1934

Ownbey v. Morgan--A Judicial Milepost on the Road to Absolutism

Forrest Revere Black

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol23/iss1/2

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
OWNBELY v. MORGAN—A JUDICIAL MILEPOST ON THE ROAD TO ABSOLUTISM*

By FORREST REVERE BLACK**

In Ownbey v. Morgan,1 Ownbey, a resident of Colorado, was sued in a Delaware court for an alleged debt, and shares of stock in a Delaware corporation owned by him were attached. The Delaware statute as construed by the Delaware courts did not permit a non-resident to make a general appearance and be heard in such a case unless he gave security to the value of the property attached for the payment of any judgment that might be rendered against him. Thus, bail was required on the theory that the statute provided that a general appearance by the defendant ipso facto released the attachment. Because of a prior receivership instituted by the Morgan interests, the stock of Ownbey had no market value, which made it worthless as security for a loan. Ownbey had no other property. He endeavored to make a general appearance, but the Delaware court denied him the right to defend the suit and gave judgment against him by default. Ownbey carried his case to the Supreme Court of the United States asserting that the Delaware statute as construed by the Delaware courts denied him due process of law. The Supreme Court of the United States upheld the Delaware statute and the proceedings thereunder, Chief Justice White and Mr. Justice Clarke dissenting.

In order to understand the issues in this unusual case, it is imperative that we start with a detailed analysis of the factual

---
*
This is one of a series of essays to be published under the general caption "Judicial Mileposts on the Road to Absolutism." Other chapters have appeared as follows: Carroll v. United States (1929), 29 Col. L. Rev. 1069; Missouri v. Holland (1931), 25 Ill. L. Rev. 911; The Selective Draft Cases (1931), 2 B. U. L. R. 37; Burdeau v. McDowell (1932), 13 B. U. L. R. 32; Debs v. United States (1932), 81 U. Pa. L. Rev. 160; Purity Extract Co. v. Lynch—The Penumbra Doctrine in Prohibition Enforcement (1933), 27 Ill. L. Rev. 511.

**Chief Attorney, Agricultural Adjustment Administration; Professor of Law, University of Kentucky, on leave 1934-35; Author of "Ill Starred Prohibition Cases" with a Foreword by Clarence Darrow (1931); A. B., Wisconsin; M. A., Columbia; LL. B., Ohio State University; Ph. D., Robert Brookings Graduate School of Government; Member of Governor Laffoon's Liquor Control Committee.

1 256 U. S. 94, 65 L. Ed. 837 (1921).
The Delaware statute under which these proceedings were instituted, was based on the custom of London and was originally enacted in 1770 and amended several times thereafter. The sections pertinent to the controversy are as follows:

4142, Sec. 25: “A writ of foreign attachment may be issued against any person not an inhabitant of this state ... upon affidavit made by the plaintiff, or some other credible person, and filed with the Prothonotary, that the defendant resides out of the state, and is justly indebted to the said plaintiff in a sum exceeding fifty dollars.”

4123, Sec. 6: “If the defendant in the attachment, or any sufficient person for him, will, at any time before judgment, appear and give security to the satisfaction of the plaintiff in such cause, or to the satisfaction of the court and to all actions brought against such defendant, to the value of the property, rights, credits and monies attached, and the costs, then the garnishee and all property attached shall be discharged.”

4137, Sec. 20: “Judgment shall be given for the plaintiff in the attachment the second term after issuing the writ, unless the defendant shall enter special bail as aforesaid; whereupon, the court shall make an order that the sheriff shall sell the property attached, on due notice, and pay the proceeds (deducting legal costs and charges) to the auditors for distribution.

Proceeding under this statute, the plaintiffs filed an affidavit made by one Joyce, a credible person, and set forth that the defendant, Ownbey, resided out of the state and was justly indebted to the plaintiffs in a sum exceeding $50. Thereupon, a writ of foreign attachment was issued to the Sheriff of New Castle County, which plaintiffs caused to be endorsed with a memorandum to the effect that special bail was required in the sum of $200,000, and under which the sheriff attached 33,324 shares of stock (par value $5 each) held and owned by the defendant in the Wooten Land and Fuel Company, a Delaware corporation, and made a proper return. Later the defendant, by attorneys, without giving security, went through the form

2The statutes are found in Delaware Rev. Code 1915. It should be noted that the stock of the defendant in the Delaware statute was attached under Section 2009 of the Revised Code, which provides, “The shares of any person in an incorporated company, with all the rights thereunto belonging may be attached for debt,” etc. The corporation was not attached, nor was it summoned as garnishee. Hence Sec. 4120 was not used, which provides that “All corporations doing business in this state are subject to the operations of the attachment laws,” etc. Hence, the point raised, that this corporation was not doing business in the state, was not applicable. Revised Code, Section 1986, provides that “for all purposes of title, action, attachment, garnishment ... the situs of the ownership of the capital stock of all corporations existing under the laws of this state ... shall be regarded as in this state.”
of entering a general appearance, and filed pleas of non-assumpsit, the statute of limitations, and payment. The plaintiff's attorneys moved to strike out the appearance and pleas on the ground that special bail, or security as required by the statute had not been given. The defendant answered that the stock attached in this case constituted substantially all of his property; that the company was in the hands of a receiver, and because of this the market value of the shares attached was temporarily destroyed, so that they were unavailable for use in obtaining the required bail, or security to procure the discharge of the shares from attachment, and that it was impossible for the defendant to secure bail or security in the sum of $200,000 or any adequate sum, for the release of the shares so attached; that defendant had a good defense in that the indebtedness sued upon had been paid; that by the true construction of the Delaware statutes the entry of bail or security for the discharge of the property attached was not a necessary prerequisite to the entry of defendant's appearance, and such appearance might be made without disturbing the seizure of property under the writ, or its security for any judgment finally entered; and that if the statutes could not be so construed as to permit appearance and defense in a case begun by foreign attachment without the entry of bail, or security for the discharge of the property seized, they were unconstitutional in that (a) they abridged the privileges and immunities of citizens of the United States, (b) that they denied to the defendant the equal protection of the law; and (c) that they deprived the defendant of property without due process of law. Upon motion of the plaintiffs this response and the attempted appearance and pleas of the defendant were struck out by the Supreme Court of Delaware.

In order that the reader may have a clear picture of the issue as it reaches the Supreme Court of the United States, we shall quote two excerpts from the decisions of the Supreme Court of Delaware. The Court in banc, speaking through Chief Justice Pennewill, said, 3

"The court have been very strongly impressed, during the progress of the case, with the thought that the situation of the defendant was not only a hard one, but also very exceptional. Having no property whatever except the corporate stock attached, the attachment together with the receivership secured in Colorado made it impossible for the

3 36 Boyce (Del.) 379, 100 Atl. Rep. 411, 434 (1917).
defendant to enter the bail demanded in the action. By the receiver-
ship proceeding the stock was stripped of any immediate market value
and became practically worthless as a security or pledge for advance-
ment or loan. . . . Because of the peculiar circumstances of the case
and the inability of the defendant to appear by giving the bail re-
quired, his motion to open the judgment in order that he might have
an opportunity to make a defense, and the case be tried on the merits
appealed strongly to the sympathy and discretion of the court. But
after a most careful consideration of all the facts we are forced to the
conclusion that no sufficient reason has been shown to justify the
opening of said judgment. We are clearly of the opinion that the legis-
lature ought to provide for the opening of a judgment in foreign at-
tachment against an individual in the same manner as is provided
against corporations, but we are equally clear that the court cannot
relieve the defendant from the hardship imposed by the statute. To
do so would be judicial legislation.”

Later the Supreme Court of Delaware⁴ affirmed the judg-
ment in banc in these words (with no further reasons):

“However as the judges comprising the Supreme Court at the time
of the argument were also members of the court in banc at the time
that court heard and determined the same questions raised by the
assignments of error, also in view of the fact that the same question
cannot arise in the future for the reason that by recent legislation
defendants, in foreign attachment cases, are permitted to appear with-
out first giving bail, we will not state reasons for our decision in this
court, our conclusions being the same as they were at the time the
case was argued and determined by the court in banc.”

We shall limit our discussion of this case to the due process
contention. The first point in our critique has to do with the
question, whether the Supreme Court of Delaware misconstrued
the statute.⁵ The Delaware court in banc quoted above refers
“to the hardship imposed by the statute.” Was it imperative
that the Delaware court, without resorting to “judicial legisla-
tion,” must construe the statute so as to impose a hardship?
Several considerations have a bearing on this problem. (1) It
is a sound principle that a court, when confronted with a statute,
the language of which admits of two constructions, should adopt
the more reasonable of the two, and this is especially so when the
alternative construction will lead to oppression and a denial

⁵ We lead off with this query in order to give the reader a chrono-
logical picture of the trials and tribulations of the defendant, Ownbey.
In doing so, we are cognizant of the doctrine that the Supreme Court
of the United States will not substitute its interpretation for the inter-
pretation placed on the state statute by the state court, but will when
properly raised, pass on the constitutionality of the state court’s inter-
pretation of the statute. (Willoughby on the Constitution of the
United States, v. 2, p. 1300.)
of justice. A statute on attachment should be strictly construed. The Supreme Court of Delaware, in construing a foreign attachment statute in the case of Smith v. Armour said, "It must be borne in mind that this is not a common law remedy. It is purely a creature of the statute, and has been quite uniformly viewed as a violent proceeding by which the property of the defendant is taken and seized upon before the claim is judicially determined by a competent court of law, and has therefore been uniformly strictly construed. (3) The construction placed upon the Delaware statute by the Supreme Court of Delaware in the case at bar renders it an anomaly among those of other American states and would compel an attitude of unenviable isolation in regard to the protection of rights so basic and so universally recognized, as the rights of appearance and defence. The attachment laws of Delaware, although based on the Custom of London, were originally taken from the legislation of Pennsylvania. The Delaware Court of Errors and Appeals, the highest court in the state, in the case of Reybold v. Parker admits this, and yet the Pennsylvania statute has not been construed in such a manner that appearance releases the attachment and that additional bail is necessary.

(4) The construction contended for by the defendant is not only in accord with the law in other jurisdictions, but also it accomplishes the two purposes of an attachment law (a) to operate as notice to the defendant to appear and defend and (b) to subject the property seized to the debt of the plaintiff, when ascertained. Section 4123 provides "that if the defendant in the attachment, or any sufficient person for him, will at any time before judgment appear and give security to the satisfaction of the court . . . to the value of the property, rights, credits and monies attached, and the costs, then the garnishees and all property attached shall be discharged." It would seem that the reasonable interpretation of this section, bearing in mind especially the words "at any time before judg-

---

*Endlich on the Interpretation of Statutes, p. 343.
1 Penn. (Del.) 361, 40 Atl. 720, 721 (1898).
6 Houston (Del.) 544, 554 (1882).
Sergeant on Foreign Attachments, pp. 24-25. So in Illinois, under a somewhat similar statute the Pennsylvania construction is used in the case of Martin v. Dryden, 1 Gilman 211 (1844) (in which Abraham Lincoln was an attorney).
Shinn on Attachment and Garnishment, Secs. 5, 191, 221, 442, 449.
ment”, clearly gives a privilege to the defendant, by which he may substitute personal security for that of the detention of his goods, to abide the issue of the suit. Section 4137 provides that “judgment shall be given to the plaintiff in attachment the second term, after issuing the writ, unless the defendant shall enter special bail as aforesaid”. This section standing alone may give some color to the plaintiff’s contention, but by reading it with reference to the whole scope of the statute and bearing in mind that nowhere in the statute is the right to appear, irrespective of giving security denied, it would seem that the reasonable construction of Sec. 4137 contemplates a situation likely to occur in foreign attachment cases, in which the defendant has entered no appearance at the term to which the writ is returned, or thereafter, and it therefore becomes necessary to perfect the proceeding quasi in rem (which the attachment up to that point is) by a judgment of condemnation of the property seized.

(5) The defendant’s construction of the Delaware statute in relation to the “special bail” provision is not only reasonable, but is also in accord with the general theory and usage of bonds in attachment cases. In general, there are two kinds of bonds to procure the release of property from the possession of the attaching officer. One kind contains the principal condition, that if judgment in the attachment suit be rendered against the defendant, the property shall be forthcoming to satisfy the execution on such judgment; otherwise, that the sureties will be bound to the extent, in some instances, of the value of the property, and in other instances, to the amount of the indebtedness. These bonds are variously called “bail bonds”, “forthcoming bonds”, and “delivery bonds”. Such bonds release the property only from the custody of the officer and do not release it from the lien of the attachment. A second class of bonds contains the principal condition that the defendant in the attachment suit will “perform whatever judgment may be entered against him” in such attachment suit, and in default thereof,

11 Ibid., Secs. 302, 583, 584.
12 The Supreme Court of Delaware in , speaking through Pennewill, J., settles this point with this unconvincing pronouncement: “While there is no express inhibition in the statute against it, the implication is as strong and conclusive as an express inhibition would be.” Morgan v. Ownbey, 100 Atl. 411, 420 (1917).
and in the event that judgment is entered against such defendant, that the sureties will pay the amount thereof. A bond of this class not only releases the officer from further liability as to the care and custody of the property, but also releases the property itself from the lien of such attachment, working an entire dissolution of the attachment so far as the property is concerned and thereafter the bond itself is held as the substitute for the res.\(^\text{13}\)

Now it is true that the Delaware procedure contemplated a bond of the second class because appearance was conditioned upon the filing of a bond and the appearance automatically released the attachment and therefore the bond itself was held necessarily as a substitute for the res. But the Delaware procedure is inconsistent with the general theory underlying the filing of bonds in attachment cases. That theory is that the bond provision constitutes a privilege\(^\text{14}\) of the defendant in an attachment case. The plaintiff cannot complain if the defendant fails to exercise the privilege nor can the plaintiff ordinarily take any steps to prohibit the exercise of the privilege on the part of the defendant.

With this much as a background, let us consider the exceptional advantages afforded to the plaintiff under this ancient Delaware statute as construed by the highest Delaware court.

(1) Prior to the selection of the Delaware forum by the plaintiff, a suit was instituted in Colorado by the plaintiff against this defendant, which threw his property into receivership and temporarily destroyed its market value. (2) Then the plaintiff comes into the Delaware court and files an affidavit alleging the non-residence of the defendant and the indebtedness of the defendant to the plaintiff in a sum exceeding $50, as the statute requires. (3) Then the plaintiff, as dominus litus, endorses on this affidavit the words "Bail, $200,000." (4) and the court having given its approval to this sum, the final curtain falls in this Delaware due process travesty just as the plaintiff has been awarded a default judgment.

The Delaware statute does not require the plaintiff in his affidavit to state (a) the nature of the cause of action, other

---

\(^{13}\) Shinn on Attachment and Garnishment, v. 1, p. 542.

than that the defendant is indebted to him in excess of $50; (b) no bill of particulars need be stated; and (c) the real amount of the indebtedness need not be sworn to. Although the Delaware courts insist that their statute is based on the Custom of London, at least the Custom of London required the plaintiff to swear to the real amount of his indebtedness.  

(d) From the time the suit is instituted until after judgment is entered by default against the defendant, there is no statement of record in the cause required by either statute or rule of court, other than the affidavit, from which the defendant can derive any information as to the nature of the plaintiff’s claim or its amount, or determine whether he will contest the same, if permitted, or determine whether the amount of bail marked on the writ is just.  

(e) The Delaware procedure does provide that after such default judgment, a declaration may be filed as preliminary to the holding of the inquisition at bar, to ascertain the exact amount of the judgment.

It should be obvious that this affidavit is wholly insufficient and inadequate as a compliance with the requirement of due process of law, either (a) as notice to the defendant of the nature and amount of the plaintiff’s claim, or (b) as any proper basis or justification for determining the amount of bail. If a $50 affidavit is sufficient to support a $200,000 bail, why not a $1 affidavit or none at all.

The plaintiff, having temporarily destroyed the market value of the defendant’s property by the receivership proceeding, sets the bail at a figure ($200,000) which the defendant cannot meet, and the way is thus open for a default judgment. The attorneys for the defendant in error present two arguments to justify this bail requirement.  

(1) The argument is made that the bail of $200,000 was not excessive because the judgment ascertained by the inquisition was $200,168.75. But the answer is obvious; this was a default judgment. It is a mere conjecture as to the amount of and the nature of the judgment if the defendant had had the opportunity for a fair hearing and trial on the merits. The defendant sought to plead payment, the

---

36 See the brief of the Plaintiff in Error in the Supreme Court of the U. S. by Louis J. Marshall, Ward, Gray and Neary, p. 63.
37 Ibid., p. 76-77.
38 Brief of Defendant in Error in the Supreme Court of the U. S. by Harlan F. Stone and Williard Saulsbury, p. 15.
statute of limitations, and non assumpsit. (2) The further contention is made that Ownbey could have appeared specially and asked that the amount of the bail be reduced, if he thought it was unreasonable. The defendant in error cites Vienne v. McCarthy for this proposition, but an analysis of the case discloses its inapplicability. That case held that where there was a foreign attachment, the court would inquire into the cause of action and dissolve it if sufficient cause be not shown. The suit had been brought against McCarthy, surviving partner of James Cummins on a bill of exchange drawn by James Cummins, contracted before the partnership had been formed. The court held that something more must be shown before McCarthy can be held and hence since no sufficient cause of action appears against the defendant the attachment is dissolved. In the principal case there is nothing in the procedure of Delaware that would have enabled the court informally to have determined whether or not Ownbey was indebted to the plaintiffs in the sum of $200,000 or in any amount. The defenses, if permitted, were non assumpsit, the statute of limitations, and payment. An informal investigation would have disclosed merely that there was an issue; that issue could only have been determined by a trial and the defendant was entitled to a jury trial of the issues. Such an informal investigation could not be a valid substitute for an orderly trial.

The real clash between the parties grows out of this bail requirement. Let us state their respective positions. The Morgan attorneys argue that foreign attachment is a process by which appearance of the non-resident defendant is enforced; then when he is brought in by attachment, that process has served its purpose; then in order to defend, he must put up bail. Prior to the appearance which is conditioned by bail, the suit is characterized as an ex parte proceeding in rem. After the bail has been met, then the action becomes in personam and the appearance automatically releases the attachment.

---

18 1 Dallas 154 (1801); see Ibid., n. 16, at p. 17.
19 See Plaintiff in Errors Brief in Supreme Court of U. S., pp. 3-7.
20 The Morgan attorneys admit after citing many Delaware cases that "the immediate point may not have been presented to the Delaware courts in the foregoing cases, yet the expressions by the court pertaining thereto are NOT OBITER and are authoritative expositions of the law." Page Mr. Oliphant: This is a queer doctrine of stare decisis. See p. 35 of Defendant in Errors Brief in U. S. Supreme Court.
Delaware courts having construed the statute in such a manner as to cause appearance to release the attachment, the Morgan attorneys insist that to allow Ownbey to appear without meeting the bail requirement, would cause the plaintiff to lose the benefit of his discovery and industry. The stock attached was the only assets that Ownbey had. The plaintiff insists that if Ownbey were allowed to appear without giving bail, the plaintiff would have what was equivalent to personal service on Ownbey, and the plaintiff would be then faced with the problem of pursuing him over the United States in a fruitless effort to find some property belonging to him out of which judgment could be collected.21

On the contrary, Ownbey contends that after the plaintiff has started a suit by attaching the property of a non-resident defendant, the plaintiff must, first of all permit said defendant to make a free choice of one of three alternatives: (a) either ignore the attachment proceedings and lose the property to the extent of the judgment by default, or (b) permit the defendant to put up bail in lieu of the property attached, or (c) permit the defendant to appear on the merits, leaving the lien upon the property attached undisturbed. Such alternatives are not only consistent with the theory of foreign attachment statutes, but also are in fact open to the non-resident defendant under the foreign attachment laws of every other state of the Union. In the case at bar, Ownbey insists on the exercise of the third alternative and if the Delaware statute is so construed as to debar him from the exercise of this elementary right, he insists that the statute as construed is violative of due process of law.

For the purpose of raising the due process question, we submit the following analysis: (1) A suit instituted by attachment is quasi in rem; (2) When the Delaware court construes the statute so that a general appearance necessarily releases the attachment, the legal effect of such a construction is to remove the only factor that makes the action quasi in rem and thereafter the statute governs an in personam action. (3) The presentation of bail under the statute is an absolute condition precedent to and an integral part of general appearance. Although


21 Defendant in Errors Brief in U. S. Supreme Court, pp. 16-19.
from a strictly technical point of view, the condition precedent is the first step in the appearance process, in practice and in legal contemplation it is synchronous with and an integral part of general appearance. Section 4137 provides that "judgment shall be given for the plaintiff in the attachment, the second term after issuing the writ, unless the defendant shall enter special bail as aforesaid". Thus, the giving of security under this statute constitutes a general appearance, otherwise, the plaintiff would have the advantage of both attachment and bail.

(4) It follows from the above, that the point of time from which the action is transformed from a quasi in rem to an in personam proceeding dates from the giving of bail. Therefore the bail requirement must meet the in personam test of due process of law, to-wit: Under it there must be afforded a reasonable notice and an opportunity for a fair and impartial hearing. Any attempt to impose an impossible condition as a prerequisite to the right to a general appearance and a defense on the merits is as invalid as it would be to attempt to provide for a fictitious notice and hearing.

The non-resident defendant attempts to proceed on the theory that the action instituted by attachment is quasi in rem. He argues for the right to appear and defend on the merits, leaving the lien upon the property attached to satisfy any claim that may be found against him. We have shown that this contention is based on a reasonable construction of the statute. What is the danger or hardship to the plaintiff that compels the Delaware court to put a strained interpretation upon this statute by converting the action from an in rem to an in personam proceeding? And what does Delaware offer the defendant as an alternative? Of what avail is the service of a summons or of a citation or of any other process, to one hailed into court to answer a demand for judgment made against him and who is eager and ready to make a meritorious defense, when under the Delaware statute, as construed, he is gagged at the very threshold by the imposition of an impossible condition that has been set by his opponent in the litigation? The statute, in effect, makes conditional and, in this case, impossible

22 The Delaware Supreme Court in Banc declared, "In a foreign attachment case there can be no appearance without entering special bail; indeed, the entering of bail constitutes the defendant's appearance." J. Pennewill, in 100 Atl. 411, 421 (1917).
the very safeguards that the due process clause guarantees in an in personam action, namely, notice and hearing.

We now come to a critique of the decision by the Supreme Court of the United States. Ten years after the decision in the Ownbey case, the Supreme Court of the United States, in a unanimous decision, stated the reason underlying the Ownbey decision: "In Ownbey v. Morgan, we upheld rather harsh legislation of the State of Delaware modeled on the Custom of London and dating back to colonial days. Its validity, challenged because of alleged conflict with the due process clause of the 14th Amendment was sustained because of the origin and antiquity of the provisions". In order to show the inadequacy of this reason, several facts are introduced by way of background. (1) The Superior Court of Delaware admitted that although this statute had been on the books since 1770, a case on all fours with the Ownbey case had never been presented to a Delaware court, i.e., a case where the bail requirement was an impossible condition for the defendant to meet. (2) It is a fact uncontradicted in the record, that other states having foreign attachment statutes based on the Custom of London were not construed by their highest courts in such a manner as to make appearance release the attachment. The Superior Court of Delaware confronted with this phenomenon and admitting its truth counters with this comment: "This case involves a construction of a statute of our own state, and cases from other jurisdictions cannot be of much assistance to the court in any event". Professor Sunderland, commenting on this point, says: "An investigation of the rule in other states that once had a statute based on the Custom of London indicates that in every one of them the rule long ago succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition, where the ghosts of ancient laws wander restlessly forever". (3) We have already shown that the Statute of London was not as harsh and severe as the Delaware construction of the Delaware statutes. (4) While the case was pending in the Delaware courts the legis-

24 100 Atl. 411, 421 (1917).
25 100 Atl. 411, 421 (1917).
27 Note 15, supra.
lature of the state amended the statute so "that another Ownbey case cannot arise in the future." 28 (5) The conclusion from the above considerations is that the Ownbey case is unique and stands in unenviable isolation, not only in Delaware, but in all the other states having a foreign attachment statute based on the Custom of London.

It seems reasonable to assume that the unique and exceptional character of the Ownbey case should have conditioned and controlled not only the Delaware courts but also the Supreme Court of the United States in disposing of the following contentions: (1) The court said, 29 Ownbey's "appeal in effect was to the summary and equitable jurisdiction of a court of law so to control its own process and proceedings as not to produce hardship. This is a recognized extraordinary jurisdiction of common law courts, distinguishable from their ordinary or formal jurisdiction. It has been much developed since the separation of the American colonies from England. But where the proceedings have been regular, it is exercised as a matter of grace or discretion, not as of right. A liberal exercise of this summary and equitable jurisdiction in the interest of substantial justice and in relaxation of the rigors of strict legal practice is to be commended; but it cannot be said to be essential to due process of law, in the constitutional sense."

(2) The uniqueness of the Ownbey case should completely repudiate the idea that it is in accord with "settled usage" in this country and therefore with due process and the further fact that the Delaware proceedings are much more harsh 30 and inequitable than the Custom of London should demonstrate that there is no "settled usage" in England as a basis for the due process doctrine. But admitting arguendo that there is a factual background of "settled usage" both here and in England for the Delaware practice it would seem that the Supreme Court of the United States would have been on firmer ground if it had repudiated the English usage test and had adopted the one more in accord with the mores of a later time. Thus, in Murray v. Hoboken Land and Improvement Company, 31 the acid test of due process from a procedural standpoint was "the common

---

29 256 U. S. 94, 110 (1920).
30 Note 15, supra.
31 18 Howard (U. S. 1855) 272, at 280, 15 L. Ed. 372.
and statute law of England prior to the emigration of our an-
cestors, and by the laws of many of the states at the time of the 
adoption of this (Fifth) amendment". The later case of Hurtado 
v. California\textsuperscript{32} repudiates English usage as the test of due proc-

cess of law. Justice Mathews said, "It would be to stamp upon 
our jurisprudence the unchangeableness attributed to the Medes 
and the Persians. This would be all the more singular and 
surprising in this quick and active age, when we consider that 
owing to the progressive development of legal ideas and institu-
tions in England, the words of Magna Charta stood for very 
different things at the time of the separation of the American 
colonies from what they represented originally". It should be 
noted that the Hurtado case did not overrule\textsuperscript{33} the Murray case, 
but simply stands for the proposition that other forms of pro-
cedure should also be upheld. It is believed that the "struck 
jury"\textsuperscript{34} case was the first one in which the court upheld a sub-
stantial departure from the norms of the common law. In a 
later case\textsuperscript{35} Justice Moody said that the Murray rule tended to 
fasten on the courts the form of procedure of the colonial period 
"like a straight-jacket, only to be loosed by a constitutional 

In the Ownbey case the court said,\textsuperscript{36} "However desirable 
it is that the old forms of procedure be improved with the 
progress of time, it cannot rightly be said that the Fourteenth 
Amendment furnishes a universal and self-executing remedy. 
Its function is negative, not affirmative, and it carries no man-
date for particular measures of reform." Professor Sunder-
land,\textsuperscript{37} commenting on this "cheerless view" of the Constitu-
tion, says, "This sounds like the exclusion from the purview of 
the Constitution of practically all cases of outworn processes 
and would probably justify the current use of trial by battle .

\textsuperscript{32} 110 U. S. 516 (1884).
\textsuperscript{33} See Mott—Due Process of Law, Chap. XIV, Due Process and 
Settled Usage; also Hannis Taylor—Due Process of Law, pp. 12, 56, 62.
\textsuperscript{34} Brown v. New Jersey, 175 U. S. 172 (1899). It should be noted 
that the "struck jury" case involved a new remedial process that was 
criticised as too radical. It involved just the converse of the Ownbey 
case, where an obsolete process was used that was out of harmony 
with prevailing conceptions of justice. These represent the two classes 
of cases arising under the procedural aspect of due process.
\textsuperscript{35} Twining v. New Jersey, 211 U. S. 78 (1908).
\textsuperscript{36} 256 U. S. 94, 112 (1920).
\textsuperscript{37} Note in 19 Mich. L. Rev. 853-854.
The reasoning of the court seems to accord too high a degree of respectability to the lingering relics of a ruder age."

Historical scholars in the last few decades have been delving into the mass of statutes in our various states. It has been the frequent complaint of these scholars and of revisors that legislation is passed without any regard for the previous legislation in the field. The well known fecundity of state legislatures has resulted in multiplying the laws without eliminating those which changing conditions have rendered obsolete. The very existence of this mass of obsolete statutes in our various states makes the Ownbey doctrine vicious in fact, and this is especially so inasmuch as our courts have never adopted the doctrine of repeal by desuetude. The Ownbey doctrine in its worst form will be found in those cases (none too rare) where law enforcement agencies will be roused to action by extraneous motives and obsolete laws will be utilized. As an illustration, witness the prosecutions of Bimba, a labor organizer, and Kallén, a Sacco Vanzetti sympathizer, under a blasphemy statute of Massachusetts, under which there had been no reported case for one hundred years.

---

39 At least five states have special commissions to investigate obsolete statutes. 43 Harv. L. Rev. 1302, 1305. Judicial councils may also give some aid; also Legislative Reference Bureaus and the attempt of Attorney Generals' Offices to revise and codify statutes.

39 Although there may be some recognition of this doctrine in the Roman Law (Just. Code Tit. 9, c. 52, Sec. 2) and although there are a few early cases at common law in England where nonuser or a contrary custom perhaps could repeal a statute, the doctrine of desuetude is not now followed in the United States. See Gray, "Nature and Sources of the Law," 2nd ed. 329 (1921); see Jones, "Statute Law Making as to Repeal by Lapse of Time," p. 155. In the Roman Law, for the decay of custom and the loss of a right by failure to exercise it when a flamen Dialis claimed and assumed a seat in the Senate, the praetor on putting him out, said, "non exoletis vetustate annalium exemplis, stare ius, sed recentissimae culsusque consuetudinis usu volebat; nec patrum nec avorum memoria Dialem quemquam id ius usurpasse." Livy, Liber 27, Chap. 8, par. 9.

40 See N. Y. Times, August 28, 1928, p. 8, col. 1; August 30, 1928, p. 37, Col. 1; March 8, 1926, p. 25, Col. 6; see Chafee, "The Inquiring Mind" 108 (1928).

40 Prof. Morris in his "Studies in the History of American Law" has pointed out historic survivals of obsolete practices to be found in statutes now on the books and not repealed, pp. 225-230; 122; also Morris, "Primogeniture and Entailed Estates in America," 27 Col. L. Rev. 47, et seq. A few old statutes could not be enforced because they apply only to conditions that have ceased to exist; see State v. Tisdell, 5 Strob I (S. C.) 1850, where statute refers to a "guardian in socage;" others have been repealed by implication or have been declared unconstitutional.
(3) The Supreme Court of the United States next utilizes the presumption that the defendant knew the law in order to show that this Delaware statute was in accord with due process. The Court says:\textsuperscript{42} "It cannot be deemed so arbitrary as to render the procedure inconsistent with due process of law when applied to a defendant, who, through exceptional circumstances, is unable to furnish the necessary security; certainly not where such defendant—as is the case now presented, so far as the record shows—has acquired the property right and absented himself from the state \textit{after the practice was established}, and hence with notice that his property situate there would be subject to disposition under foreign attachment by the very method that afterwards was pursued, and that he would have no right to enter appearance and make defense except upon giving security". Does this sound convincing when we bear in mind that this statute invoked was passed in early colonial times, and that we have in the record of the case the admission of the Delaware Court\textsuperscript{43} that no case at all similar to the Ownbey case had ever been presented to the Delaware courts in the history of the Commonwealth? Granting that desuetude is not a ground for repealing a statute, this argument stretches the presumption of knowing the law to the nth degree and our highest court in utilizing it actually weakens its decision.

(4) We conclude with an analysis of other cases to show that the Delaware proceedings do not afford the safeguards guaranteed by the due process clause of the Fourteenth amendment. We have already stressed the point that Delaware stood in unenviable isolation among her sister states when the Ownbey case was decided. No other state had a similar procedural set up and the Supreme Court of Delaware admitted that no case essentially similar to the Ownbey case had ever been decided in Delaware,\textsuperscript{44} although the statute had been in existence since 1770. Because of this factual background it will be difficult even to argue from other cases by way of analogy. However,

\begin{itemize}
\item \textsuperscript{42} U. S. 94, 111 (1920).
\item \textsuperscript{43} Supra, n. 23.
\item \textsuperscript{44} The explanation of this paradoxical situation is to be found in the following considerations: (1) the statute was seldom used; (2) where bail had been required, it was small in amount and did not constitute an impossible consideration; (3) and in some cases the defendant desired to get his attached property back and used bail for that purpose.
\end{itemize}
there are a few landmark cases that have been decided by the
Supreme Court of the United States dealing with due process
of law from the procedural aspect that will be helpful in throw-
ing light on our specific problem. In *Windsor v. McVeigh*, the
form of action was ejectment for a tract of land situated in
the city of Alexandria, Virginia. The plaintiff proved title in
himself, unless his life estate in the land had been divested by
a sale under a decree of condemnation rendered in March, 1864,
by the District Court of the United States. The defendant re-
lied upon the deed to his grantor executed by the marshal under
such condemnation sale. The proceedings mentioned were in-
stituted under the act of Congress of July 17, 1862, "to sup-
press insurrection, to punish treason and rebellion, to seize and
confiscate the property of rebels, and for other purposes". The
premises in controversy were seized by the marshals; libel against
the property was filed in the name of the United States, and
the district judge ordered process of monition and notice to
issue and designated a day and place for the trial. The owner,
in response to the monition and notice, appeared by counsel and
filed a claim to the property and an answer to the libel. The
District Attorney moved that the claim and answer and appear-
ance of the respondent be stricken from the files, on the ground
that it appeared from his answer that he was at the time of the
filing of same "a resident within the city of Richmond, within
the Confederate lines and a rebel". The motion was granted,
and the court immediately entered its sentence and decree, con-
demning the property as forfeited to the United States. The
Supreme Court held that the sentence of confiscation was as
ineffective upon his rights as though no monition or notice had
ever been issued. The legal effect of striking out his appear-
ance was to recall the monition and notice as to him. The court
further declared that "the jurisdiction acquired by seizure of
property, in a proceeding in rem for its condemnation for al-
leged forfeiture, is not to pass upon the forfeiture absolutely,
but to pass upon that question after opportunity has been af-
forded to its owner and parties interested to appear, and be
heard. Such a forfeiture pronounced against a person without
hearing him, or giving him an opportunity to be heard, is not

*93 U. S. 274 (1876).*
a judicial determination of his rights, and is not entitled to
respect in any other tribunal”.

It should be borne in mind that this was an action in rem
and that Justice Field, speaking for the court, said, 46 . "A denial
to a party of the benefit of a notice would be, in effect, to deny
that he is entitled to notice at all, and the sham and deceptive
proceeding had better be omitted altogether. It would be like
saying to a party, ‘appear and you shall be heard’; and when
he has appeared, saying ‘Your appearance shall not be recog-
nized and you shall not be heard’ . . . It is difficult to speak
of a decree thus rendered with moderation; it was in fact a
mere arbitrary edict, clothed in the form of a judicial sentence.”
If the procedural requirements in Windsor v. McVeigh consti-
tuted a “mere mockery” and a “solemn fraud” in an action
that was admittedly in rem, what shall be said of the Delaware
procedural contrivance in the Ownbey case?

In McVeigh v. United States, 47 the same Congressional
statute was involved as in the Windsor case and the court again
struck out the appearance and answer of the defendant upon
request of the government. Justice Swayne, speaking for the
court, said, “In our judgment, the District court committed a
serious error in ordering the claim and answer of the respondent
to be stricken from the files. The order in effect denies the
respondent a hearing. It was alleged that the defendant was
in the position of an alien enemy, and hence could have no locus
staudi in that forum. If assailed there, he could defend there.
The liability and the right are inseparable. A different result
would be a blot upon our jurisprudence and civilization.” The
court further said, “After the decree, pro confesso, McVeigh
occupied the same relation to the record as a defendant against
whom a judgment by default has been taken. The case is wholly
unlike a proceeding purely in rem, where no claimant is named
and none appears until after the final decree or judgment is
rendered, and the case has terminated. We entertain no doubt
that the plaintiff in error, McVeigh, had the right to sue out the
writ and that the record is properly before us.” The court fur-
ther said, “whatever may be the extent of the disability of an
alien enemy to sue in the courts of the hostile country, it is

46 93 U. S. 274, 277, 278, 284 (1876).
clear that he is liable to be sued and this carries with it the right to use all the means and appliances of defense". In the case of McVeigh v. United States, the defendant was a resident of Richmond, Virginia, within the confederate lines and a rebel and he loses by default in the District court. In the Ownbey case, the defendant was a non-resident of Delaware and his elementary right of appearing and defending his property is utterly destroyed by the imposition of an impossible condition by the plaintiff, as dominus litus in the litigation. The Supreme Court of the United States denounces the first and condones the second.

Roller v. Holly\(^4^6\) involved the validity of a Texas statute under which a defendant residing in Virginia was required to appear and answer a suit in Texas in five days, exclusive of the day of service and return. The defendant showed that it would take four days to get to Texas, leaving only one day, Sunday, for the preparation of his case. The court said,\(^5^0\) "It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose. . . . Without undertaking to determine what is a reasonable notice to non-residents, we are of opinion, under the circumstances of this case, and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law."

This was an action for the foreclosure of a vendor's lien and was regarded as a suit in rem. The significance of the case for our purposes is that the only object of serving process was to enable the defendant to come in and defend. If the statute in that case, instead of providing that the defendant would have to appear and defend in five days, had required him as a condition to appearing and defending to have paid into court the amount of the lien sought to be foreclosed, the situation would have been nowise different from that upon which the adjudication rested. In the one case the notice was unreasonable and inadequate for the purpose of giving the defendant a reasonable opportunity to defend; in the other case he was prevented from appearing and defending by an unreasonable condition. In both cases the process bade the defendant to come and defend.

\(^4^6\) 176 U. S. 398 (1899).
\(^5^0\) At p. 409.
and in each of them he was prevented from defending by physical difficulties interposed by the statute.

_Hovey v. Elliot_ is a great constitutional landmark. There the court of original jurisdiction, after the service of process and the joinder of issue, struck the defendant's answer from the files, as a punishment for his contempt in refusing to obey the court's orders. Justice White speaking for the court said, "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever, is in the very nature of things to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power depends. Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, has yet the authority to render lawful that which if done under express legislative sanction, would be violative of the Constitution?

If our analysis of the Ownbey case is correct, the Delaware statute, if properly construed would have been valid and in accord with due process of law, but the Delaware courts placed such a strained construction on the statute that it positively deprived Ownbey of notice and hearing and compelled him to submit to a default judgment. The Ownbey case is even more indefensible than the Hovey case, for Ownbey had not committed contempt of court. On the contrary, he was simply insisting on the elementary right to appear and present his defenses of non assumpsit, payment, and the statute of limitations, leaving the lien upon the attached property undisturbed, dependent on the outcome of the suit. Could the plaintiff in fairness demand more? Unless a special doctrine of due process is to be created for this kind of case, it would seem that this Delaware procedural contrivance is not in accord with the doctrine relied on in the cases above. And in reaching this conclusion it is not

---

50 167 U. S. 409, 417, 435 (1897).
necessary to speculate as to whether the defendant really had a valid defense on the merits. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits. The Supreme Court of the United States has said, 51 "Whether in fact, the individual has a defense to the debt, or is without defense is not important. To assume that he has none and therefore that he is entitled to no day in court, is to assume against him the very point he may wish to contest."

51 Reese v. City of Watertown, 19 Wall. 107, 123 (1873).