

SAMUEL BRECKENRIDGE NOTE PRIZE AWARDS

The Samuel Breckenridge Law Review Note Prize of fifteen dollars for the best note in the final number of Volume XIII has been awarded to Joseph Nessenfeld for his note on "Removability Where Resident Co-Defendant Is Not Served."

The additional Samuel Breckenridge Prize of ten dollars for the best note in Volume XIII has been awarded to Abraham E. Margolin for his note on "Liability of Employer Under Workmen's Compensation Act for Accidents Sustained by Employee on Way to or From Work," which was adjudged best in the first issue and awarded the prize for that issue.

The notes in Volume XIII were judged by a special committee, consisting of Messrs. Ralph R. Neuhoﬀ, John M. Holmes, and Harry W. Kroeger, who are also members of the Law Review Advisory Committee.

JURISDICTION IN ACTIONS IN REM AND IN PERSONAM

Suppose Mr. Jones, who is a resident of Illinois, has broken a contract giving Mr. Smith a right of action. The latter is a resident of Missouri; but, because Jones has no property in that state and because he remains in Illinois, Smith's right of action is worthless unless he cross over into Illinois and sue there. Such is the result of the rules of law today. That there is no logical reason for this rule is the fact which this note seeks to establish.*

It is necessary that the present law be given in order to make comprehensible the fact that in the above situation Smith's right is without a remedy in Missouri.

In law there are two general classes of actions and judgments, *i. e.*, *in personam* and *in rem*. Another form of action has been designated as an action *quasi in rem*, but this in theory comes under the other classes, and it will be considered later. An action *in personam* is one the judgment of which in form as well as in substance, affects the interests of the parties.¹ It is, as one court phrases it, against a person, founded on the defendant's liability.² The judgment binds only the parties litigant. There

* There are a number of considerations which this note will not treat. Such problems as due process, the divorce question, etc., are specific impediments in the path of the plan to be suggested in the note. For example, it would entail a complete reconstruction of the present conception of due process. The author's intention is to present some of the bases for his view, and not to treat of detail; that would necessitate a volume, at least.

¹ *Hine v. Hussey* (1871), 45 Ala. 496, 515; *Allen v. Morris* (1870), 34 N. J. L. 159, 162; *Woodruff v. Taylor* (1847), 20 Vt. 65, 73; *Stiller v. Atchison R. Co.* (1912), 34 Okla. 45, 124 P. 545, 598.

² *Gassert v. Strong* (1908), 38 Mont. 18, 33.

is little difficulty in arriving at a definition of an action *in personam*; but a definition of actions *in rem* has caused a great deal of confusion, probably because the courts themselves are not clear as to the meaning of the term. An action *in rem* is one whose judgment is an official decree of the status of a thing as it concerns persons. It is binding on every interested party. Not all decisions have framed the definition exactly like this one, but in general the trend has been at least an attempt at it.³ The fact that the law has recognized a distinction between these two kinds of actions has given rise to a difference in the forms and procedure of them. One of the chief differences is the distinction in jurisdictional requirements; and in a system of divided sovereignty, where the jurisdiction of a sister state is the deciding factor of whether the state of the forum will recognize a foreign judgment, these distinctions in jurisdictional requirements are especially important.

Jurisdiction is the power and the legal authority to declare what is law in a given situation.⁴ The legal authority, in a sense, rests on the power. It has been declared that the ultimate basis of jurisdiction is the physical power to enforce the court's decree.⁵ In another sense the word jurisdiction is used to indicate the proper exercise of power, so that foreign states will recognize and enforce the decree. That is the more humane and civilized kind of jurisdiction, and it is the kind which is necessary under the due process clause of the Federal Constitution. Yet it must be admitted that the final authority is not legal but physical; even if another state enforces a foreign judgment, its power to do so rests in practice on the power to compel the defendant physically. However, we shall treat of jurisdiction in its humane or international sense. Jurisdiction for an action *in rem* is obtained by getting the property or the thing within the control of the court. For an action *in personam* the defendant must be in court, or at least he should have been apprised of the proceedings and should have had an opportunity to get his day in court.⁶ But physical control of the defendant is not absolutely necessary in an *in personam* action. What Mr. Justice Holmes calls the "decencies of civilization" has given

³ *Mankin v. Chandler* (1823), 2 Brock. 125; *Woodruff v. Taylor* (1847), 20 Vt. 65; *The Sabine* (1879), 101 U. S. 384, 388; *Freeman v. Alderson* (1886), 119 U. S. 185, 7 Sup. Rep. 165; *Windsor v. McVeigh* (1876), 93 U. S. 274, 279; *The J. W. French* (1882), 13 Tex. 916; *Lord v. Chadbourne* (1856), 42 Me. 428, 443; 3 Freeman, JUDGMENTS, p. 3109; 2 Black, JUDGMENTS, Sec. 793.

⁴ 1 Black, JUDGMENTS, Sec. 3220.

⁵ *The Belgenland* (1885), 114 U. S. 355; *McDonald v. Mabee* (1917), 243 U. S. 90, L. R. A. 1917F, 458.

⁶ *Pennoyer v. Neff* (1877), 95 U. S. 714.

⁷ *Michigan Trust Co. v. Ferry* (1913), 228 U. S. 346.

rise to a few other bases of jurisdiction. Thus a valid judgment may be obtained against an absent defendant, if service of process is had at his domicile.⁸ Also, a defendant who has consented to the jurisdiction of a court cannot afterwards escape the force of its decree.⁹ And under the police power of a state a new basis of jurisdiction has arisen in the case of transient motorists passing through the state.¹⁰ But this will be considered more fully later.

Disregarding for the moment any historical reasons, what are the bases for the jurisdictional requirements in actions *in rem*? The first consideration is the limitations of the state's sovereignty to the boundaries of its territory. No state will issue a nugatory decree. The object of the judgment must be within the state, so that the decree can be made effective. It would be foolish for a New York court to adjudicate the status of land located in Missouri. The sovereign power of New York ends with its boundaries; it does not reach within the state of Missouri. And not only will that latter state refuse to enforce the New York decree, but it will deny its validity because of the lack of jurisdictional requirements.¹¹ The practical result of this jurisdictional requirement is beneficial in that it gives a plaintiff a means of enforcing his right against the defendant even when the latter is out of the state, if, however, he owns property within the state. And that is a good thing. Otherwise, the defendant could be immune to legal process merely by removing himself to another state. At present he must remove his property, too, which is much more difficult.

The power to coerce the defendant is one reason for the jurisdictional requirement of his being within the state in actions *in personam*. If Jones remains in Illinois a Missouri judgment is a nullity even within the state of Missouri. The limitations of sovereignty are equally as valid in the case of persons as in

⁸ Henderson v. Stanford (1870), 105 Mass. 504, 7 Am. Rep. 551; but service at the defendant's technical domicile has been held insufficient; McDonald v. Mabee, *supra*, note 5.

⁹ Hazel v. Jacobs (1910), 78 N. J. L. 459, 75 A. 903, 27 L. R. A. (N. S.) 1066, 20 Ann. Cas. 260.

¹⁰ Hess v. Palowski (1925), 247 U. S. 352. See also 14 ST. LOUIS L. REV. 62.

¹¹ Wimer v. Wimer (1888), 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126. Even where the parties litigant are in court, the judgment may nevertheless be ineffective because the property affected is not within the jurisdiction of the court. Standard Oil Co. v. Missouri (1912), 224 U. S. 270, Ann. Cas. 1913D 936; Chicago, B. and Q. Ry. Co. v. Chicago (1897), 166 U. S. 226; Graves v. Smith (1919), 278 Mo. 592, 213 S. W. 128, held that where the method prescribed by statute for attaching the property is not followed, it is not technically brought into court, and is not within the court's jurisdiction. For actions *in rem in admiralty* see Freeman on JUDGMENTS, p. 3125 *et seq.*

the case of things.¹² Then, too, there is to be considered the "due process" qualification. The old doctrine of hearing both sides of the controversy before rendering judgment operates to require due notice to be given to the defendant. *Pennoyer v. Neff*¹³ tried to settle what uncertainty there had been in the law before 1877. Why, then, should there be made an exception permitting valid jurisdiction to be had by service of process at the defendant's domicile without service upon the defendant himself? Pure convenience and necessity are the reasons for that. If a defendant is not to be served at his domicile, where can he be served? It is to be noted here that the courts have made an exception to the ordinary jurisdictional requirement on no more logical grounds than necessity and convenience. Again, since the legal authority for the court to exercise its power on the defendant depends a good deal on his being apprised of the suit, a previous consent to the jurisdiction answers that requisite. Also, where a defendant has been served and absents himself from the state the court is not deprived of its jurisdiction over him.¹⁴ The reason for this rule is that since the defendant was at the moment of serving within the power of the state he could have been incarcerated and held until the decree. The fact that this was not done should not invalidate the judgment, because the defendant himself was benefited by the humane action of the state. Note, too, that here the "decency of civilization" operates to give validity to an otherwise invalid basis for jurisdiction.

There remains to be considered the basis of jurisdiction in the cases of transient motorists. We can discard the notion of physical power because the defendant is out of the state; we can even assume that he had no actual notice of the suit. The Massachusetts statute which was upheld by the United States Supreme Court in the *Hess* case^{14a} was to the effect that a non-resident, operating a vehicle within the state, shall be considered to have appointed a public officer as his attorney for service of process.¹⁵ In its holding the Court said that the basis for the jurisdiction was the implied consent of the defendant. That, however, we need to consider. What is an implied consent? It is most often no consent at all but a declaration by the court as to what the consent must be. *Pennoyer v. Neff*¹⁶ implies that jurisdiction of a partnership may be based on implied consent.

¹² *McDonald v. Mabee*, *supra*, note 5; *Wetmore v. Karrick* (1907), 205 U. S. 141.

¹³ (1877), 95 U. S. 714.

¹⁴ *Michigan Trust Co. v. Ferry*, *supra*, note 7. An appeal is considered merely a continuance of the same suit, and the defendant need not be served again. *Nations v. Johnson* (1860), 24 How. 95, 16 L. ed. 628.

^{14a} *Mass. Gen. Laws*, Chap. 90, amended stat. 1923, Chap. 431, Sec. 2.

¹⁵ 95 U. S. l. c. 735.

But there is no indication of an extension of that principle to cases of tort. However, that consideration does not make the holding in the *Hess* case wrong. It would seem to be perfectly just that a right of civil recovery for torts committed by transient motorists be given to citizens of Massachusetts or of any other state. The real ground for jurisdiction is perhaps the police power of the state in regulating the use and operation of a dangerous instrumentality, the machine; but behind even this reason lies, it seems, the consideration of practical expediency. The plaintiff ought to be able to recover without following the defendant to get service on him. The defendant may be a tourist from California; then the plaintiff might find it necessary to spend a season chasing the defendant in order to serve him personally.

The situation where the defendant is absent had been met partially at common law. By the time of Blackstone the process of outlawry had been extended to defendants in civil actions.¹⁷ Previously, of course, outlawry was a dread thing, resulting in death to the outlaw and a forfeiture of all his goods to the crown. It lay for treason and other various felonies. Later it was extended to include most criminal cases, and in Bracton's time there was a tendency to permit it in civil cases. The fear of this process usually resulted in causing the defendant to consider seriously the advisability of meeting the plaintiff's legal contentions in court rather than running away.

American courts, however, refused to allow outlawry. The result was that where a defendant absconded but left property in the state, the plaintiff was left in the exasperating position of holding a valid claim and being permitted only to look on this property with which he could (but not legally) satisfy this right. That is the reason for statutory attachment suits, sometimes called actions *quasi in rem*.¹⁸ This procedure, which originated in the custom of London, is very common in the United States: almost every state has statutes providing for it.¹⁹ The plaintiff, even where the obligation is *in personam*, as for contract, attaches the defendant's property at the institution of the proceedings. Then, after judgment, he can levy execution against the property brought into court. That is the gist of the proceedings. But the exact nature of the judgment and action demands a little consideration.

Against whom or what is the action brought, the defendant or his property? It must be remembered that actions *in personam* will lie, and that is the type of case we will consider;

¹⁷ 3 Blackstone 284; 2 Pollock and Maitland; HISTORY OF ENGLISH LAW, p. 578, see also pages 447, 591, 470.

¹⁸ *Hill v. Henry* (1904), 66 N. J. Eq. 150, 57 Atl. 554.

¹⁹ See, for a typical example, R. S. Mo. 1919, Sec. 1725 *et seq.*

for, where the action is against the property (*i. e., in rem*), statutory attachment is not necessary. The action, then, is *in personam*, against the defendant.²⁰ But since the defendant cannot be served, the judgment cannot be good against him. Obviously then, the judgment must be against the property.²¹ An action *quasi in rem*, then, is one, which, though brought against a person, seeks to subject only certain of his property to the discharge of the claims asserted.²² No property but that brought into the cognizance of the court by the proceedings is subject to the plaintiff's right. And, too, it must be noted that the judgment in this kind of suit is different from the judgment *in rem* in that it is binding only between the plaintiff and the defendant. If the plaintiff through mistake proceeds against the property of one other than the defendant, the adjudication of the court is invalid as to that property. The plaintiff acts at his peril in designating the property to be attached.

The fact that in an attachment proceeding the defendant is out of the state eliminates physical power over the defendant as a basis of jurisdiction. Of course, the property is under the control of the state; but, it must be remembered, the property is not the subject of the suit; and the judgment in theory is against the defendant. What, then, is the basis for jurisdiction in attachment proceedings? No lawyer would hesitate to answer that pure expediency and practicability necessitate the action. Here is the situation: the plaintiff has a valid claim against the defendant; here is property belonging to the defendant; the court will therefore grant relief to the plaintiff in spite of the fact that the defendant is not in the state. And it is just that this should be so. The law has so far advanced today as to be able to recognize the impending effect of unnecessary formality.

The historical aspect of actions *in rem* might help in determining what our opinion of them should be. The generally accepted view is that actions *in rem* started in the Roman Law and were taken over into the common law from civil jurisprudence. But at the time of the Norman Conquest of England there were still traces of the Roman noxal action existing in Anglo-Saxon law. Between the time of the Romans in England and the eleventh century, there was ample opportunity for tribal custom to have combined with Roman law. Pollock and Maitland²³ refer to the situation where "men worked together in a forest, and by chance one let a tree fall on another, and it killed him. The tree belonged to the dead man's kinsfolk. A man whose beast wounded another might surrender the animal as an alternative

²⁰ Hill v. Henry, *supra*, note 18.

²¹ Lovejoy v. Albee (1851), 3 Me. 414, 55 Am. Dec. 630.

²² Freeman v. Alderson (1886), 119 U. S. 185, 187; 1 Black, JUDGMENTS, Sec. 229.

²³ HISTORY OF ENGLISH LAW, 2d Ed., Vol. 1, p. 55.

for money compensation." This seems to indicate the existence of a time in Anglo-Saxon law when inanimate objects (and animals, too) were tried in lawsuits as defendants. We know that such was the dictate of Biblical law, at least in regard to animals,²⁴ and that primitive Greek law had a kind of proceeding against animals or things.²⁵ There is little doubt but that all primitive thought regarded the immediate cause of an injury as capable of being tried in a lawsuit. How might our action *in rem* have developed from such thought?

Justice Holmes²⁶ presents a discussion of the growth of actions against a ship. There is first of all, he points out, the conception of the liability, or at least wrongful action, of the thing or person last connected with the injured one. To this thought there came the idea that there must have been some kind of motion, perhaps to enable the mind to read animation into the thing. The reader sees how motion gives life to the guilty object which is to be forfeited.

"The most striking example of this sort is a ship. And accordingly, the old books say that, if a man falls from a ship and is drowned, the motion of the ship must be taken to cause the death, the ship is forfeited—" There follows a discussion of the idea that if one assumes that the ship is endowed with life and personality the law at once becomes intelligible. In the case of *The Ticonderoga*,²⁷ a collision took place under such circumstances that the owner of the boat was free from liability. "Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this means that that vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her." The Supreme Court of the United States held a boat liable where she was in charge of a pilot whose employment was made compulsory by the laws of the port she was entering.²⁸ Without going into maritime law, the purpose of this brief historical paragraph is to advance the view that perhaps the action *in rem* today is a vestige of primitive notions. Nobody today looks on a boat as the offender where a passenger has fallen off and has drowned.

But the writer does not wish to be interpreted to mean that the action *in rem* should be abolished because it has primitive origins. Rather we should realize that actions *in rem* and *in*

²⁴ Exod. XXI. 28.

²⁵ See "COMMON LAW" by Justice Holmes, especially the chapter on "Early Forms of Liability."

²⁶ Op. cit. p. 25 *et seq.*

²⁷ Swably, 215, 217.

²⁸ *The China* (1868), 7 Wall, 53; See, also, the rest of Chap. 1 of Mr. Justice Holmes' book for a more complete discussion of the liability of defendants other than human beings.

personam are fundamentally the same, and that formal distinctions—such as jurisdictional requirements—should to some extent be abolished. Disregarding current misapprehension, what is an action *in rem*? Does it really effect the status of a thing? Is not the result of a judgment *in rem* similar to one in *personam* in that the rights of persons ultimately are the things affected? How foolish, then, to say that a decree by a court actually changes a thing, or its status! Of course, we know that this is another legal fiction. But what we do not realize is that we are allowing a fiction to prevent a just proceeding, as in the situation presented at the beginning of this note.

A judgment *in rem*, it is said, adjudicates a status. Thus, the effect of the judgment is that this piece of property is obligated to the plaintiff to extent of, say, \$500. But how is this different from the effect of a judgment *in personam*? In that case the effect is to say that the defendant personally is obligated to the plaintiff to the extent of \$500. In each case a status of debtor-creditor has been created by the court; and the fact that in the one case the debtor is a thing and in the other person of itself makes no difference to the parties interested. In each case the public force is pledged to the satisfying of the judgment as far as is possible.²⁹ On the other hand it is argued that a judgment *in personam* is different from one *in rem* because the former obligates the defendant personally, the latter merely affects the property. This is true only insofar as the form of the judgment is concerned. But consider what happens actually. Does an *in personam* decree affect a person if he has no property subject to execution? Certainly not, today—now that we have no longer the anachronism of the debtor's prison. The ultimate effect of a judgment *in personam*, in the sense of the object of its force, is property or the sale of property, just as it is in the case of judgment *in rem*. Also, the effect of this latter form of judgment is said to be purely against the property. But if we look through the outer form of the judgment we see that only the interests of people are involved, just as in judgments *in personam*. Certainly, if a piece of land is sold to satisfy a judgment *in rem*, the property of the defendant is not truly affected. The position of the defendant with regard to that property is changed, and he is actually impoverished to the extent of the judgment—precisely as he would have been by execution upon a judgment *in personam*. Perhaps, if we regard the property which a judgment *in rem* affects as being the right of user and disposition which one may lawfully exercise³⁰ over something,

²⁹ *Brigham v. Fayerweather* (1885), 140 Mass. 411, 5 N. E. 265, gives a suggestion of the inherent resemblance of both kinds of judgments.

³⁰ 1 Blackstone 138; *Stevens and Wood v. The State* (1839), 2 Ark. 291, 35 Am. Dec. 72; *St. Louis v. Hill* (1893), 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226, and numerous cases cited therein.

then it will be plain that only the interests of people are affected in this judgment as well as in judgments *in personam*.

The case of *Harris v. Balk*³¹ is one in which the Supreme Court in effect discarded any distinction between the two forms of judgment. This was a garnishment case, and these have always given the courts difficulty. Since the jurisdiction of the debt depends on the situs of this intangible thing, various results have been reached.³² The facts of the *Harris* case are as follows: Harris, of North Carolina, owed Balk \$300. While Harris was in Baltimore, one Epstein caused to be issued a writ of attachment against Balk, on the debt due Balk from Harris, and this writ was properly served on Harris. He did not contest the garnishment process, but left Baltimore and returned to North Carolina. There he made an affidavit that he owed Balk \$180 and stated that the amount had been attached by Epstein in Baltimore. By his counsel in the Maryland proceeding Harris consented to an order of condemnation against him as garnishee for \$180, the amount of his debt to Balk. Epstein got judgment for \$180, and Harris paid it. Later Balk commenced an action against Harris in North Carolina for \$180. Over the defendant's contentions based upon the garnishment process in Maryland, a judgment was issued in favor of Balk for the amount prayed for. The ground of the judgment was that the Maryland court had no jurisdiction to attach or garnish the debt due from Harris to Balk, because Harris was but temporarily in the state, and the situs of the debt was in North Carolina. The Supreme Court of the United States reversed the decree, holding in effect that the garnishment process of the Maryland court was valid. The reasoning was based on the ground that power over the person of the garnishee confers jurisdiction on the court of the state where the writ issues.³³ The court cited *Blackstone v. Miller*.

An analysis of *Harris v. Balk* seems to indicate that a very peculiar result was reached, *i. e.*, the rights of Balk were adjudicated in Maryland while he was in North Carolina, and his right of action against Harris was annihilated. The case proceeds on the basis that this is a garnishment suit, and is therefore *in rem*, but as a matter of fact the effect is practically a judgment *in personam* against a nonresident, which is afterwards valid as a defense against a claim by him. This is the nearest the courts have gone to obviate the distinction between actions *in rem* and *in personam* in rights *ex contractu*. And we are not arguing against this result. What we are attempting to prove is that

³¹ (1905), 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023, 3 Am. Cas. 1084.

³² *Tootle v. Coleman* (1901), 107 Fed. 41, 46 C. C. H. 132, 57 L. R. A. 120; *Bates v. Railway Co.* (1884), 60 Wis. 296, 19 N. A. 72, 50 Am. Rep. 369. See note, 100 Am. Dec. 509.

³³ See note by Prof. Beale in 27 HARV. L. REV. 107.

such a recognition of the similarity in these types of action should be carried to its logical and just conclusion.

In the case where Smith wishes to reduce to judgment a contract right against an absentee, Jones, the only objections, it seems, are formal ones. As much justice can be effected, at least, as in the transient motorist cases. In both instances, the defendant is sought to be subjected to civil liability, and the grounds for distinguishing them are doubtful. Perhaps the automobile is regarded as a dangerous instrumentality; but that, it seems, might be a basis for criminal jurisdiction. Where the plaintiff seeks money damages, what better position is he in there than if his right were in contract?

In conclusion, we think that judgments *in rem*, at least in some cases, ought to be recognized as vestigial remnants of medieval times, of a time when symbolism was permitted to obstruct the course of justice. We venture to suggest that our times are beyond such formal impediments and that our judges are capable of looking at the interests of the people involved as the final object of any legal decree. Judgments *in personam* and *in rem* should be recognized to be mere formulae, to some degree, at any rate. They are the exteriors of the forms of action which have grown up in our system of jurisprudence, and they should not be allowed to obstruct the path of justice. People, their rights of user in things, and their relationships toward each other are the things which a lawsuit actually controls. The adjudication of these things should not be interfered with by formulary procedure.

MORRIS E. COHN, '29.

WHEN IS A PARTNERSHIP INSOLVENT WITHIN THE TERMS OF THE PRESENT BANKRUPTCY ACT SO AS TO BE ADJUDGED BANKRUPT?

May a partnership be insolvent under the present Bankruptcy Act, when one of the partners is totally solvent *i. e.*, is able to pay his individual debts as well as all of the firm debts? This question is one which many students of jurisprudence consider settled in the negative. However, after a survey of the authorities on the subject, a great conflict presents itself.

Before entering a discussion of this sort, it would be well to draw the distinction between the terms "insolvent" and "bankrupt." The term "insolvent" is defined in the Bankruptcy Act of 1898, as follows: "A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed