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Brainerd Currie

The University of Chicago

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ATTACHMENT AND GARNISHMENT IN THE FEDERAL COURTS

*Brainerd Currie**

I. THE PROBLEM AND ITS ORIGINS

PERSONAL injuries allegedly caused by the negligent manufacture of safety fuses used in blasting operations in a coal mine were suffered by Raymond Davis, apparently a citizen of Arkansas. The manufacturer, Ensign-Bickford Company, was a Connecticut corporation that could not be personally served with process within Arkansas. But it happened that two foreign corporations, amenable to process in the state, were indebted in substantial amounts to Ensign-Bickford Company. Accordingly, counsel for Davis, invoking the diversity jurisdiction, filed an action in the District Court for the Western District of Arkansas. Without issue of summons, the plaintiff, in conformity with Arkansas statutes, sued out orders of general attachment, for notice by publication, and for warning the defendant. The two debtor corporations, having been garnished, answered and admitted their indebtedness to the defendant. The defendant appeared specially to object to the jurisdiction of the court; judgment was entered quashing and vacating the writs of attachment and garnishment, and dismissing the complaint for want of jurisdiction. The Court of Appeals for the Eighth Circuit affirmed, holding that in the federal courts "Jurisdiction cannot be acquired by means of attachment."¹ The question to be considered here is: In heaven's name, why not?

The subject has been rather fully considered in the literature, if scattered contributions, especially some by student writers in the law reviews, are considered as a whole.² Yet there is something to

* Professor of Law, The Law School, The University of Chicago.—Ed.

¹ *Davis v. Ensign-Bickford Co.*, 139 F.2d 624, 626 (8th Cir. 1944).

² See 7 MOORE'S FEDERAL PRACTICE, ¶64.09 (2d ed. 1955); Blume, *Actions Quasi in Rem Under Section 1655, Title 28, U.S.C.*, 50 MICH. L. REV. 1 (1951); Note, 28 SO. CAL. L. REV. 188 (1955); Note, 68 HARV. L. REV. 367 (1954); Note, 34 CORNELL L.Q. 103 (1948); Note, 25 CORNELL L.Q. 448 (1940); Note, 13 SO. CAL. L. REV. 361 (1940); Note, 18 N.C.L. REV. 51 (1939).

be said for a review that will at least bring together the critical observations that have been made, and may perhaps make some modest contribution to their reinforcement. Moreover, a reconsideration of the problem is timely in view of the continuing study of the rules of practice and procedure, prescribed by the Supreme Court, that is just being initiated by the Judicial Conference of the United States.³ This is particularly true in light of the fact that the Court of Appeals for the Eighth Circuit, in the *Davis* case, cast doubt on the ability of the Supreme Court to deal with the problem within the framework in which the rule-making power has been exercised.⁴

The anomalous defect of jurisdiction in the federal courts—this lack of power to provide a remedy that state courts clearly may provide—is traceable to two unfortunate decisions of the Supreme Court in years long past.⁵ It ought to be corrected. It might be corrected simply through the operation of the judicial process, by disapproval of the unfortunate decisions of yesteryear. The chances of litigation are such, however, that there is no ground for hope that a case presenting the question will come before the Court in the near future. It may and should be corrected by the Court through the exercise of its power to prescribe “the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts. . . .”⁶ A rule authorizing the acquisition of jurisdiction quasi in rem by attachment or garnishment of property within the district⁷ would in no wise enlarge the jurisdiction of the district courts beyond that conferred upon them by Congress. It would only rectify an anomaly of the Court’s own making.

The seeds of trouble were sown early, though they probably seemed fairly innocuous at the time. In *Hollingsworth v. Adams*⁸ a writ of foreign attachment was sued out in the circuit court for

³ See 28 U.S.C. § 331 (1958).

⁴ 139 F.2d at 626. By implication, the court’s treatment of the matter as jurisdictional cast a cloud on the power of the Supreme Court to deal with it through the rule-making authority. While the court referred only to FED. R. CIV. P. 82 for the principle that “These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States. . . .,” and while there was no similar provision in the enabling act, 48 Stat. 1064 (1934), it is of course clear that only Congress may “extend or limit” the jurisdiction of the district courts.

⁵ *Toland v. Sprague*, 37 U.S. (12 Pet.) 300 (1838); *Big Vein Coal Co. v. Read*, 229 U.S. 31 (1913).

⁶ 28 U.S.C. § 2072 (1958).

⁷ Or perhaps within the state; see FED. R. CIV. P. 4(f); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1946).

⁸ 2 U.S. (2 Dall.) 396 (C.C.D.Pa. 1798).

the district of Pennsylvania against a citizen of Delaware. Counsel for the defendant "moved to quash the writ on the ground that the federal courts had no jurisdiction, in cases of Foreign Attachments,"⁹ and quoted from the eleventh section of the First Judiciary Act:

" . . . no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. . . ."¹⁰

Counsel for the plaintiff "wished for time to enquire into the practice; but not being able, on the next day, to assign any satisfactory reason in maintenance of the action, the court directed the writ to be quashed, with costs."¹¹

One suffers a passing twinge of regret on account of counsel's lack of ingenuity. He might have cited the process act, with its provision that "the forms of writs and executions . . . and modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."¹² The Judiciary Act certainly established territorial limits on the effectiveness of personal service; the process act appeared to authorize the use of modes of process authorized by state law, and hence to permit the acquisition of jurisdiction quasi in rem by seizure of property within the district. If the two acts were construed together, might it not reasonably be concluded that the Judiciary Act did no more than limit the territorial range of personal service, leaving intact the jurisdiction of the court over property within the district where personal service was not required?¹³ Counsel might also have cited section 12 of the Judiciary Act, dealing with removal of causes and providing that "any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment had it been rendered by the court in which the suit

⁹ *Ibid.*

¹⁰ 1 Stat. 73, 79 (1789).

¹¹ 2 U.S. (2 Dall.) 396.

¹² 1 Stat. 93 (1789); *id.* at 275, 276 (1792).

¹³ *Cf.* Fed. R. Civ. P. 4 (f).

commenced.”¹⁴ The grant of jurisdiction of actions quasi in rem upon removal would have been hard to reconcile with the supposed absence of such jurisdiction in original cases. But such arguments would probably have proved futile.

The eleventh section of the Judiciary Act was more than a territorial limitation on the effectiveness of personal service. In modern terminology, it was a venue statute as well. Without distinguishing between actions in personam and actions quasi in rem, it conferred on the defendant a privilege not to be sued in the federal courts except in the district of which he was an inhabitant, or in which he was found at the time of service of process. It was a somewhat strange venue statute, since the appropriate place of trial coincided precisely with the appropriate place for service of personal process.¹⁵ Under the general venue provisions of the present Judicial Code¹⁶ it may often happen that process is validly served upon a defendant in a place where venue is improper. Yet the provision for venue in any district in which the defendant might be “found” was characteristic of federal practice until 1887;¹⁷ there can be no doubt as to the character of section 11 of the Judiciary Act as a venue statute. The merger of the concepts of personal jurisdiction and venue undoubtedly accounts in large measure for the confusion of those concepts in the early cases. When venue was improper, personal service on the defendant was also defective; the objection could be stated in terms of the one or the other, and tended to be stated in terms of jurisdiction. The identification of the two concepts where personal service was required carried over to cases in which it was not required, as in actions quasi in rem, leading to the confused impression that the objection to proceeding by attachment or garnishment was jurisdictional, whereas it was in fact only an objection to the venue. The major conclusion to be offered here is that, while venue statutes may, indeed, limit the utility of attachment and garnishment in the federal courts, there is no jurisdictional obstacle to the acquisition of jurisdiction quasi in rem by means of such process.

There were early cases of actions begun in the federal courts by foreign attachment in which no suggestion of a lack of jurisdiction was made. One of these was *Fisher v. Consequa*,¹⁸ in which there

¹⁴ 1 Stat. 79-80 (1789).

¹⁵ See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 948-49 (1953).

¹⁶ 28 U.S.C. § 1391 (1958).

¹⁷ See 24 Stat. 552 (1887), as corrected by 25 Stat. 433 (1888).

¹⁸ 9 Fed. Cas. 120 (No. 4816) (C.C.D.Pa. 1809).

was a rule to show cause why the attachment should not be dissolved on other grounds. Among counsel for the defendant was Mr. Dallas, who had reported the earlier case of *Hollingsworth v. Adams*.¹⁹ Perhaps the reason why section 11 was not invoked was that the defendant was "a Hong merchant at Canton,"²⁰ so that it was supposed that he was not "an inhabitant of the United States" within the protection of that section. Of this there is more to be said later. On whatever interpretation, the case speaks against the notion that federal courts lacked jurisdiction in cases commenced by foreign attachment. If the neglect of section 11 was inadvertent, the inference is that the jurisdictional defect was not part of the working knowledge of members of the bench and bar. If such actions could be maintained against foreigners, it was not by reason of a defect of jurisdiction that they could not be maintained against inhabitants of the United States.

Again in *Graighle v. Notnagle*²¹ Mr. Justice Washington upheld an original writ of foreign attachment without discussion of the jurisdictional question. Here, too, the defendant, being a citizen of France, was arguably outside the protection of section 11.²²

In *Harrison v. Rowan*²³ a bill in equity was filed in New Jersey concerning New Jersey land and, the defendants being citizens of Pennsylvania, process was served upon them there. Section 11 of the Judiciary Act was invoked; *Hollingsworth v. Adams* was cited.²⁴ But Mr. Justice Washington held that the objection was waived by the defendants' appearance without objection. After observing that the case was cognizable by virtue of diversity of citizenship, the requisite amount being in controversy, he said:

"That part of [section 11 of the Judiciary Act] which respects the service of process, does not amount to an exception from the general grant of jurisdiction, but secures to parties residing out of the district in which the suit is brought, a privilege of not being liable to be served with process out of the district in which they reside, or of being compelled by such service to appear in any other district. . . . Now it is clear that

¹⁹ Note 8 *supra*.

²⁰ 9 Fed. Cas. at 120.

²¹ 10 Fed. Cas. 948 (No. 5679) (C.C.D.Pa. 1816).

²² Perhaps court and counsel overlooked the jurisdictional point because of preoccupation with the plaintiff's ingenious device of self-garnishment. The stratagem was sustained; it was not, in fact, novel.

²³ 11 Fed. Cas. 657 (No. 6140) (C.C.D.N.J. 1818).

²⁴ *Ibid*.

if non-residence formed an objection to the jurisdiction . . . the subsequent appearance could not have given jurisdiction to the court. But being a mere matter of privilege, it was waved [*sic*] by a voluntary appearance which rendered the service of process unnecessary."²⁵

The subject was fully considered for the first time by Mr. Justice Story, on circuit, in *Picquet v. Swan*.²⁶ The action was brought by an alien, a resident of France, against a citizen of the United States, formerly of Boston but then residing in France. By virtue of what was known in Massachusetts as trustee process, "but . . . better known elsewhere as the process of 'foreign attachment,'"²⁷ land belonging to the defendant in Massachusetts was attached. The defendant not appearing, the plaintiff moved for judgment by default. The motion was opposed by *amicus curiae*.

Let it be noted at the outset that everything said by Mr. Justice Story concerning the power of a federal court, utilizing state statutory procedures, to acquire jurisdiction quasi in rem by attachment or garnishment was pure obiter dictum. This for two reasons: (1) In the end he held that the action was not within the diversity jurisdiction because the defendant had been described only as a citizen of the United States, and not as a citizen of a particular state.²⁸ (2) Just before the end he held that the attempted service was "defective and nugatory" under the Massachusetts statutes themselves. Those statutes provided no method of notifying the defendant in the peculiar situation before the court, where the defendant, having once been a resident, had not been such for more than three years; it was a *casus omissus*.²⁹ Notwithstanding, Mr. Justice Story at the beginning set out to consider the question of federal jurisdiction where process could not be served personally on the defendant in the district; and the considered opinion of so able a jurist is of course entitled to weight, dictum or not.

Another feature of the decision needs preliminary notice. This was Mr. Justice Story's treatment of the argument that section 11 was inapplicable because the defendant was not an "inhabitant of the United States." By an obscure process of reasoning, analysis of which would be beyond the scope of this paper, he reached the

²⁵ *Id.* at 658. In this holding the court had the support of *Logan v. Patrick*, 9 U.S. (5 Cranch) 288 (1809).

²⁶ 19 Fed. Cas. 609 (No. 11134) (C.C.D.Mass. 1828).

²⁷ *Ibid.*

²⁸ *Id.* at 616.

²⁹ *Ibid.*

conclusion that the clause should be read thus: "no civil suit shall be brought before either of said courts against *an alien or a citizen*, by any original process, in any other district than that, whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ."³⁰ This is an arresting bit of statutory construction, but it has only collateral relevance to the subject of principal concern here.³¹

Mr. Justice Story held that the federal courts were not authorized to acquire jurisdiction quasi in rem by foreign attachment or garnishment of property within the district. His reasoning is none too clear. It is clear that he entertained no idea that there was something peculiar about the federal courts, stemming from the Constitution or any other source, subjecting them to this peculiar disability. The question was whether the process act, construed together with section 11 of the Judiciary Act, empowered them to proceed in this manner. The language of the process act, adopting "the forms of writs . . . and modes of process" used in the state courts, seemed comprehensive enough to cover the case; but Mr. Justice Story proceeded to whittle down their meaning. After discussing the limits on the exercise of jurisdiction in personam,

³⁰ *Id.* at 613.

³¹ The construction serves to emphasize the perennial inadequacy of the general venue statutes. See generally Barrett, *Venue and Service of Process in the Federal Courts*, 7 VAND. L. REV. 608 (1954). At all times the federal courts have had jurisdiction, given the requisite amount in controversy, of suits between an alien and a citizen of a state. In Mr. Justice Story's time, if the alien was plaintiff, service and venue were proper in the district of the defendant's residence. If, however, the citizen was plaintiff, action against the alien was an impossibility unless he was a resident, or was found within the United States. This was completely true, even if the nonresident alien had property here, if the federal courts could not entertain original actions quasi in rem upon constructive service, or if venue was not proper in any district. Thus Mr. Justice Story's construction appears to have discriminated in favor of aliens and against citizens. Today no venue objection stands in the way of the citizen's proceeding in diversity cases by attachment or garnishment in the district of his own residence, 28 U.S.C. § 1391 (a) (1958); abandonment of the notion that there is "no jurisdiction" to proceed in such manner would suffice.

Indeed, in modern times no venue objection stands in the way of proceeding quasi in rem against a nonresident alien in any district in which property may be found, whether diversity is the basis of jurisdiction or not. "An alien may be sued in any district." 28 U.S.C. § 1391 (d). Although this provision appeared for the first time in the 1948 revision of the Judicial Code, it purported only to state existing law, MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 189 (1949); and, in fact, it appears that the modern cases, ignoring Mr. Justice Story and *Toland v. Sprague*, note 52 *infra*, held that the prior venue provisions had no application to nonresident aliens, who could be sued in any district in which they could be served with process. In *re Hohorst*, 150 U.S. 653 (1893); *Sandusky Foundry & Machine Co. v. De Lavaud*, 251 Fed. 631 (D. Ohio 1918); *but see Meyer v. Herrera*, 41 Fed. 65 (C.C.D. Tex. 1889). It follows that if the notion of jurisdictional defect were abandoned there would be no obstacle to the maintenance of actions quasi in rem against nonresident aliens in any district in which property could be found; and this would seem to be a desirable and beneficial result.

with emphasis on the frustrated imperialism of the Island of Tobago,³² he concluded that the process-venue provision of section 11 of the Judiciary Act did no more (with one exception, to be noted) than declare what would have been the law in the absence of such a provision. According to established general principles, the jurisdiction of a state or judicial district was territorially limited. The provision was inserted out of an abundance of caution, to negative any inference that Congress intended to exercise its power to provide for nationwide service of process. In the course of this discussion, however, Story clearly recognized that states might proceed quasi in rem without violating established principles:

“Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment in personam, for the plain reason, that except so far as the property is concerned, it is a judgment coram non iudice.”³³

Why, then, could not the circuit court proceed by foreign attachment, affecting only the property, since state law authorized that process?

The Judiciary Act itself made no provision for process. Had it stood alone, Mr. Justice Story was unable to see how the federal courts could have proceeded at all, “except by reference to writs, process, and service according to the common law. . . .”³⁴ By a separate and “temporary” act, no part of the scheme of the Judiciary Act itself, Congress had authorized recourse to the state practice. How was that act to be construed? In the light of the common law, “which must necessarily have been in the contemplation of the framers of the judiciary act. . . .”³⁵ And judgment without personal appearance was unknown to the common law. By the common law a defendant “may be taken on a *capias* and brought into Court, or distrained by attachment and other process

³² 19 Fed. Cas. at 612. See *Buchanan v. Rucker*, 9 East 192 (K.B. 1808).

³³ 19 Fed. Cas. at 612.

³⁴ *Id.* at 614.

³⁵ *Id.* at 613.

against his property to compel his appearance; and for non-appearance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice, and regular personal appearances in Court."³⁶ The power to proceed to judgment binding the property was conferred only by statute.

It would seem that if Congress had intended to limit the federal courts to common-law rather than statutory process it would have said so—or would have said nothing, since (according to Mr. Justice Story) that would have been the consequence of silence. When, instead, it made available state process, the fact that state statutes provided for proceedings in attachment and garnishment "must necessarily have been in the contemplation of the framers. . . ." Why this manhandling of the process act?

It is evident that Mr. Justice Story entertained sentiments of hostility against the exercise of jurisdiction based on the existence of property in the state without proper personal service:

"If the state jurisprudence authorizes its own courts to take cognizance of suits against nonresidents, by summoning their tenants, attornies, or agents, or attaching their property, whether it be a farm or a debt, or a glove, or a chip, it is not for us to say, that such legislation may not be rightful, and bind the state courts. But when the circuit courts are called upon to adopt the same rule, it ought to be seen, that Congress have, in an unambiguous manner, made it imperative upon them."³⁷

³⁶ *Ibid.* It takes a sardonic sense of humor to regard the process of outlawry as an expression of the common law's solicitude for the defendant. ". . . [I]n its modern form it can scarcely be said to have any tendency even to apprise the defendant of the action, much less to warn him by distinct and repeated summons. In fact, he is never summoned during the whole course of the proceeding. . . . A defendant against whom judgment of outlawry passes has therefore in general had no previous notice that the suit has been commenced, and may probably have had no opportunity of becoming acquainted with that fact, and it is quite possible that even his property may be seized and sold, and the proceeds paid over to the plaintiff, before he is aware that any action is pending against him." *First Report of Commissioners on the Courts of Common Law* [1829], *PARLIAMENTARY PAPERS* 93-94, quoted in 9 *HOLDSWORTH, HISTORY OF ENGLISH LAW* 254-55 (1926). Holdsworth himself says, "It is obvious, therefore, that the use of outlawry as mesne process to enforce appearance might work very serious oppression." 9 *HOLDSWORTH, op. cit. supra* at 255; and he refers to it as "this mischievous procedure." *Ibid.* Outlawry involved forfeiture of all the defendant's goods and chattels to the Crown, 3 *BLACKSTONE, COMMENTARIES* 283-84. Apparently the plaintiff's demand was paid upon his making application to the Crown office. See *Campbell v. Morris*, 3 *Harr. & McH.* 535, 546 (Md. 1797) (argument of counsel).

³⁷ 19 *Fed. Cas.* at 614.

The concern over the lack of notice to the defendant, or its adequacy, is understandable. Yet the modern legal mind can react only with the thought that that is a problem to be solved by requiring reasonable notice, not by rejecting a remedy beneficial to local people. At all events, the Supreme Court later gave its unqualified endorsement to the use by the states of the process of foreign attachment, with less concern for the realities of notice than would be indulged today.³⁸ But there is more than concern with notice. Repeated references in the opinion to the possibility that property of trifling value might be attached, with the result that the non-resident defendant would be required to come great distances to protect himself against a judgment *in invitum*,³⁹ suggest that the learned Justice was confusing two distinct ideas. The first was that the presence of any property of the defendant in the state may provide a basis for the exercise of jurisdiction over him in personam; the second was only that the property may be taken to satisfy a judgment having no further force and effect. Why would a creditor bother to attach a glove or a chip, or a debtor travel great distances to defend such an action, unless it were thought that the judgment would be binding in personam? Although Mr. Justice Story exhibited clear understanding of the limited effect of judgments quasi in rem, he seems to have been unable to put out of his mind entirely the possibility that judgments based on property in the state might somehow be given effect as personally binding adjudications. At any rate, only six years later, in his treatise, he cleanly separated the two ideas. There he first discussed the practice followed by some nations of proceedings in personam on the basis of attachment, or of citations *viis et modis*, concluding that judgments so obtained are nullities except in the countries where they are obtained.⁴⁰ Then, in separate sections, he discussed the normal proceeding by foreign attachment without hostility:

“In such cases, for all the purposes of the suit, the existence of such property, within the territory, constitutes a just ground of proceeding, to enforce the rights of the plaintiff, to the extent of subjecting such property to execution upon the decree or judgment. But it is to be treated to all intents and purposes, if the defendant has never appeared and contested the suit, as a mere proceeding *in rem*, and not personally binding

³⁸ *Pennoyer v. Neff*, 95 U.S. 714 (1877); *cf.* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³⁹ 19 Fed. Cas. at 613-16.

⁴⁰ STORY, *CONFLICT OF LAWS* 457-58 (1st ed. 1834).

on the party as a decree or judgment in personam. In other countries, it is uniformly so treated, and considered, as having no extra-territorial force or obligation."⁴¹

It is possible that there was a reason, other than the apparent confusion of ideas, for the hostility expressed in *Picquet v. Swan* to proceedings by attachment. In 1828 there was, of course, no due process clause to prevent a state from giving in personam effect to its own judgments based on the existence of property in the state. Other states might refuse them such effect; but if the defendant should later find himself in the courts of the rendering state, or should acquire other property there, there was nothing to stop the courts of that state from treating the judgment (based, perhaps, on the attachment of property of nominal value) as *res judicata*, and as having the full effect of a valid personal judgment. This may explain the hostility toward loose proceedings by attachment in general. It cannot, however, explain why Mr. Justice Story denied the power of the federal courts to entertain "bona fide"⁴² attachment suits, when he had—and exercised⁴³—the authority to declare that the judgments in such actions in the federal courts would be strictly limited in their effect to the property attached.

That Mr. Justice Story was preoccupied with attachment in the state courts, and its possible abuse there, also seems indicated by his failure to take account of the jurisdictional requirement as to the amount in controversy when he spoke of the possibility of attaching property of trifling value. From 1789 to 1887 the required amount in controversy was \$500; and so the attachment of a glove or a chip in an action in the federal courts would not have been possible unless the claim stated by the plaintiff, rather than

⁴¹ *Id.* at 461. Moreover, he maintained that such judgments, as in *rem* judgments, were entitled to recognition in other countries. *Id.* at 495-96. Yet a trace of the old suspicion remains. The attachment of property of nominal value, such as a chip or a cane, is still mentioned, and contrasted with the "bona fide" attachment of property within the territory. *Id.* at 461. It was only cases of bona fide attachment that were the subject of the quotation in the text.

⁴² See note 41 *supra*.

⁴³ "There are two reasons, which have great weight with me in support of these positions. One is, that otherwise the judgments in the courts of the United States would not, in cases of non-residents, be binding, as general judgments in personam; but if at all, only as proceedings in *rem* to the extent of the property attached, whether it be a chip, or a bale of goods. . . ." 19 Fed. Cas. at 615. This is the one completely baffling passage in the opinion. In the first place, why "if at all"? More important, why deplore judgments good only to the extent of the property attached? The property may be sufficient to satisfy the claim; if not, part of a loaf is better than none, and why should it be denied to resident creditors? Can any explanation be given for this passage?

the value of the property, could be regarded as determinative. The question of how the amount in controversy is to be determined in an attachment case appears not to have been litigated, though it might have arisen in removal cases;⁴⁴ but from our present point of vantage, at least, the answer seems clear. If the nonresident defendant is permitted to make a limited appearance to defend his interest in the property without subjecting himself personally to the jurisdiction of the court,⁴⁵ there can be no doubt that the amount in controversy is limited to the value of the property. And whether such a limited appearance is permitted or not, it is only the value of the property, and not the plaintiff's larger claim, that can measure the amount in controversy in the absence of personal jurisdiction, since the court may not render a personal judgment but can only enter a judgment affecting the property.

The final point to be noticed in connection with the *Picquet* case concerns the exception to Mr. Justice Story's position that the process-venue clause of article 11 was merely declaratory. Congress, said Mr. Justice Story, "designedly enlarged the power to proceed in cases of inhabitancy, where the party happened at the time to be absent without any intentional change of domicile. . . ."⁴⁶ That is to say, that an action may be commenced by attachment in the district of which the defendant is an inhabitant, even though he cannot be personally served therein. There are two possible views of this interesting dictum. Perhaps Mr. Justice Story was presciently anticipating the validity of personal jurisdiction over absent domiciliaries, based on constructive service.⁴⁷ The idea of jurisdiction in personam over an absent citizen, or subject, at least, was familiar to the continental jurist whose writings were known to him.⁴⁸ It seems more likely, however, that Mr. Justice Story meant that under section 11 of the Judiciary Act an original proceeding by attachment was proper in the district of which the defendant was an inhabitant *even though personal process could not be validly served on him*.⁴⁹ If this is so, the authority of a federal court to entertain an action begun by attachment cannot depend

⁴⁴ See part III *infra*.

⁴⁵ See text at note 178 *infra*.

⁴⁶ 19 Fed. Cas. at 613.

⁴⁷ The validity of such service was not established until *Milliken v. Meyer*, 311 U.S. 457 (1940), though it was hinted in *McDonald v. Mabec*, 243 U.S. 90 (1917).

⁴⁸ See STORY, *CONFLICT OF LAWS* 450-51 (1st ed. 1834).

⁴⁹ "But as to citizens of a country, domiciled abroad, the extent of jurisdiction, which may be lawfully exercised over them *in personam*, is not so clear upon acknowledged principles. . . . Whatever authority should be given to such judgments, must be purely *ex comitate*." *Id.* at 451-52.

upon whether it has jurisdiction of the defendant's person; even without such jurisdiction, the action may be maintained where venue is proper, as it is in the district of the defendant's residence.

In sum: Mr. Justice Story, in the teeth of the plain language of the process act, denied that Congress had conferred on the federal courts authority to entertain actions against nonresidents, commenced by attachment or garnishment, without personal jurisdiction, when such proceedings were authorized by state law. He did so, first, because under his interpretation of the Judiciary Act of 1789, venue was improper. He did so, second, because he deprecated such proceedings, since they might take place with no notice, or inadequate notice, to the nonresident, and since, contrary to established general principles, they might be given the effect of personal judgments in the states of their rendition. Now that it has been long and firmly established, under the due process clause, that such judgments can be given no effect in the absence of reasonable notice, and that in any event they can be given effect only with respect to the property attached, and not as personal judgments,⁵⁰ Mr. Justice Story's doubts and fears can be no obstacle to the Supreme Court's authorizing such proceedings, through the exercise of its rule-making power, in cases where venue is proper.⁵¹

The problem must have been intriguing, if not pressing; for in 1838, in *Toland v. Sprague*,⁵² the Supreme Court contrived, as if by main force, an occasion to consider and determine it. In 1834 a citizen of Pennsylvania began an action in the circuit court for the eastern district of that state against a citizen of Massachusetts, attaching property in the hands of certain residents of Pennsylvania. A motion to quash the attachment was overruled; the defendant entered special bail, appeared and pleaded on the merits, and the case was tried to a jury, which rendered a verdict for the defendant.⁵³ Previous cases⁵⁴ had made it reasonably clear, and the Court was to hold, that, whatever the nature of the objection

⁵⁰ *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Harris v. Balk*, 198 U.S. 215 (1905).

⁵¹ Three years later Mr. Justice Story again denied the authority with a curt reference to § 11 of the Judiciary Act. He did not cite his decision in *Picquet v. Swan*, nor refer to the process act. The objection was made by plea to the jurisdiction. *Richmond v. Dreyfous*, 1 Sumner 131 (C.C.R.I. 1831).

⁵² 37 U.S. (12 Pet.) 300 (1838).

⁵³ These circumstances are evidence that, despite the holdings in the *Hollingsworth* and *Picquet* cases, the bench and bar continued to believe that original proceedings by attachment were proper, at least where the defendant was not a resident of the United States. In the instant case the record showed that, although the defendant was a citizen of Massachusetts, he was a resident of Gibraltar. *Id.* at 302. See also note 63 *infra*.

⁵⁴ See note 25 *supra*.

to attachment proceedings in the federal courts—whether it was the lack of personal service, or improper venue—the objection could be waived, and was waived by the entry of special bail and general appearance.⁵⁵ Yet Mr. Justice Barbour, for the majority of the Court, announced that the first question to be discussed was “whether the process of foreign attachment can be properly used by the circuit courts of the United States, in cases where the defendant is domiciled abroad, and not found within the district in which the process issues, so that it can be served upon him?”⁵⁶

That question, said Mr. Justice Barbour, had been elaborately argued in *Picquet v. Swan*, with the reasoning of which the majority concurred; therefore the Supreme Court’s decision would be limited to a condensation of Mr. Justice Story’s opinion on circuit. Here, then, it is necessary only to notice the two respects in which the Supreme Court’s restatement of the argument clarified or departed from Mr. Justice Story’s original version.

First, as to the puzzling construction of the phrase “inhabitant of the United States”⁵⁷ as including, and extending the privilege of section 11 to, citizens residing abroad and nonresident aliens: Mr. Justice Barbour’s explanation was simple, and clearer than Mr. Justice Story’s. Congress contemplated that process could not be served upon such persons at all, unless they should be found within the district; hence there was no occasion to provide for them a privilege they already possessed.⁵⁸ This explanation assumed the validity of the proposition that personal service is necessary in all cases, including cases of attachment or garnishment. It is all very well to say that there is no occasion to make venue provisions for cases in which personal service cannot be had, if personal service is required; but if personal service is not required in cases of attachment and garnishment, then the limitation of section 11 to “inhabitants of the United States” is meaningful, and indicates a congressional willingness to allow such actions to proceed against non-residents of the United States in any district in which property can be found.

⁵⁵ 37 U.S. (12 Pet.) at 330-31.

⁵⁶ *Id.* at 327.

⁵⁷ See 1 Stat. 73, 79 (1789).

⁵⁸ “. . . [A]nd that as to all those who were not within the United States, it was not in the contemplation of congress, that they would be at all subject, as defendants, to the process of the circuit courts, which, by reason of their being in a foreign jurisdiction, could not be served upon them; and therefore, there was no provision whatsoever made in relation to them.” 37 U.S. (12 Pet.) at 329-30.

Second, Mr. Justice Story's apparent confusion concerning the effect of a judgment in rem was compounded by Mr. Justice Barbour. He indicates no awareness at all of the limited function of the judgment as subjecting the attached property to the satisfaction of the claim. He simply assumes that the defendant in attachment gets no notice (because he cannot be personally served within the district), and that the judgment entered against him is a personal one:

"Nothing can be more unjust, than that a person should have his rights passed upon, and finally decided by a tribunal; without some process being served upon him, by which he will have notice, which will enable him to appear and defend himself. This principle is strongly laid down in *Buchanan v. Rucker*, 9 East 192. Now, it is not even contended, that the circuit courts could proceed to judgment against a person who was domiciled without the United States, and not found within the judicial district, so as to be served with process, where the party had *no* property within such district. We would ask what difference there is, in reason, between the cases in which he *has*, and has *not* such property? In the one case, as in the other, the court renders judgment against a person who has no notice of the proceeding. In the one case, as in the other, they are acting on the rights of a person who is beyond the limits of their jurisdiction, and upon whom they have no power to cause process to be personally served. If there be such a difference, we are unable to perceive it."⁵⁹

At least since *Pennoyer v. Neff*,⁶⁰ any competent law student should be able to perceive the difference, provided the proceeding is directed specifically against the property, and there is reasonable notice. Whether Mr. Justice Barbour should have been expected to perceive it is a question of minor interest.⁶¹ But Joseph Story

⁵⁹ *Id.* at 329 (emphasis in the original).

⁶⁰ 95 U.S. 714 (1877).

⁶¹ Philip P. Barbour, of Virginia, died only five years after his appointment to the Court in 1836. See 1 *Dict. Amer. Biog.* 594-96 (1943). His chief distinction seems to have been his career-long opposition to interpretation of the Constitution in such a way as to enhance federal authority, judicial and other. He had been counsel for the state in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). 1 *WARREN, THE SUPREME COURT IN UNITED STATES HISTORY* 548, 665 n. (1937). When Marshall thought of retiring as Chief Justice in 1831, John Quincy Adams wrote: "The terror is that, if he should be now withdrawn, some shallow-pated wild-cat like Philip P. Barbour, fit for nothing but to tear the Union to rags and tatters, would be appointed in his place." 1 *id.* at 752.

Adams's characterization has been regarded as extreme, 1 *id.* at 753; but on Barbour's death Story paid him a damaging compliment: "He was a man . . . of considerable legal attainments (in which he was daily improving). . . ." 2 *id.* at 78.

still sat on the Court. His treatise, published four years earlier, had clearly perceived and expounded the difference between actions in personam, predicated on property in the state, and bona fide actions quasi in rem.⁶² How he could have concurred in so unperceptive a rendition of his opinion in the *Picquet* case passes understanding.

Mr. Chief Justice Taney strongly protested against the part of the opinion denying the power of the circuit courts to proceed by attachment. The holding was not necessary to the decision; the question was not free from difficulty; the practice of attachment had been followed in several districts, and the holding might unsettle titles acquired thereby.⁶³ Mr. Justice Baldwin agreed, adding that "if it was necessary, he would go further, as to the authority of the courts of the United States to issue foreign attachment."⁶⁴ Mr. Justice Wayne also agreed with the Chief Justice, adding that "He thought the circuit courts of the United States had authority to issue foreign attachments."⁶⁵ Mr. Justice Catron also agreed, but "had not formed any opinion on the question of the right of the circuit courts to issue foreign attachments."⁶⁶ Thus the cornerstone of the limiting doctrine, which persists to this day, is a glaring dictum, wholly unnecessary to the decision, concurred in by a bare majority of the Court, and infected with a total lack of understanding of the function of a proceeding quasi in rem.

II. THE CONFORMITY ACT AND THE AMENDED VENUE STATUTE

Section 6 of the Conformity Act⁶⁷ provided:

"... in common-law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such state. . . ."

The legislative history is silent as to the purpose of this provision.⁶⁸ But the background that has been sketched would seem to make

⁶² See notes 40, 41, *supra*.

⁶³ 37 U.S. (12 Pet.) at 337.

⁶⁴ *Ibid.*

⁶⁵ *Id.* at 337-38.

⁶⁶ *Id.* at 338.

⁶⁷ 17 Stat. 196, 197 (1872).

⁶⁸ What became § 6 was discussed on the floor of the Senate only with respect to a provision, not included in the quotation in the text, authorizing the courts, by rule, to

that purpose unmistakably clear. By the first Judiciary Act Congress had made applicable the forms of writs and modes of process used in the state courts. Although counsel repeatedly relied on this general language as authorizing proceedings by attachment and garnishment in accordance with state law, the courts had held that it did not do so in the absence of personal jurisdiction of the defendant. Undoubtedly this caused inconvenience, obstructing as it did the American creditor's right of access to local assets of creditors residing abroad. Hence Congress provided in *specific* terms for remedies "by attachment or other process against the property of the defendant." It could hardly be plainer that Congress was attempting to change the rule that actions could not be commenced in the federal courts by attachment or garnishment, without personal service, if state law so provided.

An argument to this effect was addressed to Mr. Justice Miller on circuit, only to be rejected. In *Nazro v. Cragin*⁶⁹ an assignee in bankruptcy sued in the court of his appointment, attaching property of a citizen of Wisconsin. Of section 6 of the Conformity Act Mr. Justice Miller said:

"[I]n my opinion, it was not intended by congress to make the great change for which the assignee's counsel here contends. It would compel citizens of the Pacific coast to go to New York to defend their property which happened to be there and would give the great central cities vast power. I cannot but think that a change so radical would have been expressed by congress in unmistakable language. And this view is strengthened by the consideration that no publication is provided for by the section under consideration, while a subsequent section of the same act does provide for publication in respect to certain suits in equity.

"The effect of this section in the act of 1872 is simply this: If the court has or can acquire jurisdiction over the defendant personally this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction."⁷⁰

So far as notice is concerned, presumably Congress intended that the notice provided by state law should be given. The reference

adopt changes made from time to time in the state laws. CONG. GLOBE, 42d Cong., 2d Sess. 2493 (1872) [covering 1871-72].

⁶⁹ 17 Fed. Cas. 1259 (No. 10062) (C.C.D. Iowa 1874).

⁷⁰ *Ibid.* Observe that this means that section 6 effected *no change* in the prior law.

to power in the "great central cities" is unintelligible from this distance. As for the hardship that would be imposed on residents of the Pacific coast who would be required to go to New York to defend their property, Mr. Justice Miller and others responsible for the defect of jurisdiction cannot escape from the difficulty confronting those who, like the present author, would correct it: what practical difference does it make whether the New York creditor can sue by attachment in the federal court in New York, since he can undoubtedly do so in the state courts,⁷¹ and thereby place the resident of the Pacific coast under the same compulsion?⁷²

In 1880 the Court—again by way of dictum—reaffirmed the doctrine that "an attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall."⁷³ No cases were cited, and there was no reference to section 6 of the Conformity Act. Since the defendant resided in Massachusetts, and was not found in Iowa, where the action was brought, the venue was doubtless improper under section 11 of the Judiciary Act; but that is all that can be said in favor of the dictum.

In the course of the next seven years the lower courts followed the jurisdictional doctrine announced by the Supreme Court, though with some uncertainty. In *Anderson v. Shaffer*⁷⁴ the venue was clearly improper, but, as usual, the holding was in terms of jurisdiction. In *Lovejoy v. Hartford Fire Ins. Co.*⁷⁵ the court, while doubting that section 6 of the Conformity Act had altered

⁷¹ *I.e.*, where there is concurrent jurisdiction, as in diversity cases and cases arising under federal law generally.

⁷² The practical reasons for rectifying the anomalous defect of jurisdiction will be discussed in Part IV *infra*.

The result in the instant case, though not the reasoning, may be justified on the ground that the venue remained improper under section 11 of the Judiciary Act.

The case departed from precedent in allowing the "jurisdictional" objection to be asserted on appeal after answer and trial on the merits. See note 25 *supra*. On principles shortly to be established, *Harkness v. Hyde*, 98 U.S. 476 (1878), the defendant was entitled to preserve his objection and assert it on appeal if it was an objection to jurisdiction of his person. Query whether the same principle applies to the venue objection, which was the only tenable one. *Cf. Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Neirbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939); *In re Louisville Underwriters*, 134 U.S. 488 (1890).

⁷³ *Ex parte Des Moines & M.R.R.*, 103 U.S. 794, 796 (1880). The circuit court having dissolved the attachment and dismissed the suit, the plaintiff sought mandamus in an original proceeding in the Supreme Court. The motion was denied "1, because it is an attempt to use the writ of *mandamus* as a writ of error to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit; and, 2, because if a writ of *mandamus* could be used for such a purpose the judgment below was clearly right."

⁷⁴ 10 Fed. 266 (C.C.S.D. Ohio 1881).

⁷⁵ 11 Fed. 63 (C.C.N.D. Ill. 1882).

the pre-existing law as to commencement of an action by foreign attachment, directed a verdict against the plaintiffs on the merits. In *Erstein v. Rothschild*⁷⁶ the court, while entertaining an attachment suit, reaffirmed the doctrine by way of dictum;⁷⁷ but there was no inconsistency since the action was brought in the district of the defendants' residence, and they entered a general appearance. Thus there was no defect of either personal jurisdiction or venue. In *Boston Electric Co. v. Electric Gas Lighting Co.*⁷⁸ the doctrine was followed, with the remarkable feature that the court cited *Pennoyer v. Neff*⁷⁹ for the proposition that "Courts of the United States cannot acquire jurisdiction by an attachment of property merely, but there must be a personal service of the writ or process upon the defendant, or a voluntary appearance."⁸⁰ Finally, in *Noyes v. Canada*⁸¹ the doctrine was reiterated and applied with an extreme emphasis on its jurisdictional character. Although the defendant, a resident of Canada, had entered a general appearance without objecting to jurisdiction or venue, the court allowed the garnishees, who claimed to own the property attached, to move to set aside the attachment. If it is true that section 11 of the Judiciary Act merely conferred a personal privilege on the defendant not to be sued outside the district of which he was an inhabitant, or in which he might be found,⁸² this decision is unjustified whether the objection to original proceedings by attachment is lack of personal jurisdiction or improper venue.

In 1887 there was a development of major, but neglected, importance. Section 11 of the Judiciary Act of 1789⁸³ was amended to read as follows:

"... and no civil suit shall be brought before either of said courts against any person by any original process of [*sic*] proceeding in any other district than that whereof he is an

⁷⁶ 22 Fed. 61 (C.C.E.D. Mich. 1884).

⁷⁷ *Id.* at 65.

⁷⁸ 23 Fed. 838 (C.C.D. Mass. 1885).

⁷⁹ 95 U.S. 714 (1878).

⁸⁰ 23 Fed. at 839. Another unusual feature of the case is that the defendants were foreign corporations having their principal places of business in Boston. There would thus have been no objection to the venue, nor any lack of personal jurisdiction, had the Massachusetts legislature not neglected to provide for process in such cases. Cf. *Ex parte Schollenberger*, 96 U.S. 369 (1877).

⁸¹ 30 Fed. 665 (C.C.D. Kans. 1887).

⁸² *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 330-31 (1838); *Harrison v. Rowan*, note 25 *supra*; *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653, 655 (1923).

⁸³ As embodied in REV. STAT. § 739 (1875), and carried over by the first section of the Act of March 3, 1875, 18 Stat. (Pt. 3) 470.

inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. . . ."⁸⁴

This amendment, which is of course the foundation of the present general venue statutes,⁸⁵ effected two changes: (1) it eliminated the provision that suit might be brought in any district in which the defendant might be found;⁸⁶ (2) in pure diversity cases, it made venue proper in the district of the plaintiff's residence, while in all other cases only the district of the defendant's residence was proper.

If the amendment is read from the modern point of view there is a deceptive aspect that must be carefully avoided. On its face the amendment seems designed to enlarge the sphere of proper venue in diversity cases, discriminating against the plaintiff in such other cases as those arising under federal law.⁸⁷ In the light of the legislative history this is an inaccurate interpretation. The House version of the bill⁸⁸ would have made no change for nondiversity cases, leaving the defendant to be sued wherever he could be found; but in diversity cases venue was restricted to two possible districts, as opposed to the sixty or seventy⁸⁹ in which he might have been sued, if found, under the prior law. The Senate version, which became the law, gave the same benefit and more to defendants in nondiversity cases: the only proper venue was to be in the district of the defendant's residence. From the standpoint of Congress, the powers of the federal courts had been greatly curtailed: whereas previously any defendant could be sued in any district in which the plaintiff could catch him, venue was now proper in only two districts in diversity cases, and in only one in all others.

Moreover, it is clear that there was no intention of extending the range of process against the person. Senator Mitchell, of Oregon, understood the amendment as authorizing a citizen of

⁸⁴ 24 Stat. 552-53 (1887).

⁸⁵ 28 U.S.C. § 1391 (1958).

⁸⁶ This was the result of Senate amendments, 18 CONG. REC., Pt. 3, 2542 (1887). The original House version retained the language "in which he shall be found" while limiting venue in diversity cases to the district of residence of either party. 18 CONG. REC. 613 (1887).

The changes noted in the text are those of immediate concern in the present discussion. Among minor changes, the word "person" was substituted for "inhabitant of the United States," thus apparently validating Mr. Justice Story's construction of the original language. See note 30 *supra*; *In re Louisville Underwriters*, 134 U.S. 488, 492 (1890); but see *In re Hohorst*, 150 U.S. 653 (1893).

⁸⁷ Cf. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 949 (1953).

⁸⁸ Note 86 *supra*.

⁸⁹ See 18 CONG. REC. 2545 (1887).

New York to sue a citizen of Oregon in the federal courts of New York. Senators Wilson and Edmunds denied this, but without giving very satisfactory explanations. Then Senator Hoar took over and made the intention unmistakably clear: in essence, the explanation was that the defendant might be sued in the district of the plaintiff's residence only if he were found there; venue would be proper in that district, but the plaintiff still had the problem of getting jurisdiction.⁹⁰

In the debates there was no reference to proceedings by attachment or garnishment. Nevertheless, when it authorized venue in the district of the plaintiff's residence, Congress removed the only real obstacle that had existed to the commencement of actions in the federal courts by such process in diversity cases. While the senators assumed that suit in the district of the plaintiff's residence would be possible only if the defendant were found there, the necessary meaning of the amendment was that suit could be brought in that district whenever proper personal service could be obtained, *or whenever personal service was not necessary*. It is now perfectly clear, for example, that in a diversity case venue is proper in the district of the plaintiff's residence, although the defendant is not found and served within that district, if proper personal service is possible outside the district, or constructive service can be had under a state nonresident-motorist statute.⁹¹ Hence, if personal service on the defendant is not necessary in actions quasi in rem, the plaintiff should now be able to proceed by attachment or garnishment in the district of his residence, if he can find property of the nonresident defendant there; and there has never been any good reason why personal service in such actions should be required in the federal courts, when it is not required in the state courts.

It was not long before the substance of this argument was advanced by an attaching plaintiff in a circuit court, only to be rejected.⁹² The opinion is a careful one, considering the venue statute of 1887 in relation to the Conformity Act⁹³ and even taking note of the Supreme Court's recognition, in *Pennoyer v. Neff*, of the power of the states to proceed against the property of non-

⁹⁰ *Id.* at 2544-45 (1887).

⁹¹ *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1946); *cf.* *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953).

⁹² *Harland v. United Lines Tel. Co.*, 40 Fed. 308 (C.C.D. Conn. 1889).

⁹³ At this time incorporated in the *Revised Statutes* as §§ 914 and 915.

residents without personal service. One gets the impression that the court was almost persuaded; but the day was carried for the defendant, and for perpetuation of the anomaly, by the old cases, decided prior to the venue amendment of 1887. The old cases spoke in terms of jurisdiction, and of the necessity of personal service. It is not surprising, though it is regrettable, that the circuit court in the end held that "The statute of March 3, 1887, introduced no new principle which obviated the necessity of personal service."⁹⁴ Indeed, it did not; yet the necessity for such service had been predicated solely upon the terms of the original venue statute, and upon the doubts and fears of Mr. Justice Story concerning the nature and effect of judgments in attachment and garnishment.⁹⁵

In *Big Vein Coal Co. v. Read*⁹⁶ the Supreme Court also turned a deaf ear to the argument that the change effected in the venue requirements by the act of 1887 should lead to a modification of the rule as to proceedings by attachment and garnishment. The argument was presented clearly enough, but Mr. Justice Day, citing the old cases, responded only:

"But we are of the opinion that this amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to personal service or voluntarily appear in the action. If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. We think the rule has not been changed; that an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court."⁹⁷

The reader will judge for himself how "radical" the suggested change would have been. As for the mode of constructive service,

⁹⁴ 40 Fed. at 312.

⁹⁵ In 1909 the Supreme Court, speaking through Mr. Justice Holmes, reaffirmed (citing the old cases) that in the federal courts attachment is but an incident to a suit, and unless the court has jurisdiction over the person of the defendant the attachment must fall. *Laborde v. Ubarri*, 214 U.S. 173, 174 (1909). Once again the statement appears clearly to have been dictum. See *id.* at 174-75. The act of 1887 was not referred to, but its innovations probably had no bearing since the case arose on writ of error to the District Court for Puerto Rico.

⁹⁶ 229 U.S. 31 (1913).

⁹⁷ *Id.* at 38.

Congress had taken care of that by adopting the state procedures, and there was no suggestion that the notice to the defendant in the instant case was either inadequate or unauthorized by the state law.

Prior to the Conformity Act, it could be maintained with a degree of plausibility that Congress had not authorized the use in the federal courts of state provisions for foreign attachment and garnishment. Prior to the act of 1887 it could be maintained, at least with respect to inhabitants of the United States, that attachment proceedings brought in the district of the plaintiff's residence, without personal service on the defendant within the district, were objectionable because the venue was improper. Prior to *Pennoyer v. Neff* it was possible to regard attachment and garnishment with distrust because of the disposition of the ignorant, and the power of the states, to regard the judgment as valid in personam. But when the *Big Vein* case was decided none of these things was possible with respect to a diversity case commenced by the plaintiff in the district of his residence, and the Court would have appeared in a better light if it had given the question more than superficial consideration instead of perpetuating the unfounded and unique disability of the federal courts.

III. JURISDICTION ON REMOVAL AND IN ADMIRALTY

Section 12 of the first Judiciary Act, after providing for the removal of certain actions commenced in state courts, continued:

"And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced."⁹⁸

In *Clark v. Wells*⁹⁹ the Supreme Court unanimously held that where an action is commenced by attachment in a state court against a nonresident, without personal service or appearance, and is removed, the federal court has jurisdiction to proceed to judgment against the property attached precisely as if the case had re-

⁹⁸ 1 Stat. 73, 79-80 (1789).

⁹⁹ 203 U.S. 164 (1906).

mained in the state court.¹⁰⁰ Indeed, such jurisdiction on removal has not been doubted in modern times.¹⁰¹

On any rational basis, the recognition of jurisdiction quasi in rem upon removal must be regarded as dealing a death blow to the notion that there is no such jurisdiction in cases originating in the federal courts. The two propositions are wholly incompatible, and one of them must fall. As a matter of abstract logic it might be argued that the removal cases may be the ones in the wrong; but the infirmities of the doctrine that an action cannot be commenced in the district courts by attachment or garnishment lead irresistibly to the conclusion that the removal cases are right and that the proposition as to original jurisdiction cannot stand.

Since 1887 the privilege of removal has been restricted to cases "of which the district courts of the United States have original jurisdiction."¹⁰² If the circuit court would not have had jurisdiction of the action in *Clark v. Wells*¹⁰³ had it been filed originally in that court, how could it have jurisdiction on removal? Attempts have been made to rationalize the incongruity on two grounds: (1) Congress expressly sanctioned the removal of actions begun by

¹⁰⁰ Two minor aspects of the case are worthy of note: (1) After removal, an order for publication according to state law issued from the circuit court. The Court brushed aside objections to this form of notice with the statement that no further notice was necessary; the defendant's removal of the case showed that he knew of it. *Id.* at 172. (2) The judgment of the court appeared on its face to be one in personam; the Supreme Court modified it so as to make it collectible only from the attached property. *Id.* at 173. Thus the Court dealt easily with two objections which had figured large in the discussion of original jurisdiction quasi in rem.

¹⁰¹ Under § 12 of the first Judiciary Act, 1 Stat. 79 (1789), the defendant was required to file his petition for removal "at the time of entering his appearance in such state court," and to "offer good and sufficient surety for . . . his there appearing and entering special bail in the cause, if special bail was originally requisite therein. . . ." Hence it might be argued that, especially in attachment and garnishment cases, there could not be removal without a general appearance. Cf. *Campbell v. Morris*, 3 Harr. & McHen. 535 (Md. 1797); *Pollard and Pickett v. Dwight*, 8 U.S. (4 Cranch) 421, 428-29 (1808); *Sayles v. Northwestern Ins. Co.*, 2 Curt. 212, 213 (C.C.R.I. 1854); *Bushnell v. Kennedy*, 76 U.S. (9 Wall.) 387, 393 (1869). But the removal procedure was amended, 18 Stat. (Pt. 3) 470, 471 (1875), 24 Stat. 552, 553-54 (1887), 25 Stat. 433, 435 (1888), so that the petition might be filed "at the time, or any time before the defendant is required by the laws of the State . . . to answer or plead to the declaration or complaint. . . ." The provision as to special bail was retained, 25 Stat. 435 (1888). Whether the changes effected by the amendments were significant or not, the earlier cases were disapproved, in so far as they treated a mere petition for removal as a waiver of the objection to jurisdiction over the person, *Goldey v. Morning News*, 156 U.S. 518, 522 et seq. (1895); *Wabash Western Ry. v. Brown*, 164 U.S. 271 (1896). In *Clark v. Wells*, note 99 *supra*, the Court made it clear, though without referring to the provision as to special bail, that there was no distinction between personal actions and actions quasi in rem; the petition for removal was not a waiver of objections to jurisdiction over the person in either case. The reference to special bail does not appear in the modern removal statutes. 28 U.S.C. §§ 1446, 1450 (1958).

¹⁰² 28 U.S.C. § 1441 (a) (1958). See 24 Stat. 552 (1887), 25 Stat. 433 (1888); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1010 (1953).

¹⁰³ The current provision is to be found at 28 U.S.C. § 1450 (1958).

attachment or garnishment when it provided, from the first Judiciary Act onward,¹⁰⁴ for the preservation of attachments obtained in the state court; and (2) the jurisdiction of the federal courts on removal is "derivative," so that federal jurisdiction of the cause is sustained by the undoubted jurisdiction of the state courts.¹⁰⁵ These explanations are quite inadequate.

Congress also expressly authorized the use of state attachment procedures in original cases: at first in general terms,¹⁰⁶ and later in terms no less specific than those used with reference to removal.¹⁰⁷ With respect to original jurisdiction the congressional language was given a narrow construction to conform to the judicial doctrine that there could be no jurisdiction over property in the absence of personal jurisdiction over the defendant. With precisely equal justification, or lack of it, the reference to attachments acquired in the state court might have been construed as limited to cases in which personal jurisdiction had been, or was later, perfected. Whatever may have been the foundation for the doctrine that jurisdiction did not exist in original cases, cases removed from the state courts necessarily presented the same problem, so far as the necessity for personal jurisdiction was concerned.¹⁰⁸

The jurisdiction of the district court on removal is, indeed, derivative. This means that where a state court lacks jurisdiction of the subject matter, or of the parties, the district court acquires none on removal.¹⁰⁹ It does not mean that the district court on removal has jurisdiction merely because the state court was competent. Any such notion renders meaningless the plain language of the removal statute, restricting removal to cases "of which the district courts of the United States have original jurisdiction."¹¹⁰

¹⁰⁴ Note, 34 CORNELL L.Q. 103, 105, 106 (1948); Note, 25 CORNELL L.Q. 448, 450-51 (1940) (*semble*); Note, 13 So. CAL. L. REV. 361, 361-62 (1940). Cf. Note, 18 N.C.L. REV. 51, 54, 55 (1939), where, although the argument based on express statutory sanction is noted, the incongruity of the distinction between original and removed cases is recognized.

¹⁰⁵ 7 MOORE'S FEDERAL PRACTICE 1534, 1539 (2d ed. 1955).

¹⁰⁶ 1 Stat. 93 (1789).

¹⁰⁷ 17 Stat. 196 (1872).

¹⁰⁸ In retrospect, it must be conceded that there was one difference in favor of jurisdiction on removal: the very filing of the removal petition demonstrated that the defendant had actual notice of the proceedings. Cf. *Clark v. Wells*, 203 U.S. 164, 172 (1906), note 100 *supra*. But, while the problem of notice had been one of the concerns of Mr. Justice Story and other architects of the no-jurisdiction doctrine, they at no time indicated a willingness to settle for actual or other reasonable notice, but insisted on personal service or general appearance as indispensable. See Part I *supra*.

¹⁰⁹ *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922). See *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943), and cases there cited.

¹¹⁰ See note 102 *supra*.

There is one good reason, and only one, why the district court should be able to proceed to judgment in an attachment case on removal when it would be unable to do so if the same case had been filed originally in the district court: the objection to venue which the defendant would have been able to assert under the Judiciary Act of 1789, and may still assert with respect to certain actions, is never available in removal cases. Since 1923 it has been clear that the general venue statutes do not apply to cases removed from state courts, and that the proper venue on removal is the district court for the district "embracing the place where such action is pending."¹¹¹ Assume an action commenced in the Southern District of New York by attachment against a resident of the Southern District of California. Under the original venue provisions the defendant would have been entitled to dismissal on the ground that the action was brought in a district of which he was not an inhabitant, and in which he was not found. But if the same action were brought originally in a state court in New York City, and removed to the District Court for the Southern District, the venue would be unobjectionable. Similarly, if such an action were begun today in the district court, jurisdiction not being founded solely on diversity, the defendant could procure dismissal—or transfer¹¹²—on the ground that the only proper venue was the district of his residence; but if the same action were filed in a state court and removed, the venue objection would disappear. And today, even if the action were filed originally in the district court for the Southern District of New York, there could be no objection to the venue if jurisdiction were founded solely on diversity of citizenship. The truth is that it has been the difficulty of justifying the venue, rather than the lack of in personam jurisdiction, that has always been the real impediment to attachment and garnishment in the federal courts.

These considerations seem abundantly sufficient to establish that there is no lack of jurisdiction in the federal courts to proceed by attachment and garnishment without personal service; but there is more. In *Rorick v. Devon Syndicate*¹¹³ the Court went well beyond *Clark v. Wells*, holding that after removal, and still without personal jurisdiction of the defendant, the district court could issue a further order of attachment or garnishment against

¹¹¹ 28 U.S.C. § 1441 (a) (1958). See *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653 (1923), overruling earlier decisions which had treated the venue provisions as jurisdictional.

¹¹² 28 U.S.C. § 1406 (a) (1958).

¹¹³ 307 U.S. 299 (1939).

other property of the same defendant. The case is significant because in it, for the first time, the Court adopted a skeptical attitude toward the precedents denying jurisdiction quasi in rem in original cases, and strongly intimated that the practice on removal might overthrow the old doctrine. In removal cases the Court, said Mr. Justice Douglas, "has not adhered rigorously to the philosophy underlying the antecedents of the *Big Vein Coal Company* case."¹¹⁴ Here there is no gainsaying the fact that the district court was authorized, by process issuing from that court in conformity to state law, to acquire jurisdiction over the property of a foreign corporation without personal service. True, the Court spoke of the lien originally acquired by the state court attachment as being "extended by the federal court to other property of the same defendant."¹¹⁵ And there was a half-hearted effort to reconcile the decision with precedent:

"This holding can be brought within the rule of the *Big Vein Coal Company* case, *supra*, if that decision is narrowly limited. For in one sense it can be said that attachment or garnishment is here used only as an 'auxiliary remedy.' *Id.*, p. 37. The garnishment effected [after removal] . . . would merely extend the proceedings *in rem* to reach other property of the same defendant."¹¹⁶

But this is surely the disingenuousness of a Court reluctant to overrule its former decisions unless such a course is absolutely required for adjudication of the case before it. The precedents on original jurisdiction had tolerated attachment and garnishment as "auxiliary remedies" solely in the sense of their being auxiliary to actions in personam:

"... [T]he principle . . . has been laid down more than once by this court, that in the courts of the United States 'attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall.' *Ex parte Railway Co.*, 103 U.S. 794, 796. 'Unless the suit can be maintained' means, of course, unless the court has jurisdiction over the person of the defendant."¹¹⁷

The ruling in the *Rorick* case was not dictum, and the Court was unanimous.

¹¹⁴ *Id.* at 311.

¹¹⁵ *Id.* at 312.

¹¹⁶ *Id.* at 313.

¹¹⁷ *Laborde v. Ubarri*, 214 U.S. 173, 174 (1909) (per Holmes, J.).

Also inconsistent with the doctrine that the federal courts have no original jurisdiction in attachment and garnishment without jurisdiction of the person of the defendant is the fact that those courts have from the beginning exercised such jurisdiction in admiralty cases.¹¹⁸ The practice in admiralty appears to have been challenged for the first time in a district court in 1802, and the court, relying on the process act¹¹⁹ and on Clarke's *Praxis*,¹²⁰ held clearly that "attachments against the goods or debts of absent persons may issue out of this court of admiralty."¹²¹

A degree of uncertainty as to the propriety of the practice was injected when Mr. Justice Washington, on circuit, unnecessarily held that section 11 of the Judiciary Act was applicable to admiralty cases.¹²² As an incident to a prize proceeding in the circuit court for the district of Rhode Island, a warrant had issued for the arrest of a resident of Pennsylvania, pursuant to which the arrest was made in that state. In support of the judgment discharging the petitioner it would have been sufficient to say, as Mr. Justice Washington did, that on general principles the process of the circuit court for the district of Rhode Island was limited to that district, and that "the person or thing against whom or which the court proceeds, [must] be within the local jurisdiction of such court."¹²³ But Mr. Justice Washington added that section 11 of the Judiciary Act was applicable,¹²⁴ thus laying the foundation for later suggestions that admiralty could not proceed originally by attachment and garnishment.

¹¹⁸ See ADM. R. 2, 5; cf. Rules 2 and 4 of the original Admiralty Rules, 3 How. ix, x (2d ed., Rapalje); 3 U.S. COMP. STAT. 2695 (1916). The effective date of the original rules seems to have been September 1, 1845. Compare Rule 47, 3 How. xix, with *Cushing v. Laird*, 6 Fed. Cas. 1017, 1021 (No. 3508) (D.C.S.D. N.Y. 1870).

¹¹⁹ "That the forms of writs, executions and other process . . . and the forms and modes of proceeding in suits . . . of admiralty and maritime jurisdiction [shall be] according to the principles, rules and usages which belong to . . . courts of admiralty . . . as contradistinguished from courts of common law." 1 Stat. 275, 276 (1792). By the original process act, such matters were to be determined "according to the course of the civil law." 1 Stat. 93, 94 (1789).

¹²⁰ "Francis Clerke was registrar of the court of arches during the reign of Queen Elizabeth. His work, 'Praxis Supremae Curiae Admiralitatis' was first printed in 1679. It was in Latin. A fifth edition, in Latin, was published in 1791. This was a very correct edition, and is the one from which the translation by Mr. Hall, which is the Baltimore edition of 1809, was made." *Cushing v. Laird*, 6 Fed. Cas. 1017, 1022 (No. 3508) (D.C.S.D. N.Y. 1870) (per Blatchford, J.).

¹²¹ *Bouysson v. Miller*, 3 Fed. Cas. 1021, 1022 (No. 1709) (D.C.S.C. 1802).

¹²² *Ex parte Graham*, 10 Fed. Cas. 911 (No. 5657) (C.C.E.D. Pa. 1818).

¹²³ *Id.* at 913.

¹²⁴ "Prize proceeding against an inhabitant of the United States, is unquestionably a civil suit; and if it be against the person, instead of the thing, the jurisdiction is excluded, unless it be instituted in the court of the district whereof he is an inhabitant, or is found at the time of serving the process." *Ibid.*

Four years prior to his decision in *Picquet v. Swan*¹²⁵ Mr. Justice Story, on circuit, fully recognized in a dictum the propriety of attachment and garnishment in admiralty without personal jurisdiction:

"I accede to the position, that, in general, in cases of maritime torts, a court of admiralty will sustain jurisdiction, where either the person, or his property, is within the territory. It is not even confined to the mere offending thing; it spreads its arms over the tangible, as well as incorporeal property of the offending party, to enable it to afford an adequate remedy. The admiralty may therefore arrest the person, or the property, or, by a foreign attachment, the choses in action, of the offending party, to answer ex delicto."¹²⁶

There is here no hint of the suspicion and distrust with which the learned Justice regarded foreign attachment in civil cases four years later—no concern with the attachment of property of trivial value, no concern with notice to the defendant, and no insistence on personal service or general appearance.

The question came before the Supreme Court in 1825 in *Manro v. Almeida*,¹²⁷ and the propriety of proceeding by foreign attachment was solidly affirmed on the ground that such had been the practice in the civil law, and formerly in the English admiralty courts, and likewise in the vice-admiralty courts and in the district of South Carolina.¹²⁸ But the former practice was not the sole basis for the decision; in our own courts the procedure had been in use "perhaps not so generally as to sanction our sustaining it altogether on authority, were we not of opinion, that it has the highest sanction also, as well in principle as convenience."¹²⁹ If the practice was sanctioned by principle and convenience in admiralty, why not in civil cases as well?¹³⁰

In *Clark v. New Jersey Steam Navigation Co.*¹³¹ Mr. Justice Story said:

¹²⁵ Note 26 *supra*.

¹²⁶ *The Invincible*, 13 Fed. Cas. 72, 76 (No. 7054) (C.C.D. Mass. 1814).

¹²⁷ 23 U.S. (10 Wheat.) 473 (1825).

¹²⁸ The authority of the case is somewhat weakened by the fact that the defendant arguably made a technical personal appearance: without entering bail, he demurred to the libel under protest on the ground that the attachment prayed for could not issue. *Id.* at 475, 478, 484, 485, 494.

¹²⁹ *Id.* at 490.

¹³⁰ Taney was counsel for the defendant, and argued that, since a civil suit by attachment could not be maintained, neither could the libel. *Id.* at 481. But it was Taney who dissented vigorously against the denial of jurisdiction in *Toland v. Sprague*. See note 63 *supra*.

¹³¹ 1 Story 531 (C.C.D.R.I. 1841).

"Neither has it been doubted, that the process of attachment well lies in an admiralty suit against the property of private persons, whose property is found within the District, although their persons may not be found therein, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit. Ever since the elaborate examination of this whole subject, in the case of *Manro v. Almeida* (10 Wheat. R. 473), this question has been deemed entirely at rest."¹³²

The question was not entirely at rest, however, in the minds of all the judges. In *Wilson v. Pierce*¹³³ Judge Hoffman, in a careful opinion giving full attention to all precedents, held that section 11 of the Judiciary Act prevented suit in admiralty by original process of attachment or garnishment against an inhabitant of the United States over whom the court did not have personal jurisdiction. The decision is highly significant, despite the fact that it was later overruled.¹³⁴ In a word, the significance lies in the fact that this obviously able and conscientious judge could find no reason whatever for distinguishing between the power of a district court to proceed by attachment in admiralty and its power to proceed in that fashion in civil cases—which is precisely the point made in this paper, except that, whereas Judge Hoffman concluded that the established unavailability of that procedure in civil cases required its denial in admiralty, the argument here is the converse: the undoubted jurisdiction of the courts to proceed by attachment in admiralty requires recognition of the same jurisdiction in civil cases.

The case of *Manro v. Almeida*¹³⁵ was distinguished on the ground that there it did not appear that the defendant was "an inhabitant of the United States"; he was described only as an absconding debtor, who, for all that appeared, might have fled the country. That case aside, the dominant precedents appeared to be *Picquet v. Swan* and *Toland v. Sprague*. On any analysis the reasoning of Judge Hoffman is at least understandable; on one level it is unanswerable:

"It may be urged that the jurisdiction and modes of proceeding of the admiralty courts of the United States, rest ex-

¹³² *Id.* at 536-37. The sole question for decision was whether attachment would lie against a foreign corporation, as well as a "private person"; the court held that it would. *Picquet v. Swan*, note 26 *supra*, and *Toland v. Sprague*, note 52 *supra*, were not cited.

¹³³ 30 Fed. Cas. 150 (No. 17826) (D.C.N.D. Cal. 1852).

¹³⁴ *Atkins v. Fibre Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 306-07 (1873).

¹³⁵ Note 127 *supra*.

clusively on the grant in the constitution, and the rules furnished by the process act of 1789 and 1792;—that as, by those acts, the forms of proceeding are required to be according to the practice of the civil law and the rules and usages of courts of admiralty, and as the writ of foreign attachment is in accordance with such practice, rules and usages, the prohibition clause of the judiciary act has no application. But by the same process act . . . the forms of writs and modes of proceeding in the supreme courts of the states, respectively, were adopted into the judicial proceedings of the United States, on the common law side. And in the cases of *Picquet v. Swan* . . . and *Toland v. Sprague* . . . the very point adjudged was, that though the practice of the state courts authorized the proceeding by foreign attachment, yet that practice can have no effect where it contravenes the positive legislation of Congress;—and that the state practice can be followed only where the court independently of it possesses jurisdiction; the process acts not having enlarged the jurisdiction, but only furnished rules for its exercise. The analogous provision, adopting in admiralty and maritime cases the practice of the civil law, must, it seems to me, receive a similar construction. If this reasoning be well founded, it follows that the process act, which prescribed the modes of proceeding in the admiralty cases, conferred no additional jurisdiction on the district courts, and that, if the prohibition contained in the judiciary act applies to courts sitting in admiralty cases, the prohibition was not removed, nor was the jurisdiction enlarged by the subsequent adoption of the civil law practice and that ‘of courts of admiralty.’ ”¹³⁶

What Judge Hoffman overlooked was (1) that section 11 of the Judiciary Act, construed as Mr. Justice Story had construed it, would have been intolerable as a venue provision in admiralty, where proceedings against foreigners and others residing abroad were commonplace; and (2) that in the linguistic structure of the Judiciary Act it was possible to find justification for not applying the process-venue provision to admiralty cases. Judge Blatchford strongly disagreed with Judge Hoffman, in a proceeding against a

¹³⁶ 30 Fed. Cas. at 151-52. See also *id.* at 153. Incidentally, Judge Hoffman made a point that should have given pause to those who, while accepting attachment in admiralty, rejected it in civil cases because of concern over notice to the defendant. While the state statutes presumably allowed ample time for the defendant to appear, in accordance with the custom of London, there seemed nothing in the federal practice to prevent a default in admiralty after the short period of time given a defendant, personally served, to plead. *Id.* at 155.

nonresident British subject.¹³⁷ His principal reliance was on the entrenched position of attachment in the traditional admiralty practice, on the rules promulgated by the Supreme Court, and on the Supreme Court's decision in *Manro v. Almeida*.¹³⁸

The Supreme Court dispelled the confusion in *Atkins v. Fibre Disintegrating Co.*¹³⁹ Its approach was strictly linguistic: if section 11 were construed in the light of other sections of the Judiciary Act, it appeared that the restrictive clause of that section was not intended to apply to causes civil and maritime, but only to cases at law and in equity. *Ex parte Graham*,¹⁴⁰ so far as it held the contrary, and *Wilson v. Pierce*¹⁴¹ were disapproved.¹⁴²

The final chapter was written in *In re Louisville Underwriters*.¹⁴³ The case arose after the 1887 amendment of the venue provision,¹⁴⁴ and the Court had only to hold that the amendment did not change the principle announced in *Atkins v. Fibre Disintegrating Co.* But the case is significant because it added to the rationale of the *Atkins* case a substantial, as well as a verbalistic, reason for the inapplicability of the general venue provisions to admiralty cases:

"Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and naviga-

¹³⁷ "It is sufficient to say, that, as it is not shown that the respondent ever has been an inhabitant of the United States, the provision cited from the said 11th section does not apply to this case, even though it should be conceded that this suit is such a civil suit as is intended by the provision." *Cushing v. Laird*, 6 Fed. Cas. 1017, 1020 (No. 3508) (D.C.S.D. N.Y. 1870).

¹³⁸ Note 127 *supra*. *Smith v. Miln*, 22 Fed. Cas. 603 (No. 13081) (D.C.S.D. N.Y. 1848), casts no doubt on the availability of attachment in admiralty; on the contrary, Judge Betts recognized that "its force and utility is grounded in the high principle that personal obligations may be enforced by justice by preliminary and direct action on property, both for the purpose of compelling an appearance of the debtor, . . . and also by the sequestration or transfer of such property to the benefit of those to whom it rightfully belongs, without other action against or coercion over the person of the debtor." *Id.* at 605. The libellant failed solely because of neglect to summon the garnishee properly.

¹³⁹ 85 U.S. (18 Wall.) 272 (1873). As in *Toland v. Sprague*, the Court seems to have gone to some length to contrive the occasion to consider the "jurisdictional" question. Unquestionably the defendant had entered a general appearance, sufficient to sustain the judgment against it in personam. *Id.* at 298. But because the stipulation for value was entered into subject to the disposition of a motion to discharge the attached property, the court took the view that it was necessary to consider the validity of the attachment since, "If the attachment clause was void for want of jurisdiction in the District Court to issue it, the seizure of the property was a trespass, and the stipulation a nullity. . . ." *Id.* at 299. But the earlier cases, including *Toland v. Sprague*, had made it clear that a general appearance cured any objection to the attachment.

¹⁴⁰ Note 122 *supra*.

¹⁴¹ Note 133 *supra*.

¹⁴² 85 U.S. (18 Wall.) at 306-07.

¹⁴³ 134 U.S. 488 (1890).

¹⁴⁴ 24 Stat. 552 (1887).

tion, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand, often have property or credits in other places. . . . To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice."¹⁴⁵

There can be no basic quarrel with this attitude. It would have been absurd to read either section 11 of the Judiciary Act or the act of 1887 as limiting the venue of suits in admiralty, just as it would be absurd to give the current general venue statutes¹⁴⁶ that effect. In general it is true now, and has always been true, that there are no venue statutes applicable to admiralty. "By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits of his. . . ."¹⁴⁷ And the facts of the *Louisville Underwriters* case make it abundantly clear that the objection to proceedings by attachment or garnishment is not one of jurisdiction, but of venue only. The process agent appointed by the corporate defendant in the forum state had been personally served.¹⁴⁸ The objection could only be that the defendant was, by the act of 1887, immune to any proceeding in personam (with or without attachment) except in the district of which it was an inhabitant.

Lest there be any misunderstanding, let it be emphasized that nothing that has been said here should be construed as deprecating the power of the district courts to proceed by attachment or garnishment in removal cases, or in admiralty cases, in the absence of personal jurisdiction. That power is well founded in precedent and reason, and there is no disposition on the part of anyone to disturb it. The pity is that the courts have treated the question,

¹⁴⁵ 134 U.S. at 493.

¹⁴⁶ 28 U.S.C. § 1391 (1958).

¹⁴⁷ *In re Louisville Underwriters*, 134 U.S. 488, 490 (1890). See 2 BENEDICT, ADMIRALTY 79 (6th ed. Knauth 1940).

¹⁴⁸ There having been no attachment or garnishment, the reference of the Court to the availability of that process in admiralty was technically dictum. Yet the point was that if the Court construed the venue statute as applicable to admiralty cases, the result would be to rule out such process where the defendant was not an inhabitant of the district.

so far as original civil cases are concerned, as one of jurisdiction rather than of venue; and that the venue statutes are careless of the interests of American creditors in certain cases. The passage quoted above¹⁴⁹ from the *Louisville Underwriters* case, emphasizing the convenience and justice of the remedy quasi in rem against foreigners, exhibits a tendency that is all too common among members of the bench and bar. Because admiralty cases frequently involve defendants residing in no judicial district the remedy by attachment is regarded as necessary and just. But ordinary civil cases also may involve defendants residing in no judicial district; yet when the courts considered the availability of attachment in such cases, they thought not of convenience and justice to the local plaintiff, but regarded attachment as an alien procedure fraught with possibilities of injustice to the foreign defendant. If venue statutes stand in the way of such proceedings there is little the courts can do to relieve the situation; but where such statutes do not stand in the way—as in diversity cases under the current Judicial Code—the courts should abandon the notion that in civil cases they have “no jurisdiction” to proceed quasi in rem without personal jurisdiction of the defendant. We would be better off if, instead of regarding admiralty cases as uniquely different from civil cases because admiralty is characterized by actions involving foreigners, we were to treat alike cases that are alike on their facts. As matters stand, a New York creditor having a nonadmiralty claim against a resident of France cannot proceed in the federal courts by attachment of the debtor’s property in New York; but if the claim is cognizable in admiralty he may so proceed¹⁵⁰—and he might do so even if the defendant were a resident of New Jersey, or of California, although in that event the practical reasons given in *Louisville Underwriters* for countenancing the procedure in admiralty would not be present.

No court has ever suggested that Congress lacks power to confer such quasi in rem jurisdiction on the district courts generally. The suggestion offered here is that Congress has done so, and that the Court has failed to recognize the fact. In each of the three cases considered the jurisdiction was conferred by reference: to state law with respect to original jurisdiction and jurisdiction on removal, and to the principles and usages of admiralty courts with respect to that head of jurisdiction. In two of the three instances

¹⁴⁹ See text at note 145 *supra*.

¹⁵⁰ For a modern instance of the use of attachment in admiralty, see *Swift & Co. v. Compania Caribe*, 339 U.S. 684 (1950).

the courts have taken the reference at face value. Only with respect to original jurisdiction of civil cases have they held that the grant of jurisdiction is circumscribed by other legislation; and, while that holding is justified where the other legislation makes the venue improper, the courts have gone far beyond this defensible position, and created the false notion that the reason for the unavailability of attachment is jurisdictional.

IV. CONCLUSION

The conclusion seems inescapable that the Advisory Committee, in proposing Rule 64 of the Federal Rules of Civil Procedure, did not intend to bring about any change in existing law. Although the language of the rule itself appears to authorize the use of state provisions for attachment "at the commencement" of an action so as to acquire jurisdiction quasi in rem, the Notes of the Advisory Committee stated: "This rule adopts the existing federal law, except that it specifies the applicable state law to be that of the time when the remedy is sought."¹⁵¹ Thus nothing of substance was added to what had been given by the process act of 1789¹⁵² and the Conformity Act of 1872,¹⁵³ as construed. But there can be no justification for the view of the Court of Appeals for the Eighth Circuit¹⁵⁴ that to construe the rule as authorizing attachment and garnishment without jurisdiction of the person of the defendant would have brought about a conflict with the provision of Rule 82, that "These rules shall not be construed to extend . . . the jurisdiction of the district courts. . . ." As we have seen, the only sense in which it can possibly be maintained that the unavailability of attachment and garnishment is "jurisdictional" is that, according to the interpretations placed by the courts on the process act and the Conformity Act, Congress has not chosen to invest the district courts with such jurisdiction. But Rule 64 is the successor to the relevant provisions of those acts. The enabling act provided: "That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. . . ."¹⁵⁵ The subject covered by the process act was "the forms of writs and execu-

¹⁵¹ See further Note, 34 CORNELL L.Q. 103, 107 et seq. (1948).

¹⁵² 1 Stat. 93 (1789).

¹⁵³ 17 Stat. 196, 197 (1872).

¹⁵⁴ *Davis v. Ensign-Bickford Co.*, 139 F.2d 624, 626 (8th Cir. 1944).

¹⁵⁵ 48 Stat. 1064 (1934); cf. 28 U.S.C. § 2072 (1958).

tions . . . and modes of process";¹⁵⁶ the subject covered by the Conformity Act was "the practice, pleadings, and forms and modes of proceeding."¹⁵⁷ It was by virtue of the authority conferred on the district courts by those two acts that jurisdiction in attachment and garnishment was upheld upon removal and in admiralty.¹⁵⁸ The very authority which Congress exercised in passing those acts was delegated to the Court by the enabling act. It is only because Congress is supposed not to have exercised its authority to approve the commencement of civil actions by attachment and garnishment that the practice has been disapproved. Hence if the Court, exercising the authority delegated to it by Congress, promulgates a rule authorizing the practice, the defect is *ipso facto* rectified, there is no longer a reason for objecting to the practice, and there is certainly no increment to the "jurisdiction" of the district courts. There has only been an exercise of the delegated power to "prescribe . . . the forms of process." And the rule, of course, does not become effective without congressional concurrence.

Any remaining doubt as to the validity of a rule authorizing the commencement of civil actions by attachment or garnishment without personal service should be dissipated by the Court's decision in *Mississippi Pub. Corp. v. Murphree*.¹⁵⁹ If Rule 4 (f), authorizing the personal process of the district court to be served anywhere within the state, instead of merely within the district, was not an extension of the jurisdiction of those courts, it can hardly be supposed that the hypothetical rule under discussion would be so considered.

"It is true that the service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served. But it is evident that Rule 4 (f) and Rule 82 must be construed together, and that the Advisory Committee, in doing so, has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts as defined by the statutes, §§51 and 52 of the Judicial Code in particular, rather than the means of bringing the defendant before the court already having venue and jurisdiction of the subject matter. Rule 4 (f) does not enlarge or diminish the venue of

¹⁵⁶ 1 Stat. 93 (1789).

¹⁵⁷ 17 Stat. 197 (§ 5) (1872); and § 6, *ibid.*, dealt expressly with "attachment or other process."

¹⁵⁸ See Part III *supra*.

¹⁵⁹ 326 U.S. 438 (1946).

the district court, or its power to decide the issues in the suit, which is jurisdiction of the subject matter. . . . Rule 4 (f) serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court at the place where Congress has declared that the suit may be maintained."¹⁶⁰

The same would be true of a rule unambiguously authorizing the commencement of an action by attachment or garnishment. In the *Davis* case the court had jurisdiction of the "subject matter" by virtue of diversity of citizenship, the requisite amount being in controversy. Venue was proper in the district of the plaintiff's residence. The rule allowing attachment or garnishment would merely provide a procedure for requiring the defendant to appear and defend, or, in the alternative, for subjecting the defendant's property, within the geographical limits of the district, to the plaintiff's claim.¹⁶¹

The former Advisory Committee on Rules for Civil Procedure in 1955 recommended an amendment of the rules designed to authorize proceedings quasi in rem in accordance with state law.¹⁶²

¹⁶⁰ *Id.* at 444-45.

¹⁶¹ Doubts, which seem clearly unfounded, have been expressed as to the propriety of such a use of the rule-making power. Note, 28 So. CAL. L. REV. 188, 193 (1955); *but cf.* Note, 34 CORNELL L.Q. 103, 107 et seq. (1948); 13 So. CAL. L. REV. 361, 363 (1940).

¹⁶² Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts 10, 11-14 (1955). The proposal was to amend Rule 4(e) to read as follows (new matter in italics):

"(e) SAME: OTHER SERVICE. Whenever a statute of the United States or any of these rules or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order. *Whenever a statute or rule of court of the state in which the district court is held provides for notice to such a party to appear and respond or to defend in an action by reason of the attachment or garnishment of his property located within the state, or for service of a summons, notice, or order in lieu of summons upon a party not an inhabitant of or found within the state, it shall also be sufficient if service is made on the party is brought before the court under the circumstances and in the manner prescribed in the state statute or rule.*"

In view of the restrictive attitude adopted in the past, it may be doubted whether the proposed amendment is adequate to accomplish the clear purpose of the Advisory Committee. The amended rule provides a mode of serving, or notifying, the nonresident defendant; but in the same way, by reference to state procedure, so did the Conformity Act, 17 Stat. 196, 197 (1872). It would seem preferable to make clear, perhaps by amendment of Rule 64, that the purpose is to authorize the district courts to proceed quasi in rem without personal service on the defendant.

I cannot agree with Professor Blume, *Actions Quasi in Rem Under Section 1655*, 28 U.S.C., 50 MICH. L. REV. 1, 9 (1951), that the appropriate solution is an amendment of section 1655 of the Judicial Code. That section has a wholly different purpose, relating to

The Court has not acted on the proposal, and presumably will not do so unless it is renewed by the new Advisory Committee on Rules of Practice and Procedure of the Judicial Conference. Professor Moore opposed the proposed amendment: "It is unwise to increase the number of diversity cases that can be brought originally in the district courts by providing for quasi in rem jurisdiction as the amendment to Rule 4 (e) purposes. Practicalities do not justify this enlargement."¹⁶³

If there were a proposal to enlarge the diversity jurisdiction of the district courts this writer would not be among its supporters. But the proposed amendment has nothing directly to do with diversity jurisdiction. It would simply allow proceedings quasi in rem according to state law where the court has jurisdiction by reason of diversity or otherwise, and where the venue is proper. It happens that in the circumstances the greatest effect would be to allow diversity cases to be filed originally (and effectively) in the district court where that is not now possible. That, however, is no reason why the problem should be beclouded by invoking the passions that surround the basic issue as to diversity jurisdiction. The only cases that would be affected are cases now within the jurisdiction of the district courts, which cannot be effectively brought

pre-existing liens and claims. The problems of attachment and garnishment have historically been dealt with in Rules 4 and 64 and their statutory predecessors.

A similar problem exists as to the power of the district court to enter judgment quasi in rem under § 1655 itself, in the absence of personal jurisdiction. See Report of Proposed Amendments, *supra*, at 13; Blume, *supra*, at 4-5; Fed. R. Civ. P. 70; *Carney v. Commonwealth Oil & Gas Co.*, 5 F. Supp. 304 (D. Kan. 1933); *Dan Cohen Realty Co. v. National Savings & Trust Co.*, 125 F.2d 288 (6th Cir. 1942). Section 1655 makes venue proper in the district where the property is located, and makes provision for constructive service on absent defendants. When the absent defendant does not appear the district court should have authority to proceed in rem, at least if such procedure is authorized by state law. The existence of this authority is further demonstration of the anomalous character of the denial of in rem authority in attachment and garnishment cases.

¹⁶³ Report of Proposed Amendments, *supra* note 162, at 7.

An objection even more pointedly invoking attitudes of hostility toward the diversity jurisdiction might be that, in a case such as *Davis v. Ensign Bickford Co.*, to change the rules so as to give the Arkansas plaintiff the option to sue in a federal court of his home state would be out of harmony with the presumed purpose of the diversity jurisdiction, to protect nonresidents against the hypothetical prejudice of state tribunals. A partial answer is: (1) The proposed change is not limited to diversity cases, though they would be the ones most affected as matters stand, but would permit proceedings quasi in rem in any case in which the venue is proper under existing or future venue statutes. (2) If it is out of harmony with the underlying purpose of the diversity jurisdiction to give the plaintiff the choice of a federal forum in his home state, it is nevertheless a fact that plaintiffs in diversity cases have enjoyed that choice since the Judiciary Act of 1789, see note 10 *supra*, and that the privilege was pointedly and expressly confirmed by the venue statute of 1887, note 84 *supra*. So long as the plaintiff in diversity cases enjoys this privilege in general, it is anomalous to withhold it from him in actions quasi in rem.

there because the strange history of judicial decision that has been recounted says that there is no means of bringing the defendant before the court. They are cases which the plaintiff may bring in a state court, and which the defendant may then remove to a federal court. It is not easy to understand why one should be concerned over the number of diversity cases "brought originally" in the district courts on account of diversity rather than over the total number of such cases, original and removed.

As for "practicalities": It is no doubt true that, in general, the plaintiff is not deprived of his remedy by the inability to proceed by attachment or garnishment in the federal court. Thus in the *Davis* case the plaintiff might have filed his action in the state courts of Arkansas and obtained the relief sought—and in the federal court at that, had the defendant exercised its right of removal. Yet if the plaintiff has reasons for preferring the federal forum, why should it be denied him when he proceeds by attachment, when he could resort to it if he could serve the defendant personally? Moreover, the alternative of attachment in the state courts is available only in cases of concurrent, not exclusive, jurisdiction. An action for patent or copyright infringement, for example, may be brought *only* in a federal court.¹⁶⁴ It may be that the current venue statutes would prevent action by attachment in such cases even if the rules were amended as suggested;¹⁶⁵ yet why should not the anomalous disability to proceed by attachment or garnishment be rectified in anticipation of a revision of the venue statutes? Why should not a trustee in bankruptcy, liquidating the assets of the bankrupt's estate, be allowed to proceed by attachment?¹⁶⁶ And why should the United States be required to resort to a state court when it locates property of its nonresident debtor in this country?¹⁶⁷

A major practical reason for rectifying the defect is that Rule 64, like its statutory predecessors, is a well-camouflaged trap for the unwary. By its terms it seems to invite litigants to avail themselves of state remedies by attachment and garnishment in the federal courts; but it turns out to be a delusion and a snare. We have seen that, although the unavailability of such remedies was

¹⁶⁴ 28 U.S.C. § 1338 (1958).

¹⁶⁵ See 28 U.S.C. § 1400 (1958).

¹⁶⁶ Cf. 28 U.S.C. § 1334 (1958); *Nazro v. Cragin*, *supra* note 69.

¹⁶⁷ See 28 U.S.C. § 1345 (1958); *United States v. Brooks*, 184 Fed. 341, 342 (S.D.N.Y. 1910) (vacating attachment of property of residents of England, in a case arising out of violation of the customs laws, "though it must be conceded that the inability of the United States to obtain relief in the courts of its own creation presents an anomalous situation").

declared by the Supreme Court as long ago as 1818,¹⁶⁸ plaintiffs have repeatedly resorted to the federal courts by way of attachment and garnishment, only to be turned away. The wasted effort and expense involved in such abortive efforts is bad enough in itself; but the consequences may be more serious. If the attachment is vacated the plaintiff loses the lien provided by state law, which may be a very serious consequence indeed.¹⁶⁹ And, although statutes of limitation are normally tolled while the defendant is beyond the reach of personal service, it is not inconceivable that in some situations the plaintiff may lose his remedy by reason of the lapse of time between his filing in the federal court and his refile in the state court.¹⁷⁰

The anomalous defect of "jurisdiction" may produce absurd results in cases in which the plaintiff pursues both a maritime and a civil cause of action, or in which it is unclear whether the case is properly cognizable by virtue of diversity or by virtue of the admiralty jurisdiction. Thus in *James Richardson & Sons v. Conners Marine Co.*,¹⁷¹ a shipper sued a marine carrier for damage and shortage suffered by a cargo of wheat which, when it could not be unloaded according to plan, remained in storage aboard the vessel. It was difficult if not impossible to determine whether the damage and loss had occurred during the period of transportation or that of storage, and the defendant contended that, so far as the claim related to the period of storage, it was not within the admiralty jurisdiction. Judge Clark, for the Court of Appeals, treated the storage as an incident of the transportation, so that the entire claim was within the admiralty jurisdiction; but, very sensibly, he noted that if the result were otherwise, it would make no difference because the district court had jurisdiction by virtue of diversity of citizenship, and so could dispose of the whole case though the claim were partly nonmaritime. Suppose this action had been commenced by foreign attachment, without personal jurisdiction of the defendant. According to existing law the attachment would be good in admiralty, but not in the civil case; and the difficulty of separating the maritime from the nonmaritime claim might prevent any resort to the attached property at all. At the least, the

¹⁶⁸ *Toland v. Sprague*, 37 U.S. (12 Pet.) 300 (1818).

¹⁶⁹ *Cf. Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934).

¹⁷⁰ *Cf. Toland v. Sprague*, note 168 *supra*.

¹⁷¹ 141 F.2d 226 (2d Cir. 1944).

unavailability of the remedy in civil actions would have obstructed the convenient and sensible solution reached by Judge Clark.¹⁷²

The Committee on Rules of Practice and Procedure of the Judicial Conference has requested that the Advisory Committee on Admiralty Rules give priority to a study of the feasibility of uniting the civil and the admiralty practices under a single set of rules of procedure. If such a unification should prove feasible, it would be necessary, of course, to preserve the practice of foreign attachment and garnishment for admiralty cases. To do that, and in the same body of rules to preserve the provisions which have been held inadequate to authorize the practice in civil actions, would be to perpetuate the anomaly and give it outright approval—and that is something no legislative and no rule-making body has yet done. Thus far the statutes and the rules have apparently authorized the practice; the worst that can be said of them is that, strictly construed, they have given insufficiently clear authorization. Only the courts have indicated disapproval of the practice, and that disapproval, early in the nineteenth century, was based on misapprehension and confusion. At all times the courts have acknowledged the power of Congress to provide for attachment and garnishment in civil cases without personal jurisdiction, and that power has now been delegated by Congress to the Court. Failure to correct the defect through the exercise of the rule-making power, in the circumstances, would amount to a deliberate decision that such proceedings in the federal courts are positively undesirable—a decision that it would be difficult indeed to justify.

Finally, if a recent decision by a district court is correct, a diversity action *may* be commenced in a district court by attachment or garnishment without personal jurisdiction of the defendant; the restriction imposed by the precedents means only that the court cannot proceed to judgment against the attached property until personal jurisdiction is perfected.¹⁷³ The defendant, though a resident of New York, had extensive business and social interests in California; an alias summons was outstanding. Since the court had jurisdiction because of diversity, and since venue was proper in the district of the plaintiff's residence, the court saw no reason why it should not hold the credits in the hands of the garnishees to answer the judgment that might ultimately be rendered, because

¹⁷² See also *Branic v. Wheeling Steel Corp.*, 152 F.2d 887 (3d Cir. 1946).

¹⁷³ *Hearst v. Hearst*, 15 F.R.D. 258 (N.D. Cal. 1954).

"in all likelihood defendant can and will be personally served with process issuing from this court."¹⁷⁴ A number of observations are suggested. First, it is apparent that, if this is a proper limitation of the restrictive precedents, the number of diversity cases that may be originally filed in the district courts will not be appreciably enlarged by a rule such as that proposed by the Advisory Committee in 1955. Original actions seeking attachment or garnishment may properly be filed now, and will remain on the docket so long as the possibility of personal service can be kept alive by the issuance of alias summons.¹⁷⁵ Second, this qualification of the restrictive doctrine would appear, on its face, to introduce a number of uncertainties and perplexities into federal practice. How long is the attached property to be tied up? Just how good is the attachment? Is it clearly within the jurisdiction of the court, or is the court exercising merely some sort of inchoate jurisdiction? Is the lien entitled to recognition in other courts?¹⁷⁶ How is the case to be removed from the docket? If the defendant appears specially and moves to quash, how is the court to determine the likelihood that he will be found and served in California in the future?

Actually, the decision is neither so novel nor so troublesome as it seems. At common law, as even Mr. Justice Story recognized, process of attachment, or distringas, could issue against the estate of a defendant; the only disability suffered by the common-law court was that it could not, in the absence of appearance, proceed to judgment against the property.¹⁷⁷ The district court in California was doing no more than common-law courts have always been able to do, even without the aid of the custom of London or the principles and usages of the civil law. There should, then, be no doubt as to the jurisdiction of the court to attach the property, nor as to the validity of the attachment lien. The question remains: how is the case to be removed from the docket? Must we once again resort to the process of outlawry? It seems simpler to amend the rules and allow the court to proceed to judgment against the property by default if the defendant does not appear.

So much for the "practicalities." To them may be added the observation that, as nature abhors a vacuum, so may the legal mind deplore a pointless deficiency in the authority of the federal courts, brought about solely by faulty analysis.

¹⁷⁴ *Id.* at 260. The motion to quash was made by the garnishees. See text at note 82 *supra*.

¹⁷⁵ *Cf.* FED. R. CIV. P. 4 (a).

¹⁷⁶ *Cf.* *Sanders v. Armour Fertilizer Works*, note 169 *supra*.

¹⁷⁷ See note 36 *supra*.

Attachment and garnishment have their harsh aspects. A resident of New York may own property worth somewhat more than \$10,000 in California. The property is attached in an action against him on a claim, which he believes to be unfounded, for \$50,000. He faces the dilemma that, if he defaults, he will certainly lose the property, while if he appears and defends he will subject himself to the possibility of a much greater personal liability in an inconvenient and perhaps unfriendly forum. There is a way of ameliorating this condition and the injustice inherent in it, and the rules should also be amended to make it clearly available. The defendant may be permitted to make a limited appearance for the purpose of defending his interest in the property by contesting the merits of the claim, without being subjected personally to the jurisdiction of the court for any purpose.¹⁷⁸ This humanitarian doctrine has been opposed by some commentators,¹⁷⁹ but their reasons rest on nothing more substantial than the same inability to conceive of a middle ground between an action in rem and an action in personam that led the Delaware court to perpetrate one of the more egregious injustices of modern times.¹⁸⁰ Local creditors might regret the absence of the compulsion that the usual practice exerts upon the defendant to appear generally; but since they now have available no such remedy in the federal courts, they can hardly complain with good grace if the remedy is made available in limited form.¹⁸¹

¹⁷⁸ RESTATEMENT, JUDGMENTS § 40; *Cheshire National Bank v. Jaynes*, 224 Mass. 14 (1916); *Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co.*, 285 Fed. 214 (6th Cir. 1922) (removal case).

In libels in rem in admiralty, the owner of the vessel seized may appear and defend the *in rem* cause, and may procure the vessel's release by giving security, without subjecting himself to personal liability. See 2 BENEDICT ON ADMIRALTY 414 (6th ed., Knauth 1940) [citing *The City of Atlanta*, 17 F.2d 311 (S.D. Ga. 1927); *The Santa Cecilia*, 1927 A.M.C. 80 (D. Ore. 1927); *The Panama City*, 1936 A.M.C. 569 (D. Mass. 1936)]; GILMORE & BLACK, *THE LAW OF ADMIRALTY* 511-12 (1957) [citing *The Monte A*, 12 F. 331 (S.D.N.Y. 1882); *The Nora*, 181 F. 845 (S.D. Fla. 1910)]. But cf. GILMORE & BLACK, *supra*, at 652-54 [citing *The Fairisle* (*Dean v. Waterman S.S. Co.*), 76 F. Supp. 27 (D. Md.), *aff'd* 171 F.2d 408 (4th Cir. 1948); *The Minnetonka*, 146 F. 509 (2d Cir. 1906); *Mosher v. Tate*, 182 F.2d 475 (9th Cir. 1950); and the dissenting opinion of Judge Clark in *Logue Stevedoring Co. v. The Dalzellance*, 198 F.2d 369, 373 (2d Cir. 1952)]. Gilmore and Black view with approbation what they regard as the tendency of the rule permitting defense of the *in rem* cause without personal liability to break down in recent years. *Id.* at 652, 654.

¹⁷⁹ 1 MOORE'S FEDERAL PRACTICE ¶ 12.13 (2d ed. 1948); Blume, *Actions Quasi in Rem Under Section 1655, Title 28, U.S.C.*, 50 MICH. L. REV. 1, 24 (1951).

¹⁸⁰ See *Ownbey v. Morgan*, 256 U.S. 94 (1921).

¹⁸¹ This suggests the question whether provision for limited appearance in diversity cases, where the state law makes no such provision, would conflict with the *Erie* doctrine as it has been applied, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Adequate investigation of the question would be beyond the scope of this paper; but it may be suggested that if the *Erie* doctrine is not offended by the total unavailability of the remedy in diversity cases when it is available in state courts, see 7 MOORE'S FEDERAL PRACTICE ¶ 64.09 (2d ed.

Attachment and garnishment are remedies that are necessary and proper for protection of the interests of local people having claims against nonresidents; their absence from the armory of the federal courts in original civil actions is regrettable; but the limited appearance offers a just way of mitigating the hardship to the defendant, and thus of allaying the fears of those who, like Mr. Justice Story in 1818,¹⁸² may look upon these remedies as harsh and oppressive.

It is to be hoped that the Court, through the exercise of its rule-making power, will rectify the anomalous incapacity which it unfortunately inflicted on the district courts in earlier years in the exercise of its ordinary judicial function.¹⁸³

1955), it would not logically be offended if the remedy were available in diversity cases in limited form.

On the other hand, if the remedy is concurrently available, a difference in the conditions under which the defendant may appear would provide an inducement for the very kind of forum-shopping that *Erie* was intended to prevent; and this seems the weightier consideration. Hence any provision in the Federal Rules of Civil Procedure for limited appearance might well be restricted to cases not within the reach of the *Erie* doctrine, leaving the practice to be governed by state law where state-created rights are involved.

¹⁸² *Picquet v. Swan*, *supra* note 26.

¹⁸³ If the garnishee is a citizen of the same state as the plaintiff, will the perfect diversity required by *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), be spoiled? Strangely, this question seems never to have arisen in the removal cases. In such cases it might be disposed of by reference to the "separate and independent claim or cause of action" provision of 28 U.S.C. § 1441 (c) (1958), although that provision has been strictly construed, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). Cf. Note, 68 HARV. L. REV. 368 (1954). In original cases the problem may be more difficult. Note, however, that in some attachment cases the garnishee is a purely nominal party, a mere custodian of the defendant's property with no interest in the case; indeed, land, and in some cases chattels, may be attached without summons to any garnishee. When a chose in action is involved the garnishee may admit the obligation and not be a party to any controversy; if he denies it, the controversy would appear to be between him and the nonresident defendant. "Generally speaking, there are three parties to a writ of foreign attachment. The plaintiff, or creditor, the defendant, or debtor; and the garnishee, who, in relation to the controversy between the plaintiff and defendant, stands very much in the situation of a stake holder. Between either of these parties, and himself, there is nothing adverse, unless he makes it so by his own conduct. It is perfectly immaterial to him, which of the parties succeeds. He is only to act bona fide, by discovering what property of the defendant is in his hands; and as he cannot himself, decide between the contending parties, he cannot deliver over the property to either, without the judgment of the court. The proceedings therefore against him, are merely auxiliary to the principal suit, and are intended to secure the end for which it was instituted." *Graighle v. Notnagle*, 10 Fed. Cas. 948, 949 (No. 5679) (C.C.D. Pa. 1816). (In this case the same individual was plaintiff and garnishee.) Cf. the third-party practice under FED. R. CIV. P. 14, *Morrell v. United Air Lines Transport Corp.*, 29 F. Supp. 757 (S.D.N.Y. 1939); *Friend v. Middle Atlantic Transportation Co.*, 153 F.2d 778 (2d Cir. 1946); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 937-43 (1953); and cf. the statutory interpleader proceeding, 28 U.S.C. § 1335 (1958); *Sanders v. Armour Fertilizer Works*, note 169 *supra*.