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Liability of the Municipality for Mob Violence

LEGISLATION

LIABILITY OF THE MUNICIPALITY FOR MOB VIOLENCE.—"The King can do no wrong" is an aphorism which has a classic[1] but not universal[2] application. Despite its ready acceptance by the courts of monarchical governments, this principle was at variance with the political ideals of America and might well have been curtailed in its scope in the democratic United States.[3] Why our jurisprudence has clung so tenaciously to a doctrine of sovereign immunity so incongruous in a country opposed to all other monarchical doctrines has vexed most legal commentators.[4] Yet until the pointless application of this doctrine provokes the legislatures and courts to greater cooperative action, it will continue to deprive many individuals of the relief which is justly their due. It is true that some erosion has taken place. The examples cover situations where a state or municipal corporation has departed from its strict governmental functions.[5] The waiver of immunity, however, in such instances has failed to constitute an important practical concession for most courts would hold, in a borderline case, that the act on which liability was sought to be predicated was not corporate or proprietary but rather governmental with the consequent exemption from suit.[6] A growing awareness that the inappropriate immunity theory should have been long since discarded finally made some impression on the legislatures, and statutes designed to undermine the doctrine began to appear.[7] But the courts, still under the influence of this well-

1. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) Introd. 5; 1 HALSBURY, LAWS OF ENGLAND (2d ed. 1931) 25.

2. See 2 GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893) 161; Borchard, *Governmental Liability in Tort* (1934-1935) 35 YALE L. J. 1; see (1935) 4 FORDHAM L. REV. 514 (discussion of theory as applied to municipal corporations).

3. See Borchard, *State and Municipal Liability in Tort* (1934) 20 A. B. A. J. 747 wherein the writer points out that this doctrine has been inflated in the United States to a point never reached in England where it originated.

4. Borchard, *State and Municipal Liability in Tort* (1934) 20 A. B. A. J. 747.

5. This doctrine is reputed to have made its first appearance in Bailey v. Mayor of New York, 3 Hill 531 (N. Y. 1842).

See Doddridge, *Distinction between Governmental and Proprietary Functions of Municipal Corporations* (1925) 23 MICH. L. REV. 325, 333, wherein the writer discusses the theory of such doctrine as follows: "Concisely stated: The State is sovereign, the sovereign cannot be sued without its consent, the municipality is a mere agent of the State, *q.e.d.*, the municipality cannot be sued unless the State shows its consent by legislation. But if the municipality is acting in its proprietary capacity for the particular benefit of the inhabitants of the locality, it is not acting as an agent of the State but is merely exercising a privilege granted by the State and therefore does not partake of the immunity of the State."

6. In matters pertaining to the police department and the public health the immunity from liability has been unquestioned. However, the maintenance of highways, schools, and fire departments have also been generally held to be governmental functions. Among the borderline cases are acts involved in the maintenance of the city waterworks, sewers and drains, and the cleaning of streets. See Tooke, *The Extension of Municipal Liability in Tort* (1932) 19 VA. L. REV. 97.

7. Thus the N. Y. CODE CIV. PROC. (1919) § 264, now N. Y. CT. OF CLAIMS ACT (1920)

established precedent, promptly proceeded in numerous instances to devitalize these statutes by extremely narrow interpretations.[8]

Statutes predicating responsibility for mob violence upon the political subdivisions of the state might be considered the first blow[9] successfully struck at the doctrine of sovereign immunity.[10] Interwoven with the rationale of such statutes[11] is the recognition of the mob as a psychological phenomenon. Students of crowd action conclude that the mob, swayed by impulses alien to its component members as individuals, behaves in a manner almost subnormal; a multitude of gross and demented emotions are released.[12] Le Bon, famous author of "The Crowd," claims that in a mob conscious independent personality vanishes, and the ideas of all persons comprising it take the same direction.[13] The very irrationality of mob thinking is also an essential condition of its formation. Perhaps it was a recognition of the unreasoning and mechanical character of the actions of the rioters which induced the legislatures to create the fixed financial responsibility of the municipality as a substitute for the illusory liability of the mob.

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§ 12 conferred upon the Court of Claims jurisdiction to hear and determine a private claim against the state.

8. The effect of the provision was rendered partially nugatory by Smith v. State, 227 N. Y. 405, 125 N. E. 841 (1920) which decided that the state had waived its immunity from suit, but not from liability for the torts of its officers or servants.

9. Borchard, *supra* note 4.

Although the doctrine of dual capacity of the municipal corporation is reputed to have made its first appearance around the same period as these statutes (*supra* note 5), statutes giving private claimants a general judicial remedy against the sovereign did not appear in New York until 1919 [N. Y. Code Civ. Proc. (1919) § 264, now N. Y. Ct. of Claims Act (1920) § 12] while the mob violence statute (aside from its existence in England before the revolution) arose in New York in 1855.

10. It has been pointed out that new countries sparsely settled do not early develop riotous tendencies and that it was not until the centralization of population in large cities toward the middle of the 19th century that riots became prevalent. These conditions have been assigned as the basis of the appearance of these statutes at such a time. See Allegheny County v. Gibson, 90 Pa. 397, 419 (1879).

11. Statutes affording damages for personal injuries only: Minn. Stat. (Mason, 1927) §§ 10036-10037; Neb. Comp. Stat. (1929) § 26-601-26-609; N. C. Code Ann. (Michie, 1935) § 3945; Ohio Code Ann. (Page, 1931) §§ 6278-6288; W. Va. Official Code (1931) § 61-6-12.

Statutes affording damages for property injury only: Cal. Pol. Code (Deering, 1931) §§ 4452-4456; Ky. Stat. (Carroll, 1936) § 8; La. Gen. Stat. (Dart, 1932) § 5369; Me. Rev. Stat. (1930) c. 134, §§ 19, 20. Md. Ann. Code (Bagby, 1924) art. 82 § 1-3; Mass. Ann. Laws (Lawyers Co-op., 1933) c. 269, §§ 1, 2, 3, 8; Mo. Rev. Stat. (1929) §§ 3271-3274; Mont. Rev. Code Ann. (Choate, 1921) § 5086; N. Y. Gen. Mun. Law (1909) § 71; R. I. Gen. Laws (1923) § 6055; Utah Rev. Stat. Ann. (1933) § 104-2-26, subd. 6.

Statutes affording damages for injuries to person and property: Conn. Gen. Stat. (1930) § 514; Ill. Rev. Stat. (Cahill, 1927) c. 38, §§ 537, 540, 541, 543, 544, 545, 548; Kan. Rev. Stat. Ann. (1923) c. 89, § 33; N. J. Comp. Stat. (Supp. 1924) tit. 130, §§ 1, 4, 5; Pa. Stat. Ann. (Purdon, 1936) tit. 16, §§ 3921, 3922, 3923, 3925, tit. 18, §§ 337, 339, 340; S. C. Const. art. 6, § 6; S. C. Code (Michie, 1932) § 1384-1386; Wis. Stat. (1935) § 66.07.

12. Coleman and Commins, Psychology, (1927) 130.

13. Le Bon, The Crowd.

The liability of such political subdivisions for mob violence exists only by virtue of statutory enactment.[14] Since the origins of such legislation are rooted so deeply in English legal history,[15] it would seem that it should have crossed the Atlantic as part of our heritage of English common law. Yet despite this country's abhorrence of all things monarchical, for some unexplained reason, it clung to the maxim "The King can do no wrong"[16] and allowed no suit for mob violence as a common law right. Such legislation even now exists in only half the states,[17] and few of these have been willing to afford indemnity for both personal and property injuries.[18] So completely have such statutes been considered a legislative gift that it has been held that the right to indemnity may be divested even after the individual has proceeded to judgment.[19]

The underlying theory of such statutes is that it is the duty of the political subdivision of the state to preserve the peace and to protect the property of all the persons within its limits.[20] As a practical matter, the statute effects a system of insurance. The municipality, as insurer, upon the happening of the stipulated risk (mob violence) becomes liable[21] for the loss suffered by

14. No relief existed at common law; failure to prevent riots and maintain the peace was merely a lapse of governmental duty involving no pecuniary liability. Gianfortone v. New Orleans, 61 Fed. 64 (E. D. La. 1894); Prather v. Lexington, 52 Ky. 559 (1852); Western College v. Cleveland, 12 Ohio 375 (1861); see DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 1636n. Likewise the city or county was not liable for the misfeasance or non-feasance of its police. Campbell v. Montgomery, 53 Ala. 527 (1875); Jolly's Adm'x v. Hawesville, 89 Ky. 279, 125 S. W. 313 (1889); See DILLON, *id.*

15. See 1 REEVES, HISTORY OF ENGLISH LAW (2d ed. 1787) 17 which points out that Canute, the Dane amerced the vill and hundred for the death of a Dane whose slayer had escaped. See POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 588. Coming down to the reign of the Norman kings, the British Parliament enacted the Statute of Winchester, in 1285, making the hundred liable for robberies committed within its borders in case the robbers were not produced. This was followed by the statute of 27 ELIZ. (1585) c. 13, § 2 providing for an assessment of such damages on all the inhabitants of the hundred. The principle that the civil subdivision charged with the duty of protecting property was liable to the individual for its failure to preserve peace and order was continued in the statute of 1 GEO. I (1714) c. 5, § 1, the famous Riot Act passed by Parliament to deal with the riots accompanying George's ascension to the throne. In the statute of 7 & 8 GEO. IV, c. 31 (1827) provision was made that the execution was not to be levied on any particular inhabitant. The present English statute is found in 49 & 50 VICT. (1886) c. 38.

16. See Borchard, *supra* note 3; see United States v. Lee, 106 U. S. 196, 206 (1882) wherein Judge Miller says: ". . . it is difficult to see on what solid foundation of principle the exemption from liability to suit rests."

17. Note 11, *supra.*

18. *Ibid.*

19. Louisiana v. New Orleans, 109 U. S. 285 (1883).

20. Pennsylvania Co. v. City of Chicago, 81 Fed. 317 (1897); Pittsburg, C. C. & St. L. Ry. v. Chicago, 242 Ill. 78, 89 N. E. 1022 (1909); Darlington v. City of New York, 31 N. Y. 163 (1865); Champaign County v. Church, 62 Ohio St. 318, 57 N. E. 50 (1900).

21. City of Chicago v. Sturges, 222 U. S. 313 (1911). In Williams v. New Orleans, 23 La. Ann. 507 (1871) it was said, "The law on which this action is based is not made de-

the individual members of the community. By levying a tax upon the entire community, the municipality spreads the burden among its residents who thus ultimately pay for their protection.[22] It is thought such statutes stimulate citizens to prevent and suppress riots, making each a champion of peace and good order.[23] Perchance such legislation may compel the innocent to pay for the acts of the guilty, but the courts have answered this by stating that "this effect is not peculiar to the case, but necessarily results from the structure of society and the nature of all institutions."[24] The legislatures must have realized that the injured plaintiff, in the absence of such statutes, would have to face the difficulties of identifying the members of the mob, of prosecuting a successful action,[25] and of collecting a judgment against a defendant who would generally be financially irresponsible.

Constitutional Problems

Immediately and inevitably the "mob violence" statutes were subjected to constitutional attack. The wedge of attack was aimed at the taxes generally levied by the city or county to raise the monies awarded the individual sufferer under these statutes.[26] Thus it was urged that such type of taxation violated the Fourteenth Amendment by taking property without due process

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pendent for its operation on the existence or non-existence of a police force."

It is interesting to note that in international law, responsibility of the states for mob violence is predicated upon failure to exercise due diligence in preventing or suppressing the riot. See BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915) 224.

22. Note 19, *supra*. See COOLEY, TAXATION (4th ed. 1924) 430.

23. Darlington v. City of New York, 31 N. Y. 164, 187 (1865). In Ratcliffe v. Eden, 2 Cowp. 485, 488, 98 Eng. Reprints 1200, 1202 (K. B. 1776) Lord Mansfield said that the principle is that the inhabitants shall be in the nature of sureties for one another, mutual pledges for each others' good behavior. In Allegheny County v. Gibson, 90 Pa. 397, 418 (1879) it was said that the effect of such legislation was to make each citizen a detective, on the alert to detect as well as to prevent and punish crime.

24. *In re* Pennsylvania Hall, 5 Pa. 204, 209 (1847). This situation in taxation is not unusual. For example school taxes are levied without regard to whether the taxpayers have school children. In view of the fact that in the United States lynching and riots are recurrent to a degree exceptional among civilized states, it seems only fitting that at least that much protection is bestowed. See EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928) 131.

25. EAGLETON, *supra* note 24, at 130, explains the difficulties of conviction thus: "Mob action reflects a strongly excited public opinion, which has a deterrent effect upon witnesses, juries, and even judges and other officials of the states."

26. Statutes making specific provision for a tax levy are: CAL. POL. CODE (Deering, 1931) § 4455; NEB. COMP. STAT. (1929) § 26-606; OHIO CODE ANN. (Page, 1931) § 6285; PA. STAT. ANN. (Purdon, 1936) tit. 18, § 339; W. VA. OFFICIAL CODE (1931) 61-6-12. The New York and Illinois statutes have been held not to impose a tax or create a debt. Chicago v. Manhattan Cement Co., 178 Ill. 372, 58 N. E. 63 (1899). In Darlington v. City of New York, 31 N. Y. 164, 186 (1865) it was said: "The act of 1855 does not impose a tax of any kind, either state or municipal. Its provisions may and doubtless will lead to the necessity of local taxation. . . . The act does not create a debt or claim. If no person should suffer damage by riot or mob, no money would be required and no debt or charge would ever be created. . . ."

of law.[27] But the aura of antiquity surrounding this kind of legislation, which first appeared before the Magna Charta,[28] provided a strong argument in its support.[29] The ultimate basis, however, on which the courts unanimously sustained its constitutionality was the police power.[30] Starting with the concept that the preservation of peace and social order is a basic function of government placed by the state in the hands of the municipality, it was convincingly concluded that the state might make such corporate entities responsible for lapses in the public peace caused by riots and mobs.[31] The fundamental justification for the exercise of police power is that the welfare of the community at large is paramount to that of the individual, and that in a clash between these interests the former must prevail.[32] An unusual feature of mob violence statutes, as an exercise of the police power, is that such legislation is directed towards the alleviation of *individual* losses, for which the *community* through tax levies indirectly pays.

What Is a Mob?

To obtain the benefits of such statutes, it is necessary to show that the damage resulted from the acts of a mob or riot.[33] Thus an ever recurring problem before the courts is the composition of a mob or riotous assemblage. Seven of the statutes define a mob,[34] but, with the exception that a minimum numerical constituency is required in five such acts,[35] their phraseology is so indefinite as to require interpretation by the courts.[36] Where a statute is

27. Darlington v. City of New York, 31 N. Y. 164 (1865) The contention was here unsuccessfully raised that the statute not only deprived taxpayers of their property but also the municipal corporations of their privately owned property.

28. 1 REEVES, HISTORY OF ENGLISH LAW (2d ed. 1787) 17.

29. Darlington v. City of New York, 31 N. Y. 164 (1865).

30. Louisiana v. New Orleans, 109 U. S. 285 (1883); Palmer v. City of Concord, 48 N. H. 211 (1868); Darlington v. City of New York, 31 N. Y. 164 (1865).

The fact that such statutes impose absolute liability upon city or county has been held not to affect their constitutionality. Iola v. Birnbaum, 71 Kan. 600, 81 Pac. 198 (1905); Chicago v. Sturges, 222 U. S. 313 (1911).

31. See Allegheny County v. Gibson, 90 Pa. 397, 419 (1879) wherein it was said: "There is an implied contract between the state and every municipality upon which it bestowes a portion of its sovereignty, that such municipality shall preserve the public peace and maintain good order within its borders. . . . The privileges conferred must be taken with such burdens as the law making power chooses to annex thereto. . . ."

32. Commonwealth v. Alger, 61 Mass. 53 (1851).

33. Fauvia v. New Orleans, 20 La. Ann. 410 (1868); Yalenezian v. City of Boston, 238 Mass. 538, 131 N. E. 220 (1921). What constitutes a mob or riot under the English statute has been settled: Field v. Receiver, L. R. [1907] 2 K. B. 853.

In the United States the term mob has been held to be practically synonymous with rioters: Koska v. Kansas City, 123 Kan. 362, 255 Pac. 57 (1927); Adamson v. City of New York, 188 N. Y. 255, 80 N. E. 937 (1905).

34. See the statutes of Illinois, Massachusetts, Nebraska, Ohio, New Jersey, Rhode Island, and West Virginia, *supra* note 11.

35. Illinois requires 5 or more; Massachusetts 12 or more; New Jersey 5 or more; Rhode Island 6 or more; West Virginia 5 or more.

36. For instance the Ohio statute, *supra* note 11, reads: "A collection of people assembled

enacted subsequent to a penal statute making riot a crime, the latter is often consulted;[37] in the absence of such pre-existent penal statute, the courts look to the well established common law definition of riot.[38] Certain clearly defined principles may be gathered only by breaking down the term into its essential components. It is generally held that the size and strength of the gathering are immaterial,[39] although a civil revolution has been excluded from the operation of a mob violence statute.[40] Another commonly followed concept is that it is not necessary that the original assembly be for an unlawful purpose if thereafter concerted action of an unlawful nature exists.[41] Although concerted purpose is a usual requisite,[42] that the assemblage does not in fact intend harm is immaterial[43] if actual harm results. Those jurisdictions, which follow the common law definition, require that the members of the mob should

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for an unlawful purpose and intending to do damage or injury to anyone, *or* pretending to exercise correctional power over other persons by violence and without authority of law, shall be deemed a 'mob' for the purpose of this chapter' (italics inserted)." The courts have interpreted the *"or"* in the statute to mean *"and"* and have held that there must be an exercise of correctional power for a mob to exist. Lexa v. Zmunt, 123 Ohio 510, 176 N. E. 82 (1931).

37. City of Cherryvale v. Hawman, 80 Kan. 170, 101 Pac. 994 (1909).

38. Yalenezian v. City of Boston, 238 Mass. 538, 131 N. E. 220 (1921); Adamson v. City of New York, 188 N. Y. 255, 80 N. E. 937 (1905). But *cf.* Feinstein v. City of New York, 283 N. Y. Supp. 335 (Mun. Ct. 1935) (a recent case growing out of the Harlem riots wherein it was held proper to charge the criminal definition in the statute as well as the common law definition).

The common law definition of riot as given in HAWKINS, PLEAS OF THE CROWN, c. 65, § 1 is: "A tumultous disturbance of the peace by three or more persons assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them."

39. City of Chicago v. Penn. Co., 119 Fed. 497 (C. C. A. 7th, 1902); Allegheny County v. Gibson, 90 Pa. 397 (1879).

However, it seems that there must be at least three persons to constitute a mob. Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354 (1898); 2 WHARTON, CRIMINAL LAW (12th ed. 1932) § 1858. In Duryea v. City of New York, 10 Daly 300 (N. Y. C. P. 1882) it was said that the legislature did not intend to impose liability for acts of malicious mischief done to gratify individual propensity and that the legislature could not have intended to impose liability in such cases, thus making the city an insurer of perfect quiet.

40. Street v. New Orleans, 32 La. Ann. 577 (1880).

41. Blakeman v. City of Wichita, 93 Kan. 444, 144 Pac. 816 (1914); Solomon v. City of Kingston, 24 Hun 562 (N. Y., 1881) (original assemblage was for the purpose of watching a fire on plaintiff's property). Champaign County v. Church, 62 Ohio 318, 57 N. E. 50 (1900).

42. Kretchmar v. City of Atchison, 133 Kan. 198, 299 Pac. 621 (1931); Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354 (1898) (plaintiff was injured by a firecracker thrown by a member of a crowd celebrating July 4th, held, that each person was the sole manipulator of his own firecracker and that there was no concerted intent or purpose to injure plaintiff). *Cf.* City of Cherryvale v. Hawman, 80 Kan. 170, 101 Pac. 994 (1909); City of Madisonville v. Bishop, 113 Ky. 106, 67 S. W. 269 (1902).

43. City of Cherryvale v. Hawman, 80 Kan. 170, 101 Pac. 994 (1909) (charivari party celebrating a marriage); Hendren v. Arkansas City, 122 Kan. 361, 252 Pac. 218 (1927).

intend to mutually aid and assist one another,[44] and that the acts done be to the terror of the people.[45] Applications by the courts of these rules to specific situations illustrate the difficulties of exact definition.[46] Thus the damage to an employer's property by his striking employees,[47] and the harm done to a woman by a band of merrymakers on Christmas eve,[48] have been held to be the result of mob action. On the other hand, a plaintiff who was injured by participants in a Communistic uprising, who were guilty of a breach of the peace,[49] and a plaintiff whose dilapidated building was pulled down by a group of men and boys to furnish fuel for an election eve bonfire[50] were held not to have suffered damages at the hands of a mob. The courts have wisely recognized the danger of bringing non-riotous criminal acts within the purview of such statutes.[51] Accordingly it has been held that a waiter assaulted by eight men who refused to pay a bill was not injured by a mob.[52]

It is perhaps best that the legislatures, when dealing with such an unpredictable and fluctuating type of action as mob violence, have provided either no definition of a mob or else so vague a formula that it may be readily adapted to fit the instant situation. No rule of thumb can categorize such a display of human emotion. The courts by a process of judicial legislation have erected a precinct within the confines of which the average mob will fall. Thus, the size of the assembly, its lawful origin, and its intention to do no harm are immaterial, but concerted action, the ultimate illegality of the assemblage, and actual harm are essential.

Situs of Mob as Affecting Liability

Even when the existence of a mob has been proved, the problem may arise of establishing liability where the mob originates in a county or city other than the one wherein the injury is inflicted.[53] The majority view holds that

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The statutes of Nebraska and Ohio, *supra* note 11, provide that a person suffering death from a mob attempting to lynch another person is within the protection of the statute.

44. Adamson v. City of New York, 188 N. Y. 255, 80 N. E. 937 (1905); Field v. Receiver (1907) 2 K. B. 853. *Contra:* Yalenezian v. City of Boston, 238 Mass. 538, 131 N. E. 220 (1921).

45. Duryea v. City of New York, 10 Daly 300 (N. Y. C. P. 1882). *Contra:* Commonwealth v. Runnels, 10 Mass. 522 (1813).

46. It is questionable whether one whose person or property was injured when officers attempted to quell a mob would be held to have suffered injuries at the hands of a mob. See Chicago League Club v. City of Chicago, 77 Ill. App. 124 (1897), *aff'd*, 196 Ill. 154, 63 N. E. 695 (1897); Hammet v. Cook, 42 Ohio App. 167, 182 N. E. 36 (1932).

47. Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571 (1895).

48. City of Madisonville v. Bishop, 113 Ky. 106, 67 S. W. 269 (1902).

49. Hammett v. Cook, 42 Ohio App. 167, 182 N. E. 36 (1932).

50. Duryea v. City of New York, 10 Daly 300 (N. Y. C. P. 1882).

51. Koska v. Kansas City, 123 Kan. 362, 255 Pac. 57 (1927).

52. Lexa v. Zmunt, 123 Ohio 510, 176 N. E. 82 (1931).

53. In Sturges v. City of Chicago, 237 Ill. 46, 86 N. E. 683 (1908) defendant contended that it made the location of the injured property and not the place the mob assembled or the riot occurred the criterion of liability. To emphasize this position it was urged that a mob may assemble in one city or county and by the use of dynamite or cannon destroy

the liability is to be controlled by the situs of the injury.[54] It would seem unjust in such a case that a county or city should bear the burden of the adjoining county or city's negligence in failing to quell the mob at its inception.[55] Some of the statutes providing a cause of action for lynching[56] attempt to solve this problem. Thus the statutes of two states[57] provide that the county wherein the lynching is committed, although liable to deceased's representatives, may recover from the county whence the mob came. The statute of one state[58] stipulates that where the victim was transported through a number of counties prior to the lynching, each of such counties shall be jointly and separately liable in an action brought by the state for the benefit of the victim's family;[59] on the other hand another statute has declared that such counties are not liable unless their citizens or officers participate therein.[60] Oddly enough, only one legislature had the foresight to attempt to apportion the damages among the counties upon whom liability would be imposed.[61]

Who May Bring the Action?

The statutes allowing recovery for property damages do not precisely specify the parties entitled to bring such action. Liberality of interpretation is evident in the decisions of the courts.[62] It has thus been held that bailees,[63]

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or injure property in another city or county. The court held the statute constitutional and refused to decide the question since that sort of case was not before it.

54. See the California, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania and South Carolina statutes, *supra* note 11. In Lanham v. City of Buckhannon, 97 W. Va. 339, 125 S. E. 157 (1924) the statute of West Virginia, though seemingly otherwise, was so interpreted.

55. An unusual situation occurred in Easter v. City of El Dorado, 104 Kan. 57, 177 Pac. 538 (1919) wherein plaintiff's home was located just outside the city limits; a mob within the city limits threw stones and shot at the house causing considerable damage, held, the plaintiff could recover from the city.

56. See personal injuries statutes, *supra* note 11.

57. See the Nebraska and Ohio statutes in note 11, *supra.*

58. See the Pennsylvania statute in note 11, *supra.*

59. This statute provides that if the deceased leaves no dependent family, then the sum shall be forfeited to the commonwealth.

60. See the West Virginia statute in note 11, *supra.*

61. See the Connecticut statute in note 11 *supra,* which provides that the tax commissioner, the Attorney-General and the comptroller shall act as a board of assessors.

62. A corporation has been held to be a proper party plaintiff. Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571 (1895); Butte Miners' Union v. City of Butte, 58 Mont. 391, 194 Pac. 149 (1920) (labor union held proper party plaintiff). A municipal corporation has been allowed to sue a county. Kensington v. County of Philadelphia, 13 Pa. 76 (1850). It is settled that plaintiff need not be a citizen or resident. Williams v. New Orleans, 32 La. Ann. 507 (1871).

63. Pittsburg, C. C. & St. L. Ry. v. City of Chicago, 242 Ill. 178, 89 N. E. 1022 (1909). The liability of the bailee is that of an insurer in such case, as mob violence is not an act of the public enemy. (4 ELLIOTT, RAILROADS § 1458). Since many of the statutes do not provide for full indemnity, the owner will elect to pursue his remedy against the bailee, who should therefore be allowed to sue the city or county.

life-tenants,[64] tenants-in-common,[65] trustees,[66] and mortgagees[67] may bring such an action. In actions for personal injuries where death results, the statutes generally specify as a proper party plaintiff the deceased's personal representatives.[68] The statutes of several states would seem to imply that the injured party's right of action against the county does not exclude an alternative action against the rioters.[69] Only one case has been found definitely holding that judgment might be recovered both from those responsible for the riot and the municipality.[70] The general trend is to subrogate the city or county, which has paid the stipulated statutory damages, to the individual's cause of action against the rioters.[71]

Defenses

Although the statutes impose absolute liability upon the defendant city or county precluding the corporate body from setting up the defense of due diligence,[72] most statutes allow the defendant to assert the plaintiff's contributory negligence as a bar to the action.[73] The statutes vary in their terminology in defining contributory negligence,[74] but no court would dispute

64. Greer v. City of New York, 3 Rob. 406 (N. Y. Surr. Ct. 1865).

65. Loomis v. Oneida County, 6 Lans. 269 (N. Y. Sup. Ct. 1872).

66. Onslow v. Smith, 3 Doug. 348 (K. B. 1774).

67. Levy v. City of New York, 3 Rob. 194 (N. Y. Surr. Ct. 1865) (mortgagee entitled to recover only when he could establish injury to the security for his debt; recovery was denied, such evidence being lacking).

68. The Pennsylvania statute, *supra* note 11, provides, however, that the attorney general shall bring the action and turn over the proceeds to the deceased's dependent family, or if no family, it shall be forfeited to the Commonwealth.

69. See Illinois, Maine, Massachusetts, Pennsylvania, and South Carolina statutes in note 11, *supra*.

70. Phillips Sheet & Tin Plate Co. v. Griffith, 98 Ohio 73, 120 N. E. 207 (1918).

71. See the Illinois, Maine, Massachusetts, Missouri, New Hampshire, Pennsylvania, and South Carolina statutes, *supra* note 11.

72. See note 23, *supra*. The Maryland statute, *supra* note 11, alone provides that the city or county is not absolutely liable.

73. See California, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina and Wisconsin statutes in note 11, *supra*.

74. The New York statute, note 11, *supra* (which has quite a following) states that recovery may be had "if the consent or negligence of such person did not contribute to the destruction or injury, and such person shall have used all reasonable diligence to prevent such damage." Under the New Hampshire, Pennsylvania, and South Carolina statutes, *supra* note 11, the plaintiff is barred by his illegal or improper conduct, See Underhill v. Manchester, 45 N. H. 214 (1864); Palmer v. Concord, 48 N. H. 211 (1868) (printing libelous articles tending to incite a breach of the peace constitutes illegal and improper conduct).

Where a statute, such as the Montana act, *supra* note 11, fails to specify that contributory negligence is a defense, it has been held ". . . it is one of the legal maxims of the jurisprudence of this state that no one can take advantage of his own wrong. In the present case, however, nothing short of the commission of an overt act by some agency authorized or abetted by the plaintiff itself to which the damage can be clearly attrib-

that where plaintiff instigates or participates in the mob or riot, it constitutes a complete defense.[75] That the destroyed property had been used as a nuisance does not bar plaintiff's action[76] nor mitigate defendant's liability for damages;[77] thus, it has been held no defense that the destruction or injury was to a house of ill fame,[78] or to a porgy oil factory emitting such stench as to render the surrounding community unhealthful.[79] It has wisely been determined that a plaintiff is not negligent in failing or wilfully refusing to take human life in protection of his property.[80] Some of the statutes specify that the plaintiff must exert all efforts to procure the conviction of the offenders,[81] but it would seem that relief should not be denied an otherwise diligent plaintiff for failure to observe this requirement which tends to impose upon him the duties of a sheriff and district attorney.

Many of the statutes provide that the plaintiff should prove as part of his case the notification to the authorities of the impending riot.[82] If this requirement were strictly construed,[83] it would in effect make the plaintiff's recovery dependent upon the lack of secrecy or celerity on the part of the rioters.[84] The courts, however, have interpreted the statutes reasonably and

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uted would relieve the city of responsibility under the statute." Butte Miners' Union v. City of Butte, 58 Mont. 391, 401, 194 Pac. 149, 151 (1920).

75. Paladino v. Westchester County, 47 Hun 337 (N. Y. 1888); Wing Chung v. City of Los Angeles, 47 Cal. 531 (1874). The Kentucky statute, *supra* note 11, bars recovery where the plaintiff unlawfully contributes by word or deed towards inciting or inflaming such tumult or riot.

76. As the court says in Blodgett v. City of Syracuse, 36 Barb. 526, 532 (N. Y. 1862), "It is always unsafe to let loose a multitude without legal restraint, and better to sustain some inconveniences and even endure some wrongs until they can be redressed in the regular and due administration of justice, than to live under the jurisdiction of Judge Lynch, however valuable in their results, his services have sometimes been." Similarly it has been held no defense that the property destroyed was used by the plaintiff corporation in carrying on an ultra vires business. Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571 (1895).

77. Brightman v. Bristol, 65 Me. 426 (1875). *Contra:* Stevens v. City of Anthony, 82 Kan. 179, 107 Pac. 557 (1910).

78. Ely v. Supervisors of Niagara County, 36 N. Y. 297 (1867). Under the Wisconsin statute, *supra note* 11, it is provided that property owners who have notice that the property is used as a house of ill fame may not recover.

The Missouri statute, *supra* note 11, says that the city or county is not liable for the destruction of any property used in a manner prohibited by state or United States laws or city ordinances.

79. Brightman v. Bristol, 65 Maine 426 (1875).

80. Spring Valley Coal Co. v City of Spring Valley, 65 Ill. App. 571 (1895).

81. See the Maine, Massachusetts, and Rhode Island statutes in note 11, *supra.*

82. See the Kentucky, New Hampshire, New York, Pennsylvania, and South Carolina statutes in note 11, *supra.*

83. In an early case, Hermits of St. Augustine v. County of Philadelphia, Brightly 116 (Pa. *Nisi Prius* 1847) *written* notice was required, but fortunately no other case seems in accord.

84. Moody v. Supervisors of Niagara County, 46 Barb. 659 (N. Y. 1866).

It has been held that notice given by an employer does not inure to the benefit of an

have held that there must be time and opportunity to give notice.[85] It has recently been decided that the city has constructive notice where it knows that riots were prevalent in the plaintiff's vicinity before the particular injury occurred.[86] Since the object of the required notice is protection of the plaintiff or his property, the courts have decided that such notice need not have been given if useless to prevent the damage.[87]

Damages

Many of the statutes place arbitrary limitations upon the amount of damages recoverable.[88] There is a prevalent reluctance to give complete indemnity and thus the wronged plaintiff in some states may recover only three-quarters of his damage,[89] while in others his damages may not exceed a stipulated sum.[90]

The statutes allowing damages for personal injuries have suffered a more strict construction by our courts than those providing for property damage.[91] It is odd that the courts should be more zealous to protect property rights than personal rights. Thus, one case, in construing a statute which affords damages to anyone who "shall be *injured in his person*" has held that the injuries must result in *death* to give rise to the action.[92] It would seem that where a person is subject to mob violence mental pain and suffering would form a considerable portion of his injury. While it has been decided that such damages might be allowed where accompanied by physical injury,[93] no

employee: Long v. Neenah, 128 Wis. 40, 107 N. W. 10 (1906). Likewise it has been held that notice of threats of mob violence conveyed to an employee does not constitute notice to the employer and therefore his failure to give notice does not bar his action. Portage Co-op Creamery Ass'n. v. Sauk County, 216 Wis. 501, 257 N. W. 614 (1934).

85. Feinstein v. City of New York, 157 Misc. 157, 283 N. Y. Supp. 335 (N. Y. Mun. Ct. 1935); the court said in Solomon v. City of Kingston, 24 Hun 562, 565 (1881) *aff'd*, 96 N. Y. 651 (1884): "When the crowd became a riot, there was no time to give notice."

86. Feinstein v. City of New York, 157 Misc. 157, 283 N. Y. Supp. 335 (N. Y. Mun. Ct. 1935); Newberry v. City of New York, 1 Sweeney 369 (N. Y. 1869).

87. Schiellein v. Supervisors of Kings County, 43 Barb. 490 (N. Y. 1865). Under the modes of conveyance at that time, it would have taken the officers so long to reach the scene of the riot that the harm would have been done before their arrival. In these days of radio equipped police cars, it would seem that even a short notice would secure protection.

88. See the Illinois, Maine, Massachusetts, and Rhode Island statutes in note 11, *supra*.

89. See the Illinois, Maine, Massachusetts and Rhode Island statutes in note 11, *supra*.

90. See the Minnesota, Nebraska, Ohio, and West Virginia statutes in note 11, *supra*.

91. Lexa v. Zmunt, 123 Ohio 510, 176 N. E. 82 (1931); Brazzill v. Lancaster, 132 S. C. 347, 128 S. E. 728 (1925); Lanham v. City of Buckhannon, 97 W. Va. 339, 125 S. E. 157 (1924) (the statutes being in derogation of common law must be strictly construed). The Kansas statute, *supra* note 11, provides that the character of the person injured may be shown in mitigation of damages. Adams v. Salina, 58 Kan. 246, 48 Pac. 918 (1897).

92. Italics supplied. Brown v. Orangeburg County, 55 S. C. 45, 32 S. E. 764 (1899) (this case so holds although the statute does not so provide). The Minnesota, Nebraska and Pennsylvania statutes, *supra* note 11, expressly so provide. The North Carolina statute would seem to limit recovery to victims, who were prisoners.

93. Hendren v. Arkansas City, 122 Kan. 361, 252 Pac. 218 (1927).

case has been found allowing compensation where unaccompanied by physical harm. Exemplary damages have been rightly denied, since the purpose of the statutes is remedial and not penal.[94]

A determination of the damages recoverable under statutes affording relief for injuries to property is intimately connected with the courts' construction of the term, property. The courts have generally construed the statutes liberally.[95] It has wisely been determined that property stolen by a rioter is property destroyed or injured within the phraseology of the statute[96] since common-sense reasoning discloses that it is of little import to the property owner whether his property is destroyed by ruinous violence or taken by theft. Then too there is the problem of whether an injury to intangible property rights, which may often overshadow tangible property injury, is compensable. The paucity of cases on this question is unexpected. Where the claimant is engaged in commercial enterprise, injuries to such intangibles,[97] as good will, might also be connected with the physical injury to his property. Though recovery for both items seems justifiable in such case, according to the most recent holding such damages are refused.[98]

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94. Hermits of St. Augustine v. County of Philadelphia, Brightly 116 (Pa. *Nisi Prius* 1847) (though exemplary damages were not recoverable against the city or county, exemplary damages might be recovered in a suit against the rioters). But see Adams v. City of Salina, 58 Kan. 246, 48 Pac. 918 (1897) (exemplary damages might be given where accompanied by actual damage).

95. City of Madisonville v. Bishop, 113 Ky. 106, 67 S. W. 269 (1902); Yalenezian v. City of Boston, 238 Mass. 538, 131 N. E. 220 (1921); Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571 (1895). *Contra:* Wells Fargo & Co. v. Mayor of Jersey City, 219 Fed. 699 (C. C. A. 3d, 1915) Warr v. Darlington County, 186 S. E. 920 (S. C. 1936). The South Carolina statute which seemingly authorized a recovery from the county for injury to property as a result of mob violence has been narrowly construed to limit recovery to cases where the damage was caused incidentally to an infringement of the political rights and liberties of the citizen.

It has been held that human life is not property within the meaning of a statute affording damages for property injuries. Gianfortone v. New Orleans, 61 Fed. 64 (E. D. La. 1894).

96. Sarles v. City of New York, 47 Barb. 447 (N. Y. 1866); Solomon v. City of Kingston, 24 Hun 562, 565 (N. Y. 1881), *aff'd,* 96 N. Y. 651 (1884); Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571 (1895). .*Contra:* Yalenezian v. City of Boston 238 Mass. 538, 544, 131 N. E. 220, 222 (1921): "A theft of property does not signify that the thing stolen has been destroyed or injured; it imports only an injury to the possessory right of the general or special owner to use and enjoy the thing which is capable of being stolen."

97. Of recent years industrial strikes have accounted for much mob violence; in such cases it would seem that the injury to the good will of the business and the loss of business arising from the methods used by the strikers would be more serious than the acts of physical violence.

98. In Wells Fargo & Co. v. Mayor of Jersey City, 219 Fed. 699 (C. C. A. 3d, 1915), the court refused plaintiff recovery for damages for its intangible property which damages greatly outweighed those to tangible property; the court based its decision on a rather strict construction of the New Jersey statute. Since the purpose of such statutes is indemnity, there does not appear to be much reason for limiting recovery for damage to tangible

Although many of the statutes provide that the city or county may recover the amount of the judgment and costs from any member of the mob,[00] such procedure does not seem to be followed;[100] the reason has been suggested that "the extraordinary waves of popular passion which produce the result are apt to infect the authorities as well, to the extent of idle observation, if not of actual participation."[101] Probably, however, the failure to prosecute such actions is attributable to the difficulties of identification, conviction, and satisfaction of judgment, which may be caused by lack of legal evidence, jury apathy,[102] or financial irresponsibility.[103]

Conclusion

That mob violence statutes are sociologically desirable can hardly be denied. Although the so-called deterrent value of such laws may be dubious,[104] it is clear that they help make more real the protection of life and property which is theoretically enjoyed by the members of a community. It should be noted, however, that there is need for great improvement in this field of legislation; inconsistencies, inadequate treatment of important problems, and even a complete disregard of the necessity for any such relief appear upon a survey of the treatment accorded by the various state legislatures. For example, in the South where undeniably the lynching evil is more prevalent, only three states afford protection for personal injuries.[105] Other jurisdictions allowing relief for personal injuries require in effect that death be a condition precedent to

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property. A possible justification for this stand is that fraudulent claimants might be tempted to exaggerate their intangible property damage proof of which is sometimes less susceptible of refutation by the defendant than tangible damage.

99. See the Illinois, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, Ohio, Pennsylvania, South Carolina, and West Virginia statutes in note 11 *supra*.

100. The currently prevalent "sit-down" strikes, accompanied by much mob violence, may culminate in actions under the mob violence statutes. Because of the advent of organized union activity by financially responsible units, the city or county may choose to sue such organization by proving the latter's responsibility for the strike.

101. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928) 137.

102. A realization of such "jury apathy" is found in the West Virginia statute, *supra* note 11, which provides "In any prosecution for any of the offenses defined herein or any forfeiture action everyone who has participated therein or who entertains or has expressed any opinion in favor of lynching or in the justification or excuse thereof or whose character, conduct, or opinions are such as in the court's judgment may tend to disqualify him for an impartial or unprejudiced trial shall be disqualified to act as a juror."

103. It is submitted that a substantial judgment against the participants in the mob would be no more collectible than the $10,000,000 fine levied against the strikers in the recent General Motors Strike.

104. See Allegheny County v. Gibson, 90 Pa. 397 (1879) wherein the court said that the application of the act to the Philadelphia riots of 1844 inculcated a lesson of inestimable value to the municipal authorities and taxpayers of that city, the results of which are seen in a well trained police force, and a freedom from mob violence that was exceptional. However, despite this optimistic view, it would seem that such legislation has not influenced the violence accompanying the most prevalent form of modern riots, strikes.

105. See the North Carolina, South Carolina, West Virginia statutes *supra* note 11.

recovery.[106] Incompleteness of treatment is evidenced by the reluctance on the part of many states to give protection for both personal and property damages.[107] Thus while it is true that seven states[108] do give relief for both types, eleven states[109] have considered property rights paramount to personal rights and have denied recovery for the latter. There are five states[110] whose statutes furnish relief for personal injuries, but conversely they do not deem property rights as worthy of recognition. Twenty-six states have completely ignored the necessity for such legislation.

It is to be hoped that the various state legislatures in the near future will take cognizance of the need for adequate mob-violence statutes, and either strengthen existing legislation, or pass initial laws upon this subject. The current wave of "sit-down" strikes, which are generally accompanied by riotous action, may direct public opinion towards the enactment of such protective statutes. Such legislation is and will be in accord with the growing trend (evidenced by social security, and bank deposit insurance legislation) towards the transfer of the risk of loss, for ills produced by the very nature of society, from the impecunious individual to the community as a whole.

GARNISHMENT OF INTANGIBLE DEBTS IN NEW YORK—ITS PAST, PRESENT AND FUTURE.—It is a familiar fact that some stubborn bits of archaic form often persist after they have outlived their usefulness.[1] Respect for the doctrine of *stare decisis* frequently so retards judicial change that legislative action is imperative to remove rigid outdated formalism.[2] The history of the garnishment of intangible debts in New York furnishes an apt illustration of a deeply rooted anachronism which has long resisted persistent demands for revision with resultant interruption of remedial expedients. Opposing repeated argu-

106. See the Minnesota, Nebraska, and Pennsylvania statutes *supra*, note 11.

107. See *supra*, note 11.

108. *Ibid.*

109. *Ibid.*

110. *Ibid.*

1. A classic example of the existence of such an ancient rule enduring long after the reasons for its continuance have passed away, is found in the modern application of the Rule in Shelley's Case. See Doyle v. Andis, 127 Iowa 36, 37, 102 N. W. 177, 177 (1905); Yates v. Yates, 104 Neb. 678, 680, 178 N. W. 262, 263 (1920); Legis. (1935) 4 FORDHAM L. REV. 316, 316-327. Another characteristic illustration of such a situation is to be found in the rule of the New York courts which have reiterated the common law doctrine with reference to the limited contractual liability of infants. See Sternlieb v. Normandie Nat. Sec. Corp., 263 N. Y. 245, 247-251, 188 N. E. 726, 726-728 (1934); Obiter Dictum (1936) 5 FORDHAM L. REV. 379, 379-380.

2. Many examples of legislative action removing such anachronisms are included among the laws sponsored by the New York Judicial Council in the course of the past two years. See Saxe, *Review of Laws Sponsored by the Judicial Council for 1935*, N. Y. B. A. BULL. (June 1935) 136; Saxe, *Review of Laws Sponsored by the Judicial Council for 1936*, N. Y. B. A. BULL. (Sept. 1936) 193.

ments[3] which disclosed the inconsistencies and shortcomings of the local law, the New York courts have steadily defied a mounting weight of authority antagonistic to their position. It was only after the New York Judicial Council penned a memorandum[4] vigorously advocating a statutory change that the legislature acted and amended the existing statute.[5] By the enactment it is believed that the value of garnishment has been appreciably enhanced, and an effective weapon has been added to the arsenal of creditors seeking relief against delinquent non-resident debtors.

To weigh and evaluate the effect of the penetrating amendment in New York procedure, this comment will be divided into the following topics: I. The Historical Background and Nature of Garnishment; II. The Garnishment of Intangible Debts in New York—A Deeply Rooted Anachronism; III. The New Legislation and Its Corrective Consequences.

I. The Historical Background and Nature of Garnishment

Garnishment proceedings in America[6] stem from the so-called Custom of Foreign Attachment of London.[7] This ancient remedy was intended to secure a defendant's appearance in an action by the plaintiff when the defendant was outside of the forum. Thus a person holding property of the defendant within the city could be brought into the proceeding by a warning order which would require him to retain the property for the plaintiff's benefit in the event that

3. See p. 291, *infra.*

4. See note 62, *infra.*

5. As amended by New York Laws, 1936, c. 818, N. Y. Civ. Prac. Act § 916 provides, as far as relevant: "Levy upon cause of action, evidence of debt or claim to estate. The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person either within or without the state; which belongs to the defendant and is found within the county. *Within the meaning of this section there shall be included any indebtedness due or to become due from a non-resident or a foreign corporation, upon whom or which service of process may be made within this state, to any person whether a non-resident or foreign corporation.* The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of the debt represented thereby. . . ." (Italics supplied).

6. Garnishment has received a varied nomenclature among American jurisdictions; thus it is referred to in some states as foreign attachment: Conn. Gen. Stat. (1930) § 5763; Kan. Rev. Stat. (1923) § 60-940. In others it has been referred to as trustee process: Mass. Laws Ann. (Lawyer's Co-op. 1933) c. 246, § 1; N. H. Pub. Laws (1926) c. 356, whereas in the majority of states it is simply called garnishment: Fla. Comp. Gen. Laws Ann. (1927) § 5284; Mo. Rev. Stat. (1929) § 1396. In New York, the garnishment remedy forms a part of the attachment law: see N. Y. Civ. Prac. Act (1920) § 902 *et seq.* However, for the separable, though related, remedy of garnishee-execution, see p. 293, *infra.*

7. See Drake, Law of Suits by Attachment in the United States (6th ed. 1886) § 450; Rood, Law of Garnishment (1896) § 5; but see, Locke, Foreign Attachment, 194 quoting from Wilson's Roman Antiquities, which suggested that the garnishment proceeding originated in the Roman law.

the defendant made no appearance and that the plaintiff procured a judgment in the main action.[8] The basic idea of the Custom of Foreign Attachment of London was incorporated into the statutory law of many American jurisdictions.[9] However, the old objective of thereby inducing the defendant to make an appearance in the action was partially abandoned. In its present form, the garnishment proceeding is a form of attachment, whereby a defendant's property is reached in the hands of a third person who is warned to retain it subject to the court's order;[10] in the *first* or so-called main action, the plaintiff

8. ASHLEY, ATTACHMENT, 11; 3 BL. COMM. *280; ROLLE, ABRID. CUSTOMS OF LONDON, k. 13.

9. ALA. CODE ANN. (Michie, 1928) §§ 8051-8093; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §§ 4258-4277; ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 4906-4918; CAL. CODE CIV. PROC. (Deering, 1931) §§ 542, 543-545; CONN. GEN. STAT. REV. (1930) §§ 5763-5780; FLA. COMP. GEN. LAWS ANN. (1927) §§ 5284, 5299-5308; GA. CODE (Harrison, 1933) §§ 8-501 to 8-508; IDAHO CODE ANN. (1932) §§ 6-507 to 6-523; ILL. REV. STAT. ANN. (Smith-Hurd, 1935) § 21; IND. STAT. ANN. (Burns, 1933) §§ 3-501 to 3-548; IOWA CODE (1935) §§ 12157-12176; KAN. REV. STAT. ANN. (1923) §§ 60-940 to 60-963; ME. REV. STAT. (1930) c. 100; MD. ANN. CODE (Bagby, 1924) art. 9; MASS. ANN. LAWS (Lawyer's Co-op, 1933) c. 246; MICH. COMP. LAWS (1929) cc. XXVIII, LXXVI; MINN. STAT. (Mason, 1927) §§ 9356-9384; MISS. CODE ANN. (1930) §§ 1839-1962; MO. REV. STAT. (1929) §§ 1396-1425; MONT. REV. ANN. (Choate, 1921) §§ 9267-9300; NEB. COMP. STAT. (1929) §§ 20-1001 to 20-1055; N. H. PUB. LAWS (1926) c. 356; N. M. STAT. ANN. (Courtwright, 1929) §§ 59-101 to 59-134; N. Y. CIV. PRAC. ACT (1920) § 902 *et seq.*; N. C. CODE (1935) §§ 819-829; N. D. COMP. LAWS ANN. (1913) §§ 7567-7587; OHIO GEN. CODE ANN. (Page, 1931) §§ 10265-10289; ORE. CODE ANN. (1930) §§ 4-401 to 4-429; PA. STAT. ANN. (Purdon, 1936) §§ 12-2861 to 12-3002; S. D. COMP. LAWS (1929) §§ 2453-2474b; TENN. CODE (1933) c. 10, art. 1; TEX. STAT. REV. (Vernon, 1936) §§ 4076-4101; UTAH REV. STAT. ANN. (1933) §§ 104-19-1 to 104-19-27; VT. PUB. LAWS (1934) §§ 1746-1842; WASH. REV. STAT. ANN. (Remington, 1932) §§ 680-704; W. VA. CODE REV. (1931) c. 38, art. 7, see particularly c. 38, art. 7-15; WIS. STAT. (1935) c. 267. For an interesting discussion of the use of the process among the states, see 2 KENT COMM. *403. Garnishment, it has been held, being purely a statutory proceeding, ought to be strictly construed. United States v. Bailey, 52 F. (2d) 286 (D. C. Ga. 1931); Beasly v. Haney, 96 Ark. 568, 132 S. W. 646 (1910); see Penoyar v. Kelsey, 150 N. Y. 77, 79, 44 N. E. 788, 789 (1896). But see White v. Simpson, 107 Ala. 386, 392, 18 So. 151, 152 (1895) suggesting that although garnishment is a statutory injunction that "attachment law must be liberally construed to advance the manifest intent of the law." This latter view, it is submitted, is the better, in view of the fact that garnishment is a procedural remedy and deserves a liberal construction. *Cf.* Nevada Co. v. Farnsworth, 89 Fed. 164 (C. C. D. Utah 1898); Taylor v. Root, 43 N. Y. 335 (1868).

10. 1 BEALE, CONFLICT OF LAWS (1935) § 107.5; see to same effect, Matthews v. Smith, 13 Neb. 178, 188, 12 N. W. 821, 825 (1882); Nat. Bank v. Furtick, 2 Marv. 35, 52, 42 Atl. 479, 481 (Del. 1897); Eagleson v. Rubin, 16 Idaho 92, 100, 100 Pac. 765, 767 (1909). But *cf.* Coller v. Sheffield Farms Co., Inc., 129 Misc. 600, 223 N. Y. Supp. 305 (City Ct. 1927). Garnishment is a distinctive form of attachment, in that property attached is not directly seized and taken into sheriff's possession [Santa Fe Pac. R. R. v. Bossut, 10 N. M. 322, 335, 62 Pac. 977, 978 (1900)], but in a more practical sense [ROOD, GARNISHMENT (1895) § 1] it is seized in the hands of a garnishee by notice to him [Beamer v. Winter, 41 Kan. 596 (1889)], thereby creating an effectual lien upon the garnishment property to satisfy whatever judgment the plaintiff may recover in the suit in which it is issued [Marowitz v. Sun Ins. Office, 96 Wis. 175, 71 N. W. 109 (1897)].

is presenting his claim against the defendant before the court;[11] and in the *second,* or ancillary proceeding, pending the result of the main suit, a warrant or writ is sought against the garnishee ordering him to retain the property allegedly belonging to the defendant.[12]

Involved, therefore, in the typical garnishment are three parties: (1) a *plaintiff* who seeks satisfaction of his claim due from the defendant out of the latter's property; (2) a *defendant* against whom the plaintiff is bringing the main action; and (3) the *garnishee,* who possesses the property which is sought to be reached by the garnishment proceeding.[13]

In the garnishment proceeding, the determination of the court's jurisdiction is frequently very important. Lacking *in personam* jurisdiction over the defendant, a plaintiff may still maintain an action against a delinquent non-resident debtor through the exercise of control over the defendant's property within the jurisdiction.[14] Nevertheless, since the kinds of property which may be subjected to this proceeding are manifold, the courts have found the task of ascertaining jurisdiction over the property of varying intricacy. Thus when the property which is sought to be reached is of a tangible character, judges have been faced with very little difficulty since such property is capable of actual seizure by reason of its physical location within the state.[15] But when the property which is sought to be reached is intangible, a much more vexatious situation presents itself.[16] Unlike tangible property, choses in action, having no actual situs and concrete existence, are mere relationships existing between a creditor and a debtor whereby a right is present in the former and an obliga-

11. *Cf.* note 14, *infra.*

12. 1 BEALE, CONFLICT OF LAWS (1935) § 107.5. However, the status of the third party in these proceedings is solely that of a stakeholder. Nevian v. Poschinger, 23 Ind. App. 695, 55 N. E. 1033 (1900); Biddle v. Girard National Bank, 109 Pa. 349 (1885).

13. GOODRICH, CONFLICT OF LAWS (1927) 127. The three terms, *plaintiff, defendant,* and *garnishee* will be used in this comment to denote the three parties, as indicated, who are involved in the triangular process.

14. Pennoyer v. Neff, 95 U. S. 714 (1877); see Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment, and Taxation* (1918) 31 HARV. L. REV. 905, 906-907. However, the importance of this power of control over the property in adjudicating a claim between the parties, when *in personam* jurisdiction over the defendant is lacking, cannot be overemphasized. Thus, for example, if in an attachment proceeding, the attachment is void [Starkey v. Lunz, 57 Ore. 147, 110 Pac. 702 (1910)], or, if the property ceases to exist or is exhausted prior to judgment [Coyne v. Plume, 90 Conn. 293, 97 Atl. 337 (1916)], then the judgment procured is itself void. So too, if jurisdiction of the court is based upon its power over the defendant's property, the judgment of the court will have no validity beyond the amount of the property. Cooper v. Reynolds, 77 U. S. 308 (1807); see Durant v. Abendroth, 97 N. Y. 132, 141 (1884).

15. 1 BEALE, *op. cit. supra* note 12; (1923) 21 MICH. L. REV. 938, 939. Tangible property may be attached in any state wherein it lies. Bowen v. Pope, 125 Ill. 28, 17 N. E. 64 (1888); Melhop and Klingman v. Doane and Co., 31 Iowa 397 (1871); Downer v. Shaw, 22 N. H. 277 (1851).

16. GOODRICH, CONFLICT OF LAWS (1927) 127; (1923) 8 CORN. L. Q. 378; 1 WHARTON, CONFLICT OF LAWS (3d ed. 1905) 798; MINOR, CONFLICT OF LAWS (1901) § 125; see (1923) 21 MICH. L. REV. 938.

tion in the latter.[17] By reason of this dual character, the right and correlative obligation may be subject to different jurisdictions. Such divided control obtains when the debtor and the creditor are residents of different states. More complicated becomes the question of jurisdiction when it is recalled that garnishment of debts involves a tripartite relationship in which two rights or obligations are involved: a *primary right* obtaining between the plaintiff and the defendant; and a *subsidiary obligation* owing from the garnishee to the defendant, which is seized by the plaintiff and diverted to satisfy the plaintiff's claim.[18] That these jurisdictional difficulties have confounded the courts is apparent from the singular lack of harmony which prevailed among the earlier American authorities[19] resulting in many hardships to the parties.[20]

In recent years, however, a new era has been unfolding which is largely traceable to the attitude of the United States Supreme Court[21] and alleviates the injustice of the older doctrines. Despite this recent advance, New York, insofar as possible,[22] stubbornly held its ground and refused to give way[23] before a mounting weight of authority. To properly evaluate the recent New York statute;[24] which was intended to bring New York in line with the majority view, it would seem to be advisable, at the outset, to venture an estimate of the older New York doctrines.

II. The Garnishment of Intangible Debts in New York—A Deeply Rooted Anachronism

In analyzing the so-called rule attention must be drawn to four different factual situations: (1) when the defendant and the garnishee are both domiciled in New York; (2) when the defendant is domiciled in New York and the gar-

17. 1 Beale, *op. cit. supra* note 12, at § 108.1; Carpenter, *supra* note 14, at 912; Kennedy, *The Garnishment of Intangible Debts in New York* (1926) 35 Yale L. J. 689, 690; see Holmes, J., dissenting, Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 97 (1929).

18. Kennedy, *supra* note 17, at 691.

19. For the divergent rules which existed among many of the jurisdictions see Notes (1893) 19 L. R. A. 577-579; (1904) 67 L. R. A. 209, 209-223; (1906) 3 L. R. A. (N. S.) 608, 608-611; (1909) 20 L. R. A. (N. S.) 264-267; L. R. A. (1918F) 880-885; (1923) 27 A. L. R. 1396-1410. Thus some cases fixed the situs of a debt at the creditor's domicile. Central Trust Co. v. Chattanooga R. & C. R. R., 68 Fed. 685 (C. C. E. D. Tenn. 1895); Green v. Farmer's and Citizen's Bank, 25 Conn. 452 (1857); Beasely v. Lenox-Haldeman Co., 116 Ga. 13, 42 S. E. 385 (1902). Others fixed the debt at the debtor's domicile. Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919 (1893); see Berry v. Davis, 77 Tex. 191, 194, 13 S. W. 978, 979 (1890). *Contra:* Kansas City, Pittsburg and Guld R. R. v. Parker, 69 Ark. 401, 63 S. W. 996 (1901); Harvey v. Great Northern Ry., 50 Minn. 405, 52 N. W. 905 (1892); Nat. Fire Ins. Co. v. Ming, 7 Ariz. 6, 60 Pac. 720 (1900) (holding the debt may be garnisheed wherever personal service may be acquired over the garnishee).

20. Minor, *op. cit. supra* note 16, at § 125.

21. Harris v. Balk, 198 U. S. 215 (1905); Louisville & Nashville R. R. v. Deer, 200 U. S. 176 (1906); Baltimore & Ohio R. R. v. Hosteller, 240 U. S. 620 (1916).

22. See p. 290, *infra.*

23. See notes 42, 43, *infra.*

24. See note 5, *supra.*

nishee is not; (3) when the garnishee is domiciled in New York and the defendant is not; (4) when neither the defendant nor the garnishee is domiciled in New York.

(A) *When Both the Defendant and the Garnishee are Domiciled in New York.*

Hereunder it has been generally conceded, without any difficulty, that an attachment of the debt owing by the garnishee to the defendant could be validly made.[25] Both the parties, defendant and garnishee, were subject to the control of the New York courts; it was therefore unnecessary to decide whether the situs of the debt was at the defendant's or garnishee's domicile, since, under either view, New York had ample jurisdictional power.

(B) *When the Defendant is Domiciled in New York and the Garnishee is not.*

In this situation, it is noteworthy that the control over the defendant is clearly present by virtue of his domicile within the state. The requisites of the common law[26] and of the constitutional mandate of due process[27] necessitated personal service upon the garnishee before the attachment proceeding could be entertained. Since the defendant would be required to obtain personal service upon the garnishee if he were suing on the claim existing between himself and the garnishee,[28] the plaintiff who traced his right through the defendant[29] had to meet similar requirements. In this situation—the defendant being domiciled within the state—New York was in accord with the established principles, for by statutory mandate personal service upon the garnishee was a strict, but sufficient, requisite.[30]

(C) *When the Garnishee is Domiciled in New York and the Defendant is not.*

As a general rule, when the defendant was not domiciled within the state it was essential that his property be attached therein, if a binding judgment was to be obtained against him.[31] Therefore, the question arose as to when proper

25. N. Y. Civ. Prac. Act (1921) §§ 916, 917; O'Brien v. Mechanics' & Traders' Fire Insurance Co., 56 N. Y. 52 (1874); Courtney v. Eighth Ward Bank, 154 N. Y. 688, 49 N. E. 54 (1898); Amberg v. Manhattan Life Ins. Co., 171 N. Y. 314, 63 N. E. 1111 (1902).

26. Buchanan v. Rucker, 9 East 192, 103 Eng. Reprints 546 (K. B. 1808).

27. Pennoyer v. Neff, 95 U. S. 714 (1877); McDonald v. Mabee, 243 U. S. 90 (1917).

28. Kennedy, *Garnishment of Intangible Debts in New York* (1926) 35 Yale L. J. 689, 693.

29. See Harris v. Balk, 198 U. S. 215, 226 (1905); R. T. Davis Mill Co. v. Bangs, 6 Kan. App. 38, 40, 49 Pac. 628, 629 (1897).

30. N. Y. Civ. Prac. Act (1920) § 917. Such a requisite would be complied with, if suit were brought against the defendant in the state of the garnishee's domicile [Continental Nat. Bank v. Thurber, 74 Hun 632 (Sup. Ct. N. Y. 1893), *aff'd*, 143 N. Y. 648, 37 N. E. 828 (1894)] or in the state where the garnishee is personally served with process. McDonald v. Mabee, 243 U. S. 90, 91 (1917); Durant v. Abendroth, 97 N. Y. 132 (1884); Buchanan v. Rucker, 9 East 192, 103 Eng. Reprints 546 (K. B. 1808). However, if the garnishee is a foreign corporation then additional proof is necessary to establish that it has submitted to the laws of this jurisdiction. The submission may be *express:* Penn Fire Ins. Co. v. Gold Issue Min. Co., 243 U. S. 93 (1917); Comey v. United Surety Co., 217 N. Y. 268, 111 N. E. 832 (1916); N. Y. Stock Corp. Law (1923) §§ 110-114; or *implied:* Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8 (1907); Tauza v. Susquehanna Co., 220 N. Y. 259, 115 N. E. 915 (1917).

31. See note 14, *supra.*

jurisdiction was acquired over the intangible debt so as to bind a non-resident defendant who was not personally served.

If New York had adhered to the theory that the debt to be garnished is located with the non-resident defendant, a doctrine which New York strongly supported,[32] then the plaintiff could not have maintained his action against the absentee defendant by the garnishment proceeding. However, when confronted with the problem, the New York court, perhaps to avoid unfortunate consequences which would result from the application of such a doctrine, recognized the court's jurisdiction under this factual situation. Unfortunately this result was accomplished not by accepting the fact that power of control over the garnishee, independent of his domicile, gave the court jurisdiction.[33] In lieu of emphasis upon personal service on the garnishee, the courts superimposed a new fiction upon the classic one of *mobilia sequuntur personam* and stated that the situs of the debt for purposes of attachment was situated at the defendant's or garnishee's domicile—a fiction which was to lead to serious discomfiture when the element of domicile was wholly absent. Thus in the case of *Douglass v. Phenix Insurance Co.*,[34] the Court said: ". . . the situs of debts and obligations is at the domicile of the creditor. But the attachment laws of our own and of other states recognize the right of a creditor of a non-resident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor."[35]

(D) *When Neither the Defendant nor the Garnishee is Domiciled in New York.*

Hereunder, the fictious doctrine of the New York courts centering around domicile broke down and its shortcomings became apparent. A review of the prevailing American rule discloses the vice of its position. In the leading case of *Harris v. Balk*,[36] the problem of ascertaining the power of a court to garnish a debt arising between non-residents was definitely solved. Correctly recognizing the fact that the essential jurisdictional ingredient in attachment actions must be power of control over the defendant's property, the court in this case said that since the obligation of the debtor-garnishee follows and clings to him wherever he goes,[37] so the debt itself may be said to be present wherever personal jurisdiction could be acquired over the garnishee. Thus for attachment purposes the debt was said to follow the person of the garnishee, and the mere fact that both the defendant and the garnishee are non-residents of the state wherein the proceeding is instituted is immaterial.[38]

32. See p. 289.

33. Carpenter, *supra* note 14, 909; Kennedy, *supra* note 19, at 694.

34. 138 N. Y. 209, 33 N. E. 938 (1893).

35. 138 N. Y. 209, 219, 33 N. E. 938, 940 (1893).

36. 198 U. S. 215 (1905).

37. "All debts are payable everywhere, unless there be some special limitation or provision in respect to payment, the rule being that debts as such have no locus or situs, but accompany the creditor everywhere and authorize a demand upon the debtor everywhere," 2 PARSONS, CONTRACTS (8th ed.) 702.

38. *Accord:* Louisville & Nashville R. R. v. Deer, 200 U. S. 176 (1906); Baltimore

Consequently the old idea that domicile fixed the garnishment situs was discredited and the debt was recognized in fact as being a migratory entity. This case also enunciated the important constitutional principle that all judgments rendered in accordance with the majority rule satisfied the requirements of full faith and of due process so as to protect the garnishee from subsequent action by his creditor.[39]

As has been indicated, the so-called New York rule was determined in the case of *Douglass v. Phenix Insurance Co.*,[40] prior to the adjudication of *Harris v. Balk*.[41] The former case set forth three distinct doctrines. First, it held strictly to a fictional doctrine of its own creation, that the situs of the debt was limited to the jurisdiction of the domicile of the defendant or that of the garnishee.[42] Second, that just as the garnishee's domicile was the determining jurisdictional element in attachment actions, so too the state of origin of the corporate-garnishee fixed the jurisdictional forum for the foreign corporation.[43]

& Ohio R. R. v. Hosteller, 240 U. S. 620 (1916); Stone v. Drake, 79 Ark. 384, 96 S. W. 197 (1903); Nat. Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663 (1895); Weiner v. American Ins. Co., 224 Pa. 292, 73 Atl. 443 (1909); Bristol v. Brent, 38 Utah 58, 110 Pac. 356 (1910).

39. Thus, if in accordance with a judgment properly rendered the garnishee should pay the obligation as required by the order of the court, then he may be freed from the risk of double liability, [*cf.* Ward v. Boyce, 152 N. Y. 191, 46 N. E. 180 (1897)] if during the pendency of the proceeding proper notice is given to the defendant so that he may defend himself against the plaintiff's action. Pierce v. Chicago Ry., 36 Wis. 283 (1874). The basis for the garnishee's liability in this event, it is suggested, is the alleged injury to the defendant as a result of the garnishee's negligence, [(1919) 32 HARV. L. REV. 575, 576] but such notice does not destroy the constitutionality of the garnishment proceeding as far as the rights have been adjudicated between the plaintiff and the defendant. Baltimore & Ohio Ry. v. Hosteller, 240 U. S. 620 (1916); Southern Ry. v. Williams, 141 Tenn. 46, 206 S. W. 186 (1918). In situations where the garnishment proceeding is sought to be brought and there is real danger thereby of the garnishee suffering double liability, the garnishment relief would be denied by some courts. Weitzel v. Weitzel, 27 Ariz. 117, 230 Pac. 1106 (1924); Parker, Peebles and Knox v. Nat. Fire Ins. Co., 111 Conn. 383, 150 Atl. 313 (1930). The holding in these cases is amply justified in as much as a garnishee ought not to be subjected to double liability, [Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 641 (1897)] or placed in a worse position by the garnishment than he occupied as a debtor of the defendant. Van Camp Hardware & Iron Co. v. Plimpton, 174 Mass. 278, 54 N. E. 538; Martin v. Nadel, L. R. (1906) 2 K. B. 26; see Embree & Collins v. Hanna, 5 Johns. 72, 73 (N. Y. 1809).

40. 138 N. Y. 209, 33 N. E. 938 (1893).

41. 198 U. S. 215 (1905).

42. *Accord:* Carr v. Corcoran, 44 App. Div. 97, 60 N. Y. Supp. 763 (1st Dep't 1899); Allen v. United Cigar Stores Co., 39 Misc. 500, 80 N. Y. Supp. 401 (Sup. Ct. 1902); see Nat. Broadway Bank v. Sampson, 179 N. Y. 213, 222-224, 71 N. E. 766, 768 (1904); Bridges v. Wade, 113 App. Div. 350, 355-362, 99 N. Y. Supp. 126, 129-134 (1st Dep't 1906).

43. *Accord:* Cohn v. Enterprise Distributing Co., 214 App. Div. 238, 212 N. Y. Supp. 39 (1st Dep't 1925); Allen v. United Cigar Stores Co., 39 Misc. 500, 80 N. Y. Supp. 401 (Sup. Ct. 1902); Gerard Investing Co. v. National Rys., 243 App. Div. 294, 276 N. Y. Supp. 1002 (1st Dep't 1935); American Dry Ice Corp. v. DeJancey Chemical Corp., 155 Misc. 661, 280 N. Y. Supp. 255 (Sup. Ct. 1935), *aff'd*, 245 App. Div. 712 (Sup. Ct. 1935).

Third, that all judgments rendered in defiance of any of the aforementioned propositions were offensive to constitutional and common law requirements and could therefore be disregarded. In recent years, the first two of these doctrines have been substantially reaffirmed,[44] but the third has been overruled to conform with the constitutional mandate of the United States Supreme Court in *Harris v. Balk*.[45] By virtue of the latter case, New York must give full faith to judgments issued by sister states.[46]

The continued adherence of many New York courts to these remaining doctrines[47] of the *Douglass* case was subject to serious criticism by commentators on the local law.[48] As to the first of these principles, it has been noted[49] that there appeared to be no reason for restricting the jurisdiction of the court to the domicile of the defendant or garnishee provided that satisfactory and direct service *in personam* had been accomplished upon the latter outside of the state of his domicile. It was pointed out that New York could no longer argue in support of its doctrine that a garnishable debt called for jurisdiction over either the domicile of the garnishee or the defendant, or both. Moreover, the continuance of the outmoded doctrine of domiciliary control in New York worked a distinct hardship upon resident plaintiffs. A resident plaintiff's access to a credit owing to a non-resident defendant from a non-resident garnishee—even when the latter was personally served within the jurisdiction—was dependent not upon the justice or injustice of the garnishment process as it affected the non-residents, one or both, but solely upon the establishment of a mythical situs of the debt garnished at the domicile of the debtor or of the garnishee. Thereby, the resident-plaintiff discovered that this fiction was not only potent enough to defeat his ancillary relief against the garnishee, but was likewise destructive of the plaintiff's jurisdiction over the defendant in the main action. Even from the standpoint of justice and expediency it appeared that the courts of New York ought to have favored procedural remedies and construed them liberally, especially when they were employed by resident plaintiffs against delinquent non-resident defendants.[50]

44. See notes 42, 43, *supra*. However the garnishment remedy was allowed when the debt sought to be attached arose out of a contract made and payable in New York [Lancaster v. Spotswood, 41 Misc. 19, 83 N. Y. Supp. 572 (Sup. Ct. 1903)], or if it arose out of the business of the garnishee carried on within the state [India Rubber Co. v. Katz, 65 App. Div. 349, 72 N. Y. Supp. 658 (1st Dep't 1901)], or from a contract to be performed within the state [Flynn v. White, 122 App. Div. 780, 107 N. Y. Supp. 860 (1st Dep't 1907)]. But see, Burlington & M. R. R. v. Thompson, 31 Kan. 180, 192, 1 Pac. 622, 623 (1884); Mineral Point R. R. v. Barron, 83 Ill. 365, 366 (1876); Morgan v. Neville, 74 Pa. 52, 56-57 (1873). These cases hold that the *lex loci* is applied when determining the parties' rights and not when ascertaining the plaintiff's remedies.

45. 198 U. S. 215 (1905).

46. *Cf.* Drake v. DeSilva, 124 App. Div. 95, 108 N. Y. Supp. 1039 (1st Dep't 1908).

47. See notes 42, 43, *supra*.

48. See note 58, *infra*.

49. See Kennedy, *supra* note 17, at 697-698.

50. See note 9, *supra*. The injustice of the resulting deprivation becomes still more forceful when it is noted that the New York Court of Appeals has specifically asserted that "The Courts of this state were primarily for the residents of this state . . ."; and

The second conclusion of the *Douglass* case—that a foreign corporation could not be a garnishee in an attachment action—likewise appears to be without sufficient basis. Clearly this proposition was derived from the old classic concept that a corporation could have no domicile or presence apart from the state of its origin.[51] However, in spirit this doctrine has been repudiated both within[52] and without[53] of New York, for in recent years the influence and activity of the corporate life have reached far beyond the borders of chartering states and very potently penetrated the affairs and activities of foreign jurisdictions.[54] Since the attachment statutes of this state were broadly worded,[55] New York should have abandoned such a time-worn fiction long ago.

Finally since the United States Supreme Court has determined that all judgments procured in accordance with the majority rule are protected by the full faith and credit clause,[56] New York's insistence upon adhering to its older doctrine with respect to actions instituted within the state thereby placed its business interests in a prejudicial position in comparison with other jurisdictions.[57] For under the New York rule, whereas local *debtors* might be subjected to decrees of foreign courts following personal service alone within the foreign state, local *creditors,* in order to bring effective garnishment proceedings, were required to establish that the *domicile* of the defendant or of the garnishee was in New York.

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that "There must be some forceful and controlling reason entering into the very nature and essence of the action which would close their doors to its own citizens. . . ." Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N. Y. 152, 159, 139 N. E. 223, 225 (1923). The court also admitted that the locality selected for the presence of the debt varies, but "At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions. . . ." Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N. Y. 120, 123, 174 N. E. 299, 300 (1931).

51. Peckham v. North Parish, 33 Mass. 274 (1834); Middlebrooks v. Springfield Fire Ins. Co., 14 Conn. 301 (1841); see Matter of McQueen v. Middleton Manufacturing Co., 16 Johns. 5, 6 (N. Y. 1819). For the reason for this doctrine, see Bank of Augusta v. Earle, 38 U. S. 517, 588 (1839).

52. See Martine v. International Life Ins. Soc., 53 N. Y. 339, 344-348 (1873); Morgan v. Mut. Ben. Life Ins. Co., 189 N. Y. 447, 453-459, 82 N. E. 438, 440-442 (1907); Comey v. United Surety Co., 217 N. Y. 268, 273-277, 111 N. E. 832, 833-835 (1916). See also generally, Rothschild, *A Strange Instance of Procedural Self-Denial* (1935) 10 ST. JOHN'S L. REV. 26; Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 FORDHAM L. REV. 272, 286-300.

53. St. Clair v. Cox, 106 U. S. 350 (1882); Moulin v. Trenton Mut. Life & Fire Ins. Co., 25 N. J. L. 57 (1855); Bushel v. Commonwealth Ins. Co., 15 S. R. 173 (Pa. 1827).

54. St. Clair v. Cox, 106 U. S. 350 (1882); See BEALE, *op. cit. supra* note 12, at § 88.1.

55. Under N. Y. CIV. PRAC. ACT (1920) §§ 916, 917 merely personal service was required upon the garnishee and no requirement such as local domicile within the jurisdiction was present. People v. St. Nichols Bank, 44 App. Div. 313, 60 N. Y. Supp. 719 (1st Dep't 1902); Weil v. Gallun, 75 App. Div. 313, 78 N. Y. Supp. 300 (1st Dep't 1903); see Kennedy, *supra* note 28, at 689-699.

56. See note 39, *supra.*

57. See Saxe, *Review of Laws Sponsored by the Judicial Council for 1936,* N. Y. B. A. BULL. (Sept. 1936) pp. 197-198; *Explanatory Note of Judicial Council on the Amendment to § 916 of N. Y. C. P. A.* (1936); Rothschild, *infra* note 58; Kennedy, *supra* note 28, at 704.

III. The New Legislation and Its Corrective Consequences

Despite frequent criticism,[58] the doctrines of the *Douglass* case prevailed in this jurisdiction for many years before a conclusive step was taken by the Legislature.[59] Although it must be conceded that since the rendition of *Harris v. Balk*,[60] no case has been decided on the problem of garnishment jurisdiction by the New York Court of Appeals, nevertheless a persistent application of the doctrine of *stare decisis* over a period of years by lower appellate courts had served to ingrain more deeply the doctrines of a bygone day into the law of this state.[61] The New York Judicial Council, keenly aware of the procedural obstacles which prevented the problem from ever coming before the New York Court of Appeals, suggested the legislative remedy which has now become law.[62] This alteration has been accomplished by adding the following provision to the section of the New York Civil Practice Act devoted to an explanation of the types of intangibles subject to attachment. The provision reads as follows:

"Within the meaning of this section [regarding garnishment] there shall be included any indebtedness due or to become due from a non-resident or a foreign corporation, upon whom or which service of process may be made within this state, to any person whether a non-resident or a foreign corporation."[63]

As a result of this amendment, it is believed that the law of this jurisdiction has been properly brought into conformity with the majority rule, so that the attachment of intangible debts is now possible in New York when either or both the garnishee and the defendant are non-residents and the garnishee has been personally served with process in the jurisdiction—and this is so whether the garnishee be a natural person or a foreign corporation.

Clearly the amendment embodies the proposals of the many commentators on the older New York law.[64] However, since the statute herein considered is limited to the provisional remedy of garnishment by creditors *prior* to judgment, attention must be drawn to the restricted rights afforded to judgment-creditors

58. Kennedy, *Jurisdiction over Debts*, N. Y. L. J., Dec. 21, 1925, p. 162, col. 1; Kennedy, *Garnishment of Intangible Debts in New York* (1926) 35 Yale L. J. 689; Rothschild, *A Strange Instance of Procedural Self-Denial* (1935) 10 St. John's L. Rev. 26.

59. See note 5, *supra*.

60. 198 U. S. 215 (1905).

61. See Rothschild, *supra* note 58, at 26.

62. New York Judicial Council, *Explanatory Note on the Proposed Amendment to N. Y. C. P. A. § 916* (1936). With regard to these procedural difficulties the Judicial Council said: "Because of procedural difficulties the Court of Appeals will in all likelihood never be able to review this question (American Dry Ice Corp. v. Delancey Chemical Corp., 155 Misc. 661, *aff'd* 243 A. D. 702, leave to appeal denied, — N. Y. —. It would seem that the question can only arise on a motion to vacate the warrant of attachment and an order entered on the application for such provisional remedy is not a final order and therefore not subject to review by the Court of Appeals (Mitchell v. Northwestern Ohio Savings Assn., 236 N. Y. 668)." See also Rothschild, *supra* note 58, in this regard.

63. See note 5, *supra*.

64. See note 58, *supra*.

seeking satisfaction of their claims out of intangible property of delinquent debtors *after* judgment. In this latter situation, the New York Civil Practice Act contains a remedy for judgment-creditors who may elect to levy execution upon the intangibles of delinquent judgment-debtors—a proceeding designated as garnishee execution.[65] Unlike the garnishment remedy employed by attaching creditors, this proceeding presupposes the existence of a judgment; nevertheless since it is directed to the satisfaction of a claim out of property, the courts have held that the jurisdictional *res* must be situated within the forum before this form of execution is available. Thus when faced with the problem of ascertaining where the intangible debts of judgment-debtors were situated for jurisdictional purposes, an analogy was drawn between the garnishment remedy provided for under the attachment statute, and that of garnishee execution. Thereafter the court concluded that the situs of debts for garnishee execution purposes was located at the domicile of the garnishee.[66]

In spite of the recent statutory changes made in the field of garnishment *prior* to judgment, the doctrine pertaining to garnishment *after* judgment remains unaffected, so that the position of creditors in an attachment action is superior to that of judgment-creditors pursuing the garnishee execution remedy. Whereas the attaching creditor under the new statute is required to show that the garnishee has been subjected to personal service within the jurisdiction,[67] in the garnishee execution action, the garnishee must in addition be domiciled within the state. The injustice of such a condition is especially unfortunate when it is noted that attaching plaintiffs may be dependent upon the attachment of the property itself in order to establish the jurisdiction of the court in the main and ancillary actions.[68] On the other hand, before bringing the garnishee execution proceeding, the judgment-creditor has already usually achieved a personal judgment against the defendant.[69] Despite the admitted jurisdiction over the defendant terminating in a valid judgment, the plaintiff finds himself in an inferior position compared with plaintiffs in garnishment before judgment. Consequently it would seem that the legislature ought to revise the New York Civil Practice Act Section 684, which is concerned with the garnishee execution remedy, so as to bring the advantages now available to attaching plaintiffs to those seeking relief subsequent to judgment.

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65. By this proceeding, a judgment creditor is authorized to deny execution on his debtor's wages, debts, earnings, salary, income from trust funds or profits, due or to become due to the judgment debtor, in the hands of a third person. N. Y. CIV. PRAC. ACT (1936) § 684. For rules applicable thereto, see 5 CARMODY, N. Y. PRACTICE (1933) § 1708 *et seq.*

66. Morris Plan Co. v. Miller, 102 Misc. 470, 169 N. Y. Supp. 37 (Sup. Ct. 1918). And this is so in spite of the fact that the defendant is a resident of New York. Penrose & McEniry v. Manogue, 129 Misc. 512, 221 N. Y. Supp. 758 (Sup. Ct. 1927); see Newman & Kaufman, *The New York Garnishee Execution as a Practical Remedy* (1935) 12 N. Y. U. L. Q. REV. 255, 265-266.

67. See p. 293, *supra.*

68. See note 14, *supra.*

69. N. Y. CIV. PRAC. ACT (1936) § 684.

Conclusion

Typical of the work accomplished since its inception,[70] the New York Judicial Council is to be congratulated for the part it played in so revising the garnishment laws of this State as to serve better the necessities of our modern age and life. By the enactment under consideration, it is believed that New York has fallen squarely into line with the great weight of authority which today recognizes the transient qualities of intangible debts for attachment purposes. The rule, which held that foreign corporations could not be garnishees in attachment actions, has been uprooted by the statutory amendment which permits a levy upon ". . . any indebtedness due or to become due . . . from a foreign corporation upon . . . which service of process may be made within the jurisdiction."[71] Consequently the task which confronted the legislature would appear to be thoroughly accomplished as far as garnishment prior to judgment is concerned. The present New York rule specifically meets the necessities of both convenience and justice by increasing the utility of the remedy of garnishment and by adequately protecting the rights of creditor, debtor and garnishee.

70. See note 2, *supra*.

71. N. Y. Civ. Prac. Act (1936) § 916.