#39.70 1/5/73

Memorandum 73-4

Subject: Study 39.70 - Prejudgment Attachment (Nonresident Attachment)

This memorandum discusses the problem of nonresident attachment. Two basic questions are involved: (1) Should attachment of a nonresident's property in the state be a proper basis of judicial jurisdiction, i.e., should the category of quasi in rem actions be continued? (2) Should the mere fact of nonresidency of a defendant be grounds for the issuance of a writ of attachment without notice and opportunity for a hearing, i.e., should nonresidency be an "exceptional circumstance" (and, if so, in what types of cases)? At times, these two questions merge.

I. Attachment as a Jurisdictional Basis

According to the rigid theoretical construct of Justice Story in his Commentaries on the Conflict of Laws and of Justice Field in Pennoyer v. Neff,[1] which restricted the territorial jurisdiction of state courts to persons and property within the geographical limits of the state, valid personal judgments entitled to full faith and credit could be rendered only where the defendant was brought within the state's jurisdiction by service of process within the state or where he appeared voluntarily.[2]

Pennoyer's formulation of the constitutional requirements of the law of jurisdiction rigidified three concepts of jurisdiction--in personam, in rem, and quasi in rem. An action in personam requires personal jurisdiction over the person of the defendant and, in the case of actions for a money judgment, seeks to make the defendant personally liable and subject his assets to

1. 95 U.S. 714 (1878).

2. 95 U.S. at 733; see generally Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241; F. James, Civil Procedure § 12.2 (1965).

execution generally. A judgment in personam of one state is entitled to full faith and credit in the others. An action in rem seeks to adjudicate the interests of persons in property within the state. Some actions in rem purport to bind the whole world regarding the property while others bind only the interests of certain persons.[3] A third type of jurisdiction--quasi in rem--originally acted to mitigate the harsh restrictions on personal jurisdiction. Actions quasi in rem are begun by attachment of property of the defendant and seek to subject the property to a judgment (often by default). A judgment in such an action is limited by the amount of the attached property; it does not bind the defendant personally and is not entitled to full faith and credit. Of course, if the defendant makes a general appearance, the action becomes one in personam.[4]

The traditional division of jurisdiction into these three categories based on the power rationale has been the subject of voluminous criticism, and its validity has been eroded by the expansion of the bases for personal jurisdiction, culminating in the International Shoe decision[5] in 1945 which made fairness the primary consideration rather than sovereign power within territorial limits. The U.S. Supreme Court in International Shoe decided that:[6]

> due process requires only that in order to subject a defendant to judgment in personam, if he be not present within the territory of the

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3. The Restatement of Judgments at 5-9 (1942) classes the latter as quasi in rem; but James, supra note 2, at 612 n.5 classes this type as in rem and states that this is general usage today. For purposes of this memorandum, James' view has been adopted.

4. See generally F. James, supra note 2 at 611-613; Restatement of Judgments 5-9 (1942); Developments in the Law--State-Court Jurisdiction, 73 Harv. L. Rev. 909, 916-918, 948-950 (1960); Comment, Jurisdiction in Rem and the the Attachment of Intangibles: Erosion of the Power Theory, 1968 Duke L.J. 725; Green, Jurisdictional Reform in California, 21 Hastings L.J. 1219-1222 (1970).

5. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

6. 326 U.S. at 316; although the court has not ruled on the matter, it is generally assumed that this test applies to individual as well as corporate defendants.

forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Since quasi in rem jurisdiction flourished as an ameliorative exception to a harsh and limited view of personal jurisdiction, the tremendous expansion of the bases for personal jurisdiction since Pennoyer has obviated most of the need for quasi in rem jurisdiction.

The staff therefore agrees with several critics of quasi in rem jurisdiction who have argued that jurisdiction based solely on attachment of the defendant's property where that property is unrelated to the controversy should be eliminated.[7] The central argument is that, where jurisdiction

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7. Criticisms of quasi in rem jurisdiction include the following: Carrington, The Modern Utility of Quasi in Rem Jurisdiction, 76 Harv. L. Rev. 303 (1962) (attached as Exhibit I); F. James, Civil Procedure 631-633 (1965)("[I]t may be seen that the device of obtaining jurisdiction over nonresidents by attaching property within the forum state is of increasingly questionable utility and desirability, especially where the property attached is intangible." Id. at 632-633); Developments in the Law--State-Court Jurisdiction, 73 Harv. L. Rev. 909, 953-956, 959-966 (1960); Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 662-663 (1959); Casad, Long Arm and Convenient Forum, 20 Kan. L. Rev. 1, 6-7 (1971); P. Li, Attorney's Guide to California Jurisdiction and Process § 3.5 at 155 (Cal. Cont. Ed. Bar 1970); Hazard, A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 266-268, 277, 280-288; J. Cound, J. Friedenthal, & A. Miller, Civil Procedure 122 (1968); E. Scoles & R. Weintraub, Conflict of Laws 163 (1967); Gorfinkel, Special Appearance in California--The Need for Reform, 5 U.S.F. L. Rev. 25, 27 (1970); B. Currie, Attachment and Garnishment in the Federal Courts, 59 Mich. L. Rev. 337, 379 (1961)(commenting on the harshness of attachment and garnishment to secure jurisdiction but nevertheless concluding that quasi in rem jurisdiction in the federal courts subject to limited appearances is better than nothing); von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1139 & n.38, 1141 & n.47 (1966); A. Ehrenzweig, Conflict of Laws § 25 at 78-79, § 29 at 103, § 58 at 211 (1962); Ehrenzweig, From State Jurisdiction to Interstate Venue, 50 Ore. L. Rev. 103, 112 (1971); Comment, Jurisdiction in Rem and the Attachment of Intangibles: Erosion of the Power Theory, 1968 Duke L.J. 725, 737-739; Comment, Podolsky v. Devinney and the Garnishment of Intangibles: A Chip Off the Old Balk, 54 Va. L. Rev. 1426, 1429 n.12, 1434-1438, 1442-1443 (1968); Comment, Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness, 69 Mich. L. Rev. 300, 326-338 (1970); Note, Jurisdiction in New York: A Proposed Reform, 69 Colum. L. Rev. 1412-1424 (1969); Comment, The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp., 17 U.C.L.A. L. Rev. 837, 843-844 n.45 (1970); Comment, Attachment in California: A New Look at an Old

cannot be had under the minimum contacts and fairness test of International Shoe, it is not fair to allow a quasi in rem action based on the mere presence of property within the state. If the defendant has insufficient contacts with a state to allow in personam jurisdiction, then it is unfair to require him to defend there (or choose to suffer a default judgment) only because the plaintiff has been able to attach some property there. Carrington states the rationale as follows (see article attached as Exhibit I):[8]

> The plaintiff who must resort to quasi in rem proceedings is seeking to compel an appearance by (or impose a forfeiture on) a defendant who, so far as appears, has inadequate contact with the state to make him fairly answerable to the claim there, or who is not of a class of defendants the legislature has seen fit to subject to the judgments of its courts.

Mere presence of property in a state is not enough contact with that state to make it fair to subject the owner to personal jurisdiction in a cause of action unrelated to the ownership of the property.[9] But, by definition, the mere presence of property is traditionally deemed sufficient to

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Writ, 22 Stan. L. Rev. 1254, 1267 (1970); Recent Developments, Civil Procedure--Quasi In Rem Jurisdiction, 14 St. Louis U. L.J. 548, 549-551 (1970); Comment, Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditor's Ointment, 34 Alb. L. Rev. 426, 439 (1970); Note, Some Implications of Sniadach, 70 Colum. L. Rev. 942, 950-951 (1970). See also Atkinson v. Superior Court, 49 Cal.2d 338, 316 P.2d 960 (1957)(opinion by Traynor, J., using minimum contacts and fairness theory in quasi in rem situation); Mills v. Bartlett, Del. Super., 265 A.2d 39 (1970)(holding Delaware foreign attachment statute unconstitutional to extent it permits prejudgment garnishment of wages of nonresident defendant without notice and hearing); J. Skelly Wright, Cir. J., dissenting in Tucker v. Burton, 319 F. Supp. 567, 572 (D.C.D.C. 1970)(three judge court); Gibbons, Cir. J., concurring in Lebowitz v. Forbes Leasing and Finance Corp., 456 F.2d 979, 982 (3d Cir. 1972), cert. denied, 93 S. Ct. 42 (1972).

8. Carrington, supra note 7, at 307.

9. See Approved Judicial Council Comment to Code of Civil Procedure Section 410.10 ("These rules are limited to causes of action which arise from the thing."); Marra v. Shea, 321 F. Supp. 1140 (N.D.Cal. 1971).

confer quasi in rem jurisdiction. The only rationale which would justify this strange distinction at a time when the strict territorial mandates of Pennoyer have been replaced by the minimum contacts and fairness test of International Shoe is that a judgment in an action quasi in rem does not affect the interests of the defendant to the extent that a personal judgment does. The difference in effect on the defendant's interests must be significant enough to justify the lesser protection given the defendant in the quasi in rem situation. The only meaningful difference is that judgments in personam make the defendant personally liable and his assets anywhere may be subject to execution whereas a judgment in an action quasi in rem is limited to the property before the court and may not be used as a basis of execution on other assets, particularly those in another state. But it is highly artificial to think that the defendant's personal rights are not being decided in a quasi in rem action. Obviously, his rights in the attached property are decided as conclusively and as much to his detriment as if he were subject to an in personam action. As Justice Holmes said:[10]

> All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected. . . . Personification and naming the res as defendants are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result, nothing more.

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10. Tyler v. Court of Registration, 175 Mass. 71, 76-77 (1900). To the same effect is Justice Frankfurter's statement in his dissenting opinion in Vanderbilt v. Vanderbilt, 354 U.S. 416, 423 (1957): "'Strictly speaking, all rights eventually are personal.' The categories of 'in personam,' 'in rem,' and 'quasi in rem' are then not particularly helpful, and . . . may indeed be hindrances in working out a solution to a particular basis-of-jurisdiction problem." See also Comment, 1968 Duke L.J. 725, supra note 7, at 737, 765.

A Comment[11] put it this way:

> [C]ourts are free--perhaps compelled--to recognize that litigation of a controversy in an inappropriate forum is no less unfair to the defendant when a limit is placed on any possible judgment than when a decision may be rendered for the full amount of the claim.

If, for example, the amount of the property attached in an action quasi in rem is equal to or exceeds the amount of the claim against the defendant, it is irrelevant to the defendant whether it is an action in personam or quasi in rem; his rights to the property are affected to the same extent as if it were an action in personam. Furthermore, it makes no sense to differentiate between the effect on the defendant in situations where the plaintiff gets a personal judgment and then executes against defendant's property in several states and in situations where the plaintiff gets several judgments against the defendant's property in actions quasi in rem brought in several states.[12] In both situations, the amount of money recovered is the same, but in the first situation fairness is satisfied since the plaintiff brings his action where it is fair to do so; in the latter situation, it is possible that each of the plaintiff's quasi in rem actions was brought where it was not fair to expect the defendant to appear and defend.

The history of jurisdictional attachment may be of some use in determining the current utility of quasi in rem jurisdiction. At the beginning of his memorandum (attached), Professor Riesenfeld briefly discusses the history of foreign attachment. Originally in England, jurisdiction was based upon the physical power of the court over the person of the defendant. As Green puts it: "To find out whether the court had jurisdiction over the person of the defendant, one looked in the dungeon; if he was there, the court had jurisdiction."[13] Later, this harsh conception softened, and less

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11. 1968 Duke L.J. 725, supra note 7, at 741.

12. See Hazard, supra note 7, at 262-280.

13. Green, supra note 4, at 1227.

coercive means were used to secure the presence of the defendant, but his physical presence was still required.[14] If the defendant appeared, then his property was released since it had served its purpose of bringing the defendant within reach of the court. Under common law attachment, however, if the defendant did not appear, his property went to the state, not the plaintiff. Later, under the procedure developed by the Lord Mayor's Court of London (and elsewhere), the property of a foreign defendant would go to the plaintiff upon the defendant's fourth default, subject to the defendant's right to disprove the debt within a year and a day, and receive restitution.[15] It was only under this custom of London that the second purpose of foreign attachment arose--preservation of assets to insure the collectibility of a claim until (default) judgment. This attachment procedure was transplanted to the American colonies where it was used both to compel the attendance of

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14. See F. Pollock & F. Maitland, The History of English Law (2d ed. 1898) at 593-594, where Bracton's list of ways to compel the attendance of the defendant is given:

> (1) Summons, (2) Attachment by pledges, (3) Attachment by better pledges, (4) Habeas Corpus, (5) a Distraint by all goods and chattels, which however consists in the mere ceremony of taking them into the king's hand, (6) a Distraint by all goods and chattels such as to prevent the defendant from meddling with them, (7) a Distraint by all goods and chattels which will mean a real seizure of them by the sheriff, who will become answerable for the proceeds (issues, exitus) to the king, (8) Exaction and outlawry.

Pollock and Maitland continue:

> One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavour to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy.

It was not until six centuries after Bracton that the seizure of the defendant's chattels was allowed to satisfy the plaintiff's claim if the defendant did not appear. See R. Millar, Civil Procedure of the Trial Court in Historical Perspective 75-76 (1952).

15. See Mussman & Riesenfeld, Garnishment and Bankruptcy, 27 Minn. L. Rev. 1, 7-10 (1942); Carrington, supra note 7, at 303-305; Hazard, supra note 7, at 248-262; Note, 69 Colum. L. Rev., supra note 7, at 1415-1416; Millar, supra note 14, at 481 485.

the defendant and to secure assets.[16] However, in the colonies, attachment--where the plaintiff was allowed to satisfy his claim out of the attached assets--was not restricted to cases of foreign attachment as in England. Given the strict conceptions of personal jurisdiction which limited the power of a court to defendants within the territory, quasi in rem jurisdiction developed and flourished as a means of softening the rigors of personal jurisdiction. However, to the extent that the bases for personal jurisdiction have expanded under International Shoe, quasi in rem jurisdiction is no longer necessary.

Nowhere have the bases for personal jurisdiction expanded farther than in California where a "court . . . may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[17] Hence, the arguments stated herein apply with fullest effect to California. The continued viability of the concept of quasi in rem jurisdiction is subject to some doubt under the new jurisdictional statute and comment. The Approved Judicial Council Comment to Code of Civil Procedure Section 410.10 discusses 11 bases of jurisdiction over individuals (presence, domicile, residence, citizenship, consent, appearance, doing business in state, doing an act in state, causing effect in state by act or omission elsewhere, ownership, use or possession of thing in state where cause of action arises from the thing, and other relationships) and nine bases of jurisdiction over partnerships, associations, and corporations (incorporation in state, consent, appointment of agent, appearance, doing business in state, doing an act in state, causing effect in state by act or omission elsewhere, ownership, use

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16. Mussman & Riesenfeld, supra note 15, at 10; C. Drake, A Treatise on the Law of Suits by Attachment in the United States § 3 (7th ed. 1891); Millar, supra note 14, at 485-493.

17. Code Civ. Proc. § 410.10.

or possession of thing in state where the cause of action arises from the thing, and other relationships). According to the comment to Section 410.10, the section "permits the California courts to exercise judicial jurisdiction" when not unconstitutional.

> Judicial jurisdiction in its broadest sense is the power of a state, through any of its courts . . . to create legal interests which will be recognized and enforced in all the states. . . . Within a state's boundaries, this power is plenary . . . . [Citing Pennoyer v. Neff.] Outside the state, such power is limited to instances in which "a defendant . . . [has] certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [Citing, inter alia, International Shoe and Atkinson v. Superior Court.]

Since the comment discusses judicial jurisdiction in terms of the effect which will be given a judgment in other states, it would appear that quasi in rem jurisdiction does not fit into Section 410.10. However, in the introduction to the comment, "other recognized bases" are listed; these are (1) traditional in rem actions, (2) "judicial jurisdiction to apply to the satisfaction of a claim interests in a thing that is subject to the court's judicial jurisdiction," (3) divorce of domiciliaries, and (4) "other proceedings relating to status": separation, annulment, support, custody, adoption, and the like. Except for the second category (which seems to be traditional quasi in rem jurisdiction), these other types of cases have traditionally been entitled to full faith and credit. In sum, the inclusion of the quasi in rem category in the "other recognized bases" contradicts both the general and detailed discussion following it in the comment. Probably the comment is purposefully vague on this point since, by avoiding the traditional categories of jurisdiction and by relying consistently on the International Shoe test, Section 410.10 and its comment indicate a desire to be free of the old conceptions. Paul Li, one of the draftsmen for the Judicial Council's Special Committee on Jurisdiction which prepared

the new law and the comments, clearly states his view that "quasi in rem has been ripe for oblivion."[18] However, Li says that the new section "permits, but would not require, California courts to maintain the distinction between jurisdiction in personam and jurisdiction in rem or quasi in rem."[19] But he emphasizes that the statute and comment make no mention of the traditional concepts; "thus, CCP § 410.10 would permit California courts to eliminate those distinctions in devising any new system of state court jurisdiction."[20] Apparently, there is as yet no authoritative statement by the courts regarding quasi in rem jurisdiction, for no case directly dealing with the new statute has been found which clears up the ambiguity.

The problem of jurisdictional attachment arose in an oblique manner in both Sniadach v. Family Finance Corporation and Fuentes v. Shevin. Both of these cases mention Ownbey v. Morgan,[21] which upheld Delaware's foreign attachment scheme, in their discussion of exceptional circumstances where notice and hearing would not be required before attachment. Professor Riesenfeld discusses the treatment of Ownbey on page 3 of his memorandum (attached). A fuller quotation from Justice Douglas' opinion in Sniadach, however, sheds some light on the meaning of his citation of Ownbey:[22]

> Such summary procedure may well meet the requirements of due process in extraordinary situations. Cf. . . . Ownbey v. Morgan . . . . But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition. Petitioner was a resident of this Wisconsin community and in personam jurisdiction was readily obtainable.

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18. Li, supra note 7, at 155, citing Atkinson v. Superior Court; Carrington, supra note 7; and Hazard, supra note 7.

19. Id. at 160-161.

20. Id. at 161.

21. 256 U.S. 94 (1921).

22. 395 U.S. at 339.

The last sentence is very important since it implies that, if in personam jurisdiction had not been readily obtainable, the situation might have been considered extraordinary enough to allow seizure without notice and hearing. (Of course, jurisdictional necessity can only occur if quasi in rem jurisdiction is constitutional.) Several commentators have taken this to be the meaning of the reference to Ownbey in Sniadach; and they and others have recommended that, if jurisdictional attachment without notice and hearing is to be allowed, it should be permitted only when personal jurisdiction is not available.[23] Further support for this reading of Sniadach may be found in

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23. See, e.g., Riesenfeld, Background Study Relating to Attachment and Garnishment 27-30 (Cal. L. Revision Comm'n, Oct. 13, 1970, revised Oct. 22, 1970); Jackson, Attachment in California--What Now?, 3 Pacific L.J. 1, 8-9, 13 n.99 (1972); Recent Developments, Creditor-Debtor Law--Wage Garnishment in Washington: A Postscript--Washington's New Garnishment Statute, 46 Wash. L. Rev. 423, 430 (1971); The Supreme Court, 1968 Term, 83 Harv. L. Rev. 113, 115-116 (1969); Comment, Constitutional Law: Garnishment Without Notice and Hearing is Denial of Due Process, 54 Minn. L. Rev. 853, 861 (1970); Note, Some Implications of Sniadach, 70 Colum. L. Rev. 942, 950, 953 (1970); Comment, Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp.: A Constitutional Fly in the Creditor's Ointment, 34 Alb. L. Rev. 426, 439 (1970); Comment, Attachment and Garnishment in California--In Need of Reform, U.C. Davis L. Rev. 57, 67 (1971); Note, The Demise of Summary Prejudgment Remedies in California, 23 Hastings L.J. 489, 511 (1972). J. Skelly Wright in his dissent in Tucker v. Burton, 319 F. Supp. 567, 572, at 577 (D.C.D.C. 1970)(three-judge court) states: "And what is absolutely clear from a reading of Ownbey and Sniadach is that 'nonresidency' will be a factor justifying a rule of summary procedure only insofar as it is a reliable indicator that the debtor may otherwise be able to escape his legal obligations. The reality which creates an 'extraordinary situation' and which justifies the summary procedure of prejudgment garnishment is the unavailability of the debtor for personal service--in this case in the District." But see Lebowitz v. Forbes Leasing & Finance Corp., 456 F.2d 979 (3d Cir. 1972), cert. denied, 93 S. Ct. 42 (1972), where the court, relying on the U.S. Supreme Court's failure to overrule Ownbey and McKay v. McInnes, upheld Pennsylvania's foreign attachment statute used to get quasi in rem jurisdiction even though personal jurisdiction was available. The court did not deal with the question of fairness to the defendant, probably because jurisdictional fairness was not an issue since personal jurisdiction was available. Two judges found a "compensating governmental interest" in compelling nonresidents to appear. Furthermore, the court found value in the certainty of quasi in rem jurisdiction and mentioned that foreign attachment was useful to preserve assets until the defendant made his general appearance. Judge Gibbons, in a concurring opinion, discounted the reasoning of the court and at least raised the fairness issue of International Shoe; however, he too felt bound by Pennoyer, Ownbey, and McKay. As the cite indicates, the Supreme Court denied certiorari.

footnote 23 of Fuentes v. Shevin[24] which cites Ownbey v. Morgan as a case involving "attachment necessary to secure jurisdiction in state court--clearly a most basic and important public interest." However, no U.S. Supreme Court decision has squarely faced the problem of jurisdictional attachment from the standpoint of jurisdictional fairness. The California court in Randone v. Appellate Department[25] hesitantly noted that the Ownbey decision was cited by Sniadach, but the court pointed out that, at the time of the Ownbey decision, attachment of the defendants' property was often the only way jurisdiction could be obtained over nonresidents who inflicted injuries on residents. The California Supreme Court did nothing to clear up the doubts about jurisdictional attachment, nor have any of the court of appeal cases cited by Professor Riesenfeld since apparently none of them were actions quasi in rem in which the jurisdictional basis was challenged. Furthermore, no recent California or U.S. Supreme Court decision has been found which expressly favors quasi in rem jurisdiction.[26]

The staff agrees that jurisdictional attachment should be limited at least to cases where personal jurisdiction is unavailable. However, as already discussed, the staff feels that the use of attachment for obtaining jurisdiction should be eliminated entirely, not only in part. To allow jurisdictional attachment only where it cannot be obtained otherwise does nothing to solve the problem of the unfairness to the defendant of requiring him to defend (or default) where it is unfair to bring an action against him in personam. It is the opinion of the staff that this unfairness is significant enough to justify

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24. 407 U.S. 67 at 91 (1972).

25. 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

26. But cf. Lebowitz v. Forbes Leasing and Finance Corp., discussed supra note 23.

the recommended elimination of quasi in rem jurisdiction regardless of whether or not the unfairness is ultimately determined to be of constitutional dimensions.

The problem of enforcing sister-state judgments against assets in California, traditionally handled by way of an action quasi in rem, is discussed at the end of Part II (see page 17 infra).

II. Nonresidency as Grounds for Attachment--Is Nonresidency an "Exceptional Circumstance"?

Regardless of the conclusion concerning attachment as a basis of jurisdiction, a second question needs to be considered: whether mere nonresidency should be grounds for attachment (and, if so, in what types of cases). While the questions of jurisdictional attachment and nonresident attachment may be distinct, they are not necessarily so. If it is decided that quasi in rem jurisdiction should be retained, it will be necessary to retain nonresident attachment since the defendant's assets have to be attached to confer jurisdiction.[27] However, it is possible to eliminate quasi in rem jurisdiction while retaining nonresident attachment in all or some cases. Therefore, to separate the quasi in rem problem from the discussion, it will be assumed that the plaintiff can get personal jurisdiction over the nonresident defendant, and the question becomes whether he should be able to get an ex parte writ of attachment.

The staff concludes that mere nonresidency--that is, the mere fact of owning property in one state and being a resident of another--should not be a permissible basis for issuance of a writ of attachment without notice and hearing. Rather the plaintiff should have to show that great or irreparable injury would result, such as by showing that the defendant would probably transfer assets, before an ex parte writ would issue.

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27. See Note, The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-Examined, 63 Harv. L. Rev. 657 (1950).

Professor Riesenfeld discusses the constitutional aspects of summary attachment of nonresident assets in the attached memorandum on pages 3-5. As Professor Riesenfeld says, the U.S. Supreme Court's mention of Ownbey v. Morgan[28] in its Sniadach and Fuentes decisions left the matter quite unsettled. But these cases may mean that ultimately ex parte attachment will not be allowed in the absence of jurisdictional necessity.[28a] Furthermore, neither the U.S. nor California Supreme Courts have ruled that the creditor interest in preserving assets, as opposed to the state interest in jurisdiction, justifies overriding the debtor interest in notice and hearing before his property is attached. These considerations would seemingly restrict attachment of nonresident assets to cases where necessary to secure jurisdiction. However, it should be noted that the U.S. Supreme Court denied certiorari in one recent case--Lebowitz v. Forbes Leasing and Finance Corporation[29]--where two judges of the third circuit ruled that foreign attachment without notice and hearing was constitutional even where not required for jurisdictional purposes apparently based on an assumed need to preserve assets both before and after a general appearance. The opinion of the court was reluctant regarding continuing the attachment after the appearance, and the concurring judge rejected its validity completely; however, both opinions felt bound by precedent.

Also significant is Property Research Fin. Corp. v. Superior Court,[30] where the court of appeal found that the creditor's interest in effective process was one requiring special protection through ex parte attachment despite the defendant's interest in due process. Other cases upholding

28. 256 U.S. 94 (1921).

28a. See authorities cited supra note 23.

29. Discussed supra note 23.

30. 23 Cal. App.3d 413, 100 Cal. Rptr. 233 (1972).

nonresident attachment on the basis of creditors' need to preserve defendants' assets (but not involving the fairness of jurisdictional attachment) are Ortleb v. Superior Court,[31] Lefton v. Superior Court,[32] Banks v. Superior Court,[33] Damazo v. MacIntyre,[34] and National General Corp. v. Dutch Inns of America, Inc.[35]

Professor Riesenfeld concludes from an examination of California cases--primarily Randone and Property Research--that:

> Prior notice and hearing is not required in commercial nonresident attachments even when nonjurisdictional. In consumer cases, the legal situation is more dubious.

However, it should be noted that the Randone decision lays emphasis on the jurisdictional necessity aspect of Ownbey and that both Sniadach and Fuentes discuss Ownbey in relation to jurisdictional necessity. Although the California Supreme Court has denied hearings in several of the court of appeal cases cited above, it has not authoritatively decided the matter of the constitutionality of nonresident attachment. Consequently, the staff feels it is as yet not certain that attachment based on mere nonresidency is constitutional in all cases. But, regardless of the constitutional issue, the staff concludes that mere nonresidency should not automatically be deemed an "exceptional circumstance" justifying the issuance of an ex parte writ. Rather, where the court has personal jurisdiction over the defendant, the ex parte writ should be issued on the same basis as in the case of

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31. 23 Cal. App.3d 424, 100 Cal. Rptr. 471 (1972).

32. 23 Cal. App.3d 1018, 100 Cal. Rptr. 598 (1972).

33. 26 Cal. App.3d 143, 102 Cal. Rptr. 540 (1972).

34. 26 Cal. App.3d 18, 102 Cal. Rptr. 609 (1972).

35. 15 Cal. App.3d 490, 93 Cal. Rptr. 343 (1971).

resident defendants. (See proposed Section 485.010.) The vague notion that nonresident defendants as a group may more readily transfer assets to avoid collection (unsupported by any data indicating the significance of its occurrence) does not justify allowing the allegation of nonresidence to provide the basis for issuance of a writ of attachment before any determination is made as to the probable validity of the plaintiff's claim. Of course, if the plaintiff can show that great or irreparable injury would result, or that the defendant would probably transfer his assets in the state, then the ex parte writ is justified.

However, in one important area, there is a need for an ex parte writ without having to show the likelihood of great or irreparable injury--where the plaintiff has already obtained a judgment against the defendant in another state. Professor Riesenfeld cites, as an example of the situation where there is a need to issue a writ of attachment on the basis of the defendant's nonresidency, the case where a New York plaintiff seeks to collect on a New York judgment against assets of the New York defendant which are in California. (See page 2 of the attached memorandum.) This situation, says Professor Riesenfeld, under current law, requires attachment as the basis of quasi in rem jurisdiction in an action to enforce the sister-state judgment in California. This need reflects an archaic concept of enforcement of sister-state judgments. Professor Riesenfeld notes that, in the federal courts and under the Uniform Enforcement of Foreign Judgments Act,[36] such a procedure is unnecessary since judgments of other courts are simply registered whereupon they are effective without any need to show jurisdiction and bring an independent action to establish the judgment. However,

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36. 9A Uniform Laws Ann. 474 (1948 Act) and 486 (1964 Act).

Professor Riesenfeld states that only four states have adopted the Uniform Act--actually as of December 1, 1970, six states had adopted the 1948 Act which employs a summary judgment procedure (Arkansas, Illinois, Missouri, Nebraska, Oregon, and Washington) and nine states had adopted the 1964 Act which provides a simple registration system (Arizona, Colorado, Kansas, New York, North Dakota, Oklahoma, Pennsylvania, Wisconsin, and Wyoming). The staff suggests that the principle of the 1964 Act be adopted in California, thereby eliminating the need for attachment since execution could be issued upon registration. (The 1964 Act is discussed in detail in Part V.)

(If the 1948 Act is preferable, then attachment would be issuable on the basis of the defendant's nonresidency to secure assets between filing and summary judgment. The 1948 Act is attached as Exhibit II.)

The registration procedure with the immediate availability of execution makes sense because the defendant already will have had an opportunity to contest the claim,and the actual validity (not just the probable validity) of plaintiff's claim will have been adjudicated. By eliminating the need for an independent action, the Uniform Act saves judicial time and creditor expense.

(If the 1964 Uniform Act is adopted, mere nonresidency would never be grounds for issuance of a writ of attachment, and attachment would never be the basis of jurisdiction. As another alternative, if the traditional means of enforcing sister-state judgments is retained under the basic scheme recommended here, nonresidency in and of itself would be a basis for issuing a writ of attachment only where an existing sister-state judgment is sought to be enforced and, in that limited case, attachment would provide the basis of jurisdiction.)

III. Current Law

Under the Marsh bill (Chapter 550), ex parte attachment is allowed in any action for the recovery of money against any person not residing in the state, including any foreign corporation not qualified to do business in the state and any foreign partnership which has not designated an agent for service of process in the state. (Sections 537.1(b), 537.2(d), and 538.5(d).) Under Section 537.3(c), all property of such defendants not exempt from execution may be attached. Interestingly, under Section 538.5(d), if the nonresident defendant makes a general appearance in the action, the court on defendant's motion may release the attachment. Such attachment may, of course, be the basis of jurisdiction.

IV. Staff Proposal

Under the staff's proposal and the draft attachment statute, ex parte attachment could be issued against a nonresident defendant on the same basis as against a resident defendant: to secure recovery on a claim for money based on contract arising out of the conduct by the defendant of a trade, business, or profession where it is shown that great or irreparable injury would otherwise result to the plaintiff. (Sections 483.010(a) and 485.010.) Execution (and ex parte attachment on grounds of nonresidency depending on the sister-state judgment enforcement procedure) would be issuable upon registration of the foreign judgment for money damages. Of course, any type of money judgment from a sister state could be enforced. Thus, quasi in rem jurisdiction would be eliminated (with the possible exception of actions to enforce foreign judgments under present procedures). Actions in tort or contract could not be brought solely on the grounds that the defendant has property in the state unrelated to the cause of action. Where personal jurisdiction exists, the plaintiff would have to show something beyond the mere nonresidency of the defendant to obtain an ex parte writ. Finally, the process of enforcing sister-state judgments would be simplified by a registration system. This proposal would be a "Middleground No.3" to be added to Professor Riesenfeld's list on page 6 of his memorandum. The staff's proposal eliminates the problems of procedure discussed by Professor Riesenfeld on pages 7-8 (particularly problems of special, limited, and general appearances) since quasi in rem jurisdiction would cease to exist.

V. Statutory Changes

In order to avoid the technical need for having quasi in rem jurisdiction to enforce a sister-state judgment against a defendant's assets in California, the staff recommends that the Revised 1964 Uniform Enforcement of Foreign Judgment Act[37] be enacted in appropriate form. The act, with recommended changes, is as follows:

> § 1. Definition.--In this Act "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

Note: For some reason, the definition of foreign judgments is not restricted to money judgments although the act later speaks of creditor and debtor. To remedy this inconsistency, Pennsylvania added the words "requiring the payment of money" after "other courts." (12 Penn. Stat. Ann. § 921 (Supp. 1972).) This change should be adopted. New York restricts judgments enforceable by the Uniform Act to exclude those "obtained by default in appearance, or by confession of judgment" (N.Y. C.P.L.R. § 5401 (Supp. 1972)), but this seems unnecessary.

> § 2. Filing and Status of Foreign Judgments.--A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the Clerk of any [District Court of any city or county] of this state. The Clerk shall treat the foreign judgment in the same manner as a judgment of the [District Court of any city or county] of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a [District Court of any city or county] of this state and may be enforced or satisfied in like manner.

Note: The bracketed parts would read "superior court" or "superior court or municipal court." As an alternative, the section could read as follows:

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37. 9A Uniform Laws Ann. 486.

A copy of any foreign judgment authenticated in accordance with the act of Congress or the laws of this state may be filed in the office of the clerk of any court of this state which would have had subject matter jurisdiction over the action had it been commenced first in this state. The clerk shall treat the foreign judgment in the same manner as a judgment of a court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of the court of this state in which filed and may be enforced or satisfied in like manner. [Based on Colo. Rev. Stat. Ann. 1963, 1969 Cum. Supp., §§ 77-13-3.]

§ 3. Notice of Filing.--(a) At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the Clerk of Court an affidavit setting forth the name and last known post office address of the judgment debtor, and the judgment creditor.

(b) Promptly upon the filing of the foreign judgment and the affidavit, the Clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the Clerk. Lack of mailing notice of filing by the Clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

[(c) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until [ ] days after the date the judgment is filed.]

Note: Subdivision (c) was not adopted in New York, Pennsylvania, or Kansas. It was adopted in the six other states which enacted the Uniform Act with time periods running from five to 20 days. Subdivision (c) should not be adopted since it would undercut the effort to secure the debtor's assets. Of course, a protective procedure could be provided, but it seems simpler to allow the issuance and levy of a writ of execution immediately. New York law provides that "the proceeds of an execution shall not be distributed to the judgment creditor earlier than thirty days after filing

of proof of service." (N.Y. C.P.L.R. § 5403 (Supp. 1972).) Pennsylvania and Kansas just omit subdivision (c). (12 Penn. Stat. § 923 (Supp. 1972); Kan. Stat. Ann. § 60-3003 (Supp. 1971).) Either procedure seems acceptable.

With reference to subdivision (b), the New York law simply provides that "within thirty days after filing of the judgment and the affidavit, the judgment creditor shall mail notice of filing of the foreign judgment to the judgment debtor at his last known address." (N.Y. C.P.L.R. § 5403 (Supp. 1972).) This seems preferable to the Uniform Act procedure, which is somewhat repetitive and confusing.

> § 4. Stay.--(a) If the judgment debtor shows the [District Court of any city or county] that an appeal from the foreign judgment in pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.
>
> (b) If the judgment debtor shows the [District Court of any city or county] any ground upon which enforcement of a judgment of any [District Court of any city or county] of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

Note: The brackets in subdivision (a) would read "court." The first bracketed part in subdivision (b) would read "court" and the second "such court" (deleting "any").

> § 5. Fees.--Any person filing a foreign judgment shall pay to the Clerk of Court _____ dollars. Fees for docketing, transcription or other enforcement proceedings shall be as provided for judgments of the [District Court of any city or county of this state].

Note: This section could be omitted (as in Wisconsin--Wisc. Stat. Ann. § 270.96 (Supp. 1972)), but it is probably better to have the section refer over to basic fees provisions (as in New York, Pennsylvania, and Oklahoma).

§ 6. Optional Procedure.--The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this Act remains unimpaired.

Note: The staff recommends that this section be deleted for the reasons stated in the preceding part--i.e., primarily to avoid the problem of jurisdictional attachment and duplicative court proceedings. Of course, the enforcement of non-money judgments remains the concern of other provisions which may or may not require an independent action to establish the sister-state judgment, but such cases do not depend on quasi in rem jurisdiction. (If the alternative of proceeding by independent action to establish the judgment is retained, it should be limited to cases where California has personal jurisdiction over the judgment debtor. As a less desirable alternative, quasi in rem jurisdiction could be retained for the limited case of enforcing sister-state judgments.)

§ 7. Uniformity of Interpretation.--This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 8. Short Title.--This Act may be cited as the Uniform Enforcement of Foreign Judgments Act.

Note: These sections would be enacted as they are.

The Uniform Act, as altered, would best be located in the execution title of the Code of Civil Procedure (Part 2, Title 9), as a new Chapter 4. It seems inappropriate to locate it where the provision requiring independent actions to enforce foreign judgments is located--Part 4 (Miscellaneous Provisions), Title 2 (of the Kinds and Degrees of Evidence), Chapter 3 (Writings), Article 2 (Public Writings).

Of course, certain other conforming and editorial changes would need to be made.

In sum, as is evident from the discussion under Section 6 of the Uniform Act, the staff proposes that the registration procedure under the Uniform Act be the only method of enforcing sister-state money judgments. There is no strong reason to continue the common law doctrine which required an independent action to establish the foreign judgment. If this alternative is adopted, there is no need for attachment in the enforcement of foreign judgments because the judgment becomes effective upon registration and the creditor then proceeds by way of execution (or some other supplementary remedy).

Two other alternatives exist: The present enforcement procedure could be retained as it is or the Uniform Act could be enacted while the present procedure is retained as an alternative (as is provided by Section 6 of the Uniform Act). If either of these alternatives is chosen, attachment as a basis for jurisdiction may be retained in the limited case where the plaintiff is attempting to enforce a foreign judgment. Attachment in such a case is needed to secure defendant's assets; and, under traditional conceptions, attachment before judgment is needed to provide the basis of the court's jurisdiction.

Of course, the old procedure of bringing an independent action could be retained and limited to the enforcement of money judgments where the state has jurisdiction over the judgment debtor. Thus, jurisdictional attachment would be eliminated while partially honoring tradition.

If quasi in rem jurisdiction in actions to enforce foreign judgments is retained, certain changes would have to be made in the Commission's attachment statute. Language would have to be added to Section 483.010 as follows:

> An attachment may be issued to secure the recovery on a judgment for money damages rendered by a court of another state or the United States which is entitled to full faith and credit in an action brought to establish such judgment.

Of course, certain editorial and conforming changes would have to be made in Section 483.010 and elsewhere. In addition, the difficult problems of limited, specical, and general appearance mentioned by Professor Riesenfeld would have to be dealt with. Additionally, a phrase would have to be added to Section 485.010(b) dealing with the grounds for an ex parte writ:

> The defendant is a nonresident [individual, corporation . . . , partnership . . .] in an action brought by the plaintiff to establish a judgment for money damages rendered by a court of another state or the United States which is entitled to full faith and credit.

However, the recommended course is to provide for simple and efficient enforcement of foreign judgments by registration, thereby obviating any need for quasi in rem jurisdiction founded on the attachment of a nonresident's property in the state.

Respectfully submitted,

Stan G. Ulrigh
Legal Assistant

Memorandum 73-4

EXHIBIT I

THE MODERN UTILITY OF QUASI IN REM JURISDICTION

Paul D. Carrington *

Professor Carrington examines the proposed amendment to the Federal Rules of Civil Procedure that would confer quasi in rem jurisdiction on the federal courts and concludes that it should be rejected. Arguing that the expansion of the concept of personal jurisdiction has removed most of what justification there once was for quasi in rem jurisdiction, the author maintains that the latter jurisdiction often provides only limited and uncertain judgments for local plaintiffs while compelling nonresident defendants to litigate in an inconvenient forum, and therefore should not be made available in the federal courts merely to bring their practice into conformity with that of the courts of the states.

NOW that the venerable concept of quasi in rem jurisdiction has largely outlived its utility, it is proposed at long last to make it available in the federal courts. It must be conceded that the proposal of the Advisory Committee on Civil Rules to amend rule 4 [1] for this purpose would bring federal courts into line with the practice in state courts and with long standing Anglo-American tradition. But greater justification than this should be required before such an antique device is appended to our modern court apparatus.

It is helpful to understanding to recall that the default judgment was unknown to English law as recently as 250 years ago. Perhaps because the defendant's presence was essential to trial by ordeal, the primitive court would not proceed without him. If he were contumacious, his presence would be compelled. One of the milder forms of duress employed for this purpose was the

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[1] The proposal was first made by the Supreme Court's Advisory Committee in 1955. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 10, 12–14 (1955). None of the 23 proposals made in this report was adopted. In 1960, Chief Justice Warren appointed a new committee; in January of 1961, it proposed three amendments which were adopted in April of that year. 81 Sup. Ct. 22 (1961). In October 1961, the Committee published a draft of 23 proposals, one of them being a repetition of the earlier proposed amendment to rule 4. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 6–9 (1961).

writ of attachment, which directed the sheriff to seize and hold the defendant's goods until he appeared and conducted his defense. The only purpose of this remedy was to compel appearance; if the defendant appeared, his goods were discharged.[2] A variation on this practice evolved in the Lord Mayor's Court in London, where the defendant's property was attached and his debts garnished without notice to him; the property was turned over to the plaintiff and the debtors were directed to pay their debts to the plaintiff on his pledge to make restitution if the defendant should appear and disprove the debt within a year and a day.[3]

The default judgment was recognized in the eighteenth century.[4] The writ of attachment and its companion process of garnishment were then found to have other uses. While there were many variations in form, a common purpose of the American legislation dealing with attachment and garnishment was to assure the successful plaintiff satisfaction of his claim. Thus, these provisional remedies were available only upon the plaintiff's making affidavit that the defendant was of a class of persons likely to frustrate a writ of execution and filing bond to secure the defendant against wrongful attachment.[5]

These statutes were, however, also bent to the purpose of solving another problem which had been created with the recognition of the default judgment — that of remote litigation. A plaintiff cannot be permitted to compel his defendant to go to a distant court under threat of a default judgment; if the default is to be binding, the plaintiff must select a proper court. The principal restraint on the plaintiff's choice among American courts has been the requirement of service of process as a basis for personal jurisdiction.[6] This requirement was satisfied by personal delivery to the defendant or his agent or to his place of abode.

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[2] See generally MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 74–97 (1952); 3 BLACKSTONE, COMMENTARIES *279.

[3] This practice was recorded by LOCKE, FOREIGN ATTACHMENT IN THE LORD MAYOR'S COURT (1853). It may have Roman ancestry. DRAKE, ATTACHMENT 1 (7th ed. 1891).

[4] Beginning with Act To Prevent Frivolous and Vexatious Arrests, 12 Geo. 1, c. 29 (1725).

[5] For a general survey of attachment statutes in many states, see Sturges & Cooper, *Credit Administration and Wage Earner Bankruptcies*, 42 YALE L.J. 487, 503–510 (1933). The custom of London extended only to actions of debt. Early American law limited provisional remedies to contract actions. DRAKE, *op. cit. supra* note 3, at 10–27. Most of these limitations have been removed however.

[6] The classic discussions are the opinions in Pennoyer v. Neff, 95 U.S. 714 (1887). The modern vitality of that decision is exhibited in the doubtful case of Hanson v. Denckla, 357 U.S. 235 (1958). As Justice Hunt's dissent in Pennoyer v. Neff

The difficulties of satisfying this requirement present the plaintiff's horn of the dilemma: he should not be frustrated by the furtive defendant who is skillful at evading the process server. The statutory remedies of attachment and garnishment offered an ameliorative, for one class of defendants against whom the statutory writs could be employed were nonresidents. Where the defendant or his domicile cannot be found by the process server, the plaintiff can direct the sheriff to attach his property or summon his debtors; if the defendant then fails to appear, his assets are liquidated to satisfy the resulting default judgment. This is the familiar pattern of what has come to be known as quasi in rem jurisdiction.[7] So long as the courts insisted on a restrictive concept of personal jurisdiction and required service of process as a requisite of a valid default judgment, the quasi in rem jurisdiction served the useful purpose of mitigating the rigors of securing personal jurisdiction. Many of the cases in which the plaintiff was forced to invoke quasi in rem jurisdiction were disputes that in fairness ought to have been subject to the decision of a local forum, which decision the defendant could otherwise have evaded by staying beyond the reach of the process server.

A line of rather questionable decisions has established that attachment and garnishment are not available in the federal courts until jurisdiction over the person of the defendant has been obtained by service of process.[8] This deprives the federal plaintiff of the possibility of using the quasi in rem jurisdiction to compel an appearance by a nonresident defendant and has been a source of dissatisfaction for some time.[9] And, as Professor Currie has

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suggests, some early American courts were satisfied with the citizenship of the plaintiff as a basis for jurisdiction. *E.g.*, Butterworth v. Kinsey, 14 Tex. 495 (1855).

[7] The modifier "quasi" is always objectionable. It is used here to distinguish in rem proceedings in which the title to the property involved is itself the subject of litigation and in personam proceedings in which attachment and garnishment may be employed as provisional remedies to conserve assets for later execution. It does not adequately distinguish actions in which the plaintiff seeks to vindicate his pre-existing claim to the property against a nonresident defendant. Most such claims may be brought in the federal courts under 28 U.S.C. § 1655 (1958). Some difficulty is encountered in applying this statute to accommodate enforcement of liens on interests which are not "property within the district." For a thorough discussion of this problem, see Annot., 30 A.L.R.2d 208 (1953).

[8] Davis v. Ensign-Bickford Co., 139 F.2d 624 (8th Cir. 1944). For a collection and criticism of the cases, see Currie, *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337 (1961). Use of local provisional remedies against a defendant already before the court is assured by FED. R. CIV. P. 64.

[9] An early protest was voiced by Judge Lowell in Dormitzer v. Illinois & St. Louis Bridge Co., 6 Fed. 217, 218 (C.C.D. Mass. 1881). See also Currie, *supra* note 8; Blume, *Actions Quasi in Rem Under Section 1655, Title 28, U.S.C.*, 50 MICH.

recently observed,[10] it is perhaps an anomaly that attachment and garnishment cannot be used in an original action in a federal court for their historic purpose of compelling appearance, although they are available in state courts for that purpose.[11]

The anomaly, however, is an anomalous exception to an anachronistic rule. In the light of the emerging concept of personal jurisdiction, the quasi in rem procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff. The modern development has been thoroughly analyzed and explained elsewhere;[12] it is sufficient here to observe that there is no longer any constitutional inhibition on the exercise of jurisdiction in personam over a defendant whose contacts with the state make it reasonably fair that he be asked to defend the claim in its courts. The contact may be sufficient to sustain constructive or substituted service of process if the defendant has "done business,"[13] solicited[14] or made[15] contracts, operated a motor vehicle,[16] or committed a tort[17] in the state, at least in actions arising out of the defendant's

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L. REV. 1, 8–9 (1951); Note, 34 CORNELL L.Q. 103 (1948); Note 13 So. CAL. L. REV. 361 (1940). A rather queer limitation to the rule was applied in Hearst v. Hearst, 15 F.R.D. 258 (N.D. Cal. 1954), 68 HARV. L. REV. 367, which held that a writ of garnishment might be issued by a federal court in anticipation of prospective service of process, although the writ would not suffice as a basis for further proceeding and should be quashed when service appeared unlikely. *Cf.* Jacobson v. Coon, 165 F.2d 565, 567 (6th Cir. 1948).

[10] Currie, *supra* note 8, at 338.

[11] The anomaly is seemingly emphasized by the established federal practice permitting removal of actions commenced by attachment or garnishment, 28 U.S.C. § 1450 (1958), but the inadequacy of quasi in rem procedure is not a reason to deny the defendant's right to remove in a proper case. This does not explain Rorick v. Devon Syndicate, 307 U.S. 299 (1939), which held that a federal court could, after removal of such a case, attach additional property without obtaining jurisdiction over the person of the defendant. That regrettable decision seems to rest on the mistaken notion that the statute (then REV. STAT. § 646 (1875)) was inconsistent with former decisions denying the use of quasi in rem jurisdiction in the federal courts.

[12] *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[13] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935); International Harvester Co. v. Kentucky, 234 U.S. 579, 583, 589 (1914).

[14] International Shoe Co. v. Washington, 326 U.S. 310 (1945); Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

[15] Compania de Astral v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955). *But cf.* Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

[16] Hess v. Pawloski, 274 U.S. 352 (1927).

[17] Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951).

activities which relate him to the jurisdiction.[18] All that is constitutionally required is that the legitimate interest of the plaintiff in securing relief in the forum of his selection bear a reasonable relation to the burdens imposed on the nonresident defendant who is called upon to defend in a distant forum.[19] Thus, corporate defendants are perhaps more amenable to these "long-arm" jurisdictional devices than individual defendants whose personal conveniences are entitled to greater weight.[20] And defendants in highly regulated businesses such as insurance may be very exposed indeed, for insurance plaintiffs are recognized as having an especially proper need for local protection.[21]

While only a few legislatures have as yet fully explored the possibilities for extending the jurisdiction of their courts, a wide variety of statutes providing more occasions for the use of constructive and substituted service of process[22] and judicial relaxation extending the availability of older statutes[23] have made the personal jurisdiction problem no longer the obstacle it once was to the plaintiff who seeks a reasonably accessible forum for his case. The plaintiff who must resort to quasi in rem proceedings is seeking to compel an appearance by (or impose a forfeiture on) a defendant who, so far as appears, has inadequate contact with the state to make him fairly answerable to the claim there, or who is not of a class of defendants the legislature has seen fit to subject to the judgments of its courts. Indeed, the only contact of the defendant with the community which will be established will be the fortuitous one that his property or his debtor happens to be there at the time of commencement of the action. It has been suggested that quasi in rem jurisdiction is necessary to discourage debtors from putting their property beyond the reach of a writ of

[18] The qualification was suggested by Chief Justice Stone in the landmark case of International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). Its importance in some cases may be exemplified in L. D. Reeder Contractors v. Higgins Indus., 265 F.2d 768 (9th Cir. 1959). *But cf.* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[19] *Developments in the Law — State-Court Jurisdiction*, *supra* note 12, at 924.

[20] Ehrenzweig, *Pennoyer Is Dead — Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285, 292 (1958).

[21] McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia *ex. rel.* State Corp. Comm'n, 339 U.S. 643 (1950).

[22] See WIS. STAT. § 262.05 (1959); ILL. REV. STAT. ch. 110, § 17 (1961). It is perhaps still an open question whether such devices for out-of-state service are available in a federal court under rule 4(d)(7) or rule 4 (f).

[23] *E.g.*, Jarrard Motors, Inc. v. Jackson Auto & Supply Co., 237 Miss. 660, 115 So. 2d 309 (1959); Henry R. Jahn & Son v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958).

execution.[24] Of course, such an avoidance provides only momentary escape since a personal judgment against the debtor can be enforced by collateral proceedings where his assets are found; this is especially so in the federal system where statutory provision is made for the registration of judgments of other district courts.[25] And, at most, the suggestion argues only for quasi in rem commencement conditioned upon a showing by the plaintiff that such an exercise of jurisdiction is necessary to avoid unnecessary litigation or absconding. It is not an argument for the foreign attachment where abundant assets are available in a forum in which the defendant can be subjected to personal jurisdiction.

It is manifestly unsatisfactory to expose the defendant to quasi in rem litigation which is based on a garnishment summons served on a nonresident garnishee;[26] in such cases, there is no showing that the defendant has any voluntary contact with the forum state. A fairminded application of the balancing-of-interests test applied in personal jurisdiction cases would lead to a rejection of jurisdiction in most cases in which the plaintiff is forced to resort to such a garnishment. And it is an almost equally harsh doctrine that exposes the defendant to the hazards of litigation simply because he has purchased local property or extended credit to a local debtor, or entrusted goods to a local carrier where the litigation is unrelated to the property or debt.[27] Quite acceptable is the policy of the statute of Pennsylvania, for instance, which exposes landowners to jurisdiction in personam in actions arising out of their ownership.[28] But it is inconsistent with the modern requirement of rational forum selection to require the property owner to answer any and all claims upon pain of forfeiting his property. Indeed, Professor Ehrenzweig has suggested that it is unreasonably arbitrary to permit the plaintiff to acquire jurisdiction solely on the basis of service of process.[29] Whether or not this is so, the chance capture of property or debtor is surely a

[24] 1 BEALE, CONFLICT OF LAWS § 106.1 (1935).

[25] 28 U.S.C. § 1963 (1958); see 7 MOORE, FEDERAL PRACTICE ¶ 69.03(3) (2d ed. 1954).

[26] *E.g.*, Harris v. Balk, 198 U.S. 215 (1905). For an example of the sort of shenanigans invited, see Siro v. American Express Co., 99 Conn. 95, 121 Atl. 280 (1923). *But cf.* Abel v. Smith, 151 Va. 568, 144 S.E. 616 (1928).

[27] Where the claim is related, at least as to the local property and goods, there is no obstacle to its assertion in federal court. See note 7, *supra*.

[28] PA. STAT. ANN. tit. 12, § 331 (1953). The statute was upheld in Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (Phila. County Ct. 1938).

[29] *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

slender justification for compelling the defendant to enter the jurisdiction to defend.[30]

The most forceful argument for the preservation of such wooden, irrational procedures as service of process and quasi in rem jurisdiction is their simplicity. Future rulemakers may conclude that our present effort to rationalize the choice of forum has failed: that the time and energy devoted to resolving disputes about fairness and accessibility are excessive costs for the benefits derived.[31] Even this argument is not easy to make with reference to the most irrational procedure involved in quasi in rem jurisdiction, for such proceedings have produced a substantial amount of uneconomic dispute not pertaining to the merits. An example is the sterile line of cases dealing with the situs of intangibles, which apparently must be located before they can be attached.[32] And, in any event, if the effort-economy argument is to prevail and a return to more formalized tests is to be made, more drastic reforms than the extension of quasi in rem jurisdiction to the federal courts are in order. Otherwise the emerging expansion of personal jurisdiction takes on the appearance of class warfare. The same concept of "fair play" invoked to favor plaintiffs in extending personal jurisdiction must be available to favor defendants in restricting the quasi in rem jurisdiction. The present restriction should therefore be preserved whether it is anomalous or not. The present rulemakers should take their stand in favor of fairness and evenhandedness in preference to doctrinal symmetry.

Unfairness to the defendant, however, is not the only consideration which militates against the proposed amendment to the rules. The value of the quasi in rem jurisdiction to the federal plaintiff is likely to be more apparent than real because of the other limitations on the availability of a federal forum and because of the persistence of doubts as to the efficacy of the limited

[30] This view was shared by Justice Story. Picquet v. Swan, 19 Fed. Cas. 609, 614 (No. 11134) (C.C.D. Mass. 1828). *But see* Currie, *supra* note 8, at 345–49.

[31] The potential for delay of the devices for challenging the selection of a forum has only begun to manifest itself. A cursory examination of the cases collected by West Publishing Co. in its digests will reveal that the process is already costly. It was this consideration that led the Supreme Court of Washington to reject the doctrine of forum non conveniens. Lansverk v. Studebaker-Packard Corp., 54 Wash. 2d 124, 338 P.2d 747 (1959). The decision is criticized by Trautman, *Forum Non Conveniens in Washington — A Dead Issue?* 35 WASH. L. REV. 88 (1960).

[32] See Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241 (1939).

judgment, which may make a quasi in rem victory indecisive.

First, it must be observed that the quasi in rem plaintiff will have to meet the restrictions of the federal venue statutes.[33] Under these statutes, most actions cognizable in a federal court may be brought only in districts in which the defendant is available for service of process. For example, actions against individuals which arise under federal law may be brought only in the district in which all the defendants reside.[34] In such cases the defendant can generally be served at his residence.[35] Actions against corporations may be brought in districts in which they are incorporated, qualified to do business, or doing business.[36] Such corporations are subject to service of process under the pertinent qualifications statutes.[37] The irrationality of these federal venue provisions has been elsewhere remarked; [38] it is enough here to observe that few cases remain in which resort to quasi in rem procedure is advantageous to the federal plaintiff. Two classes of cases are exceptional: actions in which jurisdiction is based on diversity of citizenship may be brought in the district in which all defendants or all plaintiffs reside,[39] and actions against aliens may be brought in any district.[40] A third class of exceptional cases may exist to the extent that it is possible for a defendant to have a residence in

[33] The venue requirements have been held to be inapplicable to lien enforcement proceedings brought under 28 U.S.C. § 1655 (1958) and its forebears. Greeley v. Lowe, 155 U.S. 58 (1894). The superficial similarity might suggest that this exception to the venue requirements be extended to include actions brought under the proposed new rule. But control of the property in dispute is essential to the relief sought under § 1655; hence the venue requirement is clearly inappropriate. This is not so with reference to the more personal liabilities sought to be enforced by the nonresident attachment proceedings brought under the proposed rule. Furthermore, the language of § 1655 deals specially with the problem of nonresidents and hence suggests an abandonment of residence requirements imposed by other statutes. This is to be contrasted with rule 82 which declares that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

[34] 28 U.S.C. § 1391(b) (1958).

[35] Fed. R. Civ. P. 4(d)(1) authorizes service by leaving a copy of the summons and complaint at the defendant's "dwelling house or usual place of abode with some person of suitable age and discretion." "Dwelling place" is more inclusive than residence. Rovinski v. Rowe, 131 F.2d 687 (6th Cir. 1942); Pickford v. Kravetz, 17 Fed. Rules Serv. 4d.121, Case 1 (S.D.N.Y. 1952); *cf.* First Nat'l Bank & Trust Co. v. Ingerton, 207 F.2d 793 (10th Cir. 1953).

[36] 28 U.S.C. § 1391(c) (1958).

[37] Fed. R. Civ. P. 4(d)(3)(7).

[38] Barrett, *Venue and Service of Process in the Federal Courts — Suggestions for Reform*, 7 Vand. L. Rev. 608 (1954).

[39] 28 U.S.C. § 1391(a) (1958).

[40] 28 U.S.C. § 1391(d) (1958).

the jurisdiction for purposes of the venue statute, but not of the sort sufficient to justify the use of abode service.[41] Only in such cases might the plaintiff be advantaged by the proposed amendment.[42]

Even in such cases, however, the success of the plaintiff in forcing the defendant into the forum jurisdiction may be fleeting. Another section of the federal venue statutes provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.[43]

If the plaintiff can find no basis for personal jurisdiction over the defendant, the chances are good that the convenience of the parties and witnesses and the interest of justice will indicate that some other district would be a more appropriate forum.[44] It seems likely that this provision would frustrate some plaintiffs proceeding quasi in rem. It will, however, be a frustration less often than might be expected because of the recent and regrettable decision of the Supreme Court in *Hoffman v. Blaski*,[45] which held transfer permissible only to districts in which the plaintiff might have successfully initiated the action over the protest of the defendant. This would be a substantial limitation on the use of section 1404 in a routine diversity case commenced quasi in rem, inasmuch as the only available transferee district would generally

[41] The residence requirement in the venue statute is generally equated to domicile. King v. Wall & Beaver Street Corp., 145 F.2d 377 (D.C. Cir. 1944). It is, of course, possible to have a domicile in the jurisdiction without having an "abode" for purposes of rule 4(d)(4). See cases cited in note 35 *supra*. Many states, however, exercise jurisdiction over their domiciliaries by constructive service; this practice was upheld against constitutional challenge in Milliken v. Meyer, 311 U.S. 457 (1940). To the extent that state procedures are available in federal courts under rule 4(d)(7) or rule 4(f), this third possibility is eliminated.

[42] Professor Currie, *supra* note 8, at 375 suggests that the rules be "rectified in anticipation of a revision of the venue statutes." Sufficient to the day is the evil thereof; it seems eminently wise to see what these revisions might be before altering the rules in aid of unidentified future classes of plaintiffs at the expense of unidentified future classes of defendants.

[43] 28 U.S.C. § 1404(a) (1958).

[44] Very little effort has been made to articulate standards beyond those stated in the statute, which is taken to be addressed to the sound discretion of the trial court. Southern Ry. v. Madden, 235 F.2d 198 (4th Cir.), *cert. denied*, 352 U.S. 953 (1956); Trust Co. v. Pennsylvania R.R., 183 F.2d 640 (7th Cir. 1950); Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950); New York C. & St. L.R.R. v. Vardaman, 181 F.2d 769 (8th Cir. 1950). See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.3 (Wright ed. 1958).

[45] 363 U.S. 335 (1960).

be the district in which all the defendants reside.[46] The idea expressed in the majority opinion in the *Hoffman* case was the grammar-school morality that fairness required equality in the use of venue statutes and the requirement of service of process. The Court thus smote the defendant with his own shield, for these requirements were imposed for his benefit to equalize the plaintiff's advantage of making the initial choice of forum. Clearly, the convenience of the plaintiff must be considered in the administration of section 1404, but the limitations of the venue statute which the Court invoked are not related to that consideration and have no purposeful application to the problem.

To the extent that transfer is unavailable, the inconvenienced defendant may yet seek relief in the discretionary power of the federal court to dismiss on the ground of forum non conveniens.[47] Dismissal is a more drastic remedy than transfer, however, and the defendant who seeks it will have a heavier burden in showing inconvenience sufficient to justify relief.[48] Another difficulty is suggested by the recent holding of the Supreme Court of Minnesota that forum non conveniens is not available unless the defendant is available for involuntary service of process in the convenient forum.[49] This is a reasonable protection of the plaintiff only in a court which is unwilling to employ the practice developed in New York [50] of conditioning the dismissal upon the de-

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[46] If the action were commenced at the defendant's residence, § 1404 might afford transfer to the plaintiff's residence, but there is seldom reason to commence an action quasi in rem at the defendant's residence inasmuch as personal service is generally available there. See note 41 *supra*.

[47] Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Professor Currie was very critical of this decision. Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 416–38 (1955). Arguably forum non conveniens did not survive the adoption of § 1404(a). See Hoffman v. Blaski, 363 U.S. 335, 342 (1960) (the doctrine is referred to as "superseded"). No mention is made of it in the legislative history, however, and it is still invoked in international cases, where the statutory remedy of transfer is unavailable, although a strong showing of inconvenience is necessary to secure a dismissal forcing an American plaintiff to go abroad. Burt v. Isthmus Development Co., 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955); Lesser v. Chevalier, 138 F. Supp. 330 (S.D.N.Y. 1956).

[48] Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955). The court was silent on the issue of possible deference to state law; it was apparently assured, as it was in Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947), that federal law should prevail over any state doctrine on dismissal or transfer for inconvenience. *Accord*, Willis v. Weil Pump Co., 222 F.2d 261 (2d Cir. 1955).

[49] Hill v. Upper Mississippi Towing Corp., 252 Minn. 165, 89 N.W.2d 654 (1958). *Accord*, Tivoli Realty v. Interstate Circuit, 167 F.2d 155, 156 (5th Cir. 1948).

[50] Wendel v. Hoffman, 259 App. Div. 732, 18 N.Y.S.2d 96, *appeal dismissed*,

fendant's appearance in the most convenient forum. This is now a familiar practice in federal admiralty jurisdiction,[51] and there is no reason why it should not be extended to ordinary diversity cases in which the plaintiff has made an unacceptable choice of forum. The more restrictive use of forum non conveniens would be in keeping with *Hoffman v. Blaski*, but no reason is apparent why that lamentable decision should be extended to limit the discretionary as well as the statutory remedy.[52]

The foregoing limitations on the availability of a federal forum exclude most of the cases in which a plaintiff might be advantaged by the availability of quasi in rem jurisdiction. It must be conceded that among the cases excluded are most of the worst. But the restrictions on transfer and dismissal leave a small residue of cases in which a nonresident or alien defendant would be unable to escape from litigation in a forum with only a fortuitous claim on his property. Even within this short range of cases, however, it is not clear that a plaintiff with a meritorious claim would be wise to seek the limited judgment thus available to him.

The most familiar hazard is the possibility of a limited appearance by the defendant, which, if permitted, will necessitate multiple litigation for full satisfaction of the plaintiff's claim. This is a hazard only in cases where the plaintiff has attached property insufficient to satisfy his claim. A substantial line of authority,[53] which has recently been endorsed by Professor Currie,[54] has held that a defendant in an in rem proceeding is not limited to the ugly alternatives of defaulting or subjecting himself to the juris-

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284 N.Y. 588, 29 N.E.2d 664 (1940). *Accord*, Vargas v. A.H. Bull S.S. Co., 25 N.J. 293, 135 A.2d 857 (1957), *cert. denied*, 355 U.S. 958 (1958).

[51] *Cf.* Swift & Co. Packers v. Compania Colombiana del Caribe, 339 U.S. 684, 697–98 (1950).

[52] The *Hoffman* decision was heavily dependent on the "plain words" of § 1404(a) which were said to require the result. See 363 U.S. at 342–44.

[53] McQuillen v. National Cash Register Co., 112 F.2d 877 (4th Cir.), *cert. denied*, 311 U.S. 695 (1940); Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., 285 Fed. 214 (6th Cir. 1922); Miller Bros. v. State, 201 Md. 535, 95 A.2d 286 (1953), *reversed on other grounds*, 347 U.S. 340 (1954); Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 112 N.E. 500 (1916). In Harnischfeger Sales Corp. v. Sternberg Co., 179 La. 317, 154 So. 10 (1934), the court held that the appearance of the Mississippi defendant in a quasi in rem proceeding did not suffice to sustain a judgment in personam. But in a later action in Mississippi for the deficiency, it was held that the defendant had had its day in court on the defense asserted in the Louisiana action. Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189 Miss. 73, 191 So. 94 (1939), *modification refused on rehearing*, 189 Miss. 73, 195 So. 322 (1940).

[54] Currie, *supra* note 8, at 379–80.

diction of the forum. He need not fish or cut bait, but may appear under protest, asserting that he does not intend to be bound by the judgment of the court except to the extent of the property which the court has impounded by attachment or garnishment. This device has the merit of affording defendants a shield against plaintiffs with weak claims who hope to secure modest relief through a quasi in rem judgment against property having value small in proportion to the liability which the defendant would hazard by a general appearance. On the other hand, this shield is also useful for the unworthy defendant who may employ it to compel the plaintiff to establish his meritorious claims twice before receiving full satisfaction. This is, of course, a result very much at odds with the modern concept of res judicata. A number of courts, including most of the federal courts recently considering the problem, have balanced the choice between mitigating the duress and permitting multiple litigation on the merits of the same claim, and have concluded that the limited appearance should be refused, forcing the defendant to appear or default.[55] Professor Moore has endorsed this veiw.[56] The proposed amendment to rule 4 is silent on the issue of the limited appearance, but inasmuch as the whole thrust of the amendment is a reference to a state law, it may be presumed that the Committee would contemplate its use in states in which it is permitted in local courts, although federal courts have thus far dealt with the problem as a matter of federal procedure.[57] To the extent that the limited appearance would be available in some federal courts, it would pose a threat to a plaintiff considering the use of quasi in rem proceeding against property of inadequate value.

An alternative risk faces the plaintiff who is successful by reason of the defendant's default in an action commenced by attachment of assets inadequate to cover his claim. When the plaintiff

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[55] United States v. Balonovski, 236 F.2d 298 (2d Cir. 1956), *cert. denied*, 352 U.S. 968 (1957); Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953); Campbell v. Murdock, 90 F. Supp. 297 (N.D. Ohio 1950); Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 117 A.2d 365 (Sup. Ct. 1955).

[56] 2 FEDERAL PRACTICE ¶ 12.13 (2d ed. 1961). See also Note, 25 IOWA L. REV. 329 (1940).

[57] See federal cases cited note 53 *supra*. Some significance seems to be attached to FED. R. CIV. P. 12 which abolishes the *special* appearance; clearly this rule is irrelevant to the issue of the limited appearance. Professor Currie, *supra* note 8, at 379–80, suggests that the rules should be amended to provide for a limited appearance regardless of the prevailing state rule. The issue of deference to state law is a part of the larger question raised by the whole quasi in rem procedure; this is discussed below.

seeks to recover the balance of his claim in a second jurisdiction, it may become the defendant's turn to plead res judicata. He may then invoke as a defense the familiar injunction against splitting the cause of action. All of the existing authority which is squarely in point is against this defense.[58] But modern cases abound which evidence a willingness to require plaintiffs to settle for a single remedy in situations where a judgment for full satisfaction might have been had; the problem is not too distant from cases holding that the plaintiff may not recover a judgment of ejectment and later seek equitable relief,[59] or seek contract damages in one action and reformation in another,[60] or seek personal injury damages in one action and property damages in another.[61] Cases holding against the defendant on the issue of res judicata have reasoned woodenly that the absence of personal jurisdiction prevents the merger of personal rights into a personal judgment. A more functional approach might suggest that it would be desirable to encourage economy of litigation by requiring the plaintiff to resolve his dispute whole in one lawsuit. Surely this is no more stringent than the burden imposed on the defendant with reference to a compulsory counterclaim,[62] and it is in accord with the modern trend.[63] And it would seem to be very fair in a jurisdiction which does not recognize the limited appearance, for when the two issues are placed in juxtaposition, it is not unreasonable to urge that the plaintiff cannot have it both ways: if the defend-

[58] Strand v. Halverson, 220 Iowa 1276, 264 N.W. 266 (1935); Riverview State Bank v. Dreyer, 188 Kan. 270, 362 P.2d 55 (1961); Oil Well Supply Co. v. Koen, 64 Ohio St., 422, 60 N.E. 603 (1901).

[59] Hahl v. Sugo, 169 N.Y. 109, 62 N.E. 135 (1901); *cf.* McCaffrey v. Wiley, 103 Cal. App. 2d 621, 230 P.2d 152 (Dist. Ct. App. 1951). *But cf.* Adams v. Pearson, 411 Ill. 431, 104 N.E.2d 267 (1952). See generally Note, 104 U. Pa. L. Rev. 955 (1956).

[60] Hennepin Paper Co. v. Fort Wayne Corrugated Paper Co., 153 F.2d 822 (7th Cir. 1946); *cf.* Wischmann v. Raikes, 168 Neb. 728, 97 N.W.2d 551 (1959); Massari v. Einsiedler, 6 N.J. 303, 78 A.2d 572 (1951). *But cf.* Woodbury v. Porter, 158 F.2d 194 (8th Cir. 1946).

[61] Dearden v. Hey, 304 Mass. 659, 24 N.E.2d 644 (1939); Rush v. City of Maple Heights, 167 Ohio St. 221, 147 N.E.2d 599, *cert. denied*, 358 U.S. 814 (1958). *Contra*, Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 62 N.E. 772 (1902).

[62] Fed. R. Civ. P. 13(b). The draftsman proposed also to amend this rule to make it inapplicable to actions commenced quasi in rem. This is an explicit recognition of the inconsistency of the quasi in rem judgment with the rules approach to complete litigation. By pointing to this contrast, the writer does not wish to be taken as giving full approval to the compulsory counterclaim rule, which may well be overzealous in its push for total litigation.

[63] *Developments in the Law — Res Judicata*, 65 Harv. L. Rev. 818, 826 (1952).

ant is entitled to only one day in court, the plaintiff should be entitled to only one also. The egalitarian morality of *Hoffman* seems considerably more appropriate to this situation than to that in which it was invoked.

It has been observed that both the limited appearance and the alternative split-action rule are restraints only when the plaintiff is unable to find adequate assets in the jurisdiction to cover his entire claim. But even if he finds sufficient assets, there may yet be a chance that the fruits of the default victory will escape his grasp, if he is subject to service of process in another state more generally convenient to the parties. This possibility arises from the prospects of a later action by the defaulting defendant against the quasi in rem plaintiff for unjust enrichment. The theory of such an action would be that the deliberate choice of a forum inconvenient to the defendant for a claim of doubtful merit is so unfairly coercive as to constitute duress vitiating the plaintiff's rights to the proceeds of the former action. The authority for recovery on such a theory, as Professor Dawson has observed,[64] is remarkably sparse. The authority discovered is largely adverse to recovery,[65] and there are two fairly obvious contentions to be made by the defendant in the restitution action. The first is that he merely used legal processes in a manner permitted by law and therefore cannot be condemned as a wrongdoer disentitled to the benefits obtained. This is not, however, a complete answer, for it is clear that the present plaintiff is entitled to restitution if he can show an improper motive in the use of legal processes; a showing that the former plaintiff knew that his claim was groundless would be sufficient to show such an improper motive.[66] Impropriety has also been found, however, where a plaintiff with a claim of possi-

[64] *Duress Through Civil Litigation*: I, 45 MICH. L. REV. 571, 596 (1947). Professor Dawson's appraisal of the possibilities of future developments in such cases is that:

> The limited use so far made in this area of the concept of duress can be in large part explained by the general considerations of policy already suggested, which quite rightly produce hesitation. In part, however, it appears to be due to the survival of older ideas, which associate duress with blackmail or even perhaps with mayhem, and which therefore inspire a search for some misconduct by the creditor to which disapproval can attach. In the future more decisions can be expected to support the broad proposition that where a sufficient degree of pressure is shown to exist in fact and the resulting transaction is sufficiently unjust, the means that are normally most legitimate can become an instrument of extortion.

Id. at 598.

[65] Ochivto v. Prudential Ins. Co. of America, 356 Pa. 382, 52 A.2d 228 (1947); *cf.* Security Sav. Bank v. Kellems, 321 Mo. 1, 9 S.W.2d 967 (1928); Annot., 18 A.L.R. 1233 (1922).

[66] RESTATEMENT, RESTITUTION § 71(1)(a) (1937).

ble merit insisted on presenting his claim at a time [67] or place [68] inconvenient to his alleged debtor. These cases would sustain restitutionary recovery by a quasi in rem defendant who anticipates the judgment by satisfying his creditor's claim. This suggests defendant's second argument against restitution, which can be made only if the judgment is entered and the assets held subject to the judgment are liquidated pursuant to it. This is the familiar cry of res judicata — that the judgment has laid the merits to rest. This is troublesome, however, for the quasi in rem defendant has not yet had his day in court; he has had only an opportunity to litigate, and that in an inconvenient forum. A modern court, fully indoctrinated in the enthusiasm for the convenient forum and the abandonment of mechanical anachronisms, could reasonably conclude that the quasi in rem judgment was binding only on the property, not on the absent parties, and that the time for litigation on the merits underlying the claim had not yet passed. Surely, it has been a historic function of the unjust enrichment remedy to relieve miseries caused by the wooden attributes of the doctrine of res judicata.[69]

The hazard to the quasi in rem plaintiff of such a restitutionary liability may perhaps be dismissed as remote. At the worst, the plaintiff has succeeded in shifting the moving oar, if at the cost of some attorneys' fees. It is probable that most defendants having meritorious defenses would prefer venturing their case in the forum selected by the plaintiff to risking a devious restitutionary counterattack. Whether or not the hazards discussed are sufficient to demolish the attraction to the plaintiff of quasi in rem jurisdiction, a consideration of these problems serves at least to illuminate the inadequacies of a half-baked quasi in rem judgment. These inadequacies are the result of a historic lack of conviction about the fairness of requiring a defendant to respond in a jurisdiction whose only claim on him is its chance capture of his goods or debtor. There is no place for such a process in a procedural system which emphasizes the search for a forum which can in fairness lay the whole dispute to rest.

[67] Vyne v. Glenn, 41 Mich. 112, 1 N.W. 997 (1879); American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350 (1921). *But cf.* Myers v. Watson, 204 Iowa 635, 215 N.W. 634 (1927).

[68] Kelley v. Osborn, 86 Mo. App. 239 (1900); Collins v. Westbury, 2 S.C. (Bay) 211 (1799); *cf.* Standard Roller Bearing Co. v. Crucible Steel Co. of America, 71 N.J. Eq. 61, 63 Atl. 546 (Ch. 1906). *But cf.* Dickerman v. Lord & Smith, 21 Iowa 338 (1886).

[69] See, *e.g.*, the leading case of Moses v. MacFerlan, 2 Burr 1005, 97 Eng. Rep. 676 (K.B. 1760).

Of course, the federal rulemakers cannot, on their own, shield the defendant against quasi in rem jurisdiction so long as it is available in state courts.[70] It is this fact, alone perhaps, which induced the Advisory Committee to make its proposal; for the one argument advanced in favor of a change in rule 4 was that "there appears to be no reason for denying plaintiffs means of commencing actions in federal courts which are generally available in the state courts." [71] This plea for conformity between state and federal law is, of course, an expression of the deferential policy first espoused in *Erie R.R. v. Tompkins*.[72] The *Erie* decision was drastic and deliberate and had the quality of great drama: the response was so enthusiastic and the applause so deafening that the Court and its audience were lost in encores [73] and failed to attend to the competing needs of *Erie*'s sibling, the Federal Rules of Civil Procedure.[74] When the cheering subsided, however, there were critics to be heard,[75] and the most recent decisions of the Supreme Court [76] are indicative of an awareness that excessive deference by the federal courts to local practice in all matters potentially affecting the outcome of litigation is destructive of the rights of federal litigants. Perhaps some of the encore cases were less praiseworthy than the *Erie* decision itself.

One case which seems worthy of reconsideration is *Woods v. Interstate Realty Co.*,[77] which relates to the problem at hand. It

[70] It would surely be regarded as a usurpation to amend § 1450 to provide for a dismissal of removal cases commenced by attachment or garnishment. See note 11 *supra*.

[71] COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 8 (1955).

[72] 304 U.S. 64 (1938).

[73] Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Angel v. Bullington, 330 U.S. 183 (1947); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Griffin v. McCoach, 313 U.S. 498 (1941); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[74] A poet-judge has described the *Erie* decision as a prenatal injury to the rules. Hoosier Cas. Co. v. Fox, 102 F. Supp. 214, 222 (N.D. Iowa 1951) (Graven, J.). See also Merrigan, *Erie to York to Ragan—A Triple Play at the Federal Rules*, 3 VAND. L. REV. 711 (1950).

[75] An early, strident voice was Keeffe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L.Q. 494 (1949). More telling perhaps are Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509–13 (1954) and Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958).

[76] Magenau v. Aetna Freight Lines, 360 U.S. 273 (1959); Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958).

[77] 337 U.S. 535 (1949). Compare Angel v. Bullington, 330 U.S. 183 (1947).

will be recalled that the Court there held that the federal courts in Mississippi were bound to apply a statute of that state which disabled nonqualifying foreign corporations doing business there from maintaining suit in the courts of the state. The majority opinion was dependent on the bromide that all matters classified as outcome-determinative were to be adjudged by federal courts in diversity cases on the basis of local law: since state law barred recovery in state court, it was a bar in the federal court in a diversity case. This is hard law; Justice Jackson observed in dissent:

> The state statute as now interpreted by this Court is a harsh, capricious and vindictive measure. It either refuses to entertain a cause of action, not impaired by state law, or it holds it invalid with unknown effects on amounts already collected. In either case the amount of this punishment bears no relation to the amount of wrong done the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which sustained the injury, but results in unjust enrichment of the debtor, who has suffered no injury from the creditor's default in qualification.[78]

It must be conceded to the majority that there is some unseemliness in the employment of federal jurisdiction to frustrate Mississippi's regulation of foreign corporations if, as the majority believed, that was what Mississippi sought to do. But the jurisdictional amount requirement[79] assures that the frustration would not be complete: the unqualified foreign corporation would still have no relief for small claims. And it is, after all, the mission of the diversity jurisdiction to protect nonresident litigants from just such harshness.[80] State rules which are fashioned especially for nonresidents are too likely to bear the imprint of hometown prejudices to be entitled to willy-nilly application in courts which should serve as bulwarks against such prejudices. The omnibus application of the *Erie* rule suggested by the majority opinion would not only deny the use of the Federal Rules of Civil Procedure in diversity cases, it would rob the diversity jurisdiction of purpose and meaning. If this is the intent, integrity would require abolition.

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[78] 337 U.S. at 539–40.

[79] Now $10,000 in diversity and federal-question cases. 28 U.S.C. §§ 1331, 1332 (1958).

[80] THE FEDERALIST No. 80 (Hamilton); Hart, *supra* note 75; Hill, *supra* note 75; Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22–28 (1948); see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

The problem of quasi in rem proceedings in diversity cases calls even more forcefully for the application of a federal policy. This is so, first, because there is no sound reason for invoking the *Erie* tradition. The most frequently articulated purpose in applying state law in diversity cases is the avoidance of forum-shopping, but it is clear that forum-shopping is not encouraged by the present system of closing the federal forum to quasi in rem actions and thereby limiting the plaintiff's choice to the state court. And it is also true that there is little substance to the local policy embodied in the continued use of quasi in rem procedure in local courts. In this respect, the *Interstate Realty* case is distinguishable. There is also an essential difference to be seen between providing a federal forum to a nonresident plaintiff who is barred by state law, and denying a federal forum to a resident plaintiff who is protected under state law, for in the one case the local policy is frustrated and in the other it is not. The recent decision of the Second Circuit in *Jaftex Corp. v. Randolph Mills, Inc.*[81] is here worthy of notice. The court there offered as one ground for its decision the conclusion that amenability to service of process under rule 4(d)[82] is to be determined by federal law, thus rejecting the contention of the defendant that sound application of the *Erie* doctrine required application of an especially restrictive New York concept of "doing business." This holding is consistent with the position taken above, but it is not consistent with the practice in other circuits[83] and was the subject of a vigorous dissent by Judge Friendly,[84] who urged that there is no articulated federal policy as to the amenability of foreign corporations to service of process and no sufficient reason exists for not giving effect to New York policy. Both opinions are subject to criticism for failure to perceive the difference between a federal policy which is more permissive than the state policy with respect to the demands which may be made on the nonresident defendant and

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[81] 282 F.2d 508 (2d Cir. 1960).

[82] Alternatively, the court held that Randolph Mills was "doing business" in New York by any standard.

[83] Partin v. Michaels Art Bronze Co., 192 F.2d 541 (3d Cir. 1953); Albritton v. General Factors Corp. 201 F.2d 138 (5th Cir. 1953); Canvas Fabricators, Inc. v. William E. Hooper & Sons Co., 199 F.2d 485 (7th Cir. 1952); Steinway v. Majestic Amusement Co., 179 F.2d 681 (10th Cir. 1949). *But see* Riverbank Laboratories v. Hardwood Products Corp., 350 U.S. 1003 (1956), *reversing per curiam*, 220 F.2d 465 (7th Cir. 1955), *on remand*, 236 F.2d 255 (7th Cir. 1956). See generally, Note, 67 YALE L.J. 1094 (1958).

[84] 282 F.2d at 516.

one that is less permissive. Judge Friendly is probably wrong in relying on the absence of a federal policy on the issue before the court: if there is none, there should be, and there is no time like the present for beginning to work it out. But he is probably right in result for the reason that it is not consistent with any purpose of the federal diversity jurisdiction for the federal courts to be more outreaching than the state courts. If, as Judge Friendly suggests it might, New York should choose to send its plaintiffs to North Carolina to sue corporations like Randolph Mills, so that North Carolina corporations will thereby be encouraged to deal with New Yorkers, there is no federal interest which can justify the frustration of that policy by opening a federal forum in New York to the New York plaintiffs.[85] This is to be more Roman than the Pope. Where, on the other hand, New York or another state is overreaching, and seeking to expose to liability nonresident defendants who are not adequately connected with the forum, it would be highly proper for the federal courts to refuse to conform, to force the plaintiff to use the state courts for such skulduggery, and to provide only the defendant with the choice of a federal forum.[86] Even more proper is the preservation of this historic form of protest against the use of quasi in rem jurisdiction.

Whether or not the alternative holding in the *Jaftex* case is sound, it may yet be favored as a welcome signpost of the new awareness of the federal courts to their responsibility for high standards of justice in diversity cases, a responsibility too long forgotten. What Professor Currie has condemned as a historic stupidity[87] has become a modern wisdom, for the proposed amendment to rule 4 is regrettably out of step, not only with the modern quest for a fair choice of forum but also with the long-awaited and now emerging concept of the proper role of the federal diversity jurisdiction.

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[85] *Per contra* where the local policy excludes actions between nonresidents as an economy in the operation of the state courts. Willis v. Weil Pump Co., 222 F.2d 261 (2d Cir. 1955).

[86] The advisors could well consider the amendment of rule 4(d) to assure that federal courts will exercise their responsibility in shaping the emerging principles of forum selection. When the implications of this suggestion are considered, however, it is obvious that substantive policy factors are entitled to more weight in the decision than the rulemaking process is equipped to give them. Perhaps the advisors should address themselves to Congress. *Cf.* FED. R. CIV. P. 82. *But cf.* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946).

[87] *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337 (1961).

EXHIBIT II

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT

1948 ACT

Sec.

Be it enacted .....

§ 1. **Definitions.**—As used in this Act

(a) "Foreign judgment" means any judgment, decree or order of a court of the United States or of any State or Territory which is entitled to full faith and credit in this state.

(b) "Register" means to [file and] [docket and] [record] a foreign judgment in a court of this state.

(c) "Levy" means to take control of or create a lien upon property under any judicial writ or process whereby satisfaction of a judgment may be enforced against such property.

(d) "Judgment debtor" means the party against whom a foreign judgment has been rendered.

Commissioners' Note

No distinction is made between judgments and decrees requiring the payment of money, ordering or restraining the doing of acts, or declaring rights or duties of any other character, whether entered in law or equity, in probate, guardianship, receivership, or any other type of proceedings. The fact that there is a "judicial proceeding" entitled to full faith and credit within the meaning of Article IV, Section 1, of the United States Constitution is the only criterion employed.

§ 2. **Registration of Judgment.**—On application made within the time allowed for bringing an action on a foreign judgment in this state, any person entitled to bring such action may have a foreign judgment registered in any court of this state having jurisdiction of such an action.

Commissioners' Note

Throughout the Act, as in this section of it, the law of the state in which the foreign judgment is to be registered is to furnish the substantive or procedural guide for such matters as who may initiate the registration proceeding, the court in which registration may be had, and the statute of limitations.

§ 3. **Application for Registration.**—A [verified] [petition] for registration shall set forth a copy of the judgment to be registered, the date of its entry and the record of any subsequent entries affecting it [such as levies of execution, payments in partial satisfaction and the like] all authenticated in the manner authorized by the laws of the United States or of this state, and a prayer that the judgment be registered. The Clerk of the registering court shall notify the clerk of the court which rendered the original judgment that application for registration has been made, and shall request him to file this information with the judgment.

Commissioners' Note

The Act undertakes to lay down no new methods for authentication of the judicial proceedings of other states. The full faith and credit clause of the Constitution authorizes the federal Congress "by general laws (to) prescribe the manner in which such * * * proceedings shall be proved and the effect thereof," and by its act of May 26, 1790 (Rev.Stats., Sec. 905; Comp.Laws, sec. 1519; 28 U.S.C.A., sec. 687 [1738]) the Congress prescribed a method for authentication. Since then the Congress has for all practical purposes been silent, though the constitutional clause undoubtedly empowers it to go much further than it has gone. Most of the state enactments do little more than repeat, with small variances of language, the provisions of the federal Act of 1790. Others of them authorize different procedures. If the federal enactment is complied with the authentication is adequate in any event, but the procedure set out by it is not exclusive, and a foreign judgment may permissibly be proved in accordance with a state's statutory procedure or in accordance with common law methods, as well as in the federally prescribed manner. The final sentence in the section is designed to afford reasonable protection to any person who might for any reason rely on the record of the original judgment without having received other notice of the pendency of the registration proceeding.

§ 4. **Personal Jurisdiction.**—At any time after registration the [petitioner] shall be entitled to have [summons] [issued and] served upon the judgment debtor as in an action brought upon the foreign judgment, in any manner authorized by the law of this state for obtaining jurisdiction of the person.

Commissioners' Note

This section is designed to lay a foundation upon which a new personal judgment may subsequently be rendered, on the old judgment as a cause of action, against the judgment debtor.

§ 5. **Notice in Absence of Personal Jurisdiction.**—If jurisdiction of the person of the judgment debtor cannot be obtained, a [notice] [summons] clearly designating the foreign judgment and reciting the fact of registration, the court in which it is registered, and the time allowed for pleading, shall be sent by the Clerk of the registering court by registered mail to the last known address of the judgment debtor. Proof of such mailing shall be made by certificate of the Clerk.

Commissioners' Note

The first sentence of this section is designed to achieve a double purpose. For one thing, it will assure fairness to the judgment debtor by making it reasonably certain that he will actually learn about what is being done with the judgment that has been rendered against him; for another thing, it will lay a foundation upon which a new judgment quasi in rem can validly be entered against the property of the judgment debtor levied upon in the state where the judgment is being registered, under section 12, infra.

§ 6. **Levy.**—At any time after registration and regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained, a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to execution or other judicial process for satisfaction of judgments.

Commissioners' Note

The right to levy on property of the judgment debtor at once after registration of the judgment, without waiting until the registered judgment becomes a final judgment of the state of registration, can operate to give to judgment creditors a type of relief almost as efficient as would be the case if execution could be issued directly on the foreign judgment. The procedure is substantially similar to what is variously known as attachment, trustee process, garnishment, distress, factorizing, and the like. In addition, it includes the functions of the ordinary writs of execution.

§ 7. **New Personal Judgment.**—If the judgment debtor fails to plead within [sixty days] after jurisdiction over his person has been obtained, or if the court after hearing has refused to set the registration aside, the registered judgment shall become a final personal judgment of the court in which it is registered.

Commissioners' Note

The effect of the Act is to set up a summary judgment procedure specially suited to actions on foreign judgments. Recent discussions of summary judgment procedure include Clark and Samenow, The Summary Judgment, 1929, 38 Yale L.Jour. 423; Shientag and Cohen, Summary Judgments in the Supreme Court of New York, 1932, 32 Col.L.Rev. 825; Finch, Summary Judgment Procedure, 1933, 19 Amer.Bar Assn.Jour. 504; Saxe, Summary Judgments in New York—A Statistical Study, 1934, 19 Corn.L.Q. 237; Rothschild, Summary Judicial Power, 1934, 19 Corn.L.Q. 361; Shientag, Summary Judgment, 1935, 4 Fordham L.Rev. 186; Chadbourn, A Summary Judgment Procedure for North Carolina, 1936, 14 N.C.L.Rev. 211; McCabe, Summary Judgment, 1938, 11 So.Calif.L.Rev. 436; Suggs and Stumberg, Summary Judgment Procedure, 1944, 22 Texas L.Rev. 433; Kennedy, The Federal Summary Judgment Procedure, 1947, 8 Brooklyn L.Rev. 5.

§ 8. **Defenses.**—Any defense [set-off] [counter-claim] [or cross complaint] which under the law of this state may be asserted by the defendant in an action on the foreign judgment may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions. Such pleadings must be filed within [sixty days] after personal jurisdiction is acquired over him or within [sixty days] after the mailing of the notice prescribed in section 5.

Commissioners' Note

Under the full faith and credit clause, there are certain defenses, particularly lack of jurisdiction in the court rendering the judgment, payment of the judgment and fraud or collusion in its procurement, which the judgment debtor may properly raise in a later suit on the judgment. The uniform act is so drafted as to secure a judgment debtor the essentials of due process of law in minimum form, at the same time giving him reasonable opportunity to present every defense which under the law he is entitled to present.

§ 9. **Pendency of Appeal.**—If the judgment debtor shows that an appeal from the original judgment is pending or that he is entitled and intends to appeal therefrom, the court shall, on such terms as it thinks just, postpone the trial for such time as appears sufficient for the appeal to be concluded, and may set aside the levy upon proof that the defendant has furnished adequate security for satisfaction of the judgment.

§ 10. **Effect of Setting Aside Registration.**—An order setting aside a registration constitutes a final [judgment] in favor of the judgment debtor.

§ 11. **Appeal.**—An appeal may be taken by either party from any [judgment] [order] [or decision] sustaining or setting aside a registration on the same terms as an appeal for a [judgment] [order] [or decision] of the same court.

§ 12. **New Judgment Quasi in Rem.**—If personal jurisdiction of the judgment debtor is not secured within [sixty days] after the levy and he has not, within [sixty days] after the mailing of the notice prescribed by section 5, acted to set aside the registration [or to assert a set-off] [counter-claim] [or cross-complaint] the registered judgment shall be a final judgment quasi in rem of the court in which it is registered, binding upon the judgment debtor's interest in property levied upon, and the court shall enter an order to that effect.

Commissioners' Note

The final judgment quasi in rem provided for by this section is to be contrasted with the final personal judgment provided for by section 7.

§ 13. **Sale under Levy.**—Sale under the levy may be held at any time after final judgment, either personal or quasi in rem, but not earlier except as otherwise provided by law for sale under levy on perishable goods. Sale and distribution of the proceeds shall be made in accordance with the law of this state.

§ 14. **Interest and Costs.**—When a registered foreign judgment becomes a final judgment of this state, the court shall include as part of the judgment interest payable on the foreign judgment under the law of the state in which it was rendered, and the cost of obtaining the authenticated copy of the original judgment. The court shall include as part of its judgment court costs incidental to the proceeding in accordance with the law of this state.

§ 15. **Satisfaction of Judgment.**—Satisfaction, either partial or complete, of the original judgment or of a judgment entered thereupon in any other state shall operate to the same extent as satisfaction of the judgment in this state, except as to costs authorized by section 14.

§ 16. **Optional Procedure.**—The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this Act remains unimpaired.

§ 17. **Uniformity of Interpretation.**—This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 18. **Short Title.**—This act may be cited as the Uniform Enforcement of Foreign Judgments Act.

§ 19. **Repeal.**—All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

FOREIGN ATTACHMENT--A PROPOSAL FOR REFORM

by Stefan A. Riesenfeld

A. Purpose of Foreign Attachment

The classical case of attachment was for a long period of history the so-called foreign attachment. It goes back to the customs of the City of London and was the only attachment recognized by the common law as a valid local custom (see Riesenfeld, Garnishment and Bankruptcy, 27 Minn. L. Rev. 1 at 5 (1942)). Even after domestic attachment was permitted and regulated by many jurisdictions in the United States--though not in England--attachment in actions against nonresidents retained its special character.

Under traditional jurisdictional concepts that did not permit in personam jurisdiction over persons not personally served within the jurisdiction, attachment was the only means to get at least quasi-in-rem jurisdiction over an absent defendant, i.e., jurisdiction for the purpose of getting a judgment enforceable by execution against the attached assets. Such a judgment was not enforceable against other assets of the judgment debtor nor was it entitled to full faith and credit. Its validity, moreover, depended in addition on service by publication.

Both domestic and foreign attachment had the principal purpose of assuring collectibility of a claim. But, while domestic attachment merely improved the collectibilty of a claim by barring dissipation of the assets and affording priority, foreign attachment was the only way of achieving collectibility. Foreign attachment was the basis of quasi-in-rem jurisdiction and was not a means of "forum shopping" but, rather, the only way of reaching assets in a state which had no personal jurisdiction over the defendant. Critics of quasi-in-rem jurisdiction, such as Carrington or Green, overlook this aspect.

Gradually the picture changed: States asserted in personam jurisdiction over nonresident defendants not present in the jurisdiction if the cause of action had substantial contacts with the state. This was accomplished by means of so-called long-arm statutes of the type enacted in California in 1969. As a result, foreign (nonresident) attachment lost in many instances its exclusive jurisdictional character. In such cases, the problem arises whether a plaintiff still has an option between invoking in personam or quasi-in-rem jurisdiction. At any rate, however, nonresident attachment still retained its broad scope even in actions brought by the plaintiff under the long-arm in personam jurisdiction.

Despite the broad reach of in personam jurisdiction, however, there still appear to exist instances where the only jurisdiction available is that of the quasi-in-rem type. It seems to be recognized that the mere presence of assets in the state still does not suffice to confer in personam jurisdiction if the cause of action is not related to these assets and there are no other relevant contacts.

If, for example, A and B both live in New York and B recovers a money judgment in a state court of New York against A on the basis of a tort committed by A against B in New York, B can collect out of A's assets located in California only if he recovers a judgment in California on the New York judgment. To get a California judgment, he must be able to attach the California assets and this attachment will give California quasi-in-rem jurisdiction. Of course, there must be service by publication. In the federal courts, this clumsy procedure is no longer necessary since a New York federal judgment can be registered in California pursuant to 28 U.S.C.A. § 1963, and the same result would be reached in the four states which permit registration of foreign

state judgments under the Uniform Enforcement of Foreign Judgments Act (U.L.A. Vol. 9, p. 376). But this act has been passed only by Arkansas, Nebraska, Wisconsin, and Wyoming. See Erickson v. Erickson, 47 Cal. App. 319 (1920).

Accordingly, the question arises whether the new attachment law should differentiate between cases where the nonresident is subject to in personam jurisdiction and cases where only quasi-in-rem jurisdiction over the nonresident could be obtained. This was the recommendation of the original study, but it is now recognized that further analysis in the light of the post-Sniadach cases is needed.

B. Constitutional Aspects

In Sniadach, the Supreme Court limited the preliminary notice and hearing requirements to domestic attachments. Mr. Justice Douglas recognized that, "such summary procedure [i.e., without prior notice and hearing] may well meet the requirements of due process in extraordinary situations. Cf. . . . Ownbey v. Morgan, 256 U.S. 94, 110-112, 41 S. Ct. 433, 437-438. . . . But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; . . . ." 89 S. Ct. 1820, at 1821 (1969). Ownbey v. Morgan, cited by Justice Douglas, is a famous foreign attachment case upholding Delaware's statute. In Lynch v. Household Finance Co., 92 S. Ct. 1113 (1972), the Court held that the garnishment of a bank account under the Connecticut garnishment statute, permitting the issuance of the writ by the attorney for the plaintiff, was subject to attack as a possible violation of defendants' civil rights, and subject to injunction if the court below should find a violation. The Court did not pass on the merits. The garnishment before the Court was a domestic attachment. In Fuentes v. Shevin, 407 U.S. 67 (1972), Mr. Justice Stewart referred to the attachment

cases in footnotes 21 and 23. In the first of these footnotes, he indicated that "some form of notice and hearing--formal or informal--is required before deprivation of a property interest that 'cannot be characterized as de minimis.'" In the second footnote he stated more specifically: "Another case [where this Court has allowed outright seizure without opportunity for a prior hearing] involved attachment necessary to secure jurisdiction--clearly a most basic and important public interest. Ownbey v. Morgan, 256 U.S. 94." Justice Stewart, by using the qualification "necessary to secure jurisdiction" and identifying the interest as a "public" interest rather than a creditor interest, employed language which is susceptible to the interpretation that the dispensation from notice and hearing applies only to strictly jurisdictional rather than general nonresident attachments. The matter is, however, quite unsettled.

The California courts seem to have condoned nonresident attachments without notice and hearing at least in mercantile cases. To be sure, Randone suggested a more restrictive approach. Mr. Justice Tobriner wrote: "Although the 'public interest' served by quasi-in-rem attachment does not appear as strong as that in the cases discussed above, the pre-judgment attachment of non-resident assets, under notions of jurisdictional authority controlling at the time of the Ownbey decision, frequently provided the only basis by which a state could afford its citizens an effective remedy for injuries inflicted by non-residents. Moreover, because the assets subjected to attachment consisted of only those items located outside of the debtor's home state, there was less possibility that such property would include 'necessities' required for day-to-day living, consequently the resulting hardship to the debtor would frequently be minimal." The emphasis on the jurisdictional necessity, now greatly reduced, made the dictum somewhat ambivalent.

Yet in post-Randone cases, Courts of Appeal have held that both Randone and Sniadach left Section 537(2) and (3) unaffected and the California Supreme Court denied hearing in two of them. In Property Research Fin. Corp. v. Superior Court, 100 Cal. Rptr. 233, the Court of Appeal, 2d Cir., Div. 2, upheld the validity of Code of Civil Procedure Section 537, subdivision 2, as then in force, in an action on a promissory note against one Delaware and two Texas corporations. The court reasoned that, in the case of nonresident debtors, it was far more likely that they were willing and able to transfer assets outside the state to defeat their creditors' recovery than is true in the case of resident debtors. Accordingly, the creditors' right to effective judicial protection outweighted the debtor's right to prior notice and hearing. The court stated explicitly that this need existed equally in those nonresident cases where the jurisdictional necessity has disappeared. 100 Cal. Rptr. 233 at 237. The Supreme Court denied hearing in the case and later Courts of Appeal cases followed it as precedent, both in Section 537(2) and 537(3) cases. Artleb v. Superior Court, 100 Cal. Rptr. 471 (corporate defendant); Lefton v. Superior Court, 100 Cal. Rptr. 598 (corporate defendant); Banks v. Superior Court, 102 Cal. Rptr. 540 (individual defendant sued for misappropriation of partnership funds); Damazo v. MacIntyre, 102 Cal. Rptr. 609 (taxpayers suit to declare Section 537(2)-(6) to be unconstitutional fails as to subdivisions (2), (3), and (6)), hearing denied by Supreme Court.

Hence, prior notice and hearing is not required in commercial nonresident attachments even when nonjurisdictional. In consumer cases, the legal situation is more dubious.

C. Policy Issues

1. In drafting provisions governing nonresident attachments, three interrelated policy issued must be determined relating to:

   (a) grounds of nonresident attachment;

   (b) procedure relating to issuance of writ;

   (c) procedure after attachment.

   Item (c) is most important for the decision on (a).

2. In determining the grounds of nonresident attachment, choice must be made between four basic options:

   (a) leaving present Sections 537.1(b) and 537.2(d) unchanged (Extreme No. 1);

   (b) permitting only the same grounds as for resident attachment (Extreme No. 2);

   (c) permitting nonresident attachment for all monetary claims, whether in contract or tort, arising from the conduct of a trade, business or profession (Middleground No. 1);

   (d) permitting nonresident attachment for the claims specified under (c) and, in addition, for claims based on a sister state judgment or, if fixed or easily ascertainable, on a contract (Middleground No. 2).

   We recommend option (d).

3. It seems to be unnecessary to require prior notice and hearing on the probable validity if the attachment is sought of assets of a nonresident. It would seem that the ex parte procedure for resident cases should apply.

4. The procedure following attachment is most important. Under a broad nonresident attachment statute, the defendant should be protected against abusive forum shopping or unjust subjection to proceedings in a foreign jurisdiction.

The new long-arm statute provides for built-in safety devices that should apply in attachment cases. Although courts under Code of Civil Procedure Section 410.10 may exercise jurisdiction on any basis not inconsistent with the Constitutions of California or the United States, a court under Section 410.30 may either upon motion by a party or upon its own motion find that, in the interest of substantial justice, an action should be heard in a forum outside the state and thereupon stay or dismiss the action in whole or in part on any condition that may be just.

It is clear that Section 410.30 applies to actions where in personam jurisdiction over the nonresident exists independent of attachment, but there is nothing in Sections 410.10 or 410.30 which prevents the application of the latter section even if the jurisdiction is based on the attachment and this amounts to quasi-in-rem jurisdiction.

It is, however, recommended that the statute expressly provide that the granting of an attachment does not prevent stay of all further proceedings following the levy pursuant to Section 410.30. The judge thus could stay all further proceedings and provide that the attachment lapses unless the plaintiff prosecutes his action in a more convenient forum. A motion based on inconvenience of the forum does not constitute a general appearance under Section 418.50. See Section 418.10(a)(2). A motion thus would not prejudice the defendant jurisdictionally.

The long-arm statute did not change the rather confusing law as to special, limited, and general appearances. See Gorfinkel, Special Appearance in California--The Need for Reform, 5 U. San Francisco L. Rev. 25, esp. footnote 10. Therefore, it is advisable to provide that the defendant may not only file a motion raising the objection of an inconvenient forum but, in addition, that he may appear to contest the probable validity of the claim without thereby making a general appearance.

We recommend provisions to the effect that:

(a) a defendant may move for stay of the attachment proceedings under the condition that plaintiff prosecute his action in a more convenient formum, and

(b) that he may contest the probable validity of the claim, without making a general appearance.

Whether the defendant should also have the right to make a limited appearance for the purpose of making a full defense on the merits, but only for purposes of the attachment, (see Dry Clime Lamp Co. v. Edwards, 389 F.2d 500 (1968)) is a separate issue which needs further study.

D. Summary

A. If the defendant is a nonresident, an attachment may be issued to secure the recovery on:

(1) any money claim arising out of the conduct by the defendant of a trade, business, or profession, or

(2) claims arising from a judgment of a sister state, or

(3) claims for money in a fixed or reasonably ascertainable amount, based upon a contract express or implied.

B. The writ may be obtained pursuant to the procedure provided in Chapter 5.

C. The judge may grant the writ but stay all proceedings after levy pursuant to Sections 410.30 and 418.10(a)(2).

A defendant may demand a hearing for the purpose of having a writ quashed because of lack of probable validity. Such showing shall not constitute a general appearance.