuel C. Davis & Co., *supra* note 1, at 338.