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A TREATISE ⁶⁷

ON THE LAW OF

NON-RESIDENTS

AND

FOREIGN CORPORATIONS

AS ADMINISTERED IN

THE STATE AND FEDERAL COURTS OF
THE UNITED STATES

BY

CONRAD RENO

OF THE BOSTON BAR

CHICAGO

T. H. FLOOD AND COMPANY

1892

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TO
THE MEMORY OF MY FATHER,
JESSE L. RENO,
LATE MAJOR-GENERAL, U. S. V.

PREFACE.

The term "non-resident" as herein used means a citizen of the United States who does not reside in the state in which the question arises for decision, or in which the act complained of or relied upon was performed. It does not mean an alien, or a citizen of a foreign country. The term "foreign corporation" means a corporation organized under the laws of a state or country other than the one in which the matter involved arises for settlement, or in which the act complained of or relied upon was performed. The fact that it has a place of business in the latter state does not deprive it of its character of a foreign corporation.

As there are now fifty-one states in the Union, it follows that every resident of any one state is a non-resident of fifty states; and that every corporation organized under the laws of any one state is a foreign corporation with respect to fifty states. The ownership of property and the transaction of business by non residents and foreign corporations are matters of frequent occurrence; and they often involve questions of great interest and importance. Within the past twenty-five years, since communication and intercourse between residents of distant states were rendered easy, quick and cheap, by railroads, telegraphs and telephones, the law of non-residents and foreign corporations has assumed large proportions, and hundreds of decided cases relating to this subject are scattered through the various reports of state and federal courts.

This book embodies an attempt to collect and classify these decisions, so as to bring them within easy reach of the busy practitioner. Upwards of thirteen hundred cases are cited in the text, many of them more than once to different points or propositions. In addition to the ordinary table of cases cited, the index contains a list of cases which have been overruled, reversed or criticised, under the title of "Cases overruled, reversed or criticised."

There is one principle which permeates the law of "Non-Residents and Foreign Corporations," so far as it treats of the relation of debtor and creditor. That principle is that, when debtor and creditor are residents of different states, the *situs* of the debt is the creditor's residence and not the debtor's residence; the creditor's state has jurisdiction over the debt and the debtor's state has not. The result is that the creditor's state has the power to tax the debt or to discharge it by operation of law; but the debtor's state has not this power, because it has not jurisdiction of the debt. Among discharges by operation of law may be mentioned discharges under state limitation laws, and discharges under state garnishee laws. In these cases, when the debtor and creditor are citizens of different states, the better view is that the creditor's state has the power and the debtor's state has not the power to discharge the debt. So, in the case of discharges under state insolvent laws, it is well settled that the debtor's state has no jurisdiction over a debt due to a non-resident creditor, and that therefore a discharge is void as against a non-resident and non-consenting creditor.

The work is one of general law as distinguished from local law, although some local peculiarities are briefly stated.

CONRAD RENO.

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BOSTON.

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THE LAW OF NON-RESIDENTS AND FOREIGN CORPORATIONS.

CHAPTER I.

NON-RESIDENT'S RIGHT TO TRANSACT BUSINESS.

PART I.

§ 1. Transaction of business in general.	§ 7. Foreign corporations engaged in interstate commerce.
2. Sale by sample—Drummers' tax.	8. Discrimination against products of other states.
3. Tax on products of other states.	9. Wharfage charges.
4. Discrimination — Interstate commerce.	10. Port charges.
5. Insurance business.	11. Pilot fees.
6. Foreign insurance companies.	12-14. Fishing rights — "Property" rights.

§ 1. Transaction of business in general.—The right of a non-resident to transact business in a state is secured by several clauses of the federal constitution; and therefore the states cannot deny or abridge this right.

The most important of these clauses are:

1. The commerce clause, which declares that "the congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."¹

2. The equal privileges and immunities clause, which or-

¹ Art. I, sec. 8.

dains that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."¹

3. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."²

4. "No state shall, without the consent of congress, lay any duty of tonnage."³

5. "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."⁴

§ 2. **Sale by sample — Drummers' tax.**— For the purpose of protecting their own citizens from the competition of non-residents engaged in the same line of business, many states have enacted what is known as a drummers' tax. Several of such cases have been decided by the supreme court of the United States.

In *Ward v. Maryland*, 12 Wall. 418, a Maryland statute imposed a larger license fee upon non-residents than upon residents, for selling goods by sample in Baltimore. Ward was a citizen of New Jersey and sold horse harness by sample in Baltimore without paying the license fee, for which he was indicted, found guilty and fined \$400 in a state court of Maryland.⁵ The supreme court of the United States, however, held that the statute worked an unconstitutional discrimination against non-resident traders and was void, and therefore reversed the judgment of the state court. In the opinion of the court, delivered by Mr. Justice Clifford, it is said at page 430: "Attempt will not be made to define the words 'privileges and immunities,' or to

¹ Art. IV, sec. 2.

² 14th Amend., sec. 1.

³ Art. I, sec. 10, cl. 3.

⁴ Art. I, sec. 10, cl. 2.

⁵ *Ward v. State*, 31 Md. 279.

specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens.¹

"Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the constitution; and inasmuch as the constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."²

§ 3. Tax on products of other states.—In *Ward v. Maryland*, *supra*, the tax was directed against non-resident traders; but the result is the same when the tax discriminates against the products or manufactures of other states, and the state statute is void under the commerce clause.

Thus, in *Welton v. Missouri*, 91 U. S. 275, a Missouri statute imposed a tax in the form of a license fee for peddling goods, wares or merchandise which were not the growth, produce or manufacture of Missouri; but did not impose

¹ Citing *Brown v. Maryland*, 12 464; *Fire Department v. Wright*, 8 Wheat. 419, at 449. E. D. Smith (N. Y.), 478; and *Paul*

² Citing *State v. North*, 27 Mo. v. *Virginia*, 8 Wall. 168.

any tax or license fee for peddling such goods if they were the growth, produce or manufacture of Missouri. Welton, while engaged in selling sewing-machines which were manufactured outside of Missouri, was indicted, tried and convicted in a state court for selling such goods without having paid the license fee. The Missouri supreme court held that the statute applied solely to the internal commerce of the state, and made no discrimination against citizens of other states, but merely imposed a tax upon a calling or profession; and was therefore valid.¹ But the federal supreme court reversed this judgment, and held that the state statute was repugnant to the commerce clause and void, because it discriminated in favor of Missouri products and against the products of other states.

Where the state statute, as construed by the state court, imposed the same tax upon peddlers selling domestic machines as upon those selling machines made in other states, it was held that the statute was valid.²

The objection that a state statute discriminates against the products of other states by imposing a larger tax upon drummers selling foreign goods than upon drummers selling domestic goods is not cured by another statute imposing an equal or even greater tax upon the domestic manufacturer or dealer; for the two statutes do not operate equally upon the same class of persons: the domestic manufacturer has only one tax to pay, and no tax is imposed on his agents or drummers; while the foreign manufacturer has to pay a tax on every one and all of his agents and drummers.³

§ 4. **Discrimination — Interstate commerce.** — These cases and some others countenance the idea that if residents and non-residents are both taxed the same amount for selling by sample, or if foreign and domestic products are taxed alike, the statute imposing such taxes would

¹ State v. Welton, 55 Mo. 288.

² Walling v. Michigan, 116 U. S.

³ Machine Co. v. Gage, 100 U. S. 446, 459.

not violate the commerce clause and would be valid, because there would be no discrimination against the citizens or products of other states.¹

But the better view and the one supported by the later authorities is that the lack of such discrimination does not prevent a state statute from violating the commerce clause; that if the tax operates upon a subject of lawful commerce of a national character, the statute will be void, even if it does not discriminate against the citizens or products of other states.

In *Robbins v. Shelby Taxing District*, 120 U. S. 489, Robbins was a drummer for a firm in Cincinnati, Ohio, and was selling by sample their paper and other articles of stationery in the Shelby Taxing District in Tennessee, without paying the license fee required by a statute of Tennessee. For this offense he was convicted by the state courts, upholding the validity of the statute. The statute required citizens of Tennessee to pay the same license fee, and there was no discrimination. Held, nevertheless, that as the statute undertook to regulate interstate commerce of a national character, it was unconstitutional and void.

In delivering the opinion of the court, Mr. Justice Bradley says on page 497: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

So, in *Minnesota v. Barber*, 136 U. S. 313, 326, the court

¹ *Hinson v. Lott*, 8 Wall. 148; *Guy v. Baltimore*, 100 U. S. 434; *Webber v. Virginia*, 103 U. S. 344.

says: "A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute."¹

§ 5. Insurance business.—The business of insurance, even when the contracting parties are citizens of different states, is not interstate commerce; but is merely a contract of indemnity against loss.²

For this reason, when the insurer is a foreign corporation, the states may impose such terms and conditions upon the transaction of that business within their borders as they see fit. As a corporation of one state is not a "citizen," within the meaning of the equal "privileges and immunities" clause of the national constitution, it follows that the legislature of another state may impose larger taxes, or more onerous conditions, upon its doing business therein than upon home corporations or individuals engaged in the same business. Nor is the agent who does business for a foreign insurance company, which has not complied with all the conditions of the local law, protected from fine and imprisonment for breach of that law.

Paul v. Virginia, 8 Wall. 168, is a leading case on these points. A Virginia statute declared that no foreign insurance company should carry on business in Virginia without a license, and that it should not receive a license until it had deposited \$30,000 to \$50,000 worth of bonds with the state treasurer; and imposed a fine of not less than \$50 nor more than \$500 upon any person acting as agent in Virginia for such a foreign corporation which had not complied with these terms. These terms were not imposed upon insurance companies organized under the laws of Virginia, nor upon their agents. Paul, for acting as the agent of a New York insurance company which had not deposited the bonds, was indicted, convicted and fined \$50 in a Virginia

¹To same effect see *Asher v. Texas*, 128 U. S. 129; *Bowman v. Chicago, etc. R'y*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *McCall v. California*, 136 U. S. 104.

²*Paul v. Virginia*, 8 Wall. 168.

court. He contended that the statute was unconstitutional and void upon two grounds: 1. That it discriminated against citizens of other states. 2. That it was a regulation of interstate commerce. But the court decided both points against him for the reasons above stated.

The same principles apply to a foreign joint-stock company if it has the essential attributes of a corporation.¹

§ 6. **Foreign insurance companies.**—A corporation is a “person” within the meaning of the clause of the fourteenth amendment that ordains that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”²

But a foreign corporation is not within the “jurisdiction” of a state in which it does business until it complies with all conditions that the state sees fit to impose, and unless it has complied with such conditions it is not entitled to the “equal protection of the laws.” It was upon this ground that a statute of New York imposing a larger tax or license fee upon a Pennsylvania fire insurance company doing business in New York than upon its own corporations was held valid; for as the Pennsylvania company had not paid the tax or license fee, it had not been admitted into the state of New York and was not “within its jurisdiction,” although it had complied with all other conditions, and had been doing business in New York for several years before the new act was passed.

The court by Mr. Justice Blatchford says: “The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted

¹ *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; affirming *Oliver v. Liverpool Ins. Co.*, 100 Mass. 531. *Pacific R'y*, 118 U. S. 394; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189.

² *Santa Clara County v. Southern*

within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. . . . By going into the state of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction until it should receive the consent of the state to its entrance therein under the new provisions, and such consent could not be given until the tax, as a license fee for the future, should be paid.”¹

§ 7. Foreign corporations engaged in interstate commerce.— The issuing of insurance policies is not a transaction of commerce; and it is stated at page 120 of the case just cited that the decision does not apply to the case of foreign corporations engaged in interstate commerce. The same dictum is contained in *Paul v. Virginia*, 8 Wall. 168, 182; and it has since been expressly decided that a state cannot exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce, as by requiring the payment of a license tax for the privilege of doing business within its limits.

The reason assigned is that interstate commerce is not a right or privilege granted by a state but by the United States. The states surrendered the power to regulate such commerce to the United States when they ratified the adoption of the national constitution. Such corporations are entitled, under the commerce clause, to the same privileges and immunities from state taxation and other burdens which individuals so engaged enjoy under that clause.²

The Kentucky case above cited was an indictment against

¹ *Philadelphia Fire Ass'n v. New Commonwealth*, 114 Pa. St. 256; *York*, 119 U. S. 110, 119-120. *McCall v. California*, 136 U. S. 104;

² *Crutcher v. Kentucky*, 141 U. S. 47 (reversing *Crutcher v. Commonwealth*, 12 S. W. Rep. (Ky.) 141); *Norfolk R'y v. Pennsylvania*, 136 U. S. 114 (reversing *Norfolk R'y v. Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (reversing *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. St. 105).

Crutcher for doing an interstate express business in Kentucky, as agent for the United States Express Company (a New York corporation), without a license, in violation of the Kentucky act of March 2, 1860. The state courts held that the statute was valid, found Crutcher guilty and fined him \$100; but this judgment was reversed by the supreme court of the United States.

In *Crutcher v. Kentucky* (*ubi supra*), Mr. Justice Bradley, for the court, says:

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by a state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless congress should see fit to interpose some contrary regulation on the subject." Page 57.

"The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of congress. The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state." Page 59.

The transportation of merchandise or money from point to point, commonly known as the express business, is a lawful act of commerce; and therefore a state statute imposing a fine upon foreign express companies engaged in interstate business, for failure to take out a local license and to satisfy the local state auditor that the company is possessed of an actual capital of at least \$150,000, is contrary to and void under the commerce clause, and cannot be justified or up-

held as an exercise of the "police power" of the state, adopted to protect its citizens from irresponsible corporations of other states. The citizens are able to take care of themselves in this respect.¹

§ 8. Discrimination against products of other states.—A state cannot lawfully discriminate against the products or manufactures of a sister state; nor impose more onerous conditions upon their importation and sale than upon its own products and manufactures. A statute which undertakes to do this violates the commerce clause, and is void.

In *Guy v. Baltimore*, 100 U. S. 434, an ordinance of the city of Baltimore, passed under authority of a Maryland statute, imposed a certain charge upon vessels laden with the products of other states for the use of wharves belonging to the city, and no charge was made for such use for vessels laden with the products of Maryland. Guy, a citizen of Virginia, having a cargo of potatoes grown in Virginia, unloaded them at the city wharves, but refused to pay the charges, amounting to \$4.40. The city then sued him in a state court, and recovered judgment for the penalty prescribed, amounting to \$20 and costs. The supreme court of the United States reversed this judgment, holding that the ordinance was repugnant to the commerce clause and void. Mr. Justice Harlan, for the court, says on page 443: "The power of the national government over commerce with foreign nations and among the several states is broad and comprehensive. It reaches the interior of every state of the Union so far as it may be necessary to protect the products of other states and countries from discrimination by reason of their foreign origin."² Nor can a state, under the guise of protecting the health of its citizens, impose such conditions upon the sale of food within its limits as discriminate against the food products of other states.

¹ *Crutcher v. Kentucky*, 141 U. S. 47.

² Citing *Brown v. Maryland*, 12 Wheat. 419.

In *Minnesota v. Barber*, 136 U. S. 313, a statute of Minnesota, entitled "An act for the protection of the public health," etc., declared that any person who should sell or offer for sale within the state any fresh beef, veal, mutton, lamb or pork, which was taken from an animal that had not been inspected and certified as healthy, within twenty-four hours before the slaughter of the same, should be subject to fine or imprisonment. Barber was convicted under this statute of selling one hundred pounds of fresh beef, part of an animal slaughtered in the state of Illinois, which had not been inspected and certified as healthy before slaughter by a Minnesota inspector. For this offense Barber was imprisoned by order of a state court. He then sued out a writ of *habeas corpus* from the United States circuit court, and prayed to be discharged on the ground that the statute was repugnant to the federal constitution. The court discharged him from imprisonment;¹ and from that judgment the state of Minnesota appealed to the supreme court, which affirmed the judgment on the ground that the statute violated the commerce clause. The statute was held to discriminate against fresh meat brought from other states, by requiring the animal to be inspected and certified by a Minnesota inspector within twenty-four hours before its slaughter,—a condition which was practically impossible for fresh meat brought from other states. Upon this point, Mr. Justice Harlan, who delivered the unanimous opinion of the court, says on page 322: "As the inspection must take place within twenty-four hours immediately before the slaughtering, the act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb or pork—in whatever form, and although entirely sound, healthy and fit for human food—taken from animals slaughtered in other states; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged

¹In re Barber, 39 Fed. Rep. 641.

in such business in that state. This must be so, because the time, expense and labor of sending animals from points outside of Minnesota to points in that state to be there inspected, and bringing them back, after inspection, to be slaughtered at the place from which they were sent—the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value,—will be so great as to amount to an absolute prohibition upon sales, in Minnesota, of meat from animals not slaughtered within its limits.”

§ 9. Wharfage charges.—A town or city owning wharves may enforce the payment of a reasonable sum for their use by non-residents, provided there be no discrimination in favor of residents and against non-residents. A wharf facilitates commerce, and a charge for its use is analogous to a charge for the use of a dry-dock for repairing a vessel, or for towage in a harbor. Hence a state statute, or a city ordinance, imposing a reasonable charge upon all users of its wharves, or other improved means of landing goods or passengers, does not violate any part of the federal constitution.¹

If, however, a state statute, or a city ordinance, discriminate against non-residents, as by charging them more for wharf privileges than residents, or against the products of other states, it will be unconstitutional and void.²

§ 10. Port charges.—Port charges, which are fees demanded against a vessel for the privilege of entering, remaining in, or departing from, a port, should not be confounded with wharfage dues. The latter, as shown in section 9, are valid and collectible, if reasonable in amount and if no discrimination be made against non-residents or foreign products. But port charges are void and uncollectible; and a state statute, or a city ordinance, which undertakes to impose any charge whatever for such use of its ports, without the consent of congress, is unconstitutional

¹Packet Co. v. Keokuk, 95 U. S. 423; Vicksburg v. Tobin, 100 U. S. 80; Packet Co. v. St. Louis, 100 U. S. 430.

²Guy v. Baltimore, 100 U. S. 434.

and void, even if it does not discriminate against the citizens or products of other states.¹

§ 11. Pilot fees.—In the absence of congressional action, a state may regulate or fix the charges of pilots, and may require vessels entering its ports to employ pilots or to forfeit a reasonable sum for a refusal to employ a pilot. For, although this is a regulation of commerce, yet it is a subject not of a national character, but of a local character, and can be best regulated by the states; and, therefore, the state's action does not violate the commerce clause.²

§ 12. Right of fishing — Property rights.—Has a non-resident a constitutional right to fish in the tide-waters of a state? That is, has a state the power to confine that right to its own citizens and to deny it to citizens of other states? With respect to oysters or other shell-fish, this question has been decided in favor of the state's power. In *McCready v. Virginia*, 94 U. S. 391, the state of Virginia had enacted such a statute, and under it McCready, a citizen of Maryland, was indicted, convicted and fined \$500 in a Virginia court. McCready claimed that the statute discriminated against the citizens of other states, and was repugnant both to the equal "privileges and immunities" clause and to the commerce clause. But the United States supreme court held that the statute was valid, and affirmed the judgment of the Virginia court on the grounds (1) that this is "a property-right, and not a mere privilege or immunity of citizenship," and is derived from the ownership by the people in their united sovereignty of the beds of rivers and tide-waters within the jurisdiction of the state; and (2) that "commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."³

¹ *Steamship Co. v. Port Wardens*, 6 Wall. 31; *State Tonnage Tax Cases*, 12 Wall. 204; *Cannon v. New Orleans*, 20 Wall. 577. for the court); *Steamship Co. v. Joliffe*, 2 Wall. 450.

² See, also, *State v. Medbury*, 3 R. I. 138; *Haney v. Compton*, 36 N. J. L. 507.

³ *Cooley v. Port Wardens of Philadelphia*, 12 How. 299, 319 (Curtis, J.,

The same case intimates that the same rule applies to floating or running fish when found in water which is within the jurisdiction of the state.¹

§ 13. — *A fortiori*, when there is no discrimination against non-residents, and the same punishment or prohibition is imposed upon residents, the statute is valid, at least in the absence of any regulation by congress.²

In *Commonwealth v. Manchester* (*supra*), the state's jurisdiction over its salt-water bays was elaborately discussed by Mr. Chief Justice Field, and the conclusion reached that a state has the power to prohibit the taking of swimming fish in bays within its limits which do not exceed two marine leagues at the mouth. It was accordingly held that a citizen of Rhode Island who violated a Massachusetts statute by fishing in Buzzard's bay could be tried, convicted and punished in a state court of Massachusetts. The statute applied to residents as well as to non-residents, and congress had not undertaken to regulate the subject.

This judgment was affirmed by the supreme court of the United States in *Manchester v. Massachusetts*, 139 U. S. 240. It was also held that the fact that the non-resident had a license to fish, granted by the United States, did not justify him in violating the laws of Massachusetts, and was no defense. In answer to the point that the state statute was an attempt to regulate commerce of a national character, and was therefore void without any affirmative action by congress, the court, by Mr. Justice Blatchford, says on page 266: "The pertinent observation may be made that, as congress does not assert, by legislation, a right to control pilots in the bays, inlets, rivers, harbors and ports of the United States, but leaves the regulation of that matter to the states (*Cooley v. Board of Wardens*, 12 How. 299), so, if it

¹ See, also, *Corfield v. Coryell*, 4 (Mass.), 268; *Commonwealth v. Wash. C. C.* 371, at 381; *Bennett v. Manchester*, 152 Mass. 230; affirmed *Boggs, Baldwin*, 60; *Dunham v. in Manchester v. Massachusetts*, 139 U. S. 240; *Smith v. Maryland*, 18 Lamphere, 3 Gray, 268, 275.

² *Dunham v. Lamphere*, 3 Gray How. 71.

does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the state which contains such bays."

§ 14. — Judge Sawyer, sitting in the United States circuit court for the district of California, has held that a California statute aimed at the Chinese, but declaring in general terms that "all aliens incapable of becoming electors of this state are hereby prohibited from fishing," is void, on two grounds, as against a Chinese: 1. That it violates the most favored nation clause in our treaty with China. 2. That it violates that part of the fourteenth amendment which ordains that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹

¹ In re Ah Chong, 6 Sawyer, 451.

CHAPTER II.

NON-RESIDENTS' RIGHT TO TRANSACT BUSINESS (CONTINUED).

PART II.

QUALIFICATIONS AND EXCEPTIONS.

§ 15. The police power of the states.	§ 20. Lotteries — Contract rights.
16. Illuminating oils — Patent rights.	21. Intoxicating liquors.
17. Color blindness of locomotive engineers, etc.	22. Power to change an article from a lawful to an unlawful subject of commerce.
18. Slaughter-houses.	23. Oleomargarine.
19. Exclusion of diseased cattle.	24. Same — Interstate commerce.

§ 15. **The police power of the states.**— There are, however, some important qualifications of and exceptions to the right of a non-resident to transact business in a state. Most of these are embraced under what is termed the “police power” of the states. This power existed in the states before the adoption of the constitution, and they still retain it notwithstanding the thirteenth and fourteenth amendments.¹

The federal government cannot exercise this power within the states; and its power in this respect is confined to such places as it has exclusive jurisdiction over — such, for example, as the District of Columbia.²

The following are illustrations of the exercise of the police power by a state, by which non-residents as well as residents of the state are bound:

§ 16. **Illuminating oils — Patent rights.**— Where no discrimination is made against non-residents, or foreign oils, by reason of the locality of their production, a state

¹Slaughter-house Cases, 16 Wall. 36; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667; Powell v. Pennsylvania, 127 U. S. 678.

²United States v. Dewitt, 9 Wall.

can prohibit the sale within its limits of all illuminating oils below a certain reasonable fire-test,—for example, one hundred and ten degrees Fahrenheit,—even if the oil be manufactured under a patent from the United States. A state statute of this description is a police regulation, and is a proper protection to the lives and property of its citizens.¹

§ 17. **Color blindness of locomotive engineers, etc.**—A state can require all locomotive engineers, conductors, etc., engaged upon railroads in the state, to pass an examination as to color blindness; and a statute imposing a fine upon a railroad company for employing men who have not passed such an examination is a valid exercise of the police power, even if the company be engaged in interstate commerce.²

§ 18. **Slaughter-houses.**—A state may regulate the slaughtering of cattle within its limits; and may grant to a person or corporation the exclusive right for a limited term of years to engage in this business; at least if butchers and others are permitted to slaughter in the slaughter-house upon the payment of a reasonable compensation for the use of the accommodations furnished at that place.³

But a charter to engage in such business for a definite time, and purporting to confer an exclusive right, does not form an irrepealable contract between the state and the corporation, or one that is protected by the contract clause of the national constitution from impairment. The state may disregard such exclusive grant, and confer the same right upon others at any time; for, on matters relating to the public health and the public morals, one legislature cannot bargain away the right of the people. Accordingly the grant of an exclusive right for twenty-five years to keep

¹ *Patterson v. Kentucky*, 97 U. S. 501; *Minnesota v. Barber*, 136 U. S. 313, 326-328. This same rule applies to oleomargarine manufactured in accordance with letters patent. *In re Brosnahan*, 18 Fed. Rep. 62.

² *Smith v. Alabama*, 124 U. S. 465; *Nashville R'y v. Alabama*, 128 U. S. 96.

³ *Slaughter-house Cases*, 16 Wall. 36, 61; *Ex parte Schrader*, 33 Cal. 279; *Cronin v. People*, 82 N. Y. 318.

slaughter-houses in a city does not prevent the grant to others, ten years later, to do the same business.¹

§ 19. **Exclusion of diseased cattle.**— It is within the police power of a state to exclude from its limits cattle having any disease which renders them unfit for human food, even if they belong to non-resident citizens. It may also render the owners liable for any damage which may accrue from allowing them to run at large.

In *Kimmish v. Ball*, 129 U. S. 217, a non-resident owner of cattle was sued in Iowa under a statute of that state for damage to the plaintiff's cattle caused by taking the Texas fever from the defendant's cattle. The defense was that the Iowa statute, which imposed a liability upon the non-resident owners of "Texas cattle," was void on two grounds: (1) As violating the commerce clause, and (2) as violating the privileges and immunities clause. But the court held that the statute was a valid police regulation and was not repugnant to the constitution.

When, however, the natural effect of the state statute is to exclude healthy cattle brought from other states, it is repugnant to the commerce clause and void. In *Railroad Co. v. Husen*, 95 U. S. 465, a Missouri statute declared that "no Texas, Mexican or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this state, between the first day of March and the first day of November in each year," and made railroads liable for damages resulting to cattle along their routes by the Spanish or Texas fever. *Held*, that the act was not a valid police regulation and was void under the commerce clause. A state cannot, "under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." P. 472.

Under the pretense of a police regulation one state cannot discriminate against cattle slaughtered in other states for human food, as by requiring them to be inspected by its own officials within twenty-four hours before their slaugh-

¹ *Butchers' Union Co. v. Crescent Co.*, 111 U. S. 746.

ter. Such a state statute violates the commerce clause, and is void, even if the same inspection be required of its own cattle. A state cannot make a law a police regulation by entitling it "An act for the protection of the public health." The court will determine its validity or invalidity by its natural and reasonable effect, however it may be worded.¹

§ 20. **Lotteries — Contract rights.**— Under the police power, a state can regulate or prohibit lotteries, as they tend to deprave the public morals. Even a charter for a term of years is not binding upon the state, and may be revoked or modified at any time. The doctrine of *Dartmouth College v. Woodward*,⁴ Wheaton, 518, does not apply; for the legislature cannot bargain away the police power of a state. "The people themselves cannot do it, much less their servants." . . . "The contracts which the constitution protects are those that relate to property rights, not governmental." The right to suppress lotteries is governmental, to be exercised at all times by those in power, at their discretion.²

As congress cannot legislate upon police matters within the states,³ it follows that it cannot prohibit lotteries within the states. Under the power "to establish postoffices and post-roads," however, it is settled that congress can restrict the baneful effects of lotteries by refusing to allow mail matter relating to lotteries to be carried through the mails.⁴

Congress can also tax the business of selling lottery tickets;⁵ and as the power to tax involves the power to destroy, it seems to follow that congress can destroy that business entirely.⁶

It has also been decided by the supreme court that the payment of a license fee or special tax to the federal gov-

¹ *Minnesota v. Barber*, 136 U. S. 313, 319-320.

² *Stone v. Mississippi*, 101 U. S. 814, 819-821.

³ *United States v. Dewitt*, 9 Wall. 41.

⁴ *In re Rapier*, 143 U. S. 110.

⁵ *License Tax Cases*, 5 Wall. 462.

⁶ The state banks were taxed out of existence by the national government when the national banking system was adopted.

ernment under an act of congress for the business of selling lottery tickets, or intoxicating liquors, does not authorize the licensee to carry on that business in a state which has prohibited it by statute. For the granting of license on such matters, which pertain to the police power of the states, "must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it."

Hence, a person who does such business may be punished by the national government, if he fails to pay the national tax or license fee; and may be punished by the state government, notwithstanding the payment of that tax or license fee.¹

§ 21. Intoxicating liquors.—The right to regulate or prohibit the manufacture of intoxicating liquors within the state falls also under the police power of the state.² The sale may also be regulated or prohibited by the states, and, under the recent act of congress, even when the liquor is imported in original packages from other states or foreign countries.³

But before the passage of this enabling act of congress, it was held by the supreme court that a state statute prohibiting the sale of liquors violated the commerce clause and was void, as against the importer who sold them in the original packages.⁴ And a railroad company was held liable in damages for refusing to transport liquors from one state into a prohibitory state.⁵

The chief reason for these decisions seems to be that a state has not the conclusive power to declare that certain commodities shall not be articles of lawful commerce. It

¹ License Tax Cases, 5 Wall. 462; Act of August 8, 1890; 26 Stat. 313, *Pervear v. Commonwealth*, 5 Wall. ch. 728.

² *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1.

⁴ *Leisy v. Hardin*, 135 U. S. 100, commonly known as the "Original Package" case.

³ *Bartemeyer v. Iowa*, 18 Wall. 129; *In re Rahrer*, 140 U. S. 545; ⁵ *Bowman v. Chicago, etc. R'y*, 125 U. S. 465.

cannot say that intoxicating liquors shall not be imported into the state, because in its judgment such liquors are detrimental to the health or morals of its citizens. So long as such liquors be regarded generally as lawful articles of commerce, a state cannot prevent their importation by declaring them to be a nuisance, and contrary to its public policy. If a state had the sole power to do this, it could exclude tobacco or any other article which it deemed injurious to the public health or public morals.¹

As the police power cannot be bargained away, it follows that a charter granted by a state to manufacture and sell intoxicating liquors can be revoked or annulled at any time by the same state; and that such action on the state's part will not be void as impairing the obligation of the contract contained in the charter; for contracts on that subject are not within the protection of the contract clause of the federal constitution.²

§ 22. Congress has power to change an article from a lawful to an unlawful subject of commerce; but the states have not this power.—The constitutional power of congress to effect this change in an article or commodity was upheld by the supreme court in the recent case of *In re Rahrer*, 140 U. S. 545. In April, 1890, that tribunal adjudged that intoxicating liquors were articles of lawful commerce, and that the states could not forbid their importation and sale in the original packages; because the subject was of a national, as distinguished from a local, character, and therefore the inaction of congress indicated its will that the subject should remain free from regulation. It was further decided that a state's legislation forbidding such sale could not be sustained as an exercise of the "police power" of the state.³

On August 8, 1890, congress passed an act known as

¹ *Bowman v. Chicago, etc. R'y*, 125 U. S. 465, 490-492; *Leisy v. Hardin*, 135 U. S. 100 (overruling *Peirce v. New Hampshire*, 5 How. 504); *In re Rahrer*, 140 U. S. 545, 557-559.

² *Beer Co. v. Massachusetts*, 97 U. S. 25.

³ *Leisy v. Hardin*, 135 U. S. 100.

the "Wilson bill," which provided in effect that imported liquors should be subject to the operation and effect of the laws of the state into which they were brought, to the same extent and in the same manner as though the liquors had been produced in that state.¹

In the latter part of August, 1890, one Rahrer was arrested in Kansas for violating its liquor laws. He then applied to the United States circuit court for a writ of *habeas corpus*, on the ground that he was illegally restrained of his liberty by the state officer, in violation of the constitution of the United States. The United States circuit court discharged him;² but this decision was reversed by the supreme court of the United States. This court held that congress had power under the commerce clause to pass the Wilson bill; that its effect was to make ardent spirits an unlawful subject of commerce in prohibitory states, and that the police power of the states, therefore, attached to them, and rendered the Kansas law valid and Rahrer's arrest lawful.

The results of the recent decisions may be stated as follows:

1. A state has not the power to declare that a certain commodity shall cease to be a subject of lawful commerce, so as to fall within the operation of the police power of the state. If the states had this power, the power of congress to regulate commerce would be of very little practical value, and would always be subordinate to the state's police power.

¹ This act is entitled "An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases," and reads as follows: "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the opera-

tion and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313, ch. 728.

² In re Rahrer, 43 Fed. Rep. 556.

For if the power to determine the articles which may be the subject of commerce were included in the police power, it would always have a controlling effect over the commercial power, as the power to regulate commerce can act only upon those articles which are the subjects of commerce. Hence the power of congress over the subjects of foreign and interstate commerce, instead of being paramount, as intended by the constitution, could be defeated at any time by a single state.

2. The power of congress to declare what articles shall be a subject of commerce is, therefore, essential to the enforcement of its power to regulate foreign and interstate commerce.

3. In the absence of any specific declaration of congress upon this subject, the supreme court of the United States is the final judge of whether or not an article is a lawful subject of commerce. If, in its opinion, a certain article be a lawful subject of commerce, no state can make it an unlawful subject of commerce, even on the ground that it is deleterious to the public health or public morals.¹

§ 23. **Oleomargarine.**—It has been repeatedly decided that a state legislature has the constitutional power to regulate or even to prohibit the manufacture or sale within the state of oleomargarine. Such legislation is justified as a lawful exercise of the state's police power, intended to preserve the public health, and to prevent fraud and deception in the sale of an article of human food. The natural color of oleomargarine is white or pearly white, and an artificial coloring matter, such as annatto or carrot, is added to make it resemble summer dairy butter.²

¹ *Leisy v. Hardin*, 135 U. S. 100; 678 (affirming *Powell v. Commonwealth*, 114 Pa. St. 265); *State v. Minnesota v. Barber*, 136 U. S. 313; *Addington*, 77 Mo. 110; *Waterbury v. Newton*, 50 N. J. L. 534; *Butler v. Chambers*, 36 Minn. 69; *In re*

² *People v. Arensberg*, 105 N. Y. 123; *Pierce v. State*, 63 Md. 392; *Brosnahan*, 18 Fed. Rep. 62. But *State v. Marshall*, 64 N. H. 549; see *People v. Marx*, 99 N. Y. 377. *Powell v. Pennsylvania*, 127 U. S.

In the New York case of *People v. Arensberg* (*ubi supra*), it was decided that the state legislature has the power to enact that an artificial coloring matter (carrot or anatto) shall not be added to the essential ingredients of oleomargarine to make it resemble dairy butter; and that a person who sells such an imitation of dairy butter is punishable under the statute, although he sells it as oleomargarine and not as butter. In the Maryland case of *Pierce v. State* (*ubi supra*), it was held that the state legislature has the power to prohibit the sale of oleomargarine as butter, and to require it to be stamped or marked in some way, so as to distinguish it from dairy butter. In the New Hampshire case of *State v. Marshall* (*ubi supra*), the court carried the doctrine very far, and upheld the validity of a local statute which prohibited the sale of imitation butter unless it was colored pink. On the question of the wholesomeness of oleomargarine, the court in the same case says: "It is no defense that the article sold or exposed for sale is free from impurity and unwholesome ingredients, and healthy and nutritious as an article of food." Per Clark, J., at page 552.

The Pennsylvania statute of May 21, 1885, declares by section 1: "That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession, with intent to sell the same, as an article of food." The fourth section imposed a penalty by fine or imprisonment for a violation of the first section. Under this statute one Powell was indicted, tried and convicted in the state courts of Pennsylvania for selling packages of oleomargarine or butterine, marked with the words, "Oleomargarine Butter." The article was bought as well as sold with knowledge of its true character; but the state and federal courts held that

the statute was a lawful exercise of the police power, and that Powell was punishable for its violation.¹

In the opinion of the supreme court of the United States, this reason is assigned among others: "The main proposition advanced by the defendant is that his enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects.² The court is unable to affirm that this legislation has no real or substantial relation to such objects." Per Mr. Justice Harlan, on page 684. Mr. Justice Field dissented, on the ground that the statute deprived Powell of his liberty of pursuing an ordinary calling or trade; and therefore contravened the fourteenth amendment.

§ 24. **Same — Interstate commerce.**— Some state courts have decided that their oleomargarine laws applied to and rendered unlawful a sale of it within the state's territory, even when it was manufactured in another state and imported and sold in the original package in the first state as oleomargarine. These decisions have been put upon the grounds that the statute was a police regulation, and that it was not void as a regulation of interstate commerce, be-

¹ Powell v. Commonwealth, 114 Pa. St. 265; Powell v. Pennsylvania, U. S. 623, 661.
² Citing Mugler v. Kansas, 123 U. S. 678.

cause congress has not regulated the subject, and therefore the states have the power to do so.¹

But the recent decision of the national supreme court in the "*Original Package*" case, relating to the importation and sale in original packages of intoxicating liquors manufactured in another state, seems to overrule the preceding state decisions. For this case rules explicitly that, when the subject is of a national character, the non-action of congress indicates its will that the subject should remain free from regulation, and therefore does not justify regulation of such interstate commerce by the states. Moreover, the "*License Cases*," 5 How. 504, upon whose authority the state courts rely, are expressly overruled on this point in the "*Original Package*" case, reported as *Leisy v. Hardin*, 135 U. S. 100, at 115-118.

¹ *State v. Addington*, 77 Mo. 110; *Waterbury v. Newton*, 50 N. J. L. 534.

CHAPTER III.

INVESTMENTS OF NON-RESIDENTS.

§ 25. General rule — Non-resident's investments subject to laws of the state. 26. Qualifications and exceptions. (a) Taxation of debts. 27. Leading case of State Tax on Foreign-held Bonds, 15 Wall. 300. 28. Other cases. 29. Taxation of national bank shares. 30. Federal taxation of debts due aliens. 31. (b) Discrimination against non-residents.	§ 32. (c) Change in judicial construction of state statute or constitution. 33. Leading case of <i>Gelpcke v. Dubuque</i>, 1 Wall. 175. 34. Other cases in federal and state courts. 35. Non-resident partner. 36. Firm property liable to debts of firm. 37. Non-resident member of foreign corporation. 38. State taxation of federal franchise. 39. Bonds secured by mortgage on property in foreign countries.

§ 25. General rule — Non-resident's investments subject to laws of the state.— The general rule is that a non-resident who makes an investment in a state of the Union holds it subject to all the laws of that state, both present and prospective. His property may therefore be taxed by the state;¹ it may be subjected to attachment and execution in accordance with its laws;² his title may be divested under the statute of limitations of the state in which his property is situated;³ and in other ways his property rights may be affected by state action.

§ 26. Qualifications and exceptions.— But there are various important qualifications of and exceptions to this rule,

¹ *State v. Ross*, 23 N. J. L. 517;
Sprague v. Lisbon, 30 Conn. 18;
Pullman's Car Co. v. Pennsylvania,
141 U. S. 18.

² See ch. IX, *post*, on "Attachment and Garnishment."

³ See ch. XV, *post*, on "Statutes of Limitations."

among which may be mentioned state laws which violate the national constitution or laws.

(a) **Taxation of debts.**—Some states have undertaken to tax debts due to non-residents, particularly when such debts were secured by mortgage of property situated within the taxing state. The highest courts of several states have declared that their taxation laws could not operate upon such debts owned by non-residents, and that they were not subject to state taxation, for the reason that a debt is situated at the residence or domicile of its owner, the creditor, and that therefore, when the creditor was a non-resident of the taxing state, the debt was situated outside of the jurisdiction of that state.¹

On the other hand, the supreme court of Pennsylvania and some other courts have decided that debts due to non-residents, when secured by mortgage on property situated in the state, were subject to its power of taxation, and that such a tax law could be enforced in the courts.²

This second class of decisions has raised the question as to whether or not there is any provision of federal law which protects such debts due to non-residents from state taxation; and this question has been decided in the affirmative by the supreme court of the United States, in the

§ 27. Leading case of State Tax on Foreign-held Bonds, 15 Wall. 300.—This case was a writ of error to reverse a judgment of the supreme court of Pennsylvania, rendered upon these facts: The Cleveland, Painesville & Ashtabula Railroad Company was incorporated under the laws of Ohio and Pennsylvania for the construction of a railroad

¹ *Union Bank v. State*, 9 Yerger (Tenn.), 490; *Davenport v. Mississippi R'y*, 12 Iowa, 539; *State v. Ross*, 3 Zab. (23 N. J. L.) 517; *State v. Earl*, 1 Nevada, 394; *Hoyt v. Commissioners*, 23 N. Y. 224.

² *Delaware R'y v. Commonwealth*, 66 Pa. St. 64; *Pittsburg R'y v. Com-*

monwealth, 66 Pa. St. 73; *Susquehanna Canal Co. v. Commonwealth*, 72 Pa. St. 72; *Maltby v. Reading R'y*, 52 Pa. St. 140; *Catlin v. Hull*, 21 Vt. 152; *New Albany v. Meekin*, 3 Ind. 481; *Taylor v. St. Louis*, 47 Mo. 594; *People v. Home Ins. Co.*, 29 Cal. 533.

from Cleveland, Ohio, to Erie, Pennsylvania. Prior to May 1, 1868, the railroad company issued and sold mortgage bonds amounting to \$2,500,000, which were secured by its property in the two states. These mortgage bonds bore interest at the rate of seven per cent., and nearly all of them were issued to and continued to be owned by non-residents of Pennsylvania. On May 1, 1868, the state of Pennsylvania passed an act imposing a tax of five per cent. on the interest due on all such bonds, in the following terms: "The president, treasurer or cashier of every company, except banks or savings institutions, incorporated under the laws of this commonwealth, doing business in this state, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors a tax of five per cent. upon every dollar of interest paid as aforesaid." The company having refused to pay this tax, it was sued by the state in a state court, and it set up in defense that the state law impaired the obligation of its contract with its non-resident bondholders and was therefore void. The state court held, however, that the tax was valid.¹ But this judgment was reversed by the United States supreme court, on the grounds that a state's power of taxation is limited to persons, property and business within her jurisdiction; that a debt due to a non-resident, even when secured by a mortgage on property in the state, is not within her jurisdiction; and that a state statute imposing a tax upon such a debt impairs the obligation of the contract between the mortgagor and mortgagee or bondholder, and is void under the national constitution.

In delivering the opinion of the court, Mr. Justice Field says, on pages 319-320: "Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are

¹ 2 Legal Gazette (Pa.), 404.

obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. . . .

“The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretense of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties.”

§ 28. **Other cases.**—At the same time the court decided the two cases of *Pittsburg R'y v. Pennsylvania*, 15 Wall. 326, note, and *Delaware R'y v. Pennsylvania*, 15 Wall. 326, note, reversing the judgments of the supreme court of Pennsylvania, reported in 66 Pa. St. 73, and in 66 Pa. St. 64, respectively. The only material fact in which these cases differed from that of *State Tax on Foreign-held Bonds* was that in the former the tax law under which the taxes were levied was passed in 1844, and was in existence when the bonds taxed were issued, while in the latter case the tax law was not passed until after the bonds had been issued. But the court held that this fact was not sufficient to distinguish the cases, and decided that the state tax was void in all three cases on the same grounds. Four justices dissented in each case, chiefly on the ground that, as the act

of 1844 was in force when the bonds were issued, the law did not impair the obligation of the contract.¹

§ 29. **Taxation of national bank shares.**— Congress has the power, however, when it creates a new species of debts, to authorize a state to tax such property even when owned by non-residents. By the national banking act of June 3, 1864 (13 Stat. at Large, 99), congress created the national banks and authorized them to issue shares of stock. The forty-first section of this act declared that the shares of those banks should be subject to state taxation “at the

¹ In view of the later decisions of *Lehigh Water Co. v. Easton*, 121 U. S. 388, and *Denny v. Bennett*, 128 U. S. 489, holding that a law passed previously to the contract's making does not impair its obligation, even when the creditor is a non-resident, it seems difficult to support the above judgments on the ground assigned by the court. See, also, *Brine v. Insurance Co.*, 96 U. S. 627.

Since the adoption of the fourteenth amendment, however, it seems likely that such an anterior tax law would be declared void as against non-resident bondholders, on the ground that it deprives them of their property “without due process of law,” within the principles announced in *Pennoyer v. Neff*, 95 U. S. 714. It was adjudged in that case that a state court had no jurisdiction over the person or property of a non-resident defendant in an action on a money demand, when he was not personally served with process within the state and did not voluntarily appear, and when his property was not seized until after judgment; and that, therefore, a sale of his land within the state under an execution issued on such judgment deprived him of his property

“without due process of law,” and was void under the fourteenth amendment, although the judgment and the sale were both authorized by the state statutes. This provision of the constitution operates upon all the departments of the state, and restricts the power of its legislature (as, for example, its power of taxation), as well as the power of its judiciary. *Davidson v. New Orleans*, 96 U. S. 97, 102. If a state judicial act (i. e., a judgment) is contrary to due process of law when rendered against a non-resident without jurisdiction over his person or property, it would seem to follow that a legislative act taxing a debt owned by a non-resident is also contrary to due process of law, because the taxing body has no jurisdiction over the person or over the thing taxed.

For the impairment of contract rights by state action other than by means of taxation laws, see *Seibert v. Lewis*, 122 U. S. 284; *Edwards v. Kearzey*, 96 U. S. 595; *Walker v. Whitehead*, 16 Wall. 314; *Gunn v. Barry*, 15 Wall. 610; *Von Hoffman v. Quincy*, 4 Wall. 535; *Hawthorne v. Calef*, 2 Wall. 10; *Bronson v. Kinzie*, 1 How. 311.

place where such bank is located and not elsewhere." The validity of this section, both as applied to resident and non-resident stockholders, has been upheld by the supreme court upon the grounds that this provision "is a law of the property," and "every owner takes the property subject to this power of taxation under state authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the state in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the state in which he resides and submitted to the taxing power of the state where, in contemplation of law, his investment is located. The state, therefore, within which a national bank is situated has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly."¹

§ 30. Federal taxation of debts due aliens.—Congress has also the power to tax a debt due to an alien; or, to speak more correctly, the courts have no power to restrain the collection of such a tax, or to declare the act unconstitutional and void. This is a matter of international law, upon which the judiciary is bound by the legislative and political departments of the federal government.²

§ 31. (b) Discrimination against non-residents.—A state cannot discriminate against the citizens of other states, and a state statute which attempts to do so is void under the equal privileges and immunities clause of the national constitution.³ Hence, a statute imposing a higher tax upon the property of non-residents than upon that of residents, or imposing any tax upon the former when none is imposed upon the latter, is void and cannot be enforced even in the state courts.

¹ Per Mr. Chief Justice Waite in *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 500; *People v. Commissioners*, 35 N. Y. 423, 437.

² *Railroad Company v. Collector*, 100 U. S. 595; *United States v. Erie R'y*, 106 U. S. 327.

³ Art. IV, sec. 2.

In a case of the second kind the supreme judicial court of Massachusetts has said, by Bigelow, C. J.: "It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy an immunity of which the latter would be deprived. Such has been the judicial interpretation of this clause of the constitution by courts of justice in which the question has arisen."¹

§ 32. (c) **Change in judicial construction of state statute or constitution.**—The state courts possess the power of construing their own constitution and statutes. Their construction constitutes an essential part of the constitution or statute, as much so as if embodied in it.² By an act of congress, their construction is made binding upon the federal courts sitting within the state in many classes of cases.³ Such being the well-settled general principles, is there any means of redress for one whose property rights are impaired by a change in judicial construction, made by a state court after his rights are acquired? When his rights depend upon contract, it has been decided by the highest authority that his rights are protected by the contract clause of the national constitution, which forbids a state to pass any law impairing the obligation of contracts. His rights are fixed and regulated by the construction in force at the time of the contract's making, and no subsequent construction by the state tribunals will be allowed to abridge those rights, or to impair the obligation of his contract. Such later construction is like a later statute, and occupies

¹ *Oliver v. Washington Mills*, 11 Allen (Mass.), 268, 281. Citing *Coryell v. Coryell*, 4 Wash. C. C. 380, 381; *Campbell v. Morris*, 3 Har. & McHen. (Md.) 535, 554, and *Crandall v. State*, 10 Conn. 343.

² *Christy v. Pridgeon*, 4 Wall. 196.

³ U. S. Rev. Stat. sec. 721; *Bucher v. Cheshire R'y*, 125 U. S. 555.

no stronger position; both are controlled by the contract clause.¹

§ 33. **Leading case of *Gelpcke v. Dubuque*, 1 Wall. 175.**— In this case the plaintiffs were non-resident holders of bonds issued prior to 1859 by the city of Dubuque, Iowa, under legislative authority, in aid of a railroad extending beyond its limits. By a series of six or eight cases prior to 1859 the supreme court of Iowa had decided that the state legislature had the power under the state constitution to authorize municipal corporations to subscribe to such railroads, and that bonds issued in their aid were valid and enforceable. But in 1859 the same court overruled all its previous decisions and held that the bonds were invalid, on the ground that the state legislature had no such constitutional power. The coupons on the bonds not being paid, the plaintiff sued the city in the district court of the United States for the district of Iowa, which gave judgment for the defendant city. On a writ of error, however, the federal supreme court reversed the decision, on the ground chiefly that the latest decision of the state court impaired the obligation of the contract in suit, and was therefore void as applied to it. Quoting from the opinion of Taney, C. J., in *Ohio Life Ins. Co. v. Debolt*, 16 How. 416, 432, the court says: “‘The sound and true rule is that, if the contract when made was valid by the laws of the state as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law.’”

¹ *Gelpcke v. Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa County*, 3 Wall. 291, 303; *City v. Lamson*, 9 Wall. 477; *Mitchell v. Burlington*, 4 Wall. 270, 275; *Chicago v. Sheklon*, 9 Wall. 50; *Olcott v. Supervisors*, 16 Wall. 678, 690, 691; *Township v. Talcott*, 19 Wall. 666, 677, 678; *Boyd v. Alabama*, 94 U. S. 645; *Douglass v. Pike County*, 101 U. S. 677, 686; *Louisiana v. Pilsbury*, 105 U. S. 278, 294, 295; *County of Ralls v. Douglass*, 105 U. S. 728; *Taylor v. Ypsilanti*, 105 U. S. 60, 71; *Green County v. Connes*, 109 U. S. 104; *Anderson v. Santa Anna*, 116 U. S. 356, 365.

The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." Page 206.

The court expressly recognizes that the case is an exception to the general rule that the federal court will follow the decisions of the highest local courts giving constructions to the laws and constitutions of their own state.¹

§ 34. **Other cases in federal and state courts.**— *Gelpcke v. Dubuque* (*ubi supra*) arose in a federal court; but the same doctrine applies in the state courts, and is imposed upon them by the contract clause of the national constitution. It also applies in favor of residents or domestic corporations, as well as in favor of non-residents or foreign corporations. *Louisiana v. Pilsbury*, 105 U. S. 278, was a writ of *mandamus* against the mayor of New Orleans, La., by a domestic corporation, the Southern Bank, to compel the city of New Orleans to levy a special tax to pay the overdue interest on certain "Consolidated" bonds of the city, owned by the bank. These bonds were issued under the Louisiana statute of 1852, by section 37 of which act a special tax on real estate and slaves was imposed to meet the annual interest on the bonds. The constitution of the state then in force provided that "taxation shall be equal and uniform throughout the state." This clause was several times passed upon by the highest state court, and in every case prior to this one (with one exception, which was shortly afterwards overruled) the requirement of equality and uniformity in the tax was held to apply only to taxes levied for state purposes, and not to those levied for municipal purposes. In this case, however, the state court held that this clause applied also to taxes levied for municipal purposes; that it violated this provision of the state constitu-

¹ See, also, *Taylor v. Ypsilanti*, 105 U. S. 60, 71.

tion and was void, and that therefore the bondholder was not entitled to have such a special tax levied for his benefit.¹ But this judgment was reversed by the supreme court of the United States, on the ground that such a construction of the state constitution impaired the obligation of the bondholder's contract with the city by lessening his means of enforcing the payment of his interest, there being no other adequate means of enforcing such payment provided by law in lieu of the special tax; and that, therefore, the Southern Bank was entitled to have a special tax levied by the city on land, in order to pay the interest on its bonds.²

In delivering the unanimous opinion of the United States supreme court, Mr. Justice Field says, on pages 294, 295: "The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it.³ The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts."⁴

¹ *State ex rel. Southern Bank v. Wall*, 196, and *Shelby v. Guy*, 11 Pilsbury, Mayor of New Orleans, 31 Wheat 361.
La. Ann. 1.

² See, also, *Ohio Life Ins. Co. v. Debolt*, 16 How. 416; *Wright v. Nagle*, 101 U. S. 791; *Hopkins v. McLure*, 133 U. S. 380.

³ Citing *Christy v. Pidgeon*, 4 v. Brown, 5 Phila. 180, 187; *Menges*

§ 35. Non-resident partner.— Under the “privileges and immunities” clause a citizen of one state has a right to form a partnership and to engage in any lawful business in another state, subject to the same rights and liabilities as a citizen of the latter state. “This clause of the constitution was doubtless taken and condensed from article 4, section 1, of the Articles of Confederation and Perpetual Union, adopted by congress July 9, 1778, and which formed the basis of a national government for the United States prior to the adoption of the constitution. It was thereby provided that the ‘people of each state should enjoy in any other state all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.’”¹

§ 36. Firm property liable to debts of firm.— By doing business with a resident partner, the non-resident subjects his share of the firm property within the state to the payment of the firm debts; and a judgment recovered after personal service upon the resident and notice by publication to the non-resident partner, in accordance with the local statutes, is valid and binding against the firm property of both. A state statute allowing such a judgment to be rendered does not deprive the non-resident of his prop-

v. Dentley, 9 Casey (33 Pa. St.), 495; Harris v. Jex, 55 N. Y. 421; In re Dunham, 9 Phila. 471. But see Stockton v. Dundee Co., 7 C. E. Green (N. J.), 56.

It has also given rise to much discussion in legal circles, and the curious reader is referred to the following authorities which discuss the doctrine pro and con: 2 Hare's Am. Const. Law, pp. 722-730; “Case of Gelpcke v. Dubuque,” 4 Harvard Law Rev. 311-320, by Prof. J. B. Thayer; “Rule in Gelpcke v. Dubuque,” 9 Am. Law.

Rev. 381, unsigned, but attributed to Chief Justice Reed, of Pennsylvania; “Federal Doctrine of General Principles of Jurisprudence,” 29 Cent. Law Jour. 465, 485, by Wm. M. Meigs; “Retrospective Decisions,” 22 Am. Law Rev. 523, by Joseph B. Heiskell; “Impairment of Contracts by Change of Judicial Opinion,” 23 Am. Law Rev. 190, by Conrad Reno.

¹ Per Bigelow, C. J., for the court, in Oliver v. Washington Mills, 11 Allen (Mass.), 268, 280-1.

erty "without due process of law;" nor is it repugnant to any other clause of the national constitution.¹

But if the statute or the judgment purports to bind the person or the individual property of such non-resident partner, served only by publication and not appearing in the action, it is void as contrary to due process of law;² and, since the fourteenth amendment, such non-resident partner can obtain a reversal of such state judgment on a writ of error from the United States supreme court.³

§ 37. Non-resident member of foreign corporation.—

The fact that a citizen of one state is a member of a foreign corporation does not entitle the corporation to transact business in another state upon as favorable terms and conditions as corporations of the latter state; for a person's peculiar "privileges and immunities" as a citizen of a sister state become merged in the separate entity of the corporation, and the corporation itself has no such constitutional rights. Therefore a state statute which imposes a higher tax upon foreign insurance companies doing business in the state than upon home insurance companies is valid, although the foreign company has non-resident stockholders who are citizens of other states.⁴

Where, however, the business of the foreign corporation consists of interstate or international commerce, a state cannot discriminate against it and in favor of local corporations. Such state action is in contravention of the commerce clause and therefore void.⁵

§ 38. State taxation of federal franchise.— Franchises conferred by congress, acting within its constitutional powers, cannot, without its permission, be taxed by the states;

¹ *Sugg v. Thornton*, 132 U. S. 524; *Renaud v. Abbott*, 116 U. S. 277.

² *Pennoyer v. Neff*, 95 U. S. 714; *Renaud v. Abbott*, 116 U. S. 277.

³ *Sugg v. Thornton*, 132 U. S. 524; *Pennoyer v. Neff*, 95 U. S. 714.

⁴ *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *S. C., Oliver v. Liverpool Ins. Co.*, 100 Mass. 531;

Paul v. Virginia, 8 Wall. 168.

⁵ *Crutcher v. Kentucky*, 141 U. S. 47.

and any such attempt on the part of a state will be unconstitutional and void.

Under the power to regulate interstate commerce congress has power to authorize the construction of railroads across the states and territories; and therefore a franchise granted for this purpose is not subject to state taxation. "Taxation is a burden and may be laid so heavily as to destroy the thing taxed or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, 4 Wheat. 316, 'the power to tax involves the power to destroy.' . . . The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty."¹

So, likewise, a state statute imposing a tax upon the franchise of a bank chartered by congress is unconstitutional and void.²

But the *property* of a national corporation, as distinguished from its franchise or operations, is subject to state taxation, provided there be no discrimination against the corporation.³

§ 39. Bonds secured by mortgage on property in foreign countries.—A person who invests in the bonds or stocks of a corporation organized under the laws of a foreign country incurs more risks of a legal nature than by investing in such securities issued by a corporation organized under the laws of one of the states of the Union. This is true even if the corporation has a place of business in this country and can be subjected to suit in our courts. For every person who deals with such a foreign corporation "impliedly subjects himself to such laws of the foreign government affecting the powers and obligations of the corporation with which

¹ By the court, in *California v. 816*; *Osborn v. United States Bank*, Pacific R'y, 127 U. S. 1, 41. 9 Wheat. 733.

² *McCulloch v. Maryland*, 4 Wheat. ³ *Railroad Co. v. Peniston*, 18 Wall. 5, 35.

he voluntarily contracts as the known and established policy of that government authorizes. To all intents and purposes he submits his contract with the corporation to such a policy of the foreign government; and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation under the authority of such laws which discharges it from liability there, discharges it everywhere.”¹ It was accordingly held in the case just cited that an act of the parliament of Canada, known as the “Canada Southern Arrangement Act,” which authorized that Canadian railroad to scale down the rate of interest on its bonds and to postpone the time of payment, was valid and binding upon bondholders who were citizens of the United States, and prevented a recovery in the courts of the United States of the full amount of interest promised. If such a statute were passed by one of the United States, however, for the relief of an embarrassed corporation organized under its laws, it would impair the obligation of the bondholder’s contract, and would be void under the contract clause of the federal constitution; and, therefore, it would constitute no defense to an action against the corporation by a non-assenting holder of a pre-existing bond.

¹ Per Mr. Chief Justice Waite, for the court, in *Canada Southern R’y v. Gebhard*, 109 U. S. 527, 537, 538.

CHAPTER IV.

RIGHT TO SUE AND LIABILITY TO SUIT.

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PART I.

THE RIGHT TO SUE.

A. *In state courts.*B. *In federal courts.*¹A. *In state courts.*

§ 40. A constitutional right to sue.—Under the clause of the constitution providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states (art. IV, sec. 2, cl. 1), a non-resident citizen has a right to bring and maintain suit in a state court, even against a non-resident defendant, if a resident citizen has that right.²

In *Cole v. Cunningham*, 133 U. S. 107, 113, the supreme court says: "The intention of section 2 of article IV was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions."

In *Barrell v. Benjamin*, 15 Mass. 354, a citizen of Connecticut sued a citizen of Great Britain, in Massachusetts, on a contract made in a foreign country. The defendant argued that the state courts were not organized to determine controversies in which its own citizens have no interest; and that as both parties were non-residents of Massachusetts and the cause of action did not arise there, the

¹ The right of a non-resident or foreign corporation to sue in the federal courts depends wholly upon the constitution and laws of the United States, and is regulated solely by those laws and not by state laws. This subject is treated in chapters VII and VIII, on "Suits in Federal Courts." The right of foreign executors and administrators to sue in the federal courts is stated

in this chapter, §§ 50-56, *post*; and of foreign assignees in bankruptcy and receivers, in § 64, *post*.

² *Barrell v. Benjamin*, 15 Mass. 354; *Ward v. Maryland*, 12 Wall. 418, 430; *Morgan v. Neville*, 74 Pa. St. 52, 57; *Harwell v. Sharp*, 85 Ga. 124; *Corfield v. Coryell*, 4 Wash. C. C. 371, 381. *Contra*, *Robinson v. Oceanic Nav. Co.*, 112 N. Y. 315.

court should dismiss the suit for want of jurisdiction. But the court held that the provision of the federal constitution gave the citizens of any other state the same right to sue that citizens of Massachusetts possessed. Chief Justice Parker says, on page 358: "It will be admitted that a citizen of Massachusetts has the privilege to sue any foreigner who may come within this state, whether he come to embark for a foreign country, or to reside here for the purposes of business. If so, a citizen of Connecticut has the same privilege secured to him by the constitution."

The case of *Robinson v. Oceanic Nav. Co.*, 112 N. Y. 315, is opposed to this view and to the general current of authority. That was an action of tort for personal injuries caused by defendant's negligence on the ocean and outside the jurisdiction of New York. The action was brought by a citizen of Massachusetts against a foreign corporation. The statutes of New York allowed such an action to be instituted by a resident of New York, against a non-resident or a foreign corporation, but did not allow it when both parties were non-residents of New York. The plaintiff argued that these statutes discriminated against him as a non-resident, and were therefore void under this clause of the national constitution. But the New York courts held that they had no jurisdiction, and that the statutes were valid and constitutional, and dismissed the suit.

§ 41. Qualification of non-resident's right to sue in state court.— This general right of a non-resident to sue in a state court does not, however, carry with it a right to recover in every case in which a resident plaintiff could recover. A plaintiff is in some cases held bound by the laws of his own state, even when suing in another state, and if he could not recover in his own state, the better view seems to be that the courts of the second state do not violate this constitutional clause by deciding that he cannot recover in them, even if a resident plaintiff could recover.¹

¹ *Bagby v. Atlantic R'y*, 86 Pa. Bank, 71 Me. 514, 526; *Cole v. Cunningham*, 133 U. S. 107, 114; *Bur-*

In *Cole v. Cunningham*, 133 U. S. 107, 114, it was held that, where citizens of Massachusetts attached the property of their Massachusetts debtor in New York, with knowledge of his insolvency, and in evasion of the insolvent laws of their own state, the fact that all parties were citizens of Massachusetts would have justified the courts of New York in holding that the attaching creditors could not hold the property, and thus acquire a preference over other Massachusetts creditors. The fact that by the law of New York the attaching creditors could have held the property, if they had been citizens of New York instead of Massachusetts, would not constitute an unconstitutional discrimination against citizens of other states.

This point was decided in the same way by Chief Justice Shaw, in *Burlock v. Taylor*, 16 Pick. (Mass.) 335, 341.

In a Pennsylvania case, a Virginia creditor garnished his debtor's credits, and claimed the right to hold the fund as against a Virginia receiver. Under the law of Virginia he could not recover, while under the law of Pennsylvania, if he had been a citizen of that state, he could have recovered. The court held that he was bound by the law of his own state in this respect, and that he was not thereby deprived of any privileges or immunities secured to him by the federal constitution.¹

So, it seems that a non-resident plaintiff, who brings an attachment suit to evade the insolvent laws of his own state, may be enjoined from its prosecution in the equity courts of the state where it is pending, though a resident plaintiff would not be enjoined.²

§ 42. Same — Security for costs of court. — In many states a non-resident plaintiff is required by statute to furnish the defendant security for costs of court; and if he fails to do so, the defendant may have the action dismissed.³

lock v. Taylor, 16 Pick. (Mass.) 335;
Chemung Canal Bank v. Lowery,
 93 U. S. 72. *Contra*, *Rhawn v.*
Pearce, 110 Ill. 350.

¹ *Bagby v. Atlantic, etc. Ry.*, 86
 Pa. St. 291.

² *Reynolds v. Adden*, 136 U. S. 348.

³ Mass. Pub. Sta., ch. 161, sec. 24;

When resident plaintiffs are not required to furnish security for costs of court, it is clear that such statutes do discriminate against non-residents in some degree. The difficulty of reaching a non-resident plaintiff, and the smallness of the security generally required, are, however, probably sufficient reasons to justify such statutes and to render them constitutional.¹

They are merely reasonable regulations of the right to sue, and do not deny or materially abridge the non-resident's right.

The West Virginia and Maryland statutes of this character have been held by the state courts not to work an unconstitutional discrimination against non-resident plaintiffs, and to be valid.²

In the West Virginia case the court, by Johnson, J., says, on page 310: "This is the first time the constitutionality of the law has been called in question in this state or elsewhere, so far as I know. The cases in 8 Wall. 180, and 12 Wall. 430, cited by counsel for appellants, have no bearing on this question. It would be a sad state of affairs if the law could not protect the officers of the court as to their fees against parties who are not within the jurisdiction of the court."

But if the amount of the security required is unreasonably large, or if it is apparent that the object of the statute is to harass non-resident plaintiffs and not merely to secure defendants and officers, it is believed that the statute would contravene this clause and be void.

In some of the circuit courts of the United States a non-resident plaintiff is also required to give security for costs.³

Slate v. Ackley, 8 Cush. (Mass.) 98; *Bank of Michigan v. Jessup*, 10 Wend. (N. Y.) 10; *Rhode Island Pub. Sta.*, ch. 206, secs. 25-27; *Conley v. Woonsocket Inst. for Savings*, 11 R. I. 147.

¹ See *Chemung Bank v. Lowery*, 98 U. S. 72.

² *Nease v. Capehart*, 15 W. Va. 209; *Haney v. Marshall*, 9 Md. 194, 209.

³ *Miller v. Norfolk R'y*, 47 Fed. Rep. 264; *Lyman Ventilating Co. v. Southard*, 12 Blatchf. 405; *Stewart v. The Sun*, 86 Fed. Rep. 807; *Foster v. Swasey*, 2 W. & M. 217; *Prince v. Towns*, 33 Fed. Rep.

§ 43. **Foreign corporation's right to sue.**—Corporations created by other states are not “citizens” within the meaning of the above constitutional clause;¹ and therefore they have no absolute right to sue outside of the state creating them.² But the right to sue is generally given by the states as a matter of comity.³

The right to defend a suit, however, depends upon different principles; and a judgment rendered against a foreign corporation defendant without allowing it to present its defense is void.⁴ “Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations.”⁵

161. But see *Woodworth v. Sherman*, 3 Story, 171, 173. 340; *March v. Eastern R'y*, 40 N. H. 548.

¹ *Paul v. Virginia*, 8 Wall. 168.

⁴ *Windsor v. McVeigh*, 93 U. S.

² *Augusta Bank v. Earle*, 18 Peters, 519, 590, 591; *Hoyt v. Thompson*, 5 N. Y. 320, 340. 274; *McVeigh v. United States*, 11 Wall. 259.

³ *Hoyt v. Thompson*, 5 N. Y. 320, 340.

⁵ Per Mr. Justice Field in *Wind-*

sor v. McVeigh, 93 U. S. 274, 277.

PART II.

LIABILITY TO SUIT.

A. *In state courts.*B. *In federal courts.*¹A. *In state courts.*

§ 44. (1) **Transitory actions.**—The general rule is that a non-resident is liable to suit in a state court, on any personal action of a transitory nature, when jurisdiction of his person or of his property can be obtained by service of process upon him personally or by an attachment of his property. This rule not only includes the case where the defendant is a citizen of another state, but also where he is an alien, and even when both parties are non-residents or aliens, and the cause of action arose without the state of process.²

Even if the non-resident defendant is not personally served, nor his property attached, still if he enters a voluntary and general appearance in the action, he will be bound by a judgment against him, not only in the same state, but also in others.³

A state has the constitutional power to abolish the distinction between special and general appearances, and to declare that a special appearance shall be a waiver of jurisdictional objections founded upon insufficient service of process. This law is binding upon non-residents as well as upon residents, when sued in the state courts. Consequently, a judgment *in personam*, rendered in a court of a state where such a law exists against a non-resident defendant

¹ The liability to suit in the federal courts is treated in chapters VII and VIII on "Suits in Federal Courts," *post*. The liability of foreign executors and administrators to suit in the federal courts is stated in this chapter, §§ 57-63, *post*; and of foreign assignees in bankruptcy and receivers, in §§ 65, 66, *post*.

² Barrell v. Benjamin, 15 Mass. 354; Roberts v. Knights, 7 Allen, 449; Peabody v. Hamilton, 106 Mass. 217; Cleaves v. Lord, 43 Me. 290.

³ Bellows v. Ingham, 2 Vt. 575; Harbin v. Chiles, 20 Mo. 314.

who had not been personally served with process within the state, and had entered a special appearance objecting to the jurisdiction of the court, is valid, and does not contravene the "due process of law" clause or any other provision of the national constitution.¹

§ 45. **Same — Foreign corporations.**— In the absence of statutes providing for service of process upon an officer or agent of a foreign corporation, it has been decided that it is not liable to suit upon a personal demand.² "The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary. . . .

§ 46. **Remedial statutes authorizing suits against foreign corporations.**— "This doctrine of the exemption of a corporation from suit in a state other than that of its creation was the cause of much inconvenience, and often of manifest injustice. . . . To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, al-

¹ *York v. Texas*, 137 U. S. 15; *Pick. (Mass.)* 274, 286; *McQueen v. Kauffman v. Wootters*, 138 U. S. 285. *Middletown Man. Co.*, 16 *Johns.*

² *Peckham v. North Parish*, 16 (N. Y.) 5.

lowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred."¹ Service of process in accordance with such state statutes is valid and binding, and subjects the defendant corporation to the jurisdiction of the court, and authorizes the rendition of a personal judgment against it.² Such service has also the same effect in the federal courts sitting within the state, even when the statute is confined in terms to the state courts.³ If the foreign corporation has appointed an agent in compliance with the statute, service of process must be made upon him, and service upon another person is not sufficient.⁴ But if the corporation has not complied with the statutory requirements, service upon a person who acts as its agent within the state is sufficient; for it will not be allowed to take advantage of its own illegal conduct to escape service of process.⁵

§ 47. Construction of statutes — Casual presence of officer in the state of process.— A statute authorizing service of process upon an officer or agent of a foreign corporation will not be construed to authorize such service when the corporation is not engaged in business in the state and the person served is there merely casually and not on the corporation's business; for in such case he does not carry his corporate functions with him.⁶

In *Galveston City R'y v. Hook*, 40 Ill. App. 547, service of process was made upon the president of a Texas cor-

¹ Per Mr. Justice Field, for the court, in *St. Clair v. Cox*, 106 U. S. 350, 354, 355. See, also, *Lafayette Ins. Co. v. French*, 18 How. 404; *March v. Eastern R'y*, 40 N. H. 548.

² *Johnston v. Trade Ins. Co.*, 132 Mass. 432; *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; *McNichol v. U. S. Mercantile Agency*, 74 Mo. 457.

³ *Ex parte Schollenberger*, 96 U. S. 369; *New England Mut. Ins. Co. v. Woodworth*, 111 U. S. 138, 146;

Van Dresser v. Oregon R'y, 48 Fed. Rep. 202; *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471.

⁴ *Liblong v. Kansas Fire Ins. Co.*, 82 Pa. St. 413.

⁵ *Hagerman v. Empire Slate Co.*, 97 Pa. St. 534.

⁶ *Newell v. Great Western R'y*, 19 Mich. 336; *St. Clair v. Cox*, 106 U. S. 350, 357; *Libbey v. Hodgdon*, 9 N. H. 394, 397.

poration in Illinois. The defendant filed a plea in abatement objecting to the jurisdiction of the court because it was a corporation doing business in the state of Texas; that the location of its business was at Galveston; that the president was not on official business when served with process in this state, but was attending to his own affairs and pleasure. It was admitted, however, that while in Chicago Sinclair telegraphed to a person in Minnesota who once desired to buy the property of the company, but nothing came of the matter, and Sinclair had no authority to accept any proposition.

"We are of opinion," says Moran, J., "that such message sent from Chicago under the circumstances stated in the plea was not such an act as brought the corporation of which Sinclair was president in legal contemplation within the state, so as to be found within the state for the purpose of the service of process upon it. A merely casual offer to receive a proposition relative to the business of the company is not the transaction of business which authorizes the conclusion that the company is doing its business in this state. To be found within a state a foreign corporation must have sent its agent on whom service is made to the state to conduct its business therein, either continuously or for a time, so as to complete a transaction or an enterprise, or at least charged with the duty of making a particular contract in the state, or negotiating therein for the company." Page 556.

When a foreign corporation owns property in a state, the state has power to subject such property by attachment to claims against the corporation, although it is not engaged in business within the state, and no personal service of process is made upon its officers or agents therein. A statute authorizing an attachment, even of debts, is valid and will be enforced against such property, and a judgment so rendered will be respected in other states.¹

¹ *Ocean Ins. Co. v. Portsmouth Eastern R'y*, 40 N. H. 548; *Congar R'y*, 3 Met. (Mass.) 420; *March v. v. Galena R'y*, 17 Wis. 477.

§ 48. **Effect of such judgment in other states.**— A judgment of a state court, rendered against a foreign corporation upon service on its officer or agent who is transacting its business within the state, is valid and binding *in personam*; and is entitled to full faith and credit, and will be enforced in the courts of other states and in the federal courts. A state has the right to enact that a foreign corporation which wishes to transact business in the state shall enjoy that privilege only on condition that service upon its officers or agents therein shall constitute service upon the corporation itself; and if the corporation afterwards engages in business there, it will be presumed to have assented to such mode of service, and will be bound accordingly.¹

But a state law which sanctions the service of process upon an officer or agent of a foreign corporation, who is merely casually in the state and not on the corporation's business, is so contrary to natural justice and to the principles of international law, that the courts of other states will not recognize it as conferring any jurisdiction *in personam*. A judgment so rendered will therefore not be entitled to full faith and credit, and cannot be enforced as such in their courts, nor in the federal courts.²

§ 49. (2) **Local actions.**— If, however, the action be local in its nature, as one to try the question of title to land or trespass *quare clausum fregit*, the action must be brought in the state where the land lies; and if brought in another state, it will be dismissed for want of jurisdiction; and the fact that the defendant is found in such other state and served with process from one of its courts does not confer jurisdiction, whatever the citizenship of the parties may be.³

¹ *Lafayette Ins. Co. v. French*, 18 How. 404; *Wilson v. Martin-Wil-*

son Fire Alarm Co., 149 Mass. 24, 27.

² *Moulin v. Ins. Co.*, 24 N. J. L. 222; *St. Claire v. Cox*, 106 U. S. 350.

³ *Allin v. Connecticut River Lum-*
ber Co., 150 Mass. 560; *Niles v.*
Howe, 57 Vt. 388; *Watts v. Kinney*,
6 Hill (N. Y.), 82.

PART III

FOREIGN EXECUTORS AND ADMINISTRATORS.

A. *Suits by foreign executors and administrators.*B. *Suits against foreign executors and administrators.*A. *Suits by foreign executors and administrators.*

§ 50. Preliminary.—The equal “privileges and immunities” clause of the national constitution does not give foreign executors and administrators who are citizens of a sister state a right to sue equal to that of domestic executors and administrators. Their only right to sue is derived from their letters of appointment, and these confer no power outside of the appointing state. Hence, it is well settled that, in the absence of an enabling statute of the state of process, giving effect to the foreign appointment,¹ no suit can be maintained by an executor or administrator in his official capacity, except within the limits of the state from which he derives his authority. If he wishes to prosecute an action in another state, he must first comply with its laws upon the subject. This rule applies both in the state and in the federal courts.²

In *Noonan v. Bradley*, *supra*, the plaintiff’s intestate died domiciled in New York, and the proper court of that state appointed the plaintiff administrator. He then brought this action on a bond in the United States circuit court for Wisconsin. There was a statute of Wisconsin which enabled a foreign administrator to sue in that state in certain cases, but not when there was a domestic administrator; and it appeared in this case that a domestic ad-

¹ *Lawrence v. Nelson*, 143 U. S. 215. *Potter*, 11 Mass. 313; *Chapman v.*

² *Noonan v. Bradley*, 9 Wall. 394; *Fish*, 6 Hill (N. Y.) 554; *Petersen v. Chemical Bank*, 32 N. Y. 21, 43; *Kerr v. Moon*, 9 Wheat. 565; *Fenwick v. Sears*, 1 Cranch, 259; *Dixon v. Ramsey*, 3 Cranch, 319; *Goodwin v. Jones*, 3 Mass. 514; *Langdon v.* 678; *Gilman v. Gilman*, 54 Me. 453; *Swearingen v. Morris*, 14 Ohio St. 424, 429; *Bell v. Nichols*, 38 Ala.

ministrator had been appointed before this action was brought. The supreme court held, accordingly, that the plaintiff could not recover.

This rule seems somewhat inconsistent with the principles established in the analogous cases of foreign receivers and foreign assignees in bankruptcy or insolvency.¹ The reason for its adoption is chiefly "a solicitude to protect the rights of creditors and others, resident in the jurisdiction in which the assets are found;" and it is not "because the executor or administrator has no right to the assets of the deceased, existing in another country, that he is refused a standing in the courts of such country, for his title to such assets, though conferred by the law of the domicile of the deceased, is recognized everywhere."²

§ 51. Objection of plaintiff's disability to sue may be taken either in abatement or in bar.—Some difference of opinion exists upon this point; but the better view seems to be that when a foreign executor or administrator sues in his official capacity without ancillary letters granted by the state of process, the defendant may defeat the action either by a plea in abatement or by a plea in bar.³

§ 52. Voluntary payment to foreign executor or administrator.—There is some conflict of authority as to whether a voluntary payment of a debt due the estate, made in the debtor's state to a foreign executor or administrator, will discharge the debt and prevent a recovery by a domestic administrator or executor who receives his appointment after the payment.

The better view, however, and the one which has received the approval of the supreme court of the United States, is that such payment discharges the debt and protects the debtor from the danger of double payment; because the foreign executor or administrator is not a mere stranger to

¹ See *post*, §§ 64-66.

³ *Noonan v. Bradley*, 9 Wall. 394;

² Per Denio, C. J., for the court, in *Langdon v. Potter*, 11 Mass. 313.

Petersen v. Chemical Bank, 32 N. Y. 21, 43.

the debt, but is one with lawful title; and because his incapacity to sue for it is a mere personal disability, which does not defeat his title nor his power to receive payment anywhere.¹

In *Wilkins v. Ellett*, 9 Wall. 740, a citizen of Virginia, claiming to be next of kin to the deceased, was appointed administrator in Tennessee, and brought suit in the United States circuit court for Tennessee against a citizen of that state. The defense was payment in Tennessee to an administrator appointed in Alabama before the plaintiff's appointment. The deceased's domicile had been in Alabama at the time of his death. The trial court held that such voluntary payment was in the defendant's own wrong, and gave judgment for the plaintiff, probably upon the authority of a case in the local state court deciding the same way.²

This judgment was, however, reversed by the supreme court of the United States, upon the ground that the original or principal administrator had title to the debt, and therefore could discharge it upon receiving payment anywhere. In the opinion some stress was laid upon the fact that the original administrator had taken out his letters at the domicile of the deceased; and upon a second trial of the same case (reported in 108 U. S. 256), the jury found that his domicile was in Tennessee at the time of death instead of in Alabama as before supposed. Upon the strength of that finding the trial court again rendered judgment for the plaintiff, which the supreme court again reversed, because this fact was immaterial.

In delivering the opinion of the court Mr. Justice Gray says, on pages 258, 259:

"There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his

¹ *Wilkins v. Ellett*, 9 Wall. 740; *Austin*, 4 Mason, 16, 33; *Selleck v. S. C.*, 108 U. S. 256; *Wyman v. Rusco*, 46 Conn. 370, 372. *Contra*, *Halstead*, 109 U. S. 654, 656; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 55; *Bartlett v. Hyde*, 3 Mo. 490. 45, Kent, C.; *Parsons v. Lyman*, 20 ² *Young v. O'Neal*, 3 Sneed (Tenn.), N. Y. 103, 113, 114; *Trecothick v.* 55.

domicile at the time of his death; that the proper place for the principal administration of his estate is that domicile; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt due to him at the time of his death can be brought by an administrator as such in any state in which he has not taken out administration.

“But the reason for this last rule is the protection of the rights of citizens of the state in which the suit is brought; and the objection does not rest upon any defect of the administrator’s title in the property, but upon his personal incapacity to sue as administrator beyond the jurisdiction which appointed him.

“If a debtor, residing in another state, comes into the state in which the administrator has been appointed, and there pays him, the payment is a valid discharge everywhere. If the debtor, being in that state, is there sued by the administrator, and judgment recovered against him, the administrator may bring suit in his own name upon that judgment in the state where the debtor resides.¹

“In accordance with these views, it was held by this court, when this case was before it after a former trial, at which the domicile of the intestate appeared to have been in Alabama, that the payment in Tennessee to the Alabama administrator was good as against the administrator afterwards appointed in Tennessee. *Wilkins v. Ellett*, 9 Wall. 740. The fact that the domicile of the intestate has now been found by the jury to be in Tennessee does not appear to us to make any difference. There are neither creditors nor next of kin in Tennessee. The Alabama administrator has inventoried and accounted for the amount of this debt in Alabama. The distribution among the next of kin, whether made in Alabama or in Tennessee, must be according to the law of the domicile; and it has not been suggested that there is any difference between the laws of the two states in that regard.”

¹ Citing *Talmage v. Chapel*, 16 Mass. 71, and *Biddle v. Wilkins*, 1 Pet. 686.

In New York the rule of validity of voluntary payment to a foreign executor or administrator has been carried so far as to charge a New York administrator with the amount of a debt owing to the estate by a solvent debtor residing in Pennsylvania, on account of his neglect to use due diligence in obtaining payment.¹

In the case of debts due from the national government, a foreign executor or administrator has full authority to receive payment anywhere, and to give a valid discharge of the debt, in any place where the government may choose to pay it. Debts due from the United States are not local assets at the seat of government.²

§ 53. Cases contra on voluntary payment.— The case of *Young v. O'Neal*, 3 Sneed (Tenn.), 55, holding the contrary, namely, that voluntary payment in the debtor's state to a foreign executor or administrator does not discharge the debt, nor prevent a recovery by a domestic executor or administrator subsequently appointed, proceeds upon the ground that such foreign officer is a stranger to the debt, and therefore has no authority to give a discharge. But the court concedes that if the payment had been made in Illinois, where the executor was appointed, instead of in Tennessee, the same executor could have given a discharge which would have been valid everywhere; which seems to be an admission that such executor was not a stranger to the debt.

Bartlett v. Hyde, 3 Mo. 490, was an early case decided in 1834, and obviously without much consideration.

These cases, however, receive some support from the Massachusetts case of *Pond v. Makepeace*, 2 Met. 114. There a Rhode Island administrator, without obtaining ancillary letters in Massachusetts, had brought suit in the latter state against a debtor residing therein, and obtained judgment by voluntary default of the defendant. He then levied ex-

¹ *Shultz v. Pulver*, 3 Paige (N. Y.), 182; S. C. affirmed, 11 Wend. (N. Y.) 861.

² *Vaughan v. Northup*, 15 Peters, 1; *Wyman v. Halstead*, 100 U. S. 654.

ecution upon the debtor's real estate, and obtained full satisfaction. A Massachusetts administrator was afterwards appointed, and brought this action upon the same debt; to which the defense was satisfaction on execution. The court held, in an opinion by Dewey, J., that the foreign administrator had no right or power to sue on the debt; that his action might have been defeated by an appearance and filing the proper pleadings; that the judgment and execution and satisfaction were void as against the domestic administrator, although subsequently appointed; and that therefore the defendant must pay the debt over again to the plaintiff.

In the case of *Wilkins v. Ellett*, 9 Wall. 740, payment was made voluntarily without suit, while in *Pond v. Makepeace*, *ubi supra*, satisfaction was obtained after judgment, and by the levy of an execution upon real estate. But this slight difference in facts does not seem sufficient to reconcile the cases. For satisfaction by means of legal process discharges the debt as effectually as voluntary payment. Nor does the fact that satisfaction is obtained on a *void* judgment change the result; for that also discharges the debt and prevents a recovery in another action.¹

The true test is, Has the person receiving payment or satisfaction authority to discharge the debt? The mode of payment or satisfaction is immaterial. If he has authority to discharge the debt, it necessarily follows that no subsequent action can be maintained by any one on the same debt.

The authority of *Pond v. Makepeace*, *ubi supra*, is somewhat weakened by the later case of *Rand v. Hubbard*, 4 Met. 252, 257, in which Chief Justice Shaw delivered the opinion. There it was held that a foreign executor of an indorsee of a note has authority to demand payment in Massachusetts, if there is no domestic executor or administrator at the time; and if payment be refused generally, and the indorsers duly notified, their liability is fixed, and

¹ See *Whittier v. Wendell*, 7 N. H. 257, 258; *Fitzsimmons v. Marks*, 66 Barb. (N. Y.) 833.

may be enforced by a domestic administrator subsequently appointed. The court says, on page 257, that a voluntary payment by the promisor to the notary acting for the foreign executor would have been a good payment, and would have discharged the debt as against the domestic administrator; and *Pond v. Makepeace*, and other cases holding that a foreign administrator cannot collect simple contract debts due outside of his state, were distinguished on the ground that they were cases of intestacy. The other cases cited by Chief Justice Shaw were *Goodwin v. Jones*, 3 Mass. 514; *Stevens v. Gaylord*, 11 Mass. 256, and *Vaughn v. Barret*, 5 Vt. 333. Referring to these cases, he says on pages 255, 256:

“These are all cases of intestacy, and turn on the authority of an administrator, as contradistinguished from that of an executor appointed by the will of the testator. In such case it is held that, as an administrator derives his whole authority from the law of the state under which he is appointed, his authority cannot be extended beyond its jurisdiction; though were it a new question, there would be great convenience and perhaps some legal ground to decide, as between the states of this Union, that where a principal administration is granted, that is, an administration in the state where the intestate had his domicile, and by whose laws his personal property must be distributed and his estate settled (*Dawes v. Head*, 3 Pick. 128), the principal administrator should so far have authority over debts due in other states, by negotiable securities or otherwise, that a payment to him, by a citizen of another state, before administration granted in the latter, should be a good discharge.”

As we have seen above, in section 52, the view intimated by Chief Justice Shaw has since then been generally adopted in the United States; and a foreign administrator, as well as a foreign executor, has authority, before the appointment of a domestic administrator, to receive payment and to give a discharge which is valid everywhere. If intestacy be the only ground upon which *Pond v. Makepeace* and the

earlier cases can be supported (and none other was suggested by the chief justice), it follows that those cases were virtually overruled by this one.

§ 54. Voluntary payment to foreign administrator after appointment of domestic administrator.—It has been held by the supreme court of New York that a New York debtor who voluntarily pays a mortgage debt (which was secured by mortgage on land in New York) to a foreign administrator after the appointment of a domestic New York administrator cannot set up such payment in defense to a foreclosure suit brought by the domestic administrator for non-payment of the mortgage debt. Such payment is in the debtor's own wrong, and will not discharge the debt.¹

A foreign administrator cannot discontinue a suit brought by a domestic administrator against a debtor residing in the state of process; nor can he defeat a recovery by the domestic administrator by a release given to the defendant after the action was brought, even if the foreign administrator was appointed at the place of domicile of the deceased; because the debt is *bona notabilia* where the debtor lives, upon which administration may be there granted.²

§ 55. Assets for founding administration.—“The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable.”³

¹Stone v. Scripture, 4 Lans. (N. Y.) 186. This seems to be the true ground of the decision in Vaughn v. Barret, 5 Vt. 333.

²Chapman v. Fish, 6 Hill (N. Y.), 554.

³Per Mr. Justice Gray, for the court, in Wyman v. Halstead, 109 U. S. 654, 656, and cases cited; Slocum v. Sanford, 2 Conn. 533; Chap-

A foreign corporation doing business in a state, and which has an agent for the service of process therein, is considered to have a domicile in that state, in the sense that a simple contract debt due by it to a decedent's estate is assets at that domicile, which will authorize the grant of administration there. Hence, a foreign life insurance company so situated cannot defeat an action on a policy by showing that the decedent was a non-resident of the state of administration and left no assets in that state except the policy. The grant of administration being made at one domicile of the debtor, though not its principal domicile, is valid, and the administrators there appointed can maintain an action on the policy, wherever the decedent lived.¹

§ 56. **Suit in personal capacity.**— When a foreign executor or administrator sues, not in his representative but in his personal capacity, it is well settled that he can maintain his action without obtaining ancillary letters in the state of process.

Thus, in *Doe v. M'Farland*, 9 Cranch, 151, a testator living in Virginia devised land to his executors, which land was in Virginia when the will was proved, but became a part of Kentucky before the action (ejectment) was brought. The action was brought in a federal court sitting in Kentucky, without having taken out ancillary letters in that state. *Held*, that the executors could recover.

The court says, at page 152, per Marshall, C. J.: "It has been decided in this court that letters testamentary give to the executor no authority to sue for the personal estate of the testator out of the jurisdiction of the power by which those letters are granted. But this decision has never been understood to extend to a suit for lands devised to an executor. In such case the executor sues as devisee. His right is derived from the will, and the letters testamentary do not give the title."²

man v. Fish, 6 Hill (N. Y.), 554; ¹New Eng. Mut. Ins. Co. v. Pinney v. McGregory, 102 Mass. Woodworth, 111 U. S. 138.
186; Owen v. Miller, 10 Ohio St. ²See, also, De Forest v. Thompson, 40 Fed. Rep. 375.

Where a note is given and payable to a foreign administrator, appointed at the deceased's domicile, in payment of personal property sold by him to the maker of the note, he can maintain an action thereon in the maker's state, either in his own right or in his official capacity; and payment made voluntarily to a domestic administrator is no defense to such suit.¹

So it has been decided in Massachusetts that a New York administrator who has reduced the debt to a judgment in New York can sue upon that judgment in Massachusetts without ancillary letters, because the debt is due to the plaintiff in his personal, and not in his official, capacity. The court also assigns as an additional reason that "it is important to the purposes of justice that it should be so; for an administrator appointed here could not maintain an action upon this judgment, not being privy to it. Nor could he maintain an action on the original contract; for the defendants might plead in bar the judgment recovered against them in New York."²

"And on a note made to the intestate, payable to bearer, an administrator appointed in one state may sue in his own name in another state."³

As the legal title to bills and notes passes to the executor or administrator upon the owner's death, he may transfer the same by indorsement, and the indorsee can maintain actions in their own names against the debtors in another state.⁴

B. Suits against foreign executors and administrators.

§ 57. Non-suability in federal courts.—The rule is established in the federal courts that a foreign executor or

¹McCord v. Thompson, 92 Ind. 565.

²Talmage v. Chapel, 16 Mass. 71, 73; Biddle v. Wilkins, 1 Peters, 686; Barton v. Higgins, 41 Md. 539; Lewis v. Adams, 70 Cal. 403; Cherry v. Speight, 28 Tex. 503.

³Per Mr. Justice Gray, in Wilkins v. Ellett, 108 U. S. 256, 259; Barrett v. Barrett, 8 Greenl. (Me.) 353; Robinson v. Crandall, 9 Wend. (N. Y.) 425.

⁴Harper v. Butler, 2 Peters, 239; Petersen v. Chemical Bank, 32 N. Y. 21; Wilkins v. Ellett, 108 U. S. 256,

administrator, who has not taken out ancillary letters within the jurisdiction, is not liable to suit in his official capacity in those courts. The objection is one that defeats the jurisdiction of the court and requires a dismissal of the suit.¹

The reasons for this rule are thus stated by Mr. Justice Story in *Vaughan v. Northup*, 15 Pet. 1, 5-6:

“The question is broadly presented whether an administrator, appointed and deriving his authority from another state, is liable to be sued here, in his official character, for assets lawfully received by him under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets according to the *lex loci*. Hence, it has become an established doctrine that an administrator appointed in one state cannot, in his official capacity, sue for any debts due to his intestate in the courts of another state, and that he is not liable to be sued in that capacity in the courts of the latter by any creditor for debts due there by his intestate.”

259; *Rand v. Hubbard*, 4 Met. (Mass.) 291; *Stearns v. Burnham*, 5 Greenl. (Me.) 261.

¹ *Vaughan v. Northup*, 15 Pet. 1.

§ 58. **Conflicting decisions in state courts.**— In the state courts there is some conflict of authority; but the rule of non-suability seems to be more generally accepted, in the absence of a statute of the state of process, authorizing suit against him in his official capacity.¹

§ 59. **State has power to authorize suits against foreign executors and administrators as to all property within the state.**— There seems to be no doubt that a state is not restrained by the national constitution from authorizing suits to be brought in its courts against foreign executors and administrators; and that service of process by attachment of property within its jurisdiction, and notice by publication to the non-resident foreign executor or administrator, in accordance with the local statute, will confer jurisdiction over such property and will justify its sale upon execution.

Cady v. Bard, 21 Kan. 667, in which Mr. Justice Brewer (now associate justice of the supreme court of the United States) delivered the opinion, is directly in point. A statute of Kansas (Gen. Stat. ch. 37, sec. 203) provided that "an executor or administrator, duly appointed in any other state or country, may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

Plaintiff sued defendants as foreign executors, and made service by attachment and publication. Defendants appeared specially and moved to set aside the service for the reason that the court could not acquire jurisdiction in that mode. *Held*, that whatever might be the rule independent of statute, the statute authorized that mode, and the court had jurisdiction.

Brewer, J., says, on page 668: "That a state has jurisdic-

¹ *Magraw v. Irwin*, 87 Pa. St. 139, *Swearingen v. Pendleton*, 4 S. & R. 142; *Durie v. Blauvelt*, 40 N. J. L. (Pa.) 389; *Evans v. Tatem*, 9 S. & R. 114; *Normand v. Grogard*, 2 C. E. (Pa.) 252.
Green (17 N. J. Eq.), 425. *Contra*,

tion over all property within its territorial limits, and may subject it to the process of its courts, will not be doubted. Whether a judgment rendered upon a service by attachment and publication has any extraterritorial force, or binds anything other than the specific property attached, we need not inquire. It is enough for the purposes of this case to hold that jurisdiction may be acquired so far as may be necessary to cut off all interest of a non-resident defendant in the property attached."

Such statutes seem to be eminently just and proper. They afford an easy means of preventing the withdrawal of local assets before the claims of local creditors have been satisfied. Local creditors can protect themselves by the simple process of attachment and publication. Their constitutionality seems clear. Such state process is not contrary to "due process of law," as against the defendant's title to the property attached, even if he does not appear in the proceedings; for the preliminary attachment and publication subject the property to the control and jurisdiction of the court, which is therefore authorized, upon due proof of the plaintiff's claim, to order its sale, and thereby to divest the title of the non-resident defendant. Of course, if the non-resident defendant does not appear, the judgment is not binding upon him *in personam*, nor upon any other property not attached.¹

§ 60. Effect of judgment against local assets.—A judgment so obtained divests the title of a non-resident defendant who was alive at the time the jurisdiction of the court attached; and it is entitled to "full faith and credit" in the courts of other states — even in the courts of the defendant's state.²

But it does not divest the title of a non-resident defendant who died before the suit was brought; and his administrator can maintain an action to recover the property; for such a judgment is wholly unauthorized and a nullity.

¹Pennoyer v. Neff, 95 U. S. 714.

²Campbell v. Home Ins. Co., 1 S. C. 158.

and may be avoided by the administrator without a writ of error, even in the courts of the state of rendition. The fact that the suit is *quasi in rem*, against the property merely, does not help the matter; because it is only as connected with a defendant in life that such a suit can be sustained.¹

§ 61. **Voluntary appearance as defendant.**— It has been decided that a foreign executor who enters a voluntary appearance and defends a suit on the merits *as executor*, without disclosing his foreign character or claiming his immunity from suit, thereby becomes an executor *de son tort*, and is bound by the judgment rendered against him, even in his own appointing state;² but that the estate itself is not bound by such a judgment.³

In the early Pennsylvania case of *Evans v. Tatem*, 9 S. & R. 252, an action was brought on a Tennessee decree against a Pennsylvania administrator, who had voluntarily appeared in the Tennessee court and defended the suit on the merits without claiming his non-suability. The supreme court of Pennsylvania, in an opinion by Chief Justice Tilghman, held that the Tennessee decree, being simply for the payment of money, was entitled to full faith and credit in Pennsylvania, and that the plaintiff was entitled to recover. The reasoning of the court proceeds upon the broad ground that a foreign executor or administrator is liable to suit; following the case of *Swearingen v. Pendleton*, 4 S. & R. 389. Both of these cases were disapproved of and virtually overruled on the point of suability in *Magraw v. Irwin*, 87 Pa. St. 139, 142, in which it was decided that a foreign administrator who has no assets in Pennsylvania is not liable to suit therein.

This case of *Evans v. Tatem*, *ubi supra*, lends some support to the view that a judgment so obtained against a foreign executor or administrator is binding upon the

¹ *Loring v. Folger*, 7 Gray (Mass.), 505.

² *Davis v. Connelly*, 4 B. Mon. (Ky.) 138.

³ *Judy v. Kelley*, 11 Ill. 211.

estate itself and not merely upon the defendant as one acting in his own wrong, and may be enforced in the state of domicile.¹ But the better view is believed to be that a foreign executor or administrator has no authority to bind the estate, the general assets, in the state of domicile by a voluntary appearance in and defense of a suit pending in another state; that therefore the judgment is not entitled to full faith and credit, and cannot be enforced against the estate in the state of domicile of the deceased. In such case the plaintiff may sue upon his original demand; but he will not be allowed to gain a preference as a judgment creditor over local creditors, whose claims have not been reduced to judgments.

The appearance under such circumstances is analogous to an appearance by counsel, without authority from a non-resident defendant, who has not been personally served with process. In this case it is well settled that the want of authority to appear and defend disentitles the judgment against the defendant to full faith and credit, and renders it unenforceable in other states.²

§ 62. Foreign executor is liable for local assets collected by him.—Notwithstanding the rule that a foreign executor or administrator is not suable in his official capacity, still if he comes into a state and collects assets there, he becomes liable to suit there by creditors of the estate residing in such state; for local creditors have the first claim upon local assets, and may prevent the withdrawal of such assets from the jurisdiction until their claims are paid in full. In Connecticut it is held that a foreign executor who collects assets in Connecticut may be sued there as an executor *de jure*, at any time before such assets have been fully administered at the place of domicile; but not for assets collected elsewhere and removed into Connecticut.³

¹ See, also, *Davis v. Connelly*, 4 B. Mon. (Ky.) 136.

² *Marcy v. Marcy*, 32 Conn. 308; *Hedenberg v. Hedenberg*, 46 Conn.

³ *Gilman v. Gilman*, 126 Mass. 26; 30.

Aldrich v. Kinney, 4 Conn. 390; *Starbuck v. Murray*, 5 Wend. 148.

In the early New York case of *Campbell v. Tousey*, 7 Cowen, 64 (1827), it was held that a Pennsylvania executor who intermeddled with assets in New York thereby became an executor *de son tort*, and could be sued as such by a New York creditor, and held liable, not only for the assets collected in New York, but also for assets collected in Pennsylvania. This decision seems substantially correct so far as it holds the foreign executor liable for New York assets; but so far as it holds him liable for Pennsylvania assets, it is probably not law at present even in New York; for these assets at least were rightfully collected by him, and a person cannot be charged as an executor *de son tort* for assets rightfully obtained, but only for those obtained by a wrongful act.¹

In *Fay v. Haven*, 3 Met. (Mass.) 109, it was held by the supreme judicial court of Massachusetts that a foreign administrator who is appointed at the place of domicile, and takes out ancillary letters in Massachusetts, is not liable to creditors residing there for assets collected elsewhere, but only for those collected in Massachusetts.

§ 63. Waiver of right to hold foreign executor liable for local assets collected by him.— But the right of local creditors to hold a foreign executor liable for local assets collected by him is one that they may waive, even before the statute of limitations has run; and if they lie by, without interposing by suit or by administration, until after such assets are fully administered by him at the place of domicile, they will be deemed to have waived their rights against him.

Thus, in the Connecticut case of *Marcy v. Marcy*, 32 Conn. 308, a Massachusetts executor collected assets in Connecticut, and after they had been fully administered in Massachusetts, he was sued by a Connecticut creditor of the estate. It was held that the plaintiff, by such conduct, had waived his right to recover. By the exercise of ordi-

¹ *Cureton v. Mills*, 13 S. C. 409, *Fay v. Haven*, 3 Met. (Mass.) 109, 426; *Marcy v. Marcy*, 32 Conn. 308; 115.

nary diligence the plaintiff might have sued or taken out administration himself in Connecticut before the assets were administered in Massachusetts, and, under the circumstances, justice to the defendant required that he should not be held personally liable.

In *Gray's Appeals*, 116 Pa. St. 256, 262, the case of *Marcy v. Marcy*, *supra*, was cited with approval, and the doctrine of waiver applied, so as to protect a foreign executor who had collected assets in Pennsylvania, and accounted for them in the state of domicile, from being accountable again in Pennsylvania, after he had taken out ancillary letters in that state. It is a good answer to such an attempt to surcharge him that he has already accounted for the assets in the proper court of the domicile, and has been ordered to pay them over.¹

¹ See, also, *Stevens v. Gaylord*, 11 Mass. 256.

PART IV.

FOREIGN ASSIGNEES IN BANKRUPTCY AND RECEIVERS.

§ 64. **General rules.**— A foreign assignee in bankruptcy or insolvency may sue, but cannot recover when domestic creditors exist whose claims have not been satisfied.¹

The better view seems to be that a foreign receiver can sue and recover, unless his recovery impairs the rights of creditors of the person represented by the receiver.²

In New Jersey this view has been maintained, in a case brought by a New York receiver. In delivering the opinion of the court, Beasley, C. J., says: "After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere, subject to the exception just defined. Such a rule is, I think, both practicable and just."³

Booth v. Clark, 17 How. 322, is sometimes supposed to support the contrary view; but as shown in *Hurd v. City of Elizabeth*, *supra*, that case depends upon different principles, and involved the rights of creditors. Moreover, the fund in dispute had not been reduced to possession by the receiver.

The two preceding rules apply only when the property in dispute was not subject to the jurisdiction of the appoint-

¹Story, Conf. Laws, sec. 420, and cases cited; *Hunt v. Jackson*, 5 N. Y. 320; *Lichtenstein v. Gillett*, 37 La. Ann. 522; *Bank v. Blatch*, 349; *In re Waite*, 99 N. Y. 433, 448. *McLeod*, 38 Ohio St. 174. *Contra*, *Brigham v. Luddington*, 12 Blatch.

²*Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Bagby v. Atlantic*, etc. R'y, 86 Pa. St. 291; *Hoyt v. Thomp-*

son, 5 N. Y. 320; *Lichtenstein v. Gillett*, 37 La. Ann. 522; *Bank v. Blatch*, 349; *In re Waite*, 99 N. Y. 433, 448. *McLeod*, 38 Ohio St. 174. *Contra*, *Brigham v. Luddington*, 12 Blatch. 237. ³*Hurd v. City of Elizabeth*, 41 N. J. L. 1, 4.

ing court. If the property is within the jurisdiction of the appointing court at the time of the appointment, but is afterwards taken into another state, the assignee or receiver may sue for and recover the property in such other state, or he may intervene in an attachment suit and successfully claim a better title than the attaching creditor.¹

§ 65. **Suits against foreign receivers.**—A receiver appointed by a court of one sovereignty of property within its jurisdiction cannot be sued in the courts of another sovereignty without leave of the appointing court first obtained. Without such leave the court has no jurisdiction to entertain the suit and must dismiss it.²

In *Barton v. Barbour*, *supra*, an action for negligence was brought in the supreme court of the District of Columbia against the receiver of a railroad appointed by a state court of Virginia. As the plaintiff had not obtained the consent of the Virginia court to bring his action, it was held that the court had no jurisdiction.

The opinion goes further than the facts of the case seem to require. The action was brought in a federal court; but the opinion contains an emphatic *dictum* to the effect that the state courts are bound by the same rule, which can only proceed upon the view that the constitution or laws of the United States control the question, irrespective of local state laws. Mr. Justice Woods, in delivering the court's opinion, says:

"We therefore declare it as our opinion that when the court of one state has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted

¹ *Crapo v. Kelly*, 16 Wall. 610; *signees in Insolvency and Receivers Cagill v. Wooldridge*, 8 Baxter as Against Attaching Creditors." (Tenn.), 580; Chicago, etc. R'y v. ² *Barton v. Barbour*, 104 U. S. 126; *Noe v. Gibson*, 7 Paige (N. Y.). 513; *Robertson v. Atlantic R'y*, 66 Pa. St. 160; *Payls v. Jewett*, 32 N. J. Eq. 302.

until such time as it can be sold with due regard to the rights of all persons interested therein, *a court of another state* has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the state in which he was appointed and in which the property in his possession is situated." Pages 136, 137.

The court does not explain the precise ground of federal law upon which the state courts are bound by this rule. It seems, however, that the "full faith and credit" clause of the constitution is the true ground. If the appointing court has jurisdiction, its decree exempting the receiver from suit is, under this clause, entitled to the same force and effect elsewhere as at home.

Where, by law and usage in the state of the appointment of a receiver, he is not exempt from suit, it follows that he is not exempt from suit in another state.¹ For the full faith and credit clause does not entitle a decree of a state court to any *greater* force or effect elsewhere than it has by law or usage in the state of its rendition.²

§ 66. Statutes relative to suits against receivers.—Some states have declared by statute that receivers may be sued without leave of the appointing court being first obtained.³

Such statutes seem to be binding upon the local state courts, at least when the receiver was appointed by a court of the same state.⁴

But when the receiver is appointed by a federal court, it has been decided that a local state statute of that character, even when it purports to apply to an appointment by *any* court, is not binding upon the federal courts.⁵ In the same

¹ Paige v. Smith, 99 Mass. 395.

² Public Works v. Columbia College, 17 Wall. 521, 529; Suydam v. Barber, 18 N. Y. 468.

³ Miss. Act of Jan. 6, 1877; Ohio Laws of 1872, p. 31, sec. 1; 3 Indi-

ana Statutes, 413; Act of March 4, 1863.

⁴ Ohio R'y v. Fitch, 20 Ind. 498; Louisville R'y v. Cauble, 46 Ind. 277.

⁵ See, also, Ohio R'y v. Fitch, *ubi supra*.

case it was also held that a case commenced in a state court without such prior leave of the appointing court would after removal to a federal court be dismissed for want of jurisdiction.¹

Congress has regulated this matter and changed the former rule, so far as federal receivers are concerned, by the act of March 3, 1887, section 3, which declares:

“That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.”² This statute authorizes suit against federal receivers in the state courts as well as in the federal courts, without prior leave of the appointing court.³

¹ *Hale v. Duncan* (U. S. C. C., N. Dist. Miss.), 7 Cent. Law Journal, 146.

² 24 Stat. at Large, 554.

³ *McNulta v. Lochridge*, 141 U. S. 327.

CHAPTER V.

NON-RESIDENT'S IMMUNITY FROM SUIT.

§ 67. Outline of chapter. 68. Non-resident's immunity as witness or party. 69. Modes of relief for breach of privilege. 70. Waiver of privilege. 71. Member of congress. 72. Extradition and interstate rendition. 73. Fraud or violence vitiates civil process. 74. Effect of such judgment in other states.	§ 75. General appearance no waiver of fraud. 76. Defendant's remedies for plaintiff's fraud. 77. Mode of impeaching judgment of sister state for plaintiff's fraud. 78. Administration on estate of living person is void. 79. Statutes authorizing grant of administration after three years' absence.

§ 67. **Outline of chapter.**—There are a few exceptional cases in which a non-resident of the state of process is not liable to suit therein against his will; and also some cases in which his property is exempt from attachment and execution. These privileges and immunities are accorded to him because of his non-residence, and they are not enjoyed by residents of the state of process. Such are the cases when a non-resident is a witness or a party to a suit pending; or when he has been brought within the jurisdiction by the fraud or violence of the plaintiff. So, also, he cannot be divested of his property by a grant of administration upon the supposition of his death, however long continued may be his absence.

The cases in which foreign executors, administrators and receivers are exempt from suit have been stated in the preceding chapter.¹

§ 68. **Non-resident's immunity as witness or party.**—A non-resident witness or party to a suit is privileged from

¹ Chapter IV, §§ 57-66.

arrest in another suit, and from service of process, even without arrest, in another suit, while in attendance upon court and for a reasonable time in going and returning.¹

The same rule applies to legislative hearings, where by the constitution and laws the legislature has jurisdiction of the matter; and if a non-resident party or witness be arrested on civil process after the hearing, but before he has had a reasonable time to return home, the court will discharge him on *habeas corpus*.²

The ground for this privilege is thus stated in two recent cases: "The protection against arrest which the law extends to witnesses is for the benefit of parties to suits, to enable them more easily to obtain the testimony of witnesses, who might be reluctant to attend court if they were subject to arrest. A summons could not be served upon a witness residing out of the commonwealth; and if he attends at all, his attendance is voluntary."³ "This immunity [of a non-resident] does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority."⁴

§ 69. Modes of relief for breach of privilege.—The usual mode of relief for the non-resident witness or party whose immunity has been violated is by motion to set aside the service of process, or to dismiss the action or to discharge him from arrest.⁵ The same result may be at-

¹ Hurst's Case, 4 Dallas, 387; *Ex parte Hurst*, 1 Wash. C. C. 186; *Parker v. Hotchkiss*, 1 Wall. Jr. 269 (overruling *Blight v. Fisher*, 1 Peters, C. C. 41); *In re Healey*, 53 Vt. 694; *Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 N. Y. 568; *Halsey v. Stewart*, 4 N. J. Law, 366; *Dungan v. Miller*, 37 N. J. Law, 182; *Watson v. Superior Court*, 40 Mich. 729; *Bridges v. Sheldon*, 7 Fed. Rep. 17, 43; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541; *May v.*

Shumway, 16 Gray (Mass.), 86; *Henegar v. Spangler*, 29 Ga. 217; *Ballinger v. Elliott*, 72 N. C. 596.

² *Thompson's Case*, 122 Mass. 428.
³ *May v. Shumway*, 16 Gray (Mass.), 86, 87.

⁴ *Per Rapallo, J., for the court, in Matthews v. Tufts*, 87 N. Y. 568, 570.

⁵ *Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 N. Y. 568; *Halsey v. Stewart*, 4 N. J. L. 366; *Waterman v. Merritt*, 7 R. I. 345.

tained by petition alleging the facts;¹ or by a writ of *habeas corpus* in case of arrest.² If a lower court erroneously refuses to discharge the non-resident witness or party, a writ of *mandamus* will lie to it from a higher court to compel his discharge from arrest; or to set aside the service of civil process without arrest.³

If a non-resident witness or party to a suit has, while attending the trial of that suit, been served with civil process in another suit in a state court, he may also obtain relief by removing the cause from the state court to the proper federal court, and there move to set aside the service of summons. This method was successfully adopted in *Atchison v. Morris*, 11 Fed. Rep. 582, decided by Drummond, C. J., in the United States circuit court for the northern district of Illinois.⁴

The safest way is for the non-resident to enter not a general but a special appearance in the state court, and then to move to set aside the service as soon as the cause is removed to the federal court; for if he enters a general appearance in the state court, or does not promptly object to the service after entry in the federal court, he may be deemed to have waived his exemption from process.⁵ But the mere fact that he filed in the state court a petition and bond for removal under the act of congress, without objecting to the service in the state court, does not prevent him from objecting to the service when the cause is removed to the proper United States circuit court, nor amount to a waiver of his exemption.⁶ If a non-resident is arrested on process from a state court while he is in attendance as a party or as a witness upon a federal court, the latter court will discharge him upon motion or upon *habeas corpus*.⁷

¹ *In re Healey*, 53 Vt. 694.

⁵ *Matthews v. Puffer*, 10 Fed. Rep.

² *Thompson's Case*, 122 Mass. 428. 606.

³ *Watson v. Superior Court*, 40 Mich. 729; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541.

⁶ *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 17 Fed. Rep. 865.

⁴ See, also, *Miner v. Markham*, 28 Fed. Rep. 387.

⁷ *Hurst's Case*, 4 Dallas, 387; *S. C. 1 Wash. C. C. 186*; *In re Reinitz*, 39

But if such non-resident has not been arrested, but has been served with a writ of garnishment from a state court, the federal court cannot set aside the service nor enjoin the plaintiff in that writ from proceeding in the state court, nor punish him for a contempt of the federal court. The two courts derive their powers from different sovereignties, and the acts of congress do not authorize the federal courts to interfere with the state courts in such cases.¹

§ 70. Waiver of privilege.—A non-resident witness' privilege from judicial process may be waived by his not objecting to the service promptly, or by not making the objection in the proper way, as well as by not making it at all.

Thus, he waives his privilege by not proving the fact of non-residence in his first motion to set aside the service, and will not be allowed to prove that fact in a second motion filed without leave of court.²

§ 71. Member of congress.—A member of congress from one state is also privileged from arrest on civil process while passing through another state, both on his way to and returning from his congressional duties at Washington.

The constitution expressly ordains that "The senators and representatives . . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."³

A liberal construction has been given to this clause, and it has been held to exempt a congressman not only from arrest, but also from service of civil process without arrest, and to extend to a delegate from a territory.⁴

This rule is adopted to protect the rights of constituents. "It is just as necessary for the protection of the rights of the people that their representative should be relieved from

Fed. Rep. 204; S. C. 40 Alb. L. J. 223.

³ Article I, section 6.

⁴ *Miner v. Markham*, 28 Fed. Rep.

¹ *Ex parte Schulenburg*, 25 Fed. Rep. 211.

387; *Doty v. Strong*, 1 Pinney (Wis.), 84.

² *Matthews v. Puffer*, 10 Fed. Rep.

absenting himself from his public duties during the session of congress for the purpose of defending private suits in court, as to be exempt from imprisonment on execution."¹

The fact, however, that a man is a member of the legislature of one state does not privilege him from arrest in another state.

§ 72. Extradition and interstate rendition.—If a person charged with a crime committed in this country flees to a foreign country, which, in accordance with an extradition treaty between the two countries, returns the accused to this country for trial, he can only be tried for a crime specified in the treaty, and a conviction of any other crime will be erroneous at least, and perhaps void.²

If the accused be acquitted, he is entitled to a reasonable time after his discharge to leave the country, and if during such period he is arrested on process from a state court, the federal courts will discharge him on *habeas corpus*, on the ground that he is held "in custody in violation of the constitution, or of a law or treaty of the United States," within the meaning of the Revised Statutes, section 753.³

But if the accused person has been kidnaped in a foreign country and brought by force against his will to the state where the crime was committed, and tried and sentenced by a state court, the supreme court of the United States will not reverse the judgment of the state court, although an extradition treaty existed between the two countries, because such state decision is not contrary to any right secured to the accused under the constitution, laws or treaties of the United States.⁴

Of course, if the treaty itself prohibits kidnaping, the case would be different.⁵

And if the accused escapes to a sister state, and is there

¹ Per Miller, J., in *Doty v. Strong*, U. S. 407, 431; In re Reinitz, 39 Fed. Rep. 204; S. C. 40 Alb. L. J. 223.

² *United States v. Rauscher*, 119 U. S. 407.

⁴ *Ker v. Illinois*, 119 U. S. 436.

⁵ *Mahon v. Justice*, 127 U. S. 700,

³ *United States v. Rauscher*, 119 U. S. 714.

found and unlawfully abducted to the state where the crime was committed, and held for trial by the state authorities, the federal courts cannot discharge him on *habeas corpus*; for he is not held "in custody in violation of the constitution or of a law or treaty of the United States," within section 753 of the Revised Statutes.¹

Nor has the accused any remedy in the state court; for the jurisdiction of the court in which the indictment is found is not impaired nor ousted by the manner in which the accused is brought before it.²

§ 73. Fraud or violence vitiates civil process.—If a non-resident is brought within the jurisdiction by fraud or violence, he is not amenable to a civil suit by a person who was either party or privy to the fraud or violence; for such fraud vitiates the process and deprives the plaintiff of its benefit.³

But, generally, he is amenable to prosecution at the instance of persons not privy to the wrong; and particularly by the state for a crime committed within its limits, although the accused was unlawfully abducted from another state and brought back by its own citizens.⁴

In *Cook v. Brown*, *supra*, the defendants fraudulently and by concert of action induced the plaintiff to leave his home in Rhode Island and come to Massachusetts, where they arrested him on a civil writ which they had previously prepared, on the ground that he was about to leave Massachusetts. To this first action, Cook, the plaintiff in the present action, appeared and pleaded to the merits, without pleading in abatement his illegal arrest; and judgment

¹ Mahon v. Justice, 127 U. S. 700.

² State v. Smith, 1 Bailey (S. C.), 283; State v. Brewster, 7 Vt. 118; State v. Ross, 21 Iowa, 467.

³ Cook v. Brown, 125 Mass. 503; Wanzer v. Bright, 52 Ill. 35; Townsend v. Smith, 47 Wis. 623; Dunlap v. Cody, 31 Iowa, 260; Durringer v. Moschino, 93 Ind. 495; Steele v.

Bates, 2 Aik. (Vt.) 338; Stein v. Valkenhuysen, 1 Ellis, B. & E. 65.

[Ker v. Illinois, 119 U. S. 436; Mahon v. Justice, 127 U. S. 700; Union Sugar Refinery v. Mathieson, 2 Cliff. 304; State v. Smith, 1 Bailey (S. C.), 283; State v. Brewster, 7 Vt. 118. See section 72, *ante*, on Extradition.]

was rendered against him for part of the debt upon which he was arrested. Cook then sued in this second action for such arrest, and the court held that the arrest was illegal by reason of the fraud, and that the plaintiff could recover, notwithstanding the fact that he had submitted himself to the jurisdiction of the court in the first action without pleading in abatement his illegal arrest.

§ 74. **Effect of such judgment in other states.**—When a plaintiff fraudulently procures a court to exercise jurisdiction over a non-resident defendant, and obtains a judgment in evasion of the laws of the defendant's state, such judgment is not entitled under "the full faith and credit" clause to be enforced in the courts of the defendant's state, and perhaps not in other states.¹

In the well-considered Iowa case of *Dunlap v. Cody, ubi supra*, it appeared that the defendant was a citizen of Iowa, and, after an action had become barred under the limitation laws of Iowa, the plaintiff fraudulently enticed the defendant into Illinois for the purpose of obtaining jurisdiction there; that the defendant was there served with process and made no defense; and that the plaintiff obtained a judgment upon which the present action was brought in Iowa. The supreme court of Iowa held, in an opinion by Chief Justice Day, that, as the Illinois judgment was based upon jurisdiction fraudulently procured by the plaintiff, and was in evasion of the laws of the defendant's state, the courts of Illinois would themselves perpetually enjoin the collection of the judgment; that under the practice of Iowa the same result could be attained in an action at law upon the judgment; that to so hold did not contravene the full faith and credit clause of the national constitution, and that, therefore, the plaintiff could not recover.

This view is also supported by the New York case of *Jackson v. Jackson*, 1 Johns. 424, in which it was held that a wife who fraudulently procured a Vermont court to exer-

¹ *Dunlap v. Cody*, 31 Iowa, 260; *Jackson v. Jackson*, 1 Johns. (N. Y.) 424; *Sewall v. Sewall*, 122 Mass. 156.

cise jurisdiction over her libel for divorce, and obtained a divorce and alimony in evasion of the laws of New York, which was the parties' domicile, could not enforce the Vermont decree for alimony in the courts of New York.¹

Where, however, a defendant, who has been fraudulently decoyed out of his own state and sued in another state, voluntarily confesses judgment therein, he is bound by the judgment, and it may be enforced against him in his own state, especially if no defense to the original demand be shown.²

§ 75. General appearance no waiver of fraud.—The objection that the jurisdiction was procured by the plaintiff's fraud, as by decoying a non-resident defendant into the state, is more serious than that of a mere defective service of process. The latter is waived by a general appearance, for it affects the defendant only; but the former objection is not so waived, because the fraud affects the integrity of the court's process, which the court is bound to protect and vindicate.³

§ 76. Defendant's remedies for plaintiff's fraud.—In such case the non-resident defendant has a choice of several remedies:

1. He may have the service set aside and the case dismissed on the ground of fraud.⁴

2. If the action is brought in a state court, he may remove it to a federal court (if it has jurisdiction), and there have the service of process set aside for the same reason. And his appearance in the state court to file a petition and bond for removal is no waiver of his objection.⁵

3. He may appear and defend the action on the merits without objecting to the plaintiff's fraud, and can then bring and maintain an action against the former plaintiff

¹ See, also, *Sewall v. Sewall*, 122 Mass. 156.

² *Luckenbach v. Anderson*, 47 Pa. St. 123.

³ *Townsend v. Smith*, 47 Wis. 623, 627.

⁴ *Steiger v. Bonn*, 4 Fed. Rep. 17; *Townsend v. Smith*, 47 Wis. 623.

⁵ *Blair v. Tuttle*, 5 Fed. Rep. 394; *Atchison v. Morris*, 11 Fed. Rep. 582; *Small v. Montgomery*, 17 Fed. Rep. 865.

for the fraud, even if he was unsuccessful in his defense upon the merits in the first action. He may also recover punitive damages.¹

But in this case the judgment is conclusive upon the demand sued upon and adjudicated in the first action.²

4. He may take no notice of the suit, and if the plaintiff obtains judgment and sues upon it in the defendant's state, the latter may avoid it and defeat the action, either by a bill in equity, or, where the local practice allows equitable defenses to actions at law, by plea filed in the action at law upon the judgment, stating the particulars of the fraud.³

§ 77. Mode of impeaching judgment of sister state for plaintiff's fraud.—In the federal courts and in many of the state courts, a judgment obtained in another state cannot be impeached for plaintiff's fraud in an action at law upon the judgment. A bill in equity is required.⁴

Where, however, the local law allows equitable defenses to be pleaded in actions at law, such defense may be availed of to defeat an action at law on a judgment of a sister state (*e. g.*, that it was obtained by plaintiff's fraud), even if the state in which the judgment was rendered requires such equitable matters to be proved or availed of by a bill in equity. Every state has the power to regulate the practice of its own courts in this respect; and such a decision does not fail to give "full faith and credit," or due force and effect, to the judgment of the other state. The form of granting relief is immaterial;⁵ and that a judgment obtained by plaintiff's fraud may be enjoined in equity is undoubted.⁶

¹ *Cook v. Brown*, 125 Mass. 503; *Wanzer v. Bright*, 52 Ill. 35; *Steele v. Bates*, 2 Aik. (Vt.) 338.

² *Luckenbach v. Anderson*, 47 Pa. St. 123.

³ *Dunlap v. Cody*, 31 Iowa, 260. See the following section and cases cited.

⁴ *Christmas v. Russell*, 5 Wall. 290; *Metcalf v. Williams*, 104 U. S.

93; *Embry v. Palmer*, 107 U. S. 3, 13; *Pearce v. Olney*, 20 Conn. 544; *Benton v. Burgot*, 10 S. & R. (Pa.) 240; *Anderson v. Anderson*, 8 Ohio, 108; *Engel v. Scheuerman*, 40 Ga. 206.

⁵ *Rogers v. Gwinn*, 21 Iowa, 58; *Dobson v. Pearce*, 12 N. Y. 155; *Brown v. Parker*, 28 Wis. 21.

⁶ *Pearce v. Olney*, 20 Conn. 544;

It seems that a distinction should be made between the ordinary case of a judgment obtained by fraud, where the fraud does not affect the jurisdiction of the court, and the case where the court is induced by the plaintiff's fraud to exercise jurisdiction over a case of which by law it has not jurisdiction. In the former case the judgment is entitled to the same force and effect in other states which it has at home, because rendered with jurisdiction; and therefore it cannot be impeached or set aside for any cause which is not a sufficient cause at home.¹

But in the latter case, the plaintiff's fraud defeats the jurisdiction, and deprives him of the right to enforce the judgment, and disentitles the judgment to full faith and credit in the courts of other states and in the federal courts. In the latter courts, therefore, the judgment may be impeached or disregarded, even for a cause which is not sufficient in the state of rendition, without violating the "full faith and credit" clause.²

§ 78. Administration on estate of living person is void.—A non-resident while alive cannot be divested of his property in a state, however long a period he may be absent from that state, by the grant of letters of administration on his estate, under the belief that he is dead.³

The question has generally arisen between savings banks and their depositors, who have returned and claimed their money after the bank has paid the deposit to an administrator.

The state courts have generally decided that the bank was liable to the depositor, on the ground that a probate court has no jurisdiction of the estate of a living person,

Engel v. Scheuerman, 40 Ga. 206; Mass. 156; Vose v. Morton, 4 Cush. Metcalf v. Williams, 104 U. S. 93; (Mass.) 27.

Phillips v. Negley, 117 U. S. 665.

³Jochumsen v. Suffolk Sav.

¹Embry v. Palmer, 107 U. S. 3; Bank, 3 Allen (Mass.), 87; Melia v. Simmons, 45 Wis. 334; Lavin v. Emigrant Sav. Bank, 18 Blatch. 1;

²Jackson v. Jackson, 1 Johns. Griffith v. Frazier, 8 Cranch, 9, 23. (N. Y.) 424; Sewall v. Sewall, 122

and that therefore the letters of administration were null and void and did not justify the bank in making the first payment to the administrator.¹

Thus, in *Jochumsen v. Suffolk Savings Bank*, *supra*, the plaintiff deposited \$150 with the defendant bank in 1848, and shortly afterwards went to California and was not heard of in Massachusetts for twelve years, when he suddenly reappeared. About one month before his return, A. was appointed administrator of his estate, and the defendant bank paid A. the deposit. The supreme court of Massachusetts held that the bank must pay the money over again to the plaintiff, as the letters of administration were null and void for want of jurisdiction in the probate court.

§ 79. Statutes authorizing grant of administration after three years' absence.—For the purpose of protecting savings banks and other debtors of non-residents in such cases, some states have enacted that if any person should be absent from the state for three years or more, without due proof of his being alive, administration might be granted on his estate as if he were dead.²

Under a statute of this character the court of appeals of New York has held (three judges dissenting) that a payment by the savings bank to such administrator was valid on the ground of an equitable estoppel operating against the depositor, and that the bank was not afterwards liable to the depositor.³

The better view, however, seems to be contrary to this decision on the ground that such state statutes and probate decrees deprive the non-resident depositor of his property without due process of law, contrary to the fourteenth amendment. This view is convincingly stated and elaborated by Judge Choate in the following case decided in the United States circuit court for the southern district of New York in 1880.

¹ See cases cited above.

² *Roderigas v. East River Sav.*

³ Rhode Island Pub. Stat., tit. 24, Inst., 63 N. Y. 460.
ch. 184, sec. 8; New York, 2 R. S.,
74, secs. 23, 26.

In *Lavin v. Emigrant Industrial Savings Bank*, 18 Blatch. 1, it appeared that in 1866 the plaintiff deposited money with the defendant bank in New York; that in 1867 he left his home in Rhode Island and went to California; that in 1877 A. obtained letters of administration on his estate in Rhode Island under General Statutes, title 24, chapter 173, section 8, which enacted that, if any person should be absent for three years without due proof of his being alive, administration might be granted on his estate as if he were dead. The surrogate of New York granted A. ancillary letters of administration based on the Rhode Island letters, and on these letters the defendant bank paid A. the deposit. In 1879 the plaintiff returned to Rhode Island and brought this suit.

Held, by Choate, J.:

1. That such state statutes, as applied to living persons, deprived them of their property without due process of law, and were therefore unconstitutional and void, as contrary to the fourteenth amendment.

2. That therefore the letters of administration were null, and did not justify the bank in paying A. the money.

3. The fact that the court of appeals of New York had decided in *Roderigas v. East River Savings Institution*, 63 N. Y. 460, that under similar statutes of New York such a payment was valid, was not a rule of decision binding on the federal court, because it involved a constitutional right.

4. Therefore the plaintiff was entitled to recover principal and interest and costs.

Perhaps a savings bank can protect itself against double payment as to subsequent deposits by adopting a by-law to the effect that if the depositor fails for three years to notify the bank of his continuance in life, its payment to such an administrator as agent or representative shall discharge its debt to him. Such a by-law seems to be reasonable, and if brought home to the depositor ought to relieve the bank from double payment. His failure to notify the bank,

under the circumstances, should be deemed equivalent to his assent to the bank's payment to the administrator as his agent or attorney in fact.¹

¹See *Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Vance v. Vance*, 108 U. S. 514.

CHAPTER VI.

THE CHOICE OF COURTS—STATE OR FEDERAL.

§ 80. Contents and object of chapter. 81. General rule that federal courts follow state laws. 82. Exception 1. General commercial law. 83. (a) Transfer of negotiable paper as payment of or security for pre-existing debt. 84. (b) Municipal bonds irregularly issued. 85. (c) Exemption from liability for negligence by contract. 86. (d) Payment by note. 87. Exception 2. General jurisprudence. 88. Exception 3. Conflicting decisions of same state court. 89. Voluntary payment to foreign executor or administrator. 90. Burden of proof in actions for negligence.	§ 91. Surgical examination of injured plaintiff. 92. Charging jury upon matters of fact. 93. Ordering a judgment of non-suit. 94. Setting up equitable defenses in actions at law. 95. Historical sketch of the manner of acquiring federal jurisdiction. 96. Mode of acquiring jurisdiction in state courts. 97. Selection of state court. 98. Appellate jurisdiction of United States supreme court over state courts. 99. Has congress power to confer such jurisdiction upon other federal courts?

§ 80. Contents and object of chapter.—With the exception of the following section, which states the general rule that the federal courts adopt and follow the laws of the states in which they sit, this chapter contains brief statements of the leading points of law and practice upon which the federal law, as administered by the federal courts, differs from the law of some or of all the states, as administered in the state courts. The principal object is to assist parties in making a selection between state and federal courts, when one party is a non-resident of the state of process; but it is also hoped that a statement of the conflicts

now existing between state and federal law will aid in producing harmony and uniformity in the future, by the voluntary adoption of the better rule.

§ 81. General rule that federal courts follow state laws.—The right to choose between a state court and a federal court is often very valuable, and sometimes decisive of the case. This is so whenever the decisions of the state and federal courts are opposed on the question involved in the case. As a general rule the federal courts are bound to follow the laws of the states in which they sit.¹

This rule is based upon the act of congress providing that “the laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.”²

The language of the statute limits its application to cases of trials at common law. It does not apply to the federal courts sitting in equity or admiralty; nor to criminal offenses against the United States.³

Although the federal courts sitting in equity are not bound by statute to follow the local state law, yet they will often do so, and this is especially true in cases relating to land situated within the state.⁴

Thus, in *Brine v. Insurance Co.*, *supra*, a bill in equity to foreclose a mortgage on land in Chicago was filed in a federal court sitting in Illinois, which had previously adopted as a rule of practice that a mortgagor was not entitled to redeem at any time within twelve months after

¹ *Norton v. Shelby County*, 118 U. S. 425; *Bucher v. Cheshire R'y*, 125 U. S. 555; *Burgess v. Seligman*, 107 U. S. 20; *Brine v. Insurance Co.*, 96 U. S. 627; *Leffingwell v. Warren*, 2 Black, 599.

² U. S. Rev. Stat., sec. 721; sec. 34 of the Judiciary Act of 1789, 1 Stat. 92.

³ *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 582; *Smith v. Railroad Co.*, 99 U. S. 398; *United States v. Reid*, 12 How. 361.

⁴ *Brine v. Insurance Co.*, 96 U. S. 627.

the foreclosure sale, which right of redemption was expressly given by a statute of Illinois in force when the contract of mortgage was executed. The lower court decided against the mortgagor, but the supreme court reversed that judgment, and held that the laws of the state in which land is situated control exclusively its descent, alienation and transfer; that the right of redemption given by statute conferred a substantial right, which constituted a rule of property within the state and was binding upon the federal courts sitting in equity, notwithstanding a rule of practice to the contrary.

The decisions of the highest state court in regard to the construction, the validity or the meaning of its constitution or statutes are deemed the "laws" of that state within the meaning of the act of congress, and are generally binding upon the federal courts sitting in that state as "rules of decision."¹

But the federal courts will not follow such state decisions, "where the constitution, treaties or statutes of the United States otherwise require or provide." Thus, if the local state court construe a state statute or constitution in such a way as to impair the obligation of a contract, or to deprive a person of his property without due process of law, the federal courts will disregard the state decisions and maintain the person's constitutional rights.²

EXCEPTIONS.

§ 82. Exception 1. General commercial law.—There are, however, some far-reaching exceptions to the rule that the federal courts are bound to follow the local state laws, even when the constitution, treaties or statutes of the

¹Chicago Union Bank v. Kansas City Bank, 136 U. S. 223; Bucher v. 2 Black, 599; Luther v. Borden, 7 How. 1, 40.

Cheshire R'y, 125 U. S. 555, 582; ²Butz v. Muscatine, 8 Wall. 575; Post v. Supervisors, 105 U. S. 667; Seibert v. Lewis, 123 U. S. 284, 298-300; Gelpeke v. Dubuque, 1 Wall. 425, 439-440; Leffingwell v. Warren, 175; Lavin v. Emigrant Sav. Bank, 18 Blatch. 1.

United States do not otherwise require or provide, and the result is a deplorable conflict of decisions. Where such conflicts exist between the federal and state courts, the question as to which court shall try the case is very important to the parties. If the state court favors the plaintiff's view of the law, it is to his advantage to have the case tried in that court, and to the defendant's advantage to have it tried in the federal court.

Upon questions of general commercial law the federal courts are not required to follow the law of the state in which they sit. On the contrary, it is a duty of the federal courts to exercise an independent judgment upon such questions; for the very object of creating the federal courts was to protect citizens of other states from sectional views and local prejudice.¹

§ 83. (a) **Transfer of negotiable paper as payment of or security for pre-existing debt.**—The federal courts hold that the transfer by indorsement to a creditor before maturity of negotiable paper, merely as collateral security for or as payment of a pre-existing debt, although made without an express agreement for indulgence, is a transfer in the usual course of business, which protects the holder from prior equities or defenses between antecedent parties, unless he had actual notice of such equities.²

The state courts of New York³ and Pennsylvania⁴ have held the contrary, namely, that a transferee of negotiable paper before maturity, who takes it in payment of or as security for a pre-existing debt, is not a holder for value in

¹ *Burgess v. Seligman*, 107 U. S. 102 U. S. 14; *American File Co. v. Garrett*, 110 U. S. 288, 294; *Swift v. Bank*, 102 U. S. 14; *Swift v. Tyson*, 16 Peters, 1; *Tilden v. Blair*, 21

Wall, 241; *Oates v. National Bank*, 100 U. S. 239; *Carpenter v. Providence Ins. Co.*, 16 Peters, 495; *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220.

² *Railroad Co. v. National Bank*, 83 Pa. St. 248.

³ *Coddington v. Bay*, 20 Johns. 637; *Lawrence v. Clark*, 36 N. Y. 128; *Moore v. Ryder*, 65 N. Y. 438; *Phoenix Ins. Co. v. Church*, 81 N. Y. 218.

⁴ *Royer v. Keystone Nat. Bank*,

the usual course of trade, so as to be free from equities between the original parties, but is subject to such equities.

As this is a question of general commercial law, the federal courts sitting in New York and Pennsylvania are not obliged to follow the state courts, even if the contract was made and payable in the state of process.¹

Therefore the plaintiff will succeed if the action be tried in a federal court, and the defendant will succeed if it be tried in a state court.

§ 84. (b) **Municipal bonds irregularly issued.**—The federal courts hold that a municipal bond in the hands of a *bona fide* holder for value is not vitiated by the mere fact that the election at which the issue of the bonds was authorized was presided over and the returns made by a *moderator* chosen by the electors present, instead of by the supervisor, assessor and collector, as provided by the statute; provided, that the bonds recite that they are duly issued in compliance with the vote of the legal voters of the township, and this fact is certified by the proper authorities on the face of the bonds.²

Such a departure from the mode prescribed by the statute is a mere irregularity, and does not render the bonds absolutely void, nor defeat an action against the town by a non-resident holder for value before maturity.

The state courts of Illinois, however, hold that bonds so issued are void even in the hands of a *bona fide* holder, on the ground that such an election is void, and the issue of such bonds is without authority of law.³

§ 85. (c) **Exemption from liability for negligence by contract.**—The federal courts hold that a stipulation in a bill of lading exempting a common carrier from liability for negligence of his servants is contrary to public policy and void, and therefore constitutes no defense to an action

¹ *Railroad Co. v. National Bank*,
103 U. S. 14.

³ *Lippincott v. Town of Pana*, 92
Ill. 24.

² *Pana v. Bowler*, 107 U. S. 529,
533-541.

acceptance of the note is considered as accompanied with the condition of its payment.”¹

In Massachusetts and some other states the state courts hold that the mere acceptance of a note for the amount of a debt raises a presumption of payment, which prevents the creditor from suing on the original debt, even after the note has been dishonored, unless he can overcome the presumption of payment by proof that it was not the intention of the parties that the note should be taken as payment of the debt.²

§ 87. Exception 2. General jurisprudence.— Upon questions of general jurisprudence, as distinguished from local law, the federal courts are not required to follow the law of the state in which they sit.³

The federal courts hold that “county orders” or bonds issued in pursuance of a state statute, in aid of a railroad company running through the county, are not void, nor is the statute unconstitutional as imposing a tax for a private purpose. As it is a question of general jurisprudence whether a use is public or private, the federal courts are not bound to follow the state courts.⁴

The contrary has been decided in Wisconsin.⁵

The federal courts hold that, in the absence of a special agreement, a railroad company which receives freight for transportation over its own line and connecting lines does not render itself liable for losses occurring beyond its own line by merely accepting a through fare and giving a re-

¹ Per Mr. Justice Field, for the court in *The Kimball*, 8 Wall. 37, 45; *Segrist v. Crabtree*, 131 U. S. 287, 290; *Lyman v. United States Bank*, 12 How. 225, 243.

² *Ely v. James*, 123 Mass. 36, 44, and cases cited; *Green v. Russell*, 132 Mass. 536; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158.

³ *Olcott v. Supervisors*, 16 Wall. 678, 689; *Manhattan Life Insurance Co. v. Broughton*, 109 U. S. 121,

126; *Myrick v. Michigan Central R. R.*, 107 U. S. 102, 109; *Burgess v. Seligman*, 107 U. S. 20, 33; *Chicago City v. Robbins*, 2 Black, 418; *Hough v. Railway Co.*, 100 U. S. 213, 226; *Clark v. Bever*, 139 U. S. 96, 116.

⁴ *Olcott v. Supervisors*, 16 Wall. 678, 689.

⁵ *Whiting v. Sheboygan R'y*, 25 Wis. 167.

ceipt for the goods which are marked for a particular place on a connecting line.¹

The state courts of Illinois hold the contrary.²

As this is a question of general law or jurisprudence, the federal courts sitting in Illinois are not bound to follow the state law.³

§ 88. Exception 3. Conflicting decisions of the same state court.— If when made a contract was valid according to the latest state decisions, construing its own constitution or statutes, the federal courts will not follow state decisions rendered since the making of the contract in suit, overruling the former decisions and holding the contract invalid; but they will uphold and enforce such contracts, in accordance with the law as declared when the contracts were made.⁴

§ 89. Voluntary payment to foreign executor or administrator.— The federal courts hold that voluntary payment in a debtor's state to a foreign executor or administrator, who has not taken out ancillary letters, discharges the debt and frees the debtor from liability to a domestic executor or administrator who is subsequently appointed. The fact that the rule of the local state courts is the contrary is immaterial and does not change the result in the federal courts.⁵

¹ *Myrick v. Michigan Central R. Co.*, 107 U. S. 102.

² *Illinois Central R'y v. Frankenberg*, 54 Ill. 88; *Illinois Central R'y v. Johnson*, 34 Ill. 389.

³ *Myrick v. Michigan Central R. Co.*, 107 U. S. 102.

⁴ *Gelpcke v. Dubuque*, 1 Wall. 175; *Olcott v. Supervisors*, 16 Wall. 678, 690, 691; *Douglass v. Pike County*, 101 U. S. 677, 686; *Louisiana v. Pilsbury*, 105 U. S. 278, 294, 295. The true ground of this disregard of state decisions is not entirely free from doubt. The

author inclines to the view, however, that the true ground is that such overruling state decisions, rendered after the making of the contract in suit, impair the obligation of the contract and violate the national constitution; and therefore the laws of the several states are not "rules of decision" in the federal courts, because the constitution "otherwise requires or provides." See ch. III, *ante*, §§ 32-34.

⁵ *Wilkins v. Ellett*, 9 Wall. 740; *S. C.*, 108 U. S. 256. See, also, § 52, *ante*.

In some states the contrary has been decided by the local courts.¹

§ 90. Burden of proof in action for negligence.—The federal courts hold that the burden is upon the defendant to prove that the plaintiff was guilty of such contributory negligence as to preclude a recovery for the defendant's negligence.²

The following state courts hold that the burden of proof is upon the plaintiff to show that he was free from contributory negligence: Massachusetts,³ Maine,⁴ Connecticut,⁵ New York,⁶ Illinois⁷ and Indiana.⁸

A non-resident plaintiff who fears the defense of contributory negligence therefore stands a better chance of success in a federal court than in any of the above state courts.

§ 91. Surgical examination of injured plaintiff.—In an action for personal injuries, the federal courts have no power to order the plaintiff to submit his person to a surgical examination in advance of the trial. This is not a question which is governed by the law or practice of the state in which the trial is had, but depends upon the power of the national courts under the constitution and laws of the United States. Hence, they will not follow the local law.⁹ The same rule prevails in Illinois¹⁰ and in New York.¹¹

But the contrary rule prevails in Iowa,¹² Ohio,¹³ Kansas,¹⁴

¹ *Young v. O'Neal*, 8 Sneed (Tenn.), 55; *Bartlett v. Hyde*, 3 Mo. 490. See, also, *Pond v. Makepeace*, 2 Met. (Mass.) 114; § 53, *ante*.

² *Railroad Co. v. Gladmon*, 15 Wall. 401; *Indianapolis Co. v. Horst*, 93 U. S. 291; *Northern Pacific R'y v. Mares*, 123 U. S. 710.

³ *Murphy v. Deane*, 101 Mass. 455.

⁴ *Merrill v. Hampden*, 26 Me. 234.

⁵ *Park v. O'Brien*, 23 Conn. 339.

⁶ *Cordell v. N. Y. Cent. R'y*, 75 N. Y. 330.

⁷ *Dyer v. Talcott*, 16 Ill. 300.

⁸ *Evansville R'y v. Hiatt*, 17 Ind. 102.

⁹ *Union Pacific R'y v. Botsford*, 141 U. S. 250.

¹⁰ *Parker v. Enslow*, 102 Ill. 272.

¹¹ *Roberts v. Ogdensburgh R'y*, 29 Hun, 154; *Neuman v. Third Avenue R'y*, 18 Jones & Spencer, 412; *McQuigan v. Delaware R'y*, 129 N. Y. 50; S. C., 45 Alb. L. J. 68 (overruling *Walsh v. Sayre*, 53 How. Prac. 334); *McSwyny v. Broadway R'y*, 27 N. Y. St. Rep. 363.

¹² *Schroeder v. Chicago R'y*, 47 Iowa, 375.

¹³ *Miami Co. v. Baily*, 37 Ohio St. 104.

¹⁴ *Atchison R'y v. Thul*, 29 Kan. 466.

Wisconsin,¹ Minnesota,² Nebraska,³ Missouri,⁴ Arkansas,⁵ Texas,⁶ Georgia⁷ and Alabama.⁸

§ 92. **Charging jury upon matters of fact.**—Many states have statutory or constitutional provisions declaring in effect that judges shall not charge juries with regard to questions of fact, nor express their opinions upon matters of fact, but shall confine the charge to matters of law. Such provisions of law are binding upon the local state courts;⁹ but they are not binding upon the federal courts sitting within the state. This is a matter relating to the personal conduct of the judge in the discharge of his separate functions. It is not a matter of *practice*, *pleading* nor *a form* nor *mode of proceeding* within the meaning of those terms as contained in the Federal Practice Act of June 1, 1872, section 5 (17 Stat. at Large, 197; R. S., § 914).¹⁰

In delivering the opinion of the court in *Vicksburg R'y v. Putnam*, 118 U. S. 545, at 553, Mr. Justice Gray says upon this subject: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of

¹ *White v. Milwaukee R'y*, 61 Wis. 536.

² *Hatfield v. St. Paul R'y*, 33 Minn. 130.

³ *Stuart v. Havens*, 17 Neb. 211.

⁴ *Owens v. Kansas City R'y*, 95 Mo. 169, virtually overruling *Loyd v. Hannibal R'y*, 53 Mo. 509.

⁵ *Sibley v. Smith*, 46 Ark. 275.

⁶ *Missouri Pacific R'y v. Johnson*, 72 Texas, 95.

⁷ *Richmond R'y v. Childress*, 82 Ga. 719.

⁸ *Alabama R'y v. Hill*, 90 Ala. 71.

⁹ *Commonwealth v. Barry*, 9 Allen (Mass.), 276; *Commonwealth v. Foran*, 110 Mass. 179; *Randolph v. McCain*, 34 Ark. 696; *Chambers v. People*, 105 Ill. 409, 417.

¹⁰ *Nudd v. Burrows*, 91 U. S. 426; *Indianapolis R'y v. Horst*, 93 U. S. 291; *St. Louis R'y v. Vickers*, 122 U. S. 360.

error. . . . The powers of the courts of the United States in this respect are not controlled by the statutes of the state forbidding judges to express any opinion upon the facts.”

Even in the state courts, a statute of this nature does not prevent the presiding judge from directing a verdict when the facts are undisputed. In directing a verdict under such circumstances the judge merely declares the legal effect of admitted facts; which is clearly within the province of the court. This does not substitute the decision of the court for the decision of the jury upon controverted questions of fact.¹

§ 93. Ordering a judgment of nonsuit.—In many state courts the practice prevails of ordering a judgment of nonsuit against the plaintiff when his evidence is insufficient, in the opinion of the presiding judge, to sustain a verdict in his favor. Prior to the act of congress of June 1, 1872 (R. S., § 914), the federal courts had no power to order a nonsuit without the plaintiff's acquiescence.² But under this act of congress the federal courts now possess the power to order a nonsuit under such circumstances, and they are authorized so to do when sitting in a state where that practice prevails in the local tribunals, for it falls within the terms of the statute which require those courts to conform, as near as may be, to the “practice, pleading and forms and modes of proceeding” existing in the courts of the state within which the trial is had.³

But “it is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of direct-

¹ *Todd v. Old Colony R'y*, 7 Allen 218; *Silby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172, 183. (Mass.), 207; *Poleman v. Johnson*, 84 Ill. 269.

³ *Central Transportation Co. v.*

² *Elmore v. Grymes*, 1 Peters, 469; *Pullman's Car Co.*, 139 U. S. 24. *Crane v. Morris*, 6 Peters, 598, 609;

ing a verdict for the defendant and entering judgment thereon.”¹

§ 94. Setting up equitable defenses in actions at law.— In the federal courts equitable defenses cannot be shown in actions at law; legal defenses only can be interposed. “If the defendant have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity. If his equitable grounds are deemed sufficient, he may thus stay the further prosecution of the action at law or be furnished with matter which may be set up as a legal defense to it.” Nor is this rule changed by the fact that the federal court sits in a state where the law and practice allows equitable as well as legal defenses to be set up in actions at law. The federal court is not bound to conform to the local practice upon this point.²

§ 95. Historical sketch of the manner of acquiring federal jurisdiction.— “The framers of the constitution, in establishing the federal judiciary, assumed that it would be governed in the administration of justice by those settled principles then in force in the several states, and prevailing in the jurisprudence of the country from which our institutions were principally derived. Among them none were more important than those determining the manner in which the jurisdiction of the courts could be acquired. This necessarily depended upon the nature of the subject upon which the judicial power was called to act. If it was invoked against the person, to enforce a liability, the personal citation of the defendant or his voluntary appearance was required. If it was called into exercise with reference to real property by proceedings *in rem*, or of that nature, a different mode of procedure was usually necessary, such as a seizure of the property, with notice, by publication or otherwise, to parties having interests which might be affected. The rules governing this matter in these and other cases were a part of the general law of the land, es-

¹ Ibid., per Mr. Justice Gray, for the court, at page 40.

² Northern Pacific R’y v. Paine, 119 U. S. 561.

tablished in our jurisprudence for the protection of rights of persons and property against oppression and spoliation. And when the courts of the United States were invested with jurisdiction over controversies between citizens of different states, it was expected that these rules would be applied for the security and protection of the non-resident citizen. The constitutional provision owed its existence to the impression that state prejudices and attachments might sometimes affect injuriously the regular administration of justice in the state courts. And the law of congress which was passed to give effect to the provision made it optional with the non-resident citizen to require a suit against him, when commenced in a state court, to be transferred to a federal court. This power of removal would be of little value, and the constitutional provision would be practically defeated, if the ordinary rules established by the general law for acquiring jurisdiction in such cases could be thwarted by state legislation or the decisions of the local courts. In some instances the states have provided for personal judgments against non-residents without personal citation, upon a mere constructive service of process by publication; but the federal courts have not hesitated to hold such judgments invalid.¹ So, on the other hand, if the local courts should hold that certain conditions must be performed before jurisdiction is obtained, and thus defeat rights of non-resident citizens acquired when a different ruling prevailed, the federal courts would be delinquent in duty if they followed the later decision.”²

§ 96. Mode of acquiring jurisdiction in state courts.— It follows from the principles of the preceding section that though a state judgment be regarded as void, for want of jurisdiction in the local state courts, it may nevertheless be regarded as valid in the federal courts sitting in the same state. The result is that the plaintiff may recover in one

¹ Citing *Pennoyer v. Neff*, 95 U. S. 714. court, in *Mohr v. Manierre*, 101 U. S. 417, 421-422.

² Per Mr. Justice Field, for the

court and the defendant in the other upon the same state of facts. Moreover, unless a federal question be involved, there is no common tribunal with power of ultimate decision between the conflicting decisions of federal and state courts. This rule is extremely embarrassing, especially in cases relating to the title to land.

Thus, in *Mohr v. Tulip*, 40 Wis. 66, decided by the supreme court of Wisconsin in 1876, it was held that a sale of a lunatic's land upon the order of a county court was void and passed no title to the purchaser, because the order of sale was made without jurisdiction, in that notice was not published for the length of time required by the local statutes of Wisconsin. It therefore held that the lunatic, after the proceedings and commission in lunacy were superseded, could recover from the purchaser the land sold.

But in a later case by the same plaintiff,¹ which was removed to the United States circuit court for the Wisconsin district, and which involved the validity of the same guardian's sale, but was brought to recover another part of the premises sold, the supreme court of the United States held that, as against the lunatic owner, the county court had jurisdiction to order the sale; that its license to sell was not rendered invalid by reason of the insufficient publication of notice of the hearing; that the sale passed a good title to the purchaser, and that the plaintiff could not recover. The court placed its decision upon the ground that the only object of publishing notice was to protect parties having an adverse interest to the lunatic, and that, as against the lunatic, publication was not essential to the jurisdiction of the county court. He stood in the position of plaintiff, and could no more complain of insufficient notice of his own matter than a plaintiff in an ordinary action can complain of insufficient notice to the defendant. "The object of notice or citation in all legal proceedings is to afford to parties having separate or adverse interests an opportunity to be heard. It is not required for the protec-

¹ *Mohr v. Manierre*, 101 U. S. 417.

tion of the applicant or suitor." The federal court, therefore, refused to follow the rule of the state court and followed its own earlier decision of *Grignon v. Astor*, 2 How. 319.¹

A few years afterward, the Wisconsin court voluntarily overruled its former decision in *Mohr v. Tulip*, *supra*, and followed the rule laid down by the federal court.²

§ 97. **Selection of state court.**— It is sometimes advisable for the non-resident plaintiff to bring his action in a state court rather than in the circuit court of the United States. Thus, if the rule of law involved in his case is well settled in his favor in the state court, that forum is generally the better for the plaintiff, as it saves delay and expense. When his right to recover is based upon a question of federal law, which the state courts have decided in his favor, and the matter in dispute exceeds \$5,000, the non-resident plaintiff will do well to sue in the state court. For, if the state courts decide in his favor, the defendant cannot carry the case to the United States supreme court, while, if the state court decides against the federal right, the plaintiff can carry the case to the United States supreme court. On the other hand, if the non-resident plaintiff had sued in a federal court and had recovered judgment for more than \$5,000, the defendant could have delayed execution for several years by taking an appeal or writ of error to the United States supreme court. The plaintiff may sometimes prevent this delay by remitting the amount of his verdict in excess of \$5,000, which generally destroys the jurisdiction of the United States supreme court,³ even if a federal question were decided adversely to the defendant below.⁴

§ 98. **Appellate jurisdiction of United States supreme court over state courts.**— A non-resident can sue in a state

¹ *Mohr v. Manierre*, 101 U. S. 417, 426.

³ *Thompson v. Butler*, 95 U. S. 694.

² *Mohr v. Porter*, 51 Wis. 487.

⁴ *Adams v. Crittenden*, 106 U. S. 576.

court; or, if himself sued in such court, he can contest the suit in that court without removing it to a circuit court of the United States. In either case — whether he is plaintiff or defendant — he can in common with residents of the state carry the case up to the supreme court of the United States, provided a question of federal law is involved, but not otherwise. The supreme court has jurisdiction in the former class of cases, and therefore power to reverse or to affirm the judgment of the state court, both in civil and in criminal cases, and however large or small the value of the matter in dispute may be.¹ If a federal question is not involved, the federal supreme court has no jurisdiction to review the judgment of the state court, and if a writ of error has been allowed, it will be dismissed for want of jurisdiction.²

In the early history of the country the highest state court of Virginia denied this appellate jurisdiction of the United States supreme court, in *Hunter v. Martin*, *ubi supra*. But in 1816 this position was promptly overruled by the latter court, and the contrary rule is now firmly established, and fully recognized in the state courts. “No doctrine of this court rests upon more solid foundations, or is more fully valued and cherished, than that which sustains its appellate power over state courts where the constitution, laws and treaties of the United States are drawn in question, and their authority is denied or evaded, or where any right is asserted under a state law or authority in conflict with them.”³

§ 99. Has congress power to confer such appellate jurisdiction upon other federal courts? — Although, under the existing laws of congress, only the supreme court of the United States has appellate jurisdiction over the state courts,

¹ *Williams v. Bruffy*, 102 U. S. 438; *Tennessee v. Davis*, 100 U. S. 257; *Guy v. Baltimore*, 100 U. S. 434; *Ward v. Maryland*, 12 Wall. 418, 423; *Martin v. Hunter*, 1 Wheat. 304 [overruling *Hunter v. Martin*, 4

Munf. (Va.) 1], 1 Stat. at Large, 85; Rev. Stat., § 709.

² *New Orleans Water-works v. Louisiana Sugar Co.*, 125 U. S. 18.

³ Per Mr. Justice Field, for the court, in *Williams v. Bruffy*, 102 U. S. 248, 253.

yet it seems that congress has the power to create inferior federal courts with such appellate jurisdiction over the state courts, with respect to questions of law.¹ But with respect to questions of fact, which have been decided by the verdict of a jury in a state court, it is settled that congress has not the constitutional power to authorize any federal court, not even the supreme court, to retry the case. For such an act of congress violates the seventh amendment, which declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The act is therefore void, and the federal courts cannot exercise jurisdiction under it.²

If, however, the local law of the state of process allows a second trial by jury as a matter of right, or if the verdict in the state court be set aside, then congress has the constitutional power to authorize a removal of the suit to a federal court after one verdict in the state court, if the parties be citizens of different states, or if a federal question be involved.³

Such state statutes allowing more than one trial as a matter of right in actions for the recovery of real estate are binding upon the federal courts sitting in the state, and govern the trial of those cases therein.⁴

If a verdict for a non-resident plaintiff has been set aside and a new trial granted in a state court, and he then voluntarily becomes nonsuit, he may bring a new action upon the same cause of action in a federal court; for a judgment of nonsuit is not a bar to a second action.⁵

¹ *Martin v. Hunter*, 1 Wheat. 304; 214; *Schraeder Mining Co. v. Cohens v. Virginia*, 6 Wheat. 264; *Packer*, 129 U. S. 688; *Akerly v. Tennessee v. Davis*, 100 U. S. 257, Vilas, 1 Abbott (U. S.), 284; *Johnson v. Monell*, Woolworth, 390. *Contra*, 269-270.

² *Justices v. Murray*, 9 Wall. 274; *McKee v. Rains*, 10 Wall. 22; *Parsons v. Bedford*, 3 Peters, 433; *Bryant v. Rich*, 106 Mass. 180, 193; *Wetherbee v. Johnson*, 14 Mass. 412; *Patrie v. Murray*, 43 Barb. (N. Y.) 323.

³ *Insurance Co. v. Dunn*, 19 Wall.

Akerly v. Vilas, 24 Wis. 165. ⁴ *Equator Co. v. Hall*, 106 U. S. 86; *Mansfield v. Excelsior Refining Co.*, 135 U. S. 326.

⁵ *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121.

CHAPTER VII.

SUITS IN FEDERAL COURTS.

PART I.

§ 100. General principles.	§ 110. Remedy by <i>mandamus</i> .
101. Class of cases of federal cognizance.	111. Vacancy in the office of tax collector.
102. Who are citizens for purposes of suit.	112. State remedial exemptions.
103. Mode of acquiring state citizenship.	113, 114. Effect of judgment without jurisdiction.
104. Corporations are citizens for purposes of suit.	115. Form of judgment upon reversal for want of jurisdiction.
105. Consolidation of corporations of different states.	116. Restitution of money collected on judgment afterwards reversed for want of jurisdiction.
106. Effect of leasing and operating property in other states.	117. Effect in federal courts of judgment of nonsuit, etc., in state courts.
107. National corporations.	118. Agreements not to remove suit to federal courts.
108. National banks, citizens of state of location.	
109. Remedies supplementary to judgment.	

§ 100. **General principles.**—The constitution declares that the judicial power of the United States shall, among other matters, extend to “controversies . . . between citizens of different states.”¹ This clause was inserted in order to protect citizens of other states than that in which suit is brought from discrimination against them due to local bias or prejudice.² It confers upon a non-resident citi-

¹ Const., art. III. sec. 2.

² *Gaines v. Fuentes*, 92 U. S. 10, 18, 19. In *Railway Co. v. Whitton*, 13 Wall. 270, at 289, Mr. Justice Field, in delivering the opinion of the supreme court, says on this sub-

ject: “The provision of the constitution extending the judicial power of the United States to controversies between citizens of different states, had its existence in the impression that state attachments and

zen the important right of selecting a federal court instead of a state court, and in that way he can protect himself against the possibility of injustice. If he be a party plaintiff he can bring his suit in the proper federal court; if he be himself sued in a state court, he can remove the suit to the federal court sitting in the same state.

Although the constitution declares that the judicial power of the federal government shall extend to controversies "between citizens of different states," etc., and authorizes congress to "ordain and establish" courts inferior to the supreme court, congress is not obliged to vest the whole of this jurisdiction in any one or more of such inferior courts. It has a discretion in the matter which the courts cannot interfere with; and it may either vest the whole or any part of such jurisdiction in any inferior courts which it establishes. They can exercise no jurisdiction beyond the grant of congress, however far short of the constitutional limit that grant may fall.¹

The original judiciary act of September 24, 1789, chapter 20 (1 Stat. 73), which established the circuit courts of the United States, restricted their jurisdiction to the case where "the suit is between a citizen of the state where the suit is brought and a citizen of another state," and further provided by section 11 that "no civil suit shall be brought before either of said courts [circuit and district courts] against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

The rule was well settled under this act that it was not sufficient to confer jurisdiction upon the circuit court that the adverse parties were citizens of different states; but that all the parties on one side must, in addition thereto, be citizens of the state in which the suit was brought, or the jurisdiction was defeated.²

state prejudices might affect injuriously the regular administration of justice in the state courts."

¹ Cary v. Curtis, 3 Howard, 236, at 245.

² Strawbridge v. Curtiss, 3 Cranch,

And the rule is the same under the present judiciary act of March 3, 1887 (24 Stat. 552), as amended by the act of August 13, 1888 (25 Stat. 433), the language of which is that "suit shall be brought only in the district of the residence of either the plaintiff or the defendant."¹

Congress cannot enlarge the jurisdiction of such inferior courts,² nor of the supreme court,³ beyond the limits of the constitution; and an attempt on its part to do so will be declared unconstitutional and void by the courts, and their own jurisdiction denied. Nor can state legislation enlarge or restrict the jurisdiction of any federal court.⁴

§ 101. Class of cases of federal cognizance.—The constitution imposes no limitation upon the class of cases between citizens of different states over which the federal courts have jurisdiction, and therefore congress has the power to declare that any or all such controversies may be brought in the federal courts or be removed thereto from the state courts.⁵

If the state court of last resort refuses to allow the suit to be removed to the proper federal court and proceeds to render judgment against the non-resident, when he was rightfully entitled to a removal, such state judgment is void and will be reversed by the supreme court of the United States; and he does not waive his right to deny the jurisdiction of the state court by contesting the action therein on the merits.⁶

Since the right of a non-resident citizen to try his case in a federal court is given by the federal constitution and laws, which are the supreme law of the whole Union, it follows

267; *Jones v. Andrews*, 10 Wall. 327, 331; *Coal Co. v. Blatchford*, 11 Wall. 172.

¹ *Smith v. Lyon*, 133 U. S. 315.

² *Justices v. Murray*, 9 Wall. 274; *Bryant v. Rich*, 106 Mass. 180, 193; *Wetherbee v. Johnson*, 14 Mass. 412.

³ *Marbury v. Madison*, 1 Cranch, 137.

⁴ *Ex parte McNeil*, 13 Wall. 236; *Smith v. Railroad Co.*, 99 U. S. 398; *The Moses Taylor*, 4 Wall. 411.

⁵ *Gaines v. Fuentes*, 92 U. S. 10; *Arrowsmith v. Gleason*, 129 U. S. 86, 98-101; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530.

⁶ *Insurance Co. v. Dunn*, 19 Wall. 214; *Steamship Co. v. Tugman*, 106 U. S. 118.

that no state can deny or impair this right; and any such attempt on the state's part, as by providing a special remedy in its own courts, is not binding in the federal courts.¹

"This jurisdiction of the courts of the United States, in controversies between citizens of different states, cannot be ousted or annulled by statutes of the states assuming to confer it exclusively on their own courts."²

Even when a state statute creates a new right, which was unknown to the common law, and declares that it shall be enforced only in the state courts, the federal courts have jurisdiction, if the proper citizenship of the parties exists, and will enforce the statutory right. In *Railway Co. v. Whitton*, 13 Wall. 270, a statute of Wisconsin gave a remedy for the negligent killing of a human being, and enacted that the action must be brought in a court of that state. *Held*, that a citizen of Illinois could maintain an action in the United States circuit court for Wisconsin against a railroad corporation for the negligent killing of his intestate wife in Wisconsin. The corporation was organized under the laws of Illinois, Wisconsin and Michigan; but the plaintiff described it as a citizen of Wisconsin only, and the supreme court held that the citizenship of the parties was sufficient to confer jurisdiction upon the circuit court.

§ 102. Who are citizens for purposes of suit.—It is only a citizen of a *state*, however, who falls within the benefit of this clause. Thus, a resident in the District of Columbia, or in a territory, is not a citizen of a state, and has not the latter's full right of suit in or removal to the federal courts.³

Negroes.—In the celebrated *Dred Scott Case*, 19 How. 399, it was decided that a negro of African descent, who

¹ *Boom Co. v. Patterson*, 98 U. S. 403; *Mason v. Boom Co.*, 3 Wall. Jr. 252; *Payne v. Hook*, 7 Wall. 425, 478.

430; *Arrowsmith v. Gleason*, 129 U. S. 86, 99; *Clark v. Bever*, 139 U. S. 96, 102.

² Per Mr. Justice Miller, in *Hess v. Wheaton*, 91; *Barney v. Baltimore*, 6 Wall. 280.

was born in the United States and lived in Missouri, was not a "citizen" within the meaning of this clause, and therefore could not sue in the federal courts.

But the fourteenth amendment changed the law on this point by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."¹

The phrase "subject to the jurisdiction" of the United States was intended chiefly to exclude from its operation the children of ministers, consuls and citizens or subjects of foreign states who were born within the United States, and consequently they are not citizens of the United States nor of the state wherein they reside.²

Slaves who escaped to Canada before the adoption of the fourteenth amendment, and continue to reside there, are not citizens of the United States; nor are their children who are born in Canada. They must be naturalized to make them such citizens.³

Indians.—*Elk v. Wilkins*, 112 U. S. 94, was an action brought by an Indian, in the circuit court of the United States for the district of Nebraska, against the registrar of one of the wards of the city of Omaha for refusing to register him as a qualified voter therein.

By the laws of Nebraska the plaintiff was entitled to be registered, and could therefore recover damages for the defendant's refusal to register him, if he was a citizen of the United States. The plaintiff was born a member of an Indian tribe within the United States; but he afterwards voluntarily separated himself from his tribe and took up his residence among white citizens. He had not been naturalized, nor taxed, nor recognized as a citizen, either by the United States or by any state.

Upon these facts the plaintiff claimed that he was a citi-

¹ *Slaughter-House Cases*, 16 Wall. 86, 73.

² *Slaughter-House Cases*, 16 Wall. 86, 73.

³ *Hedgman v. Board*, 26 Mich. 51.

zen of the United States by virtue of this clause of the fourteenth amendment, and therefore could maintain his action. The supreme court held:

1. That under the act of March 3, 1875, the circuit court had jurisdiction of the suit, even if the parties were citizens of the same state, as it arose under the constitution of the United States and the matter in dispute exceeded \$500.

2. But that the plaintiff was not a citizen of the United States and could not recover, because, although born in the United States, he was not "subject to the jurisdiction thereof" *at the time of his birth*, any more than the children born within the United States of ambassadors or other public ministers of foreign nations. As he was born a member of a tribe, to which he owed allegiance, he was not born subject to the jurisdiction of the United States,—not born in its allegiance. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form.¹

§ 103. Mode of acquiring state citizenship.—"A citizen of the United States can, of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein, with the same rights as other citizens of that state."²

A citizen of the United States can instantly transfer his citizenship from one state to another; and although the change of residence is made with the avowed purpose of invoking the jurisdiction of a federal court, this does not defeat that jurisdiction.³

But if the removal was made, not with a *bona fide* intention of changing his domicile, but for the sole object of placing himself in a situation to invoke the jurisdiction of a federal court, its jurisdiction will be defeated.⁴

¹ See *Karrahoo v. Adams*, 1 Dillon, 344, 348, note.

² *Slaughter-House Cases*, 16 Wall. 36, 80.

³ *Manhattan Ins. Co. v. Brough-*

ton, 109 U. S. 121, 125; *Briggs v. French*, 2 Sumner, 251, 256.

⁴ *Jones v. League*, 18 How. 76, 81; *Morris v. Gilmer*, 129 U. S. 315, 328, 329, and cases cited.

Residence within a state is the test of citizenship within the meaning of this clause, provided the person, either male or female, was born or naturalized in the United States and is subject to its jurisdiction.¹

But the fact that a party is a "resident" of a certain state or that he "does business" therein, is not sufficient to confer jurisdiction upon a federal court. It must appear that he is a citizen; and the allegation that he is a "resident," or that he "does business," in a state is not sufficient to confer jurisdiction upon a circuit court, even since the fourteenth amendment above quoted.²

§ 104. Corporations are citizens for purposes of suit.—A corporation duly organized under the laws of any state is a "citizen" of that state for all purposes of suing and being sued in the federal courts, irrespective of the citizenship of its members.

In the early cases it was held that the right of a corporation to sue or be sued in the federal courts depended upon the citizenship of its members and the proper averment in the pleadings.³

"In later cases this ruling was modified, and it was held that the members of a corporation would be presumed to be citizens of the state in which the corporation was created, and where alone it had any legal existence, without any special averment of such citizenship, the averment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeating the jurisdiction of the court."⁴

¹Gassies v. Ballou, 6 Peters, 761, 762; Shelton v. Tiffin, 6 How. 163; Cooper v. Galbraith, 3 Wash. C. C. 546, 553.

²Parker v. Overman, 18 How. 137, 141; Robertson v. Cease, 97 U. S. 646; Grace v. American Ins. Co., 109 U. S. 278; Anderson v. Watt, 138 U. S. 694, 702.

³Hope Ins. Co. v. Boardman, 5 Cranch, 57.

⁴Paul v. Virginia, 8 Wall. 168, 178; Steamship Co. v. Tugman, 106 U. S. 118; Louisville R'y v. Letson, 2 How. 497. Mr. Justice Curtis calls this roundabout method of obtaining jurisdiction a "fiction," and justifies it as necessary to en-

"Although a corporation is not a citizen of a state within the meaning of many provisions of the national constitution, it is settled that, where rights of property or of action are sought to be enforced, it will be treated as a citizen of the state where created, within the clause extending the judicial power of the United States to controversies between citizens of different states. The plaintiff was created a corporation by the legislature of New Hampshire in June, 1835. It is therefore to be treated as a citizen of that state."¹

§ 105. Consolidation of corporations of different states. When two corporations created by different states are, by the joint action of those states, consolidated and united into one corporation for all business purposes, they are still regarded as citizens of two states for purposes of suit in the federal courts.

Thus, in *Nashua R'y v. Lowell R'y*, 136 U. S. 356, the plaintiff was organized first under the laws of New Hampshire, and then under those of Massachusetts, and finally consolidated under the laws of both states. It brought suit against a citizen of Massachusetts in the United States circuit court sitting in Massachusetts, alleging itself to be a citizen of New Hampshire. *Held*, that the court had jurisdiction; because such consolidation did not extinguish or modify the plaintiff's character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts as to defeat its right to sue a citizen of Massachusetts in that court.

able the federal courts to perform their proper functions. He compares it to the fiction of the Roman law, by which the higher courts, though forbidden to assume jurisdiction when the plaintiff was a foreigner, took jurisdiction in such cases, by allowing the plaintiff to allege that he was a Roman citizen, and by not allowing that allegation to be denied. "In other

words, they introduced, by their own authority, a rule that a falsehood might be stated on the record, and that the other party could not allege the truth." And he also gives two other instances of the same sort in England. Curtis on United States Courts, pp. 127-131.

¹ Per Mr. Justice Field, for the court, in *Nashua R'y v. Lowell R'y*, 136 U. S. 356, 369, 370.

When one of the two consolidated corporations is defendant in a suit brought in a federal circuit court sitting in the state under whose laws it was created, the fact that the plaintiff is a citizen of the other state, under whose laws the other corporation was created, does not defeat the jurisdiction of the court.¹

The result of the above cases seems to be that the plaintiff has the power of election upon the question of citizenship, and that his election cannot be defeated by the defendant. If the consolidated corporation is plaintiff, it may elect to sue as a citizen of either or any state under whose laws it was organized, and such election cannot be defeated by the defendant. If the consolidated corporation is defendant, the plaintiff may describe it as a citizen of any state by whose laws it was created, and the defendant cannot defeat the jurisdiction by proof that it is also a citizen of the plaintiff's state. The same rule applies to a corporation created by two or more states, although there has been no consolidation.²

§ 106. Effect of leasing and operating property in other states.— A corporation of state A, by leasing and operating property in state B, does not thereby become a citizen of state B so as to prevent it from suing in or removing a cause to the federal courts sitting in state B; and a contrary decision by a state court, denying the right of removal, will be reversed by the United States supreme court.³

§ 107. National corporations.— Although national corporations are not citizens of a state within this clause, as they are created by congress instead of by a state legislature, yet congress has the constitutional power to authorize them to sue or to be sued in the federal courts, or to remove suits thereto from the state courts; for such suits are necessarily suits "arising under the laws of the United States," within

¹ *Muller v. Dows*, 94 U. S. 444.
See, also, *Railway Co. v. Whitton*,
13 Wall. 270, 283.

² *Railway Co. v. Whitton*, 13 Wall.
270.

³ *Railroad Co. v. Koontz*, 104
U. S. 5.

the meaning of the constitution, article III, section 2, stating the cases to which the judicial power of the United States shall extend.¹

In the leading case of *Osborn v. United States Bank*, *supra*, the state of Ohio passed a statute taxing the Bank of the United States which had been chartered by congress. Its charter expressly declared that the bank should be "able and capable in law . . . to sue and be sued . . . in any circuit court of the United States." The treasurer of Ohio took \$100,000 from the bank as a tax, and when sued by the bank in the United States circuit court for Ohio, he set up as one defense that congress had not the constitutional power to authorize the bank to sue in a federal court. But the supreme court decided that the suit was one "arising under the laws of the United States," and accordingly gave judgment for the bank.

In the recent case of *Pacific Railroad Removal Cases*, 115 U. S. 1, the doctrine of *Osborn v. United States Bank* was extended, and it was held that a railroad company which was chartered by congress could remove a suit against it from a state court to a federal court, although its charter did not in express terms allow it to sue or be sued in the federal courts.

§ 108. National banks, citizens of state of location.—But by the recent acts of congress of July 12, 1882 (ch. 290), and August 13, 1888 (sec. 4), this rule is changed so far as it relates to national banks, and it is expressly enacted by the latter act that for all purposes of suit they shall "be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state."²

¹ *Pacific R. R. Removal Cases*, 115 U. S. 1, 11, 12; *Osborn v. United States Bank*, 9 Wheat. 738, 818, 828; *Houseman*, 93 U. S. 130, 135; *Fisk v. Union Pac. R'y*, 6 Blatchf. 362.
² 22 Stat. at Large, 163; 25 Stat. at Large, 436.
United States Bank v. Planters' Bank, 9 Wheat. 904; *Clafin v.*

These statutes, therefore, repeal clause 10 of section 629 of the Revised Statutes, which the supreme court construed in *County of Wilson v. National Bank*, 103 U. S. 770, 776, as giving the United States circuit courts jurisdiction of suits brought by or against a national bank, without regard to the citizenship of the parties.¹

§ 109. Remedies supplementary to judgment.—Section 916 of the Revised Statutes enacts that “the party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise.”

The supreme court has held that this section enables a judgment creditor to examine his debtor in regard to his property in a federal court, where the local state law allows such examination, under what are variously known as poor-debtor laws, or proceedings supplementary to execution.²

So, when the local law allows a judgment creditor to garnishee persons having effects or credits of the defendant, this section enables him to do the same thing in a federal court.³

§ 110. Remedy by mandamus.—In *Riggs v. Johnson County*, 6 Wall. 166, a non-resident bondholder of municipal bonds issued in aid of railroad construction in Iowa recovered a judgment against the county in a circuit court

¹ *Leather Manufacturers' Bank v. tional Bank v. Miller*, 15 Fed. Rep. Cooper, 120 U. S. 778; *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527; *Jefferson National Bank v. Fore*, 25 Fed. Rep. 209; *Union Na-* 703.
² *Ex parte Boyd*, 105 U. S. 647.
³ *Canal, etc. R'y v. Hart*, 114 U. S. 654.

of the United States for the district of Iowa. An execution was issued and returned unsatisfied. The Iowa statute under which the bonds were issued made the levy of a tax to pay the interest on the bonds obligatory on the county. A state court of Iowa, at the suit of certain tax-payers of the county, and to which the plaintiff was not a party, enjoined the county officers from making such levy, on the ground that the Iowa statute was contrary to the state constitution and the bonds void. Held by the supreme court, that the plaintiff was entitled to a writ of *mandamus* from the United States circuit court to compel the same county officers to levy the tax. For *mandamus* is an appropriate remedy under the laws of Iowa to compel the performance of such a duty, the judgment creditors having no other remedy; and the jurisdiction of a federal court over a case does not cease upon the rendition of judgment, but extends to all process after judgment as well as before judgment; and a state court cannot enjoin any such process of a federal court.

If, at the time when a valid contract is made with a municipal corporation, the latter has the power of local taxation to the extent necessary to meet its obligations, the state cannot withdraw this power until the debt is satisfied. A subsequent state statute which purports to repeal the power of local taxation, or to materially lessen it, so as to produce insufficient funds for the creditor, impairs the obligation of the contract and is void. The state laws providing for taxes, in force when the contract is made, still remain in force for all the purposes of the contract. If, at that time, the creditor is entitled to the remedy by *mandamus* under the state laws after judgment, a non-resident creditor, by judgment in a federal court sitting in the state, will be entitled to the same remedy by *mandamus*.¹

When the contract in suit is made before the state statute has been construed by the state court not to authorize the remedy by *mandamus*, the federal courts are not bound

¹ Von Hoffman v. Quincy, 4 Wall. 535.

to follow such construction by the local courts; and if, in the opinion of the federal court, such construction is wrong, and would impair the obligation of the plaintiff's contract, it will not follow the state decisions, but will grant the writ of *mandamus*.¹

When, however, the contract is made *after* the state statute has been construed by the local tribunal not to authorize the remedy by *mandamus*, such construction is binding upon the federal courts; for the statute so construed enters into and forms a part of the contract at its inception, and therefore it does not impair the contract's obligation.²

§ 111. Vacancy in the office of tax collector.—The judgment creditor's remedy by *mandamus* is, however, not always efficacious, and some hard cases have arisen in which he has been left entirely without judicial remedy and thrown upon the mercy of the legislature. A state legislature cannot repeal the power of local taxation in municipal corporations while any debts are outstanding which arose by contract while that power existed.³ Nor can a state court, by a construction of a state statute subsequent to the contract's making, deprive a non-resident judgment creditor of his remedy by *mandamus* in a federal court.⁴ But the supreme court has held that the judgment debtor itself, the municipal corporation which has the power of local taxation, may escape the payment of its debt, and impair the creditor's remedy in a federal court, by the simple and dishonest expedient of allowing the office of tax collector to remain vacant. The writ can only be served upon the proper officer, and the federal courts have no power to appoint an officer for that purpose, unless a state statute expressly confers that power upon the state courts and that statute is adopted in the federal courts.⁵

¹ Butz v. Muscatine, 8 Wall. 575.

² Supervisors v. United States, 18 Wall. 71.

³ Von Hoffman v. Quincy, 4 Wall. 535.

⁴ Butz v. Muscatine, 8 Wall. 575.

⁵ Rees v. Watertown, 19 Wall. 107; Barkley v. Levee Com., 93 U. S. 258; Thompson v. Allen County, 115 U. S. 550.

In *Supervisors v. Rogers*, 7 Wall. 175, the federal court issued the writ of *mandamus* to its marshal, commanding him to levy and collect the requisite taxes; but in that case the local statute conferred that power upon its courts, and the federal court adopted the practice.

§ 112. **State remedial exemptions.**—When a state insolvent law forbids the imprisonment of a discharged debtor, and the federal court has adopted this provision by a rule of court, even a non-resident judgment creditor is bound by it, and cannot recover against the special bail of the insolvent debtor for failure to surrender him to the marshal in accordance with the terms of the recognizance. For the right to imprison forms no part of the contract, and this clause of the state insolvent law does not impair the obligation of the contract, even when the creditor is a non-resident and has not subjected his debt to the jurisdiction of the debtor's state. Hence the state law is valid, and as the debtor cannot lawfully be arrested, the special bail are exonerated from their obligation to surrender him for arrest.¹

Even where the federal court had not adopted the state law by rule of court, it was held that a non-resident creditor could not recover on a bond for jail limits, conditioned upon the debtor remaining within the jail limits “until he shall be *lawfully discharged*, without committing any manner of escape,” after the debtor had received a discharge under the state insolvent laws which purported to exempt him from arrest and imprisonment. For the state law does not impair the obligation of the contract, and is valid, and therefore the debtor is “lawfully discharged.”²

§ 113. **Effect of judgment without jurisdiction.**—A judgment on the merits is erroneous unless the record shows affirmatively that the lower federal court had juris-

¹ *Beers v. Haughton*, 9 Peters, 329. ² *Mason v. Haile*, 13 Wheat 370.

diction. It will therefore be reversed, on writ of error or appeal, by the supreme court.¹

Where the objection is that the record fails to show the existence of the proper citizenship of the parties to give the federal court jurisdiction, or even that it shows that the proper citizenship did not exist, its judgment on the merits is not a nullity, and therefore cannot be collaterally impeached. So long as it stands unreversed, it is entitled to full faith and credit in all the state courts; and if a state court fails to give it due effect, its judgment will be reversed by the United States supreme court.²

In *McCormick v. Sullivan*, *ubi supra*, the plaintiff contended that a former decree rendered by a federal district court was void, because the proceedings did not show that the adverse parties were citizens of different states. Mr. Justice Washington, for the court, made this answer on page 199:

“But this reason proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are of limited jurisdiction, but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may upon a writ of error or appeal be reversed for that cause. But they are not absolute nullities.”

It was accordingly decided that the former decree was binding upon the parties and privies until reversed, and could not be impeached collaterally in this suit.

In *Cragin v. Lovell*, 109 U. S. 194, it was held that a plaintiff's false and fraudulent allegation that the parties were citizens of different states, upon which the United

¹ *Robertson v. Cease*, 97 U. S. 646; *Moines Nav. Co.*, 63 Iowa, 285; *Grace v. American Ins. Co.*, 109 U. S. 278. *Plumb v. Goodnow*, 123 U. S. 560 (reversing *Goodnow v. Plumb*, 64

² *Des Moines Nav. Co. v. Iowa*, 672; *McCormick v. Sullivan*, 10 Wheat. 192; *Skillern v. Homestead Co.*, 123 U. S. 552 (reversing *Iowa Homestead Co. v. Des May*, 6 Cranch, 287.

States circuit court assumed jurisdiction and rendered judgment by default against the defendant, was not sufficient ground to set aside the judgment on a bill in equity filed by the original defendant, unless he could prove that its falsity was unknown to him before the rendition of judgment.

In the recent case of *Des Moines Nav. Co. v. Iowa Homestead Co.* (*ubi supra*), *McCormick v. Sullivan* was cited with approval, and the doctrine extended to the case where the record of the federal court shows there was no jurisdiction because two adverse parties were citizens of the same state. Until such a judgment is reversed by the United States supreme court, it constitutes a valid and subsisting prior adjudication, binding upon the parties and their privies. It was further held that it is entitled to full faith and credit in all state courts; and a judgment of the supreme court of Iowa, failing to give it this effect, was accordingly reversed as contravening the full faith and credit clause of the national constitution. The reason for this rule seems to be that the jurisdiction depends upon an inquiry into facts which may or may not support the jurisdiction; and the dignity of the federal judiciary requires this inquiry to be conducted in the federal courts instead of in the state courts. For otherwise the validity of their judgments would depend upon the varying opinions of state juries and judges upon the question of citizenship, which is frequently a doubtful question of fact.¹

§ 114. Same.—It seems difficult, if not impossible, to reconcile the case of *Vose v. Morton*, 4 Cush. (Mass.) 27, with the decisions of the United States supreme court above cited. That was an action to recover certain land in Massachusetts. Both plaintiff and defendant claimed title through the same person, Moses Morton 2d. The plaintiff claimed as a judgment creditor of Morton, by an attachment made on December 7, 1846, in the United States circuit court

¹ See *In re Sawyer*, 124 U. S. 200, *Butchers' Union*, 120 U. S. 141, 157-221; *Crescent Live Stock Co. v.* 160.

for Massachusetts, and by the levy of an execution on the land in question under a judgment by default in that court on a note given by Morton to Whitney and Fenno. The defendant claimed under a quitclaim deed from Morton, dated October 21, 1839, but not recorded until December 9, 1846, which was two days after the date of the plaintiff's attachment. It appeared in evidence in the state court that Vose, who was a citizen of New York, was not the real party in interest, but a mere nominal plaintiff; that Whitney and Fenno were the real parties in interest, and that they, as well as Moses Morton 2d, were citizens of Massachusetts. The state court held that this evidence was admissible, although these facts did not appear in the federal record; that, as it proved, if believed by the jury that both the real parties in interest in the federal court were citizens of the same state, therefore that court had no jurisdiction under the constitution and laws of the United States; that its judgment was consequently null and void and could be impeached in this collateral proceeding by the defendant, because he was not a party or privy to that judgment, although he was privy in estate with the defendant therein, Moses Morton 2d. These are the only grounds stated by the court. That the judgment cannot be supported upon any or all of them seems to follow from the cases above cited. It is elementary that "all privies, whether in estate, in blood or in law, are estopped from litigating that which is conclusive on him with whom they are in privity."¹

The judgment may, perhaps, be supported upon the ground that the plaintiff himself fraudulently procured the federal court to exercise jurisdiction over his case; and that a judgment so obtained is entitled to no faith and credit in the courts of another sovereignty, at least in favor of the party committing the fraud.²

¹ 1 Greenleaf on Evidence, sec. 523; Lovejoy v. Murray, 3 Wall. 1; Jackson v. Jackson, 1 Johns. (N. Y.) Robbins v. Chicago City, 4 Wall. 424; Dunlap v. Cody, 31 Iowa, 260; 657, 672; Litchfield v. Goodnow, Durringer v. Moschino, 93 Ind. 495. 123 U. S. 549, 551.

But where the judgment is rendered on default without personal service of process upon the defendant, or his voluntary appearance in the federal court, it seems clear that a judgment *in personam* against him on an ordinary money demand will be an absolute nullity and subject to collateral impeachment in any court. Such judgment is contrary to "due process of law" and the fifth amendment. The want of jurisdiction is fatal, and the judgment is entitled to no faith and credit, or force and effect, in any court.¹

The fact that the judgment is rendered on publication, or after summons left at the defendant's last and usual place of abode in the state, in accordance with a state statute, does not seem sufficient to cure the invalidity of the judgment, even if the state statute has been adopted by rule of the federal court. For such service is contrary to due process of law, and nothing short of a constitutional amendment can render it valid.

§ 115. Form of judgment upon reversal for want of jurisdiction.—The form of a judgment of the supreme court, when it reverses the judgment of a circuit court for want of jurisdiction, depends upon whether the want of jurisdiction appears affirmatively or negatively. If the pleadings and proofs taken together show that the circuit court had not jurisdiction, as that two or more adverse parties are citizens of the same state, the judgment of the circuit court is reversed, *with instructions to dismiss the suit for want of jurisdiction.*²

But when the pleadings and proofs taken together merely fail to show affirmatively that the circuit court has jurisdiction, the judgment is simply reversed, without such instructions. This permits the circuit court, after the cause is remanded to it, to allow amendments to the pleadings, or to receive new evidence upon the question of jurisdiction.³

¹See *Pennoyer v. Neff*, 95 U. S. Bank, 184 U. S. 527; *Anderson v. Watt*, 138 U. S. 694, 708.
by Default."

²*Menard v. Goggan*, 121 U. S. 253;

³*Morris v. Gilmer*, 129 U. S. 315, *Metcalf v. Watertown*, 128 U. S. 329; *Whittemore v. Amoskeag Nat.* 586, 590.

§ 116. Restitution of money collected on judgment, afterwards reversed for want of jurisdiction.— A defendant from whom the plaintiff has collected money on a judgment of a circuit court, which judgment is afterwards reversed or set aside and the suit dismissed for want of jurisdiction, is entitled to full restitution of the sum collected with interest, and the circuit court has jurisdiction to order such restitution, even when the mandate from the supreme court contains no such order.¹

§ 117. Effect in federal courts of judgment of nonsuit, etc., in state courts.— A judgment of nonsuit in a state court, even when it is ordered by the trial judge after hearing the plaintiff's evidence, is no bar to an action in a federal court, because it does not determine the rights of the parties and can have no weight as evidence at another trial.²

So, if a non-resident plaintiff recover a verdict in a state court, which on appeal is set aside and a new trial granted on the ground that the plaintiff's evidence did not entitle him to a verdict, a voluntary discontinuance of his action is no bar to a new suit in a federal court.³

But if, in the former case, the trial judge should order a verdict for the defendant, and enter judgment upon the verdict, or, in the latter case, the appellate court should order judgment for the defendant without granting a new trial, it seems clear that such judgment would constitute a bar in a federal court.⁴

A judgment of nonsuit, when rendered by consent upon an agreed statement of facts in a state court, is likewise no bar to another action in a federal court.⁵

In general, if a suit be disposed of on any ground not

¹ *Northwestern Fuel Co. v. Brock*, 139 U. S. 216.

² *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121.

³ *Bucher v. Cheshire R'y*, 125 U. S. 555.

⁴ See *Justices v. Murray*, 9 Wall. 274.

⁵ *Homer v. Brown*, 16 How. 354.

going to the merits, as a dismissal for want of jurisdiction, or for defect of pleadings or parties, or for a misconception of the form of action, or because it is prematurely brought, the judgment rendered will prove no bar to another suit.¹

§ 118. Agreements not to remove suit to federal courts.— A citizen of another state, or a foreign corporation, may, in each case as it occurs, waive the right to remove a case from a state court to a federal court; but such party is not bound by an agreement made in advance to waive this right on all occasions, whenever the case may be presented; because such agreements in advance to oust the courts of jurisdiction conferred by law are contrary to public policy and void.²

Some states have tried to prevent foreign corporations from removing suits from the state courts to the federal courts by enacting that they should not be allowed to transact business therein until they had filed an agreement not to remove causes to the federal courts. Such statutes are unconstitutional; and even if the agreement be filed, it is not binding upon the corporation, and does not prevent a removal. These state acts are void, for the reason that they attempt to defeat a right secured by the constitution and laws of the United States, to wit, the right to remove causes from the state courts to the federal courts in proper cases.³

But a state statute declaring that, if a foreign insurance company shall transfer a suit to the federal courts, the secretary of state shall revoke and cancel the license to do business within the state, is valid, and the company cannot after removal maintain a suit in equity to enjoin the secre-

¹Smith v. McNeal, 109 U. S. 426; 445 (reversing Morse v. Home Ins. Co., 30 Wis. 496); Barron v. Burnside, 121 U. S. 186; Railway Assurance Co. v. Pierce, 27 Ohio St. 155 (overruling New York Life Ins. Co. v. Best, 23 Ohio St. 105).

²Insurance Co. v. Morse, 20 Wall. 445.

³Insurance Co. v. Morse, 20 Wall.

v. Best, 23 Ohio St. 105).

tary of state from revoking its license; because the state has the right to exclude such a corporation from doing business within its limits altogether, and the condition imposed is not contrary to the constitution or laws of the United States. As applied to this business, the act of removal, though itself a lawful act, justifies the state in revoking its license to transact business therein, and in excluding it from the state thereafter.¹

¹ *Doyle v. Continental Ins. Co.*, 94 U. S. 535. The case just cited of *Doyle v. Continental Ins. Co.* suggests the question as to whether or not a state can by a statute of that character exclude from its limits a foreign corporation engaged in foreign or interstate commerce. This business is specially protected from state regulation by the commerce clause of the constitution, and it has been decided that a foreign corporation whose charter authorizes it to engage in such business cannot be prevented, by the action of another state, from doing business within its limits. *Crutcher v. Kentucky*, 141 U. S. 47; *ante*, § 7. The business of insurance is not foreign or interstate commerce, and is not specially protected from state regulation by the United States constitution. *Paul v. Virginia*, 8 Wall. 168; *ante*, § 5. In the *Doyle* case cited above the court was careful to add: "The cases of *Bank of Augusta v. Earle*, *Ducat v. Chicago*, *Paul v. Virginia*, and *Lafayette Ins. Co. v. French*, establish the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper *that are not repugnant to*

the constitution or laws of the United States. . . . The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts, or to cease to do business in the state. It gives the company the option. This is justifiable, *because the complainant has no constitutional right to do business in that state.* . . . No right of the complainant under the laws or constitution of the United States, by its exclusion from the state, is infringed." Pages 540, 542. In *Barron v. Burnside*, 121 U. S. 186, in which it was decided that an Iowa statute was void which required certain foreign corporations to stipulate, as a condition of obtaining a permit for the transaction of business in Iowa, that they would not remove suits into the federal courts, the court says: "The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the

transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitution and laws of the United States." Page 200. From these decisions and *dicta* it seems to follow that such a statute would fail to accomplish its purpose, either in excluding the corporation from doing business within the state or in pre-

venting it from removing a cause to a federal court. For, as applied to a foreign corporation engaged in foreign or interstate commerce, the state act is unconstitutional and void in so far as it attempts to prohibit the doing of such business within the state; and so far as it attempts to prevent a removal to the federal courts, it is void as to all kinds of foreign corporations.

CHAPTER VIII.

SUITS IN FEDERAL COURTS (CONTINUED).

PART II.

LOCALITY OF SUITS IN UNITED STATES CIRCUIT COURTS.

<i>A. Locality when the suit is of a personal and transitory nature.</i> § 119. Division of subject of chapter. 120, 121. Fundamental construction of judiciary act of 1887. 122. Plurality of plaintiffs residing in different states or districts. 123. Plurality of defendants residing in different states or districts. 124. Waiver of jurisdiction objection. 125. Non-joinder of parties. 126. Time and mode of objecting to jurisdiction. 127. Amendment dropping party from the record.	§ 128. Residence or inhabitancy of corporations. 129. Indispensable parties. <i>B. Locality when the suit is of a local nature.</i> 130. Jurisdiction of local suits not restricted by judiciary act of 1887. 131. Illustrations of local suits to enforce liens, etc. 132. Indispensable party defendant, citizen of plaintiff's state. 133. Attachment of property as conferring jurisdiction. 134. Removal of attachment suit from state to federal court. 135. Removal of suit in which jurisdiction is based upon plaintiff's fraud, etc.

A. Locality when the suit is of a personal and transitory nature.

B. Locality when the suit is of a local nature.

§ 119. Division of subject of chapter.— The question as to whether or not a particular circuit court has jurisdiction of a given case depends largely upon the nature of the suit — whether it is transitory or local in nature; and the subject will be considered under these two heads.

A. Locality when the suit is of a personal and transitory nature.

§ 120. Fundamental construction of judiciary act of 1887.—The first section of the judiciary act of 1887 is very obscurely worded, and this has led to much judicial conflict. In *McCormick v. Walther*, 134 U. S. 41, however, the supreme court construed this section in such a way as to remove many doubts, and to render its application comparatively easy and uniform. The court held unanimously that: "Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides." Per Fuller, C. J., p. 43.

It was accordingly adjudged that the United States circuit court for Nebraska had jurisdiction of an action brought by a citizen and resident of Nebraska against an Illinois corporation. The defendant corporation had an office and agent in Nebraska, and process was served upon the agent in accordance with the local statutes; and the decision shows that these facts do not defeat the court's jurisdiction, even when the adverse party is also a resident of that state.

This section, after describing the jurisdiction common to all the circuit courts of the United States, in respect to the subject-matter of the suit and the character of the parties who might sustain suits in those courts, adds the following clause, which occasioned the doubts and confusion: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;

but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”¹

The first part of the section confers original jurisdiction upon the United States circuit courts in six classes of cases, as follows: (1) Those “arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority;” (2) those in which “the United States are plaintiffs or petitioners;” (3) suits “between citizens of different states;” (4) suits “between citizens of the same state, claiming lands under grants of different states;” (5) suits “between citizens of a state and foreign states, citizens or subjects;” (6) said circuit courts “shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them.”

Then follows the clause above quoted, which limits and prescribes the *district* in which a suit may be originally brought. The construction given to this clause in *McCormick v. Walthers, ubi supra*, is that in these six classes of cases the suit must be brought in the district of which the defendant is an inhabitant, except when the jurisdiction is founded only on the fact that the action is between citizens of different states, and then the action may be brought in the district in which either the plaintiff or the defendant resides, but not elsewhere.

§ 121. Same.—The act of 1887 omits the clause contained in the prior judiciary act of March 3, 1875, which allowed a defendant to be sued in any district in which he happened to be “*found*” at the time of serving process, if the adverse parties were citizens of different states. Under the act of 1875 it sometimes happened that a man was sued

¹ The judiciary act of 1887, and a comparison of its terms with those of 1875, are printed in 120 U. S. 786.

in a district hundreds of miles from his home, and while merely traveling through the sister state on business or pleasure. The mere facts that the defendant was "found" in that district, and that the adverse parties were citizens of different states, gave the United States circuit court for that district jurisdiction of the personal suit, even if the plaintiff resided also at a distance in another state. The inconvenience and injustice arising from this state of the law under the act of 1875, when both parties were non-residents, were remedied by the act of 1887. The omission of the "found" clause and the insertion of the clause quoted above relating to the district of suit produce the following results:

1. When "the jurisdiction is founded only on the fact that the action is between citizens of different states," the suit may be brought either in the district of the residence of the plaintiff or in that of the defendant, but cannot be brought in any other district, even if the defendant be found therein and served with process.¹

2. When the jurisdiction is founded on any other ground than that of diverse citizenship, as, for instance, that the

¹McCormick v. Walthers, 134 U. S. 41; Smith v. Lyon, 133 U. S. 315. "The judiciary act of 1789 provided that no civil suit should be brought before the circuit or district courts against an inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant, or in which he should be found at the time of serving the writ (1 Stat. 79, ch. 20, sec. 12), and the act of 1875 (18 Stat. 470, ch. 137, sec. 1) contained a similar provision. This liability of the defendant to be sued in a district where he might be found at the time of serving process was omitted in the act of 1887, but he still remained liable to suit in the district of the residence of the plaintiff as well as in his own district; and as he could not be sued anywhere else, we held in Smith v. Lyon, 133 U. S. 315, that where there were two plaintiffs, citizens of different states, the defendant, being a citizen of another state, could not be sued in the state of either of the plaintiffs. Mr. Justice Miller points out, in delivering the opinion of the court, that the evident purpose of congress in the act of 1887 was to restrict rather than enlarge the jurisdiction of the circuit court, 'while,' he says, 'at the same time a suit is permitted to be brought in any district where either plaintiff or defendant resides.' Per Fuller, C. J., in McCormick v. Walthers, 134 U. S. 41, 44.

suit is one "arising under the constitution or laws of the United States," the suit must be brought in the district whereof the defendant is an "inhabitant," and, if brought in any other district, the defendant may have it dismissed, by taking the objection before pleading to the merits.¹

Those are the rules in the simple case of a suit with only two parties,—one plaintiff and one defendant. When there is a plurality of parties plaintiff or defendant, and all the parties on one side reside in the district of suit, the court has jurisdiction under the first rule. And when there is a plurality of parties defendant and they are all inhabitants of the district of suit, the court has jurisdiction under the second rule.

§ 122. Plurality of plaintiffs residing in different states or districts.—When there is a plurality of *plaintiffs*, residents of different states or districts, it is settled that they cannot sue in the district where either of them resides; even if the defendant be found and served there; but can only sue in the district of the residence of the defendant.

Smith v. Lyon, 133 U. S. 315, is the leading case upon this point. There two partners, residing respectively in Missouri and Arkansas, brought a personal action in the United States circuit court for Missouri against a citizen of Texas. The defendant was duly served with process, and filed a plea to the jurisdiction of the court. The circuit court dismissed the suit for want of jurisdiction;² and the supreme court affirmed the judgment of dismissal. Mr. Justice Miller, in delivering the unanimous opinion of the supreme court, says on page 317:

"In the case before us, one of the plaintiffs is a citizen of the state where the suit is brought, namely, the state of Missouri, and the defendant is a citizen of the state of Texas. But one of the plaintiffs is a citizen of the state of Arkan-

¹ *McCormick v. Walthers*, 134 U. S. 41, 43; *St. Louis R'y v. McBride*, 141 U. S. 127.

² *Smith v. Lyon*, 88 Fed. Rep. 53.

sas. The suit, so far as he is concerned, is not brought in the state of which he is a citizen. Neither as plaintiff nor as defendant is he a citizen of the district where the suit is brought. The argument in support of the error assigned is that it is sufficient if the suit is brought in a state where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different states. In the present case, there being two plaintiffs, citizens of different states, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a state of which either of them is a citizen."

§ 123. Plurality of defendants residing in different states or districts.—The cases are conflicting as to whether or not a circuit court has jurisdiction of a suit against joint defendants, who are residents and citizens of different states or districts, when the suit is of a personal nature and is brought in the district of the residence of one of them. The better view seems to be, however, in accordance with the reasoning of the supreme court in *Smith v. Lyon, ubi supra*, that the court has not jurisdiction in such case under the act of 1887. For the fact that *one* of the defendants or *one* of the plaintiffs resides in the district of suit does not seem to be sufficient to confer jurisdiction under this act; all of the parties on one side of the controversy must reside in that district, or the jurisdiction is defeated.

In other words, under the act of 1887, the jurisdiction depends upon the residence and citizenship of the parties; and when there are two or more adverse parties, who are non-residents of the district where suit is brought, the jurisdiction is defeated.¹

¹ *Smith v. Lyon*, 133 U. S. 315, National Cash Register Co., 42 Fed. 817; *Ames v. Holderbaum*, 42 Fed. Rep. 81; *Jewett v. Bradford Savings Bank*, 45 Fed. Rep. 801 (*Ver- mont, Wheeler, J.*); *Wyatt*, 40 Fed. Rep. 609 (*Cal., Ross, J.*, 1889); *Bensinger Co. v.*

Nor does the case of *Ex parte Schollenberger*, 96 U. S. 369, decide anything in conflict with these views. That case was governed by the judiciary act of 1875 (18 Stat. 470), which conferred jurisdiction upon the circuit court over a suit between non-residents of the state where suit was brought, if the defendant was *found* therein at the time of serving process. This clause conferring jurisdiction over suits between citizens of different states when the defendant was found in the state of suit was omitted in the act of 1887.¹ The defendant was a foreign corporation doing business in Pennsylvania, in which state the action was brought. In accordance with the local statute, the defendant had appointed an agent to receive service of process for it, and service was made upon such agent. The circuit court quashed the service of process and refused to entertain jurisdiction, on the ground that the defendant was not an inhabitant of or found within the district of suit. On a writ of *mandamus*, the supreme court held, however, that as the defendant had appointed such agent and was doing business in Pennsylvania, it was "found" there, within the meaning of the act of 1875; that the service of process was valid, and that the circuit court had jurisdiction.

The citizenship required by the act of 1875 existed, and the question involved was chiefly one of the service of process. As this was sufficient, the court had jurisdiction, beyond all doubt.

§ 124. Waiver of jurisdictional objection.— A dictum of the court in *Ex parte Schollenberger*, *ubi supra*, has, however, been supposed to support the view that under the act of 1887 it is only necessary to give jurisdiction that one of the defendants should be a citizen and resident of the district of suit for the alleged reason that the want of jurisdiction is merely a personal exemption of the non-resident from suit, and is one which he may waive, and is not one of which the resident defendant can take advantage to defeat

¹ *Ante*, § 121.

the jurisdiction. This dictum is contained on page 378, and reads as follows: "The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. *If the citizenship of the parties is sufficient*, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

The words printed in italics qualify the first part of the passage quoted, and imply that when the citizenship of the parties is not sufficient, as defined by the controlling judiciary act, the circuit court cannot acquire jurisdiction by the failure of the non-resident defendant or of any other party to object, or by any other waiving acts.¹ Jurisdiction of this character cannot be conferred by consent of parties, and as soon as the want of the proper citizenship appears, it is the duty of the circuit court of its own motion, and without waiting for the action of either party, to dismiss the suit for want of jurisdiction.²

Where, however, the citizenship of the parties is sufficient under the judiciary act in force at the time the suit is commenced, and the jurisdictional objection is based upon the defendant's personal exemption from suit in the district of suit, he may waive the objection, and his appearance and pleading to the merits amounts to a waiver.³ Thus, under the judiciary act of 1887, the defendant's objection that the suit is not brought in the district "whereof he is an inhabitant," is based upon his personal exemption from suit in the district selected by the plaintiff, and the defendant

¹ *Parker v. Ormsby*, 141 U. S. 81.

³ *St. Louis R'y v. McBride*, 141

² *Mansfield R'y v. Swan*, 111 U. S. 379; *Graves v. Corbin*, 132 U. S. 571, 590, 591; *Cameron v. Hodges*, 127 U. S. 322. See, also, *Daidsburgh v. Knickerbocker Ins. Co.*, 90 N. Y. 526; *Robinson v. Oceanic Nav. Co.*, 112 N. Y. 815.

U. S. 127; *Charlotte Nat. Bank v. Morgan*, 132 U. S. 141; *Jones v. Andrews*, 10 Wall. 327; *Toland v. Sprague*, 12 Peters, 300, 330; *Flanders v. Aetna Ins. Co.*, 3 Mason, 158; *Harrison v. Rowan*, 1 Peters' C. C., 488.

waives the objection by appearing and pleading to the merits.¹

In the case just cited of *St. Louis R'y v. McBride*, the supreme court was careful to say on pages 128, 129: "The action was one to recover money, the sum claimed being in excess of two thousand dollars, and was between citizens of different states, and was brought in the district and state of the residence of the plaintiffs. It was a case, therefore, within the general jurisdiction of the circuit courts of the United States, under section 1 of chapter 866 (25 Stat. 433); and if the jurisdiction was founded only on the fact that the action was between citizens of different states, it was brought in the circuit court of a proper district."

§ 125. Non-joinder of parties.—An important question under the judiciary act of 1887, which has not yet been decided by the supreme court, is whether or not a plaintiff, by omitting to join a person having a joint interest, whose joinder would defeat the jurisdiction, can thereby confer jurisdiction upon the circuit court?

In the case of non-joinder of parties *plaintiff*, it seems clear that jurisdiction cannot be so conferred. Thus, in *Farni v. Tesson*, 1 Black, 309, decided in 1861, the supreme court held that the non-joinder as a party plaintiff of a joint obligee, who was a citizen of the same state as the defendant, defeated the jurisdiction of the circuit court under the act of 1789. Upon the authority of this case, it seems that under the act of 1887, when there are two or more joint obligees or joint promisees, residing in different states or districts, and the suit is brought in the district of the residence of one of them, and the non-resident is not joined, the circuit court has not jurisdiction. For otherwise the decision in *Smith v. Lyon*, 133 U. S. 315, could be easily evaded, and the intention of congress to restrict the jurisdiction would be defeated at the will of the plaintiff. In *Smith v. Lyon*, *supra*, it was held that where the defendant

¹ *St. Louis R'y v. McBride*, *ubi supra*.

and one of the plaintiffs were non-residents of the state where suit was brought, the circuit court had not jurisdiction under the act of 1887, although the other plaintiff was a resident and citizen of that state and district, and the defendant was found therein and served with process. It would defeat the purpose of congress in passing the act of 1887,¹ to allow the resident plaintiff to confer jurisdiction by his own omission to join his non-resident joint promisee.

One partner cannot recover his share of a debt due to the partnership in an action at law, prosecuted in his own name alone against the debtor.²

For like reasons it seems that, notwithstanding the act of February 28, 1839³ (R. S., sec. 737), where there are two or more joint obligors or joint promisors, citizens and residents of different states or districts, and the suit is brought in the district of the residence of one of them, without joining the non-resident as a party defendant, the circuit court is without jurisdiction, whatever the plaintiff's residence or citizenship may be.

Where there are two joint promisors and one plaintiff, all residents and citizens of different states, the plaintiff

¹ "The object of the bill is to diminish the jurisdiction of the circuit courts and of the supreme court of the United States." Per Mr. Culberson, of Texas, in charge of the bill in the House of Representatives (House bill 2441), 18 Congr. Record, p. 618. The act of 1887 was "mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States." Per Mr. Justice Miller in *Smith v. Lyon*, 138 U. S. 815, 820.

² *Vinal v. West Virginia Co.*, 110 U. S. 215.

³ The act of February 28, 1839 (5 Statutes at Large, 321), is as follows: "That where, in any suit at law or in equity, commenced in any court of the United States,

there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

may sue either promisor, without joining the other, in the plaintiff's own district; because the action is then brought in the district where all the parties on one side of the controversy reside. To this extent the act of 1839 seems to be left in force by the act of 1887, as it is not in conflict with the later statute.

But where, under the same citizenship, the action is brought in the district of one of the joint promisors, the act of 1839 conferring jurisdiction seems to be in conflict with and to be repealed by the act of 1887; because all the parties on one side of the controversy are not residents of that district, and to allow the plaintiff to confer jurisdiction by omitting to join the non-resident promisor would be a palpable evasion of the act of 1887.

In *Kendig v. Dean*, 97 U. S. 423, the plaintiff omitted to join a corporation as a party defendant, in a bill to be restored to the rights of a stockholder in the corporation. The corporation was a citizen of the same state with the plaintiff, but, as between the plaintiff and the defendant, the circuit court had jurisdiction. It was held, notwithstanding the act of 1839, that the corporation was an indispensable party to the relief sought; and that as both it and the plaintiff were citizens of the same state, the circuit court was without jurisdiction, and should have dismissed the suit without prejudice.

When the citizenship of a non-joined person having a joint interest with one of the parties is such as to defeat the jurisdiction if joined, it is the duty of the circuit court to dismiss the suit for want of jurisdiction, whenever such citizenship is made to appear at a proper time and in a proper manner; and its failure to dismiss is error, for which a judgment on the merits will be reversed by the supreme court. This rule applies both to the non-joinder of a party plaintiff,¹ and to the non-joinder of a party defendant.²

¹ *Farni v. Tesson*, 1 Black, 309. 286; *Anderson v. Watt*, 188 U. S.

² *Kendig v. Dean*, 97 U. S. 423; 694.

Barney v. Baltimore, 6 Wall. 280,

§ 126. Time and mode of objecting to jurisdiction.— Under the judiciary act of 1789, the objection that the necessary citizenship of the parties did not exist could only be made at an early stage of the proceedings by a plea in abatement, if the pleadings contained the proper allegations, and such objection was waived by pleading to the merits.¹ But this rule was changed by the judiciary act of March 3, 1875, which makes it the duty of a circuit court to dismiss or to remand a suit when it appears at any time before it is finally disposed of that the necessary citizenship does not exist; provided that the circuit court has not jurisdiction upon any other ground.²

The act of 1875 does not prescribe any particular mode for objecting that the necessary citizenship does not exist. Such fact may be brought to the attention of the circuit court by affidavits or depositions, or in any other proper mode; provided that due notice be given to the adverse party and an opportunity afforded him to rebut or control the evidence tending to show a want of jurisdiction.³ Under this act of 1875 it is not incumbent upon the defendant to take an express objection to the jurisdiction by any form of pleading or motion. This duty is imposed upon the court; and if the pleadings and proofs taken together fail to show affirmatively and without inference that the necessary citizenship exists, it is the duty of the circuit court to dismiss the suit for want of jurisdiction; because the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears. If the circuit court assumes jurisdiction and renders judgment on the merits, when the pleadings and proofs fail to show that the necessary citizenship exists, the supreme court will re-

¹ *D'Wolf v. Rabaud*, 1 Peters, 476, 498; *Evans v. Gee*, 11 Peters, 80, 88; *Jones v. League*, 18 Howard, 76, 81; *De Sobry v. Nicholson*, 3 Wall, 420, 423.

U. S. 138, 144; *Morris v. Gilmer*, 129 U. S. 315, 326; *Nashua R'y v. Lowell R'y*, 136 U. S. 356, 374.

³ *Morris v. Gilmer*, 129 U. S. 315, 326; *Hartog v. Memory*, 116 U. S. 588.

² *Farmington v. Pillsbury*, 114

verse the judgment of its own motion, even if neither party raises the question of jurisdiction.¹

§ 127. Amendment, dropping party from the record.—In *Anderson v. Watt*, 138 U. S. 694, the plaintiff attempted to confer jurisdiction upon the circuit court by dropping a party plaintiff from the record. The suit was brought in Florida by two executors, one of whom was a citizen of New York and the other a citizen of Great Britain, against a citizen of New York and citizens of Florida. After its institution the letters testamentary were revoked as to the New York executor, and the circuit court allowed an amendment, ordering the suit to be discontinued as to him and to proceed in the name of the British executor as sole surviv-

¹ *Anderson v. Watt*, 138 U. S. 694; *King Bridge Co. v. Otoo County*, 120 U. S. 225.

The fifth section of the judiciary act of March 3, 1875 (18 Stat. 470, 472), reads as follows:

"Sec. 5. That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; [but the order of said circuit court

dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ of error or appeal, as the case may be]." The last paragraph of this section, which is inclosed in brackets above, is expressly repealed by section 6 of the act of 1887. *Gurnee v. Patrick Co.*, 137 U. S. 141. But the remainder of the section is left in force. Section 5 of the act of March 3, 1891 (26 Stat. 826), gives the supreme court appellate jurisdiction over the circuit and district courts "in any case in which the jurisdiction of the [lower] court is in issue." But this statute does not authorize the supreme court to exercise appellate jurisdiction where no final judgment has been rendered in the lower court; and as an order dismissing or remanding a cause for want of jurisdiction is not a final judgment, it follows that the supreme court has not jurisdiction to review such an order, and will dismiss the writ of error or the appeal. *McLish v. Roff*, 141 U. S. 661; *Chicago R'y v. Roberts*, 141 U. S. 690.

ing executor. In this way the plaintiff hoped to cure the objection that some of the adverse parties were citizens of the same state of New York. The circuit court assumed jurisdiction and rendered judgment on the merits for the plaintiff. On appeal to the supreme court, however, this judgment was reversed for want of jurisdiction, on the ground that the jurisdiction was determined by the condition of the parties at the commencement of the suit, and that jurisdiction could not be given by an amendment afterwards. As expressed by Mr. Chief Justice Fuller on page 708: "Jurisdiction could no more be given to the circuit court by the amendment than if a citizen of Florida had sued another in that court and subsequently sought to give it jurisdiction by removing from the state."

§ 128. **Residence or inhabitancy of corporations.**—The use of the terms "residence" and "inhabitant," in the judiciary act of 1887, has been the source of numerous conflicting decisions in the circuit courts, and the authoritative view has not as yet been announced by the supreme court. In some circuits it has been held that a corporation is a citizen and a resident of the state creating it only, and that it cannot, by engaging in business in another state, even with that state's consent, acquire a "residence" therein, or become an "inhabitant" thereof, within the meaning of the act of 1887.¹

But the better view seems to be that announced by Mr. Justice Miller in *Hirschl v. Case Mac. Co.*, 42 Fed. Rep. 803, in these words: "A corporation is a citizen of the state under whose laws it is organized. For the purpose of suing and being sued, it may become a resident of each state in which it does business under state law." It was accordingly held that a corporation which is sued in the courts of the state other than that of its creation cannot remove

¹ *Fales v. Chicago E'y*, 32 Fed. Engine Co., 40 Fed. Rep. 1 (Mo., Rep. 673 (Iowa, Shiras, J.); *Myers* Brewer, J.); *Miller v. Wheeler Man.* v. Murray, 43 Fed. Rep. 695 (Iowa, Co., 46 Fed. Rep. 882. Shiras, J.); *Booth v. St. Louis Fire-*

the cause to a federal court when it is doing business in the state of process; because it is then a resident of that state, and only non-residents are entitled to a removal; and furthermore, the petition for removal must allege non-residence.¹

§ 129. Indispensable parties.—No very satisfactory definition of indispensable parties can be given; but they may be broadly described as parties whose interests are so interwoven and bound up with other parties that no judgment or decree can be made without necessarily affecting them.² If an indispensable party cannot be subjected to the jurisdiction of the particular circuit court in question, the jurisdiction is defeated, and the whole suit or action must be dismissed, not on the merits, but for want of jurisdiction.

Who are or are not indispensable parties depends largely upon the judiciary act in force at the time when the question arises; and persons occupying the same relation towards each other have been held under one act to be indispensable parties, and under another act to be not indispensable parties. Thus, under the act of 1789, all of the partners were considered indispensable parties, when the suit was on a firm debt; and if one of them was a citizen of the same state with the plaintiff, or if for any other reason he was not liable to be sued in the district chosen, the jurisdiction of the circuit court over the entire action was defeated; but under the act of 1839 this was not true, and the plaintiff could prosecute his action to judgment against any one or more of such joint debtors, as the circuit court chosen had jurisdiction over, without joining the others; and such non-joinder could not be taken advantage of in any way.³

¹To the same effect are *Riddle v. United States v. Southern Pac. R'y*, New York R'y, 89 Fed. Rep. 290 49 Fed. Rep. 297.

(Penn., 1889); *Miller v. Eastern* ²*Horn v. Lockhart*, 17 Wall. 570, Oregon Gold Min. Co., 45 Fed. Rep. 579; *Ribon v. Railroad Companies*, 845 (Oregon); *Zambrino v. Galves-* 16 Wall. 446, 450.

ton R'y, 38 Fed. Rep. 449 (Texas); ³*Barney v. Baltimore*, 6 Wall.

In a bill for partition of real estate, all the part owners or tenants in common are indispensable parties; and if any one or more of them cannot be subjected to the jurisdiction of the particular circuit court chosen, the entire suit must be dismissed for want of jurisdiction, even under the act of February 28, 1839 (R. S., sec. 737).¹ Speaking of those cotenants over whom the circuit court had not jurisdiction because they were residents of the District of Columbia and not citizens of any state, the court in the case just cited says on page 285: "If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties."

In a bill to foreclose a mortgage all the joint owners of the legal estate are indispensable parties defendant, and the jurisdiction is defeated if one of them is a citizen of the plaintiff's state.² In an action at law to enforce a bond, all the joint obligees are indispensable parties plaintiff; and if one of them be a citizen of the same state with the defendant, the circuit court must dismiss the entire action for want of jurisdiction.³

B. Locality when the suit is of a local nature.

§ 130. Jurisdiction of local suits not restricted by the judiciary act of 1887.—The territorial jurisdiction of the circuit courts of the United States in suits of a local nat-

280, 286; *Inbusch v. Farwell*, 1 Black, 566; *Clearwater v. Meredith*, 21 How. 489. But see *Commercial Bank v. Slocumb*, 14 Pet. 60.

¹ *Barney v. Baltimore*, 6 Wall. 280.

² *Detweiler v. Holderbaum*, 42 Fed. Rep. 337.

³ *Farni v. Tesson*, 1 Black, 309. As to who are or are not indispensable parties, see further: *Shields v. Barrow*, 17 How. 130; *Coiron v.*

ure is not restricted by the judiciary act of March 3, 1887, but remains the same that it was under the judiciary act of March 3, 1875.

When the action or suit is brought "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title of real or personal property within the district where such suit is brought," the jurisdiction is not defeated by the fact that two or more of the adverse parties are non-residents of that state or district,¹ nor by the fact that one or more of the defendants is not an inhabitant of or found within the district of suit, nor by the fact that one or more of the defendants does not voluntarily appear thereto.

In every one and all of these cases the circuit court where the property lies is given jurisdiction by section 8 of the act of 1875 (18 Stat. 470),² which section was not repealed by the act of 1887, but was expressly saved by section 5 of the later act.³

This section 8 was intended to supersede the act of June 1, 1872 (R. S., sec. 738).⁴ It authorizes the circuit court to acquire jurisdiction over such property by publication of notice, in case personal service upon an absent and non-resident defendant is not practicable.⁵ But the court cannot acquire jurisdiction of the defendant's person in that way; nor render a personal judgment against him.⁶

And it allows a defendant, who has not been "actually personally notified," one year after judgment, within which time he may enter his appearance and have the judgment

Millaudon, 19 How. 118; House v. ³ American Co. v. Benson, 33 Fed. Mullen, 22 Wall. 42; Kendig v. Rep. 456.

Dean, 97 U. S. 423; Goodman v. ⁴ Shainwald v. Lewis, 5 Fed. Rep. Niblack, 102 U. S. 556; Gregory 510, 517.

v. Stetson, 133 U. S. 579. ⁵ Goodman v. Niblack, 102 U. S. 537. ⁶ Insurance Co. v. Bangs, 103 U. S.

537. ² Goodman v. Niblack, 103 U. S. 485, 439.

556; Ames v. Holderbaum, 42 Fed. Rep. 341.

set aside, upon payment of costs; "and thereupon said suit shall be proceeded with to final judgment according to law." Until after the expiration of one year from the entry of the decree, it is not final against such defendant.¹

¹ *Mellen v. Moline Iron Works*, 181 U. S. 352, 365; *Beach v. Mosgrove*, 16 Fed. Rep. 805, 808.

The statute reads as follows:

"Sec. 8. That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court in its discretion, and upon proof of the service or publication of said

order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state: *Provided, however*, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law." Act of March 3, 1875, ch. 137 (18 Stat. 472).

§ 131. **Illustrations of local suits to enforce liens, etc.** The following are illustrations of local suits to enforce liens, etc., within the meaning of section 738 of the Revised Statutes, and of section 8 of the act of 1875:

A bill to foreclose a mortgage upon real estate.¹ A bill to enforce a claim or lien upon a specific fund within reach of the court.² A bill to enforce a lien created by a deed of trust.³

A creditor's suit to set aside a conveyance made by the debtor corporation while insolvent, in trust to secure certain preferred creditors, is a suit brought to remove an "incumbrance or lien or cloud upon the title to" property, within the meaning of section 8 of the act of 1875.⁴ But it was not within the previous statute of June 1, 1872 (R. S., sec. 738), because that statute gave this remedy only to *enforce* and not to *remove* such incumbrances or liens.⁵

This decision proceeds upon the ground that "when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." The trust deed created a lien upon the corporation's property in favor of the preferred creditors, superior to all other creditors. This lien was therefore an incumbrance or cloud upon the title to the prejudice of the unpreferred creditors. Until such lien or incumbrance was removed they could not know the extent of their interest in the property or in the proceeds of its sale. Their suit was therefore to remove a lien, cloud or incumbrance upon property in which they had an interest.

¹ Black v. Scott, 9 Fed. Rep. 186;
Ames v. Holderbaum, 42 Fed. Rep.
341.

² Goodman v. Niblack, 102 U. S.
556.

³ Mass. Mut. Ins. Co. v. Chicago
R'y, 13 Fed. Rep. 857.

⁴ Mellen v. Moline Iron Works,
131 U. S. 352.

⁵ Id., p. 366.

§ 132. Indispensable party defendant citizen of plaintiff's state.— But this act of 1875 does not confer jurisdiction over a suit of this local nature when an indispensable party¹ defendant is a citizen of the same state with the plaintiff. The act does not attempt to do this; and if it did, it would be unconstitutional and void, and would confer no jurisdiction; because the controversy would not be between citizens of different states, and thus not within the judicial power of the inferior courts of the United States as defined by the constitution.²

§ 133. Attachment of property as conferring jurisdiction.— By the laws of many of the states, an attachment of the non-resident's property will confer jurisdiction upon the court in a transitory action, and even a judgment by default will be deemed valid as against such attached property both in the federal courts and in the courts of other states, unless the defendant can show that it was not rendered in substantial accordance with the state laws, or that it was rendered without jurisdiction.³

An ordinary attachment suit, however, is not one to enforce a lien within the meaning of the act of congress of 1875 quoted above in section 130, and the plaintiff is not entitled to an order for substituted service of process upon a non-resident defendant. In the federal courts an attachment of property is regarded merely as an incident to a suit, and if the court has not jurisdiction without the attachment, the attachment will not confer jurisdiction and the action must be dismissed. The result is that a non-resident's ownership of property in a state does not of itself render him liable to a suit in a transitory action in a federal court sitting in such state. Even before the judiciary act of 1887, unless found therein and served personally with process, he

¹ As to who are indispensable parties, see section 129, *ante*.

² *Ober v. Gallagher*, 93 U. S. 199, 204; *Anderson v. Watt*, 138 U. S. 694.

³ *Cooper v. Reynolds*, 10 Wall. 308; *Pennoyer v. Neff*, 95 U. S. 714; *Morgan v. Neville*, 74 Pa. St. 52.

could appear specially and have the attachment dissolved and the case dismissed for want of jurisdiction.¹

The jurisdiction of the federal courts is still more restricted by the act of March 3, 1887, which omits the clause contained in the act of 1875, allowing suit between non-residents where the defendant is "found" in the district, and provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."²

§ 134. Removal of attachment suits from state to federal courts.—Where there is a valid attachment of a non-resident defendant's property in a state court, without valid personal service of process upon him, and he voluntarily appears and files a petition and obtains a removal to a federal court, he thereby waives his objections to the service of process, and is not entitled to have the cause dismissed when it reaches the federal court.³

"If a non-resident citizen of another state, when sued in a state court without personal service of the process, could remove the action to the circuit court, and there have it dismissed because no personal service was made, the states would be effectually debarred from executing all their laws for making service upon the property of non-residents."⁴

As indicated by the citation of cases above, there is some conflict among the decisions of the lower federal courts on this point; but the late decision of the supreme court in *Fitzgerald Construction Co. v. Fitzgerald*, 137 U. S. 98, seems to settle the question. In that case a foreign corporation was sued in a state court of Nebraska, and its property (a debt) was attached according to the state laws. The

¹ *Ex parte Railway Co.*, 103 U. S. 794; *Toland v. Sprague*, 12 Pet. 300, 330; *Picquet v. Swan*, 5 Mason, 35. *Northwestern Ins. Co.*, 2 Curtis, 212 (R. L. Curtis, J.); *Crocker Nat. Bank v. Pagenstetcher*, 44 Fed. Rep. 705.

² *Ante*, § 121; *Smith v. Lyon*, 133 U. S. 315, 319. *Contra: Perkins v. Hendryx*, 40 F. R. 657 (Mass., Colt, J.).

³ *Fitzgerald Constr. Co. v. Fitzgerald*, 137 U. S. 98; *Sayles v.* ⁴ *Per Curtis, J., in 2 Curtis, 212, 213.*

only service of process *in personam* was upon the president of the defendant corporation while he was casually in Nebraska, and not on the business of the corporation; nor was it engaged in business within the state. This service was clearly insufficient to confer jurisdiction *in personam* over the corporation without some conduct on its part amounting to a waiver. The defendant appeared in the state court and removed the cause to the United States circuit court for Nebraska, where these facts were relied upon to show that neither the state nor federal court had jurisdiction; but no motion to set aside the service was made in either court, and the defendant went to trial on the merits after its objection to the jurisdiction was overruled. It was held that the defendant's conduct showed a waiver of defective service of process, and authorized the federal court to render a judgment *in personam* against it; but that, if the defendant had not appeared, a judgment against it in the state court would only have been binding upon its property attached. In the language of the court, per Mr. Chief Justice Fuller, on page 105:

"If the case had gone to judgment under the attachment proceedings, it would only have subjected the property of the defendant lying within the territorial jurisdiction of the court to the payment of the plaintiff's demand. The case would have been in its essential nature a proceeding *in rem*. Had defendant moved to set the service aside and the motion been sustained, the court would not have dismissed the case for want of jurisdiction. The appearance of the defendant, however, converted into a personal suit that which was before a proceeding *in rem*. By its demurrer, petition for removal, answer and amended answer, and participation in the trial, the defendant waived all question of the service of process."

In this case the attachment was valid, and the state court acquired jurisdiction over the property attached.

When, however, the writ of attachment against a non-resident defendant in a state court is so defective as not to

subject the property to the court's jurisdiction, the defendant's appearance in the state court to obtain a removal to the federal court is no waiver of his objection to the jurisdiction, and after removal he may have the cause dismissed for want of jurisdiction.¹

¹ *Richmond v. Brookings*, 48 Fed. Rep. 241; *Hendrickson v. Chicago R'y*, 22 F. R. 569. The opinion in this latter case places the decision chiefly upon a broader ground than that indicated in the text, and it is inconsistent with Mr. Justice Curtis' opinion above quoted, which seems the better view. The true distinction is believed to lie between an attachment which confers jurisdiction upon the state court over the property attached, on the one hand (which prevents a subsequent dismissal by the federal court), and, on the other hand, an attachment which does not confer such jurisdiction (which allows a dismissal by the federal court after removal). The removal acts indicate no intention on the part of congress to defeat the attachment laws of the various states; and these laws would necessarily be defeated, if, after a valid attachment in a state court, a non-resident defendant could remove the cause to a federal court and there have the action dismissed for want of jurisdiction. When the attachment is sufficient under the constitution and laws to confer jurisdiction upon the state court, a judgment against the property, even without personal service of process upon, or voluntary appearance by, the non-resident defendant, must be given the same force and effect in the federal courts that it has in the local state courts. *Cooper v. Rey-*

nolds, 10 Wall. 308. It would seem that, in justice to the plaintiff, a non-resident defendant, owning property within a state, should not thus be enabled to hold it free from the liability of being taken for the payment of his just debts. Not even a judgment first obtained against the defendant in his own state would, under the contrary view, enable the judgment creditor to reach the defendant's property situated in another state; for a suit on the judgment would likewise be subject to removal and dismissal for want of jurisdiction, and there is no other way of enforcing the judgment in other states. An execution cannot be levied on property situated outside of the state in which the judgment is rendered. *Cole v. Cunningham*, 133 U. S. 107, 112. If the federal court does dismiss the suit for want of jurisdiction, no reason is perceived which prevents the state court from re-assuming jurisdiction over the original suit. If it does so, and if it renders judgment against the property upon a valid attachment, it seems clear that the judgment would be binding in all courts, federal and state. The rights of the respective parties are fixed at the time the removal is requested, so far as that particular suit is concerned. If, at that time, the attachment be sufficient to confer jurisdiction upon the state court, it would seem to be the duty of the

§ 135. Removal of suit in which jurisdiction is based upon plaintiff's fraud, etc.— So, where the state court's jurisdiction is based upon the fraud of the plaintiff,¹ or is based upon a service of process upon the non-resident defendant in violation of his privilege as a witness in another suit,² he may remove the cause to the proper federal court and procure its dismissal for want of jurisdiction. His appearance in the state court to file his bond and petition for removal is no waiver of his rights, under this state of facts, for the state court does not obtain jurisdiction by such process. When the defendant is a foreign corporation, and does not transact business in the state, and the only service of process is made upon its president while casually in the state on private business, the state court does not thereby acquire jurisdiction over the defendant, and its appearance in the state court to obtain a removal does not preclude it from having the service set aside when the cause reaches the federal court.³

federal court to remand the cause to the state court, and not to dismiss it, if it be of opinion that it has not jurisdiction itself.

¹ Blair v. Tuttle, 5 Fed. Rep. 394.

² Atchison v. Morris, 11 Fed. Rep. 582; Small v. Montgomery, 17 Fed. Rep. 365; *ante*, §§ 69, 76.

³ Reifsnider v. American Pub. Co., 45 Fed. Rep. 433.

CHAPTER IX.

ATTACHMENT AND GARNISHMENT.

§ 136. State may authorize attachment of non-resident's property within the state. 137. But not property situated outside the state. 138-139. Attachment of debts or intangible property. 140. Effect in other states of the garnishment of debts due non-residents. 141. Same — Protection of garnishee. 142. Estoppel by conduct. 143. Action for evasion of exemption laws of parties' common domicile. 144. Voluntary appearance of defendant operates as a waiver. 145. Fraud or collusion of garnishee. 146. <i>Lis pendens</i> in other jurisdictions. 147. Non-resident garnishee. 148. Liability to attachment is determined by law of the	state where property is situated. § 149. Qualifications of this rule — (1) Plaintiff's fraud. 150. (2) Evasions of exemption laws of the parties' common domicile. 151. (8) Evasions of the insolvent laws of the parties' common domicile. 152. Exemption laws liberally construed. 153. Non-residence as ground of attachment — Discrimination. 154. Dissolution of attachment in state courts by death or insolvency of defendant. 155. Garnishee's insolvency defeats lien. 156. Effect of defendant's death in federal courts. 157. Effect in federal courts of defendant's insolvency. 158. Dissolution of attachment by defendant's bankruptcy.

§ 136. State may authorize attachment of non-resident's property within the state.— Each state has the power to authorize the attachment of any property within its limits and jurisdiction, whether the property be owned by a resident, or a non-resident, or a foreign corporation. "The exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citi-

zens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident have no property in the state, there is nothing upon which the tribunals can adjudicate."¹ In a case coming up from the district of Wisconsin, the United States supreme court has said by Mr. Justice Miller: "There can be no question of the right of the legislature of Wisconsin to pass such laws as will subject property within her territory, held or owned by non-residents, to the payment of the debts of such owners; and the manner of doing this is also entirely within legislative control, provided it does not violate some of the provisions of the federal or state constitutions."²

It must not be inferred from the preceding quotations that a state cannot authorize the attachment of property by a non-resident plaintiff as well as by a resident plaintiff. Many states confer this right as fully upon the former as upon the latter class of plaintiffs; and such legislation has been described by the supreme court as "enlightened" legislation, even when both plaintiff and defendant were non-residents of the state of attachment.³

A judgment upon attachment obtained by a non-resident against a non-resident by default in a state which allows an attachment under such facts is entitled to full faith and credit in the courts of other states, even in the state in which both parties reside; and will authorize a sale of the attached property on execution. Such judgment and sale,

¹ Per Mr. Justice Field, for the court, in *Pennoy v. Neff*, 95 U. S. 714, 723, 724; *Picquet v. Swan*, 5 Mason, 35.

² *McGoon v. Scales*, 9 Wall. 23, 30.

³ *Green v. Van Buskirk*, 7 Wall. 139, 151.

being ordered by a court having jurisdiction of the property attached, divests the defendant's title and transfers it to the purchaser by operation of law. Hence, a suit for conversion cannot be maintained against the attaching creditor, or the sheriff, either in the same state or in any other state of the Union.¹

§ 137. But not property situated outside the state.—Property situated in one state cannot be attached on process issuing from another state. No state has the power to thus extend its jurisdiction beyond its own borders. The fact that the owner of the property is a citizen of the state of suit, or that, being a non-resident, he is found therein and served with process, does not authorize the attachment of his property situated elsewhere. If the plaintiff wishes to attach the defendant's property he must bring his action in the state where that property is situated. An attachment of property in another state would be an invasion of the jurisdiction of such state, and an abuse of legal process.

Property situated in a state other than that of suit can no more be seized on mesne process than on final process or execution. Even the "full faith and credit" which the constitution requires to be given to the judicial proceedings of other states does not authorize the seizure of property so situated on execution. A judgment must be obtained in the state where the property is situated before it can be seized on execution.²

These principles are nearly self-evident, and no attempt to violate or disregard them seems to have been made in the case of ordinary attachments. In the case of attachment by garnishee or trustee process, however, some state legislatures seem to have thought that they could authorize the attachment of the defendant's goods or credits situated in another state, if the person having the possession or custody of them could be found within the state of suit and

¹ *Green v. Van Buskirk*, 7 Wall. 139; *Keller v. Paine*, 107 N. Y. 83; *Cronan v. Fox*, 50 N. J. L. 417. ² *Cole v. Cunningham*, 133 U. S. 107, 112.

served with process. But the courts have, in general, declared either that the legislature had not the power to so extend its jurisdiction into another state, or have so construed the statute as to confine its operation to property situated within the state of process.

With respect to the garnishment of tangible property, it is well settled that the state in which it is situated has exclusive jurisdiction over it, wherever its owner may reside, and that another state has no jurisdiction over it for attachment purposes, even when the owner resides in the latter state. Hence, tangible property owned by a defendant, and situated in a state other than that of suit, cannot be attached by garnishment process, any more than it can be attached by ordinary process; and the fact that the garnishee is found in the state of suit does not render it liable to attachment. The property remains subject to the jurisdiction of the state where it is situated, and it does not follow the person of the garnishee, nor become subject to the jurisdiction of another state into which he may go.¹

The states of the Union, except as restrained by the national constitution, possess and exercise the authority of independent states or nations. As such each state has exclusive jurisdiction and sovereignty over persons and property within its territory. The states are of equal dignity and authority, and therefore no state can extend its process beyond its own borders so as to subject either persons or property to its tribunals. To do so would be to deny the equal dignity and authority of the other state, and to invade its exclusive jurisdiction.²

§ 138. Attachment of debts or intangible property.—

With respect to the attachment of debts due to non-residents of the state of process, much conflict of decisions exists;

¹Sutherland v. Second Nat. Bank, v. Brewer, 6 Gray (Mass.), 320; 78 Ky. 250; Pennsylvania R'y v. Wheat v. Platte City Railway Co., Pennock, 51 Pa. St. 244; Western 4 Kan. 370.
R'y v. Thornton, 60 Ga. 300; Bates ²Pennoyer v. Neff, 95 U. S. 714, v. Chicago R'y, 60 Wis. 296; Clark 722.

but the weight of judicial opinion seems to favor the view that a debt for purposes of attachment, as well as for many other purposes, has its *situs* at the residence of its owner, the creditor; that his state has exclusive jurisdiction over the debt, and that therefore no other state has the power to attach it. It is because the debt is beyond the jurisdiction of such other state that it is exempt from attachment; and, therefore, the fact that the debtor is found in the state of process, and the debt garnished in his hands at the suit of a person having a demand against the non-resident creditor, does not render the debt liable to attachment; for the debt does not follow the person of the debtor, and is still situated outside of the jurisdiction of the attaching court, at the residence of the creditor. No lien is created upon such property, because it is not within the jurisdiction of the court.¹

The Alabama case of *Louisville R'y v. Dooley*, *supra*, supports these views, and the opinion of the court, delivered by Chief Justice Stone, contains a satisfactory statement of the principles. In that case the defendant was a resident of Kentucky, and there performed services as yard-master for the Louisville & Nashville Railroad Company, and the company was garnished for this debt in Alabama. The company was organized under the laws of Kentucky, and the writ was served upon its local agent in Alabama. The defendant was not personally served, and did not appear; and the garnishee moved to be discharged. It was held that the *situs* of the debt was in Kentucky, because its owner, the creditor, resided there; that Alabama had no jurisdiction over it, and that therefore its courts could not attach it, even if the garnishee was properly served with process in Alabama.

¹ *Louisville R'y v. Dooley*, 78 Ala. 524; *Lovejoy v. Albee*, 33 Me. 414; *Columbus Ins. Co. v. Eaton*, 35 Me. 391; *Drake v. Lake Shore R'y*, 69 Mich. 168; *Nye v. Liscombe*, 21 Pick. (Mass.) 263; *Missouri Pacific R'y v. Sharitt*, 43 Kan. 375; *Green v. Farmers' Bank*, 25 Conn. 452; *Sawyer v. Thompson*, 24 N. H. 510, 516. *Contra*, *Cousens v. Lovejoy*, 81 Me. 467; *Burlington R'y v. Thompson*, 31 Kan. 180; *Fithian v. New York R'y*, 81 Pa. St. 114.

Chief Justice Stone assigns the following reasons for this decision: "Garnishment, like attachment, is a species of proceeding *in rem*. It acquires jurisdiction of the person *pro hac vice*, by seizing his property, goods or choses in action. If it cannot acquire jurisdiction or control of the *res*, it needs must fail to acquire, through such *res*, jurisdiction of the person; for jurisdiction of the person is acquired only through the *res* or thing. The debt in this case was contracted in Kentucky, the labor performed in Kentucky, for a corporation, and by a laborer, each resident in the state of Kentucky. The *situs* of a debt, in the absence of a stipulation to the contrary, is the domicile of the creditor. A court in Alabama cannot obtain legal control of the *res*, or make any binding disposition of it; for process of attachment, under our statute, cannot change rights of property situated without the state. Hence, if it had been shown that the Louisville & Nashville Railroad Company was doing business in the state of Alabama, by operating a railroad or railroads within its borders, this could not help the plaintiff in this suit." Pages 525-526.

§ 139. *Same*.—In a leading case in Maine, *Lovejoy v. Albee*, 33 Me. 414, the plaintiff was a resident, but the defendant and garnishee or trustee were non-residents of Maine. The defendant was not found in Maine, nor was any of his tangible property attached; but the trustee, who was indebted to the defendant in a certain sum of money, was found therein and summoned. This took place under a Maine statute which provided "that any person on whom a trustee process shall be served shall be liable to be adjudged trustee, though he was not then and never had been an inhabitant of the state." The defendant did not appear, and the trustee was discharged, notwithstanding the above statutory provision, on the ground that, by a sound construction of the statute, it did not authorize such an attachment. The reasoning of the court, however, goes much further, and is to the effect that the court would not have allowed the statute to operate upon such property, even if

that had been the intention of the legislature. Thus, Shepley, C. J., for the court, says:

“No country can by its laws act directly upon persons not resident or found therein, or upon their property not found therein. The courts of a state or country can have no jurisdiction beyond its sovereignty. No court in this state can rightfully have jurisdiction to render judgment against a foreigner, when he has not been found within the state, and when no property owned by him has been found within it.” Page 416.

In the Massachusetts case of *Nye v. Liscombe*, 21 Pick. 263, it appeared that the plaintiff was a resident, but that the defendant and garnishee were non-residents, of Massachusetts. The garnishee was found and served in Massachusetts, and the defendant was served only by publication. The court held that the garnishee could not be charged for the debt due to a non-resident, and Chief Justice Shaw assigned these reasons: “We think it very clear that an ordinary action at common law will not lie in this commonwealth against an inhabitant of another state, unless either his person or his property is found within the jurisdiction of the court. . . . The trustee being discharged, and no other property being attached but that in the hands of the trustee, there is no such service as to enable the court to take cognizance of the cause.” Page 265.

Nor does the fact that the garnishee resides within the state of process, when the defendant resides without it, seem sufficient to authorize the attachment of a debt due to the non-resident defendant. The debt follows the person of its owner, and is not subject to the jurisdiction of the debtor's state, when the creditor is a non-resident. It is well settled that a state has not the jurisdiction or power to discharge under insolvent laws a debt due to a non-resident creditor by one of its own citizens.¹

¹ *Baldwin v. Hale*, 1 Wall. 223, *Newmarket Bank v. Butler*, 45 N. 234; *Gilman v. Lockwood*, 4 Wall. H. 236; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Bean v. Loryea*, 409; *Bedell v. Scruton*, 54 Vt. 493; *Roberts v. Atherton*, 60 Vt. 503; 81 Cal. 151.

Now, the garnishee process operates to discharge a debt due from one person (the garnishee) to another person (the defendant), just as insolvent laws operate to discharge debts due from one person to another. The two kinds of discharges under state laws are strictly analogous upon the question of the power of the state to discharge the debt. The insolvency cases cited above establish that the debtor's state has not the power to discharge a debt due to a non-resident, by its insolvent laws; and for the like reasons, it follows that a state has not the power by its garnishee laws to discharge a debt due to a non-resident defendant, even when the garnishee is a resident of the state of process.

§ 140. **Effect in other states of the garnishment of debts due non-residents.**— For the reason that a state has not jurisdiction over a debt due to a non-resident, a judgment of a state court charging a garnishee for a debt due to a non-resident defendant, who has not been personally served or voluntarily appeared in the action, is not entitled to "full faith and credit" in the courts of other states. In its essential nature, garnishment is a proceeding which authorizes A. (the garnishee) to discharge a debt due to B. (the defendant) by payment to C. (the plaintiff). The ownership of the debt is transferred by operation of law from B. to C. B.'s title is divested and C.'s title is vested by operation of law, and without the consent of the original owner, B. This is the legal effect when the court acts with rightful jurisdiction over the *res, i. e.*, over the debt. But if the court acts without rightful or interstate jurisdiction, a judgment charging the garnishee and purporting to discharge the debt due by him to the defendant does not have that legal effect and is not entitled to full faith and credit in other states. When the defendant is a non-resident of the state of process, and is not personally served, or does not voluntarily appear, the court has no rightful jurisdiction over a debt due to him by the garnishee; and therefore a judgment of such court charging the trustee is not entitled to any faith and credit, or force and effect, in other

states, and the judgment without satisfaction will constitute no defense to an action against the garnishee by his own creditor in such other state.¹

In the Kansas case of *Missouri Pacific R'y v. Sharitt*, 43 Kan. 375, will be found a learned discussion of this question, pro and con, in the concurring opinion of Judge Valentine, and in the dissenting opinion of Chief Justice Horton. The facts in this case were briefly as follows: The plaintiff, Sharitt, was a resident of Kansas, and there performed services as yard-master for the defendant railroad, for which services the debt in suit accrued. The defendant was a corporation organized under the laws of Missouri, and before this present action was brought in Kansas, it was garnished in a Missouri state court for this same debt, at the suit of one Stewart, a resident of Missouri, and claiming to have a demand against Sharitt. In the garnishment suit of *Stewart v. Sharitt*, the latter, being a non-resident of Missouri, was served only by publication, and did not appear in the action. Stewart obtained judgment, and the garnishee was charged in the lower Missouri court, but took an appeal to a higher court of that state. Pending that appeal, the present action was brought in Kansas against the railroad company, and it set up in defense the Missouri proceedings, claiming for them full faith and credit, and urging the injustice of subjecting the garnishee to double liability. The supreme court of Kansas held that the Missouri proceedings constituted no defense to this action, and gave judgment for the plaintiff, Sharitt. Valentine, J., says on page 382: "My concurrence in the decision in the case is founded almost wholly upon the theory that the Missouri court has no jurisdiction of Sharitt, or of anything belonging or appertaining to him, and therefore that there can be no such thing as a *lis pendens* by virtue of the Missouri proceeding with regard to the subject-matter of this action, which is the debt, and nothing in the Missouri

¹ *Renier v. Hurlbut*, 50 N. W. Rep. 783; S. C., 80 or 81 Wis. 000; *post*, § 216.

proceeding that can be considered as valid or binding as against Sharitt.”¹

This rule does not oblige the garnishee to pay the debt twice; for his remedy is to prove the Kansas judgment in the Missouri appellate court, and, under the “full faith and credit” clause, that court would be obliged to give effect to the Kansas judgment and to discharge the garnishee, because the Kansas court acted with full and rightful jurisdiction. If it should refuse to give this effect to the Kansas judgment, it seems clear that the supreme court of the United States would reverse the judgment, as contravening the constitutional provision above mentioned.

Cole v. Cunningham, 133 U. S. 107, seems also to support the proposition that garnishee proceedings against a debt due to a non-resident, non-served and non-appearing defendant, are not entitled to full faith and credit in other states. In that case a Massachusetts creditor brought an action in New York against his Massachusetts debtor, and garnished a debt due the defendant by a resident of New York. The defendant was then adjudged insolvent under the Massachusetts insolvent laws, and his insolvency assignee brought a bill in equity in Massachusetts against the attaching creditor, to enjoin the prosecution of the New York suit. It was held that a Massachusetts decree enjoining the prosecution of such New York attachment suit did not violate the “full faith and credit” clause of the federal constitution. Upon the principles above stated, it seems clear that the New York garnishee proceedings were not entitled to any faith and credit, or force and effect, in Massachusetts, because the proceeding was merely *in rem*,

¹ This decision may be regarded as an illustration of the general proposition that, when a proceeding can at most operate only *in rem*, a judgment or decree rendered by a court without jurisdiction over the *res*, purporting to change its title, is not entitled to any faith and credit in other states. *Taylor v. Carryl*, 20 How. 583; *Carpenter v. Strange*, 141 U. S. 87; *Davis v. Headley*, 22 N. J. Eq. 115; *Thompson v. Whitman*, 18 Wall. 457.

and the New York court had no rightful or interstate jurisdiction over the *res* or debt, as it was situated outside of the jurisdiction of the New York court, at the residence of its owner in Massachusetts.

This also seems to be the true ground of decision in *Stark v. Bare*, 39 Kan. 100.

The Iowa case of *Moore v. C., R. I. & P. R'y*, 43 Iowa, 385, holds the contrary view, namely, that service of process upon a garnishee gives jurisdiction over a debt due to a non-resident defendant who was served only by publication, and did not appear; that a judgment charging the garnishee, being rendered by a court having jurisdiction, is entitled to "full faith and credit" in other states; that such judgment will operate to transfer the title to the debt from the defendant to the plaintiff in garnishment; and that therefore payment by the garnishee to the attaching plaintiff, even without notice to the non-resident defendant, will protect the garnishee in an action brought against him by his own creditor in another state.

§ 141. **Same—Protection of garnishee.**—Even if the garnishee court be of the opinion that the other court was mistaken in its view that the garnishee court had not jurisdiction over the property attached, still, if the garnishee pays in good faith a judgment against him by such other court, he should not be compelled to pay the same debt again. This rule proceeds upon the ground, as stated by Gray, C. J., that the garnishee, "being a mere stakeholder, summoned into a suit in which he has no personal interest, is entitled to the protection of the court under circumstances in which an ordinary defendant might be held liable."¹

In the Massachusetts case just cited, after this garnishee process was instituted, the defendant brought in the United States district court for southern New York a libel *in rem* against a vessel owned by the garnishee to enforce his lien

¹ *Eddy v. O'Hara*, 132 Mass. 56, 61.

for wages as a seaman. The lower court of Massachusetts rendered judgment charging the garnishee for such wages, and the garnishee appealed. Pending this appeal, the proceeding *in rem* came on for trial in the federal court. The garnishee set up in defense the Massachusetts judgment; but that court held that seamen's wages were exempt from attachment; that the state court had no jurisdiction over the debt or wages garnished, and that therefore the state judgment was no defense, and rendered judgment for the libellant.¹ This judgment of the federal court was not appealable, and the garnishee paid the wages to the seaman, and then set up such payment in defense to the state action. The state court recognized it as a valid defense, and discharged the garnishee from further liability, although it inclined to the view that seamen's wages were not exempt from attachment under the garnishee process of Massachusetts, and expressly so decided in the later case of *White v. Dunn*, 134 Mass. 271.

§ 142. **Estoppel by conduct.**—Although such a judgment purporting to discharge by garnishee proceedings a debt due to a non-resident defendant is not entitled as a matter of constitutional law to "full faith and credit" in other states, yet the facts of the case may be such as to create an estoppel by conduct against the defendant in garnishment, which will prevent him from maintaining an action against the garnishee for the same debt. Thus, if the non-resident has actual notice of the pendency of the garnishee proceedings, and allows them to proceed without objection, and after judgment the garnishee pays the debt to the attaching plaintiff, this relieves the garnishee from further liability for the same debt, if he acted in good faith and without collusion.²

It seems that the best way to protect the rights of a defendant, who has received actual notice that a debt due him has been garnished in another state, is to notify the

¹ *McCarty v. Steamer "City of New Bedford,"* 4 Fed. Rep. 818. ² *Morgan v. Neville*, 74 Pa. St. 52.

garnishee that the debt is not subject to the jurisdiction of the garnishee court; that he will regard a payment by the garnishee as a payment in his own wrong, and to bring a suit against the garnishee as soon as possible. This suit may be either (1) an action at law to recover the debt, or (2) a bill in equity against the attaching plaintiff to enjoin the prosecution of his action at law, if the case contains facts conferring jurisdiction in equity; for instance, that the action at law is brought in fraud or evasion of the exemption laws of the parties' common domicile.

Estoppel *in pais* seems also to be the true ground for the judgment in *Campbell v. Home Ins. Co.*, 1 S. C. 158. So, likewise, in *Carson v. Railway Co.*, 88 Tenn. 646, it appears that the non-resident defendant had actual notice of the garnishment of his debt in Alabama, and that he failed to notify the garnishee not to pay it or to bring suit until after the garnishee had been charged and paid the judgment. By such conduct the non-resident creditor misled the garnishee to his prejudice, and therefore he should not be allowed to entail a double liability upon the garnishee. The fact that the debt was exempt as wages in Tennessee did not render it exempt in Alabama; and, as the garnishee paid the debt in good faith and under the order of the Alabama court, he should not be forced to pay it again in Tennessee.

But where the defendant has no notice of the pendency of the garnishee suit, and the court renders judgment against him and his property in the garnishee's hands without rightful jurisdiction over either, he is not estopped; and even payment by the garnishee to the attaching plaintiff is no defense for the garnishee when sued by his own creditor, the original defendant.¹

¹ *Fisher v. Lane*, 3 Wilson, 297. This statement of the point decided in *Fisher v. Lane*, *supra*, is warranted by the facts of the case, and seems to reconcile the judgment with *Banks v. Self*, 5 Taunt. 234; *Harrington v. MacMorris*, 5 Taunt. 228; and with *Chevalier v. Lynch*, 1 Doug. 170. In *Fisher v. Lane* the garnishee court had no

If the non-resident defendant die before the institution of the garnishee action, there is a total want of jurisdiction, and a judgment rendered against him and charging the garnishee is null and void. Consequently, payment to the plaintiff will not discharge the debt due the defendant; and his administrator may maintain an action against the garnishee to recover the same debt, although the latter had no knowledge of the death at the time of making payment.¹

In the Georgia case of *Molyneux v. Seymour*, 30 Ga. 440, another phase of this question was presented, in the form of a race of diligence between two creditors of the same debtor, both of whom garnished the same person. The defendant and garnishee were both residents of Georgia; but, prior to this suit, the garnishee had been found in South Carolina by creditor A. and there summoned as garnishee for a debt due the defendant. The South Carolina court, after judgment by default against the defendant, held that the garnishee was chargeable for the debt, and he paid it to creditor A. Upon his return to Georgia, he was garnished again for the same debt by the present plaintiff, acting upon the view that payment of the South Carolina judgment did not release the debt from attachment in Georgia; but the court held otherwise, and discharged the garnishee. It is obvious that this case does not depend upon the doctrine of estoppel. The true ground seems to be, that, as there was no fraud or collusion on the garnishee's part, no one could object to his payment of the judgment except his own creditor. That creditor was the sole owner of the attached debt,

jurisdiction over the defendant's person, because he was not served with process, and it had no jurisdiction over his property in the hands of the garnishee, because it was not attached until *after* judgment by default had been rendered against the defendant. Hence, the judgment was void for want of jurisdiction (*Pennoyer v. Neff*, 95

U. S. 714), and the garnishee was not authorized in paying it; and as the defendant's conduct did not create an estoppel against him, he could impeach the judgment collaterally, and recover his demand against the garnishee.

¹ *Loring v. Folger*, 7 Gray (Mass.), 505.

and the only one having the legal right to complain of its discharge by payment to another person.

So, in *Garity v. Gigie*, 130 Mass. 184, where a person was garnished twice for the same debt, first in New Hampshire and secondly on the same day in Massachusetts, and, being charged in New Hampshire, paid the debt to the plaintiff there, it was held that such payment afforded "a conclusive reason for not charging him anew" in Massachusetts.

§ 143. Action for evasion of exemption laws of parties' common domicile.—The transfer of a just debt against a home debtor to a citizen of another state for collection, by means of garnishee proceedings, and its collection by such process in accordance with the laws of that state, do not constitute a cause of action upon which the debtor can maintain an action against the creditor, even if the property garnished be exempt from attachment or garnishment under the laws of the parties' common domicile, and the transfer of a debt for such purposes be prohibited by a statute of their domicile. It is a case of *damnum absque injuria*.¹

In the Georgia case just cited, in which the garnishment was made in Tennessee, of property (wages) which were exempt in Georgia, the common domicile of the parties, the court says on page 128, in delivering judgment for the creditor: "The plaintiff may have had his election to bring the defendant's rights, as against his wages, to the test of Georgia law, or allow them to be tested by Tennessee law. This election could be exercised, however, only in due time and proper manner. He could not allow the law of Tennessee to be applied to the case, and afterwards, by such an action as this, have the law of Georgia applied to it. His remedy, if he had any, was to prevent by injunction upon his adversary the application of Tennessee law as a rule of adjudication. This he did not do, otherwise than by paying the debt."

¹ *Uppinghouse v. Mundel*, 103 Ind. *Contra*, *Kestler v. Kern*, 28 N. E. 238; *Harwell v. Sharp*, 85 Ga. 124. Rep. 726 (Ind. App. Ct.).

But where the debt is not a just one, or where a set-off exists which is sufficient to cancel the debt, and the transfer is made for the purpose of evading the exemption laws of the parties' common domicile, the debtor can maintain an action against the creditor and recover all damages which he actually sustained by reason of such conduct.¹

§ 144. Voluntary appearance of defendant operates as a waiver.— When the non-resident defendant voluntarily appears in court, he thereby waives his exemption as the non-resident owner of a debt, and his debt becomes subject to the jurisdiction and power of the state. A judgment may therefore be rendered charging the garnishee, and payment to the plaintiff will operate to discharge the debt due to the defendant.²

So, likewise, in the analogous case of insolvent laws, if the non-resident creditor voluntarily appear in the insolvency court, he thereby waives his exemption as the non-resident owner of a debt, and submits it to the jurisdiction, and therefore the state has the power to discharge the debt, and this discharge will be valid in other jurisdictions.³

§ 145. Fraud or collusion of garnishee.— If, however, there is the slightest tinge of fraud or collusion on the part

¹ *Stark v. Bare*, 39 Kan. 100. In this case the wages garnished were earned and payable in Kansas, under whose laws they were exempt from garnishment, and they were garnished in Missouri, under whose laws they were not exempt. As the owner of the wages was a resident of Kansas and they were payable in that state, it follows that they were subject to the jurisdiction and laws of Kansas, and not to the jurisdiction of Missouri. Hence, as the wage-earner was not personally served with process in Missouri and did not appear in that action, the judgment of the Missouri court was rendered without jurisdiction, and was not entitled to "full faith and

credit" in Kansas, and therefore the Kansas judgment seems not to contravene that clause of the national constitution. In other words, in such an action the plaintiff may show that the cause of action sued upon in the other state is not a just cause of action, notwithstanding a judgment by involuntary default against him in the first action.

² *Young v. Ross*, 31 N. H. 201; *Lawrence v. Smith*, 45 N. H. 533, 539.

³ *Clay v. Smith*, 3 Peters, 411; *Journey v. Gardner*, 11 Cush. (Mass.) 355; *Blackman v. Green*, 24 Vt. 17, 21.

of the garnishee, his payment of the judgment will afford him no protection in other states when sued by his own creditor.¹

In the Massachusetts case of *Whipple v. Robbins*, *ubi supra*, it was held that the mere failure of the garnishee to disclose to the Connecticut court in which he was garnished the pendency of this prior suit against him as defendant in Massachusetts was collusion on the garnishee's part; and that therefore his payment of the Connecticut judgment, which was obtained against a non-served and non-resident defendant on default, constituted no defense in Massachusetts.

So it has been decided in other states, that when the defendant is a non-resident of the state of suit, and is not personally served therein and does not appear, the garnishee is under a legal duty to notify him of its pendency, if able to do so; and that if he fails to notify such defendant, payment of the judgment to the attaching plaintiff will constitute no defense to a suit brought against him by his own creditor in another state.²

§ 146. Lis pendens in other jurisdictions.— It has been decided by the supreme court of the United States that if, while an ordinary action is pending in a federal court of competent jurisdiction, the defendant is summoned in a state court and charged as garnishee for the plaintiff, this will constitute no defense in the federal court, even if the two courts be held within the same state. The court assigned these reasons, by Mr. Justice Thompson:

“The jurisdiction of the district court of the United States and the right of the plaintiff to prosecute his suit in that court, having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that

¹ *Wilkinson v. Hall*, 6 Gray (Mass.), 568; *Whipple v. Robbins*, 97 Mass. 107; *Pierce v. Chicago R'y*, 36 Wis. 283.

² *Pierce v. Chicago R'y*, 36 Wis. 283; *Morgan v. Neville*, 74 Pa. St. 52. See, also, *Terre Haute R'y v. Baker*, 122 Ind. 433.

would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment upon the note in question.”¹

A like rule applies as between the courts of different states. If the garnishee has been sued by his own creditor in one state he cannot be charged as garnishee of the same debt in a suit subsequently commenced in another state. “The doctrine constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea. It is essential to justice, and the protection of the party summoned as trustee, who might otherwise be harassed and imperiled without any fault of his own.”² It was therefore held, in the Massachusetts case just cited, that the garnishee process in Massachusetts must yield to the prior action in Maine; and the garnishee was discharged.

So, also, when the garnishee suit is the one first commenced in the other state or jurisdiction, provided the court acquires rightful interstate jurisdiction of the property garnished. In such case, *lis pendens* is a good plea in abatement to a subsequent suit, brought against the garnishee by his own creditor.³

In the New York case of *Embree v. Hanna*, Kent, C. J., thus states the reasons for this rule:

“The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditor; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a *lien* upon the debt, binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. . . . If we were to

¹ Wallace v. McConnell, 13 Peters, 136, 151.

³ Embree v. Hanna, 5 Johns. (N. Y.) 100.

² Per Foster, J., in American Bank v. Rollins, 99 Mass. 313, 315.

disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume that, if the priority of attachment in Maryland be ascertained, the courts in that state would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad, and subjecting himself to a suit and recovery here." Pages 103, 104.

If, however, the garnishee court has not acquired rightful, interstate jurisdiction over the property garnished, the pendency of such suit is not a good plea, either in abatement or in bar, in a subsequent suit brought against the garnishee by his own creditor in another state or jurisdiction. For there can be no such thing as *lis pendens* with regard to a subject-matter over which the court has not jurisdiction.¹

§ 147. Non-resident garnishee.—There seems to be no doubt that a state has the power to subject a non-resident who is found in the state to its garnishee process, and to compel him to disclose, and to charge him as garnishee for, all the defendant's property situated within the state and under his control.² And the same rule applies to foreign corporations which have a place of business in the state, and an agent upon whom process may be lawfully served.³

¹ *Missouri Pacific R'y v. Sharitt*, 43 Kan. 375, 382, per Valentine, J.; *M'Carty v. Steamer "City of New Bedford"*, 4 Fed. Rep. 818.

² *Young v. Ross*, 31 N. H. 201.

³ *National Bank v. Huntington*, 129 Mass. 444; *Hannibal R'y v. Crane*, 102 Ill. 249; *Selma R'y v. Tyson*, 48 Ga. 351; *Cousens v. Lovejoy*, 81 Me. 467. It is true that in some of the above-cited cases the property attached by garnishee process served on a non-resident or foreign corporation was a debt due to a non-resident of the state of process, who was not served and did not appear. Hence, according to what is believed to be the better view, the property attached was not situated in the state of process and the garnishee cannot be charged for the debt. But these cases proceed upon the theory that such a debt is situated in the state of process, as it is supposed to follow the person of the debtor (the garnishee), and therefore the cases cited do support the proposition that the state has the power to subject a non-resident garnishee to the pro-

To exercise this power would in many cases, however, lead to inconvenience and hardship, by compelling the garnishee to answer to a suit pending in a court a long distance from his home. Influenced by these considerations, the courts have construed garnishee statutes strictly, and have declined to charge a non-resident or foreign corporation as garnishee, unless the legislative intention so to do was expressed in language clear and unambiguous.¹

This rule of strict construction is adopted for the protection of the garnishee. Hence the fact that both plaintiff and defendant are residents of the state of process does not vary the rule, when the garnishee is a non-resident and served with process while temporarily within the state. In a case with these facts in Rhode Island, *Cronin v. Foster*, 13 R. I. 196, 197, the court, by Potter, J., assigns these reasons for the rule:

“By the custom of London, whence the process arose, no person could be served as trustee unless he resided within the jurisdiction of the court. And to this effect was the decision of many of the earlier cases here in the United States.

“When a person transiently in another state is sued for his own debt, it is a different case. But if a person by garnishment is compelled, in order to satisfy a debt not his own but due from one of his creditors, to pay his own debt in a mode very different from that in which he would otherwise have paid it, or to carry goods perhaps of weight from his own state into another in order to discharge himself, it might in many cases be a hardship; and this has led the courts, and very properly, to a great degree of strictness in deciding on the liability.”

cess of its courts, and to charge him for all the defendant's property under his control within the state. 564; *Gold v. Housatonic R'y*, 1 Gray (Mass.), 424; *Green v. Farmers' Bank*, 25 Conn. 452; *Sawyer v.*

¹ *Baxter v. Vincent*, 6 Vt. 614; *Thompson*, 24 N. H. 510; *Wheat v. Tingley v. Bateman*, 10 Mass. 343; *Platte City R'y*, 4 Kan. 370. *Danforth v. Penny*, 3 Met. (Mass.)

When both the defendant and the garnishee are non-residents of the state of process, and the defendant is not personally served and does not appear, a judgment charging the garnishee for a debt due without the state is void as against the defendant for want of jurisdiction over him or over his property. Hence, when the garnishee is sued by his own creditor, such garnishee judgment may be impeached collaterally, and will constitute no defense for the garnishee, even in the same state of its rendition.¹

When, however, the defendant as well as the non-resident garnishee are both personally served with process in the state of suit, a judgment charging the garnishee upon default is not void, but at most only irregular or erroneous; and therefore it cannot be impeached collaterally by the garnishee when he is sued upon such judgment. Having been duly served with process, it was the garnishee's duty, although a non-resident, to appear and answer and claim his immunity from the process; and having failed to do so at the proper time, he must bear the consequences and pay the judgment.²

§ 148. Liability to attachment is determined by law of the state where property is situated.—The liability of property belonging to non-residents to be attached and sold under legal process is determined by the law of the state in which the property is actually situated and from whose courts the process issues, and is not determined by the law of the state in which the owner resides. Hence, in case of conflict between the laws of these two states, the law of the former governs.³

In the New York case of *Keller v. Paine*, *ubi supra*, all the parties were residents of Pennsylvania, under whose laws a mortgagee had a better title than a subsequent attaching creditor, although the mortgagee had not taken

¹ *Columbus Ins. Co. v. Eaton*, 35 Me. 391.

² *Lawrence v. Smith*, 45 N. H. 533.

³ *Keller v. Paine*, 107 N. Y. 83, reversing *Keller v. Paine*, 34 Hun (N. Y.), 167; *Cronan v. Fox*, 50 N. J. L. 417.

possession of the property, or had his mortgage recorded, until after the attachment was made. The property, which consisted of a canal-boat, was, however, found and attached in New York by process issuing from a New York court of competent jurisdiction; and, after judgment for the attaching creditor, it was sold in satisfaction of his demand. In an action by the mortgagee for converting his property, based upon the theory that the law of the parties' residence (Pennsylvania) governed the case, it was held by the New York court of appeals that the law of New York governed the case, notwithstanding the fact that all the parties were non-residents of that state; that according to the laws of New York the attaching creditor had a better title than the mortgagee; and that therefore the mortgagee could not recover.

So, also, exemptions from attachment are as a general rule governed by the law of the state in which the property is attached, and not by the law of the state in which its owner resides. The fact that the defendant owner resides in another state is immaterial; because, for the purpose of attachment, his property is subject to the exclusive jurisdiction and laws of the state where it is actually situated, and the only exemptions allowed are those given by the laws of that state.¹

§ 149. Qualifications of this rule — (1) Plaintiff's fraud. But there are some qualifications to these rules, as follows:

If a creditor fraudulently induces his non-resident debtor to take property from a state in which it is exempt from attachment to a state in which it is liable to attachment, and there causes it to be attached, the attachment is void, and both the creditor and the attaching officer are liable in damages as trespassers; for "a valid and lawful act cannot

¹ Mineral Point R'y v. Barron, 83 Ill. 365; Burlington R'y v. Thompson, 31 Kan. 180; Boykin v. Edwards, 21 Ala. 261, 264; Morgan v. Neville, 74 Pa. St. 52; Moore v. C., R. I. & P. R'y, 43 Iowa, 385; Carson v. Railway Co., 88 Tenn. 646; Stevens v. Brown, 20 W. Va. 450; First National Bank v. Burch, 80 Mich. 242.

be accomplished by any unlawful means, and wherever such unlawful means are resorted to, the law will interpose to restore the party injured thereby to his rights.”¹

In *Deyo v. Jennison*, *supra*, the creditor's fraud consisted in the false representation that a person in Massachusetts wished to employ the debtor (a citizen of New York state) to transport a load of goods from a town in Massachusetts to a town in New York, whereby the debtor was induced to take his horses and wagon to Massachusetts, where the creditor attached them. The court held that not only the creditor, but also the attaching officer, were liable in damages to the debtor for this fraudulent attachment of goods, which by the law of New York were exempt.

In *Pierce v. Chicago, etc. R'y*, 36 Wis. 283, it was held that a railroad corporation organized under the laws of Wisconsin and Illinois which was summoned as garnishee in Illinois of its employee living in Wisconsin, and failed to notify him of the attachment, and also failed to set up the exemption laws of Wisconsin, was, after payment to the judgment creditor in Illinois, bound to pay the same sum again to its employee in Wisconsin.

§ 150. (2) Evasions of the exemption laws of the parties' common domicile.—Some interesting questions have arisen under this head; and it is now firmly established, not only that the state of the parties' common domicile has the power to enjoin the prosecution of a garnishee suit in another state in which a debt was attached, but also that the courts of such state will exercise that power when the attachment is made in evasion or in fraud of the exemption laws of the parties' common domicile.²

¹*Deyo v. Jennison*, 10 Allen (Mass.), 410.

²*Snook v. Snetzer*, 25 Ohio St. 516; *Zimmerman v. Franke*, 34 Kan. 650; *Keyser v. Rice*, 47 Md. 203; *Teager v. Landsley*, 69 Iowa, 725; *Wilson v. Joseph*, 107 Ind. 490. *Slumper v. Wilson*, 72 Iowa, 163,

seems, however, to carry this doctrine of enjoining suits in other states too far, and to amount to an invasion of the jurisdiction of another state and to deprive an attaching plaintiff of a valid lien, obtained in accordance with the laws of the state of process. In this case,

In the recent Michigan case of *Drake v. Lake Shore Railway*, 69 Mich. 168, it was held that a debt contracted and payable in Indiana between residents of that state, which by the law of Indiana was exempt as wages, was thereby rendered exempt from attachment by garnishee process in Michigan; for the reason that such exemption was a vested right *in rem*, which followed the debt everywhere, and which the courts of other states would recognize and enforce as against an Indiana attaching creditor. The Indiana citizen therefore failed in his attempt to appropriate such

a resident of Iowa brought suit in Nebraska against his home debtor, and attached the defendant's wagon and horses, which the defendant had voluntarily taken into Nebraska for a temporary purpose. This property was exempt under the laws of Iowa, but not under those of Nebraska. The debtor then brought this suit in Iowa, and the court enjoined the creditor from prosecuting his attachment suit in Nebraska, on the ground that he was attempting to evade the exemption laws of his own state. The fact that the Nebraska court had rightful jurisdiction over the property attached was not considered an obstacle to defeating a lien given by the Nebraska laws. In this the court seems to have committed an error, and to have failed to give due effect to the judicial proceedings of Nebraska. The court relies upon the supposed analogy of the garnishment of a debt due to a non-resident defendant, and the enjoining of such an attachment suit, acting upon the view that a debt follows the person of the debtor (the garnishee). But the better view seems to be the contrary, namely, that a debt is situated at the creditor's residence, and therefore cannot be attached in an-

other state. The attaching state has no jurisdiction over the debt; and therefore to enjoin the prosecution does not invade its jurisdiction or defeat any valid lien. When, however, tangible property within the state is attached and a lien established in accordance with its laws, the attaching creditor, whether resident or non-resident, acquires a right under such judicial proceedings, which is protected from adverse action on the part of another state by the full faith and credit clause of the federal constitution. *Warner v. Jaffray*, 96 N. Y. 248; sec. 174, *post*. A citizen of any state is also a citizen of the United States, and he has certain rights under the laws of each government. When his rights or liabilities as defined by state law conflict with those given or imposed by the federal constitution, the former must give way and the latter prevail. One of his rights given by that constitution is the right to acquire a valid lien or claim upon tangible property attached by him in another state, in accordance with its laws, and this right cannot be defeated by a law or decision of his own state. *Green v. Van Burskirk*, 7 Wall. 139; *Warner v. Jaffray*, 96 N. Y. 248.

an Indiana debt to the payment of his claim by using the process of the Michigan courts; and those courts prevented him from evading the exemption laws of his own state by giving an extraterritorial effect to the Indiana law.

§ 151. (3) **Evasions of the insolvent laws of the parties' common domicile.**— So, also, if a creditor attempts to evade the operation of the insolvent laws of his own state by garnishing in another state a debt due to his home debtor, he will be enjoined from prosecuting such attachment suit at the instance of the assignee in insolvency.¹

§ 152. **Exemption laws liberally construed.**— Exemption laws are liberally construed in favor of the owner, and their benefit is extended to non-residents as well as to residents of the state of process, unless the legislature's intention to exclude non-residents from their benefit is clear and manifest. "Nothing short of the express language of a statute would justify us in saying that a person may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture, and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress."²

§ 153. **Non-residence as a ground of attachment — Discrimination.**— In many states, the mere fact that a defendant is a non-resident of the state of process, or a foreign corporation, is made by statute a sufficient ground for allowing an attachment of the defendant's property on mesne process. In some states the right to attach the property of a non-resident defendant is confined to resident plaintiffs; in others, this right is conferred upon both resident and non-resident plaintiffs.

¹ *Cole v. Cunningham*, 133 U. S. 107; affirming *Cunningham v. Butler*, 142 Mass. 47; *Dehon v. Foster*, 4 Allen (Mass.), 545. This subject is discussed at length in chapter X, §§ 170-174, *post*.

² Per *Williams, J.*, for the court, in *Haskill v. Andros*, 4 Vt. 609, 611; *Hill v. Loomis*, 6 N. H. 263; *Mineral Point R'y v. Barron*, 83 Ill. 365; *Lowe v. Stringham*, 14 Wis. 222; *Sproul v. McCoy*, 26 Ohio St. 577. But see *Allen v. Manasse*, 4 Ala. 754.

In those states whose laws allow an attachment of the property of a non-resident defendant, but not of a resident defendant, it is clear that there is some discrimination against non-residents. For this reason, when the defendant is a citizen of a state other than that of suit, such laws have been attacked, as working an unconstitutional discrimination against citizens of other states. This point has not as yet been decided by the supreme court of the United States; but some of the highest state courts have decided in favor of the validity of such statutes, and there seems to be no doubt of the correctness of these decisions.¹

A person's property should, with certain exceptions, be liable for his debts, and, since the abolition of imprisonment for debt, the creditor's sole means of obtaining satisfaction from a non-resident debtor is to attach his property on mesne process. To seize his property on execution merely, without preliminary seizure on mesne process, is contrary to due process of law and the fourteenth amendment, and confers no claim or title upon the attaching creditor, unless the debtor has been personally served with process in the state, or has voluntarily appeared in the suit.²

From these reasons it follows that, if attachment were not allowed for non-residence of defendant, he could, while owning thousands of dollars' worth of property in various states, escape liability for debts by simply taking up his residence in another state where he owned no property.³

In the case of a resident defendant these considerations do not apply. He may be legally served with process in the state of his residence, and, after judgment against him, his property may be seized on execution, and a sale thereunder violates no constitutional provision; for no preliminary seizure on mesne process is required in such case.

On these grounds it is believed that such attachment laws discriminating against non-resident defendants do not

¹ *Pyrolusite Co. v. Ward*, 73 Ga. 491; *Campbell v. Morris*, 3 Har. & McHen. (Md.) 533.

² *Pennoyer v. Neff*, 95 U. S. 714.

³ *Laughlin v. Louisiana Ice Co.*, 35 La. Ann. 1184.

contravene the national constitution. It is not every discrimination that amounts to an unconstitutional discrimination.¹

Some states require a plaintiff who wishes to attach property to execute a bond or undertaking in favor of the defendant, to indemnify him for any loss caused by an unlawful attachment. In Kansas and some other states this right to receive an indemnity bond is confined by statute to the case of a resident defendant, and does not extend to the case of a non-resident defendant or foreign corporation. This statute has also been attacked on the ground of working an unconstitutional discrimination against citizens of other states; but its validity has been upheld by the state court.²

§ 154. Dissolution of attachment in state courts by death or insolvency of defendant.— Many states provide by statute that the death or the insolvency of a defendant shall work a dissolution of an attachment of his property made within a specified period. Upon the death of the defendant before execution sale the property becomes subject to the probate laws of the state, and passes to his legal representatives free from the attachment. Upon his insolvency within the period his property passes to his assignee in insolvency free from the attaching creditor's lien. Such state statutes, if passed prior to the contract in suit, are binding on all plaintiffs in the state courts, and do

¹Chemung Canal Bank v. Lowery, 93 U. S. 72, 77, 78.

²Head v. Daniels, 38 Kan. 1, 9, 10. The correctness of this decision is, however, not free from doubt. The plaintiff's obligation to execute the bond is imposed as a qualification or regulation of the right to attach, and is intended for the protection of the defendant. It is obvious that a non-resident defendant has more need of such protection than has a resident defend-

ant. The latter, residing in the state, can more easily guard his own interests than the former, residing in another state. It is no more trouble or expense to the plaintiff to execute such bond to a non-resident than to a resident; nor does he incur any greater liability. No sufficient reason, founded upon the difference between the two cases, is perceived for the discrimination.

not impair the obligation of contracts made in view of them, even if the creditor be a non-resident.¹

In *Denny v. Bennett*, 128 U. S. 489, the insolvent law of Minnesota, which dissolved all attachments of the debtor's property made within ten days prior to his assignment for the benefit of his creditors, was held not to impair a subsequent contract, although the attaching creditor was a non-resident of Minnesota. For "the established construction of the constitution of the United States, against impairing the obligation of contracts, requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation." Per Mr. Justice Miller, page 495.

§ 155. Garnishee's insolvency defeats lien.—A debtor summoned as garnishee, who, before he is charged as garnishee, is adjudged insolvent under state laws and afterwards obtains his certificate of discharge in insolvency, is thereby discharged as garnishee and the plaintiff's attachment is defeated, even if the defendant is a non-resident creditor of the garnishee and therefore not bound by his discharge.²

This is a right secured to an insolvent debtor by the general principles of the insolvent law, irrespective of any special provision; and the fact that the defendant is a non-resident creditor does not impair this right nor enlarge the right of the attaching plaintiff.

§ 156. Effect of defendant's death in federal courts.—When, however, the attachment is made on a suit commenced in the federal court, the plaintiff does not lose his lien on the defendant's property by the latter's death within the period specified in the state statute, in the absence of

¹ *Denny v. Bennett*, 128 U. S. 489 172; *Collins v. Duffy*, 7 La. Ann. (affirming *Bennett v. Denny*, 33 39; *McClellan v. Lipscomb*, 56 Ala. Minn. 530); *Miller v. Williams*, 30 255.
Vt. 386; *Willard v. Whitney*, 49 ²*Pingree v. Hudson River Ins. Co.*, 10 Gray (Mass.), 170.
Me. 235; *Bowker v. Hill*, 60 Me.

an act of congress adopting the state practice. For such a state statute is not binding on the federal courts, though sitting within the state; and after the property has been subjected to the jurisdiction of the court by a seizure either on mesne or on final process, it remains liable to any judgment which the plaintiff may recover or has recovered.¹

In *Rio Grande R'y Co. v. Gomila*, 132 U. S. 478, the plaintiff, a foreign corporation, recovered a judgment against a resident of Louisiana in a federal court sitting in that state; took out an execution, and levied on the defendant's real estate, and advertised it for sale; but before the sale took place the defendant died. Under the probate laws of Louisiana, the defendant's death before the sale had the effect to prevent the sale of his property on an execution and to place it in the hands of his executor or administrator for the benefit of his creditors and distributees. *Held*, that this state law was not binding upon the federal courts sitting in Louisiana, and that the plaintiff was entitled to have the full amount of his judgment paid before the property was turned over to the executor.

The reason of this rule is thus stated by Mr. Justice Field: "The jurisdiction of a court of the United States once obtained over property by being brought within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state or by any proceedings subsequently commenced in a state court. This exemption of the authority of the courts of the United States from interference by legislative or judicial action of the states is essential to their independence and efficiency. If their jurisdiction could in any particular be invaded and impaired by such state action, it would be difficult to perceive any limit to which the invasion and impairment might not be extended. To sanction the doctrine for which the executor . . . contends would be to subordinate the authority of the federal courts

¹ *Rio Grande R'y v. Gomila*, 132 U. S. 478.

in essential attributes to the regulation of the state, a position which is wholly inadmissible.”¹

At the time this case was decided by the circuit court (1885), there seems to have existed no statute of congress adopting the state practice upon this point; but by the act of August 1, 1888, chapter 729, congress seems to have made the state practice binding upon the federal courts, so as to destroy the lien of a federal judgment, “whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state.”²

It seems, however, that if the state statute allows an attachment merely as a means of compelling the defendant's appearance and not for the purpose of creating a lien, the defendant's death and the appearance of his legal representative will work a dissolution of the attachment even in a federal court.³

It seems, also, that under sections 914 and 916 of the Revised Statutes the federal courts may by a general rule of court adopt the local state statute relating to the dissolution of attachment on the death of the defendant; and that such rule will be binding upon the plaintiff.⁴

§ 157. Effect in federal courts of defendant's insolvency.— When the defendant in a federal court becomes insolvent under state laws, section 933 of the Revised Statutes of the United States enacts that an attachment of his property “shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state; provided that nothing

¹ *Rio Grande R'y v. Gomila*, 132 U. S. 478, 481.

³ *Pancost v. Washington*, 5 Cranch, C. C. 507.

² 25 Statutes at Large, 357, ch. 729. See, also, R. S. U. S., sec. 933.

⁴ *Beers v. Haughton*, 9 Peters, 329.

herein contained shall interfere with any priority of the United States in the payment of debts."

The effect of this federal statute is to make the provisions of the state laws relating to the dissolution of attachment upon the defendant's insolvency binding upon the federal courts; and hence, the defendant's insolvency within the time specified in the local state statute will dissolve the attachment in the federal court.¹

One result of this statute is to place non-resident attaching creditors on the same footing as resident attaching creditors, and to deprive the former of the preference over the latter which they possessed in the federal courts prior to the original statute of March 14, 1848, chapter 18, section 1, at which time it was held that an attachment in a federal court was not dissolved by the defendant's insolvency within the period specified in the local state statute.²

§ 158. Dissolution of attachment by defendant's bankruptcy.— Under the United States bankrupt act of 1841, which contained no clause relating to the dissolution of prior attachments, and which expressly declared "that nothing in this act contained shall be construed to annul, destroy or impair . . . any *liens*, mortgages or other securities on property real or personal, which may be valid by the laws of the states respectively," the weight of reason and authority are in favor of the view that an attachment was a "lien" or "security" within the meaning of this clause, and therefore the attaching plaintiff did not lose his lien by the subsequent bankruptcy proceedings of the defendant, and was entitled to a special judgment against the attached property.³

The United States bankrupt act of March 2, 1867, how-

¹ *Tua v. Carriere*, 117 U. S. 201; *Davenport v. Tilton*, 10 Met. (Mass.) 320; *Kittredge v. Emerson*, 15 N. H. 227; *Lafolloye v. Carriere*, 24 Fed. Rep. 346; *Drake on Attachments* (6th ed.), sec. 425, and cases cited. *Contra*, *Ex parte Foster*, 2 Story, 181;

² *Springer v. Foster*, 1 Story, 601; *Towne v. Smith*, 1 Wood. & M. 115. *Matter of Bellows*, 3 Story, 428.

³ *Peck v. Jenness*, 7 How. 612;

ever, expressly declared by section 14 that an "attachment made within four months next preceding the commencement of such proceedings" should be dissolved, and the title to all such property should vest in the assignee.¹

This section applies to attachments in the state courts as well as to attachments in the federal courts, and if made within four months, the plaintiff loses his lien and preference over other creditors; but if made more than four months before the commencement of the bankruptcy proceedings, he does not lose his lien and preference over the other creditors.²

¹ R. S., sec. 5044.

642; *Chapman v. Brewer*, 114 U. S.

² *Conner v. Long*, 104 U. S. 228, 158,
239, 240; *Doe v. Childress*, 21 Wall.

CHAPTER X.

THE TITLE OF ASSIGNEES IN INSOLVENCY AND RECEIVERS AS AGAINST ATTACHING CREDITORS.

PART I.

WHEN THE PROPERTY IN DISPUTE IS AT THE TIME OF THE ASSIGNMENT SUBJECT TO THE JURISDICTION OF THE ASSIGNING COURT.

§ 159. Preliminary observations. 160. Insolvent assignees. 161. Rule in Maryland. 162. Effect of the "full faith and credit" clause. 163. Foreign receivers of chattels. 164. Statutory receivers of insolvent and dissolved corporations.	§ 165. Debts due the insolvent debtor by non-residents — Rules in Illinois and elsewhere. 166. Constitutional objections to Illinois rule.

PART II.

WHEN AT THE TIME OF THE ASSIGNMENT THE PROPERTY IS NOT SUBJECT TO THE JURISDICTION OF THE ASSIGNING COURT.

§ 167. General principles. 168. Two attachments of same property. 169. Action by assignee to recover money received under a judgment of sister state. 170. Suit by assignee to enjoin attachment suit pending in another state.	§ 171-173. Constitutional considerations upon enjoining attachment suits pending in other states — (1) Debts. 174. Same — (2) Rule with respect to lands and chattels. 175. Local law of <i>situs</i> of property is binding upon the federal courts.

§ 159. Preliminary observations.—The conflicting claims to the same property of assignees in insolvency and receivers on the one hand, and attaching creditors on the other hand, present some important and interesting questions in the law of non-residents. The insolvent laws of

most states purport to transfer all the insolvent's property, wherever it may be situated, to the assignee for the benefit of the creditors at large. And most decrees appointing receivers have a like purport. Both kinds are transfers by operation of law. Non-resident creditors are entitled to participate in the division of the property upon an equal footing with resident creditors. Any attempt to discriminate against non-residents would probably be unconstitutional and void.¹ These conflicting rights may be conveniently considered under the following heads:

PART I: When the property in dispute is at the time of the assignment subject to the jurisdiction of the assigning court.

PART II: When at that time the property in dispute is not subject to the jurisdiction of that court.

PART I.

PROPERTY SUBJECT TO JURISDICTION OF ASSIGNING COURT.

§ 160. Insolvent assignees.—An assignee in insolvency has a better title than a subsequent attaching creditor to all of the insolvent's property which is subject to the jurisdiction of the insolvency court at the time of the assignment, even if the attaching creditor is a non-resident of the state of assignment, and does not become a party to the insolvency proceedings.²

In the recent case of *Geilinger v. Philippi*, 133 U. S. 246, a resident of Louisiana (one Green) was declared insolvent, and Philippi appointed assignee, or syndic, as such persons are termed in that state. The assignee took possession of most of the insolvent's property, but omitted to take possession of, or to make any claim for, the house in dispute, until after a non-resident creditor of Green had levied an execution upon the house, on a judgment recovered in the

¹ *Geilinger v. Philippi*, 133 U. S. 246; *Perry Man. Co. v. Brown*, 2 W. & M. 246, 257; *Pingree v. Hudson River*, 449; *Torrens v. Hammond*, 10 Fed. Ins. Co., 10 Gray (Mass.), 170, 172. Rep. 900.

² *Crapo v. Kelly*, 16 Wall. 610.

United States circuit court for Louisiana. Geilinger, the non-resident creditor, had not made himself a party to the insolvency proceedings, and claimed the right to subject the house to the payment of his judgment, notwithstanding the facts that the house was situated in Louisiana and was subject to the jurisdiction of the insolvency court at the time of its assignment, and that his levy was made subsequent to the assignment. But the supreme court held unanimously that the assignee had the better title, on the grounds (1) that an insolvent assignment is "in the nature of an execution, and though it cannot by its own force attach assets in another state, it takes the assets within its own;" and (2) that "by the insolvency proceedings Green's assets were placed *in gremio legis*, and could not be seized by process from another court."¹

Of course, if the demands of all other creditors were satisfied without exhausting the insolvent's assets, the plaintiff would be entitled to satisfy his judgment out of the surplus, and in such case he would have a better title than the assignee to the surplus, while in the latter case the creditor's conduct did not amount to such waiver.

So, in *Perry Man. Co. v. Brown*, *supra*, Mr. Justice Woodbury held that a non-resident creditor could not garnishee the credits of his Massachusetts insolvent debtor in the United States circuit court for the district of Massachusetts, after the latter had made an assignment under the insolvent laws of Massachusetts; that as between those parties the assignee had the better title to the fund attached. The insolvent debtor who owned the fund attached was, at the time of his insolvency, a resident of Massachusetts, and the fund was subject to the jurisdiction of the insolvency court, and therefore the assignment passed the title to the fund to the assignee.

In *Denny v. Bennett*, 128 U. S. 489, the Minnesota insolvent law of 1881, which was in force when the contract was made, declared that attachments made within ten days

¹ Per Mr. Chief Justice Fuller, *Tennessee Bank v. Horn*, 17 How. page 257. To the same effect is 157.

before the debtor's assignment should be dissolved, and the title should vest in the assignee. The creditor was a non-resident, and brought suit in a federal court sitting in Minnesota, and the marshal seized the chattels, the value of which was now sued for, on December 31, 1883. On the same day, but whether before or afterwards did not clearly appear, the chattels were assigned to Bennett; and after a demand upon and refusal by the marshal, Denny, to deliver them to the assignee, the latter brought this action of trover in a state court of Minnesota to recover the value of the goods so converted by the marshal. The court held that the assignee could recover; because, as applied to the posterior contract, the Minnesota statute did not impair the obligation of the contract, even if the attaching creditor were a non-resident.

§ 161. **Rule in Maryland.**—This rule is not rendered obligatory upon the state courts by federal law. If the state courts wish to accord greater rights to non-residents than they are entitled to under the federal law they are not restrained from doing so. The United States supreme court has no jurisdiction to review such a judgment because no federal right is denied.¹ The state courts of Maryland decided, before the United States supreme court rendered the above decisions, that the non-resident creditor who attached property in Maryland subsequent to an assignment under its insolvent laws had a better title than the assignee.² But in 1884 the Maryland court overruled its prior decisions and followed the authority of *Crapo v. Kelly*, 16 Wall. 610.³

The early Maryland cases proceed upon the ground that state insolvent laws are absolute nullities as against non-resident creditors under the national constitution, unless they become parties to the insolvency proceedings. But as applied to the property of the debtor in Maryland at the time of the assignment, and as between the assignee and a

¹ *Missouri v. Andriano*, 138 U. S. 496; *Linton v. Stanton*, 12 How. 423.

² *Evans v. Sprigg*, 2 Md. 457; *Glenn v. Glass Co.*, 7 Md. 287.

³ *Pinckney v. Lanahan*, 63 Md. 447.

subsequent attaching creditor, this view of federal law is evidently erroneous.

For this reason a federal court sitting in Maryland refused to follow the early state decisions, even before they were overruled by the state court, on the ground that they were not constructions of a local statute, but were based upon a mistaken view of federal law.¹

§ 162. Effect of the "full faith and credit" clause.— In *Crapo v. Kelly*, 16 Wall. 610, the supreme court held that a Massachusetts assignment of property, which property was subject to the jurisdiction of Massachusetts at the time of the assignment, passed a title to the assignee, which was good as against the lien of a New York attaching creditor, who attached the property (a ship) in New York, before the assignee took possession of it. The judgment of the New York supreme court in favor of the attaching creditor was reversed, on the ground that that court had failed to give due effect to the insolvency proceedings of Massachusetts, and had therefore contravened the "full faith and credit" clause of the constitution. In the same case it was decided that a ship on the high seas is subject to the jurisdiction of the state in which its owner resides, and for the purpose of insolvent laws is to be considered as a portion of that state's territory.

By law and usage in Massachusetts, the assignee had a better title than the attaching creditor, and, as the Massachusetts insolvency court had rightful jurisdiction over the ship at the time of the assignment, its assignment was entitled to the same force and effect in New York that it had at home. The New York court failed to give the assignment this force and effect, and held that the attaching creditor had the better title, and therefore its judgment was erroneous.

If, however, the ship had been in the port of New York at the time of the Massachusetts assignment, then the New York attaching creditor would have acquired a lien upon it

¹ *Torrens v. Hammond*, 10 Fed. Rep. 900.

superior to the assignee's title; for the *situs* of the ship would then be in New York, and it would be subject to the jurisdiction and laws of New York, and its attachment laws would control the insolvent laws of Massachusetts. In the actual case, the state of New York had no jurisdiction over the ship at the time of the assignment, while in the case supposed that state would have jurisdiction over it at that time. If the property be in the state of assignment at that time, the assignee's title is better than that of a creditor who subsequently attaches it in another state after its removal, and the latter state is bound to recognize the superiority of his title.

§ 163. **Foreign receivers of chattels.**— A like rule has been applied to foreign receivers, and it has been decided that as between a foreign receiver of chattels (which were subject to the jurisdiction of the appointing court at the time of his appointment), and a creditor who afterwards attaches them in another state, the receiver has the better title.¹

Thus, in *Chicago Railway v. Keokuk Packet Co.*, *supra*, the railroad company brought suit in Illinois, and attached a barge as the property of the defendant packet company. One Clubb then intervened and claimed the barge by virtue of his appointment as receiver for the packet company by a Missouri court. It appeared that when the receiver was appointed the barge was lying at the St. Louis landing and within the jurisdiction of the Missouri court, and that the receiver took possession of the barge and chartered it for a trip up the Mississippi river, and that before it returned from this trip the plaintiff attached it at Quincy, Illinois. It was held that the foreign receiver had the better title. Sheldon, C. J., in delivering the unanimous opinion of the court, says on pages 324–325: “By taking the barge into his possession within the jurisdiction of the

¹ *Chicago, etc. Ry v. Keokuk Wooldridge*, 8 Bax. (Tenn.) 580; *Packet Co.*, 108 Ill. 317; *Pond v. note to Humphreys v. Hopkins*, 15 Cooke, 45 Conn. 126; *Cagill v. Am. St. Rep.* 81.

court that appointed him, a special property in the barge became vested in the receiver; and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the laws of the state where it is situated, the validity of such title will be recognized everywhere." It is true that the court does not place this decision explicitly upon the constitutional ground that the "full faith and credit" clause requires such decision; but in support of the above quotation the court cites the case of *Crapo v. Kelly*, 16 Wall. 610, and that case was decided solely on the constitutional ground.

Where, however, the attached property was not within the jurisdiction of the appointing court at the time of the receiver's appointment, but was brought within that jurisdiction, and was reduced to possession by the receiver before it was taken into another state, where it was attached by a resident creditor of the insolvent, it was held that the attaching creditor had the better title.¹ If the decree of the appointing court purported to convey all of the insolvent's property wherever situated to the receiver, it seems impossible to reconcile this case with the preceding cases.

In *Bank v. McLeod*, 38 Ohio St. 174, it was decided that a Kentucky receiver had a better title to chattels (railroad cars) situated in Ohio than had a prior attaching creditor, who was a non-resident of Ohio; and if the attaching creditor was a citizen of Kentucky, this rule applied with greater force, for he would then be bound by the laws of the state of the parties' common domicile, which recognized the receiver's title as superior to the attaching creditor's.

§ 164. Statutory receiver or trustee of insolvent and dissolved corporations.—Where the statutes of a state creating a corporation provide for its dissolution in case of insolvency, and authorize its courts to appoint a receiver with power to collect the assets and distribute them equally among the creditors, such receiver acquires a title as trustee

¹ *Humphreys v. Hopkins*, 81 Cal. note doubting the correctness of 551; S. C., 15 Am. St. Rep. 76, with the decision.

to all the assets of the corporation wherever situated, which is superior to that of an attaching creditor, even if the attaching creditor be a citizen of the state of process, and the receiver a foreign receiver. Such statutes enter into and form a part of all contracts afterwards made, and policy-holders in every state are charged with notice of them, and are deemed to have impliedly accepted them. This rule prevents resident creditors from obtaining a preference over non-resident creditors.¹

Relfe v. Rundel, *ubi supra*, was a suit commenced in a state court of Louisiana by resident policy-holders of a Missouri insurance corporation against the corporation and others. The corporation was insolvent, and after this suit was commenced, it was dissolved by a decree of a Missouri court, acting under the local statutes, and Relfe was appointed agent or receiver, with power to hold and dispose of the assets for the use and benefit of creditors, policy-holders and others interested. The object of the suit was to have the assets of the company in Louisiana declared a trust fund and applied to the payment of the claims of Louisiana creditors and policy-holders in preference to others, and to keep the Louisiana assets out of the hands of Relfe and his successors in office. Relfe, on his own motion, was made a party to suit in the state, as the legal representative of the dissolved corporation, and removed the cause to the United States circuit court, which court afterwards remanded it to the state court. In reversing this remanding judgment, the supreme court, per Mr. Chief Justice Waite, says on page 225:

“Relfe is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that state, and hold and dispose of it in trust for the use and benefit of creditors

¹ *Bockover v. Life Ass'n*, 77 Va. 85; *Relfe v. Rundel*, 103 U. S. 222; *Rundel v. Life Ass'n*, 10 Fed. Rep. 720; *Taylor v. Life Ass'n*, 13 Fed. Rep. 493 (Tenn., Hammond, J.). *Contra*, *Parsons v. Charter Oak Ins. Co.*, 31 Fed. Rep. 305 (Iowa, Shiras, J.); *Willitts v. Waite*, 25 N. Y. 577.

and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the state, and as such represents the state in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact the corporation itself for all the purposes of winding up its affairs."

On page 226 it is said further: "By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the superintendent of the insurance department of the state [Relfe], and he was charged with the duty of winding up its affairs. Every policy-holder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the state should represent the company in all suits instituted by them affecting the winding up of its affairs. Relfe, therefore, became by operation of law the successor of the corporation in the litigation these appellees instituted in Louisiana."

§ 165. Debts due the insolvent debtor by non-residents—Rules in Illinois and elsewhere.—There is much conflict of decision as to whether an assignee in insolvency has a better title to a debt due to his insolvent by non-residents of

his state than a home creditor who garnishes the fund after the assignment outside of the state of assignment. In *Rhawn v. Pearce*, 110 Ill. 350, a resident of Pennsylvania was declared insolvent under its laws, and the assignment purported to transfer all his property wherever situated to A. Afterwards, another resident of Pennsylvania brought suit against the insolvent in Illinois, and garnished credits due the insolvent by a resident of Illinois. A., the assignee, intervened, and claimed the fund as against the attaching creditor under the Pennsylvania assignment. The Illinois court held the attaching creditor had the better title, on the grounds that an assignment by operation of law has no extraterritorial effect, and that, as the citizens of Illinois who attached under such circumstances would have a better title than the Pennsylvania assignee, it would be discriminating against citizens of other states to hold the contrary when the attaching creditor was a citizen of Pennsylvania. A like rule prevails in New York.¹

The contrary, however, has been decided in Pennsylvania,² in Missouri³ and in Alabama,⁴ and this seems to be the better view, and more in harmony with analogous principles. In *Einer v. Beste*, *supra*, a Louisiana assignee claimed the fund in Missouri as against a citizen of Louisiana who had garnished it after the assignment. As one ground of its decision in favor of the assignee the court says: "We think no good reason can be urged why a creditor residing in the same state with the bankrupt, and subject to its local jurisdiction, should be permitted, through the courts of another state, to obtain an advantage over other creditors, by seizing, through legal process, the effects of the bankrupt in such state. To do so would be conferring upon him a right which is denied him by the laws of his own state." Per Bay, J., page 251.

In harmony with this view, it is well settled that by a

¹ *Hibernia Nat. Bank v. Lacombe*, 81 N. Y. 367.

² *Einer v. Beste*, 32 Mo. 240.

³ *Wilson v. Matthews*, 32 Ala. 332.

⁴ *Bagby v. Atlantic, etc. R'y*, 86 Pa. 291. See, also, *Pomroy v. Lyman*, 10 Allen (Mass.), 468.

suit in equity the insolvent assignee may have the home creditor enjoined from prosecuting in another state an attachment suit against the insolvent in which credits have been garnished. These decisions are placed on the ground that the attaching creditor is bound by the insolvent laws of his own state (which give the assignee the better title), and that his attachment suit in another state is an attempt to evade their operation, which justifies the interposition of a court of equity.¹

In *Bagby v. Atlantic Railway*, *supra*, it was held in Pennsylvania that a Virginia receiver has a better title to money due the debtor than an attaching creditor who is a citizen of Virginia, and garnishes the money in Pennsylvania before the receiver gets possession of it. This decision is placed upon the ground that by the laws of Virginia the receiver has the better title, and that, as the attaching creditor is a citizen of Virginia, he is bound by its laws.

The court also held that, conceding that if the attaching creditor had been a citizen of Pennsylvania his title would have been better than the receiver's title, this did not change the result; and that the decision did not contravene the equal privileges and immunities clause of the national constitution by working an unconstitutional discrimination against citizens of other states.

An English assignee in bankruptcy has a better title to the bankrupt's money due him in America than an *English* creditor who garnishes the money in America after the assignment; and, although the judgment protects the garnishee, the assignee can maintain an action for money had and received against the attaching creditor; for the attaching creditor being a citizen of England is subject to its bankrupt law, and will not be allowed to gain a preference over other creditors, and in this way to defeat the operation of that law, which contemplates an equal or *pro rata* division of the bankrupt's assets among his creditors.²

¹ *Cole v. Cunningham*, 133 U. S. 107; *Dehon v. Foster*, 4 Allen, 545. ² *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 403.

A like rule has been recognized in Kansas with respect to its exemption laws.¹

§ 166. **Constitutional objections to Illinois rule.**— But the most fatal objection to the Illinois and New York rule seems to be that the “full faith and credit” clause of the constitution entitles an insolvency assignment to the same force and effect in other states that it has by law and usage at home, as to all property which is subject to the jurisdiction of the insolvency court at the time it executes the assignment; that its assignment is in the nature of an execution from a common-law court, and passes all the insolvent’s assets which are within the court’s jurisdiction to the assignee; that as the assignee’s title is superior to that of subsequent attaching creditors at home, it is also superior in other states; and that this result is not changed by the fact that the property is found in another state and there attached, even by a citizen of that state, before the assignee reduces it to possession.

All these propositions have been decided by the supreme court as to the insolvent’s assets in the form of chattels and lands, in the cases of *Crapo v. Kelly*, 16 Wall. 610, and *Geilinger v. Philippi*, 133 U. S. 246, the facts of which are stated in sections 162 and 160 respectively. And the same principles seem to apply to the insolvent’s assets in the form of money or credit. The *situs* of a debt due to the insolvent by a non-resident debtor is the residence of the insolvent. His state has jurisdiction over the debt and not the other party’s state. If the jurisdiction of the insolvency court is co-extensive with that of the state in which it sits (as is generally the case), it seems to follow that the money assets and credits of the insolvent will pass to the assignee, wherever the debtors may reside, as well as his chattel assets and land assets; and that the court’s assignment will operate upon his money assets, and will be entitled to the same force and effect in other states that it has at home.

¹ *Stark v. Bare*, 39 Kan. 100.

This view as to debts due the insolvent by non-resident debtors is supported by the case of *Taylor v. Life Ass'n*, 13 Fed. Rep. 493. That was a suit in equity brought in the United States circuit court for Tennessee by certain Tennessee policy-holders of an insolvent insurance company of Missouri, to attach the money assets or credits of the company in Tennessee, evidenced by promissory notes due by citizens of Tennessee. A receiver of the company had been appointed by a proper court in Missouri prior to this attachment; but the Tennessee policy-holders claimed that these notes were local assets in Tennessee, and that they should be first applied to the payment of Tennessee creditors and policy-holders; that the Missouri assignment to the receiver was made under compulsion of law, and could not operate outside of Missouri; and that therefore they had a better right than the receiver.

But the court held that the *situs* of a debt is the domicile of the creditor; that the notes in dispute were at the time of the assignment subject to the jurisdiction of the Missouri court, that state being the domicile of the creditor, and passed to the receiver by the assignment; and that therefore the receiver had a better right to the notes than the subsequent attaching policy-holders. Hammond, J., says on page 496:

"In *Kirtland v. Hotchkiss*, 100 U. S. 491, it is said the *situs* of a debt is for the purposes of taxation, if not for all purposes, the domicile of the creditor. Where the transaction is *inter vivos*, the better rule seems to be that the *situs* of a debt is the domicile of the creditor, and this is with us the rule, even in the administration of decedents' estates, where the principle is of more doubtful application. If so, this property was situated in Missouri and not in Tennessee, and passed by the assignment or decree, or both."¹

¹ Citing Wharton's Confl. Laws, 7 Lea, 286; *St. John v. Hodges*, 9 Bax. 834. (2d ed.), secs. 359-371; *Wilkins v. Ellett*, 9 Wall. 740; *Goodlett v. An-*

Under this clause of the constitution, there seem to be only two questions open for inquiry in the courts of another state:

1. Did the insolvency court have jurisdiction of the property in dispute at the time of its assignment?
2. If so, what is the force and effect of the assignment at home?

If the former question be answered in the affirmative, and the latter question be answered in favor of the assignee, the judgment should be in his favor, even if the attaching creditor be a citizen of the state of process, and the local law is the contrary.

In *Kelly v. Crapo*, 45 N. Y. 86, the attaching creditor was a citizen of New York and the state law gave him a better title than the Massachusetts assignee to the ship in dispute, and on these grounds the state court decided in favor of the attaching creditor. But this judgment was reversed by the supreme court of the United States in *Crapo v. Kelly*, 16 Wall. 610, on the ground that the assignment gave the assignee the better title in Massachusetts, and as the court of assignment had jurisdiction over the ship in dispute, the assignment gave the assignee the better title in New York. *Crapo v. Kelly* should be read in connection with the then recent case of *Green v. Van Buskirk*, 5 Wall. 307; 7 Wall. 139. In that case the views are clearly expressed that if a court of Illinois, acting with jurisdiction, render a decree which by law and usage in Illinois will transfer title to chattels in that state, the courts of New York are bound to recognize and give effect to such title, even when the local law is the contrary, and all the parties are citizens of New York.

PART II.

WHEN AT THE TIME OF THE ASSIGNMENT THE PROPERTY IS NOT
SUBJECT TO THE JURISDICTION OF THE ASSIGNING COURT.

§ 167. **General principles.**—When the attaching creditor is a non-resident of the state of assignment and has not made himself a party to the insolvency proceedings, his debt is not subject to that jurisdiction and cannot be discharged. Whether or not he has a right to attach and hold property situated in another state, as against the insolvent assignee, is purely a matter of local law, which the courts of that state may give or withhold, in accordance with state laws or policy. They are not controlled in their action by any provision of the national constitution.¹ As the insolvency court has not jurisdiction either over the property attached or over the attaching creditor's debt, its decrees of assignment and discharge are not entitled to "full faith and credit" in other jurisdictions. But if the attaching creditor is a resident of the debtor's state, *i. e.*, of the state of assignment, his debt is subject to the jurisdiction of that state and may be discharged under its anterior insolvent laws.² Consequently, as an insolvency decree rendered with jurisdiction is entitled to "full faith and credit" in other states,³ it would seem to follow that a decree of discharge rendered by an insolvency court having jurisdiction over the debt, the parties and the cause, is also entitled to "full faith and credit" in other states, and will prevent such home creditor from enforcing his demand out of property attached elsewhere, as against the claim of the insolvent assignee, previously appointed.⁴

If the attaching creditor is a resident of the state of pro-

¹ Reynolds v. Adden, 136 U. S. 348.

² Crapo v. Kelly, 16 Wall. 610.

³ See Reynolds v. Adden, 136

⁴ See ch. XIV, *post*, on "State Insolvent Laws," § 278. U. S. 348, 353.

cess, the rule is that his title is better than the foreign assignee's. For each state is entitled to protect its own citizens, when not controlled by the constitution, and the laws of the state having possession of the *corpus* ought to prevail over the laws of another state not having such possession.¹ The same rule applies to the case of foreign receivers; their title is inferior to that of resident attaching creditors.² Even when the attaching creditor is a non-resident both of the state of process and of the state of assignment, the better view seems to be that his title is better than that of the assignee, at least when his attachment is made before the assignee takes possession of the property.³ In *Paine v. Lester*, *supra*, the Connecticut court held that the fact that the attaching creditor has actual notice of the assignment at the time of bringing suit does not change the result: he still has a better title than the assignee.

So, in the case of a foreign receiver, it has been decided in Louisiana that the title of a receiver appointed by a state court of Georgia on a creditor's bill is inferior to that of a subsequent attaching New York creditor to personal property in Louisiana.⁴ In this case the court says: "In our opinion, it is sufficient that the creditor who has acquired rights by legal process in our courts be not a resident or citizen of the state whose court has appointed a receiver who urges claims adverse to his acquired rights in our courts. The plaintiffs in this case, residents of New York, are not more amenable to the jurisdiction of the Georgia courts than would be a citizen of Louisiana, and they are legally entitled to the full protection of our courts against the claims of intervenor." Page 526.

¹ *Crapo v. Kelly*, 16 Wall. 610, 622; *Allen* (Mass.), 353; *Willitts v. Waite*, 25 N. Y. 577; *Hunt v. Columbian Ins. Co.*, 55 Me. 290.
² *Reynolds v. Adden*, 136 U. S. 348; *Paine v. Lester*, 44 Conn. 196.
³ *Lichtenstein v. Gillett*, 37 La. Ann. 522.
⁴ *Taylor v. Columbian Ins. Co.*, 14

Ann. 522.

§ 168. Two attachments of same property.—As between two attaching creditors of the same property of the insolvent outside of his state, both of which attachments are made prior to his insolvency assignment, the prior attachment confers the better title. And the priority of the first attachment is not defeated by the fact that the attaching creditor is a citizen of the state of assignment.

Thus, in *Kidder v. Tufts*, 48 N. H. 121, prior to the debtor's assignment under the insolvent laws of Massachusetts, the plaintiff, a citizen of Massachusetts, sued him in New Hampshire and attached his personal property there. Subsequently, other creditors, who were non-residents both of Massachusetts and of New Hampshire, attached the same property and claimed a better title, on the ground that the plaintiff was a citizen of the debtor's state and bound by its laws. But the court refused to continue the plaintiff's case to await the result of the insolvency proceedings, and held that the plaintiff had the better title.

§ 169. Action by assignee to recover money received under a judgment of sister state.—In Massachusetts it has been decided that a Massachusetts insolvent assignee cannot maintain an action at law against a citizen of that state to recover money received by him under a judgment of another state, although the judgment was rendered after the assignee's appointment.¹ In *Lawrence v. Batcheller*, *supra*, the defendant, a citizen of Massachusetts, sued the insolvent in New York in November, 1878, and garnished the insolvent's credits there. In January, 1879, the insolvent, who was also a citizen of Massachusetts, was duly adjudicated insolvent by the proper court of his state, and in February, 1879, the plaintiff was appointed assignee. After the assignment the defendant prosecuted his New York suit to final judgment, and received a certain sum of money from the garnishee; to recover which the assignee now sues in Massachusetts. But the court held that the attach-

¹ *Lawrence v. Batcheller*, 131 Mass. 504. See, also, *Proctor v. National Bank*, 152 Mass. 223.

ing creditor had the better title and that the assignee could not recover at law.

§ 170. Suit by assignee to enjoin attachment suit pending in another state.— The assignee has a remedy in equity by bill to enjoin the home creditor from prosecuting his action in the other state, which can be maintained on the ground that the assignee has the better title, and that the home creditor is seeking to evade the insolvent laws of his own state, and to gain a preference over other home creditors.

Dehon v. Foster, 4 Allen (Mass.), 545, is the leading case upon this subject. That was a bill in equity brought by a Massachusetts insolvent assignee to enjoin citizens of that state from prosecuting an attachment suit in Pennsylvania against the insolvent debtor. The insolvent law purported to transfer the debtor's property and assets to the assignee, wherever they might be situated,—outside of, as well as within, Massachusetts. *Held*, that the bill would lie. The court says, speaking of the Pennsylvania suit: "It is therefore an attempt by those creditors, citizens of this state [Massachusetts], to defeat the operation of our laws, to the injury of the other creditors of the insolvents. This is manifestly contrary to equity. The defendants, being citizens of this state, are bound by its laws. They cannot be permitted to do any acts to evade or counteract their operation, the effect of which is to deprive other citizens of rights which those laws are intended to secure. . . . By interposing to prevent it, we do not interfere with the jurisdiction of courts in other states, or control the operation of foreign laws. We only assert and enforce our own authority over persons within our jurisdiction, to prevent them from making use of means by which they seek to countervail and escape the operation of our own laws, in derogation of the rights and to the wrong and injury of our own citizens." Pages 552, 553.¹

¹ To the same effect, see *Cunningham v. Cole*, 138 U. S. 107, affirmed in *Cole v. Cunningham*, 138 U. S. 107, 142 Mass. 47; *Butler v. Ham*, 142 Mass. 47; *af-*

The same rule applies to suits by receivers; they also may have a home creditor enjoined from prosecuting an attachment suit in other states.¹

§ 171. Constitutional considerations upon enjoining attachment suits pending in other states — (1) Debts.— It is now settled, at least with respect to *debts or credits* owned by the insolvent, that an attachment suit pending in a state other than that of the insolvent assignment is not entitled to full faith and credit in the state of assignment when the attaching creditor is also a citizen of that state. Hence, the assignee in insolvency may have the home creditor enjoined from prosecuting his attachment suit in such other state; and a decree enjoining him does not contravene any clause of the national constitution. The fact that the attachment is made before the assignment does not alter the result.²

In *Cole v. Cunningham*, *supra*, certain Massachusetts creditors were enjoined by the supreme court of that state, at the instance of a Massachusetts assignee in insolvency, from prosecuting an action in New York, commenced by attaching a debt due to the insolvent by citizens of New York. The attachment was made prior to the insolvent assignment. The creditors contended that the Massachusetts decree enjoining them from prosecuting their New York attachment suit destroyed their lien under the attachment laws of New York, and therefore failed to give "full faith and credit" to the judicial proceedings of New York, as required by the constitution. But the supreme court of the United States decided, by a majority of five to three, that the Massachusetts decree did not contravene any clause of the national constitution, and therefore affirmed the state decree. An exhaustive opinion is delivered by Mr. Chief Justice Fuller; but the precise ground of the decision is somewhat difficult to determine. The reasons most

¹ *Sercomb v. Catlin*, 128 Ill. 556. *ler*, 142 Mass. 47; *Dehon v. Foster*,

² *Cole v. Cunningham*, 133 U. S. 4 Allen, 545.
107, affirming *Cunningham v. But-*

directly in point seem to be those assigned on pages 132–134, in reconciling the case at bar with the case of *Green v. Van Buskirk*, 5 Wall. 307; *S. C.*, 7 Wall. 139. This was the case upon which the three dissenting judges based their opinion. The facts of that case are stated elsewhere, and it is sufficient to state here that the supreme court held in that case that an Illinois judgment by attachment, which transferred the title to chattels situated in Illinois to the attaching creditor, was entitled to full faith and credit in New York, and that the title acquired by the attaching creditor under the laws of Illinois must be respected and enforced in New York as against a prior mortgagee of the same chattels, although the New York law was contrary to the Illinois law on this point, and gave the mortgagee the better title; and all the parties,—the attaching creditor, the mortgagee, and the owner,—were citizens of New York. This decision was put upon the ground that the Illinois court had jurisdiction of the *res*, the chattels attached, which were situated in Illinois, and therefore the attachment, judgment and sale to the attaching creditor not only divested the title of the judgment debtor, but also, according to the law of Illinois, gave the judgment creditor a superior title to the mortgagee, who claimed under a prior unrecorded mortgage. This being the legal effect of the judicial proceedings in Illinois, they were entitled to the same force and effect in New York and in other states, under the constitution, whatever might be the local law of the second state, or the citizenship of the parties.¹

To distinguish *Cole v. Cunningham* from *Green v. Van Buskirk*, the court says on pages 133–134:

“It will be perceived that it was manifestly inadmissible to hold that after Van Buskirk had permitted Green to go to judgment in a proceeding *in rem*, which appropriated the property as belonging to Bates, he could then get judgment against Green for the conversion of what had so been ad-

¹To the same effect, see *Cochran v. Fitch*, 1 Sandf. Ch. (N. Y.) 142; *Crapo v. Kelly*, 16 Wall. 610.

judged to him, an adjudication which Van Buskirk had voluntarily declined to litigate in the proper forum, and had not sought in his own state to prevent. It was a contest between two individuals claiming the same property, and that property capable of an actual *situs*, and actually situated in Illinois. The attachment was not only levied in accordance with the laws of Illinois, but the laws of that state affirmatively invalidated the instrument under which Van Buskirk claimed. Clearly, then, the law of the domicile of Van Buskirk, Green and Bates could not overcome such registry and other positive laws of Illinois as were distinctively coercive.¹

“In the case at bar the attachment suits have not gone to judgment, and the assignees in insolvency have proceeded with due diligence as against these creditors, citizens of Massachusetts, who are seeking to evade the laws of their own state; nor is there anything in the law or policy of New York opposed to the law or policy of Massachusetts in the premises.”

§ 172. *Same.*—The true ground of distinction is believed to be suggested in the words quoted above, that the property in dispute and claimed by both sides was “capable of an actual *situs*, and actually situated in Illinois,” the state in which the first judicial proceedings were had. Hence, in *Green v. Van Buskirk*, Illinois had jurisdiction of the *res*, and its laws having operated upon the chattels, and given the attaching creditor the better title, the full faith and credit clause required that title to be respected in other states to the same extent as in Illinois. But in *Cole v. Cunningham* the *res* was a debt, which was not capable of an actual *situs*, nor was it actually situated in New York, the state in which the first judicial proceedings were had. The owner of the debt being domiciled in Massachusetts, the *situs* of the debt was in Massachusetts. That state had jurisdiction of the debt, and not New York.² Hence, as New York

¹Citing *Hervey v. Rhode Island* and *Walworth v. Harris*, 129 U. S. Locomotive Works, 93 U. S. 664, 355.

²State Tax on Foreign-held

had not jurisdiction over the debt, or property attached, it follows that the New York judicial proceedings were not entitled to any faith and credit in Massachusetts, and therefore the decree of the Massachusetts court to the effect that the laws of Massachusetts governed the case, and that the assignee had a better title than the attaching creditor, did not violate the constitutional provision. The attaching creditor obtained no valid lien upon the debt garnished, because it was situated in Massachusetts, outside the jurisdiction of the New York court. This seems to be the true ground of the decision, and the only one upon which it can be reconciled with numerous decisions of the same court, holding that want of jurisdiction is the only ground upon which the courts of one state can refuse to give full faith and credit, or the same force and effect, to the prior judicial proceedings in the courts of a sister state.¹

This view receives considerable support from the case of *Peck v. Jenness*, 7 How. 612, in which the supreme court decided that the United States district court for New Hampshire, sitting in bankruptcy, had no jurisdiction over property previously attached in a state court of New Hampshire, and that the district court had no power to order the attaching plaintiff to deliver the property to the assignee in bankruptcy or to account to him for its value. The judgment of the New Hampshire state court refusing to recognize or give effect to this decree of the district court was therefore affirmed by the United States supreme court. The court of last resort treats this order of the district court as analogous to an injunction against the attaching plaintiff, restraining him from the prosecution of his attachment suit in the state court. In a unanimous opinion of the court, delivered by Mr. Justice Grier, the reasons are thus stated at page 625: "Where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by pro-

Bonds, 15 Wall. 300, 320; Kirtland 308, 316; *Peck v. Jenness*, 7 How. 612, 624, 625.
v. Hotchkiss, 100 U. S. 491.

¹ *Cooper v. Reynolds*, 10 Wall.

ceedings in another court. These rules have their foundation not merely in comity but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy v. The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the court of chancery could in that way restrain proceedings in an independent foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion [avoidance] of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.”¹

In *Mead v. Merritt*, 2 Paige (N. Y.), 402, a Connecticut executor brought a bill in chancery in New York to enjoin the defendants, Merritt and Peck, from commencing or prosecuting an action at law in Connecticut. The grounds of the bill were that since the testator's death the plaintiff had purchased a note against Peck; that Peck held a claim against the estate, but was insolvent, and had assigned his claim to Merritt in order to defeat the plaintiff's set-off on the note; that Merritt and Peck were about to institute suit against plaintiff and his sureties in Connecticut; and that by the law of Connecticut, in which state the testator had his domicile at the time of his death, the plaintiff could not set off said note against the demand of Merritt and Peck. It was held by Chancellor Walworth that the court

¹ See, also, *Mead v. Merritt*, 2 Paige (N. Y.), 402, 404; *Harris v. Pullman*, 84 Ill. 20; *Kittredge v. Emerson*, 15 N. H. 227, 278-280.

had no power to enjoin the commencement or the prosecution of such a suit in another state. In the opinion it is said at page 405: "The estate of the testator must be applied in satisfaction of his debts according to the laws of the state where he was domiciled, and where the property was situated. If those laws give it to the assignee of Peck, to the exclusion of the complainant's set-off, the latter has no right to have a different rule of equity applied to his case here." The property which would be affected by the decree sought was in the custody of the probate court of Connecticut, and was subject to the jurisdiction and laws of that state, and not to those of New York. As the laws of the state where the property was situated gave Peck's assignee a claim or title to the property free from the executor's set-off, the executor could not, by going into another state, defeat or impair this claim or title by making it subject to his set-off.

§ 173. *Same.*— Again, the fundamental ground upon which a creditor may be enjoined from prosecuting an attachment suit pending in another state is that his claim or title to the property attached is inferior to that of the plaintiff in the equity suit. That the creditor is seeking to evade the insolvent laws of his own state is a circumstance that confers jurisdiction upon a court of equity; but the mere fact that a person resorts to a court of another state in the hope of obtaining a more favorable decision than he could obtain at home does not authorize a court of the parties' common domicile to restrain the prosecution of his suit in the sister state, when the latter court has full jurisdiction of the subject-matter and of the parties.¹

¹ *Carson v. Dunham*, 149 Mass. 52; *Town of Venice v. Woodruff*, 62 N. Y. 462. The Massachusetts case just cited was a bill in equity between two citizens of that state, brought to have the defendant restrained from prosecuting a suit in a court of South Carolina to fore-

close a mortgage of land in South Carolina. In refusing to grant the injunction, the court by Morton, C. J., says on page 56: "Reduced to its elements, the argument of the plaintiff is that we should interfere because there is danger that the supreme court of South

When the laws of the two states are inconsistent, the only question is, Which shall prevail? The local law of each state is binding upon its own courts, unless the higher law of the federal constitution otherwise requires or provides. The higher law otherwise requires or provides whenever the laws of the state having jurisdiction of the property attached have operated upon the property and created a claim or title different from that created by the laws of the state in which the equity court sits. In such case the local laws of the latter state must be disregarded in its own courts, and full faith and credit (*i. e.*, the same force and effect) be given to the claim or title created under the laws of the other state that it has by law and usage at home. A decision by a court of the latter state that its own local law governs the case contravenes the full faith and credit clause and is erroneous, even when all the parties are citizens of that state.¹ A claim or title acquired to property by operation of law in the state where it is situated, and which state has jurisdiction over the property, must be respected and enforced in all other states.²

The case of *Lawrence v. Batcheller*, 131 Mass. 504, at page 509, contains an intimation to the effect that a judgment of a sister state in favor of a Massachusetts creditor, based upon an attachment of credits of a Massachusetts insolvent debtor, is entitled to full faith and credit in Massachusetts, and prevents a Massachusetts assignee in insolv-

Carolina will not rightly and justly decide the rights of the parties. We cannot yield to such an argument without a violation of every principle of interstate comity. As we have said, the general rule of comity is that the court first acquiring jurisdiction shall retain it. In our judgment, it would be indefensible for the courts of this commonwealth to restrain the prosecution of a suit pending in the court of a sister state, which has jurisdic-

tion of the subject-matter and of the parties, upon the ground that the decision of that court may differ from our own opinion, or from the decisions of other courts of equal authority."

¹ *Green v. Van Buskirk*, 7 Wall. 139; *Crapo v. Kelly*, 16 Wall. 610; *Warner v. Jaffray*, 96 N. Y. 248.

² *Ibid.*; *Walworth v. Harris*, 129 U. S. 355; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.

ency from recovering the money collected on such judgment. This reason, however, was not made a ground of decision, and the case was decided upon other grounds. If the full faith and credit clause does not prevent an insolvent assignee from appropriating the insolvent's credits which have been attached in another state, by means of a bill in equity to enjoin the home creditor from prosecuting his attachment suit,¹ it would seem to follow that the same clause does not prevent the assignee from appropriating the same credits, by means of an action at law against the same creditor after he has collected the money. For the form of the assignee's remedy is immaterial, and an action at law is no more open to this constitutional objection than is a bill in equity. If he can impeach the judicial proceedings of a sister state by means of a bill in equity, this clause does not prevent him from doing the same by means of an action at law. The form of remedy is a mere matter of practice, which each state may regulate for its own tribunals without violating this provision. It has accordingly been held that this clause does not preclude the law courts of one state from impeaching a judgment for fraud which was obtained in a state where the impeachment could be only in an equity court.²

Nor does the fact that the assignee's action at law is brought after judgment, while his bill in equity is brought before judgment in the other state, seem sufficient to change the result; for the protection of the constitution extends to all "judicial proceedings," which term clearly includes attachments on mesne process as well as final judgments.³

§ 174. Same — (2) Rule with respect to lands and chattels.—The rule with respect to lands and chattels owned by an insolvent, and situated in a state other than that of his domicile, is believed to be different from the rule with

¹ *Cunningham v. Butler*, 142 Mass. 47; *Rogers v. Gwinn*, 21 Iowa, 58; *Cole v. Cunningham*, 133 U. S. 107. *Brown v. Parker*, 28 Wis. 21.

³ *Warner v. Jaffray*, 96 N. Y. 248.

² *Dobson v. Pearce*, 12 N. Y. 156;

respect to debts. Lands and chattels are capable of an actual *situs*, separate and distinct from the domicile of the owner, while debts have no such *situs*. The former are subject to the jurisdiction and laws of the state in which they are actually situated, wherever their owner may reside, while debts are only subject to the jurisdiction and laws of the state of the creditor's domicile.

As the state in which lands and chattels are actually situated has jurisdiction over them, even when they belong to a non-resident, it follows that, if the laws of that state confer a right or title upon an attaching creditor, which is there recognized as superior to that of an assignee in insolvency, the full faith and credit clause requires the same force and effect to be given to the attachment suit in other states, whatever the local law of the second state or the citizenship of the parties may be.

These were the principles established by the supreme court of the United States in *Green v. Van Buskirk*, 7 Wall. 139, and acted upon by the court of appeals of New York in *Warner v. Jaffray*, 96 N. Y. 248. In the latter case a New York debtor made a general assignment for the benefit of creditors to the plaintiff. He owned chattels personal situated in Pennsylvania, which were afterwards attached by the defendants, who were New York creditors, before the assignment had been recorded in Pennsylvania. According to the law of Pennsylvania, the attaching creditors thereby obtained a valid lien, and their claim or title to the property attached was superior to that of the assignee. The court held unanimously, in an opinion by Earl, J., that it would not and could not enjoin the prosecution of the Pennsylvania action, because to do so would be to contravene the "full faith and credit" clause of the national constitution. The property being situated in Pennsylvania was subject to the jurisdiction of that state; and therefore the question of title must be determined by its laws, not only in the courts of Pennsylvania, but also in the courts of all other states, including those of

the parties' common domicile. The lien being valid in Pennsylvania is valid elsewhere; and the New York creditors could not be punished as tort-feasors in New York for doing an act in Pennsylvania which was lawful where performed. The attachment suit, though it had not then ripened into a judgment, was a "judicial proceeding" within the meaning of the constitution, and was therefore entitled to "full faith and credit" in other states.

In answer to the objection that the parties were citizens of New York and therefore bound by its laws, the court in *Green v. Van Buskirk*, *supra*, says on page 151:

"But the right under the constitution of the United States and the law of congress which Green invoked to his aid is not at all affected by the question of citizenship.

"We cannot see why, if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other states equal privileges with her own in her foreign attachment laws, that the judgment against the personal estate located in her limits of a non-resident debtor, which a citizen of New York lawfully obtains there, should have a different effect given to it under the provisions of the constitution and the law of congress, because the debtor, against whose property it was recovered, happened also to be a citizen of New York."

This was decided with respect to chattels personal (iron safes); but the same reasoning applies *a fortiori* to land. A decree of a state court enjoining a resident creditor from prosecuting a suit in another state wherein lands or chattels are attached necessarily decides that his claim or title is inferior to that of the plaintiff, or assignee in insolvency; and if, as matter of law in the state of attachment, his claim or title is superior to that of the assignee, it follows that the injunction fails to give the same effect to the attachment proceedings which they have by law and usage at home. If the court of attachment has jurisdiction of the property attached (and that it has in the case of chattels is settled by *Green v. Van Buskirk*, *supra*), the

law of that state, and not the law of the parties' domicile, controls the decision in every state, including the state of their domicile. It is by the laws of that state alone that the constitution requires the question to be decided. For these reasons, it seems also that where an attachment of land is made in a state, whose laws give the attaching creditor the better title, a decree by a court of another state enjoining its prosecution contravenes the full faith and credit clause and is erroneous.

It follows from the preceding principles that if, by the laws of the state in which the attachment of lands or chattels is made, the foreign assignee has a better title than the attaching creditor, the full faith and credit clause is not violated by a decree enjoining him from prosecuting his action at the instance of the assignee. For this constitutional provision does not require any *greater* effect to be given to judicial proceedings elsewhere than they have by law and usage at home.¹

The constitutional power to enjoin the attaching creditor in such case is not confined to the courts of his own state, but exists also in the courts of the state in which the action at law is pending; and also perhaps in the courts of any state, or of the United States, which obtains jurisdiction of his person and has jurisdiction of such causes.² Whether or not a state court whose authority is invoked for such purpose will exercise this right is a different question, which depends upon local law, and is not controlled by federal law.³

§ 175. Local law of situs of property is binding upon the federal courts.— When the local law of the state in which goods or chattels are attached gives the attaching creditor a better title to the property than the insolvent assignee has, a federal court will not enjoin the prosecution of the attachment suit pending in a state court, even if the

¹ *Public Works v. Columbia College*, 17 Wall. 521.

² *Proctor v. National Bank*, 152 Mass. 223.

³ *Reynolds v. Adden*, 136 U. S. 348.

creditor be a non-resident of that state. Thus, in a recent case in the supreme court, it appeared that a creditor residing in New Hampshire brought two suits in a Louisiana state court and attached the goods there of his Massachusetts insolvent debtor, and obtained judgment by default in one of them before the Massachusetts assignee interposed his claim to the goods. The assignee then brought a bill in equity in a Louisiana court, which was removed to the federal court, to enjoin the collection of this judgment, and to prevent the further prosecution of the second suit which had not gone to judgment. It was held that the attaching creditor was entitled to maintain his actions at law, and that the bill should be dismissed on the merits. The reasons assigned were, that the case was governed by the laws of Louisiana, and by those laws "such transfers by judicial operation are not binding upon the citizens and inhabitants of Louisiana, or of any other state, except the state in which the insolvent proceedings have taken place — at least until the legal assignee has reduced the property into possession or done what is equivalent thereto."¹

If, however, a federal court renders judgment for the plaintiff in an action at law, a court of equity of the state cannot enjoin its enforcement on the ground that it is contrary to the state law.²

¹ Reynolds v. Adden, 136 U. S. 348, 354, citing Olivier v. Townes, 2 Martin (N. S.), 93; Tyree v. Sands, 24 La. Ann. 363, and Lichtenstein v. Gillett, 37 La. Ann. 522. ² M'Kim v. Voorhies, 7 Cranch, 279; Town of Venice v. Woodruff, 62 N. Y. 462.

CHAPTER XI.

JUDGMENTS BY DEFAULT AGAINST NON-RESIDENTS.

PART I.

JUDGMENTS IN PERSONAM.

§ 176. Subject, how divided. 177. Preliminary — "Foreign judgments"— Relations of courts. 178. Effect of judgment upon voluntary default. 179. Judgment not responsive to pleadings, upon voluntary default. 180. Amending record after defendant's withdrawal. 181. Amendment of judgment on motion after term of rendition. 182. Involuntary default of non-resident defendant. 183. Substituted service of process — Publication. 184. Leading case of Pennoyer v. Neff, 95 U. S. 714. 185. Pennoyer v. Neff, 95 U. S. 714, is binding upon state courts. 186. Foreign corporations as defendants. 187. Such judgment no defense as set-off. 188. Domestic judgments of state courts — Collateral impeachment of. 189. Constitutional and interstate jurisdiction.	§ 190. Statutes authorizing substituted service of process must be strictly pursued. 191. Special appearance to object to insufficient service of process. 192. Joint-debtor acts. 193. Judgment void <i>in personam</i> in other states against joint debtor not served. 194. Entering appearance for non-resident partner. 195. Allegation and proof of foreign law. 196. Satisfaction of void judgment bars action on original demand. 197. Judgments of sister states. 198. Personal service of process in another state. 199. Service at residence of former citizen. 200. Attachment of property does not confer jurisdiction of the person. 201. No merger of original cause of action. 202. Merger ceases upon reversal of judgment. 203. Contradiction of the record by parol evidence. 204. Early cases overruled.

§ 205. Reversal of such judgment saves bar of limitation. 206. Qualifications and exceptions — (1) Service on agent of non-resident defendant. 207. Same — (2) Cross-actions and cross-bills against non-residents.	§ 208. Same — (3) Warrants of attorney to confess judgments. 209. Same — (4) Abolition of special appearances. 210. Same — Waiving objection to defective service. 211. Same — (5) Service of process in appellate proceedings.

PART I.

JUDGMENTS IN PERSONAM.

PART II.

JUDGMENTS QUASI IN REM BY ATTACHMENT.

§ 176. **Subject, how divided.**—The subject of “Judgments by Default against Non-residents” will be considered under the two heads above stated. This chapter treats of Part I. Judgments *in Personam*; and the following chapter treats of Part II. Judgments *Quasi in rem* by Attachment.

PART I.

JUDGMENTS IN PERSONAM.

§ 177. **Preliminary**—“**Foreign judgments**”—**Relations of courts.**—The term “foreign judgment,” as generally used, includes not only a judgment rendered in a foreign country, but also a judgment rendered in a sister state of the Union. The chief practical difference between the two kinds of judgment is that the latter is entitled to “full faith and credit” under the constitution of the United States, while the former is not entitled to such faith and credit. The supreme court of the United States has jurisdiction to review a judgment of a state court if it fails to give due effect to a judgment of a sister state; but not if it fails to give due effect to a judgment of a foreign country, unless such judgment is protected by treaty with the United States.¹

¹ *Roth v. Ehman*, 107 U. S. 819.

The federal courts in their relations to the state courts are not foreign tribunals; but they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them.¹ And this is true even when the federal court sits in the state where the judgment in question was rendered.²

§ 178. Effect of judgment upon voluntary default.—

A judgment rendered upon the voluntary default of the non-resident defendant, *i. e.*, after personal service of process upon him within the territorial limits of the state or country by a duly authorized officer of the court, or after his voluntary appearance in the action, is binding upon him *in personam*, and will be recognized and enforced in the federal courts and in the courts of other states. For in such case the defendant has had a "day in court," a fair opportunity to present his defense, and if he fails to do so it is his own fault, and there is, therefore, nothing revolting to one's sense of justice in holding the judgment conclusive of the matter adjudicated. The court thereby acquires jurisdiction over the defendant's person, and it is therefore authorized to render any judgment which is allowed by the law of its organization and which is responsive to the issues raised by the pleadings.³

§ 179. Judgment not responsive to pleadings, upon voluntary default.—In *Reynolds v. Stockton*, 140 U. S. 254, affirming the same case reported in 43 N. J. Eq. 211, it was held that a New York judgment rendered against a receiver of an insolvent insurance company, who appeared and filed an answer to the complaint, but took no subsequent part in the litigation, which judgment was not responsive to the

¹ *Pennoyer v. Neff*, 95 U. S. 714, 732, 733. *Bellows v. Ingham*, 2 Vt. 575; *Cleaves v. Lord*, 43 Me. 290; *Harbin*

² *Hart v. Sansom*, 110 U. S. 151, 155, 156. *v. Chilea*, 20 Mo. 314; *Reynolds v. Stockton*, 140 U. S. 254; *Lafayette*

³ *Hazard v. Wason*, 152 Mass. 268; *Ins. Co. v. French*, 18 How. 404.

pleadings, was not entitled to any force or effect in the courts of other states, and would not support an action thereon in New Jersey. The facts were briefly these: Reynolds and others, as policy-holders in a New York company, whose liabilities had been assumed by the insolvent company, of which Stockton was the second receiver, brought a suit in New York against the superintendent of the insurance department of the state of New York, against the insolvent company and its first receiver, Parker, for the purpose of subjecting to the payment of the plaintiff's claims a trust fund of about \$100,000 in securities, which had been deposited with the superintendent of the insurance department by the New York company for the protection of its policy-holders. The first receiver, Parker, appeared in this suit and filed an answer, but took no further part in the proceedings. The New York court subsequently rendered judgment against Parker, as receiver, in the sum of \$1,010,496, and it was upon this judgment that the action was brought in New Jersey against the second receiver, Stockton. The various courts of New Jersey held that the New York judgment was not entitled to "full faith and credit" or force and effect, and rendered judgment for the defendant, which judgment was affirmed by the supreme court of the United States on the ground that it was not responsive to the issue presented by the pleadings, and therefore was not a proper exercise of jurisdiction.

Mr. Justice Brewer, in delivering the unanimous opinion of the supreme court, says on pages 264, 265: "The first and obvious reason (for affirmance) is that the judgment of the supreme court of New York was not responsive to the issues presented. The section of the federal constitution which is invoked by plaintiffs is section 1 of article IV, which provides that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' . . . The requirements of that section are fulfilled when a judgment rendered in a court of one state, which has jurisdiction of the subject

matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state.

. . . It has been adjudged that the constitutional provision does not make a judgment rendered in one state a judgment in another state upon which execution or other process may issue; that it does not forbid inquiry in the courts of the state to which the judgment is presented, as to the jurisdiction of the court in which it was rendered over the person, or in respect to the subject-matter, or, if rendered in a proceeding *in rem*, its jurisdiction of the *res*. Without referring to the many cases in which this constitutional provision has been before this court, it is enough to notice the case of *Thompson v. Whitman*, 18 Wall. 457. The view developed in the opinion in that case, as well as in prior opinions cited therein, paves the way for inquiry into the question here presented. If the fact of a judgment rendered in a court of one state does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject-matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case: Given a court of general jurisdiction over actions in ejectment as well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same state. If not these, the constitutional provision quoted gives no greater force to the same record in another state."

§ 180. Amending record after defendant's withdrawal.

In the case of *Reynolds v. Stockton*, *ubi supra*, the supreme court of New York had not been asked to allow an amendment and none had been made in the pleadings. The supreme court of the United States, therefore, was not called upon to decide what would have been the effect of the judgment if an amendment had been allowed, after the defendant's withdrawal, presenting an issue which would have authorized the judgment. The case of *Hall v. Williams*, 6 Pick. (Mass.) 232; *S. C.*, 1 Fairfield (Me.), 278, presents one phase of this question. There the plaintiff recovered a judgment in Georgia against two partners, Williams and Fiske. Williams was personally served with process and appeared, but Fiske was not served and did not appear. The plaintiff then brought an action on this Georgia judgment in Massachusetts. In this second suit both defendants were served with process, and defended on the ground that the Georgia judgment was void. The Massachusetts court held that the Georgia judgment was void for want of service as against Fiske, and, as it was an entire judgment, its nullity as to one defendant rendered it void as to both defendants, and therefore gave judgment for both defendants. After this decision, the Georgia court, on motion of the plaintiff, allowed an amendment of its record by striking out Fiske as a defendant and by entering up judgment *nunc pro tunc* against Williams alone. This amendment was allowed upon notice to Williams' attorney, but several years after Williams himself had left Georgia without intending to return. The plaintiff then sued Williams in Maine upon this amended judgment, and the Maine court held that such judgment was entitled to full faith and credit, and would support an action in its courts. 1 Fairf. 278.

§ 181. Amendment of judgment on motion after term of rendition.— In the same case just cited of *Hall v. Williams*, 1 Fairf. (Me.) 278, it was further held that the fact that the Georgia court allowed the amendment to be made

on motion after the term at which the original judgment had been rendered was not so irregular as to disentitle its judgment to full faith and credit in other states; because the error was caused, not directly by the court, but by the clerk or other officer of the court. In the court's opinion, Parris, J., says on pages 290, 291:

"Wherever the error is in the court, as a matter of judgment or express direction, it cannot be amended on motion; the law has pointed out another course, and that must be pursued. But whenever the judgment is erroneously entered up by the mistake of the clerk or other officers of the court, it seems to be well settled by the enlightened judiciary of New York, that it can be corrected on motion, if there be anything on the record by which the amendment can be made. There was no difficulty on this point in the case before us. The whole process shows that the judgment should have been against Williams only."

§ 182. Involuntary default of non-resident defendant. A judgment against a non-resident defendant upon his involuntary default, *i. e.*, without personal service of process upon him, or his appearance in the action, stands upon a very different footing from that of a judgment rendered upon his voluntary default. The difference between these two kinds of judgments by default is fundamental; and the failure to recognize this difference has led to much confusion of thought and injustice to non-resident defendants. In the case of a voluntary default, the defendant has had his day in court and an opportunity to present his defense; while the contrary is true in the case of an involuntary default.

§ 183. Substituted service of process — Publication.— Many of the states have statutes purporting to authorize judgment to be rendered against non-resident defendants without personal service of process upon them within the state of process, and without a voluntary appearance by the defendant in the action. Generally the mode of service prescribed is by publication in a newspaper; followed in

some states by personal service upon the non-resident defendant in his own state. The statutes also generally allow an attachment of the defendant's property, when he is a non-resident. Before the decision of *Pennoyer v. Neff*, 95 U. S. 714, judgments rendered in accordance with such state statutes were generally deemed to be valid and binding *in personam* in the local state courts against non-resident defendants.¹

These cases, however, have been overruled, and the settled doctrine now is that a judgment on a money demand against a non-resident defendant upon publication or any other form of substituted service short of personal service of process within the state, or a voluntary appearance by the defendant in the action, is null and void *in personam*; that such state process is contrary to "due process of law" and the fourteenth amendment; and that no action can be maintained upon such a judgment in any court, not even in the local state courts; nor will it constitute a ground of defense in any court by way of set-off.²

§ 184. **Leading case of *Pennoyer v. Neff*, 95 U. S. 714.**—The leading case on this subject is *Pennoyer v. Neff*. The opinion of the court, delivered by Mr. Justice Field, contains an elaborate and convincing discussion of the whole subject. Briefly stated, the material facts of that case and the reasons assigned by the court were as follows: Judgment was

¹ *Graves v. Cushman*, 131 Mass. 359; *Jarvis v. Barrett*, 14 Wis. 591; *Kendrick v. Kimball*, 33 N. H. 482; *Granger v. Clark*, 22 Me. 128.

² *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350; *Freeman v. Alderson*, 119 U. S. 185; *Eliot v. McCormick*, 144 Mass. 10, and *Needham v. Thayer*, 147 Mass. 536 (virtually overruling *Graves v. Cushman*, 131 Mass. 359; *McCormick v. Fiske*, 138 Mass. 379; *Cook v. Darling*, 18 Pick. 393; *Fineran v. Leonard*, 7 Allen, 54); *Eastman v.*

Dearborn, 63 N. H. 364 (expressly overruling *Kendrick v. Kimball*, 33 N. H. 482); *Eastman v. Wadleigh*, 65 Me. 251; *Easterly v. Goodwin*, 35 Conn. 273, 277; *Hakes v. Shupe*, 27 Iowa, 465; *Mitchell v. Gray*, 18 Ind. 123; *Smith v. McCutchen*, 38 Mo. 415; *Abbott v. Sheppard*, 44 Mo. 273; *Miller v. Duggan*, 38 N. J. L. 21; *Pauling v. Bird*, 13 Johns. (N. Y.) 192; *Oakley v. Aspinwall*, 4 N. Y. 514; *Maxwell v. Stewart*, 23 Wall. 77.

recovered in the state court of Oregon against Neff by one Mitchell, who had a money demand against Neff for services as an attorney. This judgment was rendered upon default, without any personal service of process upon Neff (who was a non-resident), without any voluntary appearance by Neff, and without a levy of a writ of attachment upon his land at the commencement of the action. The requirements of the Oregon statutes relating to publication of notice in a newspaper, and the plaintiff's affidavit stating that the defendant Neff was a non-resident; that his place of residence was unknown to the plaintiff; that he could not be found within the state; that plaintiff had a just cause of action against defendant for a money demand on account; that the court had jurisdiction of such action, and that the defendant had property in the county,—were all strictly complied with. After judgment in favor of Mitchell for less than \$300, the land of Neff, of the alleged value of \$15,000, was seized on execution and sold to Pennoyer, who received a sheriff's deed, and entered into possession of the whole tract.

Neff, being a non-resident of Oregon, then brought this present action against Pennoyer in the United States circuit court for the district of Oregon to recover possession of the land. Neff's title to the land was good, unless it had been divested by the proceedings in the case of *Mitchell v. Neff*. The whole case, therefore, turned upon the validity or invalidity of the judgment in that case. If that judgment were valid, the plaintiff could not recover. If it were void, it constituted no defense. The court held that said judgment was void, and the plaintiff Neff was entitled to recover the land, for the following reasons:

1. Because no state can exercise direct jurisdiction and authority over persons or property outside of its territorial limits; and publication of notice within the state is not sufficient to compel a non-resident's appearance in the action, or to confer jurisdiction upon the court over his person in a proceeding of this character. The judgment in

Mitchell v. Neff, having been rendered without jurisdiction, was therefore entitled to no faith or credit, or force and effect, in the courts of another sovereignty. It was merely an attempt to give an extraterritorial operation to the laws of Oregon and to enforce an extraterritorial jurisdiction by its tribunals.

2. Because the process provided by the statutes of Oregon, which purported to allow a valid judgment *in personam* to be rendered upon these facts, was contrary to due process of law, unconstitutional and void; and that since the adoption of the fourteenth amendment to the federal constitution the validity of such judgments could be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law.

3. That the judgment in *Mitchell v. Neff* was not binding *in rem* upon the land, because it was not brought under the control of the court by seizure or some equivalent act at the commencement of the proceedings, but merely after judgment on execution.

4. That this is the only doctrine consistent with proper protection to citizens of other states.

“If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties upon mere publication of process, which in the great majority of cases would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished.”¹

¹ Per Mr. Justice Field, for the court, in *Pennoyer v. Neff*, 95 U. S. 714, 726.

§ 185. *Pennoyer v. Neff*, 95 U. S. 714, is binding upon state courts.—The second reason assigned above for the judgment in *Pennoyer v. Neff* is a construction placed upon a provision of the constitution of the United States by the supreme court, and is therefore binding upon all state courts as well as upon the lower federal courts, and it has been followed in many of the states.¹ Mr. Chief Justice Morton says in the case first cited above: “As the question before us depends upon the construction of a provision of the federal constitution, our decision, if against the exemption or privilege claimed under that provision, would be subject to be re-examined by the supreme court of the United States upon a writ of error. Upon such a question the decision of that court is authoritative and binding upon all state judges.” Pages 11, 12.

§ 186. *Foreign corporations as defendants*.—“The doctrine of that case (*Pennoyer v. Neff*, *supra*) applies in all its force to personal judgments of state courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation, being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them.”²

§ 187. *Such judgment no defense as set-off*.—A judgment obtained against a non-resident defendant or foreign corporation without personal service or voluntary appearance is no defense by way of set-off to an action against the original plaintiff. *St. Clair v. Cox*, 106 U. S. 350, was an action in the United States circuit court for Michigan, on two promissory notes, each for \$2,500, made by the defendant and payable to the order of the Winthrop Mining Company, through which company the plaintiff claimed.

¹ *Eliot v. McCormick*, 144 Mass. 10; *York v. Texas*, 73 Texas, 651; *Eastman v. Dearborn*, 63 N. H. 364. ² Per Mr. Justice Field, for the court, in *St. Clair v. Cox*, 106 U. S. 350, 353.

The defense was that that company was indebted to the defendant in the sum of \$10,000, on a judgment recovered by him against it; and that the plaintiff took the notes after their maturity and dishonor, and after he had notice of the defenses to them. The judgment relied upon in set-off was rendered by default in a state court of Michigan in an action commenced by attachment of property. The officer who served the writ returned that by virtue of it he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county." It did not appear anywhere in the record offered in evidence that the Winthrop Mining Company (which was a foreign corporation) was engaged in business in Michigan; and for this reason the supreme court held that the state court had acquired no jurisdiction *in personam* over that company; that its judgment was entitled to no faith and credit, or force and effect, in the federal courts, sitting even within the same state; and that therefore the judgment was no defense to this action.

§ 188. **Domestic judgments of state courts — Collateral impeachment of.**— The same rule prevails in the case of a domestic judgment. If rendered without personal service of process or voluntary appearance, it is void *in personam* against a non-resident defendant, and he may impeach it collaterally in the courts of the same sovereignty. If there is an attachment of property, the suit is substantially a proceeding *in rem*, and the judgment can have no effect except upon the property attached. It cannot be made the foundation of an action *in personam*.

The case of *Eastman v. Dearborn*, 63 N. H. 364, contains a well considered opinion. The suit was to recover a balance due upon a judgment recovered in the same state between the same parties. In the first action the defendant's horse was seized at the commencement of the proceedings

and sold, and the proceeds applied in part satisfaction of the judgment, which was rendered against the defendant (a non-resident) upon publication merely, without personal service of process, or his voluntary appearance. *Held*, that plaintiff could not maintain his action upon said judgment, because it was void *in personam*. Mr. Justice Allen, in delivering the unanimous opinion of the court, stated the doctrine clearly, concisely and forcibly: "No court has jurisdiction beyond the state which created it, and cannot effectively send its process for execution beyond the limits of the state, and an order of notice by publication made within the state cannot be more effective than a summons or other process sent out of the state. The natural and just right, universally recognized, which every person has of appearing and answering to an action, before he shall, by a judgment, be deprived of liberty or property, is not met or sustained by process sent abroad for service, nor by a newspaper notice, which may or may not reach the party, and no jurisdiction of the person is acquired by notice of that kind. Judgments may be valid for some purposes and void for other purposes. That a judgment be valid against all parties and for all purposes, the court in which it is rendered must have jurisdiction of the subject-matter of the suit, and of the person or persons against whom it is rendered. *State v. Richmond*, 26 N. H. 232. By the attachment of the defendant's property within the state in the former suit, jurisdiction of the property was acquired, and the judgment rendered without other notice to the defendant than the statutory one by publication, and without his appearance to the action, was valid for the purpose of appropriating the attached property to the payment of the debt and for no other purpose. No jurisdiction of the defendant's person having been acquired by the proceedings, the judgment is void as a personal one against the defendant beyond its effect upon the property taken, and cannot be made the foundation of another suit to collect the unsatisfied part. [Citing seven cases.] The principle is recog-

nized and adopted in the fourteenth amendment to the constitution of the United State, which declares that 'no state shall deprive any person of life, liberty or property without due process of law.' Notice of a suit to a non-resident debtor by publication as a substitute for personal service within the state cannot be due process of law, and a judgment rendered upon such notice, without appearance of the defendant, in a suit brought to determine the private rights and obligations of the parties, can have no validity."¹

Needham v. Thayer, 147 Mass. 536, was also an action upon a domestic judgment, which had been obtained against a non-resident defendant by involuntary default. The plaintiff argued that a domestic judgment could not be collaterally impeached by plea and proof in a suit brought upon it, because the only proper remedy was a writ of error.² But the court held that as the judgment is void for want of jurisdiction, "the non-resident defendant cannot be deprived of his right to show by plea and proof, if such suit is brought, that the judgment is void, without an abridgment of his privileges and immunities, to protect which was the object of the fourteenth article of amendment. To compel him to resort to our courts by a writ of error, in which he must file a bond if he would obtain a stay of execution, is to impose a burden upon him, and thus to abridge his privileges and immunities. It has been held in many cases that a domestic judgment cannot be impeached by plea and proof in a suit brought upon it, because the proper remedy is a writ of error. *Hendrick v. Whittemore*, 105 Mass. 23, and cases cited. But while a state may make laws binding its own citizens, requiring them to resort to a writ of error, it cannot so bind citizens of other states." Per Morton, C. J., page 538.

A non-resident defendant who has had such a judgment rendered against him is not, however, obliged to wait until he is sued upon the judgment to assert his right and to es-

¹See, also, *Miller v. Duggan*, 36 N. J. L. 21.

²*McCormick v. Fiske*, 188 Mass. 379.

tablish the invalidity of the judgment. He may immediately bring a writ of error and obtain its reversal, or he may resort to any other mode of direct impeachment allowed by the laws of the state of process.¹ In New York a non-resident defendant who has not been personally served with process, and against whom a judgment has been rendered upon the unauthorized appearance of an attorney, may have the judgment set aside on motion,² although a resident defendant cannot do so.³

§ 189. **Constitutional and interstate jurisdiction.**—It follows from the cases cited in the preceding sections, and especially from *Pennoyer v. Neff*, that there exists what may be termed a constitutional jurisdiction and an interstate jurisdiction, which are superior to state jurisdiction. The former is based upon the constitution of the United States, and the latter upon the unsundered powers of the states. When constitutional jurisdiction clashes with state jurisdiction, the latter must be disregarded, even in the local state courts. To illustrate: In *Pennoyer v. Neff*, and in *Needham v. Thayer*, the state court had jurisdiction of the original suit, according to the constitution and laws of the state of process; but according to the constitution of the United States, the state court had not jurisdiction, and the latter controls the former, even in the state courts.

So, likewise, in the case of interstate jurisdiction. Long before the adoption of the fourteenth amendment to the national constitution (in 1866), it was settled law that the states retained their power to refuse to enforce a judgment of another state, which had been rendered without interstate jurisdiction, though according to the law of the state of its rendition, and notwithstanding the "full faith and credit" clause of the constitution.⁴

¹ *Eliot v. McCormick*, 144 Mass. 10.

² *Vilas v. Plattsburgh R'y*, 123 N. Y. 440.

³ *Denton v. Noyes*, 6 Johns. (N. Y.) 297.

⁴ *Moulin v. Ins. Co.*, 24 N. J. L. 222; *D'Arcy v. Ketchum*, 11 How. 165; *Bissell v. Briggs*, 9 Mass. 462. It is a distressing commentary upon the difference between mine and thine, that upon the same identical

§ 190. Statutes authorizing substituted service must be strictly pursued.—Service of process upon a non-resident defendant by publication, or by personal service in another state, or by service at his last abode in the state of process, or upon a member of his family, are all in derogation of the common law; and therefore the mode prescribed by statute must be strictly pursued. "Every principle of justice exacts a strict and literal compliance with the statutory provision."¹

"No theoretical unity of husband and wife can make service upon one equivalent to service upon the other. Personal citation to the defendant, or his voluntary appearance, is the essential preliminary to a purely personal judgment."²

§ 191. Special appearance to object to insufficient service of process.—In the absence of a statute, the rule generally recognized is that a non-resident defendant, upon whom insufficient service of process has been made, may enter a special appearance to object to the court's jurisdiction, and that this will not constitute a waiver of his objection, nor confer jurisdiction over his person.³ But a state may abolish this rule by statute, and make a special

state of law and fact, a domestic judgment was formerly held valid, and a judgment of a sister state was held void, for want of jurisdiction. Thus, in states A. and B., both allowing jurisdiction to be acquired over the person of a non-resident defendant by publication, a judgment so rendered in A. was held valid and enforceable in A., but void and unenforceable in B., for want of jurisdiction; and a judgment so rendered in state B. was deemed valid and enforceable in B., but void and unenforceable in A., for want of jurisdiction. The fourteenth amendment, however, has remedied this evil, at least in the case of non-resident defendants, and a judg-

ment *in personam* so rendered is now void in all states,—in the state where rendered as well as in other states,—and also in the federal courts. *Elsasser v. Haines*, 52 N. J. Law, 10, 15.

¹ *Galpin v. Page*, 18 Wall. 850, 869; *Earle v. McVeigh*, 91 U. S. 503; *Settlemyer v. Sullivan*, 97 U. S. 444; *Wilbur v. Ripley*, 124 Mass. 468; *Thayer v. Tyler*, 10 Gray, 164; *McMinn v. Whelan*, 27 Cal. 300.

² Per Mr. Justice Field, for the court, in *Settlemyer v. Sullivan*, 97 U. S. 444, 447; *Kilbourn v. Woodworth*, 5 Johns. (N. Y.) 37.

³ *Harkness v. Hyde*, 98 U. S. 476; *Walling v. Beers*, 120 Mass. 548; *Weil v. Lowenthal*, 10 Iowa, 575.

appearance equivalent to a general appearance, and binding as such upon non-resident defendants as well as upon resident defendants.¹

§ 192. **Joint-debtor acts.**— “In most of the states legislative acts have been passed, called joint-debtor acts, which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and if the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They are generally held to bind the common property of the joint debtors as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served;² and, whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding on the latter.”³

A state legislature is not restrained by any clause of the national constitution from enacting that judgments in its courts against joint defendants, one of whom is not duly served with process, shall be valid as to those who are so served or who voluntarily appear.⁴

The legal effect of a judgment rendered in one state, when sued upon in another state, is to be determined by the law of the former state; and if, according to that law, the judgment is valid against a partner served with process, and invalid against another partner not served with process, it should be given the same effect in the courts sitting in the latter state, whatever the local law may be.⁵ If, by the law of the second state, the judgment sued upon is in-

¹ *York v. Texas*, 137 U. S. 15; *post*, § 209, and cases cited.

² *Sugg v. Thornton*, 132 U. S. 524.

³ Per Mr. Justice Bradley, for the court, in *Hall v. Lanning*, 91 U. S. 160, 163.

⁴ *Hanley v. Donoghue*, 116 U. S. 1, 8, and cases cited.

⁵ *Mason v. Eldred*, 6 Wall. 231; *Renaud v. Abbott*, 116 U. S. 277.

valid, the court must, nevertheless, disregard its own local law, and hold it valid against the defendant who was served in the first action. This is the only way in which the court can give due effect to the judgment of the sister state, and it is required by the "full faith and credit" clause of the federal constitution.¹ In reversing the judgment of the state court in the case just cited (*Renaud v. Abbott*), the United States supreme court says, by Mr. Justice Matthews, on page 288: "The principle which protects a person against the operation of judicial proceedings to which he is not a party is one of universal jurisprudence, because it is the dictate of common justice. . . . But the rule that exonerates a defendant actually served with process from the obligation of a judgment, because rendered also against another who has not been served, and therefore is not bound, is purely technical; and when by the local law, according to which such a judgment has been rendered, a different rule has been established, which enforces the personal obligation of the defendant who has been served, or who has appeared in the action, the act of congress requires that the same effect shall be given to it in every other state in which it may be sued on, whatever may be the rule that there prevails in respect to its domestic judgments."

§ 193. **Judgment void in personam in other states against joint debtor not served.**— Even before the adoption of the fourteenth amendment, such state judgment against a non-resident joint debtor or partner was void *in personam* in the courts of other states and in the federal courts on principles of international law.² *D'Arcy v. Ketchum*, 11 Howard, 165 (1850), is a leading case on this point. That action was commenced in a federal court sitting in Louisiana, and was a suit on a judgment recovered in a state court of New York against the defendant here and his partner, A., under a statute of New York, which declared that where joint debtors are sued and one is

¹ *Renaud v. Abbott*, 116 U. S. 277. ² *Hall v. Lanning*, 91 U. S. 160, 168, 169.

brought into court on process, if judgment shall pass for the plaintiff, he shall have judgment against both. A. was brought into court on process in New York, but this defendant was not, nor did he voluntarily appear. It appeared that, according to the New York decisions, a second action could be maintained upon such a judgment in the courts of New York against the non-resident partner, and therefore the plaintiff contended that, under the "full faith and credit" clause of the national constitution, he was entitled to maintain this action in the United States circuit court for the district of Louisiana. But the supreme court held otherwise, and, in a unanimous opinion delivered by Mr. Justice Catron, says, on page 176:

"The international law, as it existed among the states in 1790, was that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of courts of justice had binding force."

In the state courts the rule is the same.¹

§ 194. Entering appearance for non-resident partner. In *Phelps v. Brewer*, *supra*, the supreme judicial court of Massachusetts held, also, in a suit upon a Connecticut judgment, that one partner has no implied power to enter an appearance in an action, except for the partnership, and cannot by such appearance bind a non-resident partner, personally and individually.²

After the dissolution of the partnership, it is clear that the resident partner has no implied authority to bind the non-resident by entering an appearance, even if the action is on a cause of action which arose during the partnership; for "appearance to a suit is a very different thing from those ordinary acts which appertain to a general settlement

¹ *Phelps v. Brewer*, 9 Cush. 390; *Kane v. Cook*, 8 Cal. 449.

² See, also, *Haslet v. Street*, 2 McCord (S. C.), 310.

of business, such as receipt and payment of money, giving acquittances, and the like.”¹

§ 195. **Allegation and proof of foreign law.**—It is often important for a plaintiff, who sues in one state upon a judgment of a sister state against joint debtors, only one of whom was legally brought into court in the first action, to allege and prove the effect of such judgment in the state of its rendition. In most states it is held, if the judgment is entire and unqualified, that as it is void for want of jurisdiction over the defendant not legally brought into court, it is void as against both defendants, unless it be alleged and proved as a fact that, according to the law of the former state, the judgment is valid as against the defendant legally served with process; for in most state courts the law of another state is regarded as a matter of fact and not of law.²

Accordingly it was decided in *Knapp v. Abell*, 10 Allen, 485, that an action on a New York judgment against two joint debtors, only one of whom was served with process, could not be maintained in Massachusetts, even against the one served with process, without proof that by the laws of New York a valid judgment could be rendered there against him alone.³

In the federal courts, however, and in some of the state courts, such allegation and proof are not important to the plaintiff, as the law of a sister state is regarded as matter of law of which the court will take judicial notice without plea or proof.⁴ Whenever the supreme court of the United

¹ *Hall v. Lanning*, 91 U. S. 160, 165; *Duncan v. Bank*, 4 Porter (Ala.), 184; *Loomis v. Pearson*, Harper (S. C.), 470.

² *Wright v. Andrews*, 130 Mass. 149; *Rangely v. Webster*, 11 N. H. 299; *Holbrook v. Murray*, 5 Wend. (N. Y.) 161; *Coates v. Mackey*, 56 Md. 416, 419; *Van Buskirk v. Mulock*, 3 Harr. (18 N. J. L.) 184; *Horton v. Critchfield*, 18 Ill. 183.

³ As against the non-resident de-

fendant who was not brought into court in the first action, the judgment is void *in personam*, both within and without the state of its rendition, and the plaintiff cannot maintain an action upon it. His remedy is to sue upon his original demand. *Eliot v. McCormick*, 144 Mass. 10; *Phelps v. Brewer*, 9 Cush. 390.

⁴ *Lamar v. Micou*, 114 U. S. 218, 229; *Owings v. Hull*, 9 Peters, 607;

States is exercising its appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law in the supreme court, and whatever was matter of fact in the court appealed from is matter of fact in the supreme court.¹ But this rule does not prevent the United States supreme court from correcting an erroneous conclusion reached by a state court as to the legal effect of a judgment of a court of another state, or of a federal court.² It only requires that, when the court appealed from regards the law of a sister state as matter of fact, such law should be made part of the record sent up to the supreme court, and that the record should show that the federal question was properly raised in the state court.³

Hence in a state which regards the law of a sister state as matter of fact, an allegation in the declaration that the foreign judgment sued upon is valid where rendered against a resident partner (who was served), and void against a non-resident partner (who was not served in the first action), is an allegation of fact, which is admitted by demurrer; and if the state court renders judgment against the plaintiff on these pleadings, the United States supreme court will reverse the judgment on the ground that the state court failed to give "full faith and credit" to the judgment of another state.⁴

Hobbs v. Memphis R. R., 9 Heiskell (Tenn.), 873.

¹ *Hanley v. Donoghue*, 116 U. S. 1, 6; *Chicago, etc. R. R. v. Wiggins Ferry Co.*, 119 U. S. 615.

² *Renaud v. Abbott*, 116 U. S. 277; *Embry v. Palmer*, 107 U. S. 3; *Green v. Van Buskirk*, 7 Wall. 139; *Crescent Co. v. Butchers' Union*, 120 U. S. 149.

³ *Hanley v. Donoghue*, 116 U. S. 1, 6; *Chicago, etc. R. R. v. Wiggins Ferry Co.*, 119 U. S. 615.

⁴ *Hanley v. Donoghue*, 116 U. S. 1. This principle is not confined to judgments. Thus, in those states

whose courts will not take judicial notice of the laws of other states, a plaintiff who seeks to enforce a right given by a statute of another state for a tort committed in such other state must allege and prove the law of such other state as a fact, and also the facts which show that he is entitled to recover under that law. It is not sufficient to show that the statute of the state of process allows a recovery, for that does not apply to an act sounding in tort committed in another state, and no presumption exists that the other state has a like statute. *Selma R'y*

§ 196. Satisfaction of void judgment bars action on original demand.—A plaintiff who obtains satisfaction of a judgment, which is void *in personam* against the non-resident defendant for want of personal service or voluntary appearance, can obtain nothing more, even by suing upon the original demand in another state. Nor does it help the plaintiff that he obtained satisfaction by levying on the property of his debtor under such void judgment, instead of receiving voluntary payment. In either case the cause of action is extinguished.¹

§ 197. Judgments of sister states.—If a state court render judgment *with jurisdiction*, its judgment is entitled to “full faith and credit” in the courts of other states, by virtue of the national constitution; that is, it is entitled to the same general force and effect elsewhere within the Union that it has by law and usage at home.² When, however, a judgment of a state court is rendered *without jurisdiction*, it is not entitled to any faith and credit, or force and effect, in the courts of other states, nor in the federal courts.³

Service of process by publication, or personal service outside of the state where the court sits, is not sufficient to confer jurisdiction upon the court over the person of a non-resident defendant. Therefore a judgment so rendered is not entitled to any faith and credit, or force and effect, in the courts of other sovereignties. By them it is considered an illegitimate assumption of power, and resisted as mere abuse. It constitutes neither a cause of action nor a ground of defense; nor is it a valid set-off. The fact that this mode of service is authorized by statute and is regarded as valid in the state of the judgment’s rendition, and that the judgment is there considered to be binding against the

v. Lacy, 43 Ga. 461; Allen v. Pittsburgh R’y, 45 Md. 41; Whitford v. Panama R’y, 23 N. Y. 465; Le Forest v. Tolman, 117 Mass. 109.

¹ Whittier v. Wendell, 7 N. H. 257, 258; Fitzsimmons v. Marks, 66 Barb. (N. Y.) 333.

² Bissell v. Briggs, 9 Mass. 462; Robinson v. Fair, 128 U. S. 53, 87.

³ Folger v. Columbia Ins. Co., 93 Mass. 267; Thompson v. Whitman, 18 Wall. 457.

person of the non-resident defendant, does not change the result: it still remains void in other states and in the federal courts; because neither the legislature nor the court has jurisdiction over persons or property in other states.¹

§ 198. **Personal service of process in another state.**—Personal service of process upon a non-resident defendant in a state other than the state issuing the process is insufficient to subject his person to the jurisdiction of the court, because a state cannot effectively send its process beyond its own limits; and a judgment by default against a non-resident so served is void *in personam*, both within² and without³ the state of its rendition; and no action can be maintained upon it.

§ 199. **Service at residence of former citizen.**—Many states have statutes providing for service of process at the defendant's residence, or last and usual place of abode. In some states these statutes are held to apply to a defendant who has at some prior time been an inhabitant of the state, but who has left it before suit and become a citizen of another state.

"The object of these provisions," says Gray, C. J., in *Graves v. Cushman*, 131 Mass. 359, 362, "is to enable a plaintiff, having a claim against an absent defendant who has once been an inhabitant of this state, to obtain, after taking all reasonable precautions for notifying him of the suit and for securing his rights, a judgment which may be enforced against his property here, and against his person if he returns within their jurisdiction, although a judgment so obtained may not be allowed any force in other states."

Are such statutes constitutional, so far as to authorize a

¹ *Pennoyer v. Neff*, 95 U. S. 714; *D'Arcy v. Ketchum*, 11 How. 165; *St. Clair v. Cox*, 106 U. S. 350; *Kilbourn v. Woodworth*, 5 Johns. (N. Y.) 37; *Gleason v. Dodd*, 4 Met. (Mass.) 333; *Gilman v. Gilman*, 126 Mass. 26; *Judah v. Stephenson*, 10 Iowa, 493.

² *Harkness v. Hyde*, 98 U. S. 476; *Denny v. Ashley*, 12 Colo. 165; *Weil v. Lowenthal*, 10 Iowa, 575; *Hakes v. Shupe*, 27 Iowa, 465.

³ *Ewer v. Coffin*, 1 Cush. 23; *Rand v. Hanson*, 154 Mass. 87; *McEwan v. Zimmer*, 38 Mich. 765; *Bischoff v. Wethered*, 9 Wall. 812.

valid judgment *in personam*? As applied to the case of a defendant who is merely temporarily absent from and who retains his citizenship in the state, they may perhaps be constitutional. Being a citizen of the state of process he may perhaps be held bound by its laws on this point.¹

In *Knowles v. Gaslight Co.*, 19 Wall. 58, 61, 62, Mr. Justice Bradley says: "We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the state in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state. But in the case of non-residents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears."

As applied to the case of a defendant who has left the state of process before suit and become a citizen of another state, these statutes are clearly unconstitutional in so far as they purport to authorize the rendition of a judgment *in personam* against him by service at his residence, or at his last and usual place of abode within the state. Every citizen of the United States has the constitutional right to instantly transfer his citizenship from one state to another.² As soon as he acquires a residence and domicile in a new state, he loses his residence and citizenship in the old state.³ No man owes allegiance to two different states at the same time, and as soon as he becomes a citizen of a new state he ceases to be subject to the jurisdiction of the former state.⁴ It seems clear, therefore, that a court cannot acquire jurisdiction over the person of a non-resident defendant, by service of process at his last residence within the state, after he has become a citizen of another state; and a judg-

¹ *Bissell v. Wheelock*, 11 Cush. 277; *Biesenthall v. Williams*, 1 Duval (Ky.), 329.

² *Morris v. Gilmer*, 129 U. S. 815, 328; *Cooper v. Galbraith*, 3 Wash. C. C. 546, 554.

³ *Chicago & N. W. R'y v. Ohle*, 117 U. S. 123; *Shaw v. Shaw*, 98 Mass. 158, 160.

⁴ Cases above cited; *Briggs v. Rochester*, 16 Gray (Mass.), 337.

ment by default so rendered in accordance with local statutes is null and void *in personam*.

§ 200. **Attachment of property does not confer jurisdiction of the person.**—Attachment of the property of a non-resident defendant on a money demand, even when followed by publication or other mode of substituted service, in accordance with the local statutes, does not confer jurisdiction upon the court over the person of the defendant. If a partial satisfaction of the judgment be obtained from a sale of the attached property, the judgment for the excess is void for want of jurisdiction over the non-resident's person. Being rendered without jurisdiction of the person, it is entitled to no "faith and credit" or force and effect in the courts of other sovereignties, when sued upon as a cause of action,¹ nor when pleaded as a merger in an action upon the original cause of action,² nor when pleaded in set-off.³

In *Kilbourn v. Woodworth*, 5 Johns. (N. Y.) 37, a bedstead belonging to the defendant was attached in Massachusetts and summons to appear was there served upon his wife, and the Massachusetts court rendered a personal judgment against him by default for a larger sum than the value of the bedstead. In an action upon this judgment in New York, the court held that the attachment bound only the property attached as a proceeding *in rem*, and did not bind the defendant personally, upon the ground that to bind him personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice.

In the courts of the same state of its rendition, it is also void *in personam*, since the adoption of the fourteenth amendment to the constitution. In those courts no action can be maintained upon it;⁴ or the non-resident may obtain

¹ *Gilman v. Gilman*, 126 Mass. 26; ³ *St. Clair v. Cox*, 106 U. S. 350.
² *McVicker v. Beedy*, 81 Me. 314; ⁴ *Eastman v. Dearborn*, 63 N. H.
Woodward v. Tremere, 6 Pick. 364; *Miller v. Duggan*, 36 N. J. L.
(Mass.) 354. 21.

² *Campbell v. Steel*, 11 Pa. St. 396.

its reversal on a writ of error.¹ In Iowa it has been held that a personal judgment on a money demand against a non-resident defendant by publication and attachment of land is void for want of jurisdiction, and that the sale of the property attached is also void and passes no title to the purchaser. "In this case the court might have rendered a judgment *in rem*, but did not do so."² But if a non-resident defendant voluntarily appears in an attachment suit, the court thereby acquires jurisdiction *in personam*; the proceeding is changed from one *in rem* to one *in personam*; and a judgment against him is entitled to full faith and credit, and may be enforced in every court of the Union. *Maxwell v. Stewart*, 22 Wall. 77, was an action brought in a territorial court of New Mexico upon a Kansas judgment so rendered against a non-resident. In giving judgment for the plaintiff, the supreme court, by Mr. Chief Justice Waite, says on page 80: "The record shows that the action (in Kansas) was commenced by attachment and service had by publication. So far the action was in the nature of a proceeding *in rem*, and would bind only the property attached. But afterwards, as the record also shows, the defendant voluntarily appeared and submitted himself to the jurisdiction of the court. He at first filed a demurrer, then an answer, and finally went to trial upon the issues made by the pleadings. After judgment he moved for a new trial which was overruled. If these statements appearing in the record are true, the court did have jurisdiction of the person of the defendant, and could bind him by a judgment. No evidence was introduced to contradict the record. Its truth is therefore presumed."

§ 201. **No merger of original cause of action.**— A judgment obtained without personal service of process or voluntary appearance is generally deemed to be no merger of the original cause of action. The plaintiff can sue upon his original demand, and a plea of merger by a former recovery

¹ *Eliot v. McCormick*, 144 Mass. 10.

² *Smith v. Griffin*, 59 Iowa, 409, 411.

is no defense.¹ In *Middlesex Bank v. Butman*, *ubi supra*, the plaintiff having recovered a judgment in Massachusetts against a non-resident of that state, without personal service upon, or voluntarily appearance by, the defendant in the action, brought this suit in Maine upon the original cause of action. Held, that there was no merger, and that the second action was properly framed upon the original demand. In *Campbell v. Steel*, *ubi supra*, a like decision was rendered where there had been an attachment of property and partial satisfaction in the former suit.

In *Whittier v. Wendell*, 7 N. H. 257, it was held that a Maine judgment rendered against a citizen of New Hampshire, without personal service or voluntary appearance, was no bar to an action on the original demand in New Hampshire. The court by Parker, J., says on page 259: "It would be singular, indeed, if a judgment of another state, upon which the plaintiff could maintain no suit here, and obtain no satisfaction there, should be a bar to an action on the original demand in this state, so that the creditor would be wholly without remedy in any jurisdiction."

A contrary decision was made in *Henderson v. Staniford*, 105 Mass. 504. The ground for this decision was that the former (California) judgment was not an absolute nullity, but was merely voidable at the defendant's election, and that therefore the plaintiff was not "at liberty to treat it as a nullity, and resort to his original cause of action," contrary to the defendant's election to treat it as valid. There is one fact in this case which may possibly distinguish it from the other cases, namely, that the defendant had been a citizen and a resident of California up to within about one year before the California suit was commenced, and the court found that California continued to be his legal domicile when the judgment was rendered.

¹ *Middlesex Bank v. Butman*, 29 Me. 19; *Whittier v. Wendell*, 7 N. H. 257; *Rangely v. Webster*, 11 N. H. 299; *Campbell v. Steel*, 11 Pa. St. 396; *Bennett v. Caldwell*, 70 Pa. St. 253; *Kane v. Cook*, 8 Cal. 449; *Bonesteel v. Todd*, 9 Mich. 371. *Contra*, *Lapham v. Briggs*, 27 Vt. 26; *Henderson v. Staniford*, 105 Mass. 504.

Upon the doubtful principle that a person is bound by such laws of his own state in the courts of another state, this fact may distinguish this case from the others.¹ In *Smith v. Grady*, 68 Wis. 215, however, this principle was denied, and it was held that a judgment by default on personal service outside the jurisdiction cannot be enforced as a ground of action in the courts of another state, even when the defendant is a citizen of the country in which the judgment is rendered. *Stone v. Wainwright*, 147 Mass. 201, is the latest Massachusetts decision upon this point, and it seems to be inconsistent with *Henderson v. Staniford*, *supra*.

In *Lapham v. Briggs*, 27 Vt. 26, there was no evidence or claim that the defendant was a citizen of the state in which the first action was brought; but the court held in an opinion by Redfield, C. J., that a Massachusetts judgment rendered upon an attachment of property and publication, without personal service or appearance, was not a nullity; that the defendant could affirm its validity; and that his plea of merger was therefore a good defense to an action upon the original cause of action.

The question as to which of these views is correct is of very little practical importance; for the plaintiff may always avoid the effect of a plea of merger by inserting two counts in his declaration,—one upon the original demand, and the other upon the judgment.² When he declares solely upon the judgment, and pending the action the judgment is reversed, he may amend by adding a count on the original demand.³

As a state has the power to authorize its courts to render judgment against one or more of several joint debtors, when the others are not duly served with process, a judgment so rendered in accordance with its joint-debtor acts is no merger of the original cause of action with respect to

¹ *Douglas v. Forrest*, 4 Bing. 686. Mass. 504, 508; *Odom v. Denny*, 16 Gray (Mass.), 114.
(See Judge Cooley's explanation of this case in *McEwan v. Zimmer*, 38 Mich. 765, 769.)

³ *Goodrich v. Bodurtha*, 6 Gray (Mass.), 323.

² *Henderson v. Staniford*, 105

those not served and not appearing. Hence a second action can be maintained in another state against such non-served and non-appearing debtors, and a plea of merger by the former judgment is no defense.¹ In *Odom v. Denny*, 16 Gray (Mass.), 114, the same result was reached, but by a different course of reasoning, the Massachusetts court holding that the Massachusetts joint-debtor act applied to judgments rendered in another state as well as to those rendered in Massachusetts, and prevented a merger by a Virginia judgment; and that such judgment was no bar to an action on the original demand against a non-resident of Virginia, who had not been served and had not appeared in the Virginia action.²

A judgment for the plaintiff rendered with jurisdiction in any state operates as a merger of the original cause of action in all other states. The facts that the judgment has been appealed from and that the appeal is pending do not prevent such merger, at least when the appeal does not supersede the judgment. "When suits are pending in different states upon the same cause of action, the plaintiff must elect in which he will proceed to final judgment."³

§ 202. **Merger ceases upon reversal of judgment.**—After the reversal of a judgment for the plaintiff the merger ceases, and the plaintiff must declare upon the original demand, and a plea of merger is bad. In *Goodrich v. Bodurtha*, 6 Gray, 323, the plaintiff had obtained a judgment against the defendant on a promissory note, which judgment was afterwards reversed, for the reason that the defendant was a non-resident, was not served with process and did not appear. *Bodurtha v. Goodrich*, 3 Gray, 508. Plaintiff then declared upon the note, to which defendant pleaded a merger by the reversed judgment. Thomas, J., says: "To this (plea) the obvious reply was and is that, upon the reversal of the judgment, the merger ceases. It was as if no judgment had been rendered."

¹ *Suydam v. Barber*, 18 N. Y. 468. ³ *North America Bank v. Wheeler*,

² See, also, *Shirley v. Shattuck*, 13 28 Conn. 433, 441.
Met. (Mass.) 256.

§ 203. Contradiction of the record by parol evidence.—

A non-resident defendant, against whom a judgment has been rendered by default, is not bound by the statement of jurisdictional facts in the record. In many cases he may contradict the record, or the officer's return, by parol evidence, in order to show that the court had not jurisdiction; and want of jurisdiction may be shown either as to the subject-matter or as to the person, or, in proceedings *in rem*, as to the thing.¹

In a suit on a judgment of another state, the officer's return that he had made personal service of process on a non-resident defendant may be contradicted by parol evidence. The effect is to show that the judgment sued upon is void *in personam*, and is not entitled to any faith or credit, or force and effect, in other states, or in the federal courts.² So, likewise, in an action on a judgment of a sister state, an allegation in the record that the defendant, a non-resident, *appeared in the suit*,³ or that he *appeared by his attorney*,⁴ may be contradicted by parol evidence, notwithstanding the "full faith and credit" clause of the national constitution. In a wife's suit for divorce, the recital, in a prior *ex parte* divorce obtained by the husband in another state, of jurisdictional facts (as that he was a resident of that state), may be contradicted by parol, and the divorce invalidated as against her.⁵

On a writ of error to reverse a domestic judgment for want of service at the non-resident's last and usual place of abode within the state, the officer's return that the defendant had no last and usual place of abode within the state

¹Thompson v. Whitman, 18 Wall. 457; Knowles v. Gaslight Co., 19 Wall. 58; Hall v. Lanning, 91 U. S. 160; Tilden v. Johnson, 6 Cush. (Mass.) 354; Phelps v. Brewer, 9 Cush. (Mass.) 390; Starbuck v. Murray, 5 Wend. (N. Y.) 156.

²Carleton v. Bickford, 13 Gray (Mass.), 591; Knowles v. Gaslight Co., 19 Wall. 58; McDermott v. Clary, 107 Mass. 501.

³Starbuck v. Murray, 5 Wend. (N. Y.) 148.

⁴Aldrich v. Kinney, 4 Conn. 380; Gilman v. Gilman, 126 Mass. 26. *Contra*, Warren v. Lusk, 16 Mo. 102.

⁵Cross v. Cross, 108 N. Y. 628; Sewall v. Sewall, 122 Mass. 156; Leith v. Leith, 39 N. H. 20; Hoffman v. Hoffman, 46 N. Y. 80.

may be contradicted by parol evidence; and, if the facts be proved, the judgment will be reversed.¹ So, likewise, on a writ of error to reverse a domestic judgment, an allegation in the record that the defendant, a non-resident, "came by his attorney," may be contradicted by parol, and the judgment reversed, for want of jurisdiction.²

Even where the record states that the court has found the jurisdictional facts to exist, and the court has taken jurisdiction and rendered judgment, the non-existence of such facts may be proved by parol evidence in order to impeach the judgment collaterally in the courts of another state and in the federal courts.³ In this case a citizen of New York sued in New York the sheriff of Monmouth county, N. J., in an action of trespass for the conversion of the plaintiff's sloop, cargo, furniture and apparel. The defendant justified the taking of the sloop under the oyster law of New Jersey, which prohibits non-residents to rake or gather clams, oysters or shell-fish in any waters of New Jersey, and also under a judgment of forfeiture rendered against the sloop, cargo, etc., by two justices of the peace for Monmouth county, N. J. The statute conferred jurisdiction upon two justices of the peace of the county *in which the seizure was made*, and the justices' record stated that the seizure was made within their county of Monmouth. It was held that the plaintiff could prove by parol that the seizure was not made in their county, and that a finding by the jury that the seizure was made outside of Monmouth county showed that the justices of the peace had no jurisdiction over the sloop, and that their judgment of forfeiture was therefore not entitled to any faith and credit in the federal courts or in the courts of other states, and constituted no defense to this action for conversion.

§ 204. **Early cases overruled.**—The authorities cited in the preceding section overrule a good many early cases.

¹ *Tilden v. Johnson*, 6 Cush. 354. ³ *Thompson v. Whitman*, 18 Wall.

² *Bodurtha v. Goodrich*, 3 Gray, 457.

In *Lapham v. Briggs*, 27 Vt. 26, it was held, in an opinion by Redfield, C. J., that the full faith and credit clause prevented the contradiction of jurisdictional facts recited in the record of a sister state judgment; and that the judgment was conclusive upon those facts as well as upon others. So in *Hall v. Williams*, 6 Pick. 232, although it was held that the Georgia judgment, rendered without personal service of process, could not be enforced in Massachusetts, the decision was placed upon the ground that this involved no contradiction of the record, as the record failed to show personal service or voluntary appearance. In the opinion of the court by Parker, C. J., it is said on pages 239, 240: "If it appeared by the record that the defendants had notice of the suit, or that they appeared in defense, we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true judicially; and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress, for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process, or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it; for it is manifestly against first principles that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defense."¹

§ 205. Reversal of such judgment saves bar of limitation.—Such judgment, however, if reversed or adjudged void, may be of service to the plaintiff, by enabling him to defeat the defense of the statute of limitations, under the usual saving clause allowing him an additional year within which to bring a new action after the reversal of a judg-

¹ See, also, *Rust v. Frothingham*, Breese (Ill.), 258; *Warren v. Lusk*, 16 Mo. 102.

ment in his favor, on an action duly commenced in time. In *McCormick v. Eliot*, 43 Fed. Rep. 469, an action was brought in the United States circuit court for the district of Massachusetts twenty-four years after the accrual of a simple contract debt. The defendant pleaded the six years' statute of Massachusetts. The plaintiff replied that he had brought a former action against the defendant in a state court of Massachusetts within six years after the debt accrued, and recovered judgment, and that the judgment had been reversed within one year before the commencement of this new action. It appeared from the record of this judgment that it had been rendered against the defendant while he was a non-resident of Massachusetts by publication and an attachment of property, and without personal service of process, or a voluntary appearance in the action by the defendant. Mr. Justice Gray delivered the opinion, holding that the reversal of such a judgment entitled the plaintiff to the benefit of the saving clause, and that his second action was not barred.

QUALIFICATIONS AND EXCEPTIONS.

§ 206. (1) Service on agent of non-resident defendant. To the rule that a state has not the constitutional power to render a judgment *in personam* against a non-resident defendant upon substituted service of process, there are some qualifications and exceptions.

Where a state statute authorizes service of process upon an agent, and the non-resident defendant has appointed an agent to receive service for him, the statute is valid, and a personal judgment so rendered is binding upon the non-resident, both within and without the state of rendition. The reason given is that "it is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has

been followed, even though he may not have had actual notice of them.”¹

This question has generally arisen in the case of foreign corporations, and many states have statutes requiring them, as a condition for doing business in the state, to appoint an agent upon whom process may be served. A personal judgment so rendered against a foreign corporation is binding, both within and without the state.²

From the rule that a state can impose such conditions as it deems proper upon the transaction of business within its borders by a foreign corporation,³ it follows that state statutes requiring such corporations to appoint an agent to receive service of process are valid and binding upon the local state courts; and that they can acquire jurisdiction *in personam* by such service.⁴

Under the judiciary act of 1875 it was also decided that the federal courts sitting within a state having such a statute could acquire jurisdiction *in personam* by such service of process if the proper citizenship of parties existed. For even if the foreign corporation was not an “inhabitant” of the district, it was clearly “found” therein at the time of serving process, within the meaning of the act of congress.⁵

The judiciary act of 1887 unsettled the question by omitting the clause contained in the act of 1875 allowing suit when the foreign corporation defendant was “found” in the district of suit. Under this act the decisions are conflicting; but it is now settled that when the proper citizenship exists, as defined by the act of 1887, a foreign corpo-

¹Per Alderson, B., in *Vallee v. Commercial Ins. Co.*, 12 Gray, 201; *Dumerque*, 4 Exch. 290, 303. This reason is quoted with approval by the court in *Pennoyer v. Neff*, 95 U. S. 714, 735.

²*Lafayette Ins. Co. v. French*, 18 How. 404; *Société Foncière v. Milkien*, 135 U. S. 304; *St. Clair v. Cox*, 106 U. S. 350; *Ex parte Schollenberger*, 96 U. S. 369; *Gillespie v.*

³*Paul v. Virginia*, 8 Wall. 168.

⁴*Ante*, § 46, and cases cited.

⁵*Ex parte Schollenberger*, 96 U. S. 369.

ration doing business in a state having such a statute may be brought into a United States circuit court sitting therein, by service of process upon its agent, and that the court will thereby acquire jurisdiction *in personam*.¹

In order, however, that a judgment *in personam* so obtained may be entitled to full faith and credit, or force and effect, in the courts of other sovereignties, it must appear in the record not only that the foreign corporation was engaged in business within the state of process, but also that the service was made upon its agent. And even when these facts appear from the record, the corporation can invalidate the record by parol evidence that the alleged agent stood in no representative character to the corporation; that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose. For that principle of natural justice which forbids condemnation without opportunity for defense must be maintained.²

§ 207. (2) **Cross-actions and cross-bills against non-residents.**—Some states provide by statute that, when a non-resident has brought an action in their courts, he shall be liable to a cross-action against him by the original defendant, and that service upon his attorney of record shall be “as valid and effectual as if made on the party himself within this commonwealth.”³

There seems to be no constitutional objection to such statutes, and a judgment by default against a non-resident upon such substituted service of process is believed to be valid. A non-resident, by bringing an action in a state where such a statute exists, thereby impliedly assents in advance to such substituted service of process, and waives his right to personal service.⁴ If the rule were otherwise,

¹ *McCormick v. Walthers*, 134 U. S. 41; *ante*, § 120.

² *St. Clair v. Cox*, 106 U. S. 350, 359; *Lafayette Ins. Co. v. French*, 18 How. 404, 407.

³ *Mass. Pub. Sts.*, ch. 164, secs. 2-4; *Ill. Rev. Sts.*, ch. 22, sec. 31; *Ill. Rev. Sts. of 1845*, ch. 21, §§ 24-30.

⁴ *Lafayette Ins. Co. v. French*, 18 How. 404.

much injustice might be perpetrated upon residents who possess cross-causes of action against non-residents, of such a nature as to be incapable of set-off. When the cause of action can be set off, it is every-day practice to file a declaration in set-off in the original suit, and a judgment obtained thereon without personal service of process upon the original non-resident plaintiff is undoubtedly binding *in personam*, if in accordance with local statutes. It is due process of law, for that kind of proceeding.

This view receives considerable support from cases relating to cross-bills in equity, and holding, not only that service upon the plaintiff's attorney of record may be authorized, but also that service of process on the cross-bill may be dispensed with entirely, without violating the constitutional provision, even when the non-resident defendant in the cross-bill is an infant.¹

§ 208. (3) **Warrants of attorney to confess judgment.**—The ordinary warrant of attorney to confess judgment amounts to a voluntary waiver of the service of process, and authorizes a judgment *in personam* without personal service upon the defendant or his voluntary appearance in the suit. Such judgment, if rendered with jurisdiction, is entitled under the constitution to "full faith and credit" in the courts of other states, and a suit may be maintained upon it,² but if rendered without jurisdiction, it is entitled to no faith and credit, or force and effect, in other states or in the federal courts, and no suit can be maintained upon it therein.³

In *Grover Machine Co. v. Radcliffe*, *supra*, a citizen of Maryland gave a warrant to "any attorney of any court of record of the state of New York, or any other state," to confess judgment against him for the sum of \$3,000; and

¹ *Kingsbury v. Buckner*, 134 U. S. 650, 675; *Fleece v. Russell*, 13 Ill. 31; *Reed v. Kemp*, 16 Ill. 445, 448.

Crafts v. Clark, 38 Iowa, 237; *Ritter v. Hoffman*, 35 Kan. 215.

² *Randolph v. Kisler*, 21 Mo. 557; *Coleman v. Waters*, 13 W. Va. 278; *Grover Machine Co. v. Radcliffe*, 66 Md. 511; S. C., affirmed, 137 U. S. 287.

under this warrant of attorney a prothonotary of Pennsylvania rendered judgment against the defendant, and upon that Pennsylvania judgment this action was brought in Maryland. The prothonotary acted under the Pennsylvania statute of 1806, which empowered a prothonotary to enter such judgment. This statute was in force when the defendant executed the warrant of attorney; but there was no such statute in Maryland, where the defendant resided. The court of appeals of Maryland held that the Pennsylvania judgment was void for want of jurisdiction over the defendant's person; that it was not entitled to any faith and credit, and that it was not a valid foundation for an action. The supreme court of the United States affirmed this judgment; and held further that the defendant could not be presumptively held to knowledge and acceptance of special laws of states other than his own, allowing that to be done which was not authorized by the terms of his power of attorney. It seems, however, that if Maryland had had a like statute, or if the defendant had been a citizen of Pennsylvania, that the judgment would have been binding upon him, on the ground that the prothonotary's judgment was authorized by the law of the defendant's state.

In the courts of other states, a judgment upon defendant's warrant of attorney is subject to the same defenses as in the state wherein it is rendered. Thus, in *Brown v. Parker*, 28 Wis. 21, an action was brought in Wisconsin on an Illinois judgment which had been rendered against a citizen of Wisconsin on his warrant of attorney. Both parties to the debt had resided in Wisconsin for its full period of limitation, before the first action was brought in Illinois, which, as the Wisconsin limitation act was construed by the local court, extinguished the debt. It was held that, inasmuch as the Illinois courts regarded such judgments as subject to be set aside in equity,—which power the Wisconsin law courts also possessed,—the plaintiff could not recover, because his claim had been extinguished in Wiscon-

sin when he first sued in Illinois, and because if that matter had been brought to the attention of the Illinois court it would probably have restrained the enforcement of the judgment.

The rule is well settled that "the authority to confess a judgment without process (*i. e.*, upon warrant of attorney) must be clear and explicit, and must be strictly pursued."¹ In the New York case above cited three non-residents of New York executed a warrant of attorney, addressed to an attorney of the court of common pleas at Philadelphia, Pa., "or to any other attorney of the said court or of any other court there or elsewhere, or to any *prothonotary* of any of the said courts." Under this warrant a New York attorney confessed judgment in a state court of New York. On a motion to set aside this judgment, it was held that, as there was no such officer in New York as a "prothonotary," the warrant did not authorize the entry of judgment in a court of New York, and that the judgment must be vacated and set aside.²

A warrant of attorney to confess a "judgment or judgments" does not authorize the confession of a second judgment while a prior judgment is in force.³

§ 209. (4) **Abolition of special appearances.**— A state has the power to abolish the distinction between special and general appearances, and to declare by statute that a special appearance by a non-resident defendant (who has not been personally served with process within the state), for the purpose of objecting to the jurisdiction of the state court, will authorize the court to render a personal judgment against him. Such judgments on the merits does not deprive the non-resident of his property without due process of law; and it will be recognized and enforced in the

¹ Per Bronson, J., in *Manufacturers' Bank v. St. Johns*, 5 Hill (N. Y.), 497, 500; *Grover Machine Co. v. Radcliffe*, 66 Md. 511; S. C., 137 U. S. 287; *Connay v. Halstead*, 73 Pa. St. 354.

² The same point is decided in *Manuf. Bank v. Boyd*, 3 Denio (N. Y.), 257.

³ *Fairchild v. Camac*, 3 Wash. C. C. 558.

federal courts and in the courts of other states, as well as in the local state courts.¹

In *York v. Texas*, 73 Texas, 651; *S. C.*, 137 U. S. 15, the state of Texas sued a citizen of Missouri for rent of school lands in Texas. No process was served upon the non-resident in Texas, nor was his property attached, but in accordance with the Texas statutes citation was served upon him in Missouri. He entered a special appearance in the Texas court of first instance and objected to its jurisdiction for insufficient service, because he had not been served in Texas. The Texas statutes, as construed by the state court in this case for the first time, declared that such conduct conferred jurisdiction upon the court over the defendant, and authorized it, after his refusal to answer to the merits, to render a personal judgment by default against him on the merits. On a writ of error to the United States supreme court, it was argued that the Texas statutes so construed deprived the non-resident defendant of his property without due process of law, and were therefore void under the fourteenth amendment. But the court held otherwise and affirmed the Texas judgment, on the ground that this was not a matter of substantial right but a mere regulation of proceedings in court. The court, however, was careful to add on page 26: "If the defendant had taken no notice of the suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process, and protected the possession of his property. If the judgment had been pleaded as defensive to an action brought by him he would have been free to deny its validity."

A judgment so obtained is entitled to "full faith and credit" in the courts of other states, and a divorce so obtained by a wife in Texas will bar a divorce by the hus-

¹ *York v. Texas*, 137 U. S. 15; *Jones v. Jones*, 108 N. Y. 415; *Kaufman v. Wooters*, 138 U. S. 285.

band in New York, even if his suit was commenced before hers.¹

Speaking of the same Texas statute, the New York court of appeals says in *Jones v. Jones*, 108 N. Y. 415, 427: "The defendant in the Texas action was not bound to appear. He could stand aloof, and so long as he did so he could not be affected by the proceedings. But he chose to avail himself of the right given by the laws of Texas to file an answer and contest the claim of the plaintiff. He went within the jurisdiction and was represented by attorneys there. He voluntarily filed his answer after first seeking to dismiss the case for want of jurisdiction over his person. The effect of this proceeding was declared by statute to be equivalent to an appearance in the action, and to dispense with the service of citation. The defendant was bound by the consequences which the statute affixes to that proceeding. He cannot invoke the general rule that an answer on the merits does not waive an objection to jurisdiction because the statute in this case had intervened, and of this statute the defendant had notice." Per Andrews, J.

§ 210. Waiving objection to defective service.—On appeal or writ of error, and in the absence of such a statute as the Texas statute, it is well settled that a defendant who was not properly served with process, so as to give the court jurisdiction over his person, does not waive the objection or confer jurisdiction by answering over and going to trial on the merits after his objection to the jurisdiction has been overruled.²

And it seems that the same rule applies to the collateral impeachment of a judgment so rendered in another state, where the judgment is relied upon as a binding adjudication; for "the court does not acquire jurisdiction over the person by deciding that it has jurisdiction. If the acts of

¹ *Jones v. Jones*, 108 N. Y. 415. 300; *Dewey v. Greene*, 4 Denio

² *Harkness v. Hyde*, 98 U. S. 476; (N. Y.), 93; *Walling v. Beers*, 120
Steamship Co. v. Tugman, 106 U. S. Mass. 548.
 118; *Warren v. Crane*, 50 Mich.

the defendant do not constitute a legal waiver of the objection, or a submission to the jurisdiction so as to preclude raising the question on error in the state where the judgment is rendered, how can the same acts preclude the party from raising the question in another state in answer to the judgment.”¹

A non-resident defendant may, however, waive any objection based on insufficient service of process, and a general appearance constitutes such a waiver, even when the defendant is a foreign corporation.²

§ 211. (5) **Service of process in appellate proceedings.**—Proceedings in appellate courts to review the judgments of other courts form a qualification to the rule that prevails in courts of first instance, requiring personal service or voluntary appearance. They are considered rather as a continuation of the original suit than as the commencement of a new one. The state has therefore the power to provide that constructive service of process upon non-residents, by publication or otherwise, shall be valid in appellate proceedings; and such state action is not contrary to due process of law.³

¹ Per Andrews, J., for the court, in *Jones v. Jones*, 108 N. Y. 415, 426. ³ *Pennoyer v. Neff*, 95 U. S. 714, 734; *Nations v. Johnson*, 24 How. 195; *Renaud v. Abbott*, 116 U. S. 277.

² Cases cited *supra*; *Attorney-General v. Guardian Mut. Ins. Co.*, 77 N. Y. 272.

CHAPTER XII.

JUDGMENTS BY DEFAULT AGAINST NON-RESIDENTS (CONTINUED)

PART II.

JUDGMENTS QUASI IN REM BY ATTACHMENT.

§ 212. Introductory. 213. Attachments in federal courts. 214. Judgment by attachment of land in state courts. 215. Judgment by attachment of goods or chattels. 216. Judgment by garnishment of debt due non-resident defendant. 217. Jurisdictional facts must clearly appear in the record relied upon. 218. Seizure at commencement of suit is required. 219. Leading case upon seizure, <i>Pennoyer v. Neff</i>, 95 U. S. 714. 220. The fourteenth amendment invalidates state judgments rendered without seizure. 221. Seizure of defendant's property as notice of suit. 222. Nominal attachment. 223. Denial of hearing to non-resident defendant. 224. Evidence of plaintiff's demand in case of involuntary default. 225. Exceptions and qualifications—(1) Bill to remove cloud upon title to real estate or to quiet title. 226. Leading case of <i>Arndt v. Griggs</i>, 134 U. S. 316.	§ 227. Methods of imparting notice must be reasonable and not contrary to natural justice. 228. (2) Mortgage liens, vendor's liens, etc. 229. (3) Bill for specific performance. 230. (4) Under the power of eminent domain. 231. (5) Partition of land of non-resident. 232. Judgment for costs in partition proceedings. 233. (6) Taxation of non-resident's property. 234. (7) Divorce suits against non-residents. 235-244. Note on general attachment of non-resident's real estate. 236. Kind of jurisdiction required to divest title of non-resident defendant. 237. "Due process of law" defined. 238, 239. First ground of objection—"Inadequate notice of suit." 240, 241. One object of requiring seizure is to impart notice. 242. Second ground of objection—"Land is not under the control of the court." 243. Only the general statute of limitation applies. 244. Illustrations of due process of law in attachment suits.

§ 212. **Introductory.**— Many states provide by statute for the rendition of judgments against non-residents on money demands by attachment of their property within the state of process. Service of process is generally effected by publication of notice, or by personal service upon the non-resident in his own state. It has been shown in the preceding chapter (§ 200) that a judgment so rendered against a non-resident defendant without his appearance in the suit is void, in so far as it purports to bind him personally, because an attachment of defendant's property does not confer jurisdiction over his person. In this chapter will be stated the principles relating to judgments against the property attached.

§ 213. **Attachments in federal courts.**— In the federal courts, the fact that a non-resident's property within the district of the court is attached, either directly or by foreign attachment, does not confer jurisdiction over the property; and therefore the court cannot render a judgment against it, unless the defendant is personally served with process within the district, or enters a voluntary general appearance in the action. An attachment is regarded as but an incident to a suit, and unless the suit can be maintained the attachment must fall. The non-resident defendant who has not been legally served with process may enter a special appearance in the action, and have the attachment dissolved and the action dismissed for want of jurisdiction.¹

Even when the circuit court is held in a state which allows its own courts to acquire jurisdiction of a non-resident's property by attachment and substituted service of process, and even under the act of congress of March 3, 1887, which allows a suit to be brought in a circuit court in the district of the residence of either the plaintiff or defendant, the circuit court does not acquire jurisdiction of a suit on a money demand by a resident plaintiff against a non-resi-

¹ *Ex parte Railway Co.*, 103 U. S. 794; *Day v. Manufacturing Co.*, 1 Blatchf. 628; *ante*, § 133.

dent defendant or foreign corporation, by attachment and substituted service of process.¹

The effect of removing an attachment suit from a state court to a federal court is stated in § 134, *ante*.

§ 214. Judgment by attachment of land in state courts. In the state courts, however, if allowed by the local law, a valid judgment may be obtained against the attached property of a non-resident defendant on a money demand, without personal service of process upon him within the state or his voluntary appearance in the action. Such a judgment, if rendered with jurisdiction and in substantial accordance with the local law, cannot be impeached collaterally in the federal courts or in the courts of other states, even if it contains errors which would authorize an appellate court to reverse the judgment. Want of jurisdiction in the court which rendered the judgment is the only ground upon which it can be refused effect or disregarded when introduced in a collateral proceeding in the courts of another sovereignty.² These points were decided by the supreme court in the leading case of *Cooper v. Reynolds*, 10 Wall. 308. That was an action of ejectment to recover one hundred and sixty acres of land in Tennessee, and was brought in the United States circuit court for the eastern district of Tennessee. The plaintiff below, Reynolds, was a non-resident and the original owner of the land, and was entitled to recover the land unless his title had been divested in a prior attachment suit brought against him and another person by one Brownlow in a state court of Tennessee. The attachment suit of *Brownlow v. Reynolds et al.* was an action for alleged false imprisonment of the plaintiff. A writ of attachment was sued out against the defendant's property, upon which one hundred and sixty acres belonging to Reynolds were specifically attached at the commencement, or at least at an early stage, of the proceedings.

¹Harland v. United Lines Tel. Co., 40 Fed. Rep. 308 (Shipman, J., U. S. Cir. Ct. Dist. Conn., 1889).

²Cooper v. Reynolds, 10 Wall. 308; Voorhees v. United States Bank, 10 Peters, 449.

The requirements of the Tennessee statutes relating to the affidavit and the publication were substantially, but not strictly, complied with. The defendants were not personally served with process, nor did they appear in the action. They were defaulted. A jury assessed the plaintiff's damages at \$25,000, and judgment was rendered for that sum. Execution was levied upon the one hundred and sixty acres attached, and they were sold at sheriff's sale to Cooper. Reynolds then brought ejectment against Cooper to recover the land, and the circuit court gave judgment for the plaintiff on the ground that the affidavit and publication in the case of *Brownlow v. Reynolds* were defective and that the judgment of the court, the sheriff's sale and deed were null and void and conveyed no title to the purchaser, Cooper.

The supreme court, however, reversed this judgment, and held that the purchaser acquired a good title to the land which had been attached in the former action. The reasoning of the court was to the effect that the case in the state court was, in its essential nature, a proceeding *in rem*, and was governed by principles applicable to that class of cases; that in proceedings *in rem*, jurisdiction of the *res* is obtained by a seizure, or by an act of equivalent import; that when land is proceeded against, an actual seizure being impossible from the nature of the subject-matter, a levy of the writ of attachment upon it is sufficient to subject it to the control of the court; and that after such seizure, and notice by publication in accordance with the state laws, a state court acquires jurisdiction over the property attached, and can render a judgment which is valid as against the attached property, but is not valid as against the defendant personally, nor as against any other of his property not so seized and subjected to the jurisdiction of the court. It was also decided that the defects in the affidavit and in the publication of notice were not sufficient to show a want of jurisdiction in the state court, and that therefore the federal courts could not refuse to give full effect to its judgment. The

court, by Mr. Justice Miller, says: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which in this case is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff." Page 319. "The court, in such a suit, cannot proceed unless the officer finds some property on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." Pages 318, 319.

§ 215. Judgment by attachment of goods or chattels. A like rule prevails with respect to a judgment by default against a non-resident defendant upon an attachment of his goods or chattels situated in the state of process. The *lex situs*, the law of the state where the property is kept and used, governs the question of its seizure on attachment and execution, and not the law of the state where the non-resident owner resides. The maxim *mobilia sequuntur personam*, by which personal property is regarded as subject to the law of the owner's domicile, does not apply to the case of attachment and execution. Attachment laws are legal modes of divesting and acquiring title to property by operation of law, and without the consent of the owner. A title so acquired under a valid and constitutional law of the state of *situs* is valid and must be respected in all other states and in the federal courts, under the full faith and credit clause of the constitution.¹

In *Melhop v. Doane*, 31 Iowa, 397 (7 Am. Rep. 147), it appeared that the plaintiff, who was a resident of Iowa, owned several chests of tea which were situated in Illinois; that while there the tea was attached by the present de-

¹ *Green v. Van Buskirk*, 7 Wall. 139.

defendant in accordance with the laws of Illinois for a debt which he alleged to be due him from the present plaintiff; that after due publication of notice to the non-resident owner the Illinois court rendered judgment by default in favor of the then plaintiff and issued an execution, upon which the tea was sold to satisfy the judgment. The present action was to recover the value of the tea so converted to the defendant's use under the Illinois proceedings, on the ground that the claim sued upon in Illinois was wholly false and unfounded, and that the present plaintiff had no actual knowledge of the pendency of that action. But the court held (Miller, J., dissenting) that the plaintiff's title to the tea had been divested by the attachment suit in Illinois; that, as the Illinois judgment was rendered with jurisdiction over the tea, it was entitled to full faith and credit in Iowa; that it was not open to the plaintiff in this action to show that the claim sued upon in Illinois was unfounded, and that he could not recover the value of the tea unless he could prove that the Illinois judgment was fraudulently procured.

§ 216. Judgment by garnishment of debt due non-resident defendant.— Upon the question as to what effect is due in other states to a judgment rendered by default upon substituted service of process against a non-resident defendant, where a debt due him has been garnished, the authorities seem to be irreconcilable. *Campbell v. Home Ins. Co.*, 1 S. C. 158, was a suit on a policy of insurance brought by a citizen of South Carolina in the courts of that state against a New York insurance company. The defense was payment under judgments of garnishment rendered by the supreme court of New York in two suits against the present plaintiff by two of his New York creditors. The plaintiff contended that the New York judgments were not binding upon him, because he was a non-resident of New York, and had been served in one case by publication and in the other case by personal service in South Carolina, and because the records of the New York judgments were silent as to

whether there was a seizure of the debts by service on the garnishee and payment by it of the judgments. But the supreme court of South Carolina held that the facts of seizure and payment could be proved by evidence outside of the records; that the New York court acquired jurisdiction over the debts by such process; that its judgments were entitled to full faith and credit in South Carolina, and that payment under such judgments was a valid defense in this action.

The cases of *East Tennessee R'y v. Kennedy*, 83 Ala. 462; *Baltimore R'y v. May*, 25 Ohio St. 347; *Morgan v. Neville*, 74 Pa. St. 52; *Moore v. C., R. I. & P. R'y*, 43 Iowa, 385, and *Cochran v. Fitch*, 1 Sandf. Ch. (N. Y.) 142, all tend to support the views of the South Carolina court as expressed in *Campbell v. Home Ins. Co.*, *ubi supra*, though none of these cases go so far as that case. Several of these cases proceed more or less upon the view that the *situs* of a debt is the debtor's domicile, instead of the creditor's domicile, and that therefore the debtor's state has jurisdiction over a debt due to a non-resident, and the power to discharge it under garnishee proceedings. This is the only theory upon which a judgment charging the garnishee for a debt due by him to the non-resident defendant can be entitled to "full faith and credit" in other jurisdictions; for it is well settled that if the court rendering such a judgment has not jurisdiction over the property attached, its judgment will not be given that force and effect, and does not divest the title of the defendant, the original owner.

It was shown in sections 26-28, *ante*, that a state has no jurisdiction over a debt due by a resident to a non-resident, as it is situated outside of the state at the domicile of its owner, the creditor, and that therefore the debtor's state has no power to tax such property. The same principle has been applied to the garnishment of debts due non-residents of the state of process; and this seems to be the true view. In *Renier v. Hurlbut*, 50 N. W. Rep. 783; *S. C.*, 80 or 81 Wis. —, and in *Missouri Pacific R'y v. Sharitt*, 42

Kan. 375, this view was expressed with clearness and force. In the Wisconsin case, the defense was an Illinois judgment in garnishment, which had been rendered against the present plaintiff as defendant, who was a resident of Wisconsin and consequently a non-resident of Illinois. The Illinois judgment was rendered upon default, without personal service or voluntary appearance, but by publication and service upon the debtor of the non-resident defendant, in accordance with the law of Illinois. The Wisconsin court held that the Illinois judgment was void, both *in rem* and *in personam*: *in rem*, because the *situs* of the debt garnished was in Wisconsin at the domicile of its owner, the creditor, and not in Illinois, and that therefore the Illinois court never acquired rightful jurisdiction of the property attached, and its judgment did not divest the title of the original owner.¹

In the unanimous opinion of the court, delivered by Casoday, J., it is said: "The theory upon which foreign attachments and foreign garnishments are sustained is that the principal defendant is beyond the reach of process, but that his property is within the reach of such process, and may therefore be seized thereon. *Railroad Co. v. Pennock*, 51 Pa. St. 244. As indicated, the proceedings of the Chicago court were not based upon any cause of action originating in the state of Illinois, nor to enforce any contract or engagement entered into with reference to any subject-matter within that state, but merely for the purpose of reaching property belonging to Mrs. Renier having no tangible existence in that state. The authorities cited, as well as others which might be cited, pretty clearly show that the Chicago court obtained no jurisdiction over that property. . . . It follows that the proceedings in the Chicago court did not operate as a bar or abatement of this action."

§ 217. Jurisdictional facts must clearly appear in the record relied upon.— Unless all the essential jurisdictional

¹ See, also, §§ 140-142, *ante*.

facts clearly appear in the record relied upon as a cause of action, or as a ground of defense, a judgment by default upon substituted service will not be entitled to any force or effect in the courts of other sovereignties.¹ Publication for the full number of times and for the full period required by statute is an essential jurisdictional fact within the meaning of this rule.²

In *Guaranty Trust Co. v. Green Cove R'y*, 139 U. S. 137, a state court of Florida entered a decree foreclosing a mortgage against a non-resident defendant upon publication alone, without personal service or voluntary appearance. In a subsequent suit in the United States circuit court for Florida, this state decree was relied upon in defense. The local statutes required notice to be published once a week for four months, which the local courts had construed in other cases to mean calendar months and not lunar months. On July 29, 1884, the state court had made an order that the defendant appear and answer the bill of complaint on or before the first Monday of December, 1884, which fell on December 1st, and also ordered that notice be duly published. The only evidence that publication was duly made was an affidavit made and subscribed on December 15, 1884, stating that notice "was duly published in the said newspaper for nineteen consecutive weeks prior to this date, to the best of his knowledge and belief." Construing this affidavit strictly, the last publication fell upon Saturday, December 13th (as the paper was a weekly), and the first publication on August 9th. But as the defendant was required to appear and answer on December 1st, such publication only gave the defendant one hundred and fourteen days' notice, which was more than four lunar months but eight days less than than four calendar months before the 1st of December. It was held that the decree of the state court was void for want of jurisdiction, and constituted no defense to this suit in the federal court, because publication

¹ *Rand v. Hanson*, 154 Mass. 87.

² *Early v. Doe*, 16 How. 610; *Settemier v. Sullivan*, 97 U. S. 444.

had not been made for the full period of four calendar months.

When service is made within the state of process upon the agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application for the writ, or accompanying its service, or in the pleadings, or the finding of the court — that the corporation was engaged in business in the state; and the officer's return stating that he served the writ personally upon John Smith, "*agent of the said*" defendant in a certain county of the state, does not show with sufficient clearness that the corporation was engaged in business there. A personal judgment so rendered by default in a state court is void for want of jurisdiction, and constitutes no defense by way of set-off in a federal court.¹

In South Carolina it has been decided that where the record of a judgment of a sister state is silent upon some jurisdictional facts, the existence of such facts may be shown by evidence outside of the record; and if shown by such evidence, the judgment is entitled to full faith and credit, and may be enforced either as a cause of action or as a ground of defense.²

§ 218. Seizure at commencement of suit is required. In order that a valid judgment may be recovered upon a money demand against the property of a non-resident defendant, upon substituted service of process, his property must be seized and brought under the control of the court at the commencement of the proceedings. It is not sufficient that he owns property within the state at that time, and that it is seized upon execution after judgment, even if the local statutes in terms authorize that mode of procedure. The sale of his property under such proceedings deprives him of his property without due process of law, in violation of the fourteenth amendment, and he can main-

¹ *St. Clair v. Cox*, 106 U. S. 350. S. C. 158; *Lawrence v. Gaultney*,

² *Campbell v. Home Ins. Co.*, 1 Cheeves (S. C.), 7.

tain an action for its recovery against the purchaser at sheriff's sale. The judgment is rendered without rightful jurisdiction over the property sold, and constitutes no defense to the action for its recovery. The judgment and the sheriff's sale and deed, even when rendered and executed in strict accordance with the local statutes, are all nullities, and confer no title upon the purchaser as against the non-resident owner. Publication of notice, or other form of substituted service of process, without preliminary seizure, is not sufficient to authorize a money judgment against a non-appearing, non-resident defendant.¹

§ 219. **Leading case upon seizure, Pennoyer v. Neff, 95 U. S. 714.**— The leading case upon the above points is *Pennoyer v. Neff*, 95 U. S. 714. This action was brought by Neff against Pennoyer in the circuit court of the United States for the district of Oregon, to recover a tract of land in that state, which Pennoyer had purchased at sheriff's sale, upon a judgment recovered by one Mitchell against Neff in a local state court. Neff was a non-resident of Oregon, and Mitchell sued him for professional services as an attorney, and after a judgment by default he levied upon and sold the land in dispute to satisfy his claim. The land had not been attached at the commencement of the suit, and it was not subjected to the control of the state court until it was seized upon the execution. This was in accordance with the practice and statutes of Oregon, which also declared that "the title to property sold upon execution issued on such judgment to a purchaser in good faith shall not be thereby affected."

Mr. Justice Field, in answer to the position that it was immaterial whether the property were brought under the

¹ *Pennoyer v. Neff*, 95 U. S. 714; *Tiffany*, 17 How. Pr. (N. Y.) 106; *Webster v. Reid*, 11 How. 437; *Laughlin v. Louisiana Ice Co.*, 35 *Eaton v. Badger*, 33 N. H. 228; *La. Ann.* 1184, overruling *Field v. Lovejoy v. Albee*, 33 Me. 414; *New Orleans Newspaper Co.*, 19 *La. McKinney v. Collins*, 88 N. Y. 216; *Ann.* 36, and *O'Hara v. Booth*, 29 *Hulbert v. Hope Mut. Ins. Co.*, 4 *La. Ann.* 817. *Contra*, *Jarvis v. How. Pr. (N. Y.)* 275; *Warren v. Barrett*, 14 *Wis.* 591.

control of the state court at the commencement of the proceedings, by levy of the writ of attachment, or after judgment by the levy of the writ of execution, said: "But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his [the defendant's] obligation at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

It was accordingly decided that the purchaser at sheriff's sale acquired no title, and judgment was rendered for the non-resident owner.

In *Webster v. Reid*, 11 How. 437, the plaintiff was the purchaser of the land in dispute at sheriff's sale, under two judgments on personal demands recovered in a territorial court of Iowa, upon publication of notice under a statute of the territory against the "owners of the half-breed lands lying in Lee county," and without personal service of pro-

cess upon such owners or their voluntary appearance; nor had the land been subjected to the jurisdiction of the court by attachment. On this writ of error to the supreme court of Iowa territory, the United States supreme court held that the purchaser at sheriff's sale acquired no title and could not recover. The court, by Mr. Justice McLean, says on pages 459, 460: "No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

§ 220. **The fourteenth amendment invalidates state judgments rendered without seizure.**—It is true that *Pennoyer v. Neff*, 95 U. S. 714, might have been decided the same way without denying the constitutional power of the states to authorize and render such judgments; for the action was brought in a lower federal court and not in a local state court. The same judgment in favor of the non-resident might have been rendered by merely holding that the state court, in *Mitchell v. Neff*, had not jurisdiction over the property sold, and therefore its judgment was not entitled to any faith and credit, or force and effect, in the federal courts, and the sheriff's sale passed no title to the purchaser. But the reasoning of the court, as well as the dissenting opinion of Mr. Justice Hunt, shows clearly that the decision was meant to cover the point of the state's constitutional power under the "due process of law" clause of the fourteenth amendment. The court, by Mr. Justice Field, says on page 733: "Since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." In

Mr. Justice Hunt's dissenting opinion, he says on pages 736-738: "The judgment of this court is based upon the theory that the legislature had no power to pass the law in question; that the principle of the statute is vicious, and every proceeding under it void. . . . Whether the property of such non-resident shall be seized upon attachment as the commencement of a suit which shall be carried into judgment and execution, upon which it shall then be sold, or whether it shall be sold upon an execution and judgment without such preliminary seizure, is a matter not of constitutional power but of municipal regulation only."

A judgment so rendered against a non-resident defendant is "contrary to the first principles of justice; for its object was [is] to establish a claim against the defendant and thereby deprive him of his property without a hearing or an opportunity to be heard."¹ Although this New York case was decided on the ground chiefly that the judgment was not authorized by the New York statutes, yet the above quotation indicates that the judgment would be void, even if the local statutes had authorized it. For to deprive a person of his property "without a hearing or an opportunity to be heard" is to deprive him of his property "without due process of law;" and this the states have not the power to do under the fourteenth amendment.

Jarvis v. Barrett, 14 Wis. 591, holds the contrary, namely, that a state legislature has the constitutional power to authorize the local courts to render a personal judgment against a non-resident and non-appearing defendant by publication, without an attachment of defendant's property before judgment; and that a sale of his property seized on execution is valid and divests the original owner of his title. This decision was placed upon the grounds that "a writ of attachment is the usual and familiar method of conferring jurisdiction in such cases, but it is not the only one. There is no magic about the writ which should make it the exclusive remedy. The same legislative power which provided

¹Per Danforth, J., in *McKinney v. Collins*, 88 N. Y. 216, 219.

it can devise some other, and declare that it shall have the same force and effect. . . . The essential fact upon which jurisdiction is made to depend is, property of the defendant in the state, and not whether it has been attached." Page 593, per Dixon, C. J.

In Louisiana it was also the rule for many years that its courts had the power to render a personal judgment against a non-resident defendant upon substituted service of process on a curator *ad hoc*, without a preliminary attachment of the defendant's property; and that any of his property within the jurisdiction could be seized on execution to satisfy a judgment so rendered against him.¹ But the cases announcing this rule have recently been overruled by the same court, upon the authority of *Pennoyer v. Neff*, 95 U. S. 714, and the federal rule adopted.²

§ 221. Seizure of defendant's property as notice of suit.—An additional reason for requiring a seizure of defendant's property at the commencement of the suit is to notify him of the action, and to afford him an opportunity to appear and defend; for "the law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."³ Seizure after judgment upon execution does not notify the non-resident defendant in time to appear and defend the action; and publication alone without preliminary seizure is not sufficient notice.

§ 222. Nominal attachment.—In some states it has been held under the local statutes that a nominal attachment of a bottle or a chip as the property of the defendant will authorize a judgment on a money demand against a non-

¹ *Field v. New Orleans Newspaper Co.*, 19 La. Ann. 36; *O'Hara v. Booth*, 29 La. Ann. 817.

² *Laughlin v. Louisiana Ice Co.*, 35 La. Ann. 1184.

³ *Pennoyer v. Neff*, 95 U. S. 714,

resident non-appearing defendant, upon whom merely substituted service of process was made; and that a subsequent action on such a judgment can be maintained in the same state.¹ But since the adoption of the fourteenth amendment, it seems very clear that such judgments, even when authorized by the local statutes, are contrary to due process of law and void as to all property except that attached, and that no action can be maintained upon them in any court. The attachment of one article of defendant's property does not give the court jurisdiction over the person, nor over any other property, of a non-resident defendant, and a state legislature cannot confer such jurisdiction even upon its own courts, since the fourteenth amendment became the supreme law of the land.

Even before the adoption of the fourteenth amendment this rule prevailed in actions brought upon such judgments of other states or foreign countries.² *Ewer v. Coffin*, *supra*, was an action in Massachusetts upon a Rhode Island judgment, which had been rendered against a non-resident of Rhode Island after an attachment of "one pair of can-hooks;" and personal service upon the defendant outside of Rhode Island. This was in accordance with the Rhode Island statutes, which also allowed a recovery in an action upon such judgment. The supreme court of Massachusetts held, however, that an action could not be maintained upon the judgment in Massachusetts.

§ 223. Denial of hearing to non-resident defendant.—

A non-resident defendant who appears in an action is entitled to an opportunity to be heard in his defense. If his appearance be stricken out by the court and his right to be heard denied, a judgment against him is void, and a purchaser at sheriff's sale acquires no title as against the defendant. No circumstances will justify a court in such an arbitrary edict; not even that the defendant is a rebel and resident within rebellious territory.³

¹ *Stevens v. Fisher*, 30 Vt. 200.

Wall. 259; *Windsor v. McVeigh*,

² *Ewer v. Coffin*, 1 Cush. 23.

93 U. S. 274.

³ *McVeigh v. United States*, 11

§ 224. **Evidence of plaintiff's demand in case of involuntary default.**— The failure to recognize the difference between voluntary and involuntary defaults has led in some states to the unjust practice of allowing a plaintiff to recover the sum claimed in his declaration (if liquidated) *without evidence* on his part respecting the justice or amount of his claim, even when the record shows that the non-resident defendant has not been personally served with process, and has not appeared in the action.¹ A judgment after voluntary default may perhaps be rightly rendered upon a liquidated claim, such as a bill or note, without evidence from the plaintiff, because the defendant's conduct in failing to appear after personal service of process amounts to an admission of the plaintiff's claim and dispenses with proof. But a judgment upon involuntary default does not amount to such an admission, because the defendant is under no legal obligation to deny the claim, nor to appear in court, and therefore his conduct does not dispense with the necessity for sworn proof on the plaintiff's part.² This does not apply to a formal defect (such as a misnomer of the defendant), where the writ was served on the right person, by a proper officer, within the jurisdiction of the court; for in such case he is under a legal obligation to appear and defend. When, however, the only service is by publication, or by personal service in another state, the defect is one of such substance and magnitude that a non-resident defendant is under no legal obligation to appear and defend, and is not properly "in default." For "no person can be considered in default with respect to that which it never was incumbent upon him to fulfill;"³ and it is not incumbent upon a non-resident defendant to appear in answer to a suit on a money demand when served only in the mode just stated.⁴

¹ McCormick v. Fiske, 138 Mass. 379.

court, in Earle v. McVeigh, 91 U. S. 503, 507.

² Beach v. Mosgrove, 16 Fed. Rep. 305.

⁴ Insurance Co. v. Bangs, 103 U. S. 435; *ante*, §§ 183-186, 197, 198.

³ Per Mr. Justice Clifford, for the

For these reasons it is believed that a judgment so rendered against a non-resident defendant, upon which his property is seized on execution and sold, even under a prior attachment, would deprive him of his property without due process of law,— would be void in all courts, and would not bar a subsequent action by him for its recovery. There is absolutely no evidence before the court upon which it can predicate its judgment. There is no affirmative evidence from the plaintiff; and there is no negative evidence arising from the non-resident's failure to appear, because he is under no legal obligation to appear. A court can only render judgment for a plaintiff upon evidence, and a judgment rendered without evidence is absolutely null and void. It seems to be an improper exercise of jurisdiction; and therefore a judgment so rendered is not entitled to any force or effect in other states.¹

§ 225. Exceptions and qualifications.— There are some important qualifications of and exceptions to the rule that a non-resident's property must be subjected to the jurisdiction of the court by seizure at the commencement of the proceedings in order to justify its sale, upon substituted service of process by publication, or in such other mode as is authorized by the local state law, when the suit is in a state court, or by the federal law when the suit is in a federal court.

Exception 1 — Bill to remove cloud upon title to real estate or to quiet title.— The question as to the power of a state to authorize its courts to remove clouds upon the title to land within its borders or to quiet title thereto, by substituted service of process upon non-resident claimants, has been much discussed of late, and finally decided in favor of the state's power, by the supreme court of the United States. In other words, it is now settled that a state has the constitutional power to provide by statute that the title to real estate within its limits may be settled and determined by a suit in which the defendant, being a non-

¹ *Reynolds v. Stockton*, 140 U. S. 254.

resident or foreign corporation, is brought into court only by publication, or by any other reasonable form of substituted service of process. And a decree or judgment of a state court rendered upon such service of process, in accordance with the statute, is entitled to full faith and credit, and force and effect, in the federal courts and in the courts of sister states.¹

§ 226. Leading case of *Arndt v. Griggs*, 134 U. S. 316.

This action was brought to recover possession of land in Nebraska, and was brought in the United States circuit court for the district of Nebraska. The suit involved the validity of a decree of a state court of Nebraska, quieting title to the land in suit as against a non-resident claimant who was served only by publication, and did not appear in the proceedings in the state court. If these proceedings were valid, the defendant who claimed under them was entitled to judgment; if they were void for want of jurisdiction, the decree was not entitled to any force or effect in the federal court and the defendant was not entitled to judgment. The state decree was rendered in accordance with the local statutes, which authorized the state court to acquire jurisdiction by publication, for the purpose of quieting title to real estate, as against non-resident claimants of the same.

The circuit court held, probably upon the authority of *Hart v. Sansom*, 110 U. S. 151, that the state court did not acquire jurisdiction, and that its decree was not entitled to any force or effect in the federal court, and gave judgment for the plaintiff. The argument in support of this judgment was, that a suit to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone. But the supreme court reversed the judgment, for the following reasons:

“While these propositions are doubtless correct as state-

¹ *Arndt v. Griggs*, 134 U. S. 316; 767; *Cloyd v. Trotter*, 118 Ill. 391; *Venable v. Dutch*, 37 Kans. 515; *Essig v. Lower*, 120 Ind. 239; 21 Dillen v. Heller, 39 Kans. 599; *Mar-* N. E. Rep. 1090; *Wunstel v. Landry*, *ion County v. Welch*, 40 Kans. 39 La. Ann. 812.

ments of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purpose by publication, it is impotent to perfect titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the mode of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the consti-

tution, or against natural justice." Per Mr. Justice Brewer, for the court, at pages 320, 321.

§ 227. **Methods of imparting notice must be reasonable and not contrary to natural justice.**—It is implied in the opinion of the supreme court in *Arndt v. Griggs*, 134 U. S. 316, 321, that the method adopted by the state for imparting notice of such proceedings to non-resident defendants must be reasonably adapted to accomplishing that object. It must not be contrary to natural justice nor in conflict with the national constitution; otherwise the state judgment or decree may be treated as void and disregarded when introduced in evidence in the federal courts or in the courts of other states. If the method prescribed be so unreasonable as to be contrary to due process of law, the state judgment is void, even in the local state courts, under the fourteenth amendment to the constitution.¹

In an Illinois case, *Cloyd v. Trotter*, 118 Ill. 391, the defendant was a resident of New York, and was there served with a copy of a bill in chancery to remove a cloud from the title to land in Illinois in accordance with the Illinois statutes. He did not appear in the lower court and judgment was rendered against him, not only removing the cloud, but also for costs of court. On a writ of error to reverse this judgment the supreme court of Illinois held that the lower court acquired jurisdiction by such service to remove the cloud,² but not to render a personal money judgment for costs, or to award a general execution against him for the costs.

It may be considered as settled law in the United States that in proceedings to enforce any legal or equitable lien, or to remove a cloud upon the title to real estate, a statute which authorizes notice by publication to non-resident claimants for once a week for six or more consecutive weeks, and which allows a non-appearing defendant one

¹ *Needham v. Thayer*, 147 Mass. 536; *Eastman v. Dearborn*, 63 N. H. 364. ² Upon this point see, also, *Marion County v. Welch*, 40 Kan. 787.

year or more after judgment to appear and to have the judgment set aside upon payment of costs, is a reasonable method of imparting notice in that class of cases, and is not contrary to the federal constitution; nor is the jurisdiction so conferred upon the courts defeated by any principle of federal or interstate law.¹

§ 228. (2) **Mortgage liens, vendors' liens, etc.**—The preceding principles apply in full force to actions and suits brought to enforce liens to specific property within the territorial jurisdiction of the court as against non-residents. In such case substituted service of process, without actual seizure of the thing, is sufficient and valid to confer jurisdiction *in rem*. The eighth section² of the judiciary act of March 3, 1875 (18 Stat. 470, 472), expressly authorizes this mode of procedure in the federal courts; and the validity of this act and of the jurisdiction conferred were virtually sustained by the supreme court in *Mellen v. Moline Iron Works*, 131 U. S. 352.

Where the local law allows it, an action may be maintained by a vendor in a court of the state where immovable property is situated to set aside or dissolve a sale on the ground of non-payment of the purchase-money by the vendee; and the non-resident vendee may be brought into court by substituted service of process, and the court acquires jurisdiction *in rem* without a seizure of the property by attachment. Such state process is not contrary to the "due process of law" required by the fourteenth amendment, because the case presents the question of the title or ownership of property within the state, and is therefore not a purely personal action, but partakes of the nature of a proceeding *in rem*.³

Such proceedings in the state courts are entitled to full force and effect in the federal courts and in the courts of

¹ *Mellen v. Moline Iron Works*, 131 U. S. 352; *Arndt v. Griggs*, 134 U. S. 816, 827.

² This section is quoted in full in the note to section 130, *ante*.

³ *McKenzie v. Bacon*, 38 La. Ann. 764.

other states. Thus, in *Palmer v. McCormick*, 28 Fed. Rep. 541, a suit was brought in the United States circuit court for Iowa to redeem a mortgage of land, and to set aside a previous foreclosure ordered by a state court by publication alone, against a non-resident of Iowa. But the federal court (Shiras, J.) held that the state statutes were not unconstitutional, and that the state decree of foreclosure was valid in the federal court, and could not be set aside. So in *Oswald v. Kampman*, 28 Fed. Rep. 36, a like decision was made in a case to set aside or nullify a sale of land ordered by a state court to enforce a vendor's lien for purchase-money.

But in foreclosure proceedings against a non-resident mortgagor, by publication or other form of substituted service of process, there is no presumption in favor of the jurisdiction of the court; and unless the record shows a compliance in all essential particulars with the statute authorizing such service, its decree by default and order of sale are null and void, and will pass no title to the purchaser at sheriff's sale.¹

§ 229. (3) **Bill for specific performance.**—In the case of a bill in equity to enforce the specific performance of a written contract to convey land, the state where the land lies has the constitutional power to provide by statute that if a non-resident refuses or neglects to execute a deed, this may be done in his behalf by a trustee appointed by the court for that purpose, after notice by publication alone, without seizure.²

§ 230. (4) **Under the power of eminent domain.**—A state may authorize the taking or condemnation of property therein, belonging to non-residents, by publication and without preliminary seizure. In this class of cases this

¹ *Guaranty Trust Co. v. Green*, 139 U. S. 337; *Swift v. Cove Ry.*, 139 U. S. 137; *Arndt v. Griggs*, 134 U. S. 316, 329; *Felch v. Hooper*, 119 Mass. 52; *Meyers*, 37 Fed. Rep. 37; *Matteson v. Scofield*, 27 Wis. 671;

² *Hart v. Sansom*, 110 U. S. 151, *Rourke v. McLaughlin*, 38 Cal. 196, 155, and cases cited by the court;

constitutes "due process of law" within the meaning of the fourteenth amendment; and the non-resident owner cannot avoid such condemnation proceedings under the state law on the ground that they violate the federal constitution. If binding in the state courts under the state constitution and laws, they are also binding in the federal courts and the courts of other states.¹

Thus, in a proceeding before the county commissioners of Kansas to condemn a non-resident's land for railroad purposes, notice was published in compliance with the Kansas statute, specifying the section, township and range, county and state, in which it was proposed to locate the railroad. Upon such notice merely, the commissioners condemned the land, as of the value of \$725. The owner, being dissatisfied with the amount allowed him, brought suit in the United States circuit court for Kansas, claiming that the state tribunal had not acquired jurisdiction by such notice, and that its judgment was void. But the supreme court held otherwise, for these reasons:

"The owner of real estate who is a non-resident of the state within which the property lies cannot evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the state. Because he cannot be reached by some process of the courts of the state, which of course have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties and obligations which the state has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be sufficient warning to the owner of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations. Otherwise the burdens of taxation, and the liability of such property to be taken under the power of eminent domain,

¹ *Huling v. Kaw Valley R'y*, 180 28 Wall. 108; *Boom Co. v. Patterson*, 98 U. S. 559; *Secombe v. Railroad Co.*, 98 U. S. 403.

would be useless in regard to a very large amount of property in every state of the Union.

"It is therefore the duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called in requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is 'due process of law,' as applied to this class of cases."¹

Instead of bringing a new suit in the federal court, the non-resident owner of the land condemned should have removed the old suit from the state court to the federal court; and might have obtained in that way a much larger sum for his land.²

§ 231. (5) **Partition of land of non-resident.**— It seems to follow from the reasoning of the supreme court in *Freeman v. Alderson*, 119 U. S. 185, and in *Arndt v. Griggs*, 134 U. S. 316, that a state has the power to render a valid decree of partition of lands within its limits as against a non-resident co-tenant, by publication alone, without personal service of process, or appearance, or seizure; and that such decree will be entitled to full force and effect in the courts of other sovereignties.

§ 232. **Judgment for costs in partition proceedings.**— But a personal judgment for costs rendered in a state court in a proceeding to partition land by publication against a non-resident, non-appearing owner of an undivided part is void, and a sale of his property on an execution issued to collect the costs is void and passes no title to the purchaser. "Such action (for partition), though dealing entirely with the realty, is not an action *in rem* in the strict sense of the term; it is an action against the parties named, and though the recovery and partition of real estate are sought, that

¹ Per Mr. Justice Miller, for the court, in *Huling v. Kaw Valley R'y*, 403 U. S. 559, 563, 564.

² *Boom Co. v. Patterson*, 98 U. S.

does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property. The service of citation by publication may suffice for the exercise of the jurisdiction of the court over the property so far as to try the right to its possession and to decree its partition, but it could not authorize the creation of any personal demand against the defendant, even for costs, which could be satisfied out of his other property."¹

§ 233. (6) **Taxation of non-resident's property.**—As to the power of the state upon the subject of the taxation of property owned by non-residents and foreign corporations, see exhaustive opinions by Mr. Justice Field for the supreme court in *State Tax on Foreign-held Bonds*, 15 Wall. 300, and *Hagar v. Reclamation District*, 111 U. S. 701, and of Mr. Justice Gray for the court in *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18. As to the power of a state to tax debts due by residents to non-resident, see *ante*, §§ 26-28; and as to the power of congress to tax debts due aliens, see *ante*, § 30.

§ 234. (7) **Divorce suits against non-residents.**—A state has the power to grant a valid divorce to one of its citizens, without personal service of process upon or voluntary appearance by the non-resident defendant. Every state possesses jurisdiction to determine the civil *status* of its citizens, and notice by publication, or other form of substituted service of process, if allowed by local law, is sufficient to justify a decree in divorce cases changing the *status* of the complaining party from that of a married person to that of a single person.²

§ 235. **Note on general attachment of non-resident's real estate.**—A question of considerable practical importance in those states which allow a general attachment of

¹ Per Mr. Justice Field in *Free-man v. Alderson*, 119 U. S. 185, 190. sec. 156; Cooley's Const. Lim., p. 405 and cases cited. See further on

² *Pennoyer v. Neff*, 95 U. S. 714, this subject, ch. XIII, *post*, on Divorce. 734, 735; Bishop on Mar. & Div.,

real estate, is, whether or not a judgment rendered against a non-resident defendant on a money demand by publication and a general attachment of his real estate, without personal service or voluntary appearance, is valid, and will pass a good title to the purchaser at sheriff's sale, as against the non-resident defendant?

This form of attachment is of every day practice in the New England States, and many valuable estates are held upon titles so derived. The attachment purports to run against all the defendant's "right, title and interest in and to real estate" situated within a specified county, and it may be made at the commencement of the action, without an affidavit by the plaintiff respecting the justice or amount of his claim, or that the defendant's residence or whereabouts are unknown to him. The statute does not require the attaching officer to go upon or even within view of the land, nor to describe it with certainty. It only requires him to note the fact of attachment upon the writ, and then to deposit the original writ, or a copy thereof, in the registry of deeds, or in the office of the clerk of the courts of such county.¹

Can the non-resident owner of the land sold upon such a judgment in a state court maintain an action for its recovery against the purchaser at sheriff's sale? In the federal courts he can maintain such an action, if the state court had not jurisdiction over the property sold, or if the state process were contrary to due process of law; for then the state judgment would be entitled to no "faith and credit," or force and effect, in the federal courts, even when sitting within the same state.² In the local state courts, he can maintain such an action if the original proceedings deprive

¹ Mass. Pub. Sts., ch. 161, secs. 61-63; *Taylor v. Mixer*, 11 Pick. (Mass.) 341; *Huntington v. Cobleigh*, 5 Vt. 49; *Braley v. French*, 28 Vt. 546; *Crosby v. Allyn*, 5 Greenl. (Me.) 453; *Howard v. Daniels*, 2 N. H. 137; *Moore v. Kidder*, 55 N. H. 488; *Burkhardt v. McClellan*, 1 Abb. Ct. of App. Dec. (N. Y.) 263; *Rodgers v. Bonner*, 45 N. Y. 379; *Sanger v. Trammell*, 66 Texas, 361.

² *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151.

him of his property "without due process of law," or are void under any other provision of the national or state constitution.¹ These two questions are so closely related that they may be conveniently treated together.

§ 236. Kind of jurisdiction required to divest title of non-resident defendant.— By jurisdiction is not meant merely state jurisdiction (*i. e.*, such jurisdiction as is considered valid in the state courts under the local constitution and laws), but also jurisdiction of an interstate and constitutional nature, which is considered valid in all courts under the principles of interstate law and of the national constitution. This distinction is explained in section 189, *ante*, and is a very important one. Of course the jurisdiction, in order to render the judgment valid in any court, must be acquired in a mode allowed by the local law. But this of itself is not sufficient. If acquired in a mode prohibited by the principles of interstate law, the state judgment will be void in the federal courts; and if acquired in a mode prohibited by "due process of law," or by any other clause of the national constitution, the state judgment will be void in all courts, even in the local state courts.²

The writer is of the opinion that such a state judgment is void, for want of jurisdiction, as against the non-resident defendant, and that he can maintain an action against the purchaser at sheriff's sale, or his grantees, for the recovery of the land so sold; because the state process is contrary to due process of law, and therefore the sale is a deprivation of property without "due process of law," in violation of the fourteenth amendment.

For jurisdictional purposes an attachment must be made at the commencement of the action, and must in general be made by an actual seizure of the defendant's property, or by an act of equivalent import.³ The exceptions to this rule have been stated and explained in sections 225-234,

¹ *Pennoyer v. Neff*, 95 U. S. 714; 536; *Eastman v. Dearborn*, 68 N. H. 364.
Beard v. Beard, 21 Ind. 321.

² *Needham v. Thayer*, 147 Mass. ³ *Ante*, §§ 218-220.

ante, and a general attachment clearly does not fall within the reason of any of the exceptions.

The state court does not acquire jurisdiction by a general attachment and publication; because neither the person of the non-resident defendant, nor his land, is thereby subjected to the rightful jurisdiction of the court. It is settled that his person is not thereby subjected to its jurisdiction.¹ And it is submitted that his land is not thereby subjected to the court's jurisdiction; because such process violates due process of law in two essential particulars, which are stated in sections 238, 242, *post*. But first as to the meaning and scope of due process at law.

§ 237. “Due process of law” defined.—“Due process of law” in judicial proceedings means a course of legal proceedings in substantial accordance² with those rules and principles relating to the essential and fundamental principles of liberty and justice which were established in our systems of jurisprudence for the protection and enforcement of private rights at the time of the adoption of the constitution,³ regard being had to the particular system of jurisprudence, or course of proceedings in question.⁴

The provision in the fourteenth amendment that “no state shall deprive any person of life, liberty or property without due process of law” is an important limitation upon the power of the states, and has greatly increased the jurisdiction and power of the federal judiciary. Under this clause the supreme court of the United States is made the final judge of what process is due process, and its de-

¹ *Pennoyer v. Neff*, 95 U. S. 714. Bank, 18 Blatch. 1, 21, 35; *Crandall v. Jones*, 6 R. L. 144, 148; *Backers v. Lebanon*, 11 N. H. 19, 26, 27; *Powers v. Raymond*, 137 Mass. 483, 485, 486.

² *Hurtado v. California*, 110 U. S. 516, 523, 536, 537; *Arrowsmith v. Harmoning*, 118 U. S. 194; *Jones v. Robbins*, 8 Gray (Mass.), 329, 342-350. ³ *Murray's Lessee v. Hoboken*, 18 How. 272; *Davidson v. New Orleans*, 96 U. S. 97; *McMillan v. Anderson*, 95 U. S. 87; *Lavin v. Savings*

⁴ *Huling v. Kaw Valley R'y*, 130 U. S. 559, 564; *Stilwell v. Kellogg*, 14 Wis. 461; *Tabor v. Cook*, 15 Mich. 322, and cases cited *supra*.

cisions upon this question are binding not only upon the lower federal courts but also upon all state courts.¹

It is not every process of law which the state establishes which is due process of law, for if this were the true construction it would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense. In *Davidson v. New Orleans*, 96 U. S. 97, 101, 102, Mr. Justice Miller, in delivering the opinion of the court, says: "The prohibition against depriving the citizen or subject of his life, liberty or property without due process of law is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the constitution of the United States when it became a part of the fourteenth amendment in the year 1866. The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury and other guaranties of the rights of the subject against the oppression of the crown. . . . It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States.

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect

¹ *Eliot v. McCormick*, 144 Mass. *Laughlin v. Louisiana Ice Co.*, 85 10; *York v. State*, 78 Texas, 651; *La. Ann.* 1184.

themselves against the enactment of laws by the parliament of England. But when, in the year of grace 1866, there is placed in the constitution of the United States a declaration that 'no state shall deprive any person of life, liberty or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."¹

The mode or manner in which a court may acquire jurisdiction depends somewhat upon the nature of the subject upon which the judicial power is called to act. If it was invoked against the person, to enforce a liability, the personal citation of the defendant or his voluntary appearance was required at the time of the constitution's adoption. "If it was called into exercise with reference to real property by proceedings *in rem* or of that nature, a different mode of procedure was usually necessary, such as a seizure of the property, with notice, by publication or otherwise, to parties having interests which might be affected."²

The mode of acquiring jurisdiction in attachment suits in common-law courts, required by due process of law, is somewhat analogous to the mode of acquiring jurisdiction in admiralty courts.³

§ 238. First ground of objection — "Inadequate notice of suit." — It is submitted that in this class of cases due

¹ See, also, *Taylor v. Porter*, 4 Hill (N. Y.), 140; *Norman v. Heist*, 5 W. & S. (Pa.) 171.

² Per Mr. Justice Field in *Mohr v. Manierre*, 101 U. S. 417, 422.

³ *Cooper v. Reynolds*, 10 Wall. 808, 818, 819.

process of law prohibits the acquiring of jurisdiction by a general attachment and publication for two reasons:

1. The essence of due process of law is adequate notice of suit to the defendant. That is, such method of imparting notice to him of the suit must be provided by the state as will reasonably accomplish that object, and a general attachment with publication fails to give him adequate notice. Notice of suit is required in order to afford the defendant an opportunity to be heard in his own defense, and it is absolutely essential to due process of law.

In *Stuart v. Palmer*, 74 N. Y. 183, this subject was fully considered. It was there decided that a statute of New York which authorized the laying out and grading of a street, and which imposed an assessment for local improvements, which was made a lien upon the land, without notice to, or a hearing, or an opportunity to be heard, on the part of the owner of the land, was contrary to "due process of law," unconstitutional and void, because it did not afford the owner an opportunity to be heard. On page 191, Earl, J., for the court, says: "It is difficult to define with precision the exact meaning and scope of the phrase, 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. . . . It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this. In his argument in the *Dartmouth College Case*, 4 Wheat. 519, Webster defined 'due process of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.'"

§ 239. As we have seen above, what is adequate notice varies in different classes of cases, and that which is adequate and proper notice in one class may be inadequate and improper in another class. Thus, in admiralty proceedings,

seizure of the *res* and publication give adequate notice, and this mode is consistent with due process of law. But in common-law proceedings a higher form of notice, and one more likely to actually reach the defendant, is required by due process of law. A few words will make the reason for this difference clear. In admiralty proceedings the distinguishing and characteristic feature is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly for an injury committed by it. If the vessel be sold under the decree of the court after seizure, publication and proof of damage, the purchaser acquires a good title as against the original owner, though such owner were not in possession of the vessel at the time of the collision, either in person or by agent or servant, and was in no way to blame for it.¹

In common-law proceedings, on the other hand, a person is the defendant, and the object of the action is to make him liable for an injury done by him to the plaintiff. His property is reached only through his person, and then only to the extent of his title. "It is his title and not the property itself which is sold."² A decree in admiralty is binding only against one particular thing, or article of property. A judgment *in personam* in a common-law court is binding not only against the person, but also against *all* the property of the defendant. A judgment *in personam* entails a higher degree of severity upon the defendant, and therefore a higher degree of notice is required in common-law than in admiralty proceedings. In the latter, at the time of the adoption of the constitution, no higher degree of notice was required than seizure and publication; but in the former, at that time, a higher degree of notice was required than seizure and publication, namely, personal service of process, or voluntary appearance.³

¹Ticonderoga, Swabey, 215, 217; ²Mohr v. Manierre, 101 U. S. 417,
United States v. Malek Adhel, 2 422; Fisher v. Lane, 3 Wilson, 297
How. 210, 234. (1772); Scott v. Shearman, 2 Wm.

³The Moses Taylor, 4 Wall. 411, Blackstone, 977 (1774).
427; Woodruff v. Taylor, 20 Vt. 65.

In an admiralty suit the direct and primary object is the *thing*. In a common-law action the direct and primary object is the *person*. Therefore the necessity for notice to the owner of the thing in the former case is not so strong as the necessity for notice to the person in the latter case. The common-law courts in proceedings *quasi in rem* have borrowed some rules and principles of the admiralty courts, and have applied them to their own procedure so far as the nature of their organization would allow, but not to the extent of making the thing instead of the person the direct and primary object of the action. To do that would be to abolish the fundamental difference between the two systems.¹ The rules and principles which govern proceedings *quasi in rem* in common-law courts are partly those of the common law, with some borrowed from the admiralty. In other words, proceedings *quasi in rem* by attachment in the common-law courts, though mainly *in rem*, are not wholly *in rem*, but are partly *in personam*. Hence a higher degree of notice is required in proceedings *quasi in rem* in the common-law courts than in proceedings strictly *in rem* in the admiralty courts.

§ 240. One object of requiring seizure is to impart notice.—It was expressly decided in *Pennoyer v. Neff*, 95 U. S. 714, that the process of publication and seizure on execution, after judgment in accordance with the state law, is not due process of law; and that the non-resident owner of the property sold on a judgment so obtained could recover it from the purchaser at sheriff's sale. In the case of a general attachment there is no seizure until after judgment, and the recording of notice of the attachment adds nothing to the force of the notice by publication; because the record is no notice to prior purchasers, but merely to subsequent purchasers and incumbancers.² The two combined are not adequate notice of suit; and therefore the process lacks one essential of due process of law.

¹ Holmes, Com. Law, 28, 29.

80; Taylor v. Maris, 5 Rawle (Pa.),

² George v. Wood, 9 Allen (Mass.), 51.

The English case of *Fisher v. Lane*, 3 Wilson, 297, decided in 1772, shortly before the adoption of our national constitution, is a strong authority in support of the proposition that such a judgment does not divest the non-resident defendant of his title, because such process does not give him adequate notice of suit, and is therefore contrary to the first principles of justice and to due process of law. That was an action brought in the court of common pleas to recover the price of goods sold. The defense was payment under a judgment of foreign attachment or garnishment, in the city court of London. That is, in a suit against the now plaintiff (Fisher), the now defendant (Lane) had been charged as garnishee, and had paid the amount of the judgment to the plaintiff in that action. It appeared that this judgment by garnishment had been rendered without notice to the defendant Fisher (the now plaintiff), and that no process had been served on the garnishee Lane (the now defendant) until after the fourth and last default had been entered against the defendant. The proper officer of the city court (the sergeant-at-mace) certified that this practice was according to the custom of London, and the defendant argued that it would be unjust to make him pay the same debt twice. It was held, however, that such a custom was contrary to the first principles of justice; that a judgment so rendered was void, and payment under it constituted no defense to this action.

In his opinion, Lord Chief Justice De Grey says, on page 302: "The great objection is, that no notice has been given to the original defendant in London (the now plaintiff), nor any process awarded against the garnishees (the now defendants), till after four defaults by the original defendant. . . . Customs of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good; so this custom not to summon or give notice to a defendant in a suit commenced against him is contrary to the first principles of justice, and (in my opinion as at present advised) cannot be

good." Such state attachment laws may not inaptly be compared to this custom of London, not to summon the defendant, and not to seize his property until after judgment. If a judgment rendered under this custom be void under the higher law, because contrary to the first principles of natural justice, it seems to follow that a judgment rendered under such state attachment laws is also void under the higher law of the constitution, because contrary to those first principles of natural justice which are protected from adverse state action by the due process of law clause in the fourteenth amendment.

§ 241. When, however, there is a seizure of the defendant's property at the commencement of the action, or, in garnishment, what is equivalent to seizure at that time, namely, service of process upon the garnishee, accompanied in both cases by publication or other form of substituted service against the non-resident defendant, it is well settled that such process is due process of law in attachment suits, and that a judgment so rendered will divest the defendant of his title to such property, and will protect the garnishee from the danger of double payment.¹

The reason for this is, that preliminary seizure and publication afford the defendant adequate notice of suit and an opportunity to appear and defend it before judgment. As stated by Mr. Justice Field in *Pennoyer v. Neff*, 95 U. S. 714, 727, speaking of what constitutes due process of law in attachment suits, "Substituted service by publication or in any other authorized form may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform

¹ *Campbell v. Home Ins. Co.*, 1 *Wheeler v. Aldrich*, 13 Gray (Mass.), S. C. 158; *Morgan v. Neville*, 74 51; *Cooper v. Reynolds*, 10 Wall. Pa. St. 52; *Morrison v. New Bedford*, 308, 317; *Miller v. United States*, 11 *ford Inst.*, 7 Gray (Mass.), 269; Wall. 268, 297.

him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.”¹

To the same effect is the English case of *Scott v. Shearman*, 2 Wm. Blackstone, 977, decided in the year 1774. That was an action of trespass against five customs officers for entering the plaintiff's house and carrying off certain liquors. The defense was that the liquors had been condemned to the crown in the court of exchequer, after due seizure and proclamation, for a violation of the customs laws, and that the plaintiff's title had been thereby divested. The plaintiff contended that this decree of forfeiture was not binding upon him, because he had no notice of the proceedings in the court of exchequer, and because the liquors were not liable to forfeiture. It was held, however, that the seizure and proclamation were sufficient notice, and that the condemnation was conclusive and prevented a recovery in this action, even if the liquors were not liable to forfeiture, because the plaintiff's title was thereby divested.

In his opinion, Blackstone, J., says on page 979: “And though it be said that no notice is given to the owner in person, and that therefore he is not bound by the condemnation, not being a party to the suit, *yet the seizure itself is notice to the owner*, who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer. He knew they were carried to the king's warehouse. He knew, or might have known, that by the course of law the validity of that seizure would come on to be examined in the court of exchequer, and could be examined nowhere else. He had notice by the two proclamations according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim and trying the point of forfeiture, it was his own laches,

¹See, also, *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. (N. Y.) 275, 279.

and he shall be forever concluded by it, not only with respect to the goods themselves, but every other collateral remedy for taking them. For it would be nugatory to debar him from recovering directly the identical goods that are condemned if he is allowed to recover obliquely damages equivalent to their value."

§ 242. **Second ground of objection** — "**Land is not under the control of the court.**" — The second ground for the opinion that the process of a general attachment and publication is not *due* process of law is that such process does not bring the land under the control of the court, and therefore does not authorize its sale.

How is property brought under the control of the court? In the first place, it is very clear that its mere existence and situation within the territorial jurisdiction of the court are not sufficient to subject it to the control of the court.¹ There must be some outward and visible act done by the court through its proper officer to indicate its dominion and power over the property. In admiralty this act is an actual seizure of the ship by the marshal. But there is one act which necessarily precedes the seizure, namely, the *finding* of the ship. So in proceedings *quasi in rem* in the common-law courts by attachment, which are in their "essential nature" proceedings *in rem*, the act of *finding* the defendant's property is a necessary precedent act to that of seizure, or its equivalent.

In *Cooper v. Reynolds* the court said: "The court in such a suit cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."² This passage is quoted with approval by Mr. Jus-

¹ *Pennoyer v. Neff*, 95 U. S. 714; *Tomlinson v. Stiles*, 28 N. J. L. 201; *Eaton v. Badger*, 33 N. H. 228; S. C., affirmed, 29 N. J. L. 426.

² 10 Wall. 308, 318.

tie Field in *Pennoyer v. Neff*,¹ and in *Freeman v. Alderson*.² In *Nye v. Liscomb*,³ Chief Justice Shaw said: "We think it very clear that an ordinary action at common law will not lie in this commonwealth against an inhabitant of another state, unless either his person or his property is found within the jurisdiction of the court."⁴

In a general attachment the officer neither finds, nor makes an attempt to find, the real estate of the defendant. Therefore a general attachment does not impart notice of suit, nor bring the property under the control of the court; and is not equivalent to a seizure. As a general attachment is recorded it affords sufficient protection to the plaintiff and also to subsequent purchasers and attaching creditors, because the records give them notice. But it does not afford sufficient protection to the non-resident defendant who has not been personally served, or voluntarily appeared, for the reasons stated above.

The true view seems to be that a general attachment merely creates a lien in favor of the plaintiff; it is not sufficient to confer jurisdiction upon the court over the property of a non-resident and non-appearing defendant.

In the ordinary case of a general attachment, where the defendant is personally served or voluntarily appears, the attachment is wholly immaterial from a jurisdictional point of view. The court acquires jurisdiction of the defendant's person by service or voluntary appearance; and jurisdiction of his person includes or draws after it jurisdiction of all his property which is situated within the territorial limits of the court. It is for this reason that a plaintiff who has recovered a valid judgment *in personam* can levy his execution upon any of the defendant's property within the

¹ 95 U. S. 714, 736.

² 119 U. S. 185, 189.

³ 21 Pick. 263, 265.

⁴ See, also, *Railroad Co. v. Koontz*, 104 U. S. 5, 11; *Eaton v. Badger*, 33 N. H. 228; *United States v. Bell Tel.*, 29 Fed. Rep. 17, 35; *Lovejoy v. Al-*

bee, 33 Me. 414; *Bank of Commerce v. Huntington*, 129 Mass. 444, 447; *Silloway v. Ins. Co.*, 8 Gray, 199; *Eliot v. McCormick*, 144 Mass. 10; *Gardner v. Barker*, 12 Mass. 36.

territorial jurisdiction of the court which rendered judgment, whether the property was attached on mesne process or not. But as we have seen above, the converse is not true; that is, jurisdiction of property does not include or draw after it jurisdiction of the person; nor does jurisdiction of one piece of property include or draw after it jurisdiction of other pieces of property.¹

§ 243. Only the general statute of limitations applies.

If the foregoing conclusion be correct, namely, that a judgment so obtained upon a general attachment is void, and does not authorize a sale of the land, it follows that the short limitation acts of three or five years allowed for suing out a writ of error or a writ of review do not apply to such a case, and that the non-resident defendant is not barred of a recovery until the general statute of limitations (which varies in the different states from seven to twenty years) has run in favor of the purchaser at sheriff's sale or his grantees.

§ 244. Illustration of "due process of law" in attachment suits.—The question may be asked, "In what way, then, or by what process of attachment, can the state where land lies subject it to the jurisdiction of its courts, so that a valid judgment can be rendered against it on a personal demand against the non-resident owner?" That the state has the constitutional power to do this, by process adapted to the purpose, is undoubted; but in order that the process provided by the state may comply with the requirements of due process of law, it must afford the defendant reasonable or adequate notice of suit, and one which from the nature of the process will be likely to reach him in time to defend the action. The attachment law of New Jersey, passed in 1798, seems eminently adapted to secure the constitutional rights of non-resident defendants, without putting the plaintiff to much trouble or expense. Under this law, to constitute a valid attachment of land, in the absence

¹ Sec. 200, *ante*; *Miller v. Duggan*, 36 N. J. L. 21; *Tomlinson v. Stiles*, 28 N. J. L. 201; S. C., 29 N. J. L. 426.

of a personal service of the writ, the sheriff must go upon the land and there notify the owner, or such other person as may be in possession, that he attaches it; and if there is no one in possession, he must still go on the premises and there execute the writ; and the land must then be inventoried and appraised, and returned by the sheriff as attached; and this applies to each separate parcel. "The object of the mode of execution required is, in the absence of a personal service of the writ, to give publicity to the fact of its execution."¹

These provisions have been strictly construed, and in the case just cited it was decided that a purchaser at sheriff's sale acquired no title to a parcel of land sold, which had not been inventoried and appraised and returned as attached, although another parcel belonging to the same defendant had been properly attached.

¹ Per Whelpley, J., for the court, in *Tomlinson v. Stiles*, 29 N. J. L. 426, 429; S. C., 28 N. J. L. 201.

CHAPTER XIII.

DIVORCE.

§ 245. Elementary principles — Obligation of the contract of marriage. 246. Jurisdiction of federal courts in divorce. 247. Same — Suits to enforce property rights. § 248. I. WHEN BOTH PARTIES ARE NON-RESIDENTS. 248. Effects of divorce within and without the state. §§ 249, 250. II. WHEN LIBELANT ONLY IS A NON-RESIDENT. 249. Suit by non-resident wife or husband. 250. Cross-libel by non-resident husband or wife. §§ 251-259. III. WHEN LIBELEE ONLY IS A NON-RESIDENT. 251. Service of process upon non-resident. 252. State has power to authorize substituted service of process. 253. Voluntary appearance of non-resident spouse cures defective service.	§ 254. Provisions for imparting notice must be strictly followed. 255. Choice of domicile. 256. Effect of <i>ex parte</i> divorce within the state of rendition. 257. Same — Property attached in divorce suit. 258. Imprisonment elsewhere no ground for divorce. 259. Prohibition upon remarriage of libelee. 260. Effect of divorce outside the state of rendition. 261. Same — Jurisdiction in divorce — (1) In a second divorce suit. 262. (2) Jurisdiction in actions for property — Dower, curtesy and alimony. 263. (3) Jurisdiction in suits for custody of child. 264. (4) Jurisdiction in prosecutions by the state. 265. Criticism of <i>People v. Baker</i>, 76 N. Y. 78. 266. Fraudulent divorce no defense.

§ 245. Elementary principles — Obligation of the contract of marriage.— Marriage is a *status*, and not an ordinary contract between the parties. Not only the husband and wife, but also the state has an interest in this *status*. Therefore a marriage cannot be dissolved, as an ordinary

contract may be dissolved, by the consent of the husband and wife.¹ The marriage tie can only be broken by death or divorce.

Marriage is not a contract within the meaning of the contract clause of the constitution, prohibiting the states from "impairing the obligation of contracts," and therefore the dissolution of a marriage by a state does not violate this clause of the constitution; nor has the supreme court of the United States jurisdiction on that ground of a writ of error to a state court which has dissolved the marriage.²

In the *Dartmouth College Case*, 4 Wheat. 518, 629, Chief Justice Marshall said that this contract clause "had never been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general right of the legislature to legislate upon the subject of divorces. Those acts enable some tribunal not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other." This dictum was made the ground of the decision refusing to assume jurisdiction, in *Hunt v. Hunt*, *supra*.

¹ *Maynard v. Hill*, 125 U. S. 190; *Hardy v. Smith*, 136 Mass. 328; *People v. Dawell*, 25 Mich. 247, 257. "It is also to be observed that, whilst marriage is often termed by text-writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." Per Mr. Justice Field in *Maynard v. Hill*, 125 U. S. 190, 210.

² *Maynard v. Hill*, 125 U. S. 190; *Hunt v. Hunt*, 131 U. S. (App.) 165; *Cronise v. Cronise*, 54 Pa. St. 255.

A suit for divorce is partly *in rem* and partly *in personam*. So far as it relates to the dissolution of the bonds of matrimony, it is *in rem*. So far as it relates to the granting of alimony, and the transferring of vested rights of property from one party to the other, it is *in personam*. Important consequences are based upon this distinction, as will be seen hereafter.

In the United States the courts have only such divorce jurisdiction as is given by statute, and without statute they have none. The state legislatures, however, have jurisdiction to grant divorces, unless restrained by constitutional provisions, and this power authorizes a divorce in favor of a resident citizen against a non-resident citizen without notice. Notice is unnecessary, because the divorce is a law and not a decree.¹

§ 246. Jurisdiction of federal courts in divorce.—

Under the existing constitution and laws of the United States, the federal courts have no jurisdiction of a suit for divorce, and therefore no power to grant a divorce. This power rests exclusively in the several states; and each state has the absolute right to prescribe the conditions upon which the marriage relation between its own citizens may be created, and the causes for which it may be dissolved.²

Although the supreme court of the United States has no

¹ *Maynard v. Hill*, 125 U. S. 190; *Cronise v. Cronise*, 54 Pa. St. 255; *Sparhawk v. Sparhawk*, 116 Mass. 315; *State v. Fry*, 4 Mo. 120.

² *Hunt v. Hunt*, 72 N. Y. 217; *Hunt v. Hunt*, 131 U. S. (App.) 165; *Pennoyer v. Neff*, 95 U. S. 714, 735; *Barber v. Barber*, 21 How. 582; *Sewall v. Sewall*, 122 Mass. 156, 161. For the purpose of conferring jurisdiction upon the federal government over marriage and divorce, and in order to prevent the many unfortunate conflicts of law which now arise under state laws, an amendment to the national constitution, known as the Springer amendment, has been proposed in congress by Mr. Springer, of Illinois, in these words: "Article XVI. The congress shall have power to make a uniform law of marriage and divorce." The adoption of this amendment would not necessarily oust the state courts of jurisdiction in such cases; but would lead to uniformity, by making one tribunal (the supreme court of the United States) the final and conclusive authority to whose decisions all other courts must conform.

power to grant a divorce, yet it seems that a case may be put in which it would have the power to refuse a divorce, and jurisdiction to review the judgment of a state court granting the divorce. Thus, if A. obtains a divorce from B., and B. afterwards sues for divorce from A. in another state, and A. appears and sets up his divorce as a bar, and the court grants B. a divorce, the supreme court would, under the "full faith and credit" clause, have jurisdiction to review the state decree, and therefore power to reverse it. If, in its opinion, the second court had not given due effect to the decree of divorce of the other state, it would reverse the second decree and refuse the divorce; for this clause applies to divorce suits as well as to other suits.¹

So, when a man is indicted for bigamy in remarrying during the life-time of his wife, and he sets up in defense a divorce granted by another state, and the second court decides against the effect claimed by him for the divorce, it seems clear that the United States supreme court has jurisdiction to review his judgment of conviction.² But where a court of a foreign country has granted a divorce, a judgment of a state court holding that the foreign divorce is valid and prevents a recovery of dower is not a decision against a federal right in the absence of treaty or statute of the United States, and therefore the United States supreme court has no jurisdiction to review the state judgment.³

§ 247. Same — Suits to enforce property rights.— It is well settled, however, that the lower federal courts and the United States supreme court, on appeal from them, have jurisdiction to enforce property rights depending upon the question of whether there has been a valid divorce or not, when the proper citizenship of the parties exists.⁴

In the leading case of *Barber v. Barber*, *ubi supra*, a wife obtained a divorce from bed and board with alimony,

¹ *Ditson v. Ditson*, 4 R. I. 87, 107; ³ *Roth v. Ehman*, 107 U. S. 319.
Jones v. Jones, 108 N. Y. 415; ⁴ *Barber v. Barber*, 21 How. 582;
Cheever v. Wilson, 9 Wall. 108, 123. *Cheely v. Clayton*, 110 U. S. 701;
² *People v. Baker*, 76 N. Y. 78. *Barrett v. Failing*, 111 U. S. 523.

in a state court of New York, having jurisdiction of the cause and of both parties. The husband afterwards became domiciled in Wisconsin, and there obtained an *ex parte* divorce *a vinculo* from his wife. In a suit by her through her next friend against him for arrears of alimony under the New York decree, brought in the United States circuit court for Wisconsin, he set up in defense his Wisconsin divorce, and also objected to the jurisdiction of the federal court. The supreme court held that she could recover arrears of alimony, and that after divorce she had the right to choose her own domicile, irrespective of her husband, and that as the parties were citizens of different states at the time of suit the circuit court had jurisdiction.

So, when a resident husband obtains a divorce from his non-resident wife, which divorce is void under the local law for insufficient service of process, she can maintain a suit in a federal court, after his death, to recover dower in his land. For, even if she lives apart from him without sufficient cause, which would render her domicile the same as his in law, still, after his death, she has the right to elect her own domicile and being a non-resident of the state where the land lies, she is entitled to sue residents in the United States circuit court.¹

I. WHEN BOTH PARTIES ARE NON-RESIDENTS.

§ 248. **Effects of divorce within and without the state.** The prevailing view respecting divorce jurisdiction seems to be that rightful jurisdiction is based upon a present *bona fide* domicile of at least one of the parties in the state granting the divorce. Hence, if both parties be non-residents of that state, the suit will be dismissed, or if a divorce be granted it is void for want of jurisdiction, and may be impeached by parol evidence in that state and in other states, for it is not entitled to "full faith and credit" under the constitution. Consent of parties cannot confer jurisdiction in such case.²

¹ *Cheely v. Clayton*, 110 U. S. 701. *People v. Smith*, 13 Hun (N. Y.),

² *Hardy v. Smith*, 136 Mass. 328; 414; *Hood v. State*, 56 Ind. 263;

Accordingly it was held in a recent Massachusetts case that a divorce procured in Utah by a wife against her husband, both of whom were domiciled in Massachusetts at the time of the divorce, was void in Massachusetts, although the husband acknowledged the service of the libel and consented to be defaulted; and that such a divorce did not bar the husband's curtesy to land in Massachusetts nor his statutory portion of her personal property.¹

If a husband leaves his wife and goes into another state in order to procure a divorce, in evasion of the law of his domicile, a divorce so obtained is void in the wife's state and will not bar a subsequent libel brought there by her. The husband's divorce is not entitled to "full faith and credit," because its recital of the jurisdictional fact that the husband was domiciled in the state may be contradicted by parol evidence, and the court thus shown to have had no rightful jurisdiction.²

So, in a Michigan case, it appeared that the parties, while domiciled in Michigan, procured a divorce in Indiana by collusion and in evasion of the laws of Michigan; and that the defendant afterwards remarried during the life of his divorced wife. For this he was indicted for bigamy in Michigan, and pleaded his Indiana divorce. But the court held (one judge dissenting) that the Indiana divorce was, as against the state of Michigan, no defense, and was not entitled to "full faith and credit" on this indictment; because "there are three parties to every divorce proceeding, the husband, the wife and the state;" and therefore the consent of the husband and wife cannot bind the state of the parties' domicile.³

State v. Fleak, 54 Iowa, 429; Way v. Way, 64 Ill. 406; People v. Dawell, 25 Mich. 247; Reed v. Reed, 52 Mich. 117; Van Fossen v. State, 37 Ohio St. 317; Litowich v. Litowich, 19 Kansas, 451.

¹ Hardy v. Smith, 136 Mass. 328. See, also, Chase v. Chase, 6 Gray (Mass.), 157.

² Sewall v. Sewall, 122 Mass. 156.

³ People v. Dawell, 25 Mich. 247, 257. Cooley, J.: "The subject-matter of a divorce suit is just as much local as the subject-matter of a suit in ejectment. It is the *status* of the parties, permitted, regulated and controlled by the law of their domicile, which is to be passed upon

But in a third state, the facts that both parties were non-residents of the state granting the divorce, and procured it by collusion and in evasion of the laws of their own state, will not be sufficient cause to invalidate the divorce, at least in a suit between individuals. Thus a second husband cannot maintain a suit to annul his marriage with the divorced woman on the ground that she had not been legally divorced and had another husband living at the time he married her.¹

II. WHERE LIBELANT ONLY IS A NON-RESIDENT.

§ 249. Suit by non-resident wife or husband.—In some states a non-resident wife, whose husband lives in the state of process, is allowed to obtain a divorce in the courts of that state.² This proceeds on the ground that the domicile of the husband is in law the wife's domicile; or that the domicile of the wife follows that of her husband.

In some states even a non-resident husband is allowed to obtain a divorce from his resident wife on the ground that it is a reasonable exception to the legal fiction that the husband's domicile determines that of the wife.³ If this fiction were strictly enforced, both parties would be domiciled outside of the state of process, which would defeat the jurisdiction.

§ 250. Cross-libel by non-resident husband or wife.—Even in states where a non-resident is not allowed to bring an original libel for divorce against the resident spouse, it has been held that he or she can maintain a cross-libel against the resident; and that the dismissal or discontinuance of the resident's libel does not oust the court of jurisdiction to grant affirmative relief to the non-resident spouse.⁴

and determined; and the appearance of the parties in a foreign jurisdiction does nothing whatever towards transferring this subject-matter." Pages 264, 265.

¹ *Kinnier v. Kinnier*, 45 N. Y. 535.

See *O'Dea v. O'Dea*, 101 N. Y. 23.

² *Greene v. Greene*, 11 Pick. (Mass.)

410; *Watkins v. Watkins*, 135 Mass. 83, 85; *Cook v. Cook*, 56 Wis. 195, 205; *Harrison v. Harrison*, 20 Ala. 629.

³ *Watkins v. Watkins*, 135 Mass. 83.

⁴ *Jenness v. Jenness*, 24 Ind. 355;

Sterl v. Sterl, 2 Bradw. (Ill.) 223.

III. WHEN LIBELEES ONLY IS A NON-RESIDENT.

§ 251. **Service of process upon non-resident.**— When a resident seeks a divorce from a non-resident, it is generally impossible to make personal service of process upon the latter in the former's state; and a meritorious case would therefore frequently fail, unless substituted service of process were allowable. To confine the venue to the defendant's residence would not be an adequate remedy for the injured plaintiff, for the defendant might take up his domicile in a state where no divorce was allowed, or where none was allowed for the offense which he had committed. To obviate this objection and to enable their own citizens to obtain divorces from non-residents, for any cause allowed by the local law, the various states have enacted laws authorizing substituted service of process upon non-resident libelees, by publication, or by service outside of the state of suit.

§ 252. **The power of the state to authorize substituted service of process upon non-resident libelees at the suit of resident libelants** seems to be undoubted. To grant a divorce under such facts merely determines the *status* of one of its citizens towards a non-resident. "The jurisdiction which every state possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory."¹ When the legislature has the constitutional power to grant divorces, a divorce so granted to a resident, without any notice whatever to the non-resident spouse, dissolves the marital relation, and defeats the non-resident's right to any property of the resident within the state, which was not previously vested.²

§ 253. **Voluntary appearance of non-resident spouse cures defective service.**— Even when there is no service of

¹ *Pennoyer v. Neff*, 95 U. S. 714, 734; *Hunt v. Hunt*, 72 N. Y. 217; *Cronise v. Cronise*, 54 Pa. St. 255. *Thompson v. Thompson*, 91 Ala. 591.

² *Maynard v. Hill*, 125 U. S. 160;

process in a divorce suit by a resident against a non-resident, a voluntary appearance operates as a waiver and cures all defects in the service. A decree so rendered is valid and binding on the parties, both within and without the state of rendition, and as a decree *in rem*¹ and *in personam*.² When both parties are non-residents of the state of process the rule is different. The defendant cannot then, by voluntary appearance or by accepting service of process, confer jurisdiction upon the court. For the court has not jurisdiction by law, and consent of parties cannot confer it.³

A non-resident defendant, who has not been personally served with process in that state, and has appeared specially to object to the jurisdiction, is bound by a state statute making a special appearance equivalent to a general appearance; and a divorce so procured is valid in other states, and will bar a divorce suit brought by the other spouse.⁴ Such a statute is not contrary to "due process of law" nor to any other clause of the national constitution.⁵

§ 254. Provisions for imparting notice must be strictly followed.—The requirements of the state statute for imparting notice must be strictly followed; otherwise the decree of divorce is void, if the non-resident spouse did not waive the defect by appearing. In *Cheely v. Clayton*, 110 U. S. 701, a resident husband procured a divorce in Colorado from his non-resident wife by publication and without her appearance. The local statute required notice to be published for four weeks, and also enacted that "this proceeding [publication] shall not dispense with the usual exertion on the part of the sheriff to serve the summons." This clause, as construed by the courts of Colorado, required the sheriff to hold the writ until the return day, in order to make personal service upon the defendant if found within the bailiwick at any time during the life of the writ.

¹ *Jones v. Jones*, 108 N. Y. 415.

⁴ *Jones v. Jones*, 108 N. Y. 415.

² *Harrison v. Harrison*, 20 Ala. 629.

⁵ *York v. Texas*, 137 U. S. 15; *ante*, § 209, and cases cited.

³ *Ante*, § 248, and cases cited.

The sheriff did not hold this divorce writ until the return day, and after the husband's death the wife sued in the circuit court of the United States for the district of Colorado to recover the estate in his lands that the local statutes give to a widow. The only defense was the divorce. *Held*, by the supreme court, following the local decisions, that the failure of the sheriff to hold the divorce writ until the return day for the purpose of making the usual exertions to serve the summons rendered the divorce void for want of jurisdiction, and that the plaintiff could recover.

§ 255. **Choice of domicile.**—A husband, of course, has a right to choose his own domicile, and may acquire a domicile different from that of the marriage and from the actual residence of his wife. The courts of his domicile have jurisdiction of his marital *status*, and can divorce him in accordance with the laws of his state, without regard to the place of the marriage, or to that of the commission of the offense complained of.¹ “If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the state of his domicile, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that state.² But in order to make the divorce valid, either in the state in which it is granted or in another state, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first state requires.”³

It is settled that a wife may acquire a domicile for divorce in a state different from that of her husband's domicile, different from that of the marriage, and different from that of the offense. The maxim that the domicile of the wife follows that of her husband is qualified to this extent;

¹ *Cheely v. Clayton*, 110 U. S. 701; *Mass.* 438; *Hunt v. Hunt*, 72 N. Y. *Harvey v. Farnie*, 8 App. Cases, 43; 218.

Thompson v. State, 28 Ala. 12; ³Per Mr. Justice Gray, for the court, in *Cheely v. Clayton*, 110 *Thompson v. Thompson*, 91 Ala. 591.

² Citing *Burlen v. Shannon*, 115 U. S. 701, 705.

for otherwise the parties would stand upon very unequal grounds.¹

"Although, as a general doctrine, the domicile of the husband is by law that of the wife, yet when he commits an offense, or is guilty of such dereliction of duty in the relation as entitles her to have it either partially or totally dissolved, she not only may, but must, to avoid condonation, establish a separate domicile of her own. This she may establish, nay, when deserted or compelled to leave her husband, necessity frequently compels her to establish in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains and is entitled to gain, for the purposes of jurisdiction, a domicile of her own."²

§ 256. Effect of ex parte divorce within the state of rendition.—An *ex parte* divorce by a resident against a non-resident cannot, within the state of its rendition, be collaterally impeached, if all jurisdictional requirements of the statute are complied with, unless the statute be unconstitutional. So far as the divorce suit is merely *in rem* and operates only to dissolve the marriage relation between a resident and a non-resident by substituted service in accordance with the local statutes, the divorce is valid within the state, and the statutes are constitutional. But a divorce procured by fraud by a resident against a non-resident may be set aside or annulled in the state of its rendition by a direct proceeding for that purpose, as on motion or by bill in equity.³

In *Bradford v. Abend*, 89 Ill. 78, the facts were these: In 1858 a bill for divorce was filed in the Illinois court in the name of Mrs. Bradford, who was then insane and con-

¹ *Cheever v. Wilson*, 9 Wall. 108, 124; *Ditson v. Ditson*, 4 R. I. 87; *Jenness v. Jenness*, 24 Ind. 355.

² *Per Ames, C. J.*, in *Ditson v. Ditson*, 4 R. I. 87, 107, 108. See also, *Harteau v. Harteau*, 14 Pick. 181, 185.

³ *Adams v. Adams*, 51 N. H. 388; *Edson v. Edson*, 108 Mass. 590; *Johnson v. Coleman*, 23 Wis. 452; *Wisdom v. Wisdom*, 24 Neb. 551. *Contra*, *Parish v. Parish*, 9 Ohio St. 534.

fined in a hospital in St. Louis, Mo., against her husband, and a decree of divorce was rendered in her favor. *Held*, upon a bill in equity by Mrs. Bradford's conservator against her husband, that the divorce could be set aside, and Mr. Bradford would be compelled to contribute to the support of his insane wife.

So far, however, as the divorce suit is *in personam*, as for alimony, substituted service of process without appearance is not sufficient to bind a non-resident defendant even within the same state; for if a state statute purports to allow such service, it is unconstitutional and void, on the ground that it deprives the non-resident of property "without due process of law."¹

In a leading Indiana case it appeared that a resident wife had previously obtained an *ex parte* divorce with \$1,000 alimony in Indiana against her non-resident husband. The divorce proceedings were in accordance with a state statute allowing alimony to be granted in such cases by publication merely. Three years later, the alimony remaining unpaid, the wife brought this suit to recover it, and garnished a railroad company that was indebted to the husband. But the court held that the plaintiff could not recover, because the decree for alimony was void, as it was based on a statute which was unconstitutional, for the reason that it deprived a non-resident of his property without due process of law.² This decision was rendered under the state constitution, and before the fourteenth amendment to the federal constitution, which declares that no state shall deprive any person of property without due process of law, was adopted. Since the fourteenth amendment, the question involved is therefore one of federal cognizance, and the non-resident may resort to the United States supreme court if the highest state court decide against him by holding the decree valid.³

¹ Beard v. Beard, 21 Ind. 321; ² Beard v. Beard, 21 Ind. 321.
Bunnell v. Bunnell, 25 Fed. Rep. ³ Pennoyer v. Neff, 95 U. S. 714;
214; Ellison v. Martin, 53 Mo. 575. Bunnell v. Bunnell, 25 Fed. Rep. 214.

But if a non-resident defendant, who has not been personally served within the state, voluntarily appears in the divorce suit, the court thereby acquires jurisdiction *in personam*, and is justified in decreeing alimony against him.¹

§ 257. Same — Property attached in divorce suit.— It seems to follow from analogous principles that if a resident spouse garnishes property of the non-resident defendant in the divorce suit, in accordance with the local statutes, and obtains a decree for alimony, the decree will not deprive the non-resident of his property without due process of law, and will be valid as against such property; because it is rightfully brought under the control of the divorce court by an act equivalent to a seizure at the commencement of the divorce suit. But such an *ex parte* decree is void under the fourteenth amendment as against all his property which is not brought under the control of the divorce court by seizure or equivalent act at the commencement of the suit, and a seizure after decree is not sufficient.²

A suit for alimony is *in personam*, and if the non-resident defendant is personally served with process within the state, or if he voluntarily appears in the suit, he is bound by the decree for alimony everywhere. But if there is merely an attachment of property, without personal service of process or voluntary appearance, the suit is *quasi in rem*, and is not binding upon all of the defendant's property, but only upon the property attached at the commencement of the proceedings.

In a recent case in the United States circuit court for the district of Michigan a divorced wife brought a bill in equity in a state court of Michigan to have certain real property of her former husband applied to the payment of alimony, which had been previously decreed to her by a state court of Michigan, and to have the husband's conveyance to the daughter set aside as fraudulent. The husband was a non-resident of Michigan and did not appear in the suit for

¹ *Sanford v. Sanford*, 5 Day (Conn.), 853. ² *Bunnell v. Bunnell*, 25 Fed. Rep. 214; *Pennoyer v. Neff*, 95 U. S. 714.

divorce and alimony, but the court granted \$5,000 alimony, and ordered that, if the husband failed to pay that sum within forty-five days after notice of the decree, a commission should issue to sequester the real and personal property of the husband within the jurisdiction to be applied to the payment of the alimony. The husband failed to pay the alimony within the specified time, and afterwards conveyed the real property in dispute to his daughter by a deed recorded about three hours after the recording of the wife's notice of *lis pendens* in this bill.

After removal to the federal court, it was held by Brown, J., in a well-considered opinion, that the decree for alimony was void *in personam* for want of jurisdiction over the husband, and that the decree could not operate upon the sequestered property because it was not brought under the control of the court until after the decree was rendered, following expressly *Pennoyer v. Neff*, 95 U. S. 714. The state statutes expressly authorized such a proceeding, and the decision is therefore equivalent to declaring the statutes unconstitutional and void, a result which seems to follow from the principles of *Pennoyer v. Neff*, 95 U. S. 714. The decree of the state court was therefore entitled to no force or effect in the federal court.¹

§ 258. Imprisonment elsewhere no ground for divorce.— A statute of the state of process allowing a divorce for a sentence at hard labor for life or for five years or more “in the state prison, or in a jail or house of correction” does not apply to such imprisonment in the state prison of another state; and therefore it constitutes no ground for a divorce by a resident wife against a non-resident husband.²

§ 259. Prohibition upon remarriage of libelee.— Many states have statutes declaring in effect that where a divorce is granted on the ground of defendant's adultery, he or she shall not be allowed to remarry during the life of the plaintiff.

¹ *Bunnell v. Bunnell*, 25 Fed. Rep. 214.

² *Leonard v. Leonard*, 151 Mass. 151; *Martin v. Martin*, 47 N. H. 12.

iff, or during a certain term of years. Such statutes impose a restraint upon the person of the libelee, which is in the nature of a penalty, and will not be enforced or recognized in other states.¹ Even in the courts of the state of divorce, such statute will not be construed to apply to a remarriage in another state, unless the intent to include such remarriage on the part of its own citizens be expressed in clear and unmistakable language.²

In Maryland it is held that its courts have no power to place such a prohibition upon a non-resident libelee, who has not been personally served with process within the state, or voluntarily appeared in the suit; for the reason that "such a prohibition is not necessarily a part of the decree dissolving the marriage, but [is] in the nature of a decree *in personam* affecting the rights of parties beyond the jurisdiction of the court."³

§ 260. Effect of divorce outside the state of rendition. There is only one clause of the national constitution which gives any binding force to a judgment of one state within the borders of another state. As a mere matter of courtesy, however, one state will frequently give effect to a judgment of another state or country. The clause referred to ordains that "full faith and credit shall be given in each state to the public acts, records and *judicial proceedings* of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."⁴ Without this provision the courts of one state could refuse to give any force or effect to the judgments of a sister state without any redress; for the question would be one merely of comity or courtesy. With it, however, if the highest court of one state refuse or fail to give due effect to a judgment

¹ *Van Storch v. Griffin*, 71 Pa. St. 51; *Commonwealth v. Lane*, 113 240; *Phillips v. Madrid*, 83 Me. 205; *Mass.* 458.

Fuller v. Fuller, 40 Ala. 301. ³ *Garner v. Garner*, 56 Md. 127,

² *Van Voorhis v. Brintnall*, 86 N. 129.

Y. 18; *Thorp v. Thorp*, 90 N. Y. ⁴ *Const.*, art. IV, sec. 1.
602; *Ponsford v. Johnson*, 2 Blatch.

of another state, the aggrieved party may obtain a reversal from the supreme court of the United States, for a federal question is then involved.¹

Congress has enacted that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."²

The rule is well settled, however, that these provisions do not prevent an inquiry into the jurisdiction of the court of the sister state which rendered the judgment relied upon; and if that court did not have full jurisdiction, its judgment is not entitled to "full faith and credit" in another state, and its want of jurisdiction may be shown by parol evidence. But if the former court had full jurisdiction, its judgment is entitled to "full faith and credit," and the courts of another state and the federal courts are bound by the supreme law to give it the same force and effect that it has where rendered, as well in divorce suits as in others.³

It follows from these principles that, whenever a decree of divorce of one state is relied upon in the courts of another state, the question of jurisdiction is very important; and there is no class of cases in which this question is involved in more complication and confusion than in divorce cases. Although a divorce suit is in form between individuals only, yet the state of the parties' domicile is also interested; and, if the husband and wife live in different states, there are two states which are *quasi*-parties to the suit. Hence, there are always three, and sometimes four, parties to a divorce suit.⁴

§ 261. Same — Jurisdiction in divorce — (1) In a second divorce suit. — The jurisdiction of a divorce

¹Green v. Van Buskirk, 7 Wall. v. Jones, 108 N. Y. 415; Cheever v. Wilson, 9 Wall. 108.

²Rev. Stat. U. S., sec. 905.

⁴People v. Dawell, 25 Mich. 247,

³Sewall v. Sewall, 122 Mass. 156; 257.
Kerr v. Kerr, 41 N. Y. 272; Jones

court of another state may be questioned in four classes of cases:

1. A second divorce suit.
2. Actions for property, as to recover dower, curtesy or alimony.
3. Suits to recover custody of child.
4. Prosecutions by the state, as for bigamy.

(1) **A second divorce suit.**— If a non-resident spouse appears and defends a suit for divorce brought against him by a resident, he thereby waives his extraterritorial immunity, and cannot impeach the jurisdiction; and, if a divorce is granted, he cannot afterwards obtain a divorce himself, even in his own state.¹

In Massachusetts and New York the legal fiction of the unity of husband and wife, and the doctrine that the husband's domicile determines the wife's domicile, have been carried somewhat farther than in the other states. But the view now generally accepted seems to be that this fiction and doctrine do not bar her suit for divorce, provided she had sufficient cause for living apart from him when he obtained his *ex parte* divorce from her.² If, however, she had not sufficient cause for living apart from him at the time when he obtained such a divorce, his prior divorce will bar her suit for divorce.³ An *ex parte* divorce, obtained by the wife while living apart from her husband without sufficient cause, will not bar his suit for divorce. As against him, her divorce is entitled to no force and effect in another state, because it is rendered without jurisdiction.⁴

In *Hood v. Hood*, 11 Allen (Mass.), 196, the parties lived together in Illinois for several years, where the plaintiff left her husband and came to Massachusetts. After her departure the husband obtained an *ex parte* divorce in Illi-

¹ Jones v. Jones, 108 N. Y. 415.

² Doughty v. Doughty, 28 N. J. Eq. 581; Cook v. Cook, 56 Wis. 195; Turner v. Turner, 44 Ala. 437; Cross v. Cross, 108 N. Y. 628. See, also, § 255, *ante*, and cases cited.

³ Hood v. Hood, 11 Allen, 196;

Burten v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 218; Cheely v. Clayton, 110 U. S. 701, 705.

⁴ Lyon v. Lyon, 2 Gray (Mass.), 367.

nois for desertion. *Held*, that the husband's Illinois divorce was a bar to the wife's bill for divorce. Hoar, J., says: "The respondent [the husband] continued to be a citizen of the state of Illinois, and the domicile of the husband was in law the domicile of the wife. . . . There is no proof that the husband had done any act entitling the wife to a divorce, so as to affect her domicile even for the purpose of obtaining a divorce from him. When the respondent filed his libel in Illinois, therefore, both parties had their domicile in that state, and were subject to the jurisdiction of the court in which the libel was filed. The notice given to the respondent in that suit was such as the laws of Illinois authorize in the case of an absent defendant. . . . The decree of a court having jurisdiction of the cause and the parties is conclusive upon them." Pages 199, 200.

The reasoning of the New York cases is similar to the above.

The cases of an opposite tendency may be illustrated by *Doughty v. Doughty*, 28 N. J. Eq. 581. In that case a husband left his wife in New Jersey and went to Illinois, where he acquired a *bona fide* domicile and obtained an *ex parte* divorce from his wife. The wife then brought this bill for divorce in New Jersey, to which the husband set up in bar his Illinois divorce. The court held that the Illinois court had no jurisdiction to determine the *status* of a citizen of New Jersey in New Jersey, and that the Illinois divorce was not entitled to "full faith and credit" in New Jersey, and did not bar her suit.

§ 262. (2) **Jurisdiction in action for property — Dower, curtesy and alimony.**— There is also a conflict of authority upon the right to dower and curtesy, after an *ex parte* divorce in a sister state. In Pennsylvania and some other states it is held that a wife is not barred of her dower to land in her state by an *ex parte* divorce procured by her husband in a state of which she is a non-resident. Such a divorce is not entitled to "full faith and credit" to that extent, as the state of the husband's domicile had no juris-

diction to determine the wife's *status* in her own state where the land lies.¹ In *Turner v. Turner*, 44 Ala. 437, at 450, the court says: "It is the duty of the state to protect its own citizens. This is the natural compensation for allegiance. . . . The wife is as much a citizen of the state as the husband, and is entitled to the protection of its laws to the same extent, so long as she remains within its jurisdiction."

In a recent case in Wisconsin, it was held that an *ex parte* divorce procured in Michigan by a resident husband against his wife, whom he left in Wisconsin, was no bar to a subsequent suit by her against him in Wisconsin for alimony and a division of land in Wisconsin; for the reason that the Michigan court had no jurisdiction to determine the *status* of the non-resident wife in Wisconsin. In this case of *Cook v. Cook*, 56 Wis. 195, the court says by Cassoday, J.: "To give the judgment such an effect would be to offer a premium to all discontented husbands by way of deserting their wives and obtaining a secret divorce in a foreign jurisdiction, and thus relieve his lands in this state of all inchoate interest on the part of the wife, and himself of all obligation to pay any alimony, allowance or support." Page 217.

Platt's Appeal, 80 Pa. St. 501, was a suit to recover the widow's share of an estate under the intestate laws of Pennsylvania, the husband having died in that state. The defense was that the husband had obtained a divorce in Michigan. It appeared, however, that the Michigan divorce was obtained while the wife was a resident of Wisconsin and upon publication of notice and without her appearance. The Pennsylvania court accordingly held that the divorce "was nugatory and void so far, at least, as it affected the rights of parties in the state of Pennsylvania;" that the plaintiff was his lawful widow, and was entitled as such to the widow's share of the estate in preference to a second wife who was married after the divorce.

¹ *Colvin v. Reed*, 55 Pa. St. 375; *Cook v. Cook*, 56 Wis. 195; *Mansfield v. McIntyre*, 10 Ohio, 27.

The opposite rule prevails in Massachusetts and some other states.¹

Thompson v. Thompson, 91 Ala. 591, was a suit to recover a widow's share to property under the intestate laws of Alabama. The contest was between a second wife and the children of the first wife, and involved the effect of an Arkansas divorce obtained by publication against a non-resident wife. The material facts were that, in 1838, one Allen Thompson married Gracy Smith in Alabama and lived there for some time. In 1851, after the necessary term of residence in Arkansas, he there obtained an *ex parte* divorce from her on the ground of abandonment, she having left him and returned to her father's house in Alabama. Shortly afterwards he also returned to Alabama, and in 1852 or 1853 he married one Roanna Wilkerson, his first wife being then alive. For this act he was indicted for polygamy, but was acquitted.² In 1887 he died intestate, leaving Roanna and several children by his first wife. The Alabama court held that the Arkansas court had jurisdiction of his matrimonial status, as he was a *bona fide* resident of that state; that it had the power to proceed against the non-resident wife by publication; that a divorce so obtained dissolved the marital relation everywhere; that he had the right to remarry, and that consequently his second wife was his lawful widow and entitled to the widow's share under the intestate laws of Alabama.

Harding v. Alden, 9 Greenl. (Me.) 140, presents another phase of this question. This was an action to recover dower in land situated in Maine, under a local statute allowing dower where a wife had obtained a divorce for her husband's adultery. Her divorce was obtained for that cause in Rhode Island, while she was a resident of that state, but while her husband was a resident of North Carolina. Substituted service of process only was made upon him and he did not appear in the Rhode Island court, and

¹Hood v. Hood, 110 Mass. 463; ²Thompson v. State, 28 Ala. 12; S. C., 11 Allen, 196; Gould v. Crow, *post*, §§ 264-266.
57 Mo. 200.

the defendant therefore claimed that the decree was not binding upon the husband or upon his grantees. But the Maine court held that the Rhode Island decree dissolved the marriage, and was entitled to full faith and credit to that extent, and that the plaintiff could recover dower under the Maine statute.

But an *ex parte* divorce obtained by a resident husband from his non-resident wife will bar the wife's dower to land situated in the husband's state, unless otherwise specially provided by the local law of the place in which the real estate is situated.¹ Speaking of such a case the supreme court says in *Maynard v. Hill*, 125 U. S. 190, 216: "A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confers such right." It was accordingly held that a non-resident wife, from whom a resident husband had obtained an *ex parte* divorce without notice, was not entitled to any part of a "donation claim" to land acquired by her husband and based on four years' possession and settlement, only part of which four years' possession was had before the divorce. "The grant was to the settler, but if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband." When, therefore, the divorce was obtained, "he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his residence and cultivation which gave him anything more than a mere possessory right; a right to remain on the land so as to enable him to comply with the condition upon which the title was to pass to him. After the divorce she had no such relation

¹ *Barrett v. Failing*, 111 U. S. 523.

to him as to confer upon her any interest in the title subsequently acquired by him.”¹

Alimony awarded by a court having jurisdiction of the cause and of the parties is so far in the nature of a debt that the divorced wife can sue the husband for it in the same or in another state, and can contest the validity of a conveyance of property made by him with the fraudulent intent of preventing her from recovering the alimony.² But where the divorce court has no jurisdiction over the marital *status*, or over the person of the defendant, its decree for alimony cannot be enforced in other states.³

The share which a widow takes in the land of her deceased husband, or which a husband takes in that of his deceased wife, is determined by the law of the state where the land lies, irrespective of the parties' domicile.⁴

§ 263. (3) Jurisdiction in suits for custody of child.—

In an *ex parte* divorce suit against a non-resident, an order of the court giving the custody of the children to the plaintiff is entitled to great if not conclusive effect in other states, especially if the children were living with the plaintiff.⁵ But if both parties to the divorce suit be non-residents, or if the child was not within the jurisdiction of the plaintiff's state, the order of custody is rendered without jurisdiction, and is therefore not entitled to “full faith and credit” in a sister state, and will not be conclusive therein, even if the father was the plaintiff.⁶ In fact the better view seems to be that a decision upon the custody of a child is never final or absolute in its nature, but is merely temporary, and

¹ Per Mr. Justice Field, for the court, on page 216, in *Maynard v. Hill*, *ubi supra*.

² *Livermore v. Boutelle*, 11 Gray (Mass.), 217; *Barber v. Barber*, 21 How. 582; *Bouslough v. Bouslough*, 68 Pa. St. 495; *Barrett v. Barrett*, 5 Oreg. 411; *Downs v. Flanders*, 150 Mass. 92; *Stewart v. Stewart*, 27 W. Va. 167; *Rogers v. Rogers*, 15 B. Mon. (Ky.) 364.

³ *Bradshaw v. Heath*, 13 Wend. (N. Y.) 407.

⁴ *Cheely v. Clayton*, 110 U. S. 701, 709; *Ross v. Ross*, 129 Mass. 243, 247, 248.

⁵ *Wakefield v. Ives*, 35 Iowa, 238; *Bennett v. Bennett*, *Deady*, 290. See, also, *Woodworth v. Spring*, 4 Allen, 321.

⁶ In *re Vetterlein*, 14 R. I. 378; *Kline v. Kline*, 57 Iowa, 386.

liable at all times to be altered, modified or entirely changed, to suit the varied circumstances or condition of the parents or the progress of the child.¹ Where, however, there has been no change in the circumstances or condition of the parents, a decree of a court having jurisdiction of both parents is binding upon them in other states, though not binding upon the child, and is probably entitled to "full faith and credit" in other states, notwithstanding the absence of property rights in the child.²

"A *district court* of the United States has no authority in law to issue a writ of *habeas corpus* to restore an infant to the custody of its father, when unlawfully detained by its grand-parents."

And if the district court imprisons the grandfather for disobedience of its order to restore the child to the father, he may be released on *habeas corpus*; for the whole proceeding in the district court is *coram non judice* and void.³

§ 264. (4) **Jurisdiction in prosecutions by the state.**—An *ex parte* divorce granted to a resident husband against his non-resident wife is a valid defense for him even in his wife's state on a charge of polygamy for having married again during the life of his divorced wife.

Thus, in *Thompson v. The State*, 28 Ala. 12, the accused left his wife in Alabama, and became a *bona fide* resident of Arkansas, where, after the necessary period of residence, he obtained an *ex parte* divorce from his wife, who still resided in Alabama. He then remarried and returned to Alabama, where he was indicted for polygamy. But the court held that he had a right to choose his own domicile, and that the state of his domicile had jurisdiction of his marital *status*, and that therefore the Arkansas divorce was a perfect defense.

¹ *Thorndike v. Rice*, 24 Law Rep. (Mass.) 19.

² *Allen v. Allen*, 40 Hun (N. Y.), 611; *In re Bort*, 25 Kans. 308.

³ *In re Burrus*, 136 U. S. 586.

Query, as to the power of a United States circuit court to issue such a writ when the parties are citizens of different states, and the value of the child's services exceeds \$2,000?

Such a decision seems to be required by the "full faith and credit" clause of the constitution; for as the court of his state had jurisdiction of his marital *status*, its decree of divorce was entitled to the same force and effect elsewhere as at home. But with respect to the non-resident libelee in such a case, a contrary decision has been made. Thus, in a New York case, *People v. Baker*, 76 N. Y. 78, the defendant's wife procured a divorce from him in Ohio by publication and without his appearance, while he was domiciled in New York. He afterwards remarried in New York during the life-time of his divorced wife; for which he was indicted for bigamy. He set up in defense the Ohio divorce. The court conceded that if he had appeared in the Ohio court, the divorce would have constituted a good defense; but as he had not done so, it held that the Ohio court had not acquired jurisdiction over the husband's marriage *status*; that the Ohio divorce was entitled to no "faith and credit," or force and effect in this prosecution; that it was inoperative and void, and that therefore the accused was guilty of bigamy.

§ 265. **Criticism of *People v. Baker*, 76 N. Y. 78.**—Chief Justice Church dissented, and the correctness of this decision seems to be somewhat doubtful. Mr. Bishop, in his new work on Mar., Div. & Sep., vol. II, §§ 153, 154, criticises it very severely on various grounds. In addition to the objections stated by Mr. Bishop, the judgment seems to be open to the objection that it overlooks or disregards the reason for the rule that a judgment or decree so obtained is void and inoperative, namely, to protect and benefit the non-resident defendant; whereas the court applied the rule so as to work to his injury and detriment. If he had himself been seeking a divorce, and his wife had pleaded her Ohio divorce in bar, he would have had the right to avoid it, because as against him it was void and inoperative. But in the *Baker* case, the non-resident libelee was not seeking to avoid the Ohio divorce, but to affirm and ratify it; and the court held in substance that he could

not do so. Upon principle, it would seem that the non-resident should have an election in such case, just as he has in ordinary cases relating to property rights; and that his second marriage should constitute an affirmance, binding not only upon him, but also upon his state. This rule would bar the non-resident libelee's right to curtesy in land situated in his own state, which clearly ought to be true after his second marriage; while the New York rule, if consistently applied, would not bar this right, because it considers the divorce so void that no act of the libelee can validate it.

In civil cases, the right of a non-resident defendant to affirm and validate a judgment so obtained has been decided by high authority. In *Lapham v. Briggs*, 27 Vt. 26, and also in *Henderson v. Staniford*, 105 Mass. 504, it was held that such judgment was not an absolute nullity; that the defendant could elect to affirm its validity, and that he could plead it as a merger, and thereby defeat a second action based upon the original cause of action. In the Massachusetts case the court says on pages 506, 507, per Wells, J.: "In the opinion of the court, a plaintiff who has voluntarily converted his demand into the form of a judgment, valid where it is rendered (California), so long as the defendant has not attempted to avoid the judgment in any mode, cannot himself treat it as of no effect and sue upon the original demand. If the judgment is voidable for want of service upon the defendant or notice to him, he may waive that. He does waive it by pleading the former judgment in bar of the present action."

The same case is authority for the position that such conduct on the defendant's part constitutes an affirmance of the judgment's validity, which is binding upon him in all subsequent actions. On page 507 the court says: "In the present case, the judgment in California being against the defendant alone, if he sets it up in bar of this suit he affirms the validity of that judgment against himself, and is *eo instanti* estopped to impeach it thereafterwards." Citing

Hooker v. Hubbard, 97 Mass. 175; *S. C.*, 102 Mass. 239. See, also, *Philadelphia R'y v. Howard*, 13 How. 307.

It is true that, in general, the affirmance of a voidable judgment by one person is not binding upon another person, nor upon the state. But in *People v. Baker*, the court conceded that the defendant could have waived the objection to service of process and bound the state by a voluntary appearance in the divorce suit. And if he could bind the state by his act of appearance, it is difficult to see why he could not bind the state by his act of remarriage, or by pleading the divorce in his own defense. The last act seems to have as strong a tendency to waive this objection to the divorce as the first act has. In marrying again, the defendant acted in good faith, believing the divorce to be valid. Nor was there any fraud on his part; nor any attempt to evade the laws of his own state. His wife had acquired a domicile in Ohio; and the most that can be said against him is that he chose not to contest her suit. Under these circumstances it seems unjust to punish him for bigamy.

§ 266. **Fraudulent divorce no defense.**— A divorce procured by consent and collusion of the parties, in a state other than that of their domicile, is no defense to a prosecution for bigamy for the remarriage of either during the life-time of the other spouse. For “there are three parties to every divorce proceeding — the husband, the wife and the state;” and therefore the consent of the husband and wife cannot bind the state of their domicile, when the divorce is granted by another state. In a prosecution for bigamy by the state of domicile, such a divorce obtained in another state is entitled to no “faith and credit,” or force and effect, because the court of the latter state had no jurisdiction over the marriage *status*.¹

¹ *People v. Dawell*, 25 Mich. 247, 257; *Van Fossen v. State*, 37 Ohio St. 317.

CHAPTER XIV.

STATE INSOLVENT LAWS.

§ 267. Established principles. 268. Contracts made prior to insolvent law. 269. Existing and future laws and decisions. 270. Grounds of decisions holding discharge void as against non-resident creditors. 271. Same — "Due process of law." 272. Foreign corporations as creditors. 273. Effect of national bankrupt law upon state insolvent laws.	§ 274. Waiver and estoppel. 275. Discharge of surety. 276. Exemption from arrest and imprisonment. 277. Attachment and execution after discharge. 278. Effect of discharge in other states — (1) Action upon the debt. 279. Same — (2) Arrest or imprisonment of debtor. 280. Dissolution of attachment. 281-287. Note on insolvent laws. 282-283. I. Obligation of contracts. 284-287. II. Due process of law.

§ 267. Established principles.— It may now be regarded as settled law that a non-resident creditor is exempt from the operation of state insolvent laws, and is not bound by the debtor's discharge under such laws whether they be anterior or posterior to the making of the contract,¹ unless he has made himself an uncontesting party to the insolvency proceedings, in which latter case he will be bound by the discharge under anterior laws to the same extent as resident creditors, just as a party to any other kind of judicial proceedings is bound by the decree or judgment rendered

¹ *Sturges v. Crowninshield*, 4 N. Y. 597; *Donnelly v. Corbett*, 8 Wheat. 122; *McMillan v. McNeill*, Selden (N. Y.), 500; *Poe v. Duck*, 5 4 Wheat. 209; *Ogden v. Saunders*, Md. 1; *Anderson v. Wheeler*, 25 12 Wheat. 213; *Baldwin v. Hale*, 1 Conn. 603; *Carbee v. Mason*, 64 Wall. 223; *Suydam v. Broadnax*, N. H. 10; *Rhodes v. Borden*, 67 14 Peters, 67; *Denny v. Bennett*, Cal. 7.
128 U. S. 489; *Pratt v. Chase*, 44

with jurisdiction.¹ A state has no power to require citizens of other states to become parties against their will to any such proceeding, and the discharge is void as against them for want of jurisdiction.

Even when the contract is made and is to be performed within the state granting the discharge, the non-resident's right of action is not barred by the debtor's discharge. He can recover a judgment for the full amount of his claim, unless he has made himself a voluntary party to the insolvency proceedings. Such judgment may be recovered either in a federal court or in a court of the debtor's state, or in a court of any other state.²

A non-resident creditor who has reduced his debt to a judgment, either in the state of discharge or elsewhere, does not thereby impair his right to recover against the debtor. The judgment is a debt upon which he can recover anywhere, notwithstanding the discharge of the defendant under the insolvent laws of his own state. The essential attributes of the debt are not obliterated by the judgment.³ A non-resident creditor whose contract is made through a resident agent is not barred by the debtor's discharge, even if the agency is not disclosed to the debtor, and he supposes he is dealing with the principal.⁴

In Massachusetts it has been held that if both debtor and creditor were residents of the state at the time of the contract's making, the fact that the creditor afterwards removed from the state and was a non-resident at the time when the insolvency proceedings were commenced does not afford him any immunity, and he is bound by the

¹ *Clay v. Smith*, 3 Peters, 411; overruling *Scribner v. Fisher*, 2 Baldwin v. Hale, 1 Wall. 223; *Journey v. Garduer*, 11 Cush. (Mass.) 355; *Blackman v. Green*, 24 Vt. 17, 21; *Perley v. Mason*, 64 N. H. 6; *Gardner v. Lee's Bank*, 11 Barb. (N. Y.) 558.

Gray (Mass.), 43; *Newmarket Bank v. Butler*, 45 N. H. 236, overruling *Brown v. Collins*, 41 N. H. 405.

³ *Bean v. Loryea*, 81 Cal. 151; *Murphy v. Manning*, 134 Mass. 488.

⁴ *Guernsey v. Wood*, 130 Mass.

² Baldwin v. Hale, 1 Wall. 223; *Kelley v. Drury*, 9 Allen (Mass.), 27, 503.

debtor's discharge.¹ But the contrary has been held in a later case in Vermont,² and this seems the better view; for the creditor, if a non-resident at that time, is not subject to the jurisdiction of the insolvency court, and therefore its decree of discharge is void as against him and his demand.

When the contract is posterior to the law, but is made in view of the laws of a state which has no insolvent law, it seems that the anterior insolvent law under which the debtor obtains his discharge also impairs the obligation of his contract, and the discharge is void as against an unconsenting creditor.³

The obligation of every contract necessarily depends upon the law of some state or country, and, as said by Chief Justice Marshall, it is a "principle of universal law . . . that, in every forum, a contract is governed by the law with a view to which it was made."⁴

The case of *Pitkin v. Thompson*, 13 Pick. (Mass.) 64, decided by Chief Justice Shaw, furnishes a striking illustration of this rule. A woman contracted a debt in Rhode Island due to residents of that state, and received a discharge under its insolvent laws, one clause of which declared "that no man who shall hereafter intermarry with any woman who shall have the benefit of this act extended to her . . . shall be liable in any way, in his person or estate, for any debt incurred" by her before she took the benefit of this act. After the discharge the woman married in Rhode Island a citizen of Massachusetts and took up her abode with him in the latter state, where the creditors sued them both. *Held*, that the obligation of the contract was determined by the law of Rhode Island, and that as the

¹ *Brigham v. Henderson*, 1 Cush. 209; *Bradford v. Farrand*, 13 Mass. (Mass.) 430; *Stoddard v. Harrington*, 100 Mass. 87.

² *Roberts v. Atherton*, 60 Vt. 563.

³ *McMillan v. McNeill*, 4 Wheat. 218, 220; *Forepaugh v. Delaware R'y*, 128 Pa. St. 217.

⁴ *Wayman v. Southard*, 10 Wheat. 1, 48; *Lamar v. Micou*, 114 U. S. 218, 220; *Forepaugh v. Delaware R'y*, 128 Pa. St. 217.

plaintiffs could not recover in that state they could not recover in Massachusetts.

Chief Justice Shaw says: "At the time of the marriage the plaintiffs were citizens of Rhode Island and bound by its laws. It follows then, that upon the marriage in the state of Rhode Island, contrary to the general rule of the common law, the husband, by force of the statute, was exempt and not liable for those debts of the wife, of which she had been *sub modo* discharged, and of which that sued for in this action is one. Such being the state of the obligation there, is it changed when the same parties seek their remedy in the courts and under the laws of this state? The court are of opinion that it is not.

"It is a familiar distinction, that when a remedy is sought in one state, upon an obligation contracted in another, the *lex loci contractus* governs the contract, its construction, incidents and legal effect, and the *lex fori* governs the remedy. The question here relates to the contract, its nature and legal incidents, and not the manner in which the remedy is sought. It is therefore to be decided upon the same grounds as it would be before a court sitting in Rhode Island and administering the laws of that state." Pages 68, 69.

The law of a place where a contract is made governs its nature, obligation and interpretation, unless it appears that the parties, when entering into the contract, intended to be bound by the law of some other state or country.¹

§ 268. **Contracts made prior to insolvent law.**—When the contract is made before the passage of the insolvent law, the law impairs the obligation of the contract by undertaking to discharge the debt without full payment, and is therefore unconstitutional, and the discharge in pursuance thereof is void, at least as against prior creditors who have not proved their claims with posterior creditors without claiming their exemption as anterior creditors.²

¹ *Liverpool Co. v. Phenix Co.*, 129 U. S. 397.

² *Sturges v. Crowninshield*, 4 Wheat. 122.

The authorities are conflicting as to whether, if a creditor by contract anterior to the insolvent law proves his debt without claiming his exemption, he will be bound by the discharge. The following cases say or decide that he will be bound by the discharge under such circumstances.¹ If these cases can be supported at all, it seems that it is only upon the ground that by such conduct the anterior creditor admits the existence of an essential jurisdictional fact, to wit, that he is a resident creditor by posterior contract, and is afterwards estopped to aver the contrary, and is bound by the discharge to the same extent that resident creditors by posterior contract are bound.² The following cases decide that the creditor will not be bound by the discharge, even if he proves his debt, without claiming his exemption from the operation of the posterior insolvent law.³

When the creditor proves his debt merely for the purpose of objecting to the granting of the discharge and of claiming his exemption from the operation of the insolvent law, he is not bound by the discharge.⁴

§ 269. Existing and future laws and decisions.—As a general rule, parties are deemed to contract in view of existing laws only, and not in view of future laws; but there are some qualifications of this rule. Thus, if it be the known and established policy of a foreign country to allow a reorganization of embarrassed corporations, organized under the laws and doing business within its limits, with the consent of a majority of its bondholders, all persons who buy the bonds of such a corporation are conclusively presumed to have contracted with a view to the exercise of such a power on the part of the foreign government, and cannot complain that a law which defers payment of his bonds, and decreases the rate of interest, impairs the obligation of his contract. Such a law passed by Canada is

¹ *Bigelow v. Pritchard*, 21 Pick. 169, 172; *Van Hook v. Whitlock*, 26 Wend. 43.

² See *Chapman v. Forsyth*, 2 How. 202, 208, 209, and § 287, *post*.

³ *Kimberly v. Ely*, 6 Pick. 440; *Allen v. Roosevelt*, 14 Wend. 100.

⁴ See sec. 274, *post*.

valid, and will be enforced in the federal courts even against a creditor who is a citizen of the United States.¹

It is probably upon this principle that a state insolvent law whose operation has been suspended by a national bankrupt law is held not to impair the obligation of posterior contracts made in the state during its suspension. The parties may be presumed to have contracted with a view to the repeal of the bankrupt law and the revival of the insolvent law's operation. Hence a discharge is valid as against all such contracts owned by creditors who are subject to the jurisdiction of the insolvency court at the time it renders the decree of discharge, whether they be residents or non-residents. The law enters into and becomes a part of the contract at its inception, and therefore does not impair its obligation.²

With regard to the decisions of courts, the latest authorities sustain the view that parties have a right to rely upon the decisions of the courts of last resort as correctly stating the law, and to make their contracts accordingly. If the same court afterwards overrules the former decision, parties who have contracted while the former rule was in force will not be allowed to suffer. If the contract was valid and enforceable when made according to the law as then declared, it will remain so, notwithstanding a change by a subsequent decision.³ But this doctrine does not apply where a rule of law which has remained in force for a long time is overruled, so as to protect contracts made shortly afterwards, and the overruling case is itself overruled within a short time after its decision. Such isolated decision cannot be regarded as settling the law; nor does it justify parties in relying upon it to that extent.⁴

¹ *Canada Southern R'y v. Gebhard*, 109 U. S. 527.

² *Austin v. Caverly*, 10 Met. (Mass.) 832; *Lothrop v. Highland Foundry*, 128 Mass. 120; *Palmer v. Hixon*, 74 Me. 447.

³ *Olcott v. Supervisors*, 16 Wall.

678, 690; *Farrior v. New Eng. Mort. Co.*, 92 Ala. 176; S. C., 9 South. Rep. 532; *Whaley v. Gaillard*, 21 S. C. 560, 572; *Harmon v. Auditor*, 123 Ill. 122, 135. See, also, §§ 32-34. *ante*, and cases cited.

⁴ *McLure v. Melton*, 24 S. C. 559;

§ 270. Grounds of decisions holding discharge void as against non-resident creditor.— When the contract is made and is to be performed in the debtor's state while the insolvent law is in force, his discharge is not valid as against a non-resident creditor who has not made himself an uncontesting party to the proceedings; but there is much conflict as to the true ground of this decision. The federal courts held, before the fourteenth amendment, that such a state decree of discharge is void for want of jurisdiction in the insolvency court, and is therefore no defense to an action on the debt in any court except the state courts of the debtor's state.¹

As the state insolvency court has no jurisdiction over the non-resident creditor's debt, its decree of discharge, even if it be binding in the local state courts, is not binding in the federal courts, nor in the courts of other states; for the "full faith and credit" clause and the act of 1790 only require that a decree shall have the same force and effect elsewhere as at home when it is rendered with jurisdiction,² and when rendered without jurisdiction it is not entitled to any faith and credit.³

But if the non-resident creditor voluntarily makes him-

Hopkins v. McLure, 133 U. S. 380. This doctrine seems to be a species of estoppel, which operates not upon individuals but upon the courts, to prevent injustice to persons who have relied upon former decisions of the same court. This is merely applying to the courts a rule which the courts have long applied to the legislature. It allows a court to overrule its former decisions when reason and justice so require, and to declare the law for future guidance, while at the same time it preserves rights which become vested when a different rule prevailed. The doctrine seems, on the one hand, to avoid the objec-

tionable feature of *stare decisis*, which tends to perpetuate errors, and, on the other hand, to avoid the impairment of vested rights by judicial action.

¹ *Ogden v. Saunders*, 12 Wheat. 213; *Shaw v. Robbins*, 12 Wheat. 369, note; *Baldwin v. Hale*, 1 Wall. 223, 230; *Gilman v. Lockwood*, 4 Wall. 409; *Davidson v. Smith*, 1 Bissell, 846.

² *Crapo v. Kelly*, 16 Wall. 610; *Cole v. Cunningham*, 133 U. S. 107; *ante*, § 197.

³ *St. Clair v. Cox*, 106 U. S. 350; *Hart v. Sansom*, 110 U. S. 151; *ante*, § 197.

self a party to the insolvency proceedings and proves his debt with resident creditors, without claiming his exemption from the operation of the insolvent law as a non-resident, the court thereby acquires jurisdiction, and its decree of discharge is as binding in the federal courts and in the courts of other states as in the local state courts.¹

Some state courts have held that an anterior insolvent law as applied to such a posterior contract, made and to be performed within the state, does not impair the obligation of the contract, even if the creditor be a non-resident, because such a law enters into and becomes a part of the contract at its inception and travels with it through all the stages of its existence.²

§ 271. Same — “Due process of law.”—Since the adoption of the fourteenth amendment, ordaining that no person shall be deprived of property “without due process of law,” such a discharge seems to be void even in the local state courts on the ground that the insolvent law is contrary to this clause of the fourteenth amendment, in that it purports to authorize a court to render a decree of discharge without lawful jurisdiction of the non-resident creditor or of his debt. This rule was clearly announced in *Main v. Messner*, 17 Oregon, 78, and is supported by the principles of *Pennoyer v. Neff*, 95 U. S. 714, and *Denny v. Bennett*, 128 U. S. 489. In *Main v. Messner* the defendant had obtained a discharge under the anterior insolvent laws of Oregon. The non-resident plaintiff had not made himself an uncontesting party to the insolvency proceedings, and brought this action on his debt in the local state court of Oregon. *Held*, that the discharge was no defense. The court, by Mr. Justice Lord, says: “There being neither jurisdiction of him [the non-resident creditor] or his debt,

¹ *Clay v. Smith*, 3 Peters, 411; *Scribner v. Fisher*, 2 Gray (Mass.), Blackman v. Green, 24 Vt. 17, 21; 48; *Burrall v. Rice*, 5 Gray (Mass.), *Journey v. Gardner*, 11 Cush. 539; *Parkinson v. Scoville*, 19 Wend. (Mass.) 355. (N. Y.) 150. See, also, *Denny v. Bennett*, 128 U. S. 489.

² *Orr v. Lisso*, 33 La. Ann. 476; *nett*, 128 U. S. 489.

the decree is a mere nullity so far as it professes to discharge his debt. To hold otherwise would be to condemn him unheard and to appropriate his property 'without due process of law.' This being so, the question in such cases — the discharge of the insolvent being otherwise valid — is simply one of jurisdiction, and the forum in which the remedy is sought cannot affect the principle or alter the rule."¹ Page 84.

§ 272. Foreign corporations as creditors.— Foreign corporations owning claims against insolvent debtors stand upon the same footing with non-resident creditors. A discharge is no bar to an action, even in the local state courts, unless they have proved their claims in the insolvency court. The same is true of national corporations located in other states.²

§ 273. Effect of national bankrupt law upon state insolvent laws.— The power given to congress to pass "uniform laws upon the subject of bankruptcies" is not exclusive. Until the power be exercised by congress, the states possess the power to enact fair and ordinary insolvent laws, which shall apply to posterior contracts held by creditors who are subject to the jurisdiction of the debtor's state.³ The effect upon state insolvent laws of a national bankrupt act is only to suspend their operation while the bankrupt act remains in force, and is not to render them invalid. As soon as the bankrupt act is repealed, the insolvent laws revive, unless they have been repealed in the meantime by the states themselves.⁴ This is true even where the insolvent law is passed while the national bankrupt act is in force.⁵ But as soon as a national bankrupt law takes ef-

¹ The author believes this to be the true view of the subject, and his reasons are stated at length in the note at the end of this chapter, §§ 284-287.

² *Phoenix Nat. Bank v. Batchelder*, 151 Mass. 589; *Glenn v. Clough*, 65 Md. 65; *Newmarket Bank v. Butler*, 45 N. H. 236.

³ *Ogden v. Saunders*, 12 Wheat. 213.

⁴ *Tua v. Carriere*, 117 U. S. 201; *Ward v. Proctor*, 7 Met. (Mass.) 318; *Lothrop v. Highland Foundry Co.*, 128 Mass. 120; *Orr v. Lisso*, 83 La. Ann. 476.

⁵ *Tua v. Carriere*, 117 U. S. 201.

fect, the operation of all state insolvent laws relating to the same persons and property is suspended, and all subsequent proceedings in the state insolvency courts are absolutely null and void. The state assignee acquires no title to the insolvent's property, although no proceedings in bankruptcy have been instituted, and therefore he cannot maintain an action against an attaching creditor for conversion.¹

§ 274. **Waiver and estoppel.**—Some of the state courts have carried the doctrines of waiver and estoppel very far, with the result of indirectly upholding state insolvent laws as against non-resident creditors. Thus in *Perley v. Mason*, 64 N. H. 6, the action was on a promissory note for \$100, to which the defendant pleaded a discharge under the insolvent laws of Vermont. The plaintiff was a non-resident of Vermont, but he appeared in the insolvency court and proved two other notes which he held against the defendant. Although he did not prove this \$100 note in suit, the court held that he had waived his right to object to the jurisdiction and was estopped to recover on this note. In *Murray v. Roberts*, 150 Mass. 353,² these principles were carried still further, and it was held that a non-resident creditor who merely accepts a dividend under the composition statute of Massachusetts, without having proved any claim in the insolvency court, or otherwise made himself a party to the proceedings, waives his right to insist upon the unconstitutionality of the statute and is estopped to recover the unpaid balance of his debt.

These decisions are placed upon the principles of estoppel *in pais*, and their correctness is extremely doubtful. The supreme court of the United States has gone no further than to decide that a non-resident creditor who makes himself a voluntary party to insolvency proceedings by proving a debt is bound by the discharge so far as to prevent a subsequent recovery in an action on that same debt.³ But

¹ *Griswold v. Pratt*, 9 Met. (Mass.) 16, with note doubting the correctness of the decision.

² S. C., 15 Am. State Rep. 209, ³ *Clay v. Smith*, 3 Peters, 411; *Baldwin v. Hale*, 1 Wall. 223.

obviously these last cases depend upon the principles of estoppel by judgment or decree. The matter having been heard in a court of competent jurisdiction, its decree of discharge is binding as *res adjudicata*, even if the creditor does not accept a dividend.¹

In the New Hampshire and Massachusetts cases, however, the matter was not adjudicated by a court of competent jurisdiction. On the contrary, the insolvency court had no jurisdiction over the debt in suit in either of those cases, and therefore its discharge was not binding as *res adjudicata*. In *Murray v. Roberts*, *supra*, the court lays much stress upon the point that, as the plaintiff had accepted his dividend, he had availed himself of the benefit of the composition act and had therefore waived his right to show its unconstitutionality. But upon this point the weight of reason and authority seems to be decidedly the other way.²

In *Kimberly v. Ely*, *supra*, it was explicitly held by the same learned court, in an elaborate opinion delivered by Chief Justice Parker, that the acceptance of a dividend in accordance with a decree of discharge does not estop the creditor to show the unconstitutionality of the insolvent law; and that he can recover the unpaid balance of his debt. In *Woodbridge v. Wright*, *supra*, it was decided that a non-resident creditor who accepts a dividend without having proved his debt is not bound by the discharge.

In *Embry v. Palmer*, 107 U. S. 3, the supreme court held that a creditor whose judgment debt was saved from the operation of a state decree by the "full faith and credit" clause of the constitution was not estopped, by accepting the part decreed, to show that the decree contravened that clause; and that he could recover the unpaid balance of his debt. In *Montague v. Massey*, 76 Va. 307, it was de-

¹ *Blackman v. Green*, 24 Vt. 17, *Woodbridge v. Wright*, 3 Conn. 523, 21; *Jones v. Horsey*, 4 Md. 306. 526; *Talcott v. Harriss*, 93 N. Y.

² *Embry v. Palmer*, 107 U. S. 3, 8; 567; *Montague v. Massey*, 76 Va. *Kimberly v. Ely*, 6 Pick. 440; 807; *Douglass v. Craig*, 13 S. C. 371.

cided that a judge who accepts, in accordance with an unconstitutional statute, a part of his lawful salary, is not thereby estopped to insist upon the invalidity of the statute; and can recover the unpaid balance of his salary.

In *Reynolds v. Adden*, 136 U. S. 348, a state court of Louisiana enjoined a non-resident creditor from prosecuting an action at law against his debtor after the latter had obtained a discharge under the insolvent laws of his own state, on the ground that the creditor had waived his exemption by becoming surety on the bond of his debtor's assignee in insolvency and by describing himself therein as a resident of the debtor's state. But the supreme court held that such conduct did not estop the creditor to show that he was a non-resident of the debtor's state and not bound by the discharge, and that he could maintain his action at law.

It has been decided in several cases that when the non-resident creditor appears in the insolvency proceedings merely to object to the granting of the discharge, he does not waive his exemption, nor confer jurisdiction upon the court; and can maintain a subsequent action upon his debt, notwithstanding the discharge.¹

§ 275. Discharge of surety.—A non-resident creditor who proves his claim and accepts a dividend in insolvency thereby releases his debtor by his own voluntary act, which acts as a discharge of any one liable as surety, such as the drawer of a bill of exchange.²

§ 276. Exemption from arrest and imprisonment.—The usual clause in a state insolvent law which declares that a debtor who has received a discharge shall be exempt from arrest or imprisonment does not impair the obligation of contracts made before the passage of the insolvent law, even when they are held by non-resident creditors whose debts are not discharged, and when imprisonment

¹ *Norton v. Cook*, 9 Conn. 314, *Greene* (Iowa), 299, 305; *Phillips v. 321*; *McCarty v. Gibson*, 5 Gratt. Allan, 8 B. & C. 477.
(Va.) 307; *Collins v. Rodolph*, 3 ² *Phelps v. Borland*, 103 N. Y. 406.

for debt was allowed at the time of the contract's making; for "the right to imprison constitutes no part of the contract, and a discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects."¹

Therefore, a non-resident creditor cannot, after his debtor has received a discharge, recover on a bond for jail limits conditioned upon the debtor remaining within the jail limits "until he shall be lawfully discharged;" for this clause is valid, and therefore the debtor is "lawfully discharged."²

§ 277. Attachment and execution after discharge.—In those states which allow an attachment of property on mesne process, it is commonly provided by statute that a non-resident creditor whose resident debtor has obtained a discharge in insolvency shall not be allowed to attach subsequently-acquired property.³ Such statutes are valid and constitutional. They do not impair the obligation of the contract with the non-resident creditor, because they merely affect the remedy or the mode of proceeding to enforce payment, and leave the creditor an adequate remedy by execution after judgment.⁴ The non-resident creditor who has not proved his claim may sue upon it and recover judgment in the debtor's state as well as in other states, notwithstanding the insolvent discharge; and after judgment he is entitled to an execution upon which he may seize the debtor's property and sell it to satisfy his demand. He is entitled to full satisfaction, and not merely to the proportion paid to resident creditors.⁵

§ 278. Effect of discharge in other states — (1) Action upon the debt.—When both debtor and creditor are residents of the same state at the time of making the con-

¹ Per Mr. Justice Story, for the court, in *Beers v. Haughton*, 9 Peters, 329, 358; *Mason v. Haile*, 12 Wheat. 370; *Penniman's Case*, 103 U. S. 714; *Donnelly v. Corbett*, 7 N. Y. 500.

² *Mason v. Haile*, 12 Wheat. 370.

³ Mass. Pub. Stats., ch. 157, § 83.

⁴ *Maxwell v. Cochran*, 136 Mass. 73; *Venable v. Rickenberg*, 153 Mass. 64.

⁵ *Choteau v. Richardson*, 12 Allen (Mass.), 365; *Maxwell v. Clarke*, 139 Mass. 112.

tract and at the time of the discharge under anterior insolvent laws, the discharge is as binding upon the parties in all other courts as in the local state courts. If it be a valid defense to an action on the debt in the local state courts, it will also be a valid defense to an action on the debt in a court of another state, and in the federal courts.¹ This rule is not changed in the case of negotiable paper by the fact that an intermediate party is a citizen of a state other than the debtor's state, provided the debtor and the plaintiff are citizens of the same state granting the discharge. Thus, in the Pennsylvania case of *Wheelock v. Leonard*, 20 Pa. St. 440, the maker was a resident of Massachusetts; the payee of New York, and the indorsee of Massachusetts. The maker obtained a discharge in his state, which the court held to be a defense to an action against him by the indorsee in Pennsylvania.

So also when the creditor is a non-resident of the debtor's state, if he proves his debt in the insolvency proceedings without claiming his exemption as a non-resident, he will be bound by the discharge in the courts of other states to the same extent as resident creditors.² In *Gardner v. Lee's Bank*, *supra*, the defendant had received a discharge in Massachusetts. The plaintiff was a non-resident of that state, but appeared and proved his claim in the insolvency proceedings. The supreme court of New York held that the discharge was a good defense to an action on the debt in New York, and therefore that the plaintiff could not recover.

The decree of discharge, if rendered with jurisdiction, is entitled to the same force and effect elsewhere as at home. This is not merely a question of interstate comity or cur-

¹ *Pitkin v. Thompson*, 13 Pick. Dillon, 515; *Webster v. Rees*, 23 64; *Stone v. Tibbetts*, 26 Me. 110; *Iowa*, 269.

Hall v. Boardman, 14 N. H. 38; ² *Gardner v. Lee's Bank*, 11 Barb. *Hemstead v. Reed*, 6 Conn. 480, 491-493; *Wheelock v. Leonard*, 20 Pa. Vt. 17, 21. *St. 440*; *Von Glahn v. Darrance*, 1

tesy; it is a rule of constitutional obligation, founded upon the "full faith and credit" clause of the constitution. If a court of one state should refuse to give due effect to such a decree, its judgment would be reversed by the supreme court of the United States.¹

§ 279. Same — (2) Arrest or imprisonment of debtor.— A discharge under a state insolvent law which merely purports to relieve the person of the debtor from arrest or imprisonment, without discharging the debt (as was the case in most of the early laws), does not relieve him from either in another state; because the debt subsists, at least in part, and the remedy must be determined by the law of the state of process. Such laws, relating merely to the process or remedy, can have no extraterritorial effect; and to so hold does not impair the obligation of the contract, but rather enlarges its obligation. This rule applies both to the case of a resident and that of a non-resident creditor.²

But when the anterior insolvent law purports to discharge the debt as well as the debtor's person, then the discharge is entitled to extraterritorial effect and will bar an action on the debt, and relieve him from imprisonment in the courts of another state, if the creditor was subject to the jurisdiction of the state granting the discharge.³ If, however, the creditor was not subject to the jurisdiction of such state, but was a non-resident thereof, the discharge will not protect the debtor in other states, either from arrest or from an action on the debt.⁴

§ 280. Dissolution of attachment.— A provision in a state insolvent law that all attachments made within a certain time before or after the owner's insolvency shall be dissolved and the property pass to the assignee free from

¹ *Crapo v. Kelly*, 16 Wall. 610.

v. Wright, 3 Conn. 523; *Judd v.*

² *Wood v. Malin*, 5 Halst. (N. J.)

Porter, 7 Greenl. (Me.) 337.

208 (overruling *Rowland v. Steven-*

³ *Ante*, § 278, and cases cited.

son, 1 Halst. (6 N. J. L.) 149; *Peck v.*

⁴ *Woodbridge v. Wright*, 3 Conn.

Hozier, 14 Johns. (N. Y.) 346; *James*

523.

v. Allen, 1 Dall. 188; *Woodbridge*

the attachment does not impair the obligation of subsequent contracts made in view of that law, even when owned by non-resident creditors. The attaching creditor loses his lien on the property, and can only claim his proportion with the other creditors. This rule applies both to the state and federal courts.¹

§ 281. **Note on insolvent laws.**—The object of this note is to state the author's reasons for believing the following propositions to be sound:

1. State insolvent laws do not impair the obligation of posterior contracts made and to be performed within the state, even if the creditor be a non-resident.

2. But when the creditor is a non-resident, as the insolvent law purports to authorize the insolvency court to render a judgment or decree detrimental to his contract rights *without jurisdiction over him or over his debt*, it contravenes the "due process of law" clause of the fourteenth amendment, and the discharge is void as against all non-resident creditors who have not subjected themselves to the jurisdiction of the insolvency court; as by proving their debts without claiming their exemption as non-residents.

§ 282. **I. Obligation of contracts.**—The supreme court of the United States has never decided that insolvent laws impair the obligation of such posterior contracts when held by non-resident creditors, and the rule that the discharge is a valid defense in the local state courts² is inconsistent with that view. For if the insolvent laws do impair the obligation of such contracts, the discharge granted pursuant to those laws is void and is no defense to an action on the debt even in the local state courts.³

When the creditor is a *resident* of the debtor's state it is universally conceded that the insolvent law does not impair

¹ Denny v. Bennett, 128 U. S. 489; 409; Parkinson v. Scoville, 19 Wend. United States Revised Statutes, sec. 150; Orr v. Lisso, 33 La. Ann. 476. 933; Tua v. Carriere, 117 U. S. 201. ³ Farmers' Bank v. Smith, 6

² Ogden v. Saunders, 12 Wheat. Wheat. 131; Sturges v. Crowninshield, 4 Wheat. 122; Edwards v. 213; Gilman v. Lockwood, 4 Wall. Kearzey, 96 U. S. 595.

the obligation of such posterior contracts, because it enters into and becomes an essential part of the contract's obligation at its inception; and the recent case of *Denny v. Bennett*, 128 U. S. 489, seems to show that the mere fact that the creditor is a non-resident of the debtor's state does not alter the rule. In that case the supreme court holds that an insolvent law which dissolves all attachments made within ten days before the debtor's assignment, and which destroys the attaching creditor's lien on all such property, does not impair the obligation of such posterior contracts, even if the creditor be a non-resident.

This decision is placed squarely upon the ground that "the established construction of the constitution of the United States against impairing the obligation of contracts requires that statutes of this class shall be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation." Page 495.

This view is also supported by some decisions in the state courts. In *Orr v. Liso*, 33 La. Ann. 476, the point was directly adjudged and supported by cogent reasons. In delivering the unanimous opinion of the court against the non-resident creditor, Bermudez, C. J., says: "The qualifications [that the debtor could be discharged from the debt by complying with the local insolvent law] attached to the contract by law the moment the contract was formed, became inseparable from it, and traveled with it through all the stages of its existence." Page 478.¹

It seems almost absurd to contend that when the creditor happens to be a non-resident of the debtor's state, its insolvent laws do not enter into and form a part of the obligation of a posterior contract made and to be performed therein, and therefore that such laws do impair the obligation of the contract; while it is conceded that when the creditor happens to be a resident of the debtor's state,

¹See, also, *Parkinson v. Scoville*, 19 Wend. (N. Y.) 150; *Scribner v. Fisher*, 2 Gray (Mass.), 43.

its insolvent laws do enter into and form a part of the obligation of such posterior contract, and therefore that such laws do not impair the obligation of the contract. The creditor's place of residence constitutes the only difference between the two cases, and this seems to be an immaterial difference, so far as the obligation of the contract is concerned.

In *May v. Breed*, 7 Cush. 15, 33-41, the contract was made in England, while the English bankruptcy act was in force, and was also to be performed therein by its terms. The creditor was a citizen of Massachusetts, and the debtor was a citizen of England, and obtained his discharge under the English act. It was held that said act entered into and formed a part of such contract, and was by comity the law governing the contract, wheresoever suit was brought, and hence did not impair its obligation.

§ 283. Same.—In the absence of anything in the contract to indicate by what law the parties intended the contract to be governed, the court must determine from all the facts of the case “to what general law it is just to presume that they have submitted themselves in the matter.” Per Mr. Justice Willes in *Lloyd v. Guibert*, 6 B. & S. 100, 130; *S. C.*, L. R. 1 Q. B. 115, 121. A striking illustration of this rule is found in the case of *Watts v. Camors*, 115 U. S. 353, 362, where the court says: “Americans and Englishmen entering into a charter-party of an English ship for an ocean voyage must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed.” It was accordingly held that the contract was governed by the maritime law, which was different from that of Louisiana, where the contract was signed, although the suit was brought in the United States circuit court sitting in Louisiana. See, also, *Pritchard v. Norton*, 106 U. S. 124; *The Gaetano*, L. R. 7 P. D. 137.

From these cases, it appears that though neither the place of making nor the place of performance of a contract

is conclusive in deciding what law is to govern the contract, yet that these are leading facts to be considered in connection with the other facts of the case, including the difference of citizenship. When the place of making is also the place of performance, the presumption is very strong that the parties contracted with a view to the law of that place and meant their contract to be governed by the law of that place, especially where the debtor is a citizen of that state or country, although the creditor is not.

If the non-resident creditor expressly agrees that the debt may be discharged at any time upon a full surrender and distribution of the debtor's property, ratably among all the creditors, without a payment in full or any claim upon the debtor's future acquisitions of property, it seems perfectly clear that, if the debtor complies with these terms, the debt will be discharged without impairing the obligation of the contract. These terms enter into and form an essential part of the obligation of the contract at its inception, and therefore they cannot impair its obligation, *i. e.*, lessen its binding legal force and effect. These terms are substantially the same as those contained in ordinary insolvent laws.

It is a well-established principle that the laws subsisting when a contract is made and where it is to be performed enter into and form a part of its obligation, just as if they had been expressly referred to and incorporated in the contract by the parties. "This principle embraces alike those [laws] which affect its validity, construction, *discharge* and enforcement."¹

§ 284. II. Due process of law.—In section 271, *ante*, attention was called to the case of *Main v. Messner*, 17 *Oreg.* 78, in which the decision in favor of the non-resident creditor, who had not subjected himself to the jurisdiction

¹ Per Mr. Justice Swayne in *Von Kearsney*, 96 U. S. 595; *Brine v. Ins. Hoffman v. Quincy*, 4 Wall. 535, Co., 96 U. S. 627; *Seibert v. Lewis*, 550; citing *Ogden v. Saunders*, 12 122 U. S. 284. *Wheat* 231. See, also, *Edwards v.*

of the insolvency court, was placed solely upon the ground that to discharge his debt by such proceedings "would be to condemn him unheard, and to appropriate his property 'without due process of law.'" Page 84. In other words, as the local insolvent law purported to allow an insolvency court to render a decree of discharge of debts owned by non-resident creditors, without jurisdiction over those creditors or their debts, the law was in violation of the "due process of law" clause of the fourteenth amendment, and therefore the discharge was void as against such non-residents even in the local state courts.

The federal courts have been tending in this direction for some time. Even prior to the adoption of the fourteenth amendment in 1868 they held that a discharge rendered without jurisdiction was void in the federal courts, and that, unless the non-resident creditor voluntarily made himself a party to the insolvency proceedings, the debtor's state had no jurisdiction over him or over his debt, and the discharge was no defense to an action on the debt in a federal court sitting even in the same state.¹

Insolvency proceedings, like every other kind of judicial proceedings, require legal notice to be given to every party whose rights may be injuriously affected. But the laws of a state have no extraterritorial operation except by comity, and therefore a state cannot constitutionally and effectively send its process for imparting notice beyond its own limits, so as to compel a non-resident to appear in the insolvency proceedings, and to be bound by them.

This is substantially the reasoning of the federal supreme court. In *Gilman v. Lockwood*, *supra*, Mr. Justice Clifford, who delivered the unanimous opinion of the court, used this language: "Insolvent laws of one state cannot discharge the contracts of citizens of other states; because such laws have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases

¹ *Clay v. Smith*, 3 Peters, 411; *Baldwin v. Hale*, 1 Wall. 228; *Gilman v. Lockwood*, 4 Wall. 409.

where a citizen of such other state voluntarily becomes a party to the proceedings, has no jurisdiction of the case" (page 411), citing *Baldwin v. Hale*, *supra*, and *Baldwin v. Bank of Newbury*, 1 Wall. 334.

§ 285. **Same.**— In *Baldwin v. Hale*, *supra*, the court said, on page 233: "Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." Citing *Nations v. Johnson*, 24 How. 203; *Boswell's Lessee v. Otis*, 9 id. 350; *Oakley v. Aspinwall*, 4 Comst. 514. And on page 234 the court also stated that "insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default."

Again in the recent case of *Sloane v. Chiniquy*, 22 Fed. Rep. 213, 215, Mr. Justice Miller used this language: "No state insolvent law, as has been repeatedly decided, can discharge or release the debtor from his obligation to pay, under that contract, where the creditor is a citizen of another state; because the law cannot operate upon a citizen not within its jurisdiction. The theory of that is, that the judgment of a court discharging a debtor from his obligations is, as to the creditor residing in another state, an *ex parte* judgment; but if he comes within the state and submits himself to the jurisdiction of the court, it has never been held that the contract may not be discharged."

An examination of these cases will show that these quotations embody the true ground of the decisions. They do

not contain one word about impairing the obligation of contracts, and they all express the idea that the insolvent laws of a state are unconstitutional and void as against non-resident creditors, on the single ground that they purport to allow a valid judgment of discharge of contracts to be rendered against the claims of non-resident creditors, who are not subject to the jurisdiction of the insolvency court. Although the insolvency court has jurisdiction of the general subject of insolvency and of the debtor, yet as it has not rightful jurisdiction of a non-resident creditor, unless he voluntarily appears, the federal courts will not give effect to its discharge as against such creditor. Nor does the "full faith and credit" clause, nor the act of 1790, require them to give the same force and effect to such a decree that it has in the local state courts; because it is rendered without lawful jurisdiction.

In *Denny v. Bennett*, 128 U. S. 489, the court quoted the above passages from its previous decisions to show that those cases turned upon the question of jurisdiction, and also to show that the insolvent law of Minnesota there involved did not impair the obligation of a posterior contract, even if held by a non-resident creditor. The court says: "The proposition lying at the foundation of all these decisions is, that a statute of a state, being without force in any other state, cannot discharge a debtor from a debt held by a citizen of another state. . . . Whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another state, who is not personally subjected to the jurisdiction of the court. Any one who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a state insolvent law is, that it cannot, like the bankrupt law passed by congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property

of the debtor within the state is conceded, but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court." Pages 497, 498.

§ 286. *Same.*—This course of reasoning seems to bring these insolvency cases directly within the principle of *Pennoyer v. Neff*, 95 U. S. 714; *Harkness v. Hyde*, 98 U. S. 476; *St. Clair v. Cox*, 106 U. S. 350; *Freeman v. Alderson*, 119 U. S. 185. In these cases the supreme court decided that a state statute which purports to allow a state court to render a judgment *in personam* against a non-resident defendant, without jurisdiction over the person of such defendant, contravenes the "due process of law" clause in the fourteenth amendment, and its judgment is therefore void, even in the local state courts. And that publication of citation within the state, or personal service without the state, does not confer jurisdiction *in personam*; but that personal service within the state, or voluntary appearance in the action, does confer jurisdiction *in personam*.

The same rule has been followed in the state courts.¹ In the insolvency case of *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589, 592, the court cited *Pennoyer v. Neff*, *supra*, and intimated that within the principles of that case the local insolvent law might be void as depriving a non-resident creditor of his property without due process of law. It would be but a repetition of the reasoning above employed, with respect to the insolvency cases, to state the reasoning of *Pennoyer v. Neff* and other cases, and but a single extract will be made. In *Freeman v. Alderson*, 119 U. S. 185, 188, Mr. Justice Field, in delivering the unanimous opinion of the court, said: "The laws of the state have no operation outside of its territory, except so far as may be allowed by comity; its tribunals cannot send their citations beyond its limits and require parties there domiciled to respond to proceedings against them, and publica-

¹ *Eliot v. McCormick*, 144 Mass. 10; *Needham v. Thayer*, 147 Mass. 536.

tion of citation within the state cannot create any greater obligation upon them to appear."

Before the fourteenth amendment, such judgments *in personam* by publication merely, in accordance with local statutes, were not void in the local state courts; or, to speak more accurately, the non-resident possessed no constitutional right to impeach their validity in the local state courts.¹ But in the courts of other sovereignties he has always possessed the right to impeach such a judgment on the ground that it was rendered without rightful jurisdiction, and therefore was entitled to no "faith and credit" in the federal courts nor in the courts of other states.²

So, likewise, in the insolvency cases the better view was that, prior to the fourteenth amendment, the non-resident creditor possessed no constitutional right to impeach the discharge in the local state courts, but that in the courts of other sovereignties he has always possessed the right to impeach such a discharge on the ground that it was rendered without rightful jurisdiction, and was therefore void.

§ 287. **Same.**—The analogy between these two classes of cases becomes still more apparent when we consider another point, namely, that in both classes, if the non-resident voluntarily appears in the proceedings, the judgment or decree becomes binding upon him in all courts. His appearance gives the insolvency court as well as the common-law court jurisdiction over him, and, if the court has jurisdiction in other respects, its decree cannot be void.

His appearance in the insolvency court and the proof of his debt with resident creditors without claiming his exemption as a non-resident amount to an admission on his part that he is a resident for the purpose of that proceeding. His residence in the state is a jurisdictional fact, and, having admitted that fact by his conduct, he is afterwards

¹ *Pennoyer v. Neff*, 95 U. S. 714, 165; *Phelps v. Brewer*, 9 Cush. 390; 732; *Eliot v. McCormick*, 144 Mass. *Kane v. Cook*, 8 Cal. 449; *ante*, 10. §§ 193, 197.

² *D'Arcy v. Ketchum*, 11 How.

estopped to assert the contrary for the purpose of impeaching the discharge in an action on that same debt. For, though consent of parties cannot confer a jurisdiction which the law has not conferred upon a court, still if the parties admit the existence of jurisdictional facts and the court assumes jurisdiction and renders a decree on the merits, the parties are afterwards estopped to assert that those facts did not exist, and are bound by the decree to the same extent as if those facts actually existed.¹

In *Chapman v. Forsyth*, *supra*, a fiduciary creditor proved his debt in bankruptcy under the United States act of 1841 with common creditors without claiming his exemption from the operation of the discharge as a fiduciary creditor. After the debtor had received his discharge, the creditor brought this action on the debt. It was conceded that the bankruptcy court had no jurisdiction over fiduciary debts as such, and it was argued by plaintiff's counsel that the consent of parties could not confer jurisdiction upon the court over such debts, and therefore that the discharge was void and no defense to this action. But the court held that, as the plaintiff had proved his debt not as a fiduciary debt but as a common debt, he was estopped to show that it was a fiduciary one for the purpose of defeating the jurisdiction of the bankruptcy court, and was therefore bound by the discharge.

If the plaintiff had proved his debt merely for the purpose of objecting to the granting of the discharge, it seems that he would not have been bound by the discharge.²

That a citizen or resident of one state may, by his conduct in judicial proceedings pending in another state, estop himself to assert the truth in a later suit, was decided in the Kentucky case of *Davis v. Connolly*, 4 B. Mon. 136, 140,

¹ *Chapman v. Forsyth*, 2 How. 202; *New Lamp Co. v. Ansonia Co.*, 91 U. S. 656; *Des Moines Co. v. Iowa Co.*, 123 U. S. 552; *Railway Co. v. Ramsey*, 22 Wall. 322.

² *Morse v. Lowell*, 7 Met. (Mass.) 152; *Talcott v. Harris*, 93 N. Y. 567; *Norton v. Cook*, 9 Conn. 314, 321; *McCarty v. Gibson*, 5 Gratt. (Va.) 307.

141. In that case a Kentucky executor voluntarily appeared in and defended a suit pending in another state against his testator, without disclosing the fact that he was a foreign executor, or claiming his immunity as such from suit. Judgment was rendered against him in the other state, and the plaintiff then brought this action on the judgment in Kentucky. The defendant contended that his appointment under Kentucky laws gave him no authority to defend a suit in another state, and that therefore the judgment was not binding upon him. But the court held that his conduct in the other state was a conclusive admission that he was a domestic executor of that state, and that he was now estopped to show that he was merely a foreign executor, and that therefore the judgment was binding upon him.¹

¹ See, also, *Reynolds v. Adden*, 136 U. S. 848.

CHAPTER XV.

STATUTES OF LIMITATION.

§ 288. General principles. 289. Unconstitutional state limitation act. 290. Treaty with foreign nations. 291. Bankruptcy assignee. 292. Seizures during rebellion. 293. Customs dues. 294. Writ of error or appeal. 295. Actions against national banks for usury. 296. Suits by United States government. 297. Action on marshal's bond. 298. War period deducted. 299. Actions against stockholders of foreign corporations. 300. Actions against stockholders of national corporations. 301. Actions against foreign corporations. 302. Agreements as to limitation.	§ 303. Waiver of the contract limitation. 304. Suits for infringement of patent-rights. 305. Bar of sister state—(1) Chattels and land. 306. Bar of sister state—(2) Debts. 307. Waiver and election by selecting forum. 308. Bar of sister state evidenced by judgment. 309. Actions upon judgments of sister states. 310. Same—Unreasonably short time allowed for suit. 311. Statutory liability created by another state. 312. Discrimination against non-residents. 313-314. Extension of time for suing after bar is complete.

§ 288. **General principles.**—The fact that a non-resident has the right to choose between a state court and a federal court renders it necessary to state the effect of limitation laws in both tribunals. The federal courts are governed by the constitution, laws and treaties of the United States, irrespective of state laws. "The states can exercise no power over them or their proceedings, except so far as congress shall allow."¹ Congress has not enacted a general statute of limitations; but it has enacted that the laws of the several states shall be regarded as "rules of decision" in the trial of common-law cases in the federal courts

¹ United States v. Thompson, 98 U. S. 486, 490.

in cases where they apply.¹ Under this act of congress the federal courts are in most cases bound to adopt and follow the limitation law of the state in which they sit, together with the construction given to that law by the local state courts, both in local and in transitory actions.²

There are, however, some qualifications of and exceptions to this rule, which are stated immediately below and in various sections throughout this chapter. This rule applies only in the absence of an express act of congress; and as soon as congress legislates upon a subject within its power, and prescribes a period of limitation, it is binding both upon the federal and state courts, notwithstanding a state statute to the contrary.

In the absence of an act of congress the statute of limitations of the state in which the federal court sits is binding upon the court whenever the subject-matter of suit is subject to that state's jurisdiction; and if the action is barred under the state law it will be barred in the federal court.³ But if the subject-matter of suit is not subject to that state's jurisdiction, or if the action has been previously barred under the laws of another state while the subject-matter was subject to its jurisdiction, the federal court is not bound by the statute of the state of process; it may hold the action barred, although it is not barred under the local statute.⁴

§ 289. Unconstitutional state limitation act.— By the express terms of section 721 of the Revised Statutes the federal courts are not bound by the local statutes when “the constitution, treaties or statutes of the United States otherwise require or provide.” Thus, in *Christmas v. Russell*, 5 Wall. 290, the local statute barred the action, which

¹ U. S. R. S., sec. 721; Judiciary Act of Sept. 24, 1789, ch. 20, sec. 34. U. S. 693, 696; *Rogers v. Durant*, 140 U. S. 298.

² *McCluny v. Silliman*, 3 Peters, 270; *Leffingwell v. Warren*, 2 Black, 599; *Murray v. Gibson*, 15 How. 421; *Amy v. Dubuque*, 98 U. S. 470; *Michigan Ins. Bank v. Eldred*, 130

³ *Leffingwell v. Warren*, 2 Black, 599.

⁴ *Bicknell v. Comstock*, 118 U. S. 149; *Shelby v. Guy*, 11 Wheat. 361.

was on a judgment of a sister state. But inasmuch as it gave the judgment creditor, who was a non-resident, no time whatever after its recovery to sue his resident debtor, the supreme court held that the statute contravened the "full faith and credit" clause and was void, and that therefore the action was not barred.

So in the recent case of *In re Brown*, 135 U. S. 664, 705, the action was barred under the local state statute; but the court held that the time allowed by it was unreasonably short, as applied to pre-existing contracts, and that it impaired the obligation of the contract in suit and was void, and that therefore the action was not barred.

Whether or not a state limitation act impairs the obligation of a contract by shortening the time for suing depends upon the fact whether it leaves a reasonable time after its passage and before the bar becomes complete. If the time be reasonable the act is valid. If the time be unreasonably short, the act, as applied to anterior contracts, impairs their obligation and is void. What is a reasonable time depends upon all the circumstances of each case, and no definite rule can be laid down which will apply to all cases. This objection may be raised in a state court, as well as in a federal court, as applied to a state limitation act.¹

Where a cause of action had existed for four years at the time the new statute was passed, the supreme court held that a period of nine months and seventeen days was a reasonable time, and that the new act was valid, and barred an action brought after that period.² The court and not the legislature is the final judge of what period constitutes a reasonable time, and whether the statute is constitutional; for otherwise the contract clause would be no restraint upon the state legislatures in this class of cases, and

¹ *Terry v. Anderson*, 95 U. S. 628; *Koshkonong v. Burton*, 104 U. S. 668, 675; *Smith v. Morrison*, 22 17 Wis. 573.

Pick. (Mass.) 430; *Bigelow v. Bemis*, 2 *Terry v. Anderson*, 95 U. S. 628.

they could arbitrarily deprive meritorious plaintiffs of their remedy.

It seems that if a plaintiff fails to sue within a reasonable time after the passage of an unconstitutional act which shortens the time for bringing suit, his action will be barred, even if he might have availed himself of its invalidity if he had brought his suit within a reasonable time. Thus, where a Wisconsin statute of 1872 reduced the period for suing upon municipal bonds and coupons from twenty to six years, with a proviso allowing one year after its passage within which to sue on any bond or coupon which was then five or more years overdue; and the action was brought in 1880 upon coupons which matured at different dates from 1858 to 1877, it was held that the action was barred as to all coupons which matured more than six years before suit; and it was intimated that the plaintiff could not avail himself of the invalidity of the proviso which required suit to be brought within one year on certain overdue coupons.¹

§ 290. Treaty with foreign nations.—If the period of limitation is prescribed by a treaty between the United States and a foreign nation, this law governs where the rights of foreigners are involved, both in the state and federal courts,² unless it has been subsequently changed by congress;³ for a treaty is “the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”⁴

§ 291. Bankruptcy assignee.—Congress has declared that suits by or against assignees in bankruptcy shall be barred in two years after the cause of action accrues for or against the assignee; and this law is binding on all courts within the United States.⁵ It has also been held to bar an

¹ *Koshkonong v. Burton*, 104 U. S. 608, 675.

² *Hauenstein v. Lynham*, 100 U. S. 483.

³ *Head Money Cases*, 112 U. S. 580, 599; *Whitney v. Robertson*, 124

U. S. 190, 195; *Chinese Exclusion Case*, 130 U. S. 581, 600.

⁴ U. S. Const., art. VI.

⁵ *Bailey v. Glover*, 21 Wall. 342; *Jenkins v. International Bank*, 106 U. S. 571; *Ross v. Wilcox*, 134 Mass.

action brought by the bankrupt, with the assignee's consent, more than two years after the cause of action accrued to the assignee.¹ The constitutional power of congress to pass such limitation law is derived from the clause giving congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States." United States Const., art. I, sec. 8.² This act of congress also bars an action by a purchaser from the assignee brought more than two years after the cause of action accrued to the assignee; at least when the purchase was made two years after that date.³

If the cause of action be fraudulently concealed from the assignee in bankruptcy, and he is not guilty of negligence or laches in discovering the fraud, his action at law or suit in equity will not be barred until two years after he discovers the fraud.⁴ But if he be guilty of negligence or laches in coming to the knowledge of the fraud which is the foundation of his action or suit, he will not be entitled to the benefit of this implied exception, and unless his action or suit be commenced within two years after the cause of action accrued in his favor, it will be barred, even if brought immediately after the discovery of the fraud.⁵

§ 292. **Seizures during rebellion.**—Congress has enacted that suits for seizures made during the rebellion by virtue of authority derived from the president or under any act of congress shall be barred in two years; and this law governs actions in all courts, state as well as national.⁶ In *Mitchell v. Clark*, *supra*, the supreme court held that congress has the constitutional power to prescribe the law of limitations for all actions or suits which may be brought in or removed to the federal courts, and that, if congress exercises that

21; *Comegys v. McCord*, 11 Ala. 932; *Archer v. Duval*, 1 Fla. 219.

¹ *Kenyon v. Wrisley*, 147 Mass. 476.

² *French v. Merrill*, 132 Mass. 525, 526.

³ *Wisner v. Brown*, 122 U. S. 214; *Gifford v. Helms*, 98 U. S. 248.

⁴ *Bailey v. Glover*, 21 Wall. 342; *Rosenthal v. Walker*, 111 U. S. 185.

⁵ *Avery v. Cleary*, 132 U. S. 604.

⁶ *Mitchell v. Clark*, 110 U. S. 633; *State v. Gatzweiler*, 49 Mo. 17.

power, the law is binding in the state and federal courts. The court says: "Had congress power to pass such a law? The suit being one which under the act of congress could be removed into the courts of the United States, congress could certainly prescribe for it the law of limitations for those courts. If for such actions in those courts, why not in all courts? Otherwise there would be two rules of limitation of actions in different courts holding pleas of the same cause."¹ Page 641.

§ 293. **Customs dues.**— In *Arnson v. Murphy*, 109 U. S. 238, which was brought in the supreme court of New York, and removed to the United States circuit court, to recover back customs dues illegally exacted, it was held that the case was governed, not by the New York statute, but by the act of congress upon the subject. The court, by Mr. Justice Matthews, says: "Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive. . . . It follows that in such cases, of which the present is one, the limitation laws of the state in which the cause of action arose or in which the suit was brought do not, under section 721, Revised Statutes, furnish the rule of decision, and that it was, therefore, an error in the cir-

¹ See, also, *Clark v. Dick*, 1 Dillon, 8; *State v. Gatzweiler*, 49 Mo. 17. It seems to follow from this reasoning that congress has the power to pass general limitation acts which shall apply to cases in the state courts between citizens of different states even when no other ground of federal jurisdiction exists; for such cases may be brought in or removed to the federal courts. Some law of this character seems to be desirable in order to prevent a virtual subversion of the sound public policy upon which statutes of limitation are based. In many of the states, and until recently in nearly all of them, a creditor could,

after living in the same state with his debtor for its full period of limitation, bring and maintain an action against him in another state. *Putnam v. Dike*, 13 Gray (Mass.), 535; *post*, § 306, and cases cited. These cases carry to an extreme length the view that limitation laws relate to the remedy merely, and that therefore the law of the forum governs, entirely irrespective of the laws of any other state in which the parties have previously resided. This result is, however, so manifestly impolitic that the contrary rule has been expressly ordained by statute in many states. See § 306, *post*.

cuit court to apply as a bar to the action the limitation prescribed by the statute of New York." Page 243.

§ 294. **Writ of error or appeal.**—An act of congress bars a writ of error or appeal to the United States supreme court, "unless the writ of error is brought or the appeal is taken within two years after the entry of such judgment, decree or order."¹ This bar of two years applies to writs of error to state courts, as well as to the lower federal courts. A writ of error is not "brought," within the meaning of this act, when it is signed and allowed by a proper judge; but only when it is filed in the court which rendered the judgment; and if this is not done within two years, the writ will be dismissed on motion in the United States supreme court.²

By the act of congress of March 3, 1891, establishing circuit courts of appeals, it is further provided in section 11 "that no appeal or writ of error by which any order, judgment or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed: *Provided, however,* that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals." By section 6 of the same act an appeal from or writ of error to the circuit courts of appeals is allowed to or from the supreme court in those cases in which the circuit court of appeals has not final jurisdiction, and in which "the matter in controversy shall exceed \$1,000, besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment or decree sought to be reviewed."

¹ U. S. R. S., sec. 1008.

U. S. 567; *Polleys v. Black River*

² *Cummings v. Jones*, 104 U. S. 419; *Scarborough v. Pargoud*, 108 U. S. 419; *Arkansas Cent. R'y*, 128 U. S. 258.

§ 295. **Actions against national banks for usury.**—An act of congress declares that an action against a national bank to recover back twice the amount of interest paid at an unlawful rate shall be “commenced within two years from the time the usurious transaction occurred.”¹ This act bars such actions in the state and federal courts.²

When interest has not been paid, but is merely reserved knowingly at a usurious rate, and the bank sues for principal and interest, it cannot recover interest, even if more than two years have elapsed after the usurious transaction occurred, and before suit.³

By sections 5197 and 5198 of the Revised Statutes, if a national bank knowingly reserves interest at a greater rate than the law of the state where it is located allows, it forfeits the entire interest, but no part of the principal, even if that be the legal consequence of usury in the state where the bank is located.⁴

As this is a valid national law, it is as binding in every one and all the states as the local laws. Hence, the rule that the courts of one state will not enforce a penalty, as a partial defense, authorized by the laws of another state, does not apply; and the bank cannot escape this penalty by bringing suit in a state other than that of its location.⁵

§ 296. **Suits by United States government.**—When the federal government sues as the real party in interest it is not bound by any state statute of limitation, whether it is expressly named or not;⁶ unless the right of action was barred when the United States acquired its interest.⁷ But

¹ Act of June 3, 1864, ch. 106, sec. 30; R. S., sec. 5198.

² *Charlotte Nat. Bank v. Morgan*, 132 U. S. 141; *Peterborough Nat. Bank v. Childs*, 130 Mass. 519.

³ *Peterborough Nat. Bank v. Childs*, 130 Mass. 519.

⁴ *Farmers' Nat. Bank v. Dearing*, 91 U. S. 29.

⁵ *Peterborough Nat. Bank v. Childs*, 130 Mass. 519.

⁶ *United States v. Thompson*, 98 U. S. 486.

⁷ *United States v. Buford*, 8 Peters, 12, 30; *United States v. Nashville, etc. R'y*, 118 U. S. 120, 125.

when it is merely a nominal party and sues for the benefit of another, the local statute applies.¹

§ 297. **Action on marshal's bond.**—By act of congress any person injured by the breach of a condition of a marshal's bond may sue the marshal within six years after the right of action accrues, and a further time is given to infants, *femes covert*, and persons *non compos mentis* of three years after their disabilities are removed.² This act has been held by the lower federal courts not to apply to suits by the United States.³ It probably applies to actions in the state courts as well as in the federal courts.

§ 298. **War period deducted.**—By the act of June 11, 1864, the period of the war of rebellion was to be deducted from the usual period of limitation in actions by loyal citizens against citizens of the rebellious states.⁴ This act applies to the state and federal courts, and is constitutional, under the clause giving congress the power to wage war and suppress insurrections.⁵ In suits brought in the federal courts this war period was deducted, even irrespective of this act; it being regarded as an exception implied in the state limitation laws.⁶ Upon this point it seems that the federal courts are not bound to adopt the construction given to the state statute by the state courts.

In *United States v. Wiley*, 11 Wall. 508, it was held that this saving clause applied to the United States when suing, as well as to individuals; and that in a suit on a marshal's bond in Virginia, the United States was entitled to have the war period deducted from the time.

If a state court holds that this act does not apply to actions in the state courts, the United States supreme court will reverse the judgment.⁷

¹ *United States v. Beebe*, 127 U. S. 338.

⁴ Rev. Stat., § 1048.

² 2 Stat. at Large, 374: *United States Rev. Stat.*, § 786.

⁵ *Stewart v. Kahn*, 11 Wall. 493.

⁶ *Hanger v. Abbott*, 6 Wall. 532.

³ *United States v. Godbold*, 3 Woods, 550; *United States v. Rand*, 4 Sawyer, 272.

⁷ *Mayfield v. Richards*, 115 U. S. 137, reversing *Winn's Succession*, 33 La. Ann. 1392.

§ 299. Actions against stockholders of foreign corporations. — The time when a state statute of limitations begins to run against a stockholder of a foreign corporation, to enforce his personal liability to creditors of the corporation, is governed by the law of the state creating the corporation; for it is in reference to its laws that his contract is made; and it is not governed by the law of another state in which suit is brought.¹ In *Glenn v. Liggett*, *supra*, the defendant was a stockholder in a Virginia corporation and had paid in twenty per cent. of his subscription, when, in 1866, the corporation became insolvent and stopped business. No call was made for his unpaid subscription until December, 1880, and in July, 1886, it being still unpaid, this action was brought to recover it in a federal court sitting in Missouri. According to the law of Virginia, the statute of limitations does not begin to run in favor of a stockholder until a call is made for the unpaid subscription; while according to the law of Missouri the stockholder's liability becomes fixed by the insolvency and dissolution of the corporation, and the statute of limitations begins to run from that date.

The supreme court decided, reversing the decision of Judge Brewer in the lower court, that the rights of the parties must be adjudicated according to the statutes and jurisprudence of Virginia, which state created the corporation and in reference to whose laws the contract of the defendant to take stock was made;² the law of Missouri, where the action was brought, to the contrary notwithstanding.

This decision was made on a writ of error to a lower federal court. But under the "full faith and credit" clause, it seems that the supreme court will decide the same way on a writ of error to a state court of Missouri, or to any

¹ *Glenn v. Liggett*, 135 U. S. 533.

² A stockholder's liability is governed by the laws of the state creating the corporation, even when the

plaintiff's demand accrues and he brings action in another state. *Halsey v. McLean*, 12 Allen, 438. 440; *Flash v. Conn*, 109 U. S. 371.

other state except Virginia, if the federal question has been properly raised in the trial court, by proving as a fact the operative effect of his statutory liability in Virginia.¹

If the state creating the corporation declares that a stockholder shall not be individually liable for its debts, unless a suit shall be brought against the corporation within one year after the debt becomes due, the stockholder is not liable even in another state, if the creditor has failed to sue the company within a year; for this is an indispensable condition annexed to the creditor's right against the stockholder.²

But if the corporation be adjudicated a bankrupt within a year after the maturity of the plaintiff's debt, a suit against it is unnecessary; for the object of such a provision is to compel the creditor to exhaust the assets of the company before seeking to enforce the stockholder's liability. After bankruptcy, a suit against the corporation would be vain and fruitless, and therefore the creditor can recover against the stockholder without the performance of this condition.³

In such action the stockholder may avail himself of the statute of limitations of the state of process, even when the action would not be barred under the statute of the state creating the corporation.⁴

§ 300. Actions against stockholders of national corporations.—Can a stockholder of a corporation created by act of congress avail himself of a state statute of limitations when sued to enforce his personal liability for the debts of the corporation under the act?

In *Richmond v. Irons*, 121 U. S. 27, 51–55, the point was raised, but its decision was rendered unnecessary by holding that the suit had been brought in time. The court

¹ *Chicago, etc. R'y v. Wiggins Ferry Co.*, 119 U. S. 615, 622; *Green v. Van Buskirk*, 5 Wall. 310; 7 Wall. 139; *Crapo v. Kelly*, 16 Wall. 610.

² *Halsey v. McLean*, 12 Allen (Mass.), 438, 443.

³ *Flash v. Conn*, 109 U. S. 371, 380.

⁴ *Glenn v. Saxton*, 68 Cal. 353; *Gridley v. Barnes*, 103 Ill. 21

says: "It is not necessary to decide in this case whether the statute of Illinois, relied upon, is applicable, because in the view which we have already taken of the nature of the amended bill filed in October, 1876, the statute, if applicable, ceased to run against the creditors of the bank entitled to the benefit of the decree at that date." . . . "Whether or not the statute of limitations of Illinois would in any case operate to bar such a suit as the present, being a bill in equity in the circuit court of the United States, founded upon an obligation arising under an act of congress, is a question which we are therefore not called upon to consider or decide." Pages 51, 52, 55.

§ 301. Actions against foreign corporations.—In New York a foreign corporation cannot avail itself of the defense of the statute of limitations, even if it has had a place of business and agents upon whom process could be served and property within the state for its full period of limitation.¹ And this rule of construction is binding upon the federal courts sitting in New York, whatever they may think of its soundness.²

But notwithstanding these decisions the United States supreme court held in *Penfield v. Chesapeake, etc. R'y*, 134 U. S. 351, that a foreign corporation when sued in a federal court sitting in New York could avail itself of the provision in the New York statute giving effect to the bar of limitation of the defendant's domicile; and that if the corporation was organized under the laws of two states, it could avail itself of the bar of the state having the shorter period. If the New York state courts should decide that a foreign corporation was not entitled to the benefit of that provision, the federal courts would probably reverse their ruling in *Penfield v. Chesapeake, etc. R'y, supra*.

§ 302. Agreements as to limitation.—The parties to a contract may agree upon a period of limitation; and a con-

¹ *Olcott v. Tioga R'y*, 20 N. Y. 210; ² *Tioga R'y v. Blossburg, etc. R'y. Rathbun v. Northern Central R'y*, 20 Wall. 137.
50 N. Y. 658.

dition in the contract that no action shall be maintained thereon, unless brought within the period agreed upon, is not contrary to the policy of limitation laws, and is valid.¹

As such a limitation arises from a contract of the parties, it travels with the contract and governs an action thereon wherever brought, irrespective of the local statute. Hence the fact that the action is brought in a state other than that of the origin of the contract and the domicile of the defendant does not relieve the plaintiff from this limitation.² The Indiana court has decided that such agreements are contrary to public policy and void;³ and the Iowa court has decided that if the time allowed be unreasonably short, so that its terms could not be complied with by reasonable diligence, the plaintiff will not be bound by it.⁴

But it seems clear that such state decisions are not binding upon the federal courts sitting in those states as "rules of decision;" because the question is one of general law and the state decisions are not based upon a local statute. This provision has been generally adopted by insurance companies to shorten the ordinary period of limitation; and the cases cited above show that even a limitation for six months is valid. It is very advantageous to corporations which do business outside of their own state; especially when they are liable to suit in a state where the New York rule prevails, namely, that a foreign corporation cannot avail itself of the defense of its statute of limitations; for this provision seems to be an effectual mode of avoiding the New York rule, at least in the federal courts.

A party to such a contract is not entitled to the benefit of a saving clause or exception in the statute of limitations; such as the failure of a former action for the same cause, or the reversal of a judgment for the plaintiff, or the defend-

¹ *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 886; *Northwestern Ins. Co. v. Phoenix Co.*, 31 Pa. St. 448; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 596; *Ripley v. Ætina Ins. Co.*, 80 N. Y. 136.

² *Fullam v. New York Ins. Co.*, 7 Gray (Mass.), 61.

³ *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

⁴ *Longhurst v. Star Ins. Co.*, 19 Iowa, 364.

ant's absence from the state of process; because "the rights of the parties flow from the contract. That relieves them from the general limitation of the statute, and, as a consequence, from its exceptions also."¹

Where the period was prescribed by the act of incorporation of a mutual fire insurance company, it was held that part payment to one of the plaintiffs did not enlarge the period.²

§ 303. Waiver of the contract limitation.—The party liable on such a contract may, however, waive the benefit of this contract limitation; and while the parties are dealing on friendly terms to avoid litigation, any act which tends to mislead the plaintiff, and which induces him to forbear suing until after the period has elapsed, will amount to a waiver by estoppel; but after suit has been brought, and the parties are dealing at arms' length, the rule does not apply with the same strictness, and much more positive evidence of actual misleading, if not of intent to mislead, is necessary to prove a waiver by estoppel.³

In *Ames v. New York Ins. Co.*, *supra*, the parties had been amicably negotiating, and three days before the time expired the secretary of the insurance company informed the plaintiff that his loss would be paid on January 14th, which was nine days after the time expired. Held, that an action brought on January 18th was not barred, because the defendant's conduct estopped it to claim the benefit of the contract limitation. But after a suit is brought, the fact that the defendant does not within the period plead that it is prematurely brought does not estop him, after

¹ Per Mr. Justice Field, in *Ridlesbarger v. Hartford Ins. Co.*, *supra*. To the same effect are: *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170; *Arthur v. Homestead Ins. Co.*, 78 N. Y. 462; *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.), 136.

² *Williams v. Vermont Mut. Ins. Co.*, 20 Vt. 222.

³ *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Ames v. New York Ins. Co.*, 14 N. Y. 253; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170, 181; *Grant v. Lexington Ins. Co.*, 5 Ind. 23; *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174.

the action has been defeated on that ground, to claim the benefit of such limitation in a second action.¹

§ 304. **Suits for infringement of patent-rights.**—By the fifty-fifth section of the patent act of July 8, 1870 (16 Stat. at Large, 206), it was provided “that all actions, suits, controversies and cases arising under the patent laws of the United States . . . shall be brought during the term for which the letters patent shall be granted or extended, or within six years after the expiration thereof.” This provision was, however, afterwards repealed by operation of section 5596 of the Revised Statutes, by omitting it from the chapter on patents. This repeal has been used by some courts as an argument in favor of the applicability of state limitation laws to suits in the federal courts for infringement.² But the weight of authority seems to be that the state statute does not apply to such suits, because property in patents is a right given solely by act of congress, and the states have no jurisdiction over patent-rights or suits for infringement.³ It is a close point, however, upon which the circuit courts are very evenly divided, and the supreme court has not yet decided the question.

§ 305. **Bar of sister state — (1) Chattels and land.**—Chattels are subject to the jurisdiction and laws of the state in which they are kept and used, even if their owner is a non-resident of that state or a foreign corporation. They have a *situs* in that state, irrespective of the owner's domicile. That state has the power to divest the title of the non-resident owner, and to transfer it to an adverse possessor by operation of law, under its limitation laws. When the adverse possessor has acquired a title under the

¹ *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170.

² *Hayden v. Oriental Mills*, 15 Fed. Rep. 605, 607.

³ *California Paving Co. v. Starr*, 48 Fed. Rep. 560; *McGinnis v. Erie Co.*, 45 Fed. Rep. 91; *Read v. Miller*, 2 Biss. 12; *Parker v. Hallock*,

2 Fisher, 543, note; *Wood v. Cleveland Rolling Mill*, 4 Fisher, 550; *May v. Ralls County*, 31 Fed. Rep. 473. *Contra*, *Hayden v. Oriental Mills*, 15 Fed. Rep. 605; *Parker v. Hawk*, 2 Fisher, 58; *Rich v. Ricketts*, 7 Blatch. 230; *Sayles v. Oregon Cent. R'y*, 6 Sawyer, 31.

operation of those laws, it will be respected and enforced in the courts of other states and in the federal courts sitting therein, even if the time required by the local statute of limitations has not expired.

The leading case upon this point is probably *Shelby v. Guy*, 11 Wheat. 361, decided in 1826. This was an action of detinue to recover certain slaves, and was brought in the United States circuit court for the district of Tennessee. It appeared that the slaves had been held adversely and under a claim of title for ten years in Virginia before they were brought into Tennessee, and that the Virginia statute of limitations barred this action in five years. The slaves, however, had not been held in Tennessee for its full period of limitation, and the question was directly presented whether the bar of the statute of limitation of Virginia should be recognized and enforced in the federal courts sitting in Tennessee. The unanimous opinion of the supreme court was that the Virginia statute of limitations gave a title to the slaves which the federal court sitting in Tennessee would recognize and enforce as against the original owner of the slaves. It is necessarily implied in this decision that the original owner's title to the slaves was extinguished by operation of the Virginia statute.

The same point has been decided in the same way by the state courts.¹ In the Alabama case of *Howell v. Hair*, *ubi supra*, Collier, C. J., for the court, says on page 200: "The statute having run in the state where the property was, the title of the possessor is complete everywhere."

The effect of a limitation bar of a sister state relating to land was involved in *Bicknell v. Comstock*, 113 U. S. 149. The action was instituted in the circuit court of the United States for the eastern district of New York, and was brought to recover the consideration paid for land situated in Iowa, alleging a breach of the covenants of warranty by a failure

¹ *Broh v. Jenkins*, 9 Martin (La.) 450; *Cargile v. Harrison*, 9 B. Mon. 526; *Howell v. Hair*, 15 Ala. 194; (Ky.) 518, 521; *Chapin v. Freeland*, *Waters v. Barton*, 1 Cold. (Tenn.) 142 Mass. 383, 386.

of title in the defendant when he conveyed to the plaintiff's grantor. The defendant and those claiming under his deed, including of course the plaintiff, had been in possession of the land, adverse to all the world, for fifteen years before suit. Under the statute of limitations of Iowa, ten years of such possession is a perfect bar to any action to recover the land, while under the statute of New York more than fifteen years are required. The circuit court gave judgment for the plaintiff, probably on the ground that the local statute of New York formed a rule of decision which was binding on the federal courts. But the supreme court reversed that judgment, and held that the statute of Iowa gave a perfect title to the land, which the federal courts sitting in other states would recognize and enforce, irrespective of the local statute.

§ 306. Bar of sister state — (2) Debts.— When debtor and creditor are residents of different states, the debt is not subject to the jurisdiction and laws of the debtor's state, but is subject to the jurisdiction and laws of the creditor's state; because its *situs* is at the domicile of its owner, the creditor, and not elsewhere.¹ As shown in the preceding section, the *lex situs* has been applied with good results to actions for the recovery of chattels, and the *lex fori* has been disregarded when the chattel had had its *situs* in a sister state for its full period of limitation, without suit against the adverse possessor. In actions for the recovery of debts, however, the *lex situs* has not generally been given its due effect, and it has been found necessary in many states to change by statute the rule announced by the courts. Acting on the view that the *lex fori* governs all actions for the recovery of debts, most courts have held that the limitation bar of another state, in which both debtor and creditor had previously resided for its full period without suit, was no defense in the state of process.² In the Massachu-

¹ State Tax on Foreign-held Bonds, 15 Wall. 300; Kirtland v. 33; Putnam v. Dike, 13 Gray Hotchkiss, 100 U. S. 491; ante, (Mass.), 535; Power v. Hathaway, 43 §§ 26-28.

² Bulger v. Roche, 11 Pick. (Mass.) Barb. (N. Y.) 214; Perkins v. Guy,

sett's case of *Putnam v. Dike*, *ubi supra*, both parties had lived for forty years in Vermont without suit, before this action was brought; and yet, as the Massachusetts statute had not run in the defendant's favor, it was held that the plaintiff was entitled to recover both principal and interest for forty years! It seems evident that to allow such an action to be maintained is to allow the laws of other states to be used "as a trap to catch the unwary defendant, after the laws which had always governed the case had barred a recovery."¹ In this age of quick communication and constant travel between states, it requires very little diligence on the part of a creditor to catch his debtor away from home and spring a suit upon him long after the action is barred in the state of their common domicile. To prevent this injustice and to sustain the sound public policy of repose, upon which limitation laws are based,² the legislatures of many states have expressly declared that the bar of a sister state shall constitute a good defense in their courts.³

55 Miss. 153; *Harris v. Quine*, L. R. 4 Q. B. 653.

¹ Per Mr. Justice Bradley, for the court, in *Chemung Bank v. Lowery*, 93 U. S. 72, 77.

² *Leffingwell v. Warren*, 2 Black, 599, 606; *United States v. Wilder*, 13 Wall. 254, 256.

³ Alabama — Code of 1886, sec. 2625; Arizona — Revised Statutes of 1887, sec. 2331; California — 3 Deering's Codes and Statutes, sec. 361; Florida — Digest Laws, 1822-1881, ch. 144, sec. 18; Idaho — Revised Statutes (1887), sec. 4079; Illinois — Revised Statutes (1877), ch. 83, sec. 20; Indiana — Revised Statutes (1881), sec. 297; Iowa — 2 Revised Code (Miller, 1880), sec. 2534; Kansas — Compiled Laws (1885), ch. 80, sec. 22; Kentucky — General Statutes (1881), ch. 71, sec. 19; Louisiana — Voorhies' Revised Laws

(1884), sec. 2808; Massachusetts — Pub. Stats., ch. 197, sec. 11; Minnesota — Statutes of Minn. (1878), ch. 66, sec. 16; Mississippi — Revised Code (1880), sec. 2684; Montana — Compiled Laws (1887), sec. 55, p. 70; Nebraska — Compiled Statutes (1885), part II, sec. 21, p. 631; Nevada — General Statutes (1885), sec. 3530; New York — Code of Civil Procedure, sec. 390; Ohio — 2 Revised Statutes (1880), sec. 4990; Oregon — 1 Hill's Ann. Laws, title II, sec. 26, p. 147; Tennessee — Code (1884), sec. 3480; Texas — Revised Statutes (1879), art. 3223; Utah — Compiled Laws (1876), pp. 534-5, sec. 1731; Virginia — Code (1887), sec. 2933; Wisconsin — Revised Statutes (1878), sec. 4231; Washington — Code (1881), sec. 46; West Virginia — Code (1887), ch. 104, sec. 13.

There are, however, some cases which recognize the *lex situs* and disregard the *lex fori* as applied to debts, by holding, irrespective of statute, that if the plaintiff's action was barred in another state where the parties had previously resided, it would also be barred elsewhere.¹ And some other cases decide that, if the effect of the statute of the parties' domicile is to extinguish the right, and not merely to bar the remedy, no action can be maintained in another state or country after the time has elapsed.²

§ 307. **Waiver and election by selecting forum.**— When the action is barred under the laws of the state of process, it is not necessary to go farther and to ascertain if it be also barred under the laws of any other state. It is only when the action is not barred under the statute of the forum that it becomes important to extend the investigation to the laws of a sister state in which the subject-matter of the suit has previously had its legal *situs* for the full period of limitation. The principles of interstate comity and the *lex situs* only come into play in this latter case, and are wholly unnecessary in the former.

In many cases the defendant has relied upon the statute of limitations of the forum, and the plaintiff has tried to avoid its bar by showing that the contract was made in another state or country, or that he was a citizen of another state or country, under whose laws the action was not barred. But the courts have always held that the plaintiff would not be allowed to recover under such facts.³ The reasons assigned for such decisions have been various and inconsistent. The true reason is believed to be that stated

¹ *Harrison v. Stacey*, 6 Rob. (La.) 15; *Brown v. Peeples*, 10 Rich. Eq. (S. C.) 475.

² *Brown v. Parker*, 28 Wis. 21; *Baker v. Stonebraker*, 36 Mo. 338; *Pritchard v. Norton*, 106 U. S. 124, 131; *Maryland v. Todd*, 1 Biss. 69; *Townsend v. Jenison*, 9 How. 407, 419.

³ *McElmoyle v. Cohen*, 13 Pet. 312; *Bacon v. Howard*, 20 How. 22; *Bank of Alabama v. Dalton*, 9 How. 522; *Amy v. Dubuque*, 68 U. S. 470; *Don v. Lippman*, 5 Cl. & Fin. 1; *Decouche v. Savetier*, 3 Johns. Ch. 190, 219.

by Lord Tenterden, C. J., in the leading case of *British Linen Co. v. Drummond*, 10 B. & C. 903, 912, namely, that of waiver and election by a voluntary selection of the forum. In that case the debt arose by contract made in Scotland, where both parties resided at the time, and where the period of limitation was forty years. The action was brought in England, more than six years after the defendant removed to England, and after the debt accrued. The defense was the six years' limitation of England, and the plaintiff tried to avoid the English bar by showing that the action was not barred in Scotland. But the court held that the suit was barred, and assigned the following reason: "According to the authority of Huber and Voet, the party suing and seeking to avail himself of the law of a particular country must take that law as he finds it. Now by the law of this country, such an action as the present cannot be maintained after the expiration of six years from the making of the contract."

Nash v. Tupper, 1 Caines (N. Y.), 403, decided in 1803, and one of the earliest decisions on this point in the United States, is a leading case, and is generally believed to decide that the true ground of such judgments is that the *lex fori* governs; but a careful reading of the opinion does not sustain that view. The notes in suit were made in Connecticut, where both parties lived at that time, and where the period of limitation was seventeen years, which had not expired at the time of suing. But the suit was brought in New York, whose period was six years, and where the defendant had lived for more than six years before suit. Held, that the action was barred in New York, although not in Connecticut, chiefly on the ground of election by selecting the forum. This appears from the opinion of the court, delivered by Chief Justice Lewis, on page 413: "The plaintiff having *elected* to prosecute his suit in this state, he must pursue his remedy agreeably to our laws."

This ground of waiver or election is also assigned as the true ground in *Fletcher v. Spaulding*, 9 Minn. 64, 66.

It is not only the right but also the duty of every state to protect its own citizens against the enforcement of stale demands in its courts,¹ whether the demands arose within its limits or not;² and when a creditor, living in another state or country, comes voluntarily into the debtor's state to sue, it is only proper that he should be held to have thereby impliedly subjected himself and his debt to the jurisdiction of the debtor's state, and to have waived the right to insist that the statute of limitations of his own state should apply to the case, and should be bound by the statute of the forum which he has voluntarily selected.³ But a defendant has no power of choosing the state of suit, and therefore the doctrine of election does not apply to him, so as to prevent his setting up the bar of another state, whose statute has operated upon the debt with jurisdiction.

§ 308. Bar of sister state evidenced by judgment.—Notwithstanding the *dictum* of Mr. Justice Story in *United States Bank v. Donnelly*, 8 Peters, 361, 370, it may now be regarded as settled that when a limitation bar of any state is evidenced by a judgment for the defendant on his plea of limitation, no action can be maintained upon the same debt in another state, although its statute has not fully run against the action. The national constitution requires full faith and credit to be given in each state to the "public acts, records and judicial proceedings of every other state," and under this clause, as a second action would be barred

¹ *Pearsall v. Dwight*, 2 Mass. 84, 90.

² *Alabama Bank v. Dalton*, 9 How. 522.

³ The operation of insolvent laws is analogous to that of limitation laws. With respect to insolvent laws, it is well settled that a non-resident creditor who voluntarily makes himself a party to insolvency proceedings in the debtor's state, thereby waives his extraterritorial immunity and submits his debt to

the jurisdiction of that state, and is therefore bound by the discharge to the same extent as resident creditors, and cannot afterwards maintain an action elsewhere, although he could have done so if he had not subjected his debt to the jurisdiction of the debtor's state. *Clay v. Smith*, 8 Peters, 411; *Baldwin v. Hale*, 1 Wall. 223; *ante*, §§ 267, 274, and cases cited.

in the state where the judgment was rendered, it will also be barred in other states.¹

In *Sweet v. Brackley*, *ubi supra*, a Maine payee of a promissory note sued a Massachusetts maker in Maine. The defense was that an indorsee of the same note had sued the same maker in Massachusetts, and that judgment had been rendered for the maker on his plea of the Massachusetts statute of limitations. This statute did not purport to extinguish the debt, but merely to bar a remedy in six years, and the Maine statute had not run in the maker's favor, for he had not lived in Maine for its full period before suit. The Maine court held, nevertheless, that the former judgment was a bar to the action, and placed its decision on the express ground that the full faith and credit clause required the Maine court to give the same effect to the Massachusetts judgment that it had by law and usage at home. Appleton, C. J., delivered the unanimous opinion of the court, and on pages 346, 347, he says: "The court in Massachusetts, before which the trial was had and by which the judgment was rendered, had jurisdiction of the subject-matter of the suit as well as of the parties thereto. By the constitution of the United States, 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.' By the act of congress of May 26, 1790, it was declared 'that the said records and proceedings . . . shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from whence said records are or shall be taken.' If a judgment is conclusive in the state in which it is pronounced, it is equally conclusive everywhere in the states of the Union. No suit, therefore, could have been maintained by Stickney [the indorsee] on the notes in controversy in Massachusetts or in any of the states of the Union."

¹ *Sweet v. Brackley*, 53 Me. 346; 100 Mo. 476; *Goodman v. Munks*, 8 Fulton Iron Works v. Riggins, 14 Porter (Ala.), 81; *Freeman on Judgments* (3d ed.), § 575.

In the absence of this clause, or its equivalent, it seems that a limitation bar, even when evidenced by a judgment for the defendant, would be no defense to an action in another state. This point has been decided in England in a recent case. In *Harris v. Quine*, L. R. 4 Q. B. 653, the plaintiff sued in England for services as attorney rendered defendant in the conduct of a suit in the ecclesiastical court of the Isle of Man. The defendant pleaded that plaintiff had brought a former suit on the same cause of action in the courts of the Isle of Man, and that on his plea of the statute of limitations of that island (which was three years), judgment had been rendered in defendant's favor. On demurrer to this plea it was held by the court of queen's bench, composed of Cockburn, C. J., Blackburn, Lush and Hayes, JJ., that the plea was no bar to the action, such judgment not being one on the merits of the case, and the action not being barred under the laws of England.

The rule that a limitation bar of any state evidenced by a judgment rendered with jurisdiction is entitled to full faith and credit in other states, coupled with the doctrine that the "public acts" or statutes of any state which have operated upon a debt or other subject-matter of suit with jurisdiction over it are likewise entitled to full faith and credit in other states, seems to lead to the conclusion that, where the statute of the state of the parties' common domicile has fully operated upon the debt and barred a recovery, such bar is a good defense in any other state, under the full faith and credit clause of the national constitution. The operation of this clause is not confined to judgments or judicial proceedings, but extends also to the "public acts" or statutes of a state. In *Chicago R'y v. Wiggins Ferry Co.*, 119 U. S. 615, 622, Mr. Chief Justice Waite for the court says:

"Without doubt the constitutional requirement (art. IV, sec. 1), that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' implies that the public acts of every state shall

be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in *Mills v. Duryee*, 7 Cranch, 481, and steadily adhered to ever since."

Upon principle it is difficult to see why a limitation bar evidenced by the public statutes of a state is not entitled to as much faith and credit as a limitation bar evidenced by a judgment based on those statutes. A judgment is record evidence that the limitation laws have operated upon the debt or other subject-matter of suit and barred the action. But the only essential fact is that those laws have operated with jurisdiction, and not how that fact may be proved. That fact may be proved by parol evidence, by showing that the debt was subject to the jurisdiction of the state for its full period of limitation, namely, that both debtor and creditor resided in the state for that period. Of course if a state legislature assumes to act without jurisdiction, as to license the sale of land situated in another state, its statute is entitled to no faith and credit in other states.¹ Thus, if a statute of state A purports to bar a debt owned by a non-resident creditor in six years, wherever the action may be brought, this act is not entitled to any force or effect in other states, even if the debtor be a resident of state A; for the legislature of that state has no jurisdiction over a debt owned by a non-resident creditor. But if both parties be residents of state A for its full period of limitation, the state has operated upon the debt with jurisdiction over it, and therefore its limitation bar is entitled to extraterritorial effect. These principles seem to reconcile the cases of *Christmas v. Russell*, 5 Wall. 290, and *Brown v. Parker*, 28 Wis. 21.

§ 309. Actions upon judgments of sister states.—The "full faith and credit" clause does not entitle a creditor by judgment recovered in state A to as long a time to sue upon it in state B as he has in state A.² So long as a rea-

¹ *Bissell v. Briggs*, 9 Mass. 462, 437, 468.

² *McElmoyle v. Cohen*, 18 Peter., 312.

sonable time be left to the judgment creditor to sue upon it in another state, he cannot complain, even if the period be much shorter than that prescribed for domestic judgments.¹

In the leading case of *McElmoyle v. Cohen*, *supra*, the plaintiff recovered judgment in South Carolina, and, before its period of limitation had elapsed, he sued on it in Georgia, whose period for foreign judgments was five years, which had elapsed before suit, but its period for its own domestic judgments was twenty years, which had not elapsed. The plaintiff contended that under the "full faith and credit" clause he was entitled to as long a time to sue upon his South Carolina judgment in Georgia, or in any other state as he had by law and usage in South Carolina. But the supreme court held that the law of the forum governed the action, and that it was barred by the Georgia statute.

In *Bacon v. Howard*, *supra*, the supreme court held that sixty days after the passage of the act was a reasonable time within which to sue upon a judgment of a sister state which had been recovered four years before the act was passed. The plaintiff recovered judgment in Mississippi in 1840, and brought this action upon it in Texas in 1850. In June, 1845, Texas enacted that suits upon foreign judgments of four years' standing or longer must be brought within sixty days after the passage of the act. Held, that the statute did not contravene the "full faith and credit" clause, and that the action was barred.

A statute is valid which does not leave a foreign-judgment creditor a single day to sue upon it after the judgment debtor comes into the state, provided it leaves him a reasonable time after the judgment is rendered. In *Alabama Bank v. Dalton*, 9 How. 522, the plaintiff sued in Mississippi in 1846 upon an Alabama judgment recovered in 1843, and his action was brought on the very first day that the defendant removed from Alabama to Mississippi. The defense

¹ *Bacon v. Howard*, 20 How. 22; *McElmoyle v. Cohen*, 13 Peters, 812.

was the Mississippi statute of 1844, which in terms barred actions on foreign judgments in two years after their rendition. The supreme court held that the statute did not contravene the "full faith and credit" clause and that the action was barred.

§ 310. **Same — Unreasonably short time allowed for suit.**— But if the time allowed be unreasonably short, it will amount to a denial of a right, and the statute will be unconstitutional and void.¹ In *Christmas v. Russell*, 5 Wall. 290, a Mississippi statute declared that an action on a judgment of another state against a resident of Mississippi should be barred in Mississippi if an action on the original cause of action would have been barred there at the time the first suit was commenced in the other state. The plaintiff, who was an indorsee of a promissory note made by the defendant and due in 1841, was a citizen of Kentucky, and brought his action on the note in Kentucky in 1853 after the note was barred in Mississippi by the six years' statute of that state. The defendant resided in Mississippi, but he appeared in the Kentucky suit, and in 1859 judgment was rendered against him. In 1864 the plaintiff brought this present action of debt in Mississippi on the Kentucky judgment, and the defense was the Mississippi statute above stated. If the statute was valid, the action was barred; but the court held that the statute contravened the "full faith and credit" clause of the constitution, because it allowed the plaintiff no time whatever to sue upon a judgment of another state, and therefore the action was not barred.

In this case the plaintiff and defendant were residents of different states, and the first action was not barred in the plaintiff's state. The rule seems to be otherwise when they are residents of the same state and have lived therein for its full period of limitation before an action is brought in another state. It seems that the "full faith and credit" clause does not entitle the plaintiff to maintain an action

¹ *Christmas v. Russell*, 5 Wall. 705; *Dodge v. Coffin*, 15 *Kansas*, 290; *In re Brown*, 135 U. S. 664, 277.

upon a judgment so obtained; at least where the effect of the home statute, as construed by the local courts, is to extinguish the right or title, and not merely to bar the remedy.¹

Thus, in *Brown v. Parker*, *supra*, both parties had lived in Wisconsin for its full period (six years) before the plaintiff brought his action on the note in Illinois, in which he obtained judgment. In the following year he sued upon this Illinois judgment in Wisconsin, and relied upon the "full faith and credit" clause to show that his action was not barred. But the Wisconsin court held that the effect of the Wisconsin statute was to extinguish the right or debt, where both parties had lived in the state for its full period, and therefore that the plaintiff could not recover.

The true ground of distinction between these cases seems to be that in *Brown v. Parker* the Wisconsin statute had fully operated upon the debt before suit, with jurisdiction over the debt, by reason of its *situs* being in Wisconsin; while in *Christmas v. Russell* the Mississippi statute relied upon by defendant had not operated upon the debt before suit, *with jurisdiction over it*, because its *situs* was in Kentucky, where its owner, the creditor, resided; and therefore the legislature of Mississippi had no jurisdiction over the debt. That legislature could not tax it for state purposes;² nor discharge it by state insolvent laws;³ nor discharge it under garnishee laws;⁴ nor sequester it as a debt due from a resident;⁵ for under the federal constitution the debtor's state has no rightful jurisdiction over a debt owned by a non-resident creditor. Hence, even if the Mississippi statute had purported to extinguish the debt or title, the decision in *Christmas v. Russell* would have been

¹ *Brown v. Parker*, 28 Wis. 21. See *Brown v. Peeples*, 10 Rich. Eq. (S. C.) 475; *Baker v. Stonebraker*, 36 Mo. 338, 349.

² *Ante*, §§ 26-28; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 320.

³ *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Bedell v. Scruton*, 54 Vt. 493.

⁴ *Ante*, §§ 140, 141.

⁵ *Williams v. Bruffy*, 96 U. S. 176.

the same, because the legislature of that state had no jurisdiction.

But if the statute of the creditor's state purports or is construed to extinguish the debt or title, and he lives there for its full period after recovering a judgment, he cannot maintain an action on it in another state against his non-resident debtor; but the statute of his own state will bar an action in another state; for the "full faith and credit" clause does not require the courts of another state to give a judgment any greater force or effect than it has by law and usage at home.¹ *Baker v. Stonebraker*, *supra*, was an action in Missouri on a judgment rendered nineteen years before in Maryland. The limitation period was twenty years in Missouri and twelve years in Maryland. The plaintiff resided in Maryland for twelve years after judgment; but the defendant did not. Held, that the effect of the Maryland statute was to extinguish the judgment in twelve years, even if defendant was absent from Maryland, and therefore the plaintiff could not recover in Missouri.

If a judgment be rendered without personal service of process upon the defendant, or his voluntary appearance, no action can be maintained upon it in the courts of another sovereignty; for, being rendered without jurisdiction, it is entitled to no faith and credit, or force and effect.² The result is that the plaintiff is obliged to sue on his original cause of action, and if that be barred in the state of process, he cannot recover at all.³

§ 311. Statutory liability created by another state.—

Where a statute of one state gives a right of action unknown to the common law, and the same statute limits the time within which an action may be brought, an action brought in another state after that time has elapsed will

¹ *Baker v. Stonebraker*, 36 Mo. 19; *Campbell v. Steele*, 11 Pa. St. 338, 350; *Brown v. Peeples*, 10 Rich. Eq. (S. C.) 475.

³ *Phelps v. Brewer*, 9 Cush. 390,

² *D'Arcy v. Ketchum*, 11 How. 399; *Don v. Lippman*, 5 Cl. & Fin. 1; 165; *Pennoyer v. Neff*, 95 U. S. 714; *Bruen v. Bokee*, 4 Denio (N. Y.), 56; *Middlesex Bank v. Butman*, 29 Ma. Judah v. Stephenson, 10 Iowa, 493.

be barred, even if the local statute has not fully run. And the same rule prevails in the federal courts, notwithstanding the thirty-fourth section of the judiciary act of 1789 (U. S. Rev. Stat., sec. 721). In such case, time is of the essence of the right, and the right is lost if the time is disregarded. It is a condition attached to the right to sue at all, and it operates as a limitation of the liability itself as created, and not merely of the remedy. For these reasons it was held by the supreme court that an action brought in the United States circuit court for Pennsylvania for the negligent killing in Massachusetts of plaintiff's husband, after the time specified in the statutes of Massachusetts and Pennsylvania (one year), was barred.¹

It is true that in the preceding case the suit was barred under the law of the state of process as well as under the law of the state in which the injury occurred. But in *Boyd v. Clark*, 8 Fed. Rep. 849, a like action was held to be barred in Michigan, because the time had elapsed in Ontario, where the injury occurred, although the time allowed by the local statute of Michigan had not elapsed when the action was brought there. Brown, J., says: "The true rule I conceive to be this: that where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right, or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any jurisdiction where the plaintiff may sue." Page 852.²

Whether, if the time had elapsed in the state of process, but not in the state where the injury occurred, the action would be barred, has not been decided. The cases relating to the personal liability of stockholders are, however, analogous, and seem to answer the question in the affirmative.³

¹The *Harrisburg*, 119 U. S. 199, v. Kennedy, 44 Md. 563; *Halsey v. McLean*, 12 Allen (Mass.), 438, 443.

²Same effect: *Selma R'y v. Lacy*, 49 Ga. 107; *O'Shields v. Georgia*, 49 Ga. 107; *See, also, Phillips v. Eyre*, L. R. 6 Q. B. 1.

Pac. R'y, 83 Ga. 621, 626; *Eastwood v. Glenn v. Saxton*, 68 Cal. 353.

When, however, the right is one that exists at common law, the general rule seems to be that an action for personal injuries is governed by the limitation of the forum.¹

§ 312. Discrimination against non-residents.— A state may give a resident plaintiff a longer time to sue a non-resident on a foreign judgment than it gives to a non-resident plaintiff, provided the latter is allowed a reasonable time.²

Chemung Canal Bank v. Lowery, *supra*, was an action in Wisconsin brought in January, 1873, on a New York judgment rendered in June, 1862. The plaintiff was a New York corporation, and the defendant first became a resident of Wisconsin in 1864. The action was therefore brought within ten years after the defendant came into the state, and if the plaintiff had been a resident of Wisconsin when the cause of action accrued, his action would not have been barred; because he would have been entitled to ten years after the defendant's arrival within which to sue. But as both parties were non-residents of Wisconsin at the time when the New York judgment was rendered, the statute declared that limitation should run from the time the cause of action accrued. If the statute were valid, the action was barred in 1872; and the plaintiff contended that it worked a discrimination against non-resident plaintiffs by giving them a shorter time to sue than it gave to resident plaintiffs, and therefore that it contravened the clause ordaining that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." U. S. Const., art. IV, sec. 2.

But the supreme court held that the statute was valid and the action was barred. Mr. Justice Bradley says:

"There is in fact a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right

¹ *Finnell v. Southern Kan. R'y*, 33 Fed. Rep. 427; *Nonce v. Richmond Co.*, 33 Fed. Rep. 429. ² *Chemung Canal Bank v. Lowery*, 93 U. S. 72.

of action would be extinguished, perhaps for years, in the state where the parties reside; and yet, if the defendant should be found in Wisconsin,—it may be only on a railroad train,—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust. *Beardsley v. Southmayd*, 3 Green (N. J. L.), 171.” Page 77.¹

So also a statute is valid which gives a resident plaintiff whose demand is not merged in a judgment a longer time to sue on it than it gives to a non-resident plaintiff, by making the statute run from the time when the cause of action accrues, when both parties are non-residents at that time; but only from the time when the defendant comes into the state where the plaintiff is a resident.² The cases to the contrary of *Paine v. Drew*, 44 N. H. 306, 318, and *Hatch v. Spofford*, 24 Conn. 432, 444, are virtually overruled by *Chemung Canal Bank v. Lowery*, 93 U. S. 72.

§ 313. Extension of time for suing after bar is complete.—A state limitation act which extends the time for suing after the bar of a prior statute has taken effect is unconstitutional and void. With respect to land and chattels, the effect of a limitation act which has fully operated upon the land or chattel is to extinguish the title of the original owner and to transfer the title by operation of law to the adverse possessor or holder. Hence after such a

¹ Could the plaintiff, after this judgment against him, have maintained an action against the defendant on the New York judgment in a state other than Wisconsin, whose statute of limitations had not barred the action? It seems not; because the law of Wisconsin had operated upon the New York judgment with rightful jurisdiction over the debt; and that law, evidenced by the Wisconsin judgment,

was entitled to “full faith and credit” in the courts of sister states. *Ante*, § 308. The New York judgment debt was subject to the jurisdiction of Wisconsin, because its owner, the judgment creditor, voluntarily subjected it to the jurisdiction of Wisconsin by bringing suit therein.

² *Hyman v. Bayne*, 88 Ill. 256; *Beardsley v. Southmayd*, 3 Green (N. J. L.), 171.

statute has vested title in the latter, a new statute which purports to give the former another chance to sue is void, as depriving the latter of his property "without due process of law," in violation of the fourteenth amendment.¹

With respect to debts the state courts have generally held such acts void, on the ground that they were retrospective in their operation.²

In *Campbell v. Holt*, 115 U. S. 620, the supreme court held that such a statute does not deprive a debtor of his property without due process of law, and is therefore not void under the fourteenth amendment. Justices Bradley and Harlan delivered a strong dissenting opinion, which has received the approval of Judge Hare in his work on Constitutional Law.³ It does not appear from the report of this case whether or not both debtor and creditor were residents of Texas during the whole term required to bar the action under the prior law, and it is suggested that this may be the turning point in the case. For, if the creditor was not a resident of Texas during the whole of that term, the prior statute did not and could not operate upon the debt with rightful jurisdiction over it, even if the debtor was so resident; and therefore, as the prior statute had not rightfully operated upon the debt at the time the repealing act was passed, the latter act did not impair any right which had become absolutely vested in the debtor. On the other hand, if both parties were resident in Texas during the whole of that term, the prior statute did operate upon the debt with rightful jurisdiction over it, and thereby vested an absolute right in the debtor which the repealing act im-

¹ *Reynolds v. Randall*, 12 R. I. 522; *Campbell v. Holt*, 115 U. S. 620, 623; *Hall v. Webb*, 21 W. Va. 318; *Sprecker v. Wakeley*, 11 Wis. 432, 441; *Knox v. Cleveland*, 13 Wis. 245, 248, 249.

² *Davis v. Minor*, 1 How. (Miss.) 183; *Bigelow v. Bemis*, 2 Allen (Mass.), 496; *Ryder v. Wilson*, 12

Vroom (N. J.), 9, 11; *Wires v. Farr*, 25 Vt. 41; *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Stipp v. Brown*, 2 Carter (Ind.), 647; *Mellinger v. Houston*, 68 Texas, 37. *Contra*, *Hoffman v. Alderson*, 9 W. Va. 616.

³ 2 Hare, *Am. Const. Law*, pp. 839-843.

paired; and it therefore was void as depriving him of his property without due process of law.

§ 314. *Same.*—Where two sections of a limitation act, relating one to debts and the other to chattels, are worded in the same manner, namely, “no action shall be brought or maintained” after the lapse of a certain time, *and the debt or chattel in suit has been subject to the jurisdiction of the state for the prescribed period*, it seems absurd to hold that the right or title is extinguished in the case of chattels but not in the case of debts. There are some dicta to this effect; but it is believed that most of the actual decisions which appear conflicting upon this point may be reconciled by applying the principle suggested in the clause printed in italics above, namely, that in order that a limitation act may extinguish the right or title, the subject-matter of suit must have been *subject to the jurisdiction* of the enacting state for its full period of limitation; otherwise the right or title will not be extinguished. For instance, no one will contend that a statute of Maine can extinguish the title to a chattel situated in California, and which has never been in Maine; because the chattel has never been subject to the jurisdiction of Maine. So, likewise, no one will contend probably that the debtor’s state can extinguish the right or title to a debt due to a non-resident creditor; because that state has no jurisdiction over such debt, as it is situated outside of its limits at the creditor’s residence.

But on the other hand, it is well settled that an adverse possession of a chattel in Maine for the time prescribed by a Maine statute worded as above indicated will extinguish the right or title of the original owner, which will be effectual in other states, and will invalidate a subsequent statute of Maine purporting to remove the bar. The fundamental reason for these various decisions seems to be that Maine has jurisdiction over the chattel, because its *situs* is there, and therefore its limitation act has rightfully operated upon it. The same rules should be true of a debt under a like statute, provided the debt has had its *situs* in

the state (Maine) for its full period of limitation. A few cases which tend to support this view will be stated. In the Wisconsin case of *Brown v. Parker*, 28 Wis. 21, both debtor and creditor had resided in Wisconsin for its full period; and the court held that the effect of a statute worded as above was to extinguish the creditor's right, and not merely to bar his remedy. In the opinion of the court delivered by Dixon, C. J., it is said on page 28: "A statute which is held to extinguish the right in one class of cases, as where property is adversely claimed and possessed, must, its language being the same, also be held to extinguish the right where the subject upon which it operates is a claim or demand founded upon contract. . . . And we know of no case to the contrary, or where a distinction has been attempted, except *Jones v. Jones*, 18 Ala. 242. The reasoning in that case, so far as it concerns the point under consideration, is not satisfactory to our minds." It was accordingly held that the plaintiff could not maintain an action upon a judgment of a sister state, which had been recovered in an action brought after the Wisconsin statute had fully run against the debt.

In the well-considered case of *Davis v. Minor*, 1 Howard (Miss.), 183, 188, Mr. Chief Justice Sharkey says: "If a party be deprived of his remedy, in what does his right consist? Whatever the rule may be in morals, in a purely legal point of view, I think it is difficult to imagine the existence of a right without some adequate remedy. It is a maxim that there is no right without a corresponding remedy; by which I understand that they are dependent terms; that one cannot exist without the other; that the idea of a right is predicated on and necessarily carries with it, as essential to its existence, the means also of enforcing it; and the moment the remedy is destroyed, the right must go with it. . . . If it be true that the remedy is a constituent part of a right, and that they cannot exist separately, must it not follow that whatever destroys the one must destroy the other?" And it was accordingly

held that a statute removing the bar of a former statute by repealing it was void, even as applied to choses in action.

In *Baker v. Stonebraker*, 36 Mo. 338, an action was brought upon a Maryland judgment. The statute of Maryland barred an action in twelve years, and contained no exception or saving clause based upon the debtor's absence from Maryland. After its recovery the plaintiff had resided for more than twelve years in Maryland, and although the defendant had not resided there, the Missouri court held that the debt was dead and extinguished under Maryland law, and therefore the plaintiff could not recover in Missouri.¹

¹ See, also, *Maryland v. Todd*, 1 Biss. 69; *Kenyon v. Wrisley*, 147 Mass. 476.

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