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and Is Not Liable for Fees Received by Debtor.
Cocco v. Merchants Mortgage Co., 69 Md. App. 68,
516 A.2d 596 (1986)

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DEBTOR-CREDITOR RELATIONS — GARNISHMENT — GARNISHEE WHO ENTERS INTO A BONA FIDE PREGARNISHMENT CONTRACT WITH A DEBTOR DOES NOT HAVE POSSESSION OF DEBTOR'S PROPERTY AND IS NOT LIABLE FOR FEES RECEIVED BY DEBTOR. *Cocco v. Merchants Mortgage Co.*, 69 Md. App. 68, 516 A.2d 596 (1986).

An attorney, specializing in collection work, entered into a contract with a doctor for the collection of the doctor's overdue accounts.¹ Pursuant to the contract, the attorney retained fifty percent of the amounts he collected and forwarded the remainder to the doctor. Subsequently, the attorney fell in debt and the attorney's judgment creditors² filed a writ of garnishment directed toward the doctor for the money received from the attorney.³ The doctor denied owing any debt to the attorney⁴ or possess-

1. *Cocco v. Merchants Mortgage Co.*, 69 Md. App. 68, 69, 516 A.2d 596, 597 (1986).

2. *Merchants Mortgage Co. v. Lubow*, No. A-50134 (Md. B.C.C. Oct. 10, 1978) (order charging attorney as judgment debtor of Merchants Mortgage Co.).

3. *Cocco*, 69 Md. App. at 69, 516 A.2d at 597. The garnishment proceeding was instituted pursuant to Maryland Rule of Procedure 2-645 which reads in part:

(a) Availability. - This Rule governs garnishment of any property of the judgment debtor, other than wages subject to Rule 2-646 and a partnership interest subject to a charging order, in the hands of a third person for the purpose of satisfying a money judgment. Property includes any debt owed to the judgment debtor, whether immediately payable, unmatured, or contingent.

(b) Issuance of Writ. - The judgment creditor may obtain issuance of a writ of garnishment by filing in the same action in which the judgment was entered a request that contains (1) the caption of the action, (2) the amount owed under the judgment, (3) the name and last known address of the judgment debtor, and (4) the name and address of the garnishee. Upon the filing of the request, the clerk shall issue a writ of garnishment directed to the garnishee.

(c) Content. - The writ of garnishment shall:

(1) contain the information in the request, the name and address of the person requesting the writ, and the date of issue,

(2) direct the garnishee to hold the property of the judgment debtor subject to further proceedings,

(3) notify the garnishee of the time within which the answer must be filed and that failure to do so may result in judgment by default against the garnishee,

(4) notify the judgment debtor and garnishee that federal and state exemptions may be available,

(5) notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection.

MD. R. 2-645.

4. *Cocco*, 69 Md. App. at 69-70, 516 A.2d at 597. The doctor answered pursuant to Maryland Rule of Procedure 2-645(e), which reads:

Answer of Garnishee. - The garnishee shall file an answer within the time provided by Rule 2-321. The answer shall admit or deny that the garnishee is indebted to the judgment debtor or has possession of property of the judgment debtor and shall specify the amount and nature of any debt and describe any property. The garnishee may assert any defense that the garnishee may have to the garnishment, as well as any defense that the judgment debtor could assert. After answering, the garnishee may pay any garnished indebtedness into court and may deliver to the sheriff any

ing any property belonging to the attorney.⁵

After the attorney filed a voluntary petition in bankruptcy,⁶ the judgment creditor commenced an original action against the doctor.⁷ The judgment creditor alleged that it was entitled to recover from the doctor the amount of contingency fees received by the attorney between the date the garnishment writ was served and the date the attorney filed for bankruptcy.⁸ The Circuit Court of Maryland for Baltimore City granted summary judgment for the judgment creditor,⁹ reasoning that, because possession by the agent is equivalent to possession by the principal, payment to the creditor's authorized agent — the attorney — was equivalent to direct payment to the creditor — the doctor.¹⁰ The Court of Special Appeals of Maryland reversed, holding that, by the terms of the pre-garnishment contract, the doctor possessed no property belonging to the attorney; therefore, the creditor was foreclosed from recovery

garnished property, which shall then be treated as if levied upon by the sheriff.

MD. R. 2-645(e).

5. *Cocco*, 69 Md. App. at 69-70, 516 A.2d at 597.
6. *See In re Eugene J. Silverman*, Case No. 85-0334 (Bankr. D. Md. Mar. 6, 1985). Neither the attorney, Silverman, nor the trustee in bankruptcy participated in the judgment creditor's garnishment action against the doctor. *Cocco*, 69 Md. App. at 70, 516 A.2d at 597.
7. *Cocco*, 69 Md. App. at 70, 516 A.2d at 597. The judgment creditor commenced an original action against the doctor pursuant to Maryland Rule of Procedure 2-645(g) which reads:

When Answer Filed. - If the garnishee files a timely answer, the matters set forth in the answer shall be treated as established for the purpose of the garnishment proceeding unless the judgment creditor files a reply contesting the answer within 30 days after its filing. If a timely reply is not filed, the court may enter judgment upon request of the judgment creditor, the judgment debtor, or the garnishee. If a timely reply is filed to the answer of the garnishee, the matter shall proceed as if it were an original action between the judgment creditor as plaintiff and the garnishee as defendant and shall be governed by the rules applicable to civil actions.

MD. R. 2-645(g).

8. *Cocco*, 69 Md. App. at 70, 516 A.2d at 597. The claimed fees amounted to \$3,645.84. *Id.*
9. *See Merchants Mortgage Co. v. Cocco*, No. A-50134 (Md. B.C.C. June 3, 1986) (order without opinion). The trial judge, Judge J. Kaplan, found that there were no factual differences between this case and an earlier case, *Merchants Mortgage Co. v. Lubow*, No. A-50134 (Md. B.C.C. July 10, 1985), in which liability was imposed upon the garnishee. Thus, Judge Kaplan expressly reaffirmed his ruling in the earlier controversy. The parties, therefore, regarded Judge Kaplan's Memorandum Opinion and Order of July 10, 1985, as providing the basis for the judgment in this case and agreed to so stipulate, as authorized by Maryland Rule of Procedure 1026(e): "[T]he parties with the approval of the lower court may prepare and sign a statement of the case showing how the questions arose and were decided, and setting forth so much only of the facts . . . as is essential to a decision of such questions by this Court." Parties' Joint Statement of the Case at 3-4, *Cocco v. Merchants Mortgage Co.*, 69 Md. App. 68, 516 A.2d 596 (1986) (No. 703).
10. *Cocco*, 69 Md. App. at 70-71, 516 A.2d at 597.

against the doctor.¹¹

Attachment refers to any seizure of property by a debtor's creditor for the purpose of bringing it within the custody of the court.¹² Garnishment is a type of attachment whereby property owed to a debtor by a third party may be reached by the debtor's creditor, even though it is possessed by a third party.¹³ The third party is styled a "garnishee" be-

11. *Cocco v. Merchants Mortgage Co.*, 69 Md. App. 68, 73-74, 516 A.2d 596, 599 (1986).

12. See *In re Safady Bros.*, 228 F. 538, 541 (W.D. Wis. 1915).

Attachment proceedings have their origin in early English common law. C. DRAKE, *SUITS BY ATTACHMENT* § 1, at 1 (2d ed. 1858). The origin of attachments in England has been ascribed to Roman law. *Id.* The custom of attachment was brought to the United States and incorporated into the legal system of every state by practical necessity. *Id.* at 6.

The division of our extended domain into many different States, each sovereign within its territory, . . . the absence of a general Bankrupt Law, and the prevalent abolishment of imprisonment for debt . . . naturally, and of necessity, [led] to the establishment, and . . . the enlargement and extension, of remedies acting upon the property of debtors.

Id. For examples of state attachment statutes, see CAL. CIV. PROC. CODE §§ 482.010 - 493.060 (West 1979 & Supp. 1987); D.C. CODE ANN. §§ 16-501 to - 584 (1981 & Supp. 1986); N.Y. CIV. PROC. L. & R. §§ 6021-6226 (Consol. 1983-1984); PA. STAT. ANN. tit. 12, §§ 2741-2838 (Purdon 1969).

Attachment accomplishes the dual purpose of compelling the defendant's appearance in court as well as providing the plaintiff with security for the payment of his claim as creditor if it is established as being due. *State v. Friedman*, 283 Md. 701, 706, 393 A.2d 1356, 1359 (1978). A writ of attachment is accompanied or preceded by a summons that is served upon the debtor if practicable; if not, the debtor is notified by publication of the attachment. C. DRAKE, *supra*, § 1, at 8.

The most material differences [from English law] as it exists among us [today] are the necessity of notice to the defendant, either actual or constructive; the direct action of the attachment on tangible property, as well as its indirect effect upon debts, and upon property in the garnishee's hands; the necessity for the presentation of special grounds for resort to it; and the requirement of a cautionary bond, to be executed by the plaintiff and sureties, to indemnify the defendant against damage resulting from the attachment.

Id. § 1, at 7-8. In England, the only notice to the debtor is that derived through the attachment of his property. *Id.* § 1, at 8.

An attachment is directed against property of the principal debtor that is in his possession or under his control. *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 S. 270 (1940). An attachment may issue against any property or credit belonging to the debtor, whether matured or unmatured. *Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank*, 297 Md. 691, 697, 467 A.2d 758, 762 (1983) ("[A]n attachable 'credit' is a monetary obligation that the garnishee owes the debtor."); MD. CTS. & JUD. PROC. CODE ANN. § 3-305 (1984) ("An attachment may be issued against any property or credit, matured or unmatured, which belong to a debtor.").

Nevertheless, the debtor must have some right or title, legal or equitable, in the property. *First Nat'l Bank v. Jagers*, 31 Md. 38 (1869); *Wanex v. Provident State Bank*, 53 Md. App. 409, 454 A.2d 381 (1983). In Maryland, once there is a judgment on the debt, assets in the hands of a third person can be attached by the judgment creditor. *Northwestern Nat'l Ins. Co. v. William G. Wetherall, Inc.*, 267 Md. 378, 385, 298 A.2d 1, 6 (1972).

13. C. DRAKE, *supra* note 12, § 450, at 349.

cause he is garnished, that is, warned not to deliver the property owed to the debtor, but to appear and answer the creditor's suit.¹⁴ Generally, garnishment is applicable where a third party owes the debtor either money or property and that debt is legally enforceable between the third party and the debtor.¹⁵

Garnishment subrogates the debtor's creditor to whatever rights the debtor may have against the garnishee.¹⁶ Thus, a creditor's rights against the garnishee depend upon the existing rights between the garnishee and the debtor.¹⁷ When the garnishee is served with the writ of garnishment,¹⁸ the creditor acquires the same rights to the same extent as

14. *Id.* § 451, at 349.

15. See *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 188-89, 199 So. 270, 272 (1940).

16. See *United States Fidelity & Guar. Co. v. Williams*, 148 Md. 289, 300, 129 A. 660, 664 (1925); *Farley v. Colver*, 113 Md. 379, 385, 77 A. 589, 592 (1910).

17. See, e.g., *Zink v. Black Star Line, Inc.*, 57 App. D.C. 114, 18 F.2d 156, *cert. denied*, 275 U.S. 527 (1927); *Smith v. Crocker First Nat'l Bank of San Francisco*, 152 Cal. App. 2d 832, 314 P.2d 237, 239 (1957); *Smith v. Amherst Acres, Inc.*, 43 A.D.2d 792, 350 N.Y.S.2d 236 (1973); *Folmar v. Shaffer*, 232 Pa. Super. 22, 332 A.2d 821 (1974). *Accord Farley*, 113 Md. at 385, 77 A. at 591 ("The general rule is well settled in this State that the rights of the attaching creditor to recover against the garnishee depends upon the subsisting rights between the garnishee and the debtor in the attachment . . .").

Because the garnishee cannot be placed in a worse position than if he had been sued by the debtor, the condemnation is subject to any right of set-off or discharge existing at the time of garnishment that would be available to the garnishee if he were sued by the debtor. *Messall v. Suburban Trust Co.*, 244 Md. 502, 507-08, 224 A.2d 419, 421-22 (1966). The garnishee may avail himself of such a set-off even where the debtor's obligation is not due at the time of attachment, provided it becomes due before trial. *Id.* at 508, 224 A.2d at 422. In a dissenting opinion in *Messall*, Judge Barnes addressed Maryland's unique position in permitting set-offs on debts that mature prior to trial:

[T]he holding that the garnishee may, in the absence of the debtor's insolvency or fraud or other special circumstance, set off an indebtedness which was in existence but unmaturing when the writ was served but which becomes due before trial, is unique to Maryland. An examination of cases throughout the United States indicates this, although there are a few cases which have given the right of set-off if the time of maturity occurs prior to filing of a plea or answer by the garnishee. An Illinois statute expressly permits a garnishee to set off demands whether "due at the time of service of the garnishment summons or thereafter to become due" . . .

All of the other jurisdictions hold that the set-off may only be made by the garnishee if the obligation of the debtor is due and owing at the time of service of the writ of attachment. No jurisdiction, other than Maryland, holds that there may be a right of set-off if maturity occurs prior to trial.

Id. at 520-21, 224 A.2d at 429 (Barnes, J., dissenting) (footnote omitted).

This right of set-off, however, cannot extend to any matter originating by the garnishee's own conduct subsequent to the attachment. *Farmers & Merchants Bank v. Franklin Bank*, 31 Md. 404, 412-13 (1869). "[O]therwise it would be in the power of the garnishee in a majority of cases to defeat the right of condemnation, which should not, by any means, be allowed." *Id.* at 413.

18. See *Roberts v. First Nat'l Bank*, 157 Md. 36, 39, 145 A. 220, 222 (1929) (" '[T]he liability of the garnishee is to be ascertained . . . from the date of the laying of the process in [the garnishee's] hands to the time of the trial.' The execution of the writ

are possessed by the debtor against the garnishee.¹⁹ Unless the garnishee has actual²⁰ or constructive²¹ possession of the debtor's property when the writ of garnishment is served, the garnishee is not liable to the creditor.

Courts view valid contracts with a degree of sanctity and will not permit a garnishment to negate contract terms. Thus, garnishment cannot change a preexisting bona fide contract between the debtor and the garnishee,²² or between a third party and a garnishee.²³ If the garnishee's accountability for the debtor's property is removed or modified by a preexisting bona fide contract, the garnishee's liability to the creditor is similarly removed or modified.²⁴ If the contract between the garnishee and debtor is not based upon bona fide consideration or is a mere pretense for defrauding creditors, however, the garnishee's liability to the creditor is unaffected.²⁵

The creditor has an inchoate lien on property or credits owned by the debtor, but possessed by the garnishee, when the garnishee has been served with a writ of garnishment.²⁶ In the majority of jurisdictions, the

placed the attaching creditor in the same position, with respect to the attached rights and credits, which his debtor occupied.") (quoting *International Bedding Co. v. Terminal Warehouse Co.*, 146 Md. 479, 492, 126 A. 902, 907 (1924)); *United States Fidelity & Guar. Co. v. Williams*, 148 Md. 289, 300, 129 A. 660, 664 (1925).

19. *Messall*, 244 Md. at 506, 224 A.2d at 421. See also *Thomas v. Hudson Sales Corp.*, 204 Md. 450, 457, 105 A.2d 225, 227 (1954) ("[T]he rights of the [creditor] can never rise above those of the [debtor]. If the [debtor] cannot sue the garnishee . . . the [creditor] cannot do so."); *Cole v. Randall Park Holding Co.*, 201 Md. 616, 623-24, 95 A.2d 273, 277 (1953). But see *Odend'hal v. Devlin*, 48 Md. 439, 445 (1878) ("There are some exceptions to this general rule, as for instance if the debtor has fraudulently conveyed property to another, the grantee may be charged as garnishee, though the fraudulent grantor could not maintain a suit.").
20. *Walsh v. Lewis Swimming Pool Constr.*, 256 Md. 608, 610, 261 A.2d 475, 476 (1970); *Farley*, 113 Md. at 385, 77 A. at 591-92.
21. *Glenn v. Boston & Sandwich Glass Co.*, 7 Md. 287, 295-96 (1854). In *Glenn*, constructive possession was found to be in a trustee in bankruptcy. "Actual possession of money or property on the part of the garnishee is not necessary to make an attachment efficacious or operative, provided [the garnishee] has the legal right to the possession and control, as in the cases of money deposited in the bank and the like." *Id.*
22. See *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 622 (1894) ("[W]hatever rights the garnishee may have under existing contracts with the principal debtor, he is entitled to have the benefit thereof as against the attaching creditor."); *Baltimore & Ohio R.R. v. Wheeler*, 18 Md. 372, 379 (1862).
23. *Farley*, 113 Md. at 387, 77 A. at 592 ("[I]t is well settled that garnishment cannot have the effect of changing the nature of a contract between the garnishee and the defendant or preventing the garnishee from performing a contract with a third person.")
24. See *id.*; *Baltimore & Ohio R.R.*, 18 Md. at 379.
25. *Farley*, 113 Md. at 386-87, 77 A. at 592.
26. See *Fico, Inc. v. Ghingher*, 287 Md. 150, 161, 411 A.2d 430, 437 (1980). The goods or property belonging to the debtor and possessed by the garnishee are considered in custodia legis, and the garnishee is bound to keep them safely. *International Bedding Co. v. Terminal Warehouse Co.*, 146 Md. 479, 492, 126 A. 902, 906 (1924). The garnishee has the duty to retain such goods or property for the benefit of the creditor as against the debtor or any subsequent purchaser or pledgee, and the gar-

garnishee's liability is fixed either when the writ of garnishment is served or when the garnishee's answer must be filed.²⁷ The creditor's inchoate lien on property or credits in the garnishee's possession can be perfected only by a judgment of condemnation absolute.²⁸ Such a judgment constitutes a specific lien on the condemned property in the hands of the garnishee and relates back to the time when the writ of garnishment was served.²⁹ In Maryland, however, the garnishee's liability extends beyond service of the writ until the judgment at trial.³⁰

Determining whether the garnishee possesses any property or credits belonging to the debtor has been called the "sole purpose" of a garnishment proceeding.³¹ The practical result of garnishment is that the property is merely impounded in the garnishee's possession and maintains its status quo until the underlying action in debt between the debtor and creditor is determined.³² The creditor must prove that the garnishee is either indebted to the debtor or has possession of the debtor's property

nishiee is not at liberty to change such goods, convert them into money, or to exercise any act of ownership over them. *Id.* at 492, 126 A. at 906-07. The garnishee must hold them until his liability to the debtor or any subsequent purchaser or pledgee is determined. *Id.* at 492, 126 A. at 907.

27. *See, e.g., Steiner v. First Nat'l Bank*, 127 Ala. 595, 29 So. 65 (1900); *Smith v. Crocker First Nat'l Bank of San Francisco*, 152 Cal. App. 2d 832, 314 P.2d 237 (1957) ("Since the garnishment reaches only such debts as are owing to the defendant at the moment of garnishment subsequent debts or credits created thereafter in good faith can be no concern of the attaching creditor."); *Day v. Bank of Del Norte*, 76 Colo. 223, 225, 230 P. 785, 786 (1924) ("The rights and liabilities of the garnishee are to be determined as of the date of the garnishment and not upon a state of facts that existed theretofore or thereafter."); *Anderson v. Keystone Chem. Supply Co.*, 293 Ill. 468, 127 N.E. 668 (1920); *Messall v. Suburban Trust Co.*, 244 Md. 502, 507, 224 A.2d 419, 421 (1966). *See also* C. DRAKE, *supra* note 12, § 667, at 598-99 (garnishee's liability restricted to defendant's effects or credits in his hands at the date of garnishment and no later unless by statute).
28. *See Rhodes & Williams v. Amsinck & Co.*, 38 Md. 345 (1873). For the meaning of the term "judgment of condemnation absolute" and its legal effect, *see Gribble v. Stearman & Kaplan, Inc.*, 249 Md. 289, 294-95, 239 A.2d 573, 576 (1968) ("[A] judgment of condemnation absolute in an attachment proceeding is a specific lien on the condemned property in the hands of the garnishee, relating back to the time the attachment was laid . . .") (citing *Rowan v. State*, 172 Md. 190, 197, 191 A. 244, 248 (1937)). *See also Overmyer v. Lawyers Title Ins.*, 32 Md. App. 177, 184, 359 A.2d 260, 265 (1976) ("[S]hould final judgment be obtained, the lien relates back to the time when the property was attached and eliminates subsequent claims and liens from priority.") (citing 4 J. POE, *POE'S PLEADING AND PRACTICE* § 556 (H. Sachs 6th ed. 1975)).
29. *Rowan v. State*, 172 Md. 190, 197, 191 A. 244, 248 (1937).
30. *Fico*, 287 Md. at 161, 411 A.2d at 437; *see also International Bedding Co.*, 146 Md. at 492, 126 A. at 907 ("[L]iability of the garnishee is to be ascertained by the value of the defendant's property in his hands from the date of the laying of the process in his hands to the time of the trial."); *Glenn v. Boston & Sandwich Glass Co.*, 7 Md. 287, 296 (1854) ("[I]t has been the general practice under our attachment system . . . to condemn all credits or property in the hands of the garnishee of the debtor at the time of the trial.").
31. *Fico*, 287 Md. at 159, 411 A.2d at 436; *accord Northwestern Nat'l Ins. Co. v. William G. Wetherall, Inc.*, 267 Md. 378, 384, 298 A.2d 1, 5 (1972).
32. *Mendoza v. Acme Transfer & Storage*, 66 N.M. 32, 35, 340 P.2d 1080, 1082 (1959).

or credits.³³ Determining whether a garnishee has possession of property depends, not upon agency principles of constructive possession, but upon principles of law consistent with garnishment.³⁴

To avoid garnishment, the garnishee must contest the condemnation of the property or credit garnished.³⁵ There are several grounds for defense: (1) the attachment was issued irregularly,³⁶ (2) the property does not belong to the debtor,³⁷ or (3) the garnishee is not indebted to the debtor.³⁸ If the garnishee has permitted the property to be withdrawn from his possession, a judgment in personam will be issued against him for the value of the attached property if in fact the garnishee owed the debtor property.³⁹

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33. *Lockerman v. Eastern Shore Trust Co.*, 146 Md. 330, 348, 126 A. 140, 146 (1924); *J. Cueva Co. v. R. Lancaster Williams & Co.*, 145 Md. 526, 529, 125 A. 849, 850 (1924).

As in other civil actions, when there is no substantial conflict in the evidence, or when the evidence is such that only one conclusion reasonably can be drawn therefrom, it is a question of law for the court to decide. *See, e.g.*, *Johnston v. Western Md. Ry. Co.*, 151 Md. 422, 425, 135 A. 185, 187 (1926); *Eastern Shore Trust Co. v. Lockerman*, 148 Md. 628, 129 A. 915 (1925); *J. Cueva Co.*, 145 Md. at 529-30, 125 A. at 850-51.

34. *See Escambia Chem. Corp. v. United Ins. Co. of America*, 396 So. 2d 66 (Ala. 1981). In *Escambia*, a judgment creditor had a money judgment against an insurance agent of the garnishee insurance company. *Id.* at 67. After filing the writ of garnishment, the debtor had collected premiums and remitted to his principal the net amount due the company after deducting his commissions. The *Escambia* court rejected the agency theory of constructive possession and held that there was no garnishable debt because there was no liability on the part of the garnishee that would enable the debtor to maintain an action at law against the garnishee and recover a judgment. *Id.* at 68. *But see* *Buckner v. Western Life Ins. Co.*, 382 S.W.2d 12 (Mo. Ct. App. 1964). In *Buckner*, the garnishee was an insurance company that employed the judgment debtor as its agent to collect premiums from its life insurance policyholders. *Id.* at 13. The debtor received as his fee a percentage of the premiums he collected by deducting such fees from each collection and remitting only the remaining balance to the garnishee. In holding that such commissions were subject to garnishment, the Court of Appeals of Missouri deferred to principles of agency law, reasoning that, in essence, the debtor was withdrawing his commissions from the garnishee's cash drawer. *Id.* at 15-17.
35. *See Gorn v. Kolker*, 213 Md. 551, 553-54, 133 A.2d 65, 67 (1957).
36. *See Lambden v. Bowie*, 2 Md. 334, 338 (1852).
37. *See id.*
38. *See Gorn*, 213 Md. at 553, 133 A.2d at 67. A garnishee under an attachment issued on a judgment, however, cannot attack the validity of the judgment or contest the claim merged in the judgment. *Id.* at 553-54, 133 A.2d at 67.
39. *International Bedding Co. v. Terminal Warehouse Co.*, 146 Md. 479, 492, 126 A. 902, 907 (1924). A judgment "in personam" is a judgment against a particular person. BLACK'S LAW DICTIONARY 758 (5th ed. 1979). If the property is in the possession of the garnishee at the trial or judgment, there may be a condemnation thereof and the action is in rem. *International Bedding Co.*, 146 Md. at 492, 126 A. at 907. A proceeding "in rem" is brought to enforce a right in specific property, and a subsequent judgment operates directly upon that property. *Hobbs v. Lenon*, 191 Ark. 509, 519, 87 S.W.2d 6, 11 (1935).

Over 100 years ago, the United States Supreme Court held that every state possesses exclusive jurisdiction over persons and property within its territory. *Pennyroyer v. Neff*, 95 U.S. 714, 722 (1878). The Court later held that, because a state's

The United States Supreme Court has held that valid contracts are property.⁴⁰ A licensing contract was held attachable by the Court of Appeals of New York in *Abkco Industries, Inc. v. Apple Films, Inc.*⁴¹ In *Abkco*, a creditor sought to attach a debtor's interest in a licensing contract.⁴² Under the terms of the contract, the debtor was to receive eighty percent of the net profits from the promotion of a film.⁴³ When the order of attachment was secured, no net profits had been generated and whether such profits would in fact be forthcoming was uncertain.⁴⁴ The court concluded that the debtor's interest in the contingency fee contract "constituted property, composed of the bundle of all its rights under the Agreement [and] that property was attachable because concededly it was assignable"⁴⁵ By permitting the creditor to decide whether the contingent nature of the asset is worth pursuing, *Abkco* gives greater sig-

process could not reach beyond its borders, due process did not require any effort to give a property owner personal notice that his property was involved in an in rem proceeding. *See, e.g.,* *Arndt v. Griggs*, 134 U.S. 316, 327 (1890); *Ballard v. Hunter*, 204 U.S. 241, 262 (1907). During this early developmental stage of the notion of due process, the Court also held that, when there is a state statute providing for the attachment of debts or credits, and when a garnishee is served personally with process while visiting the creditor's state, the court acquires personal jurisdiction over the garnishee, even though the debtor himself is not subject to that state's jurisdiction. *Harris v. Balk*, 198 U.S. 215, 222 (1905). This holding, however, was limited to states where the principal debtor could have sued the garnishee if he had obtained personal jurisdiction over the garnishee in that state. *Id.* at 223. *Cf. Baltimore & Ohio R.R. v. Hostetter*, 240 U.S. 620 (1916) (unless the plaintiff has obtained a judgment establishing his claim against the principal defendant, his right to "represent" the principal defendant in an action against the garnishee is in issue).

Recently, the Supreme Court reversed the long-standing precedents established by *Pennoyer* and *Harris*: the Court extended the application of the minimum contacts test, as set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to cases where jurisdiction formerly was based solely on the presence of the defendant's property within the forum state. *Shaffer v. Heitner*, 433 U.S. 186 (1977). *Shaffer* precludes a court from exercising quasi in rem jurisdiction without first determining the sufficiency of the contacts between the forum state and the defendant. *Id.* at 212. But the Court also noted that it "does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation." *Id.* at 207.

The Supreme Court also has ruled that due process requires a hearing prior to attaching the defendant's property in order to secure the defendant's due process rights with regard to his property. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Such a hearing also serves to ensure that the attachment infringes none of the defendant's rights in the underlying dispute. *Fuentes*, 407 U.S. at 81. The court must disallow those attachments that are unfair to the defendant or result from mistake. *Id.*

40. *See, e.g.,* *Lynch v. United States*, 292 U.S. 571, 579 (1934); *North Texas Producers Ass'n v. Young*, 308 F.2d 235 (5th Cir. 1962); *Department of Financial Inst. v. Holt*, 231 Ind. 293, 108 N.E.2d 629 (1952).

41. 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976).

42. *Abkco Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 672, 350 N.E.2d 899, 900, 385 N.Y.S.2d 511, 512 (1976).

43. *Id.* at 673, 350 N.E.2d at 900, 385 N.Y.S.2d at 512.

44. *Id.* at 674, 350 N.E.2d at 901, 385 N.Y.S.2d at 513.

45. *Id.* at 674, 350 N.E.2d at 901, 385 N.Y.S.2d at 513-14. The court went on to state, "We know of no threshold requirement that the attaching creditor show the value of

nificance to the economic potential of an asset.⁴⁶

In Maryland, "property" embraces everything that has exchangeable value or goes to make up a man's wealth,⁴⁷ including tangible and intangible property of every kind.⁴⁸ Furthermore, an attaching judgment creditor is permitted to garnish "any property of the judgment debtor."⁴⁹ Nevertheless, in *Belcher v. Government Employees Insurance Co.*,⁵⁰ the Court of Appeals of Maryland held that an executory contract was not attachable. In *Belcher*, the creditor attempted to attach an insurance contract owned by an absent defendant policyholder.⁵¹ The creditor claimed that the insurer's obligation to indemnify the insured defendant and to provide a defense to a claim constituted an asset⁵² within the definition of Maryland's attachment statute.⁵³ The court rejected the creditor's claim

the attached property or indeed that it has any value." *Id.* at 675, 350 N.E.2d at 902, 385 N.Y.S.2d at 514.

46. D. SIEGEL, PRACTICE COMMENTARIES, N.Y. CIV. PRAC. L. & R. § 5201, at 53-54 (McKinney 1978). Although the contingent nature of the "debt" would make it unattachable, the judgment creditor is entitled to pursue it if he treats the asset as "property." *Id.* at 54. "If the pursuit is undertaken and it comes to nothing, the judgment creditor has wasted some time and effort and perhaps some money. If he is willing to take the chance, the law should not stand in his way." *Id.* at 55.
47. *Diffendall v. Diffendall*, 239 Md. 32, 36, 209 A.2d 914, 915 (1965). *But cf.* *Archer v. Archer*, 303 Md. 347, 358, 493 A.2d 1074, 1080 (1985) (husband's medical degree not marital property subject to equitable distribution upon divorce).
48. MD. R. 1-202(u) ("Property includes real, personal, mixed, tangible or intangible property of every kind."). *See also* *Bouse v. Hutzler*, 180 Md. 682, 686, 26 A.2d 767, 769 (1942) (construing "property" to include obligations, rights, and other intangibles as well as physical things); *Schill v. Remington Putnam Co.*, 179 Md. 83, 90, 17 A.2d 175, 178 (1941) (characterizing "goodwill" as a legally protected and valuable property right); MD. EST. & TRUSTS CODE ANN. § 1-101(p) (1974) ("'Property' includes both real and personal property, and any right or interest therein.").

Similarly, other jurisdictions allow for a broad definition of "property." *See, e.g.,* *Pillar Rock Packing Co. v. Commissioner*, 90 F.2d 949, 950 (9th Cir. 1937) (property includes accounts receivable); *Samet v. Farmers' & Merchants' Nat'l Bank*, 247 F. 669, 671 (4th Cir. 1917) ("'Property' is a term of very broad signification, embracing everything that has exchangeable value or goes to make up a man's wealth . . ."); *City Stores Co. v. United States*, 225 F. Supp. 867, 868 (E.D. Pa. 1964) (property includes accounts receivable); *Haldeman v. Haldeman*, 202 Cal. App. 2d 498, 21 Cal. Rptr. 75 (1962) ("A business is a type of property which is a composite of tangible and intangible properties. Its tangibles will be its fixtures, inventory of supplies and stock in trade, perhaps a building or leasehold, cash . . . , accounts receivable and other personal property."); *Standard Marine Ins. Co. v. Board of Assessors*, 123 La. 717, 720, 49 So. 483, 484 (1909) (property includes outstanding uncollected accounts).

49. *International Bedding Co. v. Terminal Warehouse Co.*, 146 Md. 479, 488, 126 A. 902, 905 (1924) (all lands, goods, rights and credits held to be subject to attachment by garnishment).
50. 282 Md. 718, 387 A.2d 770 (1978).
51. *Belcher v. Government Employees Ins. Co.*, 282 Md. 718, 719-20, 387 A.2d 770, 771 (1978).
52. *Id.* at 721-22, 387 A.2d at 772.
53. MD. CTS. & JUD. PROC. CODE ANN. § 3-302 (1984) reads:
A court of law including the District court, within the limits of its jurisdiction, may issue an attachment at the commencement of the action or while

for four reasons. First, the obligation was contingent upon an independent event because it would arise only after a judgment was rendered against the insured.⁵⁴ Second, the insurer's mere promise to defend the insured was by itself an insufficient basis to furnish jurisdiction over the matter.⁵⁵ Third, the insurance policy created an obligation to provide a personal service that was nontransferable; therefore, not attachable.⁵⁶

it is pending against any property or credits, whether matured or unmatured, belonging to the debtor upon the application of the plaintiff in the action.

54. *Belcher*, 282 Md. at 725, 387 A.2d at 774. The court stated, "Determinative of our conclusion in this case . . . is the long-established principle that where an interest is uncertain and contingent — in that it may never become due and payable — it is not subject to attachment . . ." *Id.* at 723, 387 A.2d at 773 (footnotes omitted). The court drew a distinction between a contingent interest and one that is, although unmatured, still subject to attachment. With a contingent interest, liability is neither certain nor absolute, but depends on some independent event. With an unmatured interest, the amount of the garnishee's liability may be somewhat uncertain, but there is no question about the fact of liability. *Id.* at 724 n.3, 387 A.2d at 774 n.3. See also *Javorek v. Superior Court*, 17 Cal. 3d 629, 640, 131 Cal. Rptr. 768, 777 (1976) ("A distinction exists between situations where only the amount of liability is uncertain and those where the fact of liability is uncertain.") *But see Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (an insurer's duty to defend and indemnify becomes a "debt" within the meaning of New York attachment statutes as soon as the accident occurs).
55. *Belcher*, 282 Md. at 725, 387 A.2d at 774. After attempts to obtain personal service of process upon the insured had failed, the summons was returned non est. *Id.* at 719-20, 387 A.2d at 771. The court labeled the plaintiff's subsequent attempt to obtain jurisdiction over the action a "bootstrap approach" because the insurer's duty to defend would "not arise unless and until litigation [was] properly instituted against the insured with service of process upon him requiring him to respond." *Id.* at 725, 387 A.2d at 774. The court concluded that, to grant jurisdiction in such circumstances would be "a classic example of the tail wagging the dog, a bit of wizardry in which we decline to engage." *Id.* at 726, 387 A.2d at 775.
56. *Id.* at 725 n.4, 387 A.2d at 774 n.4 ("The policy creates an obligation to provide personal services; that obligation, being personal, is not transferable and consequently not attachable.") (citing *Javorek v. Superior Court*, 17 Cal. 3d 629, 646, 131 Cal. Rptr. 768, 780 (1976)). For the proposition that personal services are not attachable in a garnishment case, see Comment, *Quasi In Rem Jurisdiction Based on Insurer's Obligations*, 19 STAN. L. REV. 654, 655-56 (1967). An insurer's duty to defend an insured was discussed in the context of the garnishment form of attachment:

[I]t does not necessarily follow that the obligation to defend is attachable since the concept of a 'debt' within the meaning of the statute may be limited to money debts. Although the New York courts have never been called upon to answer the question, the general rule is that obligations payable in services rather than in money cannot be attached.

Comment, *supra*, at 655 (citing *Mims v. Parker*, 1 Ala. 421 (1840)). The author explained the rationale for the rule: "courts have no right to interfere with the contracts between parties, and to make one party pay money when by the terms of his contract he has agreed to pay, and the other party has agreed to receive something else." Comment, *supra*, at 655-56 (quoting *Weil v. C.H. Tyler & Co.*, 38 Mo. 545, 546-47 (1866)).

This analysis is still valid in the context of the garnishment variety of attachment, wherein the attaching creditor attempts to force the garnishee to perform personal services for the benefit of the creditor rather than for the benefit of the judgment debtor. This would indeed constitute involuntary servitude. A personal

Fourth, the valuation of such a contractual duty to defend was "a practical impossibility, for its true worth can be determined only at the end of the litigation, at which point the obligation ceases to exist because it has been fulfilled, leaving no other res that can be attached."⁵⁷ Although the executory contract was held not attachable, the decision is tailored to the particular facts of the case.

In *Cocco v. Merchants Mortgage Co.*,⁵⁸ the Court of Special Appeals of Maryland recognized that garnishment was not intended to change the relationship between a garnishee and a debtor pursuant to a bona fide contract.⁵⁹ A creditor's rights against the garnishee are the same as those held by the debtor.⁶⁰ The court reasoned, "The judgment creditor, therefore, stands in [the attorney's] shoes; his rights are not superior to, but the same as the debtor's."⁶¹ Liability depends upon whether the garnishee has possession of property or credits belonging to the debtor for which the debtor would have the right to sue,⁶² possession need not be actual.⁶³ Based upon the terms of the contingency contract between the doctor and the attorney, the attorney could not have sued the doctor because the doctor had no property belonging to the attorney for which the attorney could sue.⁶⁴ Furthermore, the court observed that remitting only that amount owed to the doctor, decreased by a deduction for the attorney's services, did not make the contingent fee contract improper.⁶⁵ Consequently, the court reversed the circuit court's summary judgment for the creditor and held in favor of the doctor.⁶⁶

Cocco is a sound decision based on prior case law. It has long been held in Maryland that the test of a garnishee's liability is whether the debtor would be able to successfully maintain a suit against the garnishee.⁶⁷ In *Cocco*, the debtor had no such cause of action by which he could recover a judgment from the garnishee; according to the terms of

services contract, however, has been held to be attachable as property in the hands of the debtor for the creditor's benefit. See *Abkco Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976). See *supra* notes 40-48 and accompanying text.

57. *Belcher*, 282 Md. at 725 n.4, 387 A.2d at 774 n.4.

58. 69 Md. App. 68, 516 A.2d 596 (1986).

59. *Cocco v. Merchants Mortgage Co.*, 69 Md. App. 68, 73, 516 A.2d 596, 599 (1986).

60. *Id.*

61. *Id.*

62. *Id.* at 74, 516 A.2d at 599.

63. *Id.* at 71, 516 A.2d at 598. The court acknowledged that the attorney was the garnishee's agent. *Id.* at 73, 516 A.2d at 599. Notwithstanding, the court rejected *Buckner v. Western Life Ins. Co.*, 382 S.W.2d 12 (Mo. Ct. App. 1964), wherein the Court of Appeals of Missouri held that, because an agent's possession is possession by the principal, payments to the agent are in law payments to the principal and therefore subject to garnishment. See *supra* note 34 and accompanying text.

64. *Cocco*, 69 Md. App. at 74, 516 A.2d at 599.

65. *Id.* at 73, 516 A.2d at 598. The court found nothing in the record that would in any way suggest that the agreement between the doctor and the attorney was collusive or was designed to defraud creditors. *Id.* at 73, 516 A.2d at 598-99.

66. *Id.* at 74, 516 A.2d at 599.

67. See *supra* notes 16-21 and accompanying text.

the preexisting contingency contract between the debtor and garnishee, the garnishee never had possession of monies or credits due the debtor.⁶⁸ If, by agreement or established practice, the attorney forwarded the entire sums collected to the doctor and the doctor periodically reimbursed the attorney for his services, the doctor would have been subject to the creditor's garnishment to the extent of the sums forwarded between service of the garnishment writ and trial. In such a case, the doctor as garnishee is in possession of "property or credits" due the attorney.⁶⁹

In *Cocco*, the judgment creditor's pleadings narrowly restricted "property" to include only the debt owed by the doctor to the attorney.⁷⁰ A contract was created between the doctor and the attorney.⁷¹ Additionally, the contract in *Cocco* was similar to that found in *Abkco*, where the Court of Appeals of New York permitted a creditor to attach an executory contingent fee contract as property in the debtor's possession.⁷² Notwithstanding, the judgment creditor in *Cocco* ignored the possible remedy of attaching the property rights in the attorney's possession, that is, the bundle of rights inherent in his contract with the doctor.

Furthermore, the obstacles to the attachment of an executory personal services contract cited in *Belcher*⁷³ are absent in *Cocco*. First, performance of the collection contract between the doctor and the attorney was not contingent upon any independent event. Rather, its value as property was merely unmatured.⁷⁴ Second, due process would have been upheld because the attorney was a Maryland resident served with process.⁷⁵ Third, valuation of the contract would not have been a "practical impossibility" because the selling of accounts receivables is a commonplace commercial practice, subject to reasonable estimation.⁷⁶ Fourth, although the contract was one for personal services, the attachment of the contract as property in the debtor's possession would not contravene the policy against garnishing such a contract as a debt in the garnishee's hands.⁷⁷ The nature of the contract's quid pro quo would not be changed by such an attachment because, in any event, the doctor would receive a fungible item — money. The only change that such an

68. *Cocco*, 69 Md. App. at 73, 516 A.2d at 599.

69. See *supra* note 12.

70. See *supra* note 15 and accompanying text.

71. *Cocco*, 69 Md. App. at 69, 516 A.2d at 597.

72. *Abkco Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 385 N.Y.S.2d 511, 350 N.E.2d 899 (1976). See *supra* notes 41-46 and accompanying text.

73. *Belcher v. Government Employees Ins. Co.*, 282 Md. 718, 387 A.2d 770 (1978). See *supra* notes 50-57 and accompanying text.

74. For a discussion of contingent versus unmatured contracts, see *supra* note 54.

75. For a discussion of due process in attachment and garnishment proceedings, see *supra* note 39.

76. I. NAITOVE, MODERN FACTORING 18 (1976) ("Factoring is the outright sale of accounts receivable without recourse. The factor assumes the credit risk and handles all details of collection."). For a general discussion on the subject, see C. PHELPS, ACCOUNTS RECEIVABLE FINANCING AS A METHOD OF BUSINESS FINANCE (1st ed. 1957).

77. See *supra* note 56 and accompanying text.

attachment would effect would be substitution of the creditor for the debtor as the recipient of the balance of the monies collected. Indeed, by the terms of the contract, no personal service was ever owed by the attorney to the doctor. Rather, the essence of the contract was that upon the occurrence of an uncertain future event — the collection of money — a definite portion of the money would accrue to the doctor. Thus, the doctor did not expect to receive personal services, he expected to receive money.

A valid contract can be property subject to attachment even though it may entail personal services. Nevertheless, a creditor attaching an executory contract for personal services will have to expend effort fulfilling the contract to exact a realization of an economic benefit from the attachment. In deciding whether to attach the contract, the attaching creditor must consider whether it has the expertise to perform the services called for in the contract as well as the time and expense necessary to acquire the decree of the attachment.⁷⁸

Cocco is consistent with prior case law. If the creditor had not chosen garnishment as its remedy, but rather attachment, the creditor may have been more successful. In addition, a decision enforcing an attachment on the contract in *Cocco* would have been consistent with *Belcher*. The creditor, however, must weigh carefully the economic viability of attaching an executory contract. When a debtor is a party to a potentially valuable contingency fee contract, judgment creditors should not attempt to garnish the proceeds from the contract, but pursue an attachment of the contract.

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78. If the attaching creditor in *Cocco* did not itself possess the necessary expertise to act competently as a collection agent for the doctor, it could have subcontracted the job to another specialist on a contingency fee basis, thereby still retaining a percentage of any proceeds. The attorney in *Cocco* derived an economic benefit from his contract after attachment of \$3,645.84. See *supra* note 6.