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George B. Fraser Jr.

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# ACTIONS IN REM

GEORGE B. FRASER, JR.

Even though courts have been entertaining actions in rem for centuries, there is still much uncertainty about them. To define actions in rem is not difficult; they are legal proceedings directed against property itself in order to reach and dispose of the property or of some interest therein. But not all phases of a legal proceeding can be determined from just a definition. For example, how are actions in rem distinguished from other types of actions? What is considered property for the purposes of actions in rem? Can only the title to the property be litigated, or can other issues be determined in the same action? How are such actions commenced? What is the effect of decrees in such actions? To answer these questions resort must be had not only to a definition of actions in rem but to the basic principles underlying such actions and, as is inevitable in legal writing, to cases themselves. This paper proposes to answer these questions about actions in rem by this method.

## I. *Nature of Actions In Rem*

Actions in rem, being proceedings directly against property, are a manifestation of the principle that a state has the power to determine the title, status, or condition of property within its borders.<sup>1</sup> But this power may not be arbitrarily exercised; it is limited by a second principle, which is, that the interests of persons in property may not be cut off without attempting to provide such persons notice and an opportunity to be heard.<sup>2</sup> Thus, for a court to act in rem, certain preliminary steps must be taken. When these have been taken, the court is said to have jurisdiction to act in rem, or jurisdiction in rem.

*a. Actions in Rem and Actions in Personam.* In discussing actions in rem it is usual to distinguish them from actions in personam. This distinction is necessary because the object of an action in rem is property and the object of an action in personam is a person, and because the steps preliminary to the acquisition of jurisdiction over property are different from those to be taken when the object of the action is a person.<sup>3</sup> However, the distinction between actions in rem and actions in personam is

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<sup>1</sup>American Land Co. v. Zeiss, 219 U. S. 47, 31 Sup. Ct. 200 (1911); Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557 (1890); See RESTATEMENT, CONFLICT OF LAWS § 98 (1934).

<sup>2</sup>Windsor v. McVeigh, 93 U. S. 274 (1876); Boswell's Lessee v. Otis, 9 How. 335 (U. S. 1850); See RESTATEMENT, JUDGMENTS § 6 (1942).

<sup>3</sup>Thompson v. Steamboat Julius D. Morton, 2 Ohio St. 27, 30 (1853); See Woodruff v. Taylor, 20 Vt. 65 (1847). To be complete courts should subdivide actions in rem into actions *in tractabilem* and actions *in intractabilem* because the method of acquiring jurisdiction over tangible property is different from that of acquiring it over intangible.

usually overemphasized because the two actions are similar in many respects. The same form might be used, the same issues might be litigated and the same relief might be given in actions in rem as in ones in personam.

The form of the proceeding will not always indicate whether it is in rem or in personam, as an action may be in rem even though a person may be named in the pleadings as defendant. ". . . the res need not be personified and made a party defendant, as happens with the ship in the admiralty. . . . Personification and naming the res as defendant are mere symbols, not the essential matter."<sup>4</sup>

Many issues may be litigated in an action either in rem or in personam, the choice as to which to use depending largely on what the court can get jurisdiction of. Thus, title or interests in property may be determined in actions in personam;<sup>5</sup> but then the court is proceeding directly against a person, and the effect on the title or status of the property is indirect.

The nature of the proceeding does not indicate whether the action is in rem or in personam. Thus even probate proceedings which are traditionally classed as in rem, are in personam as to persons over whom the court exercises jurisdiction.<sup>6</sup> Similarly, insanity proceedings which are usually classed as in personam would be in rem if the proceeding were to appoint a committee for property over which it exercised jurisdiction.<sup>7</sup> The important thing is not the classification of the action but what is the object of the action. Courts may in fact act in rem and in personam simultaneously when they have acquired jurisdiction over property and over a person. The resulting decree is then effective both in rem and in personam.<sup>8</sup>

To be distinguished from both actions in rem and actions in personam are actions as to status. They have frequently been included in actions in rem. However, the U. S. Supreme Court indicated that a distinction should be made. "The historical view that a proceeding for a divorce was a proceeding in rem . . . was rejected by the Haddock case. We likewise agree that it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings in rem. Such a suit, however, is not a mere in personam action."<sup>9</sup> Thus, a distinction is made

<sup>4</sup>Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76, 55 N. E. 812, 814 (1900).

<sup>5</sup>Massie v. Watts, 6 Cranch 148 (U. S. 1810).

<sup>6</sup>Riley v. New York Trust Co., 315 U. S. 343, 353, 62 Sup. Ct. 608, 614 (1942); Loewenthal v. Mandell, 125 Fla. 685, 170 So. 169 (1936).

<sup>7</sup>Re Sall, 59 Wash. 539, 110 Pac. 32 (1910); See McCormick v. Blaine, 345 Ill. 461, 178 N. E. 195, 200 (1931).

<sup>8</sup>Riley v. New York Trust Co., 315 U. S. 343, 353, 62 Sup. Ct. 608, 614 (1942); Glancy v. Williams, 50 Idaho 109, 293 Pac. 665 (1930).

<sup>9</sup>Williams v. North Carolina, 317 U. S. 287, 297, 63 Sup. Ct. 207 (1942).

between actions over a status and actions in rem because the object of the action is different, being a status instead of property, and because the method of acquiring jurisdiction over a status differs from that of acquiring jurisdiction over property. Courts may, however, exercise jurisdiction over status and jurisdiction in rem in one proceeding. Actions for a divorce and for alimony based on jurisdiction over status and jurisdiction over property of a non-resident spouse are examples of this.<sup>10</sup>

*b. Issues and Remedies in Actions In Rem.* In actions in rem, the issues litigated do not have to concern the title or status of the property subject to the court's jurisdiction. This does not mean that there is no limit to the issues that may be litigated in actions in rem. The issues must concern the title or status of the res, or be such that their determination would create a situation that would involve the title to the res. Thus a liability unconnected with the res can be litigated in an action in rem because after the liability is established, satisfaction can be obtained from the property under the jurisdiction of the court.<sup>11</sup> The court's power to determine the obligation is incidental to its jurisdiction over property. This permits a plaintiff to litigate a claim against a person wherever he can find property belonging to that person.

It is believed that courts should limit this power of a claimant to sue a debtor wherever he can find some of his property. Although this power is frequently necessary to protect a claimant, it can also be used to harass a debtor. The statutes of many states impose some limitations on claimants by permitting them to sue non-residents by attachment for only certain types of claims, such as for "actions upon a judgment, or upon contract, . . . or for the collection of any penalty. . . ."<sup>12</sup> But the courts should also limit plaintiffs by the use of the doctrine of *forum non conveniens*. A suit against a non-resident based on attachment should be permitted only if the obligee is concealing himself or is about to conceal his assets or is taking some other step that would prevent a plaintiff from obtaining satisfaction of a judgment or if the jurisdiction chosen be the domicile of either the obligor or the obligee or the place where the cause of action arose or the obligation is due. This doctrine has been used to prevent interstate railroads from being sued in states where they neither own nor operate a railroad by a plaintiff who does

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<sup>10</sup>Pennington v. Fourth National Bank, 243 U. S. 269, 37 Sup. Ct. 282 (1917); Reed v. Reed, 121 Ohio St. 188, 167 N. E. 684 (1929).

<sup>11</sup>Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co., 285 Fed. 214 (C. C. A. 6th 1922); see Pennoyer v. Neff, 95 U. S. 714, 723 (1877).

<sup>12</sup>IDAHO CODE (1932) § 6-510(2).

not and did not reside there upon a cause of action which arose elsewhere out of a transaction entered into elsewhere.<sup>13</sup>

Where the determination of a cause of action would not affect the res, the cause of action cannot be brought in an action in rem. Thus, a plaintiff cannot litigate his own liabilities in an action in rem, even though the court has jurisdiction over a res, because the decision, whether favorable or unfavorable, would not affect the res but would only reduce the plaintiff's obligations. In one case a court refused to reform a lease so as to reduce the rent of a lessee in an action in rem based on jurisdiction over the leased premises, because the title or right to the leased premises would not be affected by the result.<sup>14</sup> Rights in property created by contract may be determined in actions in rem if the decree affects the property,<sup>15</sup> but not all issues resulting from contracts concerning property can be litigated in actions in rem. Also the effect of the holdings on issues that are litigated in actions in rem for the purpose of determining the title or status of property is limited to its effect on the title or status of the property. As will be discussed under Judgments, the holding will have no effect on the rights between the parties.

Just as any issues may be litigated in actions in rem if their determination will affect the title or right to possession of the property subject to the court's jurisdiction, so any type of relief may be given in actions in rem if the relief is appropriate to the issues litigated and will affect the property which is subject to the court's jurisdiction.

Equitable relief, as specific performance or quiet title, may be granted in actions in rem because such remedies directly affect the title or status of property. It has long been recognized that equity may act in rem as well as in personam.<sup>16</sup>

Some courts claim that it is an inherent power of equity to affect the title to property in action in rem,<sup>17</sup> but others act only when specifically given that power by statute.<sup>18</sup> Statutes granting equity courts power to affect titles in rem actions are of either the vesting or the appointive type. Where actions of this nature are permitted, it is immaterial whether real or personal property is involved.<sup>19</sup> Courts proceeding in rem can even grant injunctions when they directly affect either property or the

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<sup>13</sup>Davis v. Farmers Co-op. Equity Co., 262 U. S. 312, 43 Sup. Ct. 556 (1923).

<sup>14</sup>State *ex rel.* Truitt v. District Court, 44 N. M. 16, 96 P. 2d 710 (1939).

<sup>15</sup>Prudential Ins. Co. v. Berry, 153 S. C. 496, 151 S. E. 63 (1930); Bush v. Aldrich, 110 S. C. 491, 96 S. E. 922 (1918).

<sup>16</sup>See note 15 *supra*.

<sup>17</sup>Glancey v. Williams, 50 Idaho 109, 293 Pac. 665 (1930); Tennant's Heirs v. Fretts, 67 W. Va. 569, 68 S. E. 387 (1910).

<sup>18</sup>See Garfein v. McInnis, 248 N. Y. 261, 162 N. E. 73, 74 (1928).

<sup>19</sup>Wait v. Kem River Mining Co., 157 Cal. 16, 106 Pac. 98 (1909).

use of property.<sup>20</sup> Proceedings to abate a public nuisance, such as proceedings to padlock or restrict the use of a building where there has been a violation of liquor laws, are of this nature.<sup>21</sup>

Declaratory judgments may be given in actions in rem if the court is to declare the title or status of the property which is the object of the action.

It is stated that a court cannot grant interpleader if it has jurisdiction in rem instead of jurisdiction in personam over both claimants. But these statements have usually been made in actions where the stakeholder has tried to set up the decree given in an interpleader action as a defense to an action in personam.<sup>22</sup> If there is property which could be the res in the action, interpleader would lie to determine the right or title to the property.<sup>23</sup> But the decree as to the title or status of the property would not prevent a claimant who was not subject to the jurisdiction of the court from holding the stakeholder personally liable.

Money judgments may even be granted in actions in rem when they are to be satisfied out of the property subject to the jurisdiction of the court. This is the usual result when a plaintiff litigates a claim against a person not subject to the jurisdiction of the court by proceeding against his property. The judgment, however, cannot bind the obligor personally.<sup>24</sup>

*c. The Res.* It has previously been stated that actions in rem are proceedings in which the object of the action is property. Any tangible property, whether movable or immovable, may constitute the res, but it is not necessary that the property be tangible; it is only necessary that there be something over which the court could exercise jurisdiction. The res may be a right to or an interest in tangible property,<sup>25</sup> or it may be a specific fund such as a trust fund,<sup>26</sup> or it may be an obligation owed by one person to another.<sup>27</sup>

Actions involving obligations owed by one person to another determine the right of the obligee to the obligation. As to the obligee, the

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<sup>20</sup>See *Lyle v. Haskins*, 27 Wn. 2d 507, 168 P. 2d 797 (1947); *Buchman v. Smith*, 137 N. J. Eq. 215, 44 A. 2d 179, 180 (1945). *Contra*: *Gainsburg v. Dodge*, 193 Ark. 473, 101 S. W. 2d 178 (1937).

<sup>21</sup>*State v. Brown*, 62 Idaho 250, 110 P. 2d 835 (1941).

<sup>22</sup>*Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160 (1887).

<sup>23</sup>*Glasser v. Wessel*, 152 F. 2d 428 (C. C. A. 2d 1945); *Union Trust and Hudson County National Bank v. Kyle*, 96 N. J. Eq. 125, 124 Atl. 455 (1924).

<sup>24</sup>*Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co.*, 285 Fed. 214 (C. C. A. 6th 1922); see *Pennoyer v. Neff*, 95 U. S. 714, 723 (1877); *Cheshire Nat'l Bank v. Jaynes* 224 Mass. 14, 112 N. E. 500, 501 (1916).

<sup>25</sup>*West End Irrig. Co. v. Garvey*, — Colo. —, 184 P. 2d 476 (1947).

<sup>26</sup>*Glasser v. Wessel*, 152 F. 2d 428 (C. C. A. 2d 1945).

<sup>27</sup>*Security Savings Bank v. California*, 263 U. S. 282, 44 Sup. Ct. 108, 110 (1923) (bank deposits); *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722 (1915) (shares of stock).

action may be in rem, but as to the obligor, the action must be in personam as that is the only way a judgment could be obtained that would subject the obligor to a personal liability. Thus, actions of this type are really mixed actions, being both in rem and in personam.<sup>28</sup>

A plaintiff is not permitted to make his own liabilities or contractual relationships the res for an action in rem.<sup>29</sup> To permit this would permit an obligor to pick his own time and place to litigate his own obligations. A plaintiff may no more cut off his obligations to another person in an action in rem than he can obtain a judgment against another person in an action in rem. "The jurisdictional issue is the same whether the plaintiff claims or denies liability."<sup>30</sup> The United States Supreme Court recently stated in a case in which it was discussing the power of one state to affect an alimony decree of another state, "But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding."<sup>31</sup> This very thing is done in actions as to status, but the definition of status is limited so as to exclude contractual relationships and include only relationships involving a paramount public interest.<sup>32</sup>

Similarly, a plaintiff should not be permitted to garnish himself. The reasons for not permitting a plaintiff to make his own liabilities the object of an action in rem apply here because that is the essence of what a plaintiff is doing if he garnishes himself. Such a proceeding could not possibly be an adversary proceeding so that there would be no one to protect the interests of the obligee. Moreover, there is no necessity for a plaintiff to garnish himself. In the usual garnishment proceeding a plaintiff must act to obtain the money that the garnishee would otherwise pay the plaintiff's debtor. If the plaintiff is himself both creditor and debtor, the necessity of acting is not so urgent; he can wait until an action is commenced against him. Unfortunately the cases do not follow this view. About half the states permit a plaintiff to garnish himself.<sup>33</sup> Even more unfortunate is the fact that the cases that refuse to permit a plaintiff to garnish himself attribute their rulings to the compulsion of statutes. They say the question is one of local law and not one

<sup>28</sup>Security Savings Bank v. California, 263 U. S. 282, 287, 44 Sup. Ct. 108, 110 (1923).

<sup>29</sup>Brooklyn v. Insurance Co., 99 U. S. 362 (1878); Densby v. Acacia Mut. Life Ass'n, 78 F. 2d 203 (App. D. C. 1935).

<sup>30</sup>Maryland Casualty Co. v. Martin, 88 N. H. 346, 189 Atl. 162, 163 (1937).

<sup>31</sup>Estin v. Estin, — U. S. —, 68 Sup. Ct. 1213, 1218 (1948).

<sup>32</sup>RESTATEMENT, CONFLICT OF LAWS § 119, Comment b and c (1934).

<sup>33</sup>For case denying right of plaintiff to garnish self, see First International Bank v. Brehmer, 56 N. D. 81, 215 N. W. 918 (1927). For case permitting it, see Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348 (1885). For collection of cases, see 31 A. L. R. 711 (1924), 61 A. L. R. 1458 (1929).

of due process.<sup>34</sup> However, it would not seem to be due process to permit a plaintiff to terminate obligations in what is in substance an *ex parte* action.

Both tangibles and intangibles may be represented by muniments of title, such as receipts or certificates. When these instruments are negotiable and represent chattels or intangibles, they may constitute the res for an action in rem.<sup>35</sup> In that case, the property represented would not usually constitute the res.<sup>36</sup> There must usually be specific statutory authority for the instrument to constitute the res as this was not usual at common law.<sup>37</sup> The law of the place where the instrument was issued determines its effect.<sup>38</sup>

A will may not be a res so as to constitute a basis for jurisdiction. In probate proceedings the decedent's estate is the res.<sup>39</sup> This is true whether the decedent died testate or intestate. Any determination as to decedent's domicile or validity of a will made in probate proceedings by a court with territorial jurisdiction over some of the estate will be conclusive as to the property located there. But a determination as to domicile<sup>40</sup> or validity of a will<sup>41</sup> will not be conclusive as to property not within the jurisdiction of the court, whether realty or personalty, should other courts wish to reexamine it.

If a will were the object of an action in rem, a decree as to its validity made at the decedent's domicile would be conclusive everywhere as to the validity of the will. But such a decree does not have this effect, as is well recognized if a question concerning realty in another jurisdiction should arise.<sup>42</sup> Such a decree is usually followed elsewhere, however, if a question concerning decedent's personalty should arise.<sup>43</sup> But the decree is not followed because it has any territorial effect. It is followed because the conflict of laws rule of other states indicates that the law to be followed in distributing personalty is the law of decedent's domicile.

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<sup>34</sup>Jos. Joseph Bros. Co. v. Hoffman, 173 Ala. 568, 56 So. 216 (1911).

<sup>35</sup>Norrie v. Lohman, 16 F. 2d 355 (C. C. A. 2d 1926) (stock certificates); First Trust Co. v. Matheson, 187 Minn. 468, 246 N. W. 1 (1932) (bonds).

<sup>36</sup>Venus Foods v. District Court, — Idaho —, 181 P. 2d 775 (1947). However a state where the property is may enforce certain interests. See RESTATEMENT, CONFLICT OF LAWS § 50(2) (1934).

<sup>37</sup>See Trade Bond and Mortgage Co. v. Schwantz, 303 Ill. App. 165, 24 N. E. 2d 892, 893 (1940). For typical statutes see UNIFORM SALES ACT § 39; UNIFORM WAREHOUSE RECEIPTS ACT § 25; UNIFORM BILLS OF LADING ACT § 24; UNIFORM STOCK TRANSFER ACT § 13.

<sup>38</sup>Mills v. Jacobs, 131 Pa. Super. 469, 200 Atl. 233 (1938), *mod.* 133 Pa. Super. 231, 4 A. 2d 152 (1939).

<sup>39</sup>See *In re Price's Estate*, 230 Iowa 1228, 300 N. W. 542, 545 (1941); Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675, 697 (1945).

<sup>40</sup>Burbank v. Ernst, 232 U. S. 162, 34 Sup. Ct. 299 (1914); Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603 (1900); Thormann v. Frame, 176 U. S. 350, 20 Sup. Ct. 446 (1900).

<sup>41</sup>Schwertyer v. Bean, 154 Ark. 228, 242 S. W. 63 (1922); Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41, 59 (Ky. 1831); see Kerr v. Moon, 9 Wheat. 565, 569 (U. S. 1824).

<sup>42</sup>Selle v. Rapp, 143 Ark. 192, 220 S. W. 662 (1920).

<sup>43</sup>See ATKINSON, WILLS 432 (1937).

Thus, the decree of decedent's domicile as to the validity of a will is followed elsewhere as a result of comity only, not because it is conclusive everywhere.<sup>44</sup>

*d. Rem and Quasi-in-rem.* Courts have distinguished between actions that affect the interests in the property of all persons, whether known or unknown, and actions that affect only the interests in the property of designated persons.<sup>45</sup> The first of these, actions against the interests of everyone, are called actions in rem; the latter, actions against the interests of designated persons, are called actions quasi-in-rem.

The distinction between actions in rem and actions quasi-in-rem has been confused at times because courts and legal writers have not been too careful in defining the property subject to the jurisdiction of the court. Thus, probate proceedings are, at times, called quasi-in-rem because the decedent may have owned property in common with another and only the decedent's part could be administered by the probate court. But, probate proceedings are actually in rem. The property subject to the court's jurisdiction is only the decedent's estate, and the proceeding is to affect the claims of all heirs, devisees, and legatees, whether known or unknown.

Whenever a proceeding will bar unknown claimants, it is in rem. Thus, quiet title actions may be in rem or quasi-in-rem. If the proceeding is to determine the interests of all persons in the property it is in rem. If the proceeding is to determine the validity of the claim of a certain person, it is quasi-in-rem.

Proceedings for forfeitures may be either in rem or quasi-in-rem, depending on the statute. When the interests of all persons are cut off, whether innocent or not, the action is in rem.<sup>46</sup> But statutes may provide for only the forfeiture of the interests of guilty parties, who would necessarily be designated. The action would then be quasi-in-rem.<sup>47</sup>

Actions for specific performance or foreclosure of a mortgage are usually quasi-in-rem because the vendor or mortgagor are designated persons.<sup>48</sup> But, even these actions could be in rem as the question of the interests of unknown heirs could arise as a result of the death of the vendor or mortgagor.<sup>49</sup>

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<sup>44</sup>See *Baker v. Baker, Eccles and Co.*, 242 U. S. 394, 400, 37 Sup. Ct. 152, 155 (1917); *GOODRICH, CONFLICT OF LAWS* 454-456 (1938). At common law the rule was expressed differently—decedent's personality was deemed to be at decedent's domicile.

<sup>45</sup>*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165 (1886); see 3 *FREEMAN, JUDGMENTS* § 1522 (5th ed. Tuttle 1925).

<sup>46</sup>*Van Oster v. Kansas*, 272 U. S. 465, 47 Sup. Ct. 133 (1926).

<sup>47</sup>*Day v. Micou*, 18 Wall. 156 (U. S. 1873); see *U. S. v. One 1936 Model Ford Coach*, 307 U. S. 219, 59 Sup. Ct. 861 (1939).

<sup>48</sup>*Georgia Casualty Co. v. O'Donnell*, 109 Fla. 290, 147 So. 267 (1933) (mortgage foreclosure).

<sup>49</sup>*Simmons v. Fry*, 8 Mackey 472 (D. C. 1890) (specific performance).

Even actions involving choses-in-action, although usually quasi-in-rem because the obligor and obligee are known, may be in rem. Actions to condemn unclaimed bank deposits would be an example of this because they would affect the interests of all possible claimants.<sup>50</sup>

Actually actions quasi-in-rem are merely specialized types of actions in rem, because the court proceeds against the property itself and jurisdiction is based on jurisdiction over property, not over a person.<sup>51</sup> For that reason, courts and legislatures are not too careful in their use of these terms; they frequently describe an action as in rem when more specifically it could be described as quasi-in-rem.<sup>52</sup>

## II. *Acquisition of Jurisdiction*

For a court to act in rem it must have jurisdiction over the res. Certain steps in the acquisition of jurisdiction are mandatory in all states, being required by due process. These will be discussed here. States may require by statute more steps than are required by due process, but these additional requirements vary so greatly from state to state that it is practically impossible to deduce from them any general rule on the subject.<sup>53</sup> For a court to have jurisdiction, due process requires that the court have control over the res, that notice be given to persons whose interests are to be so affected, and that a hearing must be granted.

*a. Control over the Res.* Since actions in rem are derived from the principle that a state can determine the title or status of property within its borders, for a court to act in rem the res must be within the territorial jurisdiction of the court.<sup>54</sup> This necessitates the determination of the location or situs of property. For tangible property this presents no problem. The situs of rights to or interests in tangible property is the situs of the property burdened or the place where the right is exercised, not the situs of the property benefited.<sup>55</sup> Intangible property is more difficult as it has no actual situs, only a legal situs. This legal situs has been held to be at the domicile of the obligor or wherever he may

<sup>50</sup>See note 28 *supra*.

<sup>51</sup>Day v. Micou, 18 Wall. 156 (U. S. 1873). The name *quasi-in-rem* is erroneous because these actions are not just similar to actions *in rem* but they are actions *in rem*. See Cook, *Powers of Courts of Equity*, 15 COL. L. REV. 37, 47 (1915).

<sup>52</sup>Title and Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 359 (1906); Dulin v. McCaw, 39 W. Va. 721, 724, 20 S. E. 681, 684 (1894).

<sup>53</sup>The problem is even further complicated by the fact that all statutory requirements may not be jurisdictional. See Bank of Colfax v. Richardson, 34 Ore. 518, 526, 54 Pac. 359, 364 (1899).

<sup>54</sup>Montrose Pickle Co. v. Dodson Mfg. Co., 76 Iowa 172, 40 N. W. 705 (1888); Bates v. Chic. M. and St. P. Ry. Co., 66 Wis. 296, 19 N. W. 72 (1884); First National Bank v. Smith, 80 W. Va. 678, 93 S. E. 755 (1917).

<sup>55</sup>See note 25 *supra*.

be found and subjected to jurisdiction in personam.<sup>56</sup> But the obligor may not voluntarily submit to the jurisdiction of a court.<sup>57</sup> In cases where an instrument may be the res, the actual location of the instrument is controlling, not the situs of the property or the right it represents.<sup>58</sup>

There are statements that indicate that in addition to having the property within the territorial jurisdiction of the court, seizure or acts of equivalent import are necessary to bring the property within the control of the court.<sup>59</sup> Seizure means that the sheriff must take possession of the property and either personally keep it or entrust it to a bailee. In the case of land, the seizure is usually only constructive, consisting of filing a writ with some public official.<sup>60</sup> Acts that have been held to be of equivalent import are enjoining the transfer of the res,<sup>61</sup> the appointment of a receiver,<sup>62</sup> and the service of process on a third person having possession of the res as a trustee or bailee.<sup>63</sup>

Most of the statements that indicate that seizure is necessary for jurisdiction in rem do not indicate whether seizure is necessary to satisfy statutory jurisdictional requirements or the requirements of due process. Moreover, those statements that do indicate that seizure is necessary for due process are usually dictum. For many types of proceedings it has been held that no seizure is necessary. Thus, no seizure is necessary if the proceeding is in equity,<sup>64</sup> or in probate, or if it is to foreclose an existing lien on the property,<sup>65</sup> or if the property is in the possession of the plaintiff,<sup>66</sup> or if the court could at any time take custody of the property.<sup>67</sup>

In fact, there are fairly definite statements that seizure of the res is never required by due process. In *Tyler v. Judges of the Court of Registration*,<sup>68</sup> where the object of the action was realty Chief Justice Holmes

<sup>56</sup>Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625 (1904); Chic. R. I. and Pac. Ry. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797 (1899). Originally it was believed that a court had no jurisdiction for garnishment if the obligation was due by one foreigner to another foreigner. Tingley v. Batemen, 10 Mass. 343 (1813).

<sup>57</sup>First National Bank v. Smith, 80 W. Va. 678, 93 S. E. 755 (1917).

<sup>58</sup>Norrie v. Lohman, 16 F. 2d 355 (C. C. A. 2d 1926); Venus Foods v. District Court, — Idaho —, 181 P. 2d 775 (1947); First Trust Co. v. Matheson, 187 Minn. 468, 246 N. W. 1 (1932).

<sup>59</sup>Pennington v. Fourth National Bank, 243 U. S. 269, 37 Sup. Ct. 282 (1917).

<sup>60</sup>See Cooper v. Reynolds, 10 Wall. 308, 317 (U. S. 1870).

<sup>61</sup>Pennington v. Fourth National Bank, 243 U. S. 269, 37 Sup. Ct. 282 (1917); Benner v. Benner, 63 Ohio St. 220, 58 N. E. 569 (1900).

<sup>62</sup>State v. Ninth Judicial District Court, 50 Nev. 382, 257 Pac. 831 (1927); cf. Nichols v. Superior Court, 1 Cal. 2d 589, 36 P. 2d 380 (1934).

<sup>63</sup>Clark v. Clark, 202 Ind. 104, 172 N. E. 124 (1930); Zuhlke v. Prudential Ins. Co., 244 App. Div. 549, 279 N. Y. Supp. 835 (1935).

<sup>64</sup>Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135 (1884).

<sup>65</sup>See Roller v. Holly, 176 U. S. 398, 405, 20 Sup. Ct. 410, 412 (1900).

<sup>66</sup>Clossan v. Clossan, 30 Wyo. 1, 215 Pac. 485 (1923); Bernhardt v. Brown, 118 N. C. 706, 24 S. E. 528 (1890).

<sup>67</sup>See note 26 *supra*.

<sup>68</sup>175 Mass. 71, 55 N. E. 812, 814 (1908).

stated, "However this may be, when we come to deal with immovables, there would be no sense whatever in declaring seizure to be a constitutional condition of the power of the legislature to make a proceeding in rem. . . . When it is considered how purely formal such an act may be, . . . I cannot think that the presence or absence of the form makes a constitutional difference." The U. S. Supreme Court expressed similar sentiments in *Heidritter v. Elizabeth Oil-Cloth Co.*<sup>69</sup> "In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."<sup>70</sup>

The same rule should apply to chattels because courts have the same power over chattels as they do over immovables. The statements are, however, more persistent that seizure of a chattel is necessary. But again the statements do not clearly indicate that seizure is required by due process.

Seizure of chattels was required at common law and is now required by most state statutes for an attachment. But why is seizure necessary, is it to protect the owner of the property? The purpose is usually two fold, to assure that the chattel is kept within the territorial jurisdiction pending determination of the action<sup>71</sup> and to give the attaching creditor rights in the chattel prior to those of other creditors or purchasers.<sup>72</sup> The owner of property cannot claim that there has been a denial of due process even though there has been no seizure. In *Gallum v. Weil*<sup>73</sup> the court held, ". . . seizure of property under a writ of attachment is not necessary to the jurisdiction of the court over the same or authority for service of summons upon the defendant by publication. It is sufficient if it be made to appear by the complaint or the affidavit for the order of publication that the defendant has property in this state which can be reached by proceeding to enforce the judgment in case one is rendered. The statutory requisites for an order of service by publication do not include seizure of property or any use of the provisional remedy by attachment proceedings. Attention has been many times called to that by this court, though a seizure of property is commonly supposed to be neces-

<sup>69</sup>112 U. S. 294, 302, 5 Sup. Ct. 135, 138 (1884).

<sup>70</sup>See also *Allen v. Allen*, 126 Ark. 164, 189 S. W. 841 (1916); *Forrester v. Forrester*, 155 Ga. 722, 118 S. E. 373 (1923); *Reed v. Reed*, 121 Ohio St. 188, 167 N. E. 684 (1929); *Wilder v. Wilder*, 93 Vt. 105, 106 Atl. 562 (1919); cf. *Blackington v. Blackington*, 141 Mass. 423, 5 N. E. 830 (1886).

<sup>71</sup>See note 4 *supra*.

<sup>72</sup>*Gallum v. Weil*, 116 Wis. 236, 92 N. W. 1091 (1903).

<sup>73</sup>116 Wis. 236, 242, 92 N. W. 1091, 1093 (1903).

sary because that method of proceeding is the usual and probably the only one to efficiently guard *the interests of the plaintiff*.<sup>74</sup> In this case there was no seizure of the property but there was notice to its owner. This case is to be distinguished from *Pennoyer v. Neff*<sup>75</sup> where there was neither seizure nor notice. Thus, the rule for chattels is the same as the rule for immovables; seizure is not required by due process.

If the property is within the territorial jurisdiction of the court, notice, not seizure, is the important requirement of due process. But notice that a proceeding is pending is not enough; the notice must indicate specifically that certain property is involved, and is to be charged with any judgment for the plaintiff.<sup>76</sup>

Not requiring seizure of tangible property for actions in rem is in accord with the basic principles of such actions. A state has power over all the property within its borders without seizure. Moreover, seizure is unnecessary to protect persons with an interest in the property. Notice and hearing effectively accomplish that.

Where the res is intangible no question of its seizure arises. As stated previously, to obtain jurisdiction over intangibles the court must have jurisdiction over the obligor obtained by personal service.

*b. Notice.* Notice in actions in rem is to be distinguished from service of process in actions in personam because notice may be given a person even though he is outside the territorial limits of the court, since jurisdiction over the person is not necessary in actions in rem. The notice must indicate that there is a proceeding involving certain property, the nature of the proceeding, whose interests are to be affected, and the time and place of the hearing. Due process does not require any special form of notice. Anything that reasonably conveys the information may be used. In some cases, as in actions for specific performance or actions quasi-in-rem to quiet title, this information is contained in the pleadings.<sup>77</sup> In some other cases notice is given by writ of attachment or by a similar form. There may even be errors on the notice, as the misspelling of a name, if the resulting notice adequately advises persons of the proceeding.<sup>78</sup>

Whether the persons whose interests are to be affected must be named in the notice depends on the nature of the action and on whether or not

<sup>74</sup>Italics added. See *Hamilton v. Brown*, 161 U. S. 256, 274, 16 Sup. Ct. 585, 592 (1896).

<sup>75</sup>95 U. S. 727 (1877).

<sup>76</sup>*Wesner v. O'Brien*, 56 Kan. 724, 44 Pac. 1090 (1896); *Reed v. Reed*, 121 Ohio St. 138, 167 N. E. 684 (1929); *Beyer v. Investors' Syndicate*, 47 N. D. 358, 182 N. W. 934, 938 (1921) (concurring opinion of Judge Birdzell).

<sup>77</sup>See note 76 *supra*. This is why no seizure is necessary in equity actions.

<sup>78</sup>*Grannis v. Ordean*, 234 U. S. 385, 34 Sup. Ct. 779 (1914); cf. *Meyer v. Kuhn*, 65 Fed. 705 (C. C. A. 4th 1895).

the person is known. In cases where the government is proceeding against property for public purposes, as where land is being sold for taxes, describing the property is sufficient.<sup>79</sup> Persons who are known to have interests in the property do not have to be named. Where the action is brought by a private person, as actions to quiet title, known claimants must be designated by name, whether the action be quasi-in-rein or in rem. Their interests cannot be affected by a notice that indicates only a proceeding against unknown claimants.<sup>80</sup> Interests of unknown claimants cannot be affected unless the notice indicates that the proceeding is against unknown claimants.<sup>81</sup>

This distinction between actions by the government and actions by private litigants is not justified. Notice is necessary to advise a person whose interests are affected about the proceeding. Therefore, what is reasonable to advise him should not depend on the kind of plaintiff or the nature of the proceeding. Moreover, governmental activities would not be hampered by requiring a government, when plaintiff, to follow the rule applied to private litigants, as only known claimants would have to be included in the notice, and errors in making the assessment would not vitiate any proceedings taken under it.<sup>82</sup> To take the rule that errors made in assessing property will not vitiate the assessment and extend it to hold that it is unnecessary to name known claimants, as was done in the case of *Castillo v. McConnico*,<sup>83</sup> is not justified.<sup>84</sup> It is recognized that distinctions may be made between these two types of proceedings, but it is not believed that that justifies not indicating the names of known claimants to land that is the object of an action by the government. Even though taxes were levied and land sold in an administrative proceeding, due process would still require adequate notice to persons whose interests were affected.<sup>85</sup>

Various methods of delivering the notice are permissible under due process. It may be delivered personally, mailed, or even published in a newspaper or on a courthouse bulletin board. But receipt of the notice is not required.<sup>86</sup> It is believed that this is in accord with the basic prin-

<sup>79</sup>*Castillo v. McConnico*, 168 U. S. 674, 18 Sup. Ct. 229 (1898).

<sup>80</sup>*Priest v. Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443 (1914); *Meyer v. Kuhn*, 65 Fed. 705 (C. C. A. 4th 1895); see *Hill v. Henry*, 66-N. J. Eq. 150, 57 Atl. 554 (1904).

<sup>81</sup>*Savage v. Gray*, 96 Me. 557, 53 Atl. 61 (1902); cf. *Thomas v. Myers*, 193 P. 2d 624 (N. Mex. 1948).

<sup>82</sup>*Witherspoon v. Duncan*, 4 Wall. 210 (U. S. 1866).

<sup>83</sup>168 U. S. 674, 18 Sup. Ct. 229 (1898).

<sup>84</sup>In *Bragg v. Weaver*, 251 U. S. 57, 62, 40 Sup. Ct. 62, 64 (1919), the statute provided that if the claimant was not present at the hearing he should "be notified thereof in writing." Yet in *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 285, 45 Sup. Ct. 491, 495 (1925), the *Bragg* case is cited for the proposition, "that in proceedings for the condemnation of property for public use, notice by publication is constitutionally sufficient."

<sup>85</sup>*Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390 (1904).

<sup>86</sup>See note 4 *supra*.

ciples of actions in rem. Though the exercise of the state's power over property within its borders can be postponed pending a reasonable effort to give notice, it cannot be completely frustrated where giving such notice is impossible. Mr. Justice Bradley in the *Case of Broderick's Will*<sup>87</sup> pointedly stated, "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*."

Whether notice by publication<sup>88</sup> satisfies due process has been questioned many times. For such notice to satisfy the requirements of due process it must have been specifically authorized by statute.<sup>89</sup> If the interests of unknown claimants are involved, publication is the only possible way of giving them notice. If a claimant and his address are known, a choice of methods of delivering the notice is available. If a known claimant is a non-resident, the U. S. Supreme Court has upheld notice by publication in actions both in rem and quasi-in-rem without even discussing whether it was the means most likely to give knowledge of the proceedings.<sup>90</sup> When the claimant is a resident and the action is quasi-in-rem notice by publication has been upheld only if his address is unknown.<sup>91</sup> If the action is one by the government for public purposes even though there be a resident claimant, notice by publication is permissible.<sup>92</sup> If the action is by a private litigant and in rem, notice by publication is necessary for unknown claimants. There is no case deciding whether a different method of delivery must be used for known claimants who are residents. Justice Holmes in *Tyler v. Judges of the Court of Registration* indicated that notice by publication would be appropriate for all claimants because, "it hardly would do to make a distinction between the constitutional rights of claimants who were known and those who were not known to the plaintiff, when the proceeding is a bar to all."<sup>93</sup> However, the reasoning used here has not been approved by the U. S. Supreme Court because it has distinguished between known and unknown claimants when considering whether names of claimants should be indicated in a notice. Even though the action is strictly in rem,

<sup>87</sup>21 Wall. 503, 509 (U. S. 1874).

<sup>88</sup>Since jurisdiction in personam can also be obtained by publication, it is believed that confusion would be avoided if the phrase service by publication were limited to actions in personam and the phrase notice by publication used for actions in rem.

<sup>89</sup>*Compare* Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557 (1890) with *Hart v. Samson*, 110 U. S. 151, 3 Sup. Ct. 586 (1884).

<sup>90</sup>Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557 (1890); *Huling v. Kaw Valley Ry. and Imp. Co.*, 130 U. S. 559, 9 Sup. Ct. 603 (1889).

<sup>91</sup>*Jacob v. Roberts*, 223 U. S. 261, 32 Sup. Ct. 303 (1912).

<sup>92</sup>*Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390 (1904); *Castillo v. McConico*, 168 U. S. 674, 18 Sup. Ct. 229 (1898).

<sup>93</sup>175 Mass. 71, 75, 55 N. E. 812, 813 (1900).

if there is a known resident claimant notice by publication should be held insufficient. In *Hamilton v. Brown*<sup>94</sup> the court stated, "But it was within the power of the legislature of Texas to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons."

When a claimant's address is known, whether he be a resident or a non-resident, courts should insist that the notice be delivered by whatever means is the most likely to give actual knowledge of the proceeding. The court should decide whether notice by publication is as desirable a method of giving notice as mail or personal delivery. This is the test laid down by the U. S. Supreme Court when considering substituted service in actions in personam, "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."<sup>95</sup> Most courts do not follow this in actions in rem. They decide simply whether the method used was reasonable, not whether it was the *most* reasonable method. One court has, however, pointed the way. In *People v. One 1941 Chrysler 6 Touring Sedan*<sup>96</sup> a California court stated, "Due process is a variable concept. Whether it has been violated depends upon the facts of the case. Where alternatives are given it requires that that alternative reasonably calculated to notify the person affected be used."

To insist on the method of delivery that would most likely reach persons whose interests are involved would not interfere with a state's exercise of its power over property and would further effectuate the second basic principle of actions in rem by giving greater protection to persons affected. This might require that in actions in rem notice be given by publication to unknown claimants and another way to known claimants, but it is believed that there is nothing unconstitutional about this.

To distinguish between actions by the government and private litigants or residents and non-residents as to the method of delivering notice is not justified. The objection to distinguishing between the government and private litigants was discussed during the consideration of whether the names of claimants had to be given in the notice. Everything said then applies as well to the question of method of delivering the notice. The distinction between residents and non-residents is not justified because actions in rem are based on power over property and not on the residence of persons with an interest in the property. Non-residents have as much right to protect their interests as residents, and

<sup>94</sup>161 U. S. 256, 274, 16 Sup. Ct. 585, 592 (1896).

<sup>95</sup>*McDonald v. Mabee*, 243 U. S. 90, 92, 37 Sup. Ct. 343, 344 (1917).

<sup>96</sup>180 P. 2d 780, 788, *rehearing* 183 P. 2d 368, 378 (Dist. Ct. App. Cal. 1947).

therefore, as much right to the most reasonable method of delivery of notice as do residents. Here is one place where it would hardly do to make a distinction between constitutional rights of claimants, to use Justice Holmes' phrase.

In considering the most reasonable method of delivering notice it must be remembered ". . . that service of process by newspaper publication is allowed as of necessity. It is due process of law more in form than substance. However convenient, it is a harsh and highly technical substitution for service of process. . . ."<sup>97</sup> Where notice by publication is permitted, statutes usually require that the publication be made in the county where the res is. However, in *Security Bank v. California*<sup>98</sup> the U. S. Supreme Court held that publication in another county, here the one in which the state capitol was located, was in accord with due process. Another typical requirement of statutes when notice by publication is permitted is that there be an affidavit of non-residence or that personal service is impossible. In the same case, *Security Bank v. California*, the court held that such a requirement was not constitutionally indispensable.

In garnishment proceedings service of process on the garnishee is sufficient. This is deemed notice to the person whose debt was garnished. No actual notice need be given by either the plaintiff or the garnishee.<sup>99</sup>

Notice that there is a proceeding involving property may be given by seizure of property.<sup>100</sup> Thus seizure, although not necessary to bring the property under the control of the court, is one effective means of giving notice that there is an action pending involving the property. It operates as notice to all persons that the property has been taken into the custody of the court. But seizure will not satisfy all the requirements of notice, as it cannot supply the necessary information about the hearing. "A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. . . . The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential."<sup>101</sup>

When written notice is used instead of seizure, it must describe the

<sup>97</sup>*Stanton v. Thompson*, 234 Mo. 7, 136 S. W. 698, 699 (1911).

<sup>98</sup>263 U. S. 282, 289, 44 Sup. Ct. 108, 111 (1923).

<sup>99</sup>*Baltimore and Ohio R. R. Co. v. Hosteller*, 240 U. S. 620, 36 Sup. Ct. 475 (1916).

<sup>100</sup>*Cooper v. Reynolds*, 10 Wall. 308 (U. S. 1870).

<sup>101</sup>*Windsor v. McVeigh*, 93 U. S. 274, 277 (1876); see *Scott v. McNeil*, 154 U. S. 34, 14 Sup. Ct. 1108 (1894); *The Mary*, 9 Cranch 126, 144 (U. S. 1815).

property involved with such certainty that a person can tell whether it is his; property not described is not affected by a decree.<sup>102</sup>

However, this does not apply to probate proceedings unless some phase of the proceedings concerns specific property when it may be necessary to describe the property.

*c. Other Requirements.* In addition to control over the res and notice, a hearing is required for due process; for unless a party has a chance to be heard, the notice itself loses all value.<sup>103</sup> Also, sufficient time must be allowed between the giving of the notice and the hearing to allow a party to appear and answer.<sup>104</sup> What is a reasonable time depends on the distance between the place of receipt of notice and the place of the hearing. If an interested person cannot appear because he has been forced to leave the country, the proceeding is void as to him.<sup>105</sup> This is to be distinguished from the situation where an interested party voluntarily leaves the jurisdiction.<sup>106</sup> If a party does attempt to appear and answer but is prevented by the court, the court lacks jurisdiction to proceed in the case.

It was stated that the court's jurisdiction must be invoked by appropriate pleadings. Any form of pleading prescribed by the state would constitute due process unless it failed to give persons notice of the nature of the action.

There are a few special types of proceedings where requirements that are in addition to the ones already discussed are made necessary by due process. Probate proceedings are examples of this. For a court to have jurisdiction, the person whose estate is being probated must be deceased.<sup>107</sup>

### III. *Judgments In Rem and Quasi-In-Rem*

In determining the effect of judgments, one fundamental principle must be remembered—that a court conclusively determines the title, status, or liability of whatever was subject to the court's jurisdiction. Thus, if a court has jurisdiction in personam the judgment conclusively determines the liabilities or right to act of the defendant. If the court has jurisdiction in rem, the judgment conclusively determines the title or status of the res. "In what has been called their 'legislative' effect there is no substantial difference between judgments in rem and in personam."<sup>108</sup> But there are other differences between judgments in rem and judgments in personam which should be recognized.

<sup>102</sup>*Boswell's Lessee v. Otis*, 9 How. 336 (U. S. 1850).

<sup>103</sup>*Windsor v. McVeigh*, 93 U. S. 274 (1876).

<sup>104</sup>*Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410 (1900); see *Wick v. Chelan Electric Co.*, 280 U. S. 108, 50 Sup. Ct. 41 (1929).

<sup>105</sup>*Dean v. Nelson*, 10 Wall. 158 (U. S. 1869).

<sup>106</sup>*Dudlow v. Ramsey*, 11 Wall. 581 (U. S. 1870).

<sup>107</sup>*Scott v. McNeil*, 154 U. S. 34, 14 Sup. Ct. 1108 (1894).

<sup>108</sup>3 FREEMAN, JUDGMENTS 3115 (5th ed. Tuttle 1925).

Judgments in personam determine the rights and duties of a person, even subjecting him to a personal liability, but they affect only the person subject to the court's jurisdiction. Judgments in rem determine the title or status of property subject to the court's jurisdiction. In acting on property, judgments in rem affect persons by determining their right to or interest in property. This is the limit of their effect on persons however; they cannot subject anyone to a personal liability, not even for costs.<sup>109</sup> A person may even appear specially to protect his property and not be bound in personam.<sup>110</sup> Of course, courts may give judgments that are effective both in rem *and* in personam if the court has both in rem *and* in personam jurisdiction.<sup>111</sup>

Just as actions may be divided into actions strictly in rem and actions quasi-in-rem, so may judgments. If the action was against the interests in property of designated persons, the judgment would affect the interests of only those persons and would be quasi-in-rem.<sup>112</sup> If the action is against the interests in the property of all persons, the resulting determination will be conclusive as to all persons, and would be in rem. Everybody in the world is bound by the title or status of the property as determined by a judgment in rem,<sup>113</sup> including not only persons sui juris, but also persons non compos mentis, infants, and persons under other legal disabilities unless they are exempted by statute.<sup>114</sup>

Because judgments in actions where the court is exercising jurisdiction over status have this effect, they have frequently been called in rem. However, the U. S. Supreme Court indicated that a distinction should be made between judgments in rem and judgments in actions, as to status, even though it recognized the similarity, when it stated that a divorce decree partakes of some of the characteristics of a decree in rem.<sup>115</sup>

Although the decree as to the title or status of the res which is subject to the jurisdiction of the court is conclusive on both the property and the persons whose interests were affected, findings of fact or holdings on issues litigated are distinguishable, being conclusive only so far as the property itself is concerned. Justice Holmes in *Brigham v. Fayerweather*<sup>116</sup> stated, "And it does not follow in the former case [a judgment in rem] any more than in the latter [a judgment in personam], nor

<sup>109</sup>*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165 (1886); see *Pennoyer v. Neff*, 95 U. S. 714, 723 (1877).

<sup>110</sup>*Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co.*, 285 Fed. 214 (C. C. A. 6th 1922).

<sup>111</sup>See note 8 *supra*.

<sup>112</sup>*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165 (1886).

<sup>113</sup>*Woodruff v. Taylor*, 20 Vt. 65 (1847).

<sup>114</sup>*Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407 (1885); *Goodrich v. Thompson*, 19 Fla. 327, 118 So. 60 (1928).

<sup>115</sup>*Williams v. North Carolina*, 325 U. S. 226, 232, 65 Sup. Ct. 1092, 1096 (1945).

<sup>116</sup>140 Mass. 411, 5 N. E. 265, 266 (1886).

is it true, that the judgment, because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded. . . . We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding in rem. This does not mean that all the world are entitled to be heard; and, as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes.”

Even plaintiffs and persons who had a right to appear because their interests were affected are not bound in later actions by any findings of fact or holdings made in an action in rem, even though issues specifically litigated therein should arise again, if in the later action the court has jurisdiction in personam or jurisdiction over different property. It was indicated earlier that any issues might be litigated or any relief given in an action in rem if the holding on the issue or the relief given affected the res. The holding on issues litigated and the relief given are effective only for the purpose of determining the title or status of the property and have no effect on the personal rights between the parties.

Plaintiffs in actions in rem whose claims had not been completely satisfied by the in rem action can bring a second action, but they would have to relitigate their claim completely. They could not use the judgment in the in rem action as the basis of the second action. Thus, if an action is brought against a non-resident for a debt when jurisdiction is based on attachment of the non-resident's property, and if a judgment is obtained that is only partially satisfied from the property attached, a second action may be brought, but on the original claim.<sup>117</sup> Or, if a contract provides for the sale of two tracts of land, each in a different jurisdiction, and if the vendee should sue in one in an action based on jurisdiction over the tract there, the vendee would not be affected by any judgment rendered should he later sue for the second tract in an action either in rem based on jurisdiction over the second tract or in personam.<sup>118</sup>

Similarly, persons whose interests in property are affected by actions in rem are not concluded by the judgment in rem should they sue the person who was plaintiff in the in rem action on some issue litigated in that action. Thus, if a vendor should have the interests in property created by a land sale contract with a non-resident vendee terminated in an action based on jurisdiction over the land under contract, the vendor might still be liable to the vendee in an action in personam. The

<sup>117</sup>Toby v. Brown, 11 Ark. 308 (1850); Cheshire National Bank v. Jaynes, 224 Mass 14, 112 N. E. 50 (1916).

<sup>118</sup>Van Horst v. Thompson, 18 F. 2d 177 (App. D. C. 1927).

action in rem would terminate the vendee's interest in the land but not his personal rights against the vendor. Also, the vendor may still sue the vendee for any damages he has sustained.<sup>119</sup> Similarly, when a court grants interpleader on the basis of jurisdiction over the res, and perhaps over one claimant, the decree will be conclusive on all claimants as to the title or right to possession of the res. But any claimant who was not subject to the jurisdiction of the court will not be prevented from asserting any claims he may have against the stakeholder.<sup>120</sup> Decrees in hybrid class actions have a similar effect, they are conclusive as to the res but not as to the personal rights of persons not subject to the jurisdiction of the court.<sup>121</sup>

Garnishees must be distinguished from plaintiffs. A determination of the liability of a garnishee in an action quasi-in-rem is conclusive, so that he is protected in a later action by his creditor.<sup>122</sup> However, the creditor may still sue the plaintiff if the garnishment was improper; his personal rights are protected to that extent.<sup>123</sup>

In discussing the conclusive effect of judgments in rem it should be remembered that they are as subject to attack as are judgments in personam for fraud or lack of jurisdiction. However, they also benefit from the same presumptions as to jurisdiction.<sup>124</sup>

### *Conclusion*

It has been shown how the principle that a state has power to determine the status or title of property within its borders has been used by courts to permit all types of actions against property and rights in property and even against intangible interests. But it has also been shown that persons whose interests are affected are not at the complete mercy of a state. Most of the problems in the field of actions in rem concern methods of protecting persons who have interests in the property involved. Also, most of the possibility for improving the applicable laws concern the same subject.

Protection is provided persons whose interests are affected by the requirements for notice and hearing. Protection is also provided by the rules that issues litigated in actions in rem must affect the res and that in determining the title or status of the res the court does not affect rights or liabilities between parties. Another protection to persons is

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<sup>119</sup>See *Prudential Ins. Co. v. Berry*, 153 S. C. 496, 498, 151 S. E. 63, 64 (1930).

<sup>120</sup>*Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160 (1887).

<sup>121</sup>See 2 MOORE AND FRIEDMAN, *FEDERAL PRACTICE* 2292 (1938).

<sup>122</sup>*Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625 (1904).

<sup>123</sup>*Anderson v. Canaday*, 37 Okla. 171, 131 Pac. 697 (1913).

<sup>124</sup>*Hobbs v. Lenon*, 191 Ark. 509, 87 S. W. 2d 6 (1935).

provided by those courts that hold that a plaintiff cannot make his own liabilities a res or garnish himself.

It is believed, however, that further protection should be afforded persons with interests in property subject to the jurisdiction of the court. The rules as to the method of giving notice should be changed so that the most reasonable method would be required. Also, more use should be made of the doctrine of *forum non conveniens*. Not only would these changes afford necessary additional protection to persons affected by actions in rem, but they could be made without hampering the power of a state over property.