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not being requested as a safeguard for defendants who belong to minority races. When a colored man is on trial for a crime, his equality is guaranteed under the law; that fact is fundamental. For this reason the effectiveness of the instruction may be doubted. Granted that jurors do not always decide cases according to the law given them, nevertheless there are jurors who make an honest effort to follow the law as given to them by the court in its instructions. On the whole it would seem that as a means of overcoming prejudice, not only in cases of negro defendants and witnesses, but of other minority races and nationalities as well, such instructions are likely to prove beneficial. The great weight of the authorities hereinabove discussed establish that the defendant is entitled to this instruction as a matter of right. Perhaps lawyers should avail themselves of such instructions, in proper cases, much oftener than is the current practice.

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SPECIAL APPEARANCE TO PROTECT PROPERTY IN ATTACHMENT PROCEEDINGS

In an action against a non-resident defendant, begun by a preliminary or concurrent attachment of the non-resident's property located within the state, and where service is procurred by publication or by out of state service, the court merely acquires jurisdiction over the attached property,[1] and not over the person of the defendant.[2] It is generally held that the non-resident may enter a special appearance to object to the court's jurisdiction over the attached property and still limit the liability of the defendant to an *in rem* judgment.[3] There is a split of authority on the effect of an attack on the attachment on other bases than jurisdictional grounds.[4] The problem presented in this note goes one step further than this: can the non-resident defendant appear specially, defend to the merits, and hence not subject to personal liability, but rather limit recovery to the property brought under the jurisdiction of the court by the preliminary attachment?[5]

The leading cases holding that the defendant is an attachment action

1. This particular type of jurisdiction has commonly been called "quasi in rem", but is referred to throughout this article as in rem jurisdiction because its effects and character is typical of the in rem action.
2. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed 565 (1877); Freeman v. Alderson, 119 U.S. 185, 7 S.Ct. 165, 30 L.Ed. 372 (1886); Clymore v. Williams, 77 Ill. 618 (1875); King v. Vance, 46 Ind. 246 (1874); Epstein v. Salorgne, 6 Mo. App. 352 (1878); Robinson v. Nat. Bank, 81 N.Y. 385 (1880); Bates v. Crow, 57 Miss. 676 (1880).
3. Big Vein Coal Co. v. Read, 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1053 (1913); Davis v. Cleveland, C. C. & St. L. R. Co., 217 U.S. 157, 30 S.Ct. 463, 54 L.Ed. 708, 27 L.R.A. (NS) 823, 18 Ann. Cas. 907 (1909); Meyer v. Brooks, 29 Ore. 203, 44 P. 281, 54 Am. St. Rep. 790 (1896); Adams v. Trepanier Lumber Co., 117 Ohio St. 298, 158 N.E. 541, 55 A.L.R. 1118 (1927); Chubbuck v. Cleveland, 37 Minn. 466, 35 N.W. 362, 5 Am. St. Rep. 864. Likewise in Tabor v. Baer, 107 W.Va. 594, 149 S.E. 675 (1929), a motion to dismiss an attachment case, solely on the ground that no property was attached and the order of publication was insufficient, constituted a special appearance.
5. For other articles on the same problem see: 18 Ford. L. Rev. 73 (1949); 97 U. of Pa. L. Rev. 403 (1949); 25 Iowa L. Rev. 329 (1940).

can appear specially for the purpose of limiting the recovery to the property attached are *Cheshire National Bank v. Jaynes*[6] and *Salmon Falls Manufacturing Co. v. Midland Tire & Rubber Co.*[7] In the *Cheshire* case the court said: "it would be unreasonable to oblige any man living in one state, and having property in another state, to make himself amenable to the courts of the last state, that he might defend his property there attached."[8] This same court argued that allowing non-resident defendants to defend to the merits in the *in rem* action by entering a special appearance would not create any impairment on the doctrine of res judicata if the plaintiff subsequently brings another action on the same cause of action by acquiring personal jurisdiction over the defendant or by attaching other property of the defendant. To justify this dictum the court agrued that the estoppel must effect both parties to the same degree before the doctrine of res judicata is applied, and that it only effects both parties to the same degree when it is applied as to the specific property attached.[9]

The rule of the *Cheshire* case was wholly approved in both "its reasoniing and conclusion" in the case of *Salmon Falls v. Midland Tire & Rubber Co.*[10] In that case the Sixth Circuit Court of Appeals held that where the defendant appears specially to defend the attached property that the "recovery is to be satisfied only from the attached property"[11] and thus the defendant is not subject to a personal judgment.

The American Law Institute in its *Restatement of Judgments* adopts the view of the *Cheshire* and *Salmon Falls* cases:

> "If in a proceeding begun by attachment or garnishment or by a creditor's bill in a court which has no jurisdiction over the defendant, he enters an appearance for the purpose of contesting the validity of the plaintiff's claim, he does not thereby subject himself personally to the jurisdiction of the court, if in appearing he states that he does not submit himself to the jurisdiction of the court."[12]

The comment following this section in the *Restatement of Judgments* makes it clear that this stand is taken because of the so-called "dilemma" that the defendant would be forced into if he could not make a special appearance for the sole purpose of defending his attached property. As Mr. Austin W. Scott, the Committee Reporter, said in the proceedings to the adoption of this section of the *Restatement of Judgments,* "But where his [the defendant's] property has been atttached must he either kiss it goodbye or submit himself generally to the jurisdiction?"[13] The adoption of this

6. 224 Mass. 14, 112 N.E. 500 (1916).
7. 285 F. 214 (C.C.A. 6th, 1922).
8. Quotation from an earlier Massachusetts case: Bissel v. Biggs, 9 Mass. 462 at 468, 6 Am. Dec. 88 (1812), which was quoted in and approved by the court in the Cheshire case, page 502.
9. Supra note 6, at 502.
10. Supra note 7, at 219.
11. Id. at 222.
12. Restatement, Judgments: Sec. 40 (1942), Appearance to Defend on the Merits.
13. 19 Proceedings, A.L.I. 291 - 301 (1941-1942).

section was their solution to this problem. In the Comment following this section it is further noted that:

> "It is reasonable that the defendant should not be subjected to this dilemma. Accordingly, he is permitted to enter an appearance in the action for the purpose of contesting the validity of the Plaintiff's claim without subjecting himself personally to the jurisdiction of the court."[14]

Another policy argument that might be raised in conjunction with the *Restatement's* "dilemma" argument is that the non-resident's choice between defending or forfeiting his attached property by default is made more difficult by the possibility of local prejudice and bias against a non-resident.

There are those who favor a special appearance rule in situations in which the non-resident defendant would otherwise be forced to defend in an inconvenient court.[15] It has been argued that the non-resident defendant's witnesses will probably reside in his locality and "he is faced with the expense of transporting them to the place of trial or of taking depositions, an expensive and clearly less effective mode of proof than oral testimony."[16] Rules of procedure and evidence might also be quite unfavorable to the defendant in the state where his property is attached. Thus it is contended that a special appearance ought to be permitted in these situations by construing procedural problems and rules of appearance in view of the principal of *forum non conveniens.*[17]

These are the arguments that have been raised in favor of a special appearance rule for non-resident defendants in actions begun by attachment. Upon closer examination of these arguments supporting the *Cheshire, Salmon Falls,* and *Restatement* view, however, there seems to be certain fallacies to each of these arguments which negative any reasoning heretofore presented in favor of the special appearance rule.

The "dilemma" argument brought out by the *Restatement* completely disregards the actuality that the defendant either does or does not have a valid defense to the plaintiffs claims; and if he does have a valid defense, he will not be afraid to come into court and settle the controversy. This type of a defendant believes in his defense, his thoughts are of winning and thereby quieting the plaintiff's claim against the attached property. To ask this defendant to choose between forfeiting his property by default or defend on a *in personam* basis is not to cast him into a "dilemma", nor is it an unreasonable choice for the defendant with a good defense to make. It is, however, a difficult choice for the defendant who knows he has either a very weak defense or no defense to the plaintiff's claim. It is this defendant who would like to delay the plaintiff's rightful recovery by limiting recovery to the property attached. This type of a defendant is cast into a

14. Supra note 12, at 154.
15. 18 Ford. L. Rev. 73, 87 (1949).
16. Id. at 86.
17. For a well-formulated discussion of the doctrine of forum non conveniens see 35 Calif. L. Rev. 380 (1947).

dilemma. It is a dilemma, however, caused by his knowledge that he is obligated to this plaintiff, but desires not to meet this obligation or loose the attached property. This type of defendant will only defend if given the opportunity to defend on a limited liability basis.

There is also another situation in which the defendant does not know the value of his defense. If this be the case, he should be willing to put the issues he might raise by his defense before "twelve men, tried and true" and settle the controversy once and for all. It is possible that this defendant's choice involves weighing the value of the attached property against the chances of defeating recovery by the plaintiff or a personal judgment against himself. However, this is not an unreasonable choice to make; it is the same choice as the defendant in other type of action has to make: defend to the merits or suffer the consequences of a default judgment.

Under the rule of the *Cheshire* and *Salmon Falls* cases and the *Restatement of Judgments,* the defendant can enter a special appearance and defend to the merits, but an ajudication of the suit merely operates as a bar only as to the attached property.[18] Thus, should the plaintiff loose the attachment action, he could bring a subsequent action by either attaching other property or by acquiring personal service on the defendant. Likewise, should the defendant loose the attachment action and the attached property did not cover the total amount of the plaintiff's claim, the plaintiff would have to start his action all over again by attaching different property or acquiring personal service, and the defendant would be allowed to defend even though he lost the first attachment action. There is an inconsistency with the doctrine of res judicata in a rule which permits such a result. This inconsistency, however, is corrected by holding in any subsequent action by the plaintiff, as was done by a Mississippi court in *Harnischfeger v. Sternberg Dredging Co.,*[19] that a defense in an in rem action[20] is res judicata and cannot be asserted in the subsequent action. Since the bar raised by the doctrine of res judicata must equally effect both parties, it would logically follow, although the *Harinschfeger* case does not expressly state so, that the plaintiff cannot assert his cause in any subsequent action if he lost the prior attachment action. Thus, the ultimate result of the *Harnischfeger* rule would be to make a prior attachment suit where a special appearance was allowed to defend to the merits of the same effect as if it were originally deemed to be a general appearance.

Actually if the procedure as set out by the *Cheshire, Salmon Falls,* and *Restatement* view were followed, contra to the *Harnischfeger* rule, the benefit of a special appearance by the non-resident defendant is not so advantagous as it might seem. Most defendants look at the rule as an

18. Supra note 6 at 502, note 14 at 154, and note 12, Comment "a" following section 40.
19. 189 Miss. 73, 191 So. 94 (1939).
20. The previous in rem action was in the district court for the state of Louisiana, see 154 So. 10 (1934).

opportunity to defend an interest on a limited liability basis. What these defendants often fail to realize is that even if they should successfully defend their attached property, they still have not quieted the plaintiff's claim as to other property or against them personally.

The contention that a dilemma may be caused by the possibility of local prejudice and bias against a non-resident defendant is an antiquated view with little or no merit. It is true that removal to federal courts in diversity of citizenship cases in available,[21] but the present necessity of removal on such grounds is open to question. Removal of a cause to the federal courts was created because of the condition of state rivalry that existed during the formative era of the United States and at the end of the Civil War.[22] This condition can hardly be said to exist today. The fact that one of the parties is a resident of another state seems to make no difference to the modern jurist . However, to those non-resident defendants who refuse to acknowledge the present lack of state rivalry, it should be pointed out that removal to federal courts is available to them in most instances,[23] and thus local prejudice fear can be avoided whether warranted or not.

The fallacy of the "inconvenient court" argument[24] is that once the non-resident defendant decides to defend rather than loose the attached property, the forum is not going to become one that is more accessible merely because such a defense will be called a special appearance rather than a general appearance. The problem of which rule should be adopted does not depend upon this policy consideration even though it may be present in the action.

While the Harinschfeger rule will correct the effects of the *Cheshire, Salmon Falls,* and *Restatement* rule, it would be more practical for trial courts to hold that defenses to the merits in actions begun by attachment will constitute a general appearance and will thereby subject the defendant to personal liability. The authority for this view is *Grant v. Kellog Co.*[25] In that case the defendant ,a non-resident corporation, wished to appear to defend an action begun by an attachment of certain bank accounts. The defendant fearing such a defense might be a general appearance, made a motion to allow a special appearance to defend. The federal district court denied the motion and based their reasoning on and quoted from *Moore's Federal Practice,*[26] in which it is pointed out that a defense to the merits goes to the essence of the personal claim as well as the claim against the property. Professor Moore reasons that: "the defendant, being willing to

21. U.S.C., sec. 1441 (1949).
22. See Lewis, Removal of Causes, page 5 (1923.). See also Friendly, The Historical Basis of Diversity Jurisdiction, 41 Harv .L. Rev. 483 (1928); and Frank, The Historical Basis of the Federal Judicial System, 41 Law and Contemporary Problems 3, 23 (1948).
23. See Moore, Commentary on the U.S. Judicial Code 232 (1949).
24. Supra note 15.
25. 154 F.2d 59, 58 F.S. 48, 3 F.R.D. 229 (S.D.N.Y. 1943).
26. Moore's Federal Practice, sec. 12.12 (2d ed. 1948)

come in and litigate this claim in part so as to protect any interest in the property, should have to let such a defense on the merits determine the entire personal rights as between the parties."[27]

Outside of the *Grant* case authority for the general appearance rule seems to be limited to rulings of the English admiralty courts. These courts have held that where the defendant appears to contest their liability in an *in rem* action, he becomes personally liable.[28]

Other arguments in favor of the general appearance rule are the fact that it enables a once victorous plaintiff to bring suit on the easier-to-prove action of debt on a judgment rather than start his case all over again in a subsequent action. This is only fair as he has already proven his claim once. Likewise, the general appearance rule would permit the judgment creditor to execute on newly dsicovered property rather than force him to bring and prove his cause all over again if the property from the first attachment action is insufficient to cover his claim.

If the problem presented in this article were to occur in the courts of the state of Wyoming, there would be further cause to deny a request to enter a special appearance to defend to the merits in an attachment action. A definition of general appearance was set forth by the Wyoming Supreme Court in the case of *Honeycutt v. Nyquist, Peterson, and Co.*[29] In that case it was said: "any action on the part of the defendant, except to object to jurisdiction, which recognizes the case as in court will amount to a general appearance."[30] Certainly a defense to the merits does more than question jurisdiction. Certainly the filing of pleadings, the participation in a trial by interrogating witnesses, and the presentation of evidence and arguments "recognize the case as in court."

In conclusion the general appearance rule is the more favorable procedural rule in that it not only more closely fits the definition of a general appearance, but also in that the general appearance rule does not stand as an inconsistency with the doctrine of res judicata. If the special appearance rule were followed, it would be the only situation in the whole field of the law where the losing party in an ajudicated suit is given two chances in the trial courts.

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27. Ibid.
28. The Dupleix [1912] P.8; The Dictator [1892] P. 304; The Gamma [1899] P. 285.
29. 12 Wyo. 183, 74 P. 90, 109 Am. St. Rep. 975 (1903).
30. Id. at 92.