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Attachment in New Mexico - Part 2

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ATTACHMENT IN NEW MEXICO—PART II*

VERN COUNTRYMAN**

V. EXECUTION OF THE WRIT

A. *Property Subject to Attachment.* Following the Missouri pattern for the summoning of garnishees under the attachment writ, the Kearny draftsmen followed Missouri language also in authorizing attachment "against the lands, tenements, goods, moneys, effects and credits of the debtor in whosoever hands they may be."²⁸⁵ In addition, they added the provision that the writ shall direct the sheriff "to attach the defendant, by all and singular, his lands and tenements, goods, moneys, effects and credits in whosoever hands the same may be found."²⁸⁶ Additional enactments in 1882²⁸⁷ and 1903²⁸⁸ made specific provision for attachment of defendant's interest in shares of corporate stock.²⁸⁹

No change was made in these provisions when, in 1909, the operative sections relating to summoning garnishees under the attachment writ were repealed and a separate writ of garnishment was authorized.²⁹⁰ But in 1939 the original provision authorizing attachment was expanded to cover also "any right, title, lien or interest whether legal or equitable upon, in or to real or personal, tangible or intangible property whether present or possessory or reversionary or in remainder and all property which could be reached upon execution or upon equitable proceedings in aid of execution."²⁹¹ At the same time, the writ's

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285. Kearny Code, Attachments § 2 (1846) at 1 N.M. Stat. Ann. 303 (1953); Mo. Rev. Stat. ch. 12, art I, § 2 (1845); Mo. Ann. Stat. § 521.050 (1953). See also Mo. Ann. Stat. § 513.090 (1953).

286. Kearny Code, Attachments § 7 (1846) at 1 N.M. Stat. Ann. 304 (1953). The Missouri statute of the time merely directed that the writ be "in the form now used and allowed in the courts of this state." Mo. Rev. Stat. ch. 11, art. I, § 9 (1845). It was later amended to provide for a writ directing the sheriff "to attach the lands, tenements, goods, chattels, rights, moneys, credits, evidences of debt and effects of the defendant." Mo. Rev. Stat. ch. 12, art. I, § 18 (1885); Mo. Ann. Stat. § 521.140 (1953). See also Mo. Ann. Stat. § 521.240 (1953).

287. N.M. Laws 1882, ch. VI, §§ 1-3, at 22 (now N.M. Stat. Ann. §§ 26-1-38, 26-1-41, 26-1-42 (1953)).

288. N.M. Laws 1903, ch. 94, §§ 1, 2, at 167 (now N.M. Stat. Ann. §§ 26-1-39, 26-1-40 (1953)).

289. See discussion pp. 90-96, *infra*.

290. N.M. Laws 1909, ch. 63, at 167 (now N.M. Stat. Ann. §§ 26-2-1 through 26-2-36 (1953)).

291. N.M. Laws 1939, ch. 159, § 1, at 341 (now N.M. Stat. Ann. § 26-1-4 (1953)). Expressly excluded was property specifically exempted from attachment and the interest of a beneficiary in a spendthrift trust. For exemptions from attachment, see N.M. Stat. Ann. §§ 5-5-21, 24-5-1 through 24-6-9, 36-8-1, 39-4-10, 58-14-21, 59-9-18(c), 59-10-21, 59-11-25, 73-12-89 (1953). N.M. Laws 1961, ch. 125 at 469, increases the amount of homestead and in lieu allowances authorized by N.M. Stat. Ann. §§ 24-6-1, 24-6-6 and 24-6-7 (1953). As the contracts clause of the federal constitution is interpreted in *Gunn v. Barry*, 82 U.S. (15 Wall.) 610 (1872), the increases cannot be claimed in attachment proceedings as against creditors whose claims were in existence prior to the 1961 amendments. As that clause is misinterpreted in *Kener v. La Grange Mills*, 231 U.S. 215 (1913), the increases cannot

direction to the sheriff was expanded to include "all other property and interests in property of whatsoever nature and kind."²⁹²

The purpose obviously is to authorize attachment of all non-exempt property²⁹³ interests capable of conversion into money, but no question as to the precise reach of the writ has come before our Supreme Court. The more limited Missouri language has been held to authorize attachment of a co-tenant's undivided interest in realty,²⁹⁴ a mortgagor's equity of redemption in realty,²⁹⁵ a vendee's equitable interest under a contract to purchase realty,²⁹⁶ and an insured's interest in the cash surrender value of his policy, although that value did not become payable until several months after attachment.²⁹⁷ And our statute expressly negatives a Missouri holding that non-possessory interests in personalty are not subject to attachment.²⁹⁸

Because of the overlapping provisions of our attachment and garnishment statutes, however, there is uncertainty as to which writ is to be used in some circumstances, or whether plaintiff may take his choice.²⁹⁹ From the beginning, our statutes have authorized attachment of the defendant's "credits"³⁰⁰—a necessary provision when garnishees were summoned under the attachment writ. But since 1909 a separate writ of garnishment has been available to reach persons "indebted" to the defendant.³⁰¹ From the beginning, also, our statutes have authorized attachment of defendant's property in "whosoever hands the same may be found."³⁰² But the writ of garnishment has been authorized since

be claimed as against such creditors even in a bankruptcy proceeding. See *Countryman, For a New Exemption Policy in Bankruptcy*, 15 *Rutgers L. Rev.* 678, 726-32 (1960). The same is true of N.M. Laws 1961, ch. 8, at 21, increasing the wage exemption from garnishment under N.M. Stat. Ann. § 26-2-27 (1953).

292. N.M. Laws 1939, ch. 159, § 3 at 342 (now N.M. Stat. Ann. § 26-1-13 (1953)).

293. See note 291, *supra*.

294. *Wigley v. Beauchamp*, 51 Mo. 544 (1873).

295. *Young & Co. v. Ruth*, 55 Mo. 515 (1874); *Fisher v. Tallman*, 74 Mo. 39 (1881).

296. *Huxley v. Harrold*, 62 Mo. 516 (1876).

297. *Industrial Loan & Inv. Co. v. Missouri State Life Ins. Co.*, 222 Mo. App. 1228, 3, S.W.2d 1046 (1928). But see N.M. Stat. Ann. § 24-5-3 (1953), specifically exempting the cash surrender value of life insurance policies from attachment. Cf. *Workman v. Anderson*, 297 S.W.2d 519 (Mo. Sup. Ct. 1957), where the court found it unnecessary to decide whether attachment would reach a remainder interest in fee contingent upon the remainderman's survival of a life tenant. See also *Williams v. Lobban*, 206 Mo. 399, 104 S.W. 58 (1907).

298. *Merchants' Nat'l Bank v. Abernathy*, 32 Mo. App. 211 (1888).

299. If plaintiff has a choice, he might prefer attachment for the reason indicated in the text at note 654 *infra*, or he might prefer garnishment to avoid liability for seizure of personalty in the event his case fails. See p. 131, *infra*.

300. N.M. Stat. Ann. §§ 26-1-4, 26-1-13 (1953). See also N.M. Stat. Ann. § 26-1-17 (Supp. 1961) prescribing the manner of levy on "evidences of debt."

301. N.M. Stat. Ann. §§ 26-2-4, 26-2-9, 26-2-10, 26-2-13, 26-2-16, 26-2-19, 26-2-26, 26-2-32 (1953).

302. N.M. Stat. Ann. §§ 26-1-4, 26-1-13 (1953). See also *Kearny Code, Attachments* § 13 (1846) at 1 N.M. Stat. Ann. 305 (1953); and N.M. Stat. Ann. § 26-1-20 (1953), authorizing any "other person" in whose hands property of the defendant is attached to retain possession by posting a forthcoming bond.

1909 to summon one who "has in his hands effects belonging to the defendant."³⁰³ Since 1882 the attachment statute has contained specific provision for attaching defendant's interest in the shares of "companies" and corporations.³⁰⁴ But the 1909 garnishment statute also provides for garnishment of "an incorporated or joint stock company" in whose shares defendant has an interest.³⁰⁵ And any argument that the attachment provisions were impliedly repealed by the garnishment statute must deal with the fact that the provisions for attachment of "credits" and of defendant's property "in whosoever hands the same may be found" were re-enacted in 1939.³⁰⁶

The location of the property, so long as it is within the state, should create no difficulty in district court suits. In bringing his action, of course, plaintiff is limited by the venue statute,³⁰⁷ and defendant's property may not be located in a county where the suit can be brought.³⁰⁸ But the attachment law provides that the writ shall be directed to the sheriff "of the proper county."³⁰⁹ While all doubt could have been removed by adopting the specific Missouri provision authorizing separate writs to each county in which defendant has property,³¹⁰ or by authorizing issuance of the writ to the sheriff of "any county" as in our execution statute,³¹¹ there is evidence that the "proper county" under the attachment law is not merely the county in which suit is brought. Attachment writs are to be "issued and returned in like manner as ordinary writs of summons"³¹² and are to be "served on the defendant as an ordinary summons."³¹³ And since 1912 our statutes have provided that summons is to be served "by the sheriff of the county where the defendant may be found."³¹⁴ The "proper

303. N.M. Stat. Ann. § 26-2-4 (1953). See §§ 26-2-9, 26-2-10, 26-2-13, 26-2-16, 26-2-20, 26-2-21, 26-2-32.

304. See discussion at pp. 90-96, *infra*.

305. N.M. Stat. Ann. §§ 26-2-4, 26-2-11, 26-2-13, 26-2-16, 26-2-22, 26-2-32 (1953).

306. Notes 291-292, *supra*.

307. N.M. Stat. Ann. § 21-5-1 (Supp. 1961). This statute provides that where lands or an interest therein "are the object of any suit in whole or in part" the action shall be brought in a county where the land or a portion thereof is located. But this should not authorize an action otherwise unconcerned with the land in any county in which land can be attached. Attachment of the land does not make it "an object of the suit." Cf. *Bell v. Gaylord*, 6 N.M. 227, 27 Pac. 494 (1891); *Carter v. Arbuthnot*, 62 Mo. 582 (1876); *Huxley v. Harrold*, 62 Mo. 516 (1876).

308. This is only a matter of venue, and not of jurisdiction, however, and may be waived by defendant by a general appearance. *Romero v. Hopewell*, 28 N.M. 259, 210 Pac. 231 (1922). See *Heron v. Gaylor*, 53 N.M. 44, 201 P.2d 366 (1948).

309. Kearny Code, Attachments § 7 (1846) at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. § 26-1-13 (1953)).

310. Mo. Rev. Stat. ch 11, art. I, § 10 (1845) (now Mo. Ann. Stat. § 521.160 (1953)).

311. N.M. Stat. Ann. § 24-1-1 (1953).

312. N.M. Stat. Ann. § 26-1-15 (1953).

313. N.M. Stat. Ann. § 26-1-17 (1953).

314. N.M. Laws 1912, ch. 56, § 1, at 91; N.M. Stat. Ann. § 21-1-1(4)(e) (1953). The Kearny Code provided for three multi-county circuit courts (Courts and Judicial Powers § 2 (1846) at 1 N.M. Stat. Ann. 310 (1953)) and required all process issued by such courts should be "directed to the sheriff of their respective counties" (Sheriff § 3 (1846) at 1

county," therefore, for effecting service of the writ on the defendant, may be a county other than the one in which suit is brought.³¹⁵ It may, indeed, be a county outside the judicial district in which suit is brought. By the same token, the "proper county" for effecting a levy on the defendant's property may be still another county, within or without the district of suit.³¹⁶ Considerable aid in selecting the proper county for purposes of levy is provided by a 1939 enactment which, again ignoring the existence of separate writs of garnishment, provides that the "situs of debts and obligations for the purpose of attachment shall be the domicile of the debtor or obligor and the situs of intangible interests in property, real or personal, legal or equitable, shall be the place where such property is located."³¹⁷ All but two county clerks responding to a questionnaire³¹⁸ indicated that attachment writs are issued in their counties to sheriffs in other counties and other districts. In San Miguel County, writs are not issued to sheriffs outside the Fourth District, and in Luna County, writs are not issued to sheriffs of any other county.

In justice courts, use of the attachment writ is much more restricted. Attachment is authorized only for defendant's "goods and chattels"—not his real estate.³¹⁹ While the suit must be brought in a precinct of proper venue,³²⁰ the attachment writ is to be directed to "the sheriff or any constable of the

N.M. Stat. Ann. 355 (1953). This ambiguous provision was not altered by the statute substituting multi-county district courts for the circuit courts, N.M. Laws 1851-1852, pp. 119, 195, but was later replaced by a statute directing all process to issue to the sheriff of the county in which the action was brought. N.M. Laws 1859, ch. X, § 3, at 22.

315. See *Magrew v. Foster*, 54 Mo. 258 (1873); *Williams v. Short*, 219 Mo. App. 99, 268 S.W. 706 (1925).

316. See *Schofield v. Folsom*, 7 N.M. 601, 38 Pac. 261 (1894), appeal dismissed 168 U.S. 706 (1896), where plaintiff sued in Bernalillo County and "caused writs of attachment to be issued to Bernalillo, Colfax, Santa Fe, Socorro, Dona Ana, and San Miguel counties."

Cf. N.M. Stat. Ann. § 15-40-14 (1953) authorizing sheriffs to enter any county in the state for the purpose of arresting any person charged with crime, and *Orosco v. Gonzales*, 19 N.M. 130, 135, 141 Pac. 617, 619 (1914), where it is assumed that a sheriff is authorized to serve a writ of summons only within his own county. See also *Carter v. Arbuthnot*, 62 Mo. 582 (1876). The clerks of nine of the district courts answering the questionnaire (Bernalillo, Chavez, Curry, Eddy, Lincoln, McKinley, Quay, San Miguel and Union counties) attached copies of their attachment writs. Each writ directs the sheriff to levy upon so much of defendant's property as is found in the sheriff's county. And see the statutory form of writ for justice courts which directs the constable to levy upon defendant's property "in your township." N.M. Stat. Ann. § 36-11-1 (1953).

317. N.M. Laws 1939, ch. 159, § 5; N.M. Stat. Ann. § 26-1-3 (1953). Since all "interests" in property are "intangible" and since only tangible property can be "located" in a "place," the reference to "intangible interests" should probably be read to mean non-possessory interests in intangible property. See discussion at pp. 87-88, *infra*.

318. See note 9, *supra*.

319. N.M. Stat. Ann. §§ 36-7-3, 36-7-4 (1953). The writ of execution is similarly limited in justice courts. N.M. Stat. Ann. §§ 24-1-2, 36-6-2, 36-6-5 (1953).

320. N.M. Stat. Ann. § 36-3-1 (1953). Again, as in the district courts (note 308 *supra*), defendant may waive his venue objection by entering a general appearance. *Butler Paper Co. v. Sydney*, 47 N.M. 463, 144 P.2d 170 (1943).

county in which the justice resides.”³²¹ The territorial jurisdiction of the justice is limited to that county,³²² and only the sheriff or constables of the county in which the action is commenced are authorized to execute justice court process.³²³ If, therefore, venue cannot be laid in a precinct of the county where defendant has property located, attachment is not available in justice court suits.

B. *The Executing Officer.* From the beginning, our attachment statutes have directed that writs of the district court be directed to the sheriff,³²⁴ and have described the manner in which “the officer” is to make the levy.³²⁵ Similar provisions were included in the garnishment statute of 1909.³²⁶ Although a 1912 statute provided for service of summons by either the sheriff or “any other person not a party to the action, over the age of eighteen,”³²⁷ this provision was held inapplicable to service of the garnishment writ because the garnishment statute clearly contemplated service by the sheriff.³²⁸ Before the Supreme Court had announced this conclusion, a statute had been enacted in 1919 providing that “writs of attachment . . . may be served by any person not a party to the action over the age of twenty one years who may be especially designated by the court to perform such service.”³²⁹ Since “service” of the writ is defined to include both the service upon the defendant and the levy upon his property,³³⁰ the 1919 statute is apparently sufficient to authorize

321. N.M. Stat. Ann. § 36-7-3 (1953).

322. N.M. Stat. Ann. § 36-2-8 (1953).

323. N.M. Stat. Ann. § 36-4-3 (1953).

324. Kearny Code, Attachments § 7 (1846) at 1 N.M. Stat. Ann. 304 (1953) (now N.M. Stat. Ann. § 26-1-13 (1953)). Justice court writs are directed to “the sheriff or any constable of the county in which the justice resides.” N.M. Stat. Ann. § 36-7-3 (1953).

325. Kearny Code, Attachments § 9 (1846) at 1 N.M. Stat. Ann. 304 (1953) (now N.M. Stat. Ann. § 26-1-17 (Supp. 1961)).

326. N.M. Stat. Ann. §§ 26-2-9, 26-2-10, 26-2-13 (1953). Cf. § 26-2-14 providing for substitution of some person over 21 years of age to make service when the sheriff is garnishee.

327. N.M. Laws 1912, ch. 56, § 1, at 91 (now N.M. Stat. Ann. § 21-1-1 (4) (e) (1953)).

328. *Upjohn Co. v. Board of Comm'rs*, 25 N.M. 526, 185 Pac. 279 (1919). Under N.M. Stat. Ann. § 15-40-11 (1953), deputy sheriffs may be authorized “to discharge all duties which belong to the office of sheriff.”

329. N.M. Laws 1919, ch. 38, § 2, at 86 (now N.M. Stat. Ann. § 21-1-1 (4) (n) (1953)). Service of most other process by non-parties over 21, without special court designation, was authorized by section 1 of the same 1919 statute. This section was later amended to reduce the age requirement to eighteen. See N.M. Stat. Ann. § 21-1-1 (4) (m) (1953). It has recently been held inapplicable to service of a writ of garnishment because (1) it excludes writs of attachment, and garnishment is “in effect an attachment” and (2) the writ was directed to the sheriff. *Mendoza v. Acme Transfer & Storage Co.*, 66 N.M. 32, 340 P.2d 1080 (1959). The grounds for decision suggest that the writ of garnishment might be served by a non-party of proper age, if he is specially designated by the court as in attachment cases and if the writ is directed to him rather than to the sheriff. The second ground suggests also that when a non-party is designated to serve an attachment writ, the writ should be directed to him.

330. N.M. Stat. Ann. § 26-1-17 (1953).

full substitution for the sheriff in the execution of the attachment writ.³³¹

C. *Service on Defendant.* Under a provision taken from Missouri, "original writs of attachment" are to contain "a clause of the nature and to the effect of an ordinary citation to answer the action of the plaintiff."³³² An additional Missouri requirement that the "writ and declaration shall be served upon the defendant as an ordinary summons,"³³³ was revised by the Kearny draftsmen to require that the "writ, petition or other lawful statement of the cause of action" be so served.³³⁴ In subsequent compilations and the 1907 revision the word "petition" was dropped,³³⁵ leaving the requirement that either the writ or the complaint be served upon defendant "as an ordinary summons."³³⁶

Since a summons may be served by delivering a copy to defendant or reading it to him if he refuses to receive a copy, or, if he is absent, by leaving a copy with some person over fifteen years of age residing at defendant's usual place of

331. N.M. Stat. Ann. § 36-4-6 (1953), authorizing justices of the peace to select "any suitable person" to execute process when no sheriff or constable is available, expressly provides that the person so selected "shall possess all the authority of a constable in relation to the execution of such process."

332. Kearny Code, Attachments § 7 (1846) at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. § 26-1-13 (1953)). Cf. Mo. Rev. Stat. ch. 11, art. I, § 9 (1845). The Missouri statute has now been amended to specify that this requirement applies only when the action is commenced by attachment. Mo. Ann. Stat. § 521.140 (1953). Our requirement for "original writs" apparently would apply to the ancillary writs authorized by N.M. Stat. Ann. § 26-1-43 (1953), where defendant has already been served with summons.

333. Mo. Rev. Stat. ch. 11, art I, § 12 (1845); Mo. Ann. Stat. § 521.170 (1953).

334. Kearny Code, Attachments § 9 (1846) at 1 N.M. Stat. Ann. 304 (1953). And under this provision service of a writ was "never complete without also serving the petition or other statement of the cause of action." *Holzman v. Martinez*, 2 N.M. 271, 288 (1882).

335. N.M. Laws 1884, ch. II, at 29-30; N.M. Laws 1897, ch. 73, § 175, at 192; N.M. Laws 1907, ch. 107, § 1 (193), at 272.

336. N.M. Stat. Ann. § 26-1-17 (1953). Since the statutory form of attachment affidavit (§ 26-1-6) does not include a statement of "on what account" defendant is indebted to plaintiff, as originally required by the attachment statute (§ 26-1-5), the affidavit probably would not qualify as "a lawful statement of the cause of action" under § 26-1-17. See *Staab v. Hersch*, 3 N.M. (Gild B.W. ed.) 160, 3 N.M. (Gild. E.W.S. ed.) 209, 213, 3 N.M. (John ed.) 153, 3 Pac. 248, 249 (1884), where the court says by way of dictum that "the affidavit for an attachment has never been considered sufficient as a declaration under our practice." But it may suffice for that purpose in a justice court. See *Crolot v. Maley*, 2 N.M. 198, 209 (1882). Cf. *Burnham-Hanna-Munger Dry Goods Co. v. Hill*, 17 N.M. 347, 128 Pac. 62 (1912).

While service of the writ only would apparently satisfy the attachment statute, it would not start the time running for service of defendant's answer on the merits. See note 546, *infra*.

In justice courts the writ is to be executed as "an ordinary summons," N.M. Stat. Ann. § 36-7-4 (1953), and the writ and an inventory of property seized is to be served on defendant if he can be found, or they are to be left at defendant's residence in the county if he cannot be found, or they are to be left with the person in whose possession the property was found if defendant cannot be found and has no residence in the county. N.M. Stat. Ann. § 36-7-4 (1953). But only service on defendant personally gives the court *in personam* jurisdiction. See §§ 36-7-6, 36-7-7.

abode,³³⁷ personal service of the writ or complaint in an attachment suit may be made in the same manner.³³⁸ *A fortiori*, personal service of the writ or complaint upon a corporate defendant should be sufficient if made upon any of the statutory or other agents upon whom summons may be served.³³⁹

Where personal service of the writ or complaint is not effected in one of the ways prescribed by statute, the court gets no *in personam* jurisdiction over the defendant,³⁴⁰ unless he enters a general appearance.³⁴¹

Whenever property has been attached, but it appears from the attachment affidavit and the sheriff's return that defendant "cannot be personally served," service by publication is authorized.³⁴² The quoted language was substituted for the Kearny Code's "cannot be cited"³⁴³ by a 1913 amendment which also added the requirement that the requisite facts appear from the affidavit and sheriff's return.³⁴⁴ The reference apparently is to effective personal service, however, rather than to the manual delivery of a copy of the process to the defendant, which is one method of making effective personal service.³⁴⁵ Hence, it is probably still true that service by publication is not authorized where defendant can be served by leaving a copy of process with a person of proper age residing at his usual place of abode³⁴⁶ or where a corporate defendant has an agent within the state upon whom effective service can be made.³⁴⁷

The published notice, when authorized, is to state "the nature and amount of the plaintiff's demand"³⁴⁸ and to notify the defendant "that his property

337. N.M. Stat. Ann. § 21-1-1 (4) (e) (1) (1953). The same type of service for justice courts is authorized by § 36-4-4. As to the efficacy of service by posting, authorized by both § 21-1-1 (4) (e) (1) and § 36-4-4 where no person is found at defendant's abode who is willing to accept service, see note 50 *supra*.

338. Spiegelberg v. Sullivan, 1 N.M. 575 (1873); Bell v. Gaylord, 6 N.M. 227, 27 Pac. 494 (1891).

339. See text at notes 195-201 *supra*.

340. Holzman v. Martinez, 2 N.M. 271 (1882).

341. Waldo v. Beckwith, 1 N.M. 97 (1854). A defendant not personally served may enter a special appearance for the purpose of moving to quash the writ or dismiss the action for defects on the face of the writ, Holzman v. Martinez, *supra* note 340, or for defects apparent on the face of the record. Waldo v. Beckwith, *supra*. He does not thereby confer *in personam* jurisdiction upon the court unless he also pleads to the merits of the action. Waldo v. Beckwith, *supra*; Schlatter v. Hunt, 1 Mo. 651 (1826).

342. N.M. Stat. Ann. § 26-1-18 (1953). The comparable provision for justice courts is § 36-7-7. In Missouri, where the statute does not specify that the property must be attached before notice is published, it is held immaterial which first occurs. Tufts v. Volkening, 122 Mo. 631, 27 S.W. 522 (1894).

343. Kearny Code, Attachments § 11 (1846) at 1 N.M. Stat. Ann. 305 (1953); N.M. Laws 1907, § 1 (196), at 274. This provision was taken from Missouri, with "cited" substituted for "summoned." Mo. Rev. Stat. ch. 11, art. I, § 14 (1845).

344. N.M. Laws 1913, ch. 53, § 1 (196), at 64.

345. N.M. Stat. Ann. § 21-1-1 (4) (e) (1) (1953).

346. Spiegelberg v. Sullivan, 1 N.M. 575 (1873). As to the efficacy of posting process at defendant's residence, see note 50, *supra*.

347. Weidman v. Byrne, 207 Mo. App. 500, 226 S.W. 280 (1920).

348. This language was construed in Missouri to require an allegation of the amount due at the time of suit if it is greater, by reason of interest, than the face amount of a

has been attached and that unless he appears at the return day named in said publication, judgment will be rendered against him and his property sold to satisfy the same." If the published notice fails to state that defendant's property has been attached and that, upon his failure to appear, judgment will be rendered against him, the court acquires no jurisdiction even though the notice does state that the suit is by attachment.³⁴⁹

Under the Kearny Code the notice was to state that these consequences would result from failure of defendant to appear "next term."³⁵⁰ The 1907 revision substituted "the return day of said publication,"³⁵¹ and a 1913 amendment inserted the present language³⁵² without specifying how the return day should be fixed. Since return days for ordinary summons were abolished in 1897,³⁵³ and the general provision for notice by publication in non-attachment cases has since 1897 referred also to the "day named" in the notice,³⁵⁴ the matter of time is left in the discretion of the district judge³⁵⁵—save that the last publication of notice must be at least twenty days before defendant is directed to appear.³⁵⁶

The notice is to be published in "the same manner prescribed by law for the publication of other notices from the district courts,"³⁵⁷ which under Rule

note sued upon. *Haywood v. Russell*, 44 Mo. 252 (1869). See also *Sloan v. Forse*, 11 Mo. 126 (1847); *Freeman v. Thompson*, 53 Mo. 183 (1873); *Holland v. Adair*, 55 Mo. 40 (1874).

349. *Smith v. Montoya*, 3 N.M. (Gild. B.W. ed.) 3, 3 N.M. (Gild. E.W.S. ed.) 13, 3 N.M. (John. ed.) 39, 1 Pac. 175 (1883). See also *Mares v. Schuth*, 38 N.M. 101, 28 P.2d 527 (1933), holding published notice in garnishment proceedings ineffective although it stated, as required by N.M. Stat. Ann. § 26-2-34 (1953), that defendant's "money and effects have been garnisheed," and that if he failed to appear "judgment will be rendered against him and such garnishee," but omitted the further statutory statement that "his money [would be] applied and effects . . . disposed of as provided by law to pay said judgment." See also *Drake v. Hale*, 38 Mo. 346 (1886); *Harris v. Grodner*, 42 Mo. 159 (1868); *Haywood v. Russell*, supra note 348; *Moore v. Stanley*, 51 Mo. 317 (1873); *Freeman v. Thompson*, supra note 348; *Holland v. Adair*, supra note 348; *Hauser v. Murray*, 256 Mo. 58, 165 S.W. 376 (1913); *Graves v. Smith*, 278 Mo. 592, 213 S.W. 128 (1919). Cf. N.M. Stat. Ann. § 26-1-17 (Supp. 1961) authorizing personal service on defendant in attachment cases merely by service of the complaint, which would not necessarily give him any notice of the attachment. See p. 80, supra.

350. Kearny Code, Attachments § 11 (1846) at 1 N.M. Stat. Ann. 305 (1953).

351. N.M. Laws 1907, ch. 107, § 1 (196), at 274.

352. N.M. Laws 1913, ch. 53, § 1, at 64.

353. See note 77, supra.

354. N.M. Laws 1897, ch. 73, § 24, at 165-66 (now N.M. Stat. Ann. § 21-1-1(4) (g) (1953)). Prior to 1897, notice by publication was to "conform as far as practicable in form, time, and substance, to the laws governing publication in causes of attachment." N.M. Laws 1874, ch. 16, § 2, at 36.

355. The statute applicable in justice courts directs that the notice is to specify a time for appearance, not less than 20 nor more than 90 days from the date of notice, which must be published or posted at least 15 days before the appearance date. N.M. Stat. Ann. §§ 36-7-7, 36-7-8 (1953).

356. N.M. Stat. Ann. § 10-2-10 (Supp. 1961).

357. N.M. Stat. Ann. § 26-1-18 (1953).

4(g) means publication in a newspaper published in the county where the suit is brought or, if none is there published, then in a newspaper of general circulation in that county.³⁵⁸ But the additional requirement of Rule 4(j) for service by mail on defendant at his residence if known to plaintiff³⁵⁹ is not applicable in attachment proceedings.³⁶⁰

In 1927 an alternate form of substituted service in the district courts was provided by an amendment authorizing, as "equivalent to publication," personal service of the notice (in the form prescribed for publication) upon defendant outside the state "in the same manner as now provided by law for the personal service of summons outside the State."³⁶¹ This language apparently incorporates the provisions of Rule 4(k),³⁶² which does not prescribe a "manner" of service, but does require defendant to appear within thirty days after service, and provides for return of service by "affidavit of the person making same" without specifying who is competent to make service.³⁶³ In any event, it is the statutory notice, and not the complaint, the attachment affidavit, or the writ, or all three, which is to be served upon the out-of-state defendant.³⁶⁴

And the substituted service must be either by publication or by out-of-state personal service. Service by mail confers no jurisdiction in an attachment suit.³⁶⁵

D. *The Attachment Levy*. With the italicized language added in 1939, our attachment statute has from 1846 directed that, "when lands or tenements *or interests in real estate whether legal or equitable* are to be attached, the officer shall briefly describe the same in his return, and state that he attached all the right, title and interest of the defendant to the same, and shall moreover give notice to the actual *occupants*, if any there be."³⁶⁶ Since 1933 a separate

358. N.M. Stat. Ann. § 21-1-1(4) (g) (1953). Cf. N.M. Stat. Ann. § 10-2-10 (Supp. 1961). In justice courts, the justice may order notice by publication or by posting. N.M. Stat. Ann. § 36-7-7 (1953).

359. N.M. Stat. Ann. § 21-1-1(4) (j) (1953).

360. *Glasgow v. Peyton*, 22 N.M. 97, 159 Pac. 670 (1916).

361. N.M. Laws 1927, ch. 91, § 2 at 276 (now N.M. Stat. Ann. § 26-1-18 (1953)).

362. N.M. Stat. Ann. § 21-1-1(4) (k) (1953). See also § 21-3-16.

363. See *Denison v. Tocker*, 55 N.M. 184, 229 P.2d 285 (1951), an attachment suit in which defendant was served in Texas by "one F. B. Rimmer," not otherwise identified.

364. See *Larkin v. Folsom Town & Investment Co.*, 61 N.M. 441, 301 P.2d 1091 (1956). See *Graves v. Smith*, 278 Mo. 592, 213 S.W. 128 (1919). *First Nat'l Bank v. Proffitt*, 293 S.W. 524 (Mo. App. 1927).

365. *Walter v. Richardson*, 62 N.M. 152, 306 P.2d 643 (1957).

366. *Kearny Code*, Attachments § 9 (1846) at 1 N.M. Stat. Ann. 304 (1953); N.M. Laws 1939, ch. 159 § 4, at 345 (now N.M. Stat. Ann. § 26-1-17 (1953)). The first 1939 amendment is part of a general effort to expand the types of property interests subject to attachment which is discussed at pp. 75-76, *supra*. The second substituted the word "occupants" for the more limited term "tenants." The *Kearny Code* closely followed Mo. Rev. Stat. ch. 11, art. I, § 12 (1845), but omitted a requirement that the sheriff's return state that he had notified the tenants and name them. See Mo. Ann. Stat. § 521.170 (1953).

statute has required any officer "making a levy on real estate" under a writ of attachment or execution to file a notice of levy, describing the real estate and the litigation, with the county clerk of the county where the property is located, and has provided that such filed notice shall constitute notice "to the public of the facts therein recited."³⁶⁷

Since our statutes, and the Missouri counterpart,³⁶⁸ prescribe certain steps to be taken by the officer "when" interests in land "are to be attached" or by the officer "making a levy," the statutory steps might be viewed as requirements *in addition to* a levy by actual or symbolic seizure of the property. In Missouri, however, the statutory requirements are construed as *a definition of the levy*, and nothing more is required. Indeed, a valid levy may be made for some purposes without complying with all the statutory steps. If the sheriff files a return describing the property³⁶⁹ and stating that he attaches all of the right, title and interest of the defendant therein, he has made an effective levy against a defendant who is personally served or appears.³⁷⁰ Omission of the notice to occupants of the premises is fatal only where defendant has been served by publication and has not appeared, since the notice to the occupant is designed only to bring notice home to the defendant.³⁷¹ After the addition of a filing requirement, the Missouri Court concluded that the filing of the notice of levy "is an act enterting into and constituting a part of a levy of an attachment of lands, and is a condition precedent to a valid attachment lien" so that, as between competing attachments, the one first filed was entitled to priority.³⁷² And as between defendant and the attaching creditor, the court was "unable to see that the purpose for which [filing] was required would be material," and held the levy invalid as to defendant because of the sheriff's failure to file.³⁷³ Although the Missouri statute, like ours, requires both filing and recording of the attachment notice when real estate is attached,³⁷⁴ subsequent Missouri

367. N.M. Laws 1933, ch. 13, §§ 1, 2, at 12 (now N.M. Stat. Ann. §§ 24-1-4, 24-1-5 (1953)). Missouri imposed a similar requirement more than a half-century earlier. Mo. Gen. Stat. ch. 141, § 23 (1866) (now Mo. Ann. Stat. § 521.170 (1953)).

368. Mo. Ann. Stat. § 521.170 (1953).

369. As to the adequacy of the description, see *Henry v. Mitchell*, 32 Mo. 512 (1862). But note that N.M. Stat. Ann. § 26-1-17 (1953) omits the italicized language in Mo. Ann. Stat. § 521.170 (1953): "The officer shall briefly describe the same in his return, *stating the quantity and situation.*"

370. *Lackey v. Seibert*, 23 Mo. 85 (1856); *Huxley v. Harrold*, 62 Mo. 516 (1876).

371. *Walter v. Scofield*, 167 Mo. 537, 67 S.W. 276 (1901); *Siling v. Hendrickson*, 193 Mo. 365, 92 S.W. 105 (1905); *Miner's Bank v. Kingston*, 204 Mo. 687, 103 S.W. 27 (1907).

372. *Stanton v. Boschert*, 104 Mo. 393, 399, 16 S.W. 393, 394 (1891).

373. *Bryant v. Duffy*, 128 Mo. 18, 22, 30 S.W. 317, 318 (1895). Defendant had been served by publication and the sheriff had also failed to give notice to tenants in possession. Cf. *Walter v. Scofield*, 167 Mo. 537, 561, 67 S.W. 276, 283 (1901), holding that filing would not perfect an attachment where notice to tenants was omitted and defendant was served only by publication, where it was said that the filing requirement "manifestly was only intended to give notice to third persons and not to the defendant."

374. Mo. Ann. Stat. § 521.170 (1953): "The officer . . . shall . . . file in the recorder's office . . . an abstract of the attachment . . . , which shall be duly recorded in the land

cases have held that the attachment is good against the defendant or a subsequent transferee from him if the sheriff files the notice, although the recorder records it in the wrong place,³⁷⁵ or fails to record it at all.³⁷⁶

Our court also seems disposed to view the prescribed statutory steps as a definition of the levy. The statute requiring filing and recording is applicable both to attachment and to execution levies and is the only statutory requirement for an execution levy. In a New Mexico case where defendant contended an execution levy was invalid as to him because he was not served with the writ and notice of levy, the court replied that neither was required by statute and that an execution levy on realty "is made by filing notice of levy in the office of the county clerk."³⁷⁷ That the essential step is the filing of notice by the sheriff, rather than a proper recording of it by the clerk, seems even more clear under our statute than in Missouri. The statute provides, ungrammatically, that "The county clerk . . . shall record such notice . . . and shall index the same . . . , and when so filed shall be notice to the public of the facts therein recited."³⁷⁸

Where personal property is to be attached, our statute has provided from the beginning, with no account taken of the addition of separate writs of garnishment in 1909, and with the italicized language added in 1939, that, "when goods and chattels, moneys, effects, evidences of debt³⁷⁹ or other personal property, are to be attached, the officer shall seize the same and keep them in custody, if accessible, and if not accessible he shall summon the person in whose hands they may be as garnishee."³⁸⁰ Since the statute has also from the begin-

records. . . ." N.M. Stat. Ann. § 24-1-4 (1953): "Officer . . . shall file a notice of such levy in the office of the county clerk" N.M. Stat. Ann. § 24-1-5 (1953): "The county clerk . . . shall record such notice in a book kept for that purpose. . . ."

375. *Richards v. Lee's Adm'r*, 71 Mo. App. 224 (1897).

376. *Winningham v. Trueblood*, 149 Mo. 572, 51 S.W. 399 (1899).

377. *Inman v. Brown*, 59 N.M. 196, 200, 281 P.2d 474, 476 (1955). Matters would be clearer if the court had not said immediately thereafter, "There was substantial compliance here by going upon the land, serving the occupant with notice of levy and filing the return in the office of the county clerk."

378. N.M. Stat. Ann. § 24-1-5 (1953).

379. Perhaps transferable "evidences of debt" may be seized and sold, as an alternative to collecting them by garnishment. See *Tipton v. Christopher*, 135 Mo. App. 619, 116 S.W. 1125 (1909). The new Uniform Commercial Code, which became effective in New Mexico January 1, 1962, seems to contemplate as much with respect to negotiable instruments. It provides, in the Article on Commercial Paper, that one who purchases an instrument at judicial sale or takes it under legal process does not become a holder in due course. N.M. Stat. Ann. § 50A-302(3) (Supp. 1961). But such a purchaser or taker from a holder in due course would, under § 3-201, succeed to that holder's rights. But see text at notes 441 and 442, *infra*.

380. *Kearny Code*, Attachments § 9 (1846) at 1 N.M. Stat. Ann. 303 (1953); N.M. Laws 1939, ch. 159, § 4 at 345 (now N.M. Stat. Ann. § 26-1-17 (1953)). In *Jones v. Springer*, 15 N.M. 98, 103 Pac. 265 (1909) *aff'd* 226 U.S. 148 (1912), a receiver was appointed to take charge of tangible personalty which the sheriff had seized.

Justice court attachments are limited to "goods and chattels," N.M. Stat. Ann. § 36-7-3 (1953), and the levying officer is to "attach, take into possession and safely keep" them. N.M. Stat. Ann. § 36-7-4 (1953).

ning provided for attachment of defendant's property "in whosoever hands the same may be found," and has provided further that where property is attached in the hands of a third party he may "retain possession" by posting a forthcoming bond,³⁸¹ it is apparent, as several Missouri cases recognize,³⁸² that property does not become inaccessible, so that garnishment is to be substituted for seizure, merely because it is in the hands of a third party.³⁸³

Under the virtually identical Missouri provisions³⁸⁴ the courts have held that for accessible property capable of manual delivery, the levying officer must take physical control from the defendant.³⁸⁵ If the property is in the hands of defendant's agent it is not enough to notify the agent that he now holds the property for the sheriff.³⁸⁶ Neither is it enough to notify the defendant's bailee that the property has been attached, though the bailee apparently could be constituted the sheriff's agent to hold the property.³⁸⁷ And to preserve the levy the sheriff must keep the property "in his custody" as required by the statute. If he or his custodian voluntarily relinquishes possession the attachment is released³⁸⁸ although a competing creditor cannot obtain superior rights where he persuades the sheriff by trickery to relinquish possession of attached property.³⁸⁹

Our court in one case has apparently taken the same approach. While the "essential requirement is that the acts of the officer be such as to put the property out of the control of the attachment debtor" it is not essential "that the sheriff maintain personal and immediate custody over it." He can make an

381. Kearny Code, Attachments §§ 2, 7, 13 (1846) at 1 N.M. Stat. Ann. 303, 304, 305 (1951) (now N.M. Stat. Ann. §§ 26-1-4, 26-1-13, 26-1-20 (1953)).

382. Russell v. Major, 29 Mo. App. 167 (1888); Shanklin v. Wetzler, 67 Mo. App. 457 (1896). See also J. I. Case Plow Works v. Union Iron Works, 56 Mo. App. 1 (1894). Cf. Heffner v. Rice, 129 Mo. App. 667, 108 S.W. 590 (1908).

383. But Hauptman v. Richards, 85 Mo. App. 188 (1900), holds that if the third party in possession claims an interest in the property it is not "accessible" and garnishment is proper. Westheimer & Sons v. Giller, 84 Mo. App. 122 (1906), agrees that garnishment is proper but suggests that attachment by seizure would also be valid.

384. Mo. Rev. Stat. ch. 11, art. I, § 12 (1845); Mo. Ann. Stat. § 521.170 (1953). The Missouri statute differs only in that the officer is to "take" rather than "seize" accessible property, and where property is not accessible is to "*declare to the person in possession thereof that he attaches the same in his hands*, and summons such person as garnishee." But N.M. Stat. Ann § 26-1-20 (1953), providing that a third party in possession "may retain possession" by posting a forthcoming bond is a copy of Mo. Rev. Stat. ch. 11, art. I, § 20 (1845); Mo. Ann. Stat. § 521.260 (1953). Since garnishment does not involve taking possession, this provision would be unnecessary unless it was intended that property may be "accessible" and subject to being "taken" by the officer even though in the hands of a third party.

385. Elliott v. Bowman, 17 Mo. App. 693 (1885), found physical seizure of a locked safe to constitute an effective levy upon its contents, at least where the sheriff had manifested his intention to reach the contents by attempting, unsuccessfully, to persuade defendant to reveal the safe's combination.

386. Russell v. Major, 29 Mo. App. 167 (1888).

387. Shanklin v. Wetzler, 67 Mo. App. 457 (1896). See J. I. Case Plow Works v. Union Iron Works, 56 Mo. App. 1 (1894).

388. Russell v. Major, 29 Mo. App. 167 (1888).

389. Nicholson v. Mersletter, 68 Mo. App. 441 (1897).

effective levy on ten tons of farm machinery in the possession of one "whose relationship, if any, to the defendant does not clearly appear" by making an inventory of it, taking from the person in possession a receipt for it, and directing him to hold it for the sheriff. And the attachment is not lost by removal of the property without the caretaker's knowledge, where he promptly notifies the sheriff and the latter repossesses the property.³⁹⁰

In one instance, the Missouri court has sanctioned a deviation from the statutory requirements. Where the levying officer finds the property already in the custody of another officer under a prior levy, the court, being sensitive to "the prevention of conflict of jurisdiction and the interference of one officer with the prior custodianship of another," has not required that the officer in possession be summoned as garnishee in the second attachment proceeding. Rather, it has held that the second officer makes an effective junior levy by advising the first of the second writ, making an inventory of the property, and attaching the inventory to his return.³⁹¹

Since the provision relating to attachment of personal property in any event contemplates "seizure" by the sheriff, with garnishee summons authorized only for the fortuity where the property is not accessible, it seems clear that this provision prescribes a method of attachment levy only for property capable of being sized, i.e., tangible property.³⁹²

It has been clear in New Mexico since 1939 that the provisions relating to seizure of personal property apply only where defendant has either a "tangible interest" in the property or possession of it. An amendment of that year made separate provision for the attachment of "an intangible interest or right either legal or equitable in personal property in the possession of someone other than the defendant." In that case the officer is to indorse on the attachment writ his levy on all of defendant's interest in the property and a description of the property, and to serve a copy of the writ so indorsed upon the person in possession "in the same manner as summons are served." If the property is in the possession of a New Mexico corporation or a foreign corporation doing business here and the indorsed writ cannot be served upon it in the manner in which process is authorized to be served, the writ may be served by leaving it "at the usual and most notorious place of doing business of such corporation in the state."³⁹³

What is not clear is the meaning of "*intangible interest or right, legal or equitable, in personal property.*" Obviously, the statute does not mean what it

390. *Hart v. Oliver Farm Equipment Sales Co.*, 37 N.M. 267, 21 P.2d 96 (1933).

391. *Patterson v. Stephenson*, 77 Mo. 329 (1883).

392. And perhaps in addition, as pointed out in note 379, *supra*, tangible evidences of debt where the debt can be transferred by transferring the evidence.

393. N.M. Laws 1939, ch. 159, § 4, at 345 (now N.M. Stat. Ann. § 26-1-17 (Supp. 1961)).

says. All "interests" or "rights" in property are intangible.³⁹⁴ The property itself may be tangible or intangible. But, since the new provision for levy contemplates that the "property to be attached" will be either in the possession of defendant or of some other person, it cannot refer to interests or rights in intangible property, which is not capable of being reduced to possession. The only interpretation which seems consistent with the procedure prescribed for levy seems to be to read "intangible interest or right" as meaning "non-possessory interest or right." This would result in the following alternative procedures: (1) Where defendant has a possessory interest in tangible personal property the levy is made by seizure, regardless of who has actual possession, unless the property is inaccessible, in which event the person in possession is to be summoned as garnishee. (2) Where defendant has a non-possessory interest in tangible personal property and the property is in the actual possession of someone else, levy is made by serving an indorsed writ on the person in possession. (3) Where defendant has a non-possessory interest in tangible personal property and also has actual possession of it, either wrongfully or at the will of the owner of the possessory interest, levy is to be made by seizure of the property if accessible, otherwise by summoning defendant as garnishee.³⁹⁵ Where defendant's interest is in intangible property, it can be reached only by garnishment or by the special provisions³⁹⁶ for attaching defendant's interest or shares of stock in business enterprises.

This interpretation makes sense of the provisions for levy, but can be reconciled with another section of the 1939 amendment authorizing attachment of "any right, title, lien or interest whether legal or equitable . . . in . . . personal, tangible or intangible property whether *present or possessory or reversionary or in remainder*"³⁹⁷ only by concluding that the legislature authorized more than it provided machinery to effectuate.

Apart from all of the above, special provisions are made in New Mexico for levy upon livestock, corporate stock and other securities, documents of title and certain other interests in business enterprise.

The Range Levy Act of 1889³⁹⁸ provides that whenever any "live stock or herd of cattle" of the defendant in attachment or execution are "ranging

394. Webster's New International Dictionary (2nd ed., unabridged, 1960) defines intangible as "not tangible, incapable of being touched or perceived by touch; impalpable; imperceptible."

395. All of this is fairly consistent with N.M. Stat. Ann. § 26-1-3 (1953), providing that "the situs of intangible interests in property, real or personal, legal or equitable, shall be the place where such property is located" if, as suggested in note 317, *supra*, "intangible interests" is read here also to mean non-possessory interests in tangible property. If, of course, the tangible property is located outside New Mexico, this statute would preclude levy here even though the person in possession could be served here.

396. See discussion at pp. 90-99, *infra*.

397. See text at note 291, *supra*.

398. N.M. Laws 1889, ch. 54, §§ 1-4, at 111-13 (now N.M. Stat. Ann. §§ 24-4-1. through 24-4-4 (1953)).

at large . . . over any range country"³⁹⁹ with the live stock or cattle of others, so that it is impracticable to round up defendant's stock without rounding up and cutting out the stock of others, the levying officer shall only take possession of such stock of defendant as he can get "without interfering with the live stock of other owners."⁴⁰⁰ As to defendant's remaining stock, the officer is to file a certified copy of the attachment writ "with the county clerk of the county in which the brand of such live stock is recorded," who is to note the attachment in his reception book and in his brand book and "properly index the process." After the "filing, noting and indexing of such process," it not only constitutes a lien upon the stock not seized, but subjects anyone disposing or attempting to dispose of such stock to prosecution for grand larceny.

It is a fair prediction that this procedure has not been extensively employed in the past sixty-five years. The statute providing for the recording of brands in the county of the owner's residence⁴⁰¹ was superseded in 1895 by a statute providing for recording with the state Cattle Sanitary Board.⁴⁰² It may be that, where defendant has recorded his brand with a county clerk, although not required to do so, an effective levy can be made by filing the writ with that clerk. It may be, also, that the Range Levy Act has a very limited utility under a special proviso dealing with the case where "said live stock range" [the reference here apparently is to the "range country" over which defendant's stock is "ranging at large"] is in more than one county. In that event, the officer may "file a like certified copy of the writ and brand in any such county, and the same shall have a like binding effect as a lien upon such live stock."⁴⁰³ If, as is not clear, the filing of the writ and brand in one of the counties covered by the stock range is to be in lieu of, rather than in addition to, the filing of the writ in the county where brands are no longer required to be recorded, it may still be possible in some cases to use the Act. But no clerk responding to a questionnaire⁴⁰⁴ could recall any attempt to do so.

399. It is not clear whether the term "range country" is intended to have legal significance and, if so, whether it is meant to refer to the "public lands, proper for pasturing" which are declared "common pastures" by N.M. Stat. Ann. §§ 7-3-5, 7-3-6 (1953) or to the "public domain of the United States, or otherwise" upon which owners of water rights may acquire rights to pasture stock under N.M. Stat. Ann. §§ 7-3-13, 7-3-14 (1953), or both.

400. Dictum in *Schofield v. Territory ex rel. American Valley Co.*, 9 N.M. 526, 543, 56 Pac. 306, 314-15 (1899), construes this provision to mean that the sheriff may not stop his seizure of stock at the point where he gets a few head belonging to others but at the point where "it would be necessary to gather such number of stock belonging to other owners as would do them some substantial injury or damage."

401. N.M. Laws 1884, ch. 47, §§ 1, 2, at 137.

402. N.M. Laws 1895, ch. 6, §§ 4, 9, at 28, 29 (now N.M. Stat. Ann. §§ 47-9-6, 47-9-8 (1953)). This statute makes it unlawful for a county clerk to record a brand until it is first recorded with the Board (§ 47-9-10), but it does not require county recording, or prescribe any effect to be given to county recording.

403. N.M. Stat. Ann. § 24-4-1 (1953).

404. See note 9, *supra*.

But even this is not the end of the uncertainty. Presumably, after the enactment of the special statute in 1889, it prescribed the exclusive method for levy of attachment in situations to which it was applicable, and the general provisions for levy of attachment on personal property no longer applied to levies on range cattle.⁴⁰⁵ The 1889 statute has not been repealed. The fact that it has been largely if not entirely unworkable since 1895 will hardly operate to restore the original coverage of the general attachment law.

Stock of another sort was provided for by an 1882 enactment applicable to a defendant who "shall have or own any interest or amount of shares in any . . . corporation incorporated under the laws of" New Mexico "or any foreign corporation doing business in" New Mexico. The levying officer is directed to attach such shares by indorsing on the attachment writ his levy on the "shares or interest of the defendant" and serving a copy of the indorsed writ on the president of the company by leaving it at the corporation's "usual and most notorious place of doing business" in New Mexico.⁴⁰⁶ Thereafter, any transfer of the stock or interest is void and the sheriff on subsequent execution sale is directed to issue certificates of purchase which the corporation is required to recognize by transferring the stock on its books and issuing new stock certificates to the purchaser.⁴⁰⁷

In 1903 provisions were added, not to change the method of levy, but to aid the levying creditor in discovering defendant's shareholdings. They authorize the levying officer to serve notice of levy on the secretary of the corporation, or

405. N.M. Laws 1889, ch. 54, § 5, at 113, contained a standard repealer of "all acts or parts of acts in conflict herewith."

406. N.M. Stat. Ann. §§ 26-1-38, 26-1-41, 26-1-42 (1953). A separate Act, N.M. Laws 1882, ch. 32 §§ 1-3 provided for levy of execution upon corporate shares by giving notice to defendant and to one of certain designated corporate officers. Events in Missouri followed a different course. Mo. Rev. Stat. ch. 61 §§ 18, 19 (1845); Mo. Ann. Stat. §§ 513.115, 513.120 (1953), provided for levy of execution upon "rights or shares" in a corporation by serving the writ on one of certain designated corporate officers, but no provision was made for attachment. The Missouri court concluded therefore that attachment of corporate shares was not authorized. *Foster v. Potter*, 37 Mo. 525 (1866). A statute was then enacted providing for attachment of corporate shares "in the same manner as the same may be levied upon under execution." Mo. Ann. Stat. § 521.250 (1953). Under this statute attachment by serving the writ upon the proper corporate officer will reach defendant's interest in shares held in the name of another. *Tufts v. Volkening*, 122 Mo. 631, 27 S.W. 522 (1894). Although both the attachment and execution statutes refer to "any corporation" they are confined to Missouri corporations, at least in part because the Missouri court believes that shares in a foreign corporation are beyond the constitutional reach of Missouri. *Armour Brothers Banking Co. v. The St. Louis Nat'l Bank*, 113 Mo. 12, 20 S.W. 690 (1892); *Richardson v. Busch*, 198 Mo. 174, 95 S.W. 894 (1906); *State ex rel. North American Co. v. Koerner*, 357 Mo. 908, 211 S.W.2d 698 (1948), appeal dismissed 335 U.S. 803 (1948).

407. In the exact language of the statute, the corporation is to "afford the purchaser such evidence of title to the stock purchased as is usual and necessary with other stockholders." N.M. Stat. Ann. § 26-1-42 (1953). This is broad enough to cover the case where the defendant has an "interest" in the shares but no legal title, so that stock certificates would not be the "usual and necessary" evidence of title.

on any agent of a foreign corporation upon whom process can be served if the secretary cannot be served. The secretary or agent so served is then required to give the officer a verified statement of the "number of shares or amount of the interest" of the defendant in the corporation.⁴⁰⁸

From 1882 until 1943, it was clear that the method of levying attachment on corporate stock was by leaving a copy of an indorsed writ at the corporation's usual and most notorious place of business in the state.⁴⁰⁹ In the latter year, however, New Mexico adopted the Uniform Stock Transfer Act. Section 13 of that Act provides:

No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate has been lost or destroyed, such corporation shall not be compelled to issue a new certificate until the old certificate is surrendered to it.⁴¹⁰

Although the Act contained a standard repealer of "all acts or parts of acts inconsistent herewith,"⁴¹¹ it is clear that the 1882 statute was not to be repealed. Section 13 by its terms applied only to stock "for which a certificate is outstanding" and it could hardly have been intended to allow a stockholder to immunize his holdings from creditors' process by having the corporation withhold a certificate. Moreover, Section 23 provided⁴¹² that the entire Act applied

408. N.M. Laws 1903, ch. 94, §§ 1, 2 at 167 (now N.M. Stat. Ann. §§ 26-1-39, 26-1-40 (1953)). This statute is also applicable where levy is to be made under execution. The 1882 statute governing execution levy on corporate stock (note 406 *supra*) was repealed by the 1905 General Corporation Act, which contained its own provisions for levying execution by serving a copy of the writ and a notice of levy upon one of certain designated corporate officers. N.M. Laws 1905, ch. 79, §§ 126-128, 134 at 188, 192. These provisions are now codified with the other execution statutes. N.M. Stat. Ann. §§ 24-3-1 through 24-3-4 (1953). The General Corporation Act also contained a section authorizing levy of attachment on corporate stock in the same manner as levy of execution, N.M. Laws 1905, ch. 79, § 130 at 190, but this provision was omitted from the 1915 Code.

409. Save for the period 1905-1915 when the alternate method of levy on writs of execution apparently was also available. See note 408 *supra*.

410. N.M. Stat. Ann. § 51-5-13 (1953). Section 14 of the Act provides that "A creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process." In the Missouri version of the Uniform Stock Transfer Act, § 13 is considerably modified to conform to the existing law referred to in note 406, *supra*. See Mo. Stat. Ann. § 403.170 (1953); State *ex rel.* North American Co. v. Koerner, 357 Mo. 708, 211 S.W.2d 698 (1948); Maichel, The Uniform Stock Transfer Act in Missouri, 1951 Wash. U.L.Q. 384 (1951).

411. N.M. Laws 1943, ch. 67, § 24 at 95.

412. N.M. Stat. Ann. § 51-5-23 (1953).

"only to certificates issued after" its effective date (July 11, 1943),⁴¹³ so that the 1882 statute remained applicable to all earlier-issued certificates.⁴¹⁴ In addition, Section 22 defined "certificate" as "a certificate of stock in a corporation organized under the laws of this state or of another state whose laws are consistent with this act."⁴¹⁵ Hence, the 1882 statute remained applicable to levies on stock in corporations organized in states which have not adopted the Uniform Act or a similar act.⁴¹⁶ And even for corporations formed in other states which have adopted the Uniform Act, Section 23 of our Act made it inapplicable, and left the 1882 statute to apply to certificates issued by such corporations prior to July 11, 1943. The special treatment accorded stock in foreign corporations apparently was in deference to the notion that the state of incorporation is entitled to determine, and other states are obliged to respect the determination, whether the "situs" of shares is to be in the state of incorporation or elsewhere—with adoption of the Uniform Act treated as a determination that the "situs" follows the stock certificates.⁴¹⁷

Because Section 13 provides that "no attachment or levy upon shares of stock . . . shall be valid until" one of three steps has been taken, an apparently more serious question was whether Section 13 was intended to require one step in addition to the method of levy prescribed by the existing attachment law, or whether any one of the steps prescribed by Section 13 was itself, without more, to constitute a valid attachment levy. Some cases seem to assume that it is enough to have the levying officer seize the certificate, or to have its transfer by the holder enjoined.⁴¹⁸ Others assume that prior statutes relating to attach-

413. See N.M. Const. art. IV, § 23; *Garcia v. J. C. Penny Co.*, 52 N.M. 410, 200 P.2d 372 (1948).

414. *Equitable Trust Co. v. Gallagher*, 31 Del. Ch. 88, 67 A.2d 50 (1949), *aff'd* 32 Del. Ch. 401, 77 A.2d 548 (1950); *Knight v. Shutz*, 141 Ohio St. 267, 47 N.E.2d 886 (1943); *Peoples Bank v. Jones*, 193 Ga. 720, 20 S.E.2d 74 (1942); *Tobias v. Wolverine Mining Co.*, 52 Idaho 576, 17 P.2d 338 (1932); *Columbia Brewing Co. v. Miller*, 281 Fed. 289 (5th Cir. 1922).

415. N.M. Stat. Ann. § 51-5-22 (1953). The Section contains a similar definition of "shares." In the Commissioners' Note on this Section the reference is to "a similar act." 6 Uniform Laws Ann. 25-26 (1922). While all states have at one time or another adopted the Uniform Stock Transfer Act, those which have adopted the Uniform Commercial Code have in the process repealed the USTA. And several states have not adopted § 13 of the USTA or have revised it considerably. See Note, 73 Harv. L. Rev. 1579 (1960); Austin & Nelson, *Attaching and Levying on Corporate Shares*, 16 Bus. Law. 336 (1961).

416. *Mills v. Jacobs*, 333 Pa. 231, 4 A.2d 152 (1939); *United States Fid. & Guar. Co. v. Newburger*, 263 N.Y. 16, 188 N.E. 141 (1933); *Penington v. Commonwealth Hotel Const. Corp.*, 18 Del. Ch. 170, 156 Atl. 259 (1931). See *Turnbull v. Longacre Bank*, 249 N.Y. 159, 163 N.E. 135 (1928).

417. *Mills v. Jacobs*, note 416 *supra*; *Direction der Disconto. Gesellschaft v. United States Steel Corp.*, 267 U.S. 22 (1925); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1 (1899); *United Cigarette Mach. Co. v. Canadian Pac. Ry. Co.*, 12 F.2d 634 (2d Cir. 1926). See *Krizanek v. Smith*, 32 Del. Ch. 513, 87 A.2d 871 (1951). Cf. *Wirt Franklin Petroleum Corp. v. Gruen*, 139 F.2d 659 (5th Cir. 1944).

418. *Mills v. Jacobs*, 333 Pa. 231, 4 A.2d 152 (1939); *Bowen v. Magee*, 14 N.J. Misc. 7, 182 Atl. 28 (1935); *Johnson v. Wood*, 15 N.J. Misc. 150, 189 Atl. 613 (1936).

ment of corporate stock are still applicable and must also be complied with,⁴¹⁹ and one court has so held.⁴²⁰

In any event, compliance with prior law will not alone suffice.⁴²¹ There must also be a seizure of the certificate,⁴²² or it must be surrendered to the corporation, or its transfer enjoined. And the injunction must run against the holder of the certificate, not against the corporation⁴²³—which means that personal jurisdiction over the holder must be obtained in any case where the certificate is beyond reach and has not been surrendered to the corporation.⁴²⁴

The injunction against transfer is, moreover, less insurance against conflicting claims than seizure or surrender of the certificate, since the holder may disregard the injunction and transfer the certificate.⁴²⁵ Moreover, since the second sentence of Section 13 expressly excuses the corporation from any obligation to issue a new certificate until the old one is surrendered to it, further proceedings against the holder under Section 14⁴²⁶ may be necessary in connection with sale of his attached interest on execution.⁴²⁷

But all rules in New Mexico about attachment of corporate stock were

None of these cases goes so far as to suggest that a mere surrender of the certificate to the corporation, without more, would constitute a valid levy.

419. *Hodes v. Hodes*, 176 Ore. 102, 155 P.2d 564 (1945); *Amm v. Amm*, 117 N.J. Eq. 185, 175 Atl. 186 (1934); *Progressive Bldg. & Loan Ass'n v. Rudolph*, 113 N.J.L. 204, 172 Atl. 884 (1934); *Trade Bond & Mortgage Co. v. Schwartz*, 303 Ill. App. 165, 24 N.E.2d 892 (1940).

420. *Glenn v. Ferrell*, 5 Utah 2d 439, 304 P.2d 380 (1956).

421. *Frost v. Davis*, 288 F.2d 497 (5th Cir. 1961); *Harbridge v. American Nat'l Bank*, 177 Wis. 206, 187 N.W. 853 (1922); *Wallach v. Stein*, 102 N.J.L. 517, 133 Atl. 81, 396 (1926), *aff'd* 103 N.J.L. 470, 136 Atl. 209 (1927); *Elgart v. Mintz*, 123 N.J. Eq. 404, 197 Atl. 747 (1938); *American Surety Co. v. Kasko Mills*, 149 Misc. 10, 266, N.Y.S. 531 (1932), *aff'd* 237 App. Div. 880, 261 N.Y.S. 987, *aff'd* 262 N.Y. 585, 188 N.E. 75 (1933); *Snyder Motor Co. v. Universal Credit Co.*, 199 S.W.2d 792 (Tex. Civ. App. 1947); *Claude Neon, Inc. v. Birrell*, 177 F. Supp. 706 (S.D. N.Y. 1959).

422. *Mulock v. Ulizio*, 102 N.J.L. 251, 131 Atl. 622, 623 (1926), where the stock certificate was pledged, held there was no valid levy where the sheriff took the certificate in his hands, "announced that he levied upon the said certificate of stock by virtue of the execution," and then returned the certificate to the pledgee. Cf. *Mills v. Jacobs*, 333 Pa. 231, 4 A.2d 152 (1939), where the certificates were seized and sold and the pledgee's rights were transferred to the proceeds. See also *United States v. Lucas*, 148 F. Supp. 768 (M.D. N.C. 1957). But see *Crane v. Crane*, 373 Pa. 1, 95 A.2d 199 (1953).

423. *Elgart v. Mintz*, 123 N.J. Eq. 404, 197 Atl. 747 (1938); *Amm v. Amm*, 117 N.J. Eq. 185, 175 Atl. 186 (1934); *Johnson v. Wood*, 15 N.J. Misc. 150, 189 Atl. 613 (1936); *Bloch-Daneman Co. v. J. Mandelker & Son, Inc.*, 205 Wis. 641, 238 N.W. 831 (1931). *Hodes v. Hodes*, 176 Ore. 102, 155 P.2d 564 (1943), concludes that the owner is the "holder" and may be enjoined although the stock certificates are in a safety deposit box under his control in another state.

424. *Frost v. Davis*, 288 F.2d 497 (5th Cir. 1961); *Elgart v. Mintz*, note 423 *supra*; *Amm v. Amm*, note 423 *supra*; *Johnson v. Wood*, note 423 *supra*.

425. See *Overlock v. Jerome-Portland Copper Mining Co.*, 29 Ariz. 560, 243 Pac. 400 (1926).

426. Note 410 *supra*.

427. See *Knight v. Shutz*, 141 Ohio St. 267, 47 N.E.2d 886 (1943); *Hodes v. Hodes*, 176 Ore. 102, 155 P.2d 564 (1945); *Luks v. Luks*, 106 N.J. Eq. 160, 150 Atl. 346 (1930).

changed after December 31, 1961, when the new Uniform Commercial Code became effective.⁴²⁸ Article 8 of the Code governs transactions in "Investment Securities" and Section 8-102⁴²⁹ defines the "security" to which the Article applies as an instrument which:

- (i) is issued in bearer or registered form;⁴³⁰ and
- (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
- (iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
- (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Obviously, this definition is broad enough to cover corporate⁴³¹ stock certificates as well as bonds and other evidences of indebtedness. According to the official Comments on the Code, the definition is intended to "cover anything which securities markets, including not only the organized exchanges but as well the 'over-the-counter' markets, are likely to regard as suitable for trading. For example, transferable warrants evidencing rights to subscribe for shares in a corporation will normally be 'securities' within the definition."⁴³²

Attachment of the securities so defined is governed by Section 8-317,⁴³³ which provides:

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy, but a security which has been surrendered to the issuer may be attached or levied upon at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by

428. N.M. Laws 1961, ch. 96, § 10-101, at 414.

429. N.M. Stat. Ann. § 50A-8-102 (Supp. 1961).

430. Definitions in Section 8-102 provide that a security is in "bearer form" when it runs to bearer according to its terms and not by reason of any endorsement and that it is in "registered form" when it specifies a person entitled to the security or the rights it evidences and when its transfer may be registered upon books maintained for that purpose by or on behalf of an issuer or the security so states.

431. If the terms of the definition are met, it is not necessary that the issuer be incorporated. Section 8-201 (30) defines "issuer" as a "person" and Section 1-201 (30) provides that "person" includes "an individual or an organization." Section 1-201 (28), in turn, defines "organization" to include a "corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity."

432. See Comment accompanying § 8-102, Uniform Commercial Code (1958 Official Text) at 530-31.

433. N.M. Stat. Ann. § 50A-8-317 (Supp. 1961).

means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

As the official Comments on this section make clear, injunctive and other equitable remedies may still be used by creditors "to gain control of the security" and subject it to levy,⁴³⁴ but the injunction is no longer "operative as an effective levy." The levy is accomplished only by one of two methods whereby "all possibility of the security finding its way into a transferee's hands has been removed." While the statute itself is vague as to the method of levy "at the source" where the security has been surrendered to the issuer, the official Comments indicate that this is to be done by "an attachment filed at the issuer's office."⁴³⁵

At least in New Mexico, there is no longer any question as to the applicability of prior statutes relating to levy upon corporate stock. Section 10-102 of the Commercial Code expressly repeals the Uniform Stock Transfer Act,⁴³⁶ the 1882 attachment statute,⁴³⁷ the 1903 discovery statute,⁴³⁸ the 1905 execution statute⁴³⁹ and certain sections of the 1909 garnishment statute.⁴⁴⁰ Section 8-317 of the Code remains as the only statute governing levy of attachment or execution on corporate stock. And section 8-317 may also repeal, with respect to debts evidenced by "securities" of the sort to which it applies, so much of the general attachment law as authorizes attachment of "credits"⁴⁴¹ and "evidences of debt,"⁴⁴² and as provides that the situs of debts and obligations for the purpose of attachment is the domicile of the debtor or obligor and the situs of "intangible interests" in property is the place where the property is located.⁴⁴³

There are rough edges remaining, however. While Section 8-317 is not confined to interests in incorporated enterprises,⁴⁴⁴ it is by its terms confined

434. But see *Nederlandsche Handel-Maatschappij v. Sentry Corp.*, 163 F. Supp. 800 (E.D. Pa. 1958), where the court, with personal jurisdiction over the defendant, refused to read § 8-317(2) to authorize a mandatory injunction directing defendant to bring its stock certificates into the state and surrender them to the sheriff.

435. Comment, Uniform Commercial Code (1958 Official Text) § 8-317 at 570.

436. N.M. Stat. Ann. §§ 51-5-1 through 51-5-24 (1953).

437. N.M. Stat. Ann. §§ 26-1-38, 26-1-41, 26-1-42 (1953).

438. N.M. Stat. Ann. §§ 26-1-39, 26-1-40 (1953). Discovery proceedings should now be available under N.M. Stat. Ann. § 50A-8-317(2) (Supp. 1961).

439. N.M. Stat. Ann. §§ 24-3-1 through 24-3-4 (1953). See note 408 *supra*.

440. N.M. Stat. Ann. § 26-2-11 (1953), requiring garnisheed corporations or joint stock companies to disclose defendant's shares, rights or interests in the garnishee, and § 26-2-22 providing for sale of defendant's shares or interest on execution.

441. N.M. Stat. Ann. § 26-1-4, 26-1-13 (1953).

442. N.M. Stat. Ann. § 26-1-17 (Supp. 1961). Section 10-102 of the Commercial Code contains a specific repealer of "all other acts and parts of acts inconsistent therewith." It is relevant too, in connection with the suggestion in note 379, *supra*, that § 8-102(b) of the Commercial Code provides that any negotiable instrument which qualifies as a "security" is governed by the Investment Securities Article and not by the Commercial Paper Article. N.M. Stat. Ann. § 50A-8-102(b) (Supp. 1961).

443. N.M. Stat. Ann. § 26-1-3 (1953).

444. See note 431, *supra*.

to such interests as are represented by an instrument in bearer or registered form, of a type commonly dealt in upon securities markets or commonly recognized as a medium for investment, which is either one of a class or series or by its terms divisible into a class or series. Any interest not represented by such an instrument is not attachable under Section 8-317, although it might have been attachable under the 1882 statute which covered "any interest or amount of shares in any company doing business in" New Mexico, as well as in New Mexico corporations and in foreign corporations doing business here.⁴⁴⁵ Perhaps such interests may be attachable under the general attachment laws as non-possessory interests in tangible property—by filing the writ in the county where the business enterprise's real estate is located, notifying the occupants thereof, and making the prescribed return,⁴⁴⁶ and by serving an indorsed writ upon the enterprise to reach defendant's interest in its personalty.⁴⁴⁷ But the general attachment statute does not seem to reach interests in intangible property⁴⁴⁸ or non-possessory interests in tangible property located outside the state.⁴⁴⁹ Hence, if the enterprise owned property of either sort, attachment would not reach defendant's interest in the enterprise's assets.

With respect to one type of interest in a business enterprise not covered by Section 8-317 of the Commercial Code, our statutes remain clear. Under Section 25(2)(c) of the Uniform Partnership Act,⁴⁵⁰ "A partner's right in specific partnership property⁴⁵¹ is not subject to attachment or execution, except on a claim against the partnership." The individual creditor's remedy is, instead, first to get judgment and then to apply under Section 28 for a charging order, and, if necessary, a receiver, to reach his debtor's interest in the partnership profits,⁴⁵² or the court may order a sale of the partner's interest.⁴⁵³ As has been pointed out elsewhere,⁴⁵⁴ Section 25(2)(c) merely forbids attachment of specific partnership property and Section 28 authorizes a method by which an individual creditor *with judgment* can reach a partner's interest in profits. Neither forbids attachment or garnishment of the partner's interest in profits

445. N.M. Stat. Ann. § 26-1-38 (1953).

446. See pp. 83-84, *supra*.

447. See p. 88, *supra*.

448. See p. 88, *supra*.

449. See note 395 *supra*.

450. N.M. Stat. Ann. § 66-1-25(2)(c) (1953).

451. Under § 25(1), "A partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership." N.M. Stat. Ann. § 66-1-25(1) (1953).

452. N.M. Stat. Ann. § 66-1-28 (1953). The Uniform Limited Partnership Act similarly provides for a charging order to reach the interest of a limited partner. N.M. Stat. Ann. § 66-2-22 (1953).

453. Technically, the § 28 charging order reaches "the interest of the debtor partner." Section 26 provides that, "A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." N.M. Stat. Ann. § 66-2-26 (1953). See 1 Rowley, *Partnership* §§ 25-2(c), 28.1 and 28.2 (2d ed. 1960).

454. Gose, *The Charging Order Under the Uniform Partnership Act*, 28 Wash. L. Rev. 1, 20 (1953). See also Note, 9 Wyo. L.J. 112 (1955).

before judgment, if that is possible under the attachment and garnishment statutes. Since the partner's interest can be assigned⁴⁵⁵ and sold pursuant to court order after judgment against the partner,⁴⁵⁶ the only obstacle to attachment in New Mexico is the absence of provision in our attachment statute for levying upon interests in intangible property.⁴⁵⁷ Garnishment is likewise generally unavailable because confined by our statute to shares of and interests in corporations and joint stock companies.⁴⁵⁸ While garnishment is also available to reach "debts" due the defendant,⁴⁵⁹ a partner's claim for his share of profits is not a debt of the form collectible by an action at law or, normally, by an accounting prior to dissolution.⁴⁶⁰

The availability of garnishment to reach other equity or debt interests which will not fit the definition of "security" covered by Section 8-317 of the Commercial Code is similarly unclear. Indeed, in view of the selective repeal of garnishment provisions made by the Code,⁴⁶¹ it is not clear that garnishment may not be used to reach equity and debt interests which are represented by securities reachable under Section 8-317, although garnishment of such interests might not be valid unless there was also compliance with that section.⁴⁶² The affidavit for garnishment may still allege that the garnishee is indebted to the defendant or is a corporation or joint stock company in which defendant owns shares or has an interest.⁴⁶³ The writ is directed to garnishees indebted to defendant⁴⁶⁴ though no longer to corporations or joint stock companies in which he owns a share or has an interest.⁴⁶⁵ The service of the writ has "the effect of attaching" all sums "owing" to defendant and "all bonds, bills, notes, drafts, or other choses in action"⁴⁶⁶ and of making unlawful the payment by

455. N.M. Stat. Ann. § 66-1-27 (1953).

456. N.M. Stat. Ann. § 66-1-28(2) (1953).

457. See p. 88, *supra*. The assignee of a partner's interest does not become entitled to an accounting until dissolution. Prior thereto he is merely entitled "to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled." N.M. Stat. Ann. § 66-1-27 (1953).

458. See text at note 305 *supra*. The joint stock company, as distinguished from the corporation, is itself a specialized type of partnership. See Burns, Joint Stock Co. in 8 *Encyc. Soc. Sci.* 411 (1932); New York Law Revision Comm'n Ann. Rep. 267-69 (1937).

459. N.M. Stat. Ann. §§ 26-2-4, 26-2-12, 26-2-13, 26-2-19 (1953).

460. See N.M. Stat. Ann. §§ 66-1-22, 66-1-40 (1953); Willey v. Renner, 8 N.M. 641, 45 Pac. 1132 (1896).

461. See note 440 *supra*. But there is a general repealer in Section 10-103 of "acts and parts of acts inconsistent" with the Commercial Code. N.M. Laws 1961, ch. 96, § 10-103, at 416.

462. Section 13 of the Uniform Stock Transfer Act, which like § 8-317 of the Commercial Code, applies to an "attachment or levy," was held applicable to garnishment in *Frost v. Davis*, 288 F.2d 497 (5th Cir. 1961) and in *Snyder Motor Co. v. Universal Credit Co.*, 199 S.W.2d 792 (Tex. Civ. App. 1947).

463. N.M. Stat. Ann. § 26-2-4 (1953).

464. N.M. Stat. Ann. §§ 26-2-13, 26-2-29 (1953).

465. See note 440 *supra*. But the statutory form of writ still provides for such corporations or joint stock companies. N.M. Stat. Ann. § 26-2-13 (1953).

466. N.M. Stat. Ann. § 26-2-12 (1953).

the garnishee of any debt to the defendant or the recognition by the garnisheed corporation or joint stock company of any sale or transfer of defendant's share or interest⁴⁶⁷ and the garnishment proceedings may culminate in a judgment against the garnishee for any amount found due from garnishee to defendant.⁴⁶⁸ But plaintiff may no longer get a decree ordering sale of defendant's shares of or interest in a corporation or joint stock company—even though the shares or interest are not represented by the type of "security" attachable under Section 8-317 of the Commercial Code.⁴⁶⁹

The Commercial Code makes no distinction between securities issued before and those issued after its enactment.⁴⁷⁰ Neither, with respect to securities of foreign corporations, does it distinguish between those incorporated in states having an act similar to the Article on Investment Securities and those incorporated in other states.⁴⁷¹ And thereby another problem may arise when the stock to be attached under Section 8-317 of the Code is issued by a corporation formed in a state which does not recognize that the "situs" of the stock follows the certificate.⁴⁷² As previously indicated,⁴⁷³ the prevailing notion seems to be that the state of attachment must respect the "situs" determination of the state of incorporation. If, as is not yet determined, this is a matter of constitutional compulsion rather than a mere choice-of-law rule, Section 8-317 will not authorize attachment of stock in corporations, formed in other states which claim the "situs," by seizure of the certificate in New Mexico. Service of the writ upon an agent capable of accepting service of process for the foreign corporation might be effective under Section 8-317 if the stock certificates have been surrendered to the corporation. But if the certificates have not been so surrendered, service of the writ upon the corporate agent would not constitute a

467. N.M. Stat. Ann. § 26-2-16 (1953). N.M. Stat. Ann. § 50A-4-303 (Supp. 1961) appears to modify the provision somewhat so far as payor banks are concerned.

468. N.M. Stat. Ann. § 26-2-19 (1953).

469. See note 440, *supra*.

470. N.M. Laws 1961, ch. 96 § 10-101, at 414, provides that the Code shall apply "to transactions entered into and events occurring after" its effective date. See also N.M. Laws 1961, ch. 96, § 10-102(2), at 416. But, with respect to attachment, this appears to refer to the time of attachment rather than to the time of issuance of the security attached.

471. Hence, it is not necessary with respect to New Mexico attachments of stock in foreign corporations to speculate whether the Uniform Stock Transfer Act is sufficiently similar to the Investment Securities Article of the Code. But such speculation will be necessary for attachment in states having the Uniform Stock Transfer Act of stock in corporations formed in states adopting the Commercial Code.

472. N.M. Stat. Ann. § 50A-8-106 (Supp. 1961), of the Commercial Code provides that, "The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of organization of the issuer." The language is not apt to incorporate the law of the state of incorporation as to the "situs" of the security.

473. See text at note 417, *supra*.

valid levy under Section 8-317, and all prior statutes authorizing attachment levy by service upon the corporation have been repealed.⁴⁷⁴

It is probable, too, that the Commercial Code will not govern attachment of stock in national banks. A federal statute⁴⁷⁵ provides that such stock shall be "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association," and by-law provisions as to the method of transfer have heretofore been held controlling in attachment proceedings.⁴⁷⁶

In two other areas, Uniform Laws adopted in New Mexico have undertaken to fashion special rules for attachment. Section 24 of the Uniform Bills of Lading Act, adopted here in 1947, provides that if goods are delivered to a carrier by the owner or by one with power to transfer title:

and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise,⁴⁷⁷ or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.⁴⁷⁸

With respect to a non-negotiable bill, Section 33 provides that the title of a transferee of the bill "may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor" unless the transferor or the transferee has, prior to such levy, notified the carrier of the transfer of the bill.⁴⁷⁹ For shipments in interstate commerce and foreign exports, the vir-

474. There seems to be no similar notion about the authority of the state of incorporation to define the "situs" of corporate debt securities, and hence no similar problem in the application of § 8-317 of the Commercial Code, N.M. Stat. Ann. § 50A-8-317 (Supp. 1961). See Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 Yale L.J. 241 (1939); Stumberg, *Commercial Paper and the Conflict of Laws*, 6 Vand. L. Rev. 489 (1953).

475. 49 Stat. 710, 720 (1935), 12 U.S.C. § 52 (1952).

476. *Bateman v. Gits*, 16 N.M. 441, 120 Pac. 307 (1911); *Continental Nat'l Bank v. Eliot Nat'l Bank*, 7 Fed. 369 (C.C.D. Mass. 1881); *Scott v. Peoquonnock Nat'l Bank*, 15 Fed. 494 (C.C.S.D.N.Y. 1883); *Hazard v. National Exch. Bank*, 26 Fed. 94 (C.C.D.R.I., 1886); *Sibley v. Quinsigamond Nat'l Bank*, 133 Mass. 515 (1882); *Doty v. First Nat'l Bank*, 3 N.D. 9, 53 N.W. 77 (1892). Cf. *In re Braden's Estate*, 165 Pa. St. 184, 30 Atl. 746 (1895).

477. As noted at pp. 76-77, *supra*, this is a situation where, the debtor's goods being in the possession of another, our statutes appear to authorize either attachment or garnishment.

478. N.M. Stat. Ann. § 50-12-24 (1953). Section 25 authorizes the creditor to receive "such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof as is allowed by law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process." N.M. Stat. Ann. 50-12-25 (1953). Sections 39 and 40 of the Uniform Sales Act, never adopted in New Mexico, contain similar provisions.

479. N.M. Stat. Ann. § 50-12-33 (1953).

tually identical provisions of the Federal Bills of Lading Act are applicable.⁴⁸⁰

The Uniform Warehouse Receipts Act contains identical provisions with respect to goods warehoused under negotiable and non-negotiable receipts, and a garbled version of this Act has been in effect in New Mexico since 1909.⁴⁸¹

Since the documents covered by these Acts, and particularly the bills of lading, are instruments of short life and high mobility, the attaching creditor must be nimble. An attachment, though in full compliance with statutory requirements, will avail him nothing if effected at a stage in the negotiation of the document when title to the goods has not yet reached, or has departed from, his debtor.⁴⁸²

Because these statutes are somewhat more clear on the point than the Uniform Stock Transfer Act, or perhaps because tangible goods are involved, no one seems to have assumed that an effective attachment or garnishment of the goods is made merely by having the document surrendered to the carrier or warehouseman or its negotiation enjoined. One of these steps is essential, in addition to what may be required by the attachment or garnishment laws, in order to make a valid levy,⁴⁸³ and the carrier or warehouseman who surrenders

480. 49 U.S.C. §§ 81, 103, 104, 112 (1952).

481. N.M. Stat. Ann. §§ 50-8-25, 50-8-26, 50-8-42 (1953). The garbling is in the third paragraph of § 50-8-42, which, ignoring some quaint spelling, should be revised as indicated: "Prior to notification of the warehouseman by the transferer or transferee of a non-negotiable receipt, the title of the transferer [transferee] to the goods . . . may be defeated by the levy of attachment or execution upon the goods by a creditor of the transferer"

482. See *Goldstein v. Societa Veneziana Per L'Industria Delle Conterie*, 193 App. Div. 168, 183 N.Y.S. 460 (1920); *Neumann v. Reiss*, 138 Misc. 576, 245 N.Y.S. 464 (1930); *P. Pastene & Co. v. Irving Nat'l Bank*, 249 N.Y. 272, 164 N.E. 49 (1928); *First Nat'l Bank v. McClain, Adams & Co.*, 279 S.W. 614 (Tex. Civ. App. 1926); *State Sav. & Trust Co. v. Kinsolving*, 195 Mo. App. 326, 190 S.W. 379 (1916); *First & Old Detroit Nat'l Bank v. Holloman*, 86 Okla. 246, 208 Pac. 791 (1922); *Burdg v. Scott*, 111 Kan. 610, 208 Pac. 668 (1922); *Cremonin v. Wahhab*, 275 App. Div. 561, 90 N.Y.S.2d 604 (1949), appeal dismissed. 300 N.Y. 459, 88 N.E.2d 324 (1949); *Ex parte Benjamin Harris & Co.*, 141 S.C. 430, 140 S.E. 101 (1927). This frequently means that the attaching creditor of a shipper must litigate the question whether a bank with whom the shipper has deposited a draft with bill of lading attached has "purchased" the documents or taken them as agent for collection only. See *Goldstein v. Societa Veneziana Per L'Industria Delle Conterie*, *supra*; *P. Pastene & Co. v. Irving Nat'l Bank*, *supra*; *First Nat'l Bank v. McClain, Adams & Co.*, *supra*; *Burdg v. Scott*, *supra*. The creditor may, of course, face the same issue if he tries to reach the proceeds of the draft rather than the goods. *Campbell v. Noble-Trotter Rice Milling Co.*, 188 S.C. 212, 198 S.E. 373 (1938). Sections 2 and 4 of the Bank Collection Code, sponsored by the American Bankers' Association, are designed to insure that the collecting bank holds as agent for collection only unless "otherwise provided by agreement and except as to subsequent holders of a negotiable instrument payable to bearer or endorsed specially or in blank." N.M. Stat. Ann. §§ 48-9-2, 48-9-4 (1953).

483. *Brimberg v. Hartenfeld Bag Co.*, 89 N.J. Eq. 425, 105 Atl. 68 (1918); *International Bedding Co. v. Terminal Warehouse Co.*, 146 Md. 479, 126 Atl. 902 (1924); *Pottash v. Albany Oil Co.*, 274 Pa. 384, 118 Atl. 317 (1922); *Keith v. J. F. Arnold & Co.*, 254 Ill. App. 115 (1929). This requirement applies even when the warehouseman is

the goods to the attaching creditor where neither step has been taken may be liable to the holder of the document.⁴⁸⁴ Indeed, the carrier or warehouseman need not surrender the goods merely because negotiation of the document has been enjoined. The injunction perfects the levy but the carrier or warehouseman is, by express provision of the statutes, entitled to retain the goods until the document is surrendered to him or impounded by the court.

If "surrender" of the document is relied upon to validate the attachment, it must be made by one "authorized to make a surrender under circumstances which would relieve the carrier [or warehouseman] from responsibility for failure to deliver the goods." It is not enough that a carrier holds the bill with instructions to return the goods to the consignor after the consignee has rejected them.⁴⁸⁵ If injunction against negotiation is to be the validating device, it must run against the holder of the document, not the carrier or warehouseman,⁴⁸⁶ and it must be an injunction—service of the attachment writ on the holder will not suffice.⁴⁸⁷

The statutes, in any event, protect only goods covered by a negotiable document,⁴⁸⁸ after the document is issued,⁴⁸⁹ and while the goods are in the possession of the warehouseman or carrier.⁴⁹⁰ Goods covered by a non-negotiable document

plaintiff. *Standard Bonded Warehouse Co. v. Cooper & Griffin*, 30 F.2d 842 (W.D.N.C. 1929).

484. *Manufacturers' Mercantile Co. v. Monarch Refrigerating Co.*, 266 Ill. 584, 107 N.E. 885 (1915); *Love v. People's Compress Co.*, 137 Miss. 622, 102 So. 275 (1924). The safe course for the carrier or the warehouseman is to appear in the attachment or garnishment proceeding and invoke the statute to defeat the levy, *Keith v. J. F. Arnold & Co.*, note 483 *supra*, or at least to notify the holder of the document so that he may do so. *Love v. People's Compress Co.*, *supra*.

485. *Meyers Lumber Co. v. Wayne Mach. Co.*, 123 Misc. 517, 206 N.Y.S. 1 (1924).

486. It is not necessary to conclude, as one court has, that the statute forbids an injunction against the carrier shipping or releasing the goods. *Frederick Leyland & Co. v. Webster Bros. & Co.*, 283 S.W. 332 (Tex. Civ. App. 1926). The injunction may be granted, *Chicago B. & Q. Ry. Co. v. Fowler*, 224 Mo. App. 736, 27 S.W.2d 72 (1930), but it will not validate the attachment.

487. *Pottash v. Albany Oil Co.*, 274 Pa. 384, 118 Atl. 317 (1922).

488. *Bell v. Courteen Seed Co.*, 197 Iowa 120, 196 N.W. 1006 (1924); *Goldstein v. Scotieta Veneziana Per L'Industria Delle Conterie*, 193 App. Div. 168, 183 N.Y.S. 460 (1920). See *Stone Leather Co. v. Henry Boston & Sons*, 234 Mass. 477, 126 N.E. 46 (1920), holding that the equitable assistance to creditors authorized by the statute is available only with respect to goods covered by a negotiable document.

489. *International Bedding Co. v. Terminal Warehouse Co.*, 146 Md. 479, 126 Atl. 902 (1924). And see *Branch v. Bekins Van & Storage Co.*, 106 Cal. App. 623, 290 Pac. 146 (Dist. Ct. App. 1930), suggesting that the warehouseman may be liable to the owner for negligent delay in issuing the negotiable receipt which would have brought the goods within the protection of the statute.

490. The protection of the Bills of Lading Act is not confined to the time the goods are in transit. So long as the carrier has possession the Act applies, although the goods have been stopped in transit, *Stamford Rolling Mills Co. v. Erie Ry. Co.*, 257 Pa. St. 507, 101 Atl. 823 (1917), are held in storage at destination, *Cooper v. Crowder*, 131 S.C. 30, 126 S.E. 436 (1925), or are being unloaded by the carrier's stevedores. *Neumann v. Reiss*, 138 Misc. 576, 245 N.Y.S. 464 (1930). But the Act no longer applies where the

are subject to levy without surrender of the document or injunction against its negotiation until defendant has transferred the document and the carrier or warehouseman has been notified of the transfer.⁴⁹¹

Here also, the New Mexico law changed at the end of 1961, save for bills of lading covering interstate shipments and foreign exports. The Uniform Commercial Code repeals both the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act⁴⁹² and substitutes an Article on Documents of Title.⁴⁹³ Section 7-602⁴⁹⁴ of the Article provides:

Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

The only clear change with respect to negotiable documents is that an injunction against negotiation no longer constitutes absolute perfection of the levy. In the words of the Official Comment, "The last sentence covers the possibility that the holder of a document who has been enjoined from negotiating it will violate the injunction by negotiating to an innocent purchaser for value. In such case the lien will be defeated."⁴⁹⁵ But the Comment ignores the fact that

consignee has paid the freight charges, surrendered the bill of lading, and begun unloading the goods, *Chicago & N.W. Ry. Co. v. Alvin R. Durham Co.*, 271 U.S. 251 (1926).

491. *Tennessee Egg Co. v. Monroe*, 151 Tenn. 121, 268 S.W. 372 (1925); *Rodgers v. Murray*, 247 S.W. 888 (Tex. Civ. App. 1923). Cf. *Edward L. Eyre & Co. v. Hirsch*, 36 Wash.2d 439, 218 P.2d 888 (1950). Here, again, creditors of the shipper pursuing the proceeds of a draft may have to litigate the rights of a collecting bank. See *American Nat'l Bank v. Warren*, 96 Misc. 265, 160 N.Y.S. 413 (1916); *City Nat'l Bank v. West Virginia Farm Bureau Serv. Co.*, 109 W. Va. 158, 153 S.E. 300 (1930).

492. N.M. Laws 1961, ch. 96, § 10-102, at 414.

493. "Document of Title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass." N.M. Stat. Ann. § 50A-1-201(15) (Supp. 1961).

494. N.M. Stat. Ann. § 50A-7-602 (Supp. 1961).

495. Uniform Commercial Code (1958 Official Text), § 7.602, n. 2, at 527. N.M. Stat. Ann. § 50A-7-602 (Supp. 1961). See also Braucher, Documents of Title 80-81 (1958). The Commercial Code also repeals the Bank Collection Code, referred to in note 482, *supra*, but under § 4-201 of the new Code "Unless a contrary intent appears and prior to the time that a settlement given by a collecting bank . . . is or becomes final" the bank holds as agent for collection. N.M. Stat. Ann. § 50A-4-201 (Supp. 1961).

the second sentence of Section 7-602 also protects a purchase for value by one without notice of the "process," which might conceivably occur at some time after levy even though the document had been surrendered to the bailee at the time of levy.

Unless the word "process" is to be ignored, therefore, it seems accurate to say that under Section 7-602 a levy upon goods covered by a negotiable document can never be perfected against a bona fide purchaser for value of the document, even though the document is surrendered to the bailee or its negotiation is enjoined at time of levy.

A more substantial change is made with respect to goods covered by a non-negotiable document. Attaching creditors of the transferor can no longer prevail over the transferee merely because the bailee has not been notified of the transfer. Under Section 7-504(2) they must also show that the sale was void under Section 2-402.⁴⁹⁶ And the latter section only partially resolves existing conflict of authority as to whether retention of possession of the goods by the seller renders the sale fraudulent as to creditors.⁴⁹⁷ It provides that retention of possession "in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent." But, beyond that, it allows creditors of the seller to treat the sale as void if "retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated." And New Mexico has nothing closer to a "rule of law" on this subject than a dictum statement that retention of possession by the seller "is only prima facie evidence of fraud, which may be rebutted by proof showing the bona fides of the transaction."⁴⁹⁸

In one instance in New Mexico, attachment levy is forbidden: "No writ of attachment or execution shall be levied upon the property or assets of any bank when in the possession of the state bank examiner, special deputy bank examiner or receiver appointed by the court."⁴⁹⁹

E. The Sheriff's Return. As previously indicated,⁵⁰⁰ our attachment law contains conflicting provisions relating to the return to be made by the officer executing the writ of a district court.⁵⁰¹ One provision, originating in the Kearny Code and re-enacted in 1907, directs that original writs "shall be issued and returned in like manner as ordinary writs of summons."⁵⁰² This provision apparently now incorporates Rule 4(f)⁵⁰³ which provides:

496. N.M. Stat. Ann. §§ 50A-7-504 (a), 50A-2-402 (Supp. 1961).

497. See Braucher, Documents of Title (1958), 74.

498. Heisch v. J. L. Bell & Co., 11 N.M. 523, 70 Pac. 572 (1902).

499. N.M. Stat. Ann. § 48-7-10 (1953). Cf. text at notes 283 and 284.

500. See text at note 81, *supra*.

501. The officer executing the writ of a justice court is to make return to the justice at the time specified in the writ, which is to be not less than 5 nor more than 15 days from the date of the writ. N.M. Stat. Ann. § 36-7-6 (1953).

502. See text at notes 80, 84, 85 *supra*.

503. N.M. Stat. Ann. § 21-1-1(4) (f) (1953).

The person serving process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process.⁵⁰⁴ If service is made by a person other than a sheriff or his deputy, he shall make affidavit thereof.⁵⁰⁵ Failure to make proof of service does not affect the validity of the service.

But another statute, enacted in 1897, provides that all writs of attachment "shall be returned within sixty days from the date of the delivery thereof to the sheriff or other officer or person whose duty it is, or who may be designated to serve the same."⁵⁰⁶

The conflict, in any event, relates only to the time of making the return, not to its contents or effect. As to contents, the statutes are not very specific. The return is to contain a brief description of real estate attached and is to state that all the right, title and interest of defendant therein was attached;⁵⁰⁷ the officer is to return with the writ a schedule "of all property and effects attached,"⁵⁰⁸ and the fact that defendant cannot be personally served with process must appear from the attachment affidavit and the sheriff's return if service by publication is to be authorized.⁵⁰⁹ Beyond this, the statutes are silent, but the return obviously should recite the time and manner in which service was made,⁵¹⁰ if it was made, the time and manner in which the levy was made,⁵¹¹ and should contain some description of all property levied upon.⁵¹² Under the Missouri counterpart of our statute requiring the sheriff to seize tangible personal property and keep it in his custody, it is not necessary that the return recite that the sheriff has retained custody.⁵¹³ And our court has held that the

504. Defendant must serve his answer within 30 days after service of summons and complaint. N.M. Stat. Ann. §§ 2-1-1(4)(b), 21-1-1(12) (1953). Cf. N.M. Stat. Ann. § 21-1-1(4)(c) (1953).

505. Rule 4(e), relating to service of summons, also provides: "When served by the sheriff, proof thereof shall be by certificate and when served by a person other than the sheriff, proof thereof shall be by affidavit." N.M. Stat. Ann. § 21-1-1(4)(e) (1953).

506. N.M. Stat. Ann. § 26-1-16 (1953). On the risk incurred by the sheriff in levying or refusing to levy after expiration of the 60-day period see note 88, *supra*.

507. N.M. Stat. Ann. § 26-1-17 (Supp. 1961).

508. N.M. Stat. Ann. § 26-1-21 (1953).

509. N.M. Stat. Ann. § 26-1-18 (1953).

510. See *Senescal v. Bolton*, 7 N.M. 351, 34 Pac. 446 (1893).

511. See *Blaisdell v. Steamboat William Pope*, 19 Mo. 157 (1893).

512. See *Henry v. Mitchell*, 32 Mo. 512 (1862). Perhaps it should also recite that the property belongs to defendant and the name of the person in possession. See *Anderson v. Scott*, 2 Mo. 15 (1828). Cf. *Chambers v. Kelly*, 12 Mo. 514 (1849).

513. *Blaisdell v. Steamboat William Pope*, 19 Mo. 157 (1893). N.M. Stat. Ann. § 15-40-19 (1953), authorizing payment to the sheriff of his actual expenses in taking care of goods and chattels levied on under writs of execution has been construed to authorize a similar payment for personalty taken under attachment, which is an "execution in advance." *Jones-Noland Drilling Co. v. Bixby*, 34 N.M. 413, 282 Pac. 382 (1929). No similar custodial fees are authorized where the levy is on realty and no taking of possession is involved. *Retsch v. Renehan*, 16 N.M. 541, 120 Pac. 897 (1911). Section 15-40-19 also authorizes a commission to the sheriff where land, goods or chattels are

return to a summons need not recite that it was served in the sheriff's county, "as it will be presumed that the service was made in the proper county, in the absence of a showing to the contrary."⁵¹⁴

The express provision in Rule 4(f) that failure to make proof of service does not affect the validity of the service was taken verbatim from Federal Rule 4(g), and is literally enforced by the federal courts.⁵¹⁵ It probably makes no change in New Mexico law, since our court had earlier recognized that it is the service of process which confers jurisdiction and the return "is merely the evidence by which the court is informed" that service was made.⁵¹⁶

While the sheriff's return is "evidence of a high character" that the attachment writ was properly executed,⁵¹⁷ omissions in the return may be corrected by amendments supported by proof⁵¹⁸ while a motion to quash is pending,⁵¹⁹ after judgment⁵²⁰ and while a motion to set the judgment aside is pending,⁵²¹ or in a subsequent ejectment or quiet title action between the attachment defendant and the purchaser at the judicial sale of the attached property.⁵²² In-

levied upon under execution and sold, consisting of 4% of the first \$500 of the amount paid under the execution and 2% of all amounts above \$500 paid, or "one-half of said commission when the money has been paid without making levy or sale." In *Jones-Noland Drilling Co. v. Bixby*, supra, the sheriff was allowed the one-half commission where he had levied under attachment, plaintiff got judgment and an order for sale of the attached property and, after the sale had been advertised but before it took place, defendant paid the judgment. Both the commission and the custodial fee were taxed to defendant as costs. See also [1943-1944] N.M. Att'y Gen. Rep. 110.

Under N.M. Stat. Ann. § 15-40-18 (Supp. 1961), the sheriff in attachment proceedings is also entitled to collect from plaintiff \$2 per defendant for serving the writ, \$1.50 for taking a forthcoming or discharging bond, and \$1 for making his return, and to collect from any purchaser of the attached property \$3 for the sheriff's deed. See also § 15-40-17.

514. *Orosco v. Gonzales*, 19 N.M. 130, 141 Pac. 617 (1914).

515. *Peeples v. Ramspacher*, 29 F. Supp. 632 (E.D.S.C. 1939); *Kertes Mfg. Corp. v. Speidel Corp.*, 93 F. Supp. 483 (S.D.N.Y. 1949); *Hale v. Morgan Packing Co.*, 91 F. Supp. 11 (E.D. Ill. 1950); *Szabo v. Keeshin Motor Express Co.*, 10 F.R.D. 275 (N.D. Ohio 1950).

516. *Bourgeois v. Santa Fe Trail Stages, Inc.*, 43 N.M. 453, 456, 95 P.2d 204, (1939); *Miera v. Sammons*, 31 N.M. 599, 248 Pac. 1096 (1926). *Southern California Fruit Exch. v. Stamm*, 9 N.M. 361, 54 Pac. 345 (1898). And see *Inman v. Brown*, 59 N.M. 196, 281 P.2d 474 (1955), holding that failure of the sheriff to file his return on execution within the 60-day period specified by N.M. Stat. Ann. §§ 24-1-9 and 26-1-16 (1953) is no ground for setting aside the execution sale. Cf. *Gallegos v. Sandoval*, 15 N.M. 216, 106 Pac. 373 (1909).

517. *Walsh v. Agnew*, 12 Mo. 520 (1849). See *Southern California Fruit Exch. v. Stamm*, 9 N.M. 361, 54 Pac. 345, 348 (1898).

518. The opposing party is, of course, free to offer contradictory evidence. *Feurt v. Caster*, 174 Mo. 289, 73 S.W. 576 (1902). See *Hopkins v. Henson*, 205 Mo. App. 384, 224 S.W. 119 (1920). Cf. *Mengwasser v. Tackitt*, 280 S.W.2d 433 (Mo. App. 1955).

519. *Norvell v. Porter*, 62 Mo. 309 (1876).

520. *Kitchen v. Reinsky*, 42 Mo. 427 (1868); *Magrew v. Foster*, 54 Mo. 258 (1873); *Ace Mining & Milling Co. v. R. U. Mining Co.*, 247 S.W. 172 (Mo. 1922).

521. *Blaisdell v. Steamboat William Pope*, 19 Mo. 157 (1853).

522. *Feurt v. Caster*, 174 Mo. 289, 73 S.W. 576 (1902). See also *Howell v. Sherwood*, 242 Mo. 513, 147 S.W. 810 (1912); *Ace Mining & Milling Co. v. R. U. Mining Co.*, 247 S.W. 172 (Mo. 1922).

deed, in one New Mexico case the Supreme Court relies in part upon a sheriff's return filed after a motion to set aside the judgment in attachment proceedings had been overruled by the trial court.⁵²³ And, since the return is only evidence, it seems correct to hold, as the federal courts do,⁵²⁴ that defendant may impeach it by proof of defects in service or levy.

F. Alias and Pluries Writs. The sheriff, on the original levy, may be able to find no property of the defendant, or insufficient property to satisfy plaintiff's claim. Hence, after return of the original writ, plaintiff may want an additional writ or writs to reach subsequently-acquired or subsequently-discovered property of the defendant. In an early decision our court concluded that the attachment laws as they stood at the turn of the century did not authorize issuance of an alias writ.⁵²⁵ In so doing, the court pointed out that changing circumstances might have eliminated the grounds for attachment alleged in the original affidavit and that the original bond recited that plaintiff's attachment was returnable at the next term of court,⁵²⁶ whereas an alias writ might issue long after the return day of the original writ.

The 1907 revision of the attachment laws added a provision authorizing alias and pluries writs in district courts "where on attachment under a prior writ an insufficient amount of property has been levied upon to satisfy the amount of damages claimed in the affidavit, with costs accrued or likely to accrue."⁵²⁷ But such writs may be issued only "upon a new affidavit and bond laying the foundation therefor the same as required of original writs."⁵²⁸

IV. CONTESTING THE ATTACHMENT

A. Motion to Quash. The 1907 statute authorizing alias and pluries writs in district courts contemplates, though it does not specifically authorize, motions to quash the writ for defects in the affidavit, bond or writ,⁵²⁹ and our cases

523. *Southern California Fruit Exch. v. Stamm*, 9 N.M. 361, 54 Pac. 345 (1898).

524. *Hicklin v. Edwards*, 226 F.2d 410 (8th Cir. 1955); *Polhemus v. American Medical Ass'n*, 145 F.2d 357 (10th Cir. 1944); *Metropolitan Theatre Co. v. Warner Bros Pictures, Inc.*, 16 F.R.D. 391 (S.D.N.Y. 1954); *Gamlen Chem. Co. v. Dacar Chem. Prod. Co.*, 57 F. Supp. 574 (W.D. Pa. 1944); *Puett Elec. Starting Gate Corp. v. Thistle Down Co.*, 2 F.R.D. 550 (N.D. Ohio 1942). *Contra*, *Woods v. Zellers*, 9 F.R.D. 6 (E.D. Pa. 1949).

525. *Dye v. Crary*, 12 N.M. 469, 78 Pac. 533 (1904), 13 N.M. 439, 85 Pac. 1038 (1906), *aff'd* 208 U.S. 515 (1908).

526. This recital was eliminated in 1907. See note 258 *supra*.

527. N.M. Laws 1907, ch. 107, § 1(227) at 280 (now N.M. Stat. Ann. § 26-1-14 (1953)). Alias and pluries writs are also authorized where a prior writ has been quashed for defect in the affidavit, bond or writ that cannot be cured by amendment. See text at note 244, *supra*.

528. Unfortunately, no corresponding change was made in N.M. Stat. Ann. § 26-1-13 (1953), prescribing the contents of "original writs" or in § 26-1-15, providing that "original writs" shall be issued and returned in like manner as ordinary writs of summons.

529. See note 527, *supra*. On the extent to which such defects may be cured by amendment, see pp. 338-39, *supra*.

reveal use of the motion to quash to raise objections to defects apparent on the face of the affidavit⁵³⁰ or the bond,⁵³¹ for failure to file an affidavit and bond,⁵³² and for defects apparent on the face of the writ.⁵³³ The motion to quash has also been used where the writ has been issued despite a statutory prohibition against its issuance after defendant had made an assignment for the benefit of creditors.⁵³⁴

B. *Answer*. Since the Kearny Code, defendant in district court has been authorized to file an unsworn answer⁵³⁵ "denying the truth of any material fact contained in the affidavit," to which plaintiff may reply. A trial of "the truth of the affidavit" is then had,⁵³⁶ with the burden on plaintiff to prove the facts denied "as set forth in the affidavit as the ground of attachment." If the issue is found for plaintiff, "the cause shall proceed," but if found for defendant "the attachment shall be dismissed" at plaintiff's cost.⁵³⁷

530. *Bennett v. Zabriski*, 2 N.M. 7 (1880), on rehearing 2 N.M. 176 (1881); *Robinson v. Hesser*, 4 N.M. 282, 13 Pac. 204 (1887). Accord., *Wirt v. Dinan*, 41 Mo. App. 236 (1890); *Scheele v. Long*, 244 S.W.2d 395 (Mo. App. 1951). See *Colter v. Marriage*, 3 N.M. (Gild. B.W. ed.) 429, 3 N.M. (Gild. E.W.S. ed.) 604, 3 N.M. (John ed.) 351, 9 Pac. 383 (1886) and Cf. N.M. Stat. Ann. § 21-9-1 (1953).

531. *Baca v. Coury*, 27 N.M. 611, 613, 204 Pac. 57, 58 (1922).

532. *Waldo v. Beckwith*, 1 N.M. 97 (1854).

533. *Holzman v. Martinez*, 2 N.M. 271 (1882). Accord, *Smith, Heddins & Co. v. Hackley*, 44 Mo. App. 614 (1891).

534. *Schofield v. Folsom* 7 N.M. 601, 38 Pac. 261 (1894); *Saint v. Folsom*, 8 N.M. 650, 46 Pac. 1117 (1896). See *Lyndonville Nat'l Bank v. Folsom*, 7 N.M. 611, 38 Pac. 253 (1894). And see *Auchincloss, Parker & Redpath, Inc. v. Harris*, 349 Mo. 190, 159 S.W.2d 799 (1942); *Trinidad Asphalt Mfg. Co. v. Standard Oil Co.*, 214 Mo. App. 115, 258 S.W. 64 (1924).

535. Kearny Code, Attachments, § 16, at 1 N.M. Stat. Ann. 306 (1953) (now N.M. Stat. Ann. § 26-1-31 (1953)). Under the Kearny Code the answer was to be filed "at the court to which the writ is returnable." In 1907 the language was changed to direct the filing of the answer "within the time limited in the writ of attachment." N.M. Laws 1907, ch. 107, § 1(201). Of the nine forms of attachment writ returned by district court clerks with their responses to the questionnaire (note 9 supra), those of Bernalillo, Chaves, Curry, Lincoln and Quay Counties follow N.M. Stat. Ann. §§ 2-1-1(4) (b) and 21-1-1(12) (1953) in directing defendant to appear and answer plaintiff's complaint or action within thirty days after service of the writ, but those of Eddy, McKinley, San Miguel and Union Counties follow a statute repealed in 1925 (note 87 supra) in directing defendant to appear and answer plaintiff's complaint or action within twenty days after service of the writ if served within the judicial district or within thirty days after service outside the district.

The statutes governing justice court attachments make no provision for challenging the attachmen by motion or answer.

536. In *Everett v. Gilliland*, 47 N.M. 269, 279, 141 P.2d 326, 333 (1943), it was said that "the issue thus raised by the affidavit and answer thereto is tried before the court or jury, as in other cases of law."

537. This provision closely followed Mo. Rev. Stat. ch. 11, art. I, §§ 25, 26 (1845), save that the Kearny draftsmen substituted an answer by defendant for a plea in abatement. After the Missouri Rules of Civil Procedure abolished pleas in abatement, one Missouri Court of Appeals concluded that defendant's challenge of the truth of the affidavit should be by motion to quash or dissolve. *Heidemann v. Hellrung*, 220 S.W.2d 737 (Mo. App. 1949); *Mengwasser v. Tackitt*, 280 S.W.2d 433 (Mo. App. 1955). In

Under the Kearny Code, it was the "cause," rather than the "attachment," which was directed to be dismissed on a finding for the defendant—a result which was obviously unnecessary in any case where the court had personal jurisdiction over the defendant. Such jurisdiction it clearly had whenever defendant was personally served; whether an unserved defendant confers such jurisdiction by filing an answer to the affidavit is still an unresolved question.⁵³⁸ In 1874 the legislature went to the other extreme by enacting a separate statute directing that where the truth of any material allegation of the affidavit was denied and the issue was found for the defendant, the attachment should be dismissed but such dismissal should not abate the suit.⁵³⁹ In the 1907 revision the original statute was conformably amended to provide for dismissal of the attachment only, rather than dismissal of the cause.⁵⁴⁰

Under these statutes it is established that not all allegations of the affidavit are put in issue by defendant's answer. The affidavit must allege the amount which defendant is "justly indebted" to plaintiff and that the affiant "has good reason to believe and does believe" in the existence of one or more grounds for attachment.⁵⁴¹ But on the trial of issues raised by defendant's answer to the affidavit and plaintiff's reply, there is no inquiry into the validity or amount of plaintiff's claim against defendant, or into plaintiff's belief or reason to believe. The only issue is whether or not grounds for attachment actually exist.⁵⁴²

Our court has held that a pending motion to quash the attachment or a pending answer denying the allegations of the attachment affidavit does not toll the time within which a defendant who has been served must answer on the merits, and that for defendant's failure to answer in time plaintiff may take a default

1955 the statute was amended expressly to authorize defendant to employ a motion to dissolve. Mo. Ann. Stat. §§ 521.410, 521.420 (1953). Since the dismissal, on a finding for defendant, is to be a plaintiff's cost, the Missouri court has held plaintiff cannot move to dissolve the attachment after defendant has put the allegations of the affidavit in issue. *Mense v. Osborn*, 5 Mo. 544 (1839).

538. See note 89 *supra*.

539. N.M. Laws 1874, ch. 17, § 21 (now N.M. Stat. Ann. § 26-1-32 (1953)). A similar change in the Missouri statute, Mo. Ann. Stat. § 521.420 (1953), apparently can be frustrated by a defendant not personally served who takes advantage of the Missouri court's ruling that defendant can put the allegations of the affidavit in issue by a special appearance. *State ex rel. Auchincloss, Parker & Redpath, Inc. v. Harris*, 349 Mo. 190, 159 S.W.2d 799 (1942). The statute is, of course, effective against a defendant personally served. *Peery v. Platte*, 39 Mo. 404 (1867); *Green v. Craig*, 47 Mo. 90 (1870). See also *Brackett v. Brackett*, 53 Mo. 265 (1873), 61 Mo. 221 (1875).

540. Note 535, *supra*.

541. N.M. Stat. Ann. § 26-1-5 (1953).

542. *Leitensdorfer v. Webb*, 1 N.M. 34 (1853), *aff'd* 61 U.S. (20 How.) 176 (1857); *Mundil v. Hutson*, 33 N.M. 388, 268 Pac. 566 (1928); *Everett v. Gilliland*, 47 N.M. 269, 141 P.2d 326 (1943). *Accord*, *Chenault v. Chapron*, 5 Mo. 438 (1838); *Dider v. Courtney*, 7 Mo. 500 (1842); *Temple v. Cochran*, 13 Mo. 116 (1850); *Chouteau v. Broughton*, 100 Mo. 406, 13 S.W. 877 (1890). *Rheinhardt v. Grant*, 24 Mo. App. 154 (1887). See *Sharkey v. Williams*, 20 Mo. App. 681 (1886); *Rees v. Augustine*, 24 Mo. App. 671 (1887).

judgment on the merits before the attachment issues are resolved.⁵⁴³ It is not clear that the same rule would apply to a defendant not served who entered a general appearance, since the court relied upon a provision in the attachment statutes that "when the defendant is cited to answer the action, like proceedings shall be had between him and the plaintiff as in ordinary actions on contracts, and a general judgment may be rendered for or against the defendant."⁵⁴⁴ Under our Rules of Civil Procedure,⁵⁴⁵ moreover, no time is fixed for the filing of an answer by a defendant not served who enters a general appearance and answers the attachment affidavit. The answer is to be served within thirty days after the service of summons and complaint⁵⁴⁶ unless the court in certain cases directs otherwise. Provision is made for tolling this time when defendant serves a "motion,"⁵⁴⁷ but no corresponding provision is made for the defendant who files an answer to an attachment affidavit.⁵⁴⁸ The net effect of the rules seems to be: (1) to leave undisturbed the court's ruling as to a defendant who has been served with writ and complaint and who answers the affidavit—denial of the allegations of the attachment affidavit does not toll the time within which such a defendant must answer on the merits; (2) to make the ruling inapplicable to a defendant not served who enters a general appearance and answers the affidavit, unless he is thereafter served with the writ and complaint, and (3) to make the ruling inapplicable to a defendant who files a motion to quash since, under Rule 12, "unless a different time is fixed by the court," defendant has ten days to answer after the court either denies a motion or postpones its disposition until the trial on the merits.

Where the attachment is on a demand not yet due, a different procedure

543. *Ripley v. Astec Mining Co.*, 6 N.M. 415, 28 Pac. 773 (1892); *Leusch v. Nickel*, 16 N.M. 28, 113 Pac. 595 (1911); *First Nat'l Bank v. George*, 26 N.M. 46, 184 Pac. 240 (1920). The court in the *Ripley* case declined to follow Missouri cases holding that a defendant who answered on the merits while his challenge to the affidavit was pending waived that challenge. Shortly thereafter, those cases were overruled. *Coombs Commission Co. v. Block*, 130 Mo. 668, 32 S.W. 1138 (1895). Cf. *Curran v. Kendall Boot & Shoe Co.*, 8 N.M. 417, 421, 45 Pac. 1120 (1896); *C.J.L. Meyer & Sons Co. v. Black*, 4 N.M. 352, 363-64, 16 Pac. 620 (1888).

544. N.M. Stat. Ann. § 26-1-15 (1953).

545. N.M. Stat. Ann. §§ 2-1-1(4) (b) 21-1-1(12) (1953). But see § 21-1-1(4) (c).

546. N.M. Stat. Ann. § 21-1-1(12) (1953). If the complaint is not served with the summons, defendant has twenty days from the time he does receive a copy of the complaint. N.M. Stat. Ann. § 21-1-1(4) (c) (1953). Note in this connection that service of only the attachment writ with its summons clause, as authorized by the attachment statute (p. 80, *supra*), without service of the complaint, is apparently insufficient to start the time running for service of defendant's answer.

547. N.M. Stat. Ann. § 21-1-1(7) (c) (1953), abolishing "demurrers, pleas and exceptions for insufficiency of a pleading" and § 21-1-1(7) (b), providing that "an application to the court for an order shall be by motion," do not seem broad enough to authorize use of a motion to challenge the truth of the attachment affidavit, particularly in view of § 21-1-1(1) providing that the Rules are inapplicable "in special statutory . . . proceedings where existing rules are inconsistent." Cf. note 537, *supra*.

548. Default may be taken only against a party who "has failed to plead or otherwise defend as provided by these rules." N.M. Stat. Ann. § 21-1-1(55) (a) (1953).

must in any event be followed, although none is provided for by statute. In an early case the court specified what that procedure should be:

The writ of attachment [is] to contain a citation to the defendant to appear and answer the affidavit; the issue, if any, thus raised in the attachment proceedings to be speedily tried, and the attachment lien dissolved or continued, according to the verdict of the jury for or against the defendant; if sustained, the attachment to remain a subsisting lien on the property of the debtor, and, upon the maturity of the demand, a declaration be filed and the defendant cited to plead thereto. . . .⁵⁴⁹

In 1884 a statute was enacted to prescribe a procedure for attachment on demands not yet due. It provided for starting the action by affidavit and bond only, forbade the filing of a complaint until plaintiff's claim became due, allowed defendant to answer and contest the affidavit, and provided that if the attachment was dissolved, it should not abate the suit.⁵⁵⁰ It was, unaccountably, repealed in the 1907 revision.⁵⁵¹

C. *Appeals*. Clearly, a judgment for plaintiff on defendant's motion to quash or answer to the affidavit, or a judgment for defendant quashing or dismissing the attachment where the court has personal jurisdiction over defendant, is not a final judgment disposing of the case. The point was overlooked in some early cases,⁵⁵² was first noted in a case holding that plaintiff could not appeal a judgment dismissing the attachment after he had settled and voluntarily dismissed his suit,⁵⁵³ and was afterwards held to preclude appeal from a judgment quash-

549. *Staab v. Hersch*, 3 N.M. (Gild. B.W.ed.) 160, 3 N.M. (Gild. E.W.S. ed.) 209, 3 N.M. (John. ed.) 153, 3 Pac. 248 (1884). In *Leusch v. Nickel*, 16 N.M. 28, 113 Pac. 595 (1911), although the court did not pass upon the propriety of the procedure followed, it appears that plaintiff filed a complaint with his affidavit and attachment bond, personally served defendants, defeated their motions to quash and to dissolve the attachment, and to dismiss the action, then filed a supplemental complaint alleging that the note sued upon was now due, served the supplemental complaint upon defendants, and took a default judgment upon their failure to answer. Defendants had demurred to the original complaint but the court held that the trial court properly disregarded the demurrer after the supplemental complaint was filed.

550. N.M. Laws, 1884, ch. 2, §§ 1, at 29, 2 at 30; N.M. Comp. Laws tit. 23, ch. 2, §§ 2687, 2688 (1897). One Missouri Court of Appeals has concluded that if the attachment is finally dismissed the action must be dismissed also even though the claim has become due, since the right to begin suit on a claim not due at the time suit is initiated is dependent solely upon the attachment law. *Houser v. Andersch*, 61 Mo. App. 15 (1895). See *Grier v. Fox*, 4 Mo. App. 522 (1877); *C. Aultman & Co. v. Daggs*, 50 Mo. App. 280 (1892).

551. N.M. Laws 1907, ch. 107, § 1(300), at 294. The Missouri statute expressly provides that no judgment shall be entered until plaintiff's demand is mature and that defendant may plead to the merits at any time before maturity. Mo. Ann. Stat. §§ 521.020, 521.350 (1953).

552. *Schofield v. Folsom*, 7 N.M. 601, 38 Pac. 261, (1894), appeal dismissed 18 U.S. 706 (1897); *Saint v. Folsom*, 8 N.M. 650, 46 Pac. 1117 (1896); *Lyndonville Nat'l Bank v. Folsom* 7 N.M. 611, 38 Pac. 253 (1894).

553. *Schofield v. American Valley Co.*, 9 N.M. 485, 54 Pac. 753 (1898).

ing the attachment where no judgment on the merits was yet entered.⁵⁵⁴

The territorial legislature of 1899 undertook to remedy matters by adding two new sections to the attachment law.⁵⁵⁵ The first provided that plaintiff could appeal from any order or judgment of a district court discharging an attachment and could preserve his attachment lien pending the Supreme Court's decision by posting a supersedeas bond. The second apparently took care of defendant's appeal also by providing that a final judgment on the merits should not be a prerequisite to an appeal of "questions arising in the attachment proceedings," but that such appeal might be taken before or after judgment on the merits. In 1901 an additional statute authorized the Supreme Court to review a variety of other interlocutory orders and amended the 1899 act to make clear that it authorized appeals from a district court "order or judgment dissolving or sustaining an attachment."⁵⁵⁶

Both of these statutes were held invalid as in conflict with the organic act creating the territorial government,⁵⁵⁷ which limited the Supreme Court's appellate jurisdiction to "final decisions" of the district courts.⁵⁵⁸ Some confusion thereafter ensued. In 1903 one section of the 1901 act was repealed, but the section amending the 1899 act was left on the books.⁵⁵⁹ In 1907 the 1899 act, but not the 1901 amendment thereto, was repealed⁵⁶⁰ and the provisions of the 1899 act without the clarifying 1901 amendment were simultaneously re-enacted verbatim.⁵⁶¹ Under the state Constitution of 1911 the Supreme Court's appellate jurisdiction now extends to all final judgments and to such "interlocutory orders and decisions of the district courts as may be conferred by law."⁵⁶² Since adoption of the Constitution the Court has assumed, although it has not decided, that the re-enacted provisions are valid⁵⁶³ and has applied that part of the re-enactment which allows plaintiff to appeal the judgment dismissing the attachment after judgment is entered on the merits.⁵⁶⁴ It has also held that an order denying a motion to quash a writ of garnishment, which is apparently not covered by the re-enactment, is not appealable under general statutes relating

554. *Lyndonville Nat'l Bank v. Folsom*, 10 N.M. 306, 62 Pac. 976 (1899).

555. N.M. Laws 1899, ch. 75, §§ 8, 9, at 170.

556. N.M. Laws 1901, ch. 82, §§ 1 at 159, 2 at 160.

557. 9 Stat. 446, 450 (1850).

558. *Jung v. Myer*, 11 N.M. 378, 68 Pac. 933 (1902), invalidating the 1901 act, was not an attachment case. In *Machen v. Keeler*, 11 N.M. 413, 68 Pac. 937 (1902), invalidating the 1899 Act, the district court which had dismissed the attachment apparently had personal jurisdiction over defendant so that the dismissal order was not final.

559. N.M. Laws 1903, ch. 26, § 1, at 36.

560. N.M. Laws 1907, ch. 107, § 1(300), at 294-95.

561. *Id.*, §§ 1(223), 1(224), at 279 (now N.M. Stat. Ann. §§ 26-1-33, 26-1-34 (1953)).

562. N.M. Const. (1911), art. VI, § 2.

563. *First Nat'l Bank v. George*, 26 N.M. 46, 184 Pac. 240 (1920).

564. *First Nat'l Bank v. George* 26 N.M. 176, 190 Pac. 1026 (1920). Plaintiff had taken judgment on the merits by default, which was affirmed on the same day in *First Nat'l Bank v. George*, 26 N.M. 46, 184 Pac. 240 (1920). Where plaintiff appeals adverse judgments on the merits and on the attachment, and the judgment on the merits is affirmed, the court

to the Court's appellate jurisdiction,⁵⁶⁵ either as a "final judgment" or as an interlocutory judgment, order or decision which "practically disposes of the merits of the action."⁵⁶⁶

VII. RELEASING THE ATTACHED PROPERTY

Alternate methods are provided for releasing property from the attachment levy by substituting a bond.

A. *Forthcoming Bond*. Taken verbatim from Missouri is a provision that the defendant, or any other person in possession of property of the defendant at the time of attachment, may retain possession of the property by giving the levying officer bond and security satisfactory to the officer, in an amount double the value of the property attached, "conditioned that the [property] will be forthcoming when and where the court shall direct, and shall abide the judgment of the court."⁵⁶⁷ Such a bond, if obtained from a surety company, will cost the principal \$20 per \$1,000 of the penalty of the bond.⁵⁶⁸

Under this statute the Missouri courts early held that, since the condition of the bond is that the property will be forthcoming to abide the outcome of the suit, the property remains subject to the attachment lien, so that neither the debtor nor another person to whom it is released can transfer title superior to the lien.⁵⁶⁹ Our court adopted the same notion,⁵⁷⁰ concluding that an un-

will not review the judgment on the attachment issues. *Melini & Eakin v. Freise*, 15 N.M. 455, 110 Pac. 563 (1910).

565. N.M. Stat. Ann. § 21-2-1(5)(2) (1953). See also § 21-2-1(5)(1).

566. *Cornett v. Fulfer*, 26 N.M. 175, 189 Pac. 1108 (1919), on rehearing, 26 N.M. 368, 189 Pac. 1108 (1920).

567. *Kearny Code, Attachments*, § 13, at 1 N.M. Stat. Ann. 305 (1953) (now N.M. Stat. Ann. § 26-1-20 (1953)); *Mo. Rev. Stat. ch. 11, art. I, § 20* (1845); *Mo. Ann. Stat. § 521.260* (1953). Read literally, the provision that defendant or the person in possession "may retain possession" by posting bond would mean that once the levying officer had taken possession this procedure would be unavailable. Missouri has anticipated the problem by amendment providing that defendant or the person in possession may "retain or regain" possession by posting bond. *Mo. Laws 1883*, at 29: The problem will not arise in New Mexico justice court attachments, where one statute authorizes a forthcoming bond before the levying officer has "removed" the goods and another authorizes a forthcoming bond which entitles defendant to dissolution of the attachment. N.M. Stat. Ann. §§ 36-7-5, 36-7-10 (1953). See *Pomerenk v. Scheck*, 33 N.M. 128, 262 Pac. 226 (1927).

568. This is the rate per annum, with an annual minimum of \$10. *Rate Manual of Fidelity, Forgery and Surety Bonds of the Surety Assoc. of America*. See note 260, *supra*.

569. *Evans v. King*, 7 Mo. 411 (1842); *Fleming v. Clark*, 22 Mo. App. 218 (1886). See *Hudson v. Lamar*, 74 Mo. App. 238 (1898); *Kelley v. Sitlington*, 54 Mo. App. 168 (1893); *Lebeaume ex rel. Chouteau v. Sweeney*, 21 Mo. 166 (1855). Missouri also has a separate provision, not adopted here for district courts (see note 567 *supra*), authorizing a defendant first to "appear and plead to the action" and then to post a forthcoming bond approved by the court. Although the condition of this bond is the same, the statute provides for dissolution of the attachment after the bond is posted, *Mo. Ann. Stat. § 521.480* (2) (1953) and the dissolution order terminates the lien. *Haber v. Klauberg*, 3 Mo. App. 342 (1877). See *Wise Coal Co. v. Columbia Lead & Zinc Co.*, 123 Mo. App. 249, 100 S.W. 680 (1907).

570. *Holzman v. Martinez*, 2 N.M. 271, 285 (1882). No contention was made that defendant, by posting the forthcoming bond, had waived his right to contest the attach-

served defendant does not confer personal jurisdiction on the court either by appearing solely to move to quash the writ or by posting a forthcoming bond,⁵⁷¹ and saying with respect to the latter that "the giving of what is sometimes called a forthcoming bond in attachment, does not release the property from the attachment lien. It simply constitutes the defendant the bailee of the sheriff for the safe keeping of the property, and for its return to the sheriff in case the plaintiff shall recover, and in default of which the liability of the bond attaches to the defendant and his sureties."

Since the condition of the bond is that the property will be forthcoming "when and where the court shall direct," the condition is not breached until after the court enters such an order for redelivery of the property⁵⁷²—neither judgment for plaintiff nor execution returned unsatisfied will suffice.⁵⁷³ And if the property is returned, the bond is not breached, even though the property has been damaged while held under the bond.⁵⁷⁴ Plaintiff's recovery for breach⁵⁷⁵ apparently is the value of the property or the amount of his judgment with costs, whichever is least.⁵⁷⁶ And the penalty of the bond⁵⁷⁷ is *prima facie* evidence of the value of the property.⁵⁷⁸

ment. Since the bond did not discharge the lien, no such waiver should be found. See *Hubbard v. Moss*, 65 Mo. 647 (1877); *Ranscher v. McElhinney*, 11 Mo. App. 434 (1882).

571. Accord: *Currey v. Trinity Zinc, Lead & Smelting Co.*, 157 Mo. App. 423, 139 S.W. 212 (1911).

572. *Brotherton v. Thomson*, 11 Mo. 94 (1847); *McDonald v. Loewen*, 145 Mo. App. 49, 130 S.W. 52 (1910). See *Weed v. Dills*, 34 Mo. 483 (1864). See *Romero v. Wagner*, 3 N.M. (Gild. B.W. ed.) 130, 3 N.M. (Gild. E.W.S. ed.) 167, 3 N.M. (John. ed.) 131, 3 Pac. 50 (1884).

573. *Brotherton v. Thomson*, note 572 *supra*.

574. *Jones ex rel. McClure v. Jones*, 38 Mo. 429 (1866).

575. By the terms of the statute, the bond runs to the levying "officer or his successor." See *Hughesville Mercantile Co. v. McGruder*, 132 Mo. App. 387, 111 S.W. 1179 (1908). The Missouri statute contains provision for later assignment to plaintiff and summary proceedings to enforce the bond against principal and sureties. Mo. Ann. Stat. §§ 521.570, 521.580 (1953). In New Mexico a plenary proceeding would be necessary, but N.M. Stat. Ann. § 28-1-8 (1953) should permit plaintiff to sue "without any assignment by the officer." Or, under N.M. Stat. Ann. § 21-1-1(17) (a) (1953), authorizing suit by one "in whose name a contract has been made for the benefit of another," the sheriff may sue for the benefit of plaintiff. And under N.M. Stat. Ann. § 21-6-3 (1953) the suit may be maintained against any one or more persons liable on the bond. *Romero v. Wagner*, 3 N.M. (Gild. E.W.S. ed.) 167, 3 N.M. (Gild. B.W. ed.) 130, 3 N.M. (John. ed.) 131, 3 Pac. 50 (1884).

576. This is the measure of recovery specified in the Missouri statute referred to in note 575, *supra*. And *Jones ex rel. McClure v. Jones*, 38 Mo. 429 (1866), indicates that the property should be valued as of the time when it should have been redelivered. This also seemed to be contemplated by the requirement that the penalty of the bond be double the value of the property attached.

577. Which is fixed by the levying officer, not the court. See *Yelton v. Becker*, 248 S.W.2d 86 (Mo. App. 1952).

578. *Weed v. Dills*, 34 Mo. 483 (1864). And see *Grant v. Brotherton's Adm'r*, 7 Mo. 458 (1842). The recovery on the bond cannot in any event exceed the penalty. *Rayburn v. Deaver*, 8 Mo. 104 (1843). Cf. *Hoshaw v. Gullett*, 53 Mo. 208 (1873), holding that the fact that the principal, who was not the defendant in attachment, posted the bond, is

B. *Discharging Bond.* The Kearny draftsmen did not include in their Code a Missouri provision providing for dissolution of the attachment if defendant should "appear and plead to the action" and post a bond conditioned to pay any judgment plaintiff should recover in the action.⁵⁷⁹ The 1907 New Mexico revision⁵⁸⁰ added provisions of similar effect for district court attachments, authorizing defendant or another in his behalf, at any time before judgment to post a bond executed to plaintiff, with one or more sureties possessing the qualifications required of sureties on attachment bonds,⁵⁸¹ conditioned that "defendant shall perform the judgement of the court." Upon the posting of such bond, the attachment is to be discharged. If, after the posting of such bond, judgment is entered against defendant it is also to be entered against the sureties on the bond "for the amount of the damages recovered against the defendant, without further process or notice."⁵⁸²

There are at least three serious deficiencies in this statute. It does not specify the amount of the bond; presumably the court is to fix an amount which is, as the Missouri statute puts it, "sufficient to satisfy the amount sworn to" in the attachment affidavit.⁵⁸³ It does not specifically require that defendant enter an appearance and file an answer as a prerequisite to posting the bond, thus leaving open the question whether the posting of the bond itself constitutes a general appearance. Finally, by specifying the sureties' liability as "the amount of damages recovered against defendant," it raises doubts as to whether the sureties are liable for interest and costs.

None of these ambiguities has been resolved. Eight of the district court clerks responding to the questionnaire indicated that they had no experience with a discharging bond. Two indicated their understanding that the penalty of the bond should be twice the amount sued for as in an attachment bond, and one indicated that the penalty of the bond was fixed "by the attorney." Our court has decided only that where defendants were personally served, *and* posted such a bond *and* entered a general appearance, the court had jurisdiction to enter a personal judgment against defendants and the sureties on the bond.⁵⁸⁴ The

sufficient evidence that he was in possession at the time of attachment and thus entitled to give bond.

579. Mo. Rev. Stat. ch. 11, art. I, § 47 (3) (1845); Mo. Ann. Stat. § 521.480 (3) (1953).

580. N.M. Laws 1907, ch. 107, §§ 1 (225), 1 (226), at 279 (now N.M. Stat. Ann. § 26-1-30, 26-1-35 (1953)).

581. For the qualifications of sureties on attachment bonds, see text following note 254, *supra*.

582. N.M. Stat. Ann. § 26-1-30 (1953) also provides that such bond "shall also discharge any garnishee from liability in said cause," although the separate garnishment statute enacted in 1909 contains its own provision "that the defendant may at any time before judgment replevin any effects, debts, shares, or claims, or any account garnished by giving bond" conditioned "for the payment of any judgment that may be rendered against the said garnishee" and which contemplates that the defendant may take over the garnishee's defense. N.M. Stat. Ann. § 26-2-16 (1953).

583. Note 579 *supra*.

584. *Leusch v. Nickel*, 16 N.M. 28, 113 Pac. 595 (1911). The court said that "by a general appearance the parties were certainly before the court, and this also appears from the bond executed for the payment of any judgment which might be rendered." *Id.*

same decision treats the posting of the bond as automatically dissolving the attachment and the attachment lien and for that reason refuses to review the action of the trial court in overruling defendants' motions to quash and to dissolve the attachment for defects in the affidavit and attachment bond.⁵⁸⁵

Language in the opinion also indicates that a fixed-penalty bond is contemplated, which means that the bond will cost defendant \$20 per \$1,000 of penalty rather than \$40 per \$1,000 of the amount in controversy, the charge for an open-penalty bond.⁵⁸⁶ As a federal court following the Missouri procedure has recognized, defendant's interest in a discharging bond measured by the amount of plaintiff's claim, rather than a forthcoming bond measured by double the value of the property attached, will increase as the value of the property attached approaches the amount in controversy.⁵⁸⁷

The Kearny Code, under provisions taken in substance from Missouri, required the officer executing the writ to return with the writ "all bonds taken by him in virtue thereof" and provided that, if he "wilfully fail to return a good and sufficient bond in any case where bond is required by law, he shall be held and considered as security for the performance of all acts and the payment of all money to secure the performance of which such bond ought to be taken."⁵⁸⁸ The language is apt to cover both the forthcoming bond and the later-authorized discharging bond. But interpretation of it to apply to both will raise a nice question, should a sheriff wilfully release attached property without taking a bond of any sort. Should his liability then be measured by the condition of a forthcoming bond or a discharging bond?

VIII. THIRD PARTY CLAIMS

Defendant cannot have the attachment quashed on the ground that the property attached does not belong to him.⁵⁸⁹ But third persons claiming property

at 36, 113 Pac. at 598. Note in this connection that N.M. Stat. Ann. § 26-1-35 (1953) expressly provides that "the giving of said bond shall have the effect of conferring jurisdiction upon the court to render said judgment against the said sureties."

585. *Accord, Payne v. Snell*, 3 Mo. 409 (1834). See also *St. Louis Perpetual Ins. Co. v. Ford*, 11 Mo. 295 (1848). Cf. *Williams v. Coleman*, 49 Mo. 325 (1872). And see *Blount v. American Lead & Baryta Co.*, 161 Fed. 714 (8th Cir. 1908), holding that after a Missouri defendant has posted bond and the attachment has been dissolved, he should not be required to go to trial on his challenge to the truth of the attachment affidavit. The court in *State ex rel. Lunsford v. Landon*, 304 Mo. 654, 265 S.W. 529 (1924), found it unnecessary to decide the effect of an amendment of the complaint to state a different cause of action after a discharging bond had been posted.

586. These are annual rates, with a \$10 annual minimum. *Surety Association of America, Rate Manual* (see note 260 *supra*).

587. *Blount v. American Lead and Baryta Co.*, 161 Fed. 714 (8th Cir. 1908).

588. *Kearny Code, Attachments* §§ 14, 15 (1846) at 1 N.M. Stat. Ann. 305 (1953) (now N.M. Stat. Ann. §§ 26-1-21, 26-1-22 (1953)); *Mo. Rev. Stat. ch. 11, art. I, §§ 21, 24* (now *Mo. Ann. Stat. §§ 521.180, 521.190* (1953)).

589. *Curran v. Kendall Boot & Shoe Co.*, 8 N.M. 417, 45 Pac. 1120 (1896). See also *Magrew v. Foster*, 54 Mo. 258 (1873); *Klopf Sales Co. v. Klopf*, 74 F. Supp. 821 (W.D. Mo., 1947); *Hodiamont Bank v. Franklin*, 215 S.W. 503 (Mo. App. 1919). Cf. *text* at note 534, *supra*.

attached as that of defendant, or claiming some interest therein superior to the attachment lien, may assert their claims in a variety of ways.

A. *Intervention.* The Kearny Code did not incorporate a Missouri provision authorizing any person claiming property attached to interplead in the attachment proceeding and assert his claim there.⁵⁹⁰ In two early cases where third party claimants sought to intervene in attachment proceedings under a statute authorizing intervention by "any person who has an interest in the matter in litigation"⁵⁹¹ our court concluded that the "matter in litigation" was the plaintiff's claim against defendant, not the title to the property attached, and held the intervention improper.⁵⁹² Shortly after the second decision, a special statute was enacted authorizing intervention by any person "owning or claiming any property, or a lien thereon, which has been attached in any proceeding to which he is not a party."⁵⁹³ This procedure has since been employed by persons claiming full title, and by mortgagees and conditional vendors, who have had to establish their pre-attachment interest in the property,⁵⁹⁴ and then to defend it against attack by the attaching creditor under recording acts⁵⁹⁵ and the doctrine

590. Mo. Rev. Stat. ch. 11, art. I, § 39 (1845) (now Mo. Ann. Stat. §521.520 (1953)).

591. Cf. N.M. Stat. Ann. § 21-1-1 (24) (1953).

592. C.J.L. Meyer & Sons Co. v. Black, 4 N.M. 352, 16 Pac. 620 (1888); Consolidated Liquor Co. v. Scotello, 21 N.M. 485, 155 Pac. 1089 (1916). Cf. Simon Vorenberg Co. v. Bosserman, 17 N.M. 433, 130 Pac. 438 (1913), where the third party's right to intervene was not challenged.

593. N.M. Laws 1917, ch. 75, § 1, at 194 (now N.M. Stat. Ann. § 26-1-29 (1953)). This provision may be applicable in justice courts. See Butler Paper Co. v. Sydney, 47 N.M. 463, 144 P.2d 170 (1943). The third party intervened without challenge in a justice court attachment in Pomerenk v. Schenck, 33 N.M. 128, 262 Pac. 226 (1927). In Missouri, the fact that a third party interplea in a justice court attachment involves title to property worth more than the monetary limit on the justice's jurisdiction is held not to deprive him of jurisdiction. Mills v. Thomson, 61 Mo. 415 (1875); Springfield Engine & Thresher Co. v. Glazier, 55 Mo. App. 95 (1893). Our court has similarly concluded that N.M. Const. (1911) art. VI § 26, withholding jurisdiction from justices of the peace "in any matter in which the title to real estate . . . may be in dispute or drawn in question" does not prevent a justice, in a case involving garnishment of land rental proceeds, from entertaining intervenor's claim to the rents although plaintiff contended that the transfer of the land from defendant to intervenor was a fraudulent conveyance. Wood Garage v. Jasper, 41 N.M. 289, 67 P.2d 1000 (1937).

594. Pomerenk v. Scheck, *supra* note 593. This case also holds that the intervenor cannot challenge the court's jurisdiction over defendant. If he owns the property he may recover regardless of the court's jurisdiction over defendant. If he does not, he likewise has no interest in the jurisdictional issue. See also Brownwell & Wight CarCo v. Barnard, 139 Mo. 142, 40 S.W. 762 (1897); National Sur. Corp. v. Fisher, 317 S.W.2d 334 (Mo. 1958); Graham Paper Co. v. Crowther, 92 Mo. App. 273 (1902); Glover & Son Comm'n Co. v. Abilene Milling Co., 136 Mo. App. 365, 116 S.W. 1112 (1909); Johnson v. Mason, 178 Mo. App. 109, 163 S.W. 260 (1914). Cf. Sedalia Milling Co. v. Stafford County Flour Mills, 169 Mo. App. 460, 155 S.W. 70 (1913); Highfield v. United Magazine Press, 190 S.W. 926 (Mo. App. 1916); Scott v. Levan, 286 S.W. 407 (Mo. App. 1926).

595. Hart v. Oliver Farm Equip. Sales Co., 37 N.M. 267, 21 P.2d 96 (1933). See also Simon Vorenberg Co. v. Bosserman, 17 N.M. 433, 130 Pac. 438 (1913); Wilson v. Barnes, 359 Mo. 352, 221 S.W.2d 731 (1949). But not all recording acts may be invoked by attaching creditors. See note 608, *infra*.

of fraudulent conveyance.⁵⁹⁶ It has also been employed by a third party claimant who first obtained a release of the property by posting a forthcoming bond.⁵⁹⁷

B. *Separate Possessory or Title Action.* The third party claimant, who is not a party to the attachment proceeding unless he does intervene "before the trial thereof begins,"⁵⁹⁸ is not bound to protect his rights by intervention.⁵⁹⁹ He may assert a possessory interest⁶⁰⁰ in personalty by a replevin action against the sheriff, or against the purchaser of the property at the judicial sale following judgment for the attachment plaintiff.⁶⁰¹ He may similarly assert a possessory in-

596. *Portales Nat'l Bank v. Beeman*, 52 N.M. 243, 196 P.2d 876 (1948). See also *Blue v. Penniston*, 27 Mo. 272 (1858); *Levy v. Levy*, 31 Mo. 403 (1861); *Burgert v. Borchert*, 59 Mo. 80 (1875); *Hewson v. Tootle*, 72 Mo. 632 (1880); *Albert v. Besel*, 88 Mo. 150 (1885); *Hazell v. Bank of Tipton*, 95 Mo. 60, 8 S.W. 564 (1888); *Boland v. Ross*, 120 Mo. 208, 25 S.W. 524 (1894); *Ettinger v. Kahn*, 134 Mo. 492, 36 S.W. 37 (1896); *Stewart v. Outhwaite*, 141 Mo. 562, 44 S.W. 326 (1897); *R. L. McDonald & Co. v. Hoover*, 142 Mo. 484, 44 S.W. 334 (1897); *Mansur-Tebbetts Implement Co. v. Ritchie*, 143 Mo. 587, 45 S.W. 634 (1898); *Keet-Roundtree Shoe Co. v. Lisman*, 149 Mo. 85, 50 S.W. 276 (1898); *John Deere Plow Co. v. Sullivan*, 158 Mo. 440, 59 S.W. 1005 (1900); *Mansur-Tebbetts Implement Co. v. Hudson*, 159 Mo. 213, 60 S.W. 87 (1900); *Rice, Stix Dry Goods Co. v. Sally*, 198 Mo. 682, 96 S.W. 1030 (1906). Although the attachment affidavit alleges the transfer to intervenor was a fraudulent conveyance entitling plaintiff to attach, and that issue is litigated on defendant's answer to the affidavit, the intervenor who was not a party to that proceeding is not bound by a decision there for plaintiff. *Huiskamp v. Moline Wagon Co.*, 121 U.S. 310 (1887). On the other hand, where the issues on intervention were first tried and the fraudulent conveyance issue was resolved against intervenor, defendant was not allowed to challenge the attachment affidavit, since the conveyance was good as between him and intervenor and he could not complain about attachment of another's property. *Bank of Tipton v. Cochel*, 27 Mo. App. 529 (1887).

597. *Pomerenk v. Scheck*, 33 N.M. 128, 262 Pac. 226 (1927). See also *Petrin v. Chrisler*, 90 Mo. 649, 3 S.W. 405 (1886); *People ex rel. Wilson v. Mosley*, 263 S.W.2d 340 (Mo. 1953); *Bradley Hubbard Mfg. Co. v. Bean*, 20 Mo. App. 111 (1886); *Mansur v. Hill*, 22 Mo. App. 372 (1886).

598. N.M. Stat. Ann. § 26-1-29 (1953).

599. *Wangler v. Franklin*, 70 Mo. 659 (1879). But if he does intervene and loses, the decision there may be *res judicata* in any subsequent proceeding. See *Richardson v. Watson*, 23 Mo. 34 (1856). Cf. *Wheeler Sav. Bank v. Tracey*, 141 Mo. 252, 42 S.W. 946 (1897).

600. See N.M. Stat. Ann. § 22-17-1 (1953).

601. Our replevin statute at one time expressly forbade replevin against an officer holding goods under an attachment levy. See *Botts v. Woods*, 4 N.M. 343, 16 Pac. 617 (1888). Cf. *Maxwell v. Tufts*, 8 N.M. 396, 45 Pac. 979 (1896); *Heisch v. J. L. Bell & Co.*, 11 N.M. 523, 70 Pac. 572 (1902). It was amended in 1907 expressly to authorize such an action against an officer holding goods under judicial process. N.M. Laws 1907, ch. 107, §§ 1 (229), 1 (230), at 280, (now N.M. Stat. Ann. §§ 22-17-2, 22-17-3 (1953)). Such an action was maintained against a sheriff holding goods under execution levy in *Chesher v. Shafter Lake Clay Co.*, 45 N.M. 419, 115 P.2d 636 (1941). See also *Chambers v. Kelly*, 12 Mo. 514 (1849); *Hartt v. McNeil*, 47 Mo. 526 (1871); *Wangler v. Franklin*, 70 Mo. 659 (1879); *Stone v. Spencer*, 77 Mo. 356 (1883); *Fahy v. Gordon*, 133 Mo. 414, 34 S.W. 881 (1896); *Woodson v. Carson*, 135 Mo. 521, 35 S.W. 1005, 37 S.W. 197 (1896); *Hall v. Goodnight*, 138 Mo. 576, 37 S.W. 916 (1897); *Fearey v. O'Neill*, 149 Mo. 467, 50 S.W. 918 (1899); *Harvey v. Stephens*, 159 Mo. 486, 60 S.W. 1055 (1901). Replevin against the sheriff was successfully maintained in *Huels v. Boettger*, 40 Mo. App. 310 (1890), by the third party claimant who first retained possession by posting a forthcoming bond,

terest⁶⁰² in realty by an ejectment action against such attachment purchaser,⁶⁰³ though not against the sheriff, since the attachment levy on realty does not involve taking possession.⁶⁰⁴ Or, he can assert any claimed interest in realty⁶⁰⁵ by quiet title action⁶⁰⁶ against the attachment plaintiff⁶⁰⁷ or the attachment purchaser. Here, again, the third party may have to ward off attacks on his claim under recording statutes⁶⁰⁸ and the doctrine of fraudulent conveyance.⁶⁰⁹

C. *Damages*. As our court has recognized,⁶¹⁰ the third party whose personality has been attached in a suit against another may let the property go and maintain an action of conversion against the sheriff and, in some circumstances, against the plaintiff in attachment. In such action he may recover the value of the goods at the time of levy plus "damages in the nature of interest."⁶¹¹

but later surrendered the property on direction of the court after judgment for plaintiff. See also *Kelley v. Sitlington*, 54 Mo. App. 168 (1893).

602. See N.M. Stat. Ann. § 22-8-1 (1953).

603. *Chandler v. Bailey*, 89 Mo. 641, 1 S.W. 745 (1886). Or the purchaser in the attachment proceedings may sue the third party claimant. *First Nat'l Bank v. Hughes*, 10 Mo. App. 7 (1881).

604. See pp. 83-84, *supra*; *Haessler v. Gank*, 23 Mo. App. 282 (1886).

605. See N.M. Stat. Ann. § 22-14-1 (1953).

606. *Chetham-Strode v. Blake*, 19 N.M. 335, 142 Pac. 1130 (1914). Or the purchaser in attachment may bring the suit. *Huffman v. Nixon*, 152 Mo. 303, 53 S.W. 1078 (1899). And see *Union Nat'l Bank v. Barker*, 145 Mo. 356, 46 S.W. 1096 (1898), and *Dunham v. Stevens*, 160 Mo. 95, 60 S.W. 1064 (1901)), where a foreclosing mortgagee named a post-mortgage attaching creditor as defendant and the creditor litigated the question whether the mortgage was a fraudulent conveyance. See also *Union Nat'l Bank v. State Nat'l Bank*, 155 Mo. 95, 55 S.W. 989 (1900); *Riesterer v. Horton Land & Lbr. Co.*, 160 Mo. 141, 61 S.W. 238 (1901).

607. A quiet title action will lie against any person claiming a lien on realty, "whether such lien be a mortgage or otherwise." N.M. Stat. Ann. § 22-14-1 (1953).

608. *Chetham-Strode v. Blake*, 19 N.M. 335, 142 Pac. 1130 (1914); *Maxwell v. Tufts*, 8 N.M. 396, 45 Pac. 979 (1896). Our recording statute for "writings affecting the title to real estate" does not protect attaching creditors, but does protect any "purchaser . . . or judgment lien creditor, without knowledge," N.M. Stat. Ann. § 71-2-3 (1953), and "purchaser" may include one who purchases at judicial sale after judgment for the attachment plaintiff. See *Arias v. Springer*, 42 N.M. 350, 359, 78 P.2d 153, 159 (1938). The filing statute for non-possessory liens or retained titles on motor vehicles protects both attaching creditors and subsequent purchasers without notice, N.M. Stat. Ann. §§ 64-5-1, 64-5-2 (1953), and may extend to the purchaser at judicial sale. See § 64-4-7. The Uniform Commercial Code repeals the chattel mortgage and conditional sale filing acts and the Uniform Trust Receipts Act, and substitutes perfection requirements which by Art. 9, Part 3, protect attaching creditors without notice and, in varying circumstances, purchasers, which may include purchasers at judicial sale. N.M. Stat. Ann. §§ 50A-7-301 through 50A-9-318 (Supp. 1961).

609. *Heisch v. J. L. Bell & Co.*, 11 N.M. 523, 70 Pac. 572 (1902); *Chesher v. Shafter Lake Clay Co.*, 45 N.M. 419, 115 P.2d 636 (1941); *Chambers v. Kelly*, 12 Mo. 514 (1849); *Stone v. Spencer*, 77 Mo. 356 (1883); *Hall v. Goodnight*, 138 Mo. 576, 37 S.W. 916 (1897); *Fearey v. O'Neill*, 149 Mo. 467, 50 S.W. 918 (1899).

610. *Cevada v. Miera*, 10 N.M. 62, 61 Pac. 125 (1900); *Santa Fe Pac. R.R. Co. v. Bossut*, 10 N.M. 322, 62 Pac. 977 (1900); *Murry v. Belmore*, 21 N.M. 313, 154 Pac. 705 (1916).

611. N.M. Stat. Ann. § 21-8-24 (1953). The liability may extend to lost profits if the levy interrupts operation of a going business. *Cunningham v. Sugar*, 9 N.M. 105, 49 Pac.

The sheriff's position is particularly precarious. If he desists from levy because a third party claims the property or, having levied, releases the property to a third party claimant without bond, he will be liable to plaintiff in attachment if the third party's claim is not sustained.⁶¹² If he levies upon and retains the property, he may be liable to the third party claimant whose claim is good. He may demand an indemnity bond from the attaching plaintiff, but since his power to do so is found in the common law rather than the attachment laws,⁶¹³ it may not extend to attachments in justice courts, which have no common law jurisdiction.⁶¹⁴

The plaintiff in attachment incurs liability to a third party whose property is attached only if he or his authorized agent directed the officer to levy on the particular property⁶¹⁵ or if, knowing of the third party's claim, he ratifies the levy. Ratification is most often found in plaintiff's acceptance of the proceeds of the sale of the property,⁶¹⁶ but evidence to ratification has also been found in plaintiff's unsuccessful opposition to the third party's claim on intervention in the attachment proceedings,⁶¹⁷ and in the fact that he gave the sheriff an indemnity bond.⁶¹⁸

A third party claimant who recovers his property through dismissal of the attachment by plaintiff⁶¹⁹ or on defendant's motion to quash or answer to the

910 (1897). The Missouri courts have also allowed punitive damages on a finding that the defendant acted maliciously. *Frank v. Curtis & Son*, 58 Mo. App. 349 (1894); *Carson v. Smith*, 133 Mo. 606, 34 S.W. 855 (1895); *Klie v. Wellman*, 189 Mo. App. 601, 175 S.W. 267 (1915). See *Cottrell v. Russell*, 21 Mo. App. 1 (1885); *Haeussler v. Bank*, 23 Mo. App. 282 (1886); *Central Coffee & Spice Co. v. Welborn*, 153 Mo. App. 647, 134 S.W. 2 (1911). And see *Cunningham v. Sugar*, *supra*.

612. *Bachelor Bros. v. Chaves*, 5 N.M. 562, 25 Pac. 783 (1891); *State ex rel. Armstrong Bros. v. Langdon*, 57 Mo. 353 (1874); *State ex rel. O'Bryan v. Koontz*, 83 Mo. 323 (1884). See also *Metzner v. Graham*, 57 Mo. 404 (1874). Cf. *State ex rel. Gates v. Fitzpatrick*, 64 Mo. 185 (1876).

613. Hence, N.M. Stat. Ann. § 28-1-8 (1953), authorizing "any person interested in any bond by virtue of the attachment . . . laws" to sue thereon without assignment by the officer to whom the bond was given, does not apply when the third party claimant attempts to sue on the indemnity bond. *DeWitt v. United States Fid. & Guar. Co.*, 20 N.M. 163, 148 Pac. 489 (1915). On the amount of the indemnity bond, See *Bachelor Bros. v. Chaves*, 5 N.M. 562, 25 Pac. 783 (1891).

614. *State ex rel. O'Bryan v. Koontz*, 83 Mo. 323 (1884). Cf. *State ex rel. Goddard, Peck & Co. v. Rayburn*, 22 Mo. App. 303 (1886). In Missouri the indemnity bond is authorized by statute for attachments in the city of St. Louis. Mo. Ann. Stat. §§ 521.750 through 521.890 (1953).

615. *Santa Fe Pac. R.R. Co. v. Bossut*, 10 N.M. 322, 62 Pac. 977 (1900); *Murry v. Belmore*, 21 N.M. 313, 154 Pac. 705 (1916); *Kuhn v. Weil*, 73 Mo. 213 (1880); *Wurmser v. Frederick*, 62 Mo. 634 (1895); *Kreber v. Mason*, 25 Mo. App. 291 (1887); *Klie v. Wellman*, 189 Mo. App. 601, 175 S.W. 267 (1915); *Central Coffee & Spice Co. v. Welborn*, 153 Mo. App. 647, 134 S.W. 2 (1911).

616. *Murry v. Belmore*, note 615 *supra*; 2 *Freeman, Executions* § 273 (3rd ed. 1900).

617. *Perrin v. Clafin*, 11 Mo. 13 (1847).

618. *Bruce v. Crysler*, 217 S.W. 563 (Mo. App. 1920).

619. *Merchants' Nat'l Bank v. Abernathy*, 32 Mo. App. 211 (1888).

attachment affidavit,⁶²⁰ or through his own intervention in the attachment proceeding,⁶²¹ is also entitled to damages, from the sheriff or from an attachment plaintiff who directs or ratifies the levy, for the wrongful taking and detention. The same result should follow where the third party claimant establishes his right to the property in an independent action. Such damages are authorized in ejectment⁶²² and in replevin⁶²³ actions. They are not authorized in a quiet title action,⁶²⁴ but, if incurred, should be recoverable in a separate action for trespass.

In any damage action by the third party claimant, whether for the value of personalty or for wrongful taking and detention, or both, he must of course establish his interest in the property⁶²⁵ and defend it against attacks under recording statutes⁶²⁶ and the doctrine of fraudulent conveyance.⁶²⁷

620. *Callaway Mining & Mfg. Co. v. Clark*, 32 Mo. 305 (1862); *Gens & Tiede v. Hargadine, McKittrick & Co.*, 56 Mo. App. 245 (1894).

621. *Perrin v. Clafin*, 11 Mo. 13 (1847); *Clark v. Brott*, 71 Mo. 473 (1880); *State ex rel. Reeves v. Barker*, 26 Mo. App. 487 (1887); *Taylor v. Hines*, 31 Mo. App. 622 (1888); *Franke v. Eby, Davis & Co.*, 50 Mo. App. 579 (1892). Cf. *State ex rel. Jamison v. Fink*, 57 Mo. App. 626 (1894).

622. N.M. Stat. Ann. §§ 22-8-9, 22-8-11, 22-8-13 (1953).

623. N.M. Stat. Ann. § 22-17-1 (1953).

624. *Rosser v. Rosser*, 42 N.M. 360, 78 P.2d 1110 (1938).

625. *State ex rel. Reeves v. Barker*, 26 Mo. App. 487 (1887), holds that where the third party claimant first interpleads in the attachment proceeding and gets judgment for return of his property, and then sues the sheriff for damages for wrongful taking, the sheriff is bound by the decision in interpleader that the third party had title to the property. Although the sheriff was not a party to the interpleader action, he was an officer of the court which decided it, and the decision "binding the court itself" also bound its officer. The attaching creditor, when sued for damages, is of course bound by an adverse decision on interpleader. *Taylor v. Hines*, 31 Mo. App. 622 (1888).

626. *State ex rel. Mayer v. O'Neill*, 151 Mo. 67, 52 S.W. 240 (1899). See note 608, *supra*.

627. *State ex rel. Cochran v. Cooper*, 79 Mo. 464 (1883); *State ex rel. Robertson v. Hope*, 88 Mo. 430 (1885); *Fredrick v. Allgaier*, 88 Mo. 598 (1886); *State ex rel. Mayer v. O'Neill*, *supra* note 626; *Kurtz v. Troll*, 175 Mo. 506, 75 S.W. 386 (1903); *Loeser v. Boekhoff*, 33 Mo. App. 223 (1888), 38 Mo. App. 440 (1889); *Antram v. Burch*, 84 Mo. App. 256 (1900). *Gens & Tiede v. Hargadine, McKittrick & Co.*, 6 Mo. App. 245 (1894), holds that where the attachment is dismissed on defendant's challenge of the truth of the attachment affidavit, and the third party claimant then sues the attachment plaintiff for damages, the attachment plaintiff, having lost his attachment, has no standing to attack the pre-attachment transfer from the attachment defendant to the third party as a fraudulent conveyance. But in Missouri an attaching creditor likewise had no standing to attack a fraudulent conveyance before judgment, *Martin v. Michael*, 23 Mo. 50 (1856), until that right was specifically conferred by statute. Mo. Ann. Stat. § 521.510 (1953). Our court originally took the same approach, *Talbott v. Randall*, 3 N.M. (Gild. B.W. ed.) 257, 3 N.M. (Gild. E.W.S. ed.) 367, 3 N.M. (John. ed.) 226, 5 Pac. 533 (1885), but later decided that an attaching plaintiff could attack a fraudulent conveyance in the attachment proceeding before judgment on the merits. *C. J. L. Meyer & Sons Co. v. Black*, 4 N.M. 352, 16 Pac. 620 (1888). Under Rule 18(b) plaintiff can now do the same without attachment. N.M. Stat. Ann. § 21-1-1(18) (1953); *Fitzhugh v. Plant*, 57 N.M. 153, 255 P.2d 683 (1953). And under sections 9 and 10 of the Uniform Fraudulent Conveyance Act, plaintiff may bring action to set a fraudulent conveyance aside without attaching and even before his claim has matured. N.M. Stat. Ann. §§ 50-14-9, 50-14-10 (Supp. 1961). While neither Rule 18(b) nor the Uniform Act are directed to the situation where the creditor

IX. PERISHABLE PROPERTY

The Kearny Code did not incorporate Missouri provisions⁶²⁸ for the sale of perishable property prior to judgment in the attachment suit, but such provisions were added here in 1859, applicable to attachment suits in the district courts.⁶²⁹ Where the property attached is "of a perishable nature and liable to be lost or diminished in value before the final adjudication of the case, and the defendant shall not give bond to retain possession of the same," the court may, on petition of either plaintiff or defendant,⁶³⁰ order it sold if it finds⁶³¹ "that the interests of both plaintiff and defendant will be promoted" thereby.⁶³² The judge may appoint a receiver or other person to make the sale, may require the appointee to post bond, and may allow him reasonable compensation and costs.⁶³³ The proceeds of sale are to be delivered "to such person as the . . . court shall determine entitled to the same upon final disposition of the suit."⁶³⁴

Although the statute provides for sale of property which is "of a perishable nature *and* liable to be lost or diminished in value" while the suit is pending, our court has read it in the disjunctive in order to give the second clause some meaning. Accordingly, it has held that a dredge which "was anchored in an embanked pond fed by a mountain stream subject to heavy floods, and . . . liable to damage from that source" might be ordered sold three months after it was attached.⁶³⁵

is challenging a fraudulent conveyance as a defense to a damage action, they do dispose of the earlier notion that a creditor has no standing to complain of a fraudulent conveyance by his debtor until he has "established his claim by judgment" and "obtained a lien upon the property." *Talbott v. Randall*, *supra*. 521.280 (1953).

628. Mo. Rev. Stat., ch. 11, art. I, §§ 48,49,50 (1845); Mo. Ann. Stat. §§ 521.270,

629. N.M. Laws 1859, ch. 18, §§ 1 through 5, at 40-42; N.M. Stat. Ann. § 26-1-24 through 26-1-28 (1953).

630. The statute, oddly, provides that the petition shall be presented to the judge "in vacation." N.M. Stat. Ann. § 26-1-24 (1953). But, since 1897 the district courts, "except for jury trials, are declared to be at all times in session for all purposes." N.M. Stat. Ann. § 21-9-1 (1953).

631. N.M. Stat. Ann. § 26-1-24 (1953). The statute does not expressly require a hearing, although it does provide that the court "may hear the testimony of witnesses." The Missouri statute likewise does not expressly require a hearing and says nothing about taking testimony, but an ex parte order of sale was set aside in *Mitchell v. Greely*, 174 Mo. App. 250, 156 S.W. 754 (1913).

632. Since the sale is for the benefit of both parties, the sheriff is not justified in respecting plaintiff's request for delay as he would be with respect to an execution sale. See *Oeters v. Ahle*, 31 Mo. 380 (1861).

633. These allowances apparently should be taxed as costs to the unsuccessful party, so that where plaintiff fails on the merits, the full proceeds of sale should be returned to defendant. *Snead v. Wegman*, 27 Mo. 176 (1858).

634. N.M. Stat. Ann. § 26-1-27 (1953).

635. *Jones v. Springer*, 226 U.S. 148, 154 (1912) (affirming 15 N.M. 98, 103 Pac. 205 (1909)). The Missouri statute covers property "which is likely to perish or depreciate in value." Mo. Ann. Stat. § 521.270 (1953). The Missouri courts, evidencing an apparent lack of confidence in the sheriff's office, have occasionally ordered sale of intoxicating beverages. *Nolan v. Deutsch*, 23 Mo. App. 1 (1886); *Kreher v. Mason*, 25 Mo. App. 291 (1887);

Where the attachment suit is finally disposed of in favor of defendant, he is entitled to have the proceeds of the sale returned to him.⁶³⁶ Indeed, he apparently becomes entitled to the proceeds if the attachment is dismissed and regardless of the outcome on the merits. But the court's order for delivery of the proceeds is not to be entered until "final disposition of the suit."⁶³⁷ And a plaintiff who has lost on attachment but won on the merits may at that point garnishee the proceeds in the hands of the sheriff or other person designated to make the sale.⁶³⁸

The Missouri courts have concluded, in order to avoid sales at "ruinous sacrifice," that the sale of attached property as perishable passes to the purchaser a title good even as against a third party claimant of the property,⁶³⁹ the rights of the third party being transferred to the proceeds of sale.⁶⁴⁰ The third party may also sue the sheriff⁶⁴¹ or an attachment plaintiff who requested or ratified the sale with notice of the third party claim,⁶⁴² for the difference between the sale price and the value of the property.⁶⁴³ Our court has adopted the Missouri view that the purchaser at the sale takes title good against third party claimants.⁶⁴⁴

St. Louis Brewing Ass'n v. Drulinger, 62 Mo. App. 485 (1895). In *Mundil v. Hutson*, 33 N.M. 388, 268 Pac. 566 (1928), grain in the shock and growing in the field was sold as perishable.

636. *Snead v. Wegman*, 27 Mo. 176 (1858); *Ex parte Haley*, 99 Mo. 150, 12 S.W. 667 (1889). And see note 633, *supra*.

637. N.M. Stat. Ann. § 26-1-27 (1953).

638. *Mundil v. Hutson*, 33 N.M. 388, 268 Pac. 566 (1928). Prior cases holding that money in the custody of an officer is not subject to garnishment were distinguished on the ground that, since the court had ordered the proceeds returned to defendant, the sheriff was "indebted" to the defendant. Cf. *State ex rel. Kansas City Nat'l Bank v. Booth*, 68 Mo. 546 (1876).

639. *Young v. Kellar*, 94 Mo. 581, 7 S.W. 293, 4 Am. St. Rep. 405 (1887). Note that no similar protection against "ruinous sacrifice" is afforded for sales of attached property after judgment on the merits for the attachment plaintiff. See pp. 117-118, *supra*.

640. Where the third party intervenes in the attachment proceeding and establishes his claim, he is entitled to an order directing payment of the proceeds to him, but not to a money judgment against the attachment plaintiff. *Skinner v. Thompson*, 21 Mo. 15 (1855); *Nolan v. Deutsch*, 23 Mo. App. 1 (1886); *Nelson Distilling Co. v. Hubbard*, 53 Mo. App. 23 (1853); *Springfield Engine & Thresher Co. v. Glazier*, 55 Mo. App. 95 (1893); *Williams v. Braden*, 57 Mo. App. 317 (1894); *Rogers & Baldwin Hardware Co. v. Randell*, 69 Mo. App. 342 (1897); *Hargadine-McKittrick Dry Goods Co. v. Carnahan*, 83 Mo. App. 318 (1900); *Citizens Trust Co. v. Elders*, 212 Mo. App. 589, 259 S.W. 136 (1923). If the third party claimant makes off with the goods, the purchaser can sue him for conversion. *Buller v. Woods*, 43 Mo. App. 494 (1891).

641. *Clark v. Brott*, 71 Mo. 473 (1880); *State ex rel. North v. Hadlock*, 52 Mo. App. 297 (1893).

642. *Franke v. Eby, Davis & Co.*, 50 Mo. App. 579 (1892). *Vaughn v. Fisher*, 32 Mo. App. 29 (1888), holds that where the sheriff had notice of the third party's claim before the sale this notice is imputed to the creditor who requested the sale.

643. Where the third party claims under a mortgage and the proceeds of sale exceed his claim, he can prove no damage. *State ex rel. Jamison v. Fink*, 57 Mo. App. 626 (1894).

644. *Jones v. Springer*, 15 N.M. 98, 103 Pac. 265 (1909) *aff'd* 226 U.S. 148 (1912). Although the court purported to adopt the rule of *Young v. Kellar*, 74 Mo. 581, 7 S.W. 203 (1887) (see text at note 639, *supra*), such action was not necessary to its decision.

X. THE ATTACHMENT LIEN

From the time of levy under the attachment writ "an inchoate or conditional lien attache[s] . . . subject to consummation by the rendition of a valid judgment. When the judgment [is] rendered, it relate[s] back to and establish[es] the lien acquired by the seizure of the property."⁶⁴⁵ This is the traditional description of the attachment lien.⁶⁴⁶ But in the same case in which it was adopted our court held that plaintiff suing on a claim not involving real estate, but attaching real estate, was entitled to file with the county clerk five days after the attachment levy a statutory notice of *lis pendens*. The statute authorizing such filing in all actions in the state or federal district courts "affecting the title to real estate" provides that from the filing of such notice any subsequent purchaser or encumbrancer of the property shall be bound by the outcome of the action as if a party thereto.⁶⁴⁷ But since the effect of the *lis pendens* notice is virtually the same as an attachment lien, since it is filed with the county clerk where the notice of attachment levy on realty is also filed,⁶⁴⁸ and since the notice would apparently not be authorized as one in a suit "affecting the title to real estate" if the attachment proceedings were so defective as not to create a lien, the utility of the *lis pendens* notice in attachment cases is not apparent. In any event, the case does not hold that the filing of *lis pendens* notice is essential to perfect an attachment lien on realty.⁶⁴⁹

The defendant in attachment had gone into bankruptcy and under § 67f of the Bankruptcy Act this rendered the attachment lien void as to the bankruptcy trustee, but a proviso in § 67f protected the title of a bona fide purchaser for value. The court concluded that the purchaser of personalty at a sale in the attachment proceedings after bankruptcy was such a purchaser, so that the bankruptcy trustee should take the proceeds of sale, which were still in custody of the court, rather than the property. Substantially different results would follow under present provisions of the Bankruptcy Act. See note 702, *infra*.

645. *Bell v. Gaylord*, 6 N.M. 227, 230, 2 Pac. 494, 495 (1891). Accord, *Lackey v. Seibert*, 23 Mo. 85 (1856). See *Ensworth v. King*, 50 Mo. 477 (1872); *Huxley v. Harrold*, 62 Mo. 516 (1876); *Hall v. Stephens*, 65 Mo. 670 (1877). The lien is not lost by plaintiff taking a general judgment which does not mention the attachment, levying execution on other property, and selling it in partial satisfaction of the judgment. *First Nat'l Bank v. George*, 26 N.M. 176, 190 Pac. 1026 (1920). Neither is it lost by release of the property on a forthcoming bond. See text at note 569, *supra*. And in *Young v. Kellar*, 94 Mo. 581, 7 S.W. 293 (1887), the court said (94 Mo. at 599) that when attached property was sold as perishable the attachment lien was transferred to the proceeds of sale. But the lien is lost if the attachment is dissolved, *Pitman v. West*, 198 Mo. App. 92, 199 S.W. 756 (1917), or if judgment is entered for defendant on the merits. *Melini v. Freige & Bro.*, 15 N.M. 455, 110 Pac. 563 (1910). Cf. *Jaffray v. H. B. Claffin Co.*, 119 Mo. 117, 24 S.W. 761 (1893).

646. See *Waples, Attachment & Garnishment* § 17 (2d ed. 1895); *Drake, Attachment* § 221 (7th ed. 1891).

647. N.M. Stat. Ann. § 21-3-14 (1953). The notice may be filed any time between the filing of the complaint and entry of judgment, but loses its effect unless within 60 days of filing defendant is served or notice to him is published. N.M. Stat. Ann. § 21-3-15 (1953).

648. N.M. Stat. Ann. § 24-1-4 (1953).

649. The court said that when judgment was entered for plaintiff on the merits it "established the lien acquired by seizure of the property, February 23" and that third

After the addition of the filing requirement for attachment of realty in Missouri, it was concluded there that the attachment lien on realty dates from the time of filing.⁶⁵⁰ Presumably, our court would reach the same conclusion, since it views the levy on realty as being "made by filing notice of levy in the office of the county clerk."⁶⁵¹ On tangible personalty which is accessible, the lien dates from the time of seizure of the property by the levying officer.⁶⁵² But where tangible personalty is not accessible, so that the person in possession must be summoned as garnishee,⁶⁵³ no lien will arise if our court should agree with the Missouri courts that garnishment does not create a lien.⁶⁵⁴ If, as previously suggested,⁶⁵⁵ interests in intangible property not specifically provided for can only be reached by garnishment, this leaves questions as to the time the attachment lien arises only with respect to investment securities attached under Section 8-317 of the Commercial Code. As to such attachments it seems fairly clear, for want of any other significant act, that the lien should arise when the instrument is seized or the attachment writ is filed with the issuer to whom the security has been surrendered.⁶⁵⁶

In Missouri, the attachment lien will be postponed to that of a creditor under

party encumbrancers "were chargeable with full notice of the attachment suit, and that it was a lien upon the property attached from the time when the notice was filed . . . , February 28." *Bell v. Gaylord*, 6 N.M. 227, 230, 233, 27 Pac. 494, 495, 496 (1891).

650. *Stanton v. Boschert*, 104 Mo. 393, 16 S.W. 393 (1891). This rule is applied even though the recorder fails to record the notice of levy. *Winningham v. Trueblood*, 149 Mo. 572, 51 S.W. 399 (1899).

651. *Inman v. Brown*, 59 N.M. 196, 200, 281 P.2d 474, 476 (1955).

652. *Elliott v. Bowman*, 17 Mo. App. 693 (1885). But in the case of competing writs delivered to the same sheriff's office, which should be executed in the order of delivery, it has been suggested that the writ first delivered should be given the first lien although levy was made first on a writ later delivered. *State ex rel. Rice v. Harrington*, 28 Mo. App. 287 (1887).

653. See pp. 85-86, *supra*.

654. *McGarry v. Lewis Coal Co.*, 93 Mo. 237, 6 S.W. 81 (1887); *Calumet Paper Co. v. Haskell Show Printing Co.*, 144 Mo. 331, 45 S.W. 1115 (1898); *State ex rel. Rabiste v. Southern*, 300 Mo. 417, 254 S.W. 166 (1923). Note that this difference would also be a reason for plaintiff to prefer attachment to garnishment where both are available. See p. 76, *supra*.

655. See p. 88, *supra*.

656. If, as suggested in note 379 *supra*, transferable "evidences of debt" which do not qualify as investment securities may also be attached by seizure, the lien should also date from seizure. But under the Missouri statutes, which expressly authorize seizure on attachment of "account books, accounts, notes . . . and other evidences of debt," Mo. Ann. Stat. § 521.240 (1953), and direct the sheriff or a receiver to "proceed with diligence to settle and collect the same," Mo. Ann. Stat. § 521.310 (1953), it is held that seizure of account books is only an "inchoate levy" which, while good against the debtor or a subsequent transferee, does not create a lien good against subsequent garnisheeing creditors unless the sheriff or receiver has notified the obligor on the accounts of the attachment proceedings. *Elliott v. Bowman*, 17 Mo. App. 693 (1885); *Kreher v. Mason*, 33 Mo. App. 297 (1889); *Fleisch v. Nat'l Bank of Commerce*, 45 Mo. App. 225 (1891).

later attachment, apparently on a theory of collusion, if the debtor in the first attachment proceeding confesses judgment without being served with process⁶⁵⁷ or, if served, confesses judgment before the return day of the process.⁶⁵⁸ But no such consequence follows where defendant withdraws his challenge to the truth of the attachment affidavit and confesses judgment on or after the return day,⁶⁵⁹ nor where the first attaching creditor releases part of his claim and part of his attachment and pays the debtor some boot not to contest judgment, at least where the second attaching creditor does not challenge the bona fides of the claim nor the existence of grounds for attachment.⁶⁶⁰

The attachment lien may prevail over earlier transfers if the attaching creditor can invalidate them under the doctrine of fraudulent conveyance⁶⁶¹ or where the earlier transfer was not properly filed or recorded under a statute protecting attachment creditors.⁶⁶²

After judgment for plaintiff on the merits, attached realty is to be sold by a special master appointed by the district court in the county where the property is located⁶⁶³ and attached personalty is to be sold "under an execution issued on such attachment as in other cases of ordinary execution"⁶⁶⁴ to satisfy plaintiff's judgment. These provisions, which were added in 1939,⁶⁶⁵ do not follow the Missouri pattern of a general execution which may be levied upon all property whether attached or not for the case where defendant is personally served or appears, and a special execution which may be levied only upon property attached for the case where no personal jurisdiction is obtained over the defendant.⁶⁶⁶ Missouri decisions that a defective attachment levy cannot be cured by a valid execution levy as against an intervening purchaser⁶⁶⁷ and that the purchaser under a defective execution writ does not take title good against defend-

657. *Burnham, Hanna, Munger & Co. v. Blank*, 49 Mo. App. 56 (1892). Cf. N.M. Stat. Ann. §§ 21-9-9 through 21-9-51 (1953), § 21-9-6 (Supp. 1961), and §§ 21-9-7 through 21-9-18 (1953).

658. *Gilbert v. Gilbert*, 33 Mo. App. 259 (1888). The same result follows where the first plaintiff in attachment sues defendant by the wrong name, *Lorie v. Abernathy*, 63 Mo. App. 249 (1895), unless the second plaintiff attaches with full knowledge. *Thompson v. Simpson*, 148 Mo. App. 145, 127 S.W. 620 (1910).

659. *Adler v. Anderson*, 42 Mo. App. 189 (1890).

660. *Doggett, Baskett & Hill Co. v. Wimer*, 54 Mo. App. 125 (1893).

661. See notes 596, 609, 627, *supra*.

662. See notes 595, 608, 626, *supra*.

663. N.M. Stat. Ann. § 26-1-36 (1953).

664. N.M. Stat. Ann. § 26-1-37 (1953).

665. N.M. Laws 1939, ch. 159, §§ 6, 7, at 346.

666. Mo. Ann. Stat. §§ 521.360, 521.370, 521.380, 521.390, 521.560 (1953).

667. *Henry v. Mitchell*, 32 Mo. 512 (1862). As against a defendant personally served, a defective attachment may of course be cured by a later valid execution levy, so that the execution purchaser takes good title in the absence of intervening claims. *Harvey v. Wickha*, 23 Mo. 112 (1856).

ant despite a valid attachment⁶⁶⁸ may be applicable here. But there is no apparent reason why our court should follow Missouri holdings⁶⁶⁹ that the attachment lien on realty is "merged" in the judgment lien and lost after the statute of limitation on the judgment lien has run.⁶⁷⁰

XI. ACQUIRING JURISDICTION THROUGH ATTACHMENT

If the defendant in attachment is personally served, the court, of course, acquires jurisdiction to enter a personal judgment against him for the full amount of plaintiff's claim, and the only office of the attachment is to hold the property to abide the judgment. This is recognized by provisions of the Missouri attachment law copied here, which direct that the attachment writ shall contain "a clause of the nature and to the effect of an ordinary citation"⁶⁷¹ and that "when the defendant is cited to answer the action . . . a general judgment may be rendered for or against the defendant."⁶⁷² The same result follows where defendant is not personally served, but enters a general appearance.⁶⁷³ In either case, dissolution of the attachment will not deprive the court of jurisdiction.⁶⁷⁴

But, since the United States Supreme Court spelled out the requirements of the due process clause of the Fourteenth Amendment in a case to which that Amendment did not apply,⁶⁷⁵ it has been established that by attachment of property within its jurisdiction and substituted service "reasonably likely" to give notice, a state can subject the attached property to the payment of plain-

668. *Crittenden v. Leitensdorfer*, 35 Mo. 239 (1864).

669. *Crittenden v. Leitensdorfer*, note 668, *supra*. *Green v. Dougherty*, 55 Mo. App. 217 (1893). The Missouri rule does not apply to personality nor to the proceeds of the sale of attached personalty which the judgment lien does not reach. *State ex rel. Burnham v. Hickman*, 150 Mo. 626, 51 S.W. 680 (1899).

670. A judgment lien on realty is acquired under N.M. Stat. Ann. § 21-9-6 (1953) by filing a transcript of the docket with the clerk of the county in which the property is located. The question of the applicable period of limitation on enforcement of the lien was extensively discussed but not decided in *Pugh v. Heating & Plumbing Finance Corp.*, 49 N.M. 234, 161 P.2d 714 (1945). Our attachment statute, like the Missouri statute, contains no provision dealing with the duration of the attachment lien. Cf. N.M. Stat. Ann. § 24-2-13 (1953), providing with respect to execution levies that the "lien of levy upon the property shall continue until the debt is paid."

671. *Kearny Code*, Attachments § 7 (1846) at 1 N.M. Stat. Ann. 303 (1953) (now § 26-1-3 (1953)); Mo. Rev. Stat. ch. 11, art. I, § 9 (1845); Mo. Ann. Stat. § 521.140 (1953).

672. *Kearny Code*, Attachments § 8 at 1 N.M. Stat. Ann. 304 (1953) (now N.M. Stat. Ann. § 26-1-15 (1953)); Mo. Rev. Stat. ch. 11, art. I, § 11 (1845); Mo. Ann. Stat. §§ 521.360, 521.370 (1953). It is not clear that service of the complaint, without service of the writ, as authorized by § 26-1-17, would suffice to give the court personal jurisdiction.

673. *Waldo v. Beckwith*, 1 N.M. 97 (1854); *Hempstead v. Dodge*, 1 Mo. 493 (1824); *Whiting v. Budd*, 5 Mo. 443 (1838); *Evans v. King*, 7 Mo. 411 (1842); *Huxley v. Harrold*, 62 Mo. 516 (1876).

674. *Waldo v. Beckwith*, note 673, *supra*; *Schlatter v. Hunt*, 1 Mo. 651 (1826); *Peery v. Platte*, 39 Mo. 404 (1867); *Owens v. Johns*, 59 Mo. 89 (1875).

675. *Pennoyer v. Neff*, 95 U.S. 715 (1877). The case arose in 1865, three years before the effective date of the Fourteenth Amendment.

tiff's claim against defendant.⁶⁷⁶ This "quasi in rem" jurisdiction⁶⁷⁷ is also recognized in a provision of our attachment statute derived from Missouri:

When the defendant shall be notified, by publication as aforesaid, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded on to a final judgment as in ordinary actions, but such judgment shall only bind the property attached, and shall be no evidence of indebtedness against the defendant in any subsequent suit.⁶⁷⁸

Here, both a valid attachment levy⁶⁷⁹ and valid substituted service⁶⁸⁰ are essential. If either is missing the court acquires no jurisdiction. Where both are present, but the court has no personal jurisdiction over defendant, the default judgment is authority only for sale of the property attached.⁶⁸¹

The Missouri courts have concluded that, where joinder is otherwise proper,

676. See Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958); Comment, 10 Stan. L. Rev. 750 (1958). For the substituted service authorized by the attachment law, see pp. 81-83, *supra*. I am advised that the service by posting at defendant's residence as authorized by statute (note 50, *supra*) is frequently employed in New Mexico in attachment cases where defendant is believed to be evading service. As indicated in note 50 *supra*, this may not always be sufficient to give personal jurisdiction. Where it is not, there is some doubt also as to its efficacy as substituted service in an attachment case since other forms of substituted service are specifically authorized for attachment cases.

677. See *State ex rel. Truitt v. District Court*, 44 N.M. 16, 21, 23, 96 P.2d 710, 713 (1939).

678. *Kearny Code, Attachments* § 12 (1846) (now N.M. Stat. Ann. § 26-1-19 (1953)); *Mo. Rev. Stat. ch. 11, art. I, §§ 16, 17* (1845); *Mo. Ann. Stat. §§ 521.380, 521.390* (1953). The corresponding provision for justice courts merely provides that "judgment by default shall be rendered, which may be proceeded on to final judgment in like manner as in ordinary actions." N.M. Stat. Ann. § 36-7-9 (1953).

679. *Southern California Fruit Exchange v. Stamm*, 9 N.M. 361, 54 Pac. 345 (1898); *Smith v. McCutcheon*, 38 Mo. 415 (1866); *Abbott v. Sheppard*, 44 Mo. 273 (1869); *Bray v. McClury*, 55 Mo. 128 (1874); *Burnett v. McCluey*, 78 Mo. 676 (1883); *Bryant v. Duffy*, 128 Mo. 18, 30 S.W. 317 (1895); *Miner's Bank v. Kingston*, 204 Mo. 687, 103 S.W. 27 (1907) (citing cases at 204 Mo. at 687, 103 S.W. at 31).

680. *Walter v. Richards*, 62 N.M. 152, 306 P.2d 643 (1957); *Smith v. Montoya*, 3 N.M. (Gild. B.W. ed.) 3, 3 N.M. (Gild. E.W.S. ed.) 13, 3 N.M. (John. ed.) 39, 1 Pac. 175 (1883); *Drake v. Hale*, 38 Mo. 346 (1866); *Haywood v. Russell*, 44 Mo. 252 (1869). But in Missouri defects in substituted service cannot be raised by collateral attack in ejectment or quiet title actions between the defendant and the purchaser at the judicial sale of the attached property. *Freeman v. Thompson*, 53 Mo. 183 (1873); *Holland v. Adair*, 55 Mo. 40 (1874); *Kane v. McCown*, 55 Mo. 181 (1874); *Johnson v. Gage*, 57 Mo. 160 (1874); *Randall v. Snyder*, 214 Mo. 23, 112 S.W. 529 (1908). Cf. *White v. Gramley*, 236 Mo. 647, 139 S.W. 127 (1911); *Hauser v. Murray*, 256 Mo. 58, 165 S.W. 376 (1913); *Graves v. Smith*, 278 Mo. 592, 213 S.W. 128 (1919); *Thomason v. Allen*, 324 Mo. 1061, 26 S.W.2d 609 (1930). And a defendant who enters a general appearance in the attachment action cannot thereafter complain of defects in the substituted service. *Bieser v. Woods*, 347 Mo. 437, 150 S.W.2d 524 (1941).

681. *Clark v. Holliday*, 9 Mo. 711 (1846); *Johnson v. Holly*, 27 Mo. 594 (1859); *Givens v. Harlow*, 251 Mo. 231, 158 S.W. 355 (1913). See *Cabell v. Grubbs*, 48 Mo. 353 (1871); *Massey v. Scott*, 49 Mo. 278 (1872); *Burnett v. McCluey*, 92 Mo. 230, 4 S.W. 694

plaintiff may, in a single action, sue one defendant by personal service of summons and a co-defendant by attachment and either personal⁶⁸² or substituted⁶⁸³ service. But the Missouri statute, unlike its New Mexico counterpart,⁶⁸⁴ provides that plaintiff "may have an attachment against the property of the defendant, or that of any one or more of several defendants."

Although the federal district court in New Mexico will follow state attachment procedures,⁶⁸⁵ it cannot allow attachment and substituted service to create "quasi in rem" jurisdiction in suits originating in that court. Perhaps through perpetuation of an ancient error⁶⁸⁶ in the interpretation of a venue statute,⁶⁸⁷ the Supreme Court has held that a suit may be initiated by attachment in the federal courts only where defendant can be personally served or voluntarily appears.⁶⁸⁸ This limitation applies only to cases originating in the federal district courts, however. The Judicial Code provides that whenever an action is removed from a state court to a federal district court "any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered in the State court."⁶⁸⁹ And this provision has been held to authorize, not only removal of a "quasi in rem" suit from state to federal district court,⁶⁹⁰ but also to authorize the federal district court after removal and without acquiring personal jurisdiction over defendant to "extend" the attachment lien by ordering attachment or garnishment of additional property.⁶⁹¹

(1887). Conversely, where a defendant is personally served or enters a general appearance, the Missouri courts hold that he can object to a judgment or execution writ limited to the property attached, since he is entitled to apply other property to the judgment. *Kritzer v. Smith*, 21 Mo. 296 (1855); *Jones v. Hart*, 60 Mo. 351 (1875); *Phillips v. Stewart*, 69 Mo. 149 (1878); *Maupin v. Virginia Lead Mining Co.*, 78 Mo. 24 (1883).
 682. *Franciscus v. Bridges*, 18 Mo. 208 (1853).

683. *Kinsley Bank v. Woods*, 61 S.W.2d 384 (Mo. App. 1933).

684. Mo. Ann. Stat. § 251.010 (1953). Cf. N.M. Stat. Ann. § 26-1-1 (1953). And see *Hempstead v. Dodge*, 1 Mo. 493 (1824).

685. See text at note 4, *supra*.

686. See *Currie, Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337 (1961).

687. 28 U.S.C. § 1391 (1952).

688. *Toland v. Sprague*, 12 Pet. 300 (1838); *Ex parte Railway Co.*, 103 U.S. 794 (1880); *Big Vein Coal Co. v. Read*, 229 U.S. 31 (1913).

689. 28 U.S.C. § 1450 (1952).

690. *Clark v. Wells*, 203 U.S. 164 (1906). See *Hisel v. Chrysler Corp.*, 90 F.Supp. 655 (W.D. Mo. 1950), holding that where, after removal, the attachment is dissolved, the action should not be dismissed because of the possibility that defendant might yet be personally served under 28 U.S.C. § 1448, providing that in removal cases where a defendant has not yet been served, he may be served after removal. See 28 U.S.C. § 1447a also. But under Federal Rule 4(f), the summons of a federal district court does not run beyond the boundaries of the state in which the court sits, save in certain special cases covered by federal statutes.

691. *Rorick v. Devon Syndicate*, 307 U.S. 299 (1939).

Under Rules 55 (c) and 60(b) of our Rules of Civil Procedure,⁶⁹² which so far has here relevant are verbatim copies of Federal Rules 55(c) and 60(b), a default judgment may be set aside, upon motion made within one year after judgment, for "mistake, inadvertence, surprise, or excusable neglect." Neither our court nor the federal courts have considered the application of this provision to a judgment entered by default on substituted service.⁶⁹³ But the federal courts have set aside judgments entered on service which was sufficient to give personal jurisdiction upon a showing that defendant in fact received no notice.⁶⁹⁴ The same test should be applied in "quasi in rem" actions, with relief being accorded not merely upon the ground that substituted service was employed,⁶⁹⁵ but on a showing that defendant in fact did not receive notice in time to plead.

XII. THE RISKS OF ATTACHMENT

A plaintiff resorting to attachment runs the risk of precipitating a bankruptcy proceeding in which he may lose all advantage gained by his attachment and the risk of financial liability to defendant if either the attachment or his underlying claim cannot be sustained.

A. *Bankruptcy*. If the defendant is insolvent⁶⁹⁶ at the time the attachment lien is acquired, and does not vacate or discharge the lien within 30 days thereafter, or at least 5 days before the date set for sale or other disposition of the property, an act of bankruptcy has been committed,⁶⁹⁷ and upon an involuntary petition filed by creditors⁶⁹⁸ within four months after the lien was obtained,⁶⁹⁹

692. N.M. Stat. Ann. §§ 21-1-1(55) (c), 21-1-1(60) (b) (1953).

693. The federal courts will have little occasion to consider the matter. "Quasi in rem" judgments can be entered in those courts only where defendant has learned of the suit in a state court and removed it to a federal court. And for federal *in rem* actions on published notice, 28 U.S.C. § 1655 (1952), which is specifically recognized in Federal Rule 60(b), provides for automatic setting aside of a default judgment if defendant appears within a year.

694. *Rooks v. American Brass Co.*, 263 F.2d 166 (6th Cir. 1959); *Huntington Cab Co v. American Fid. & Cas. Co.*, 4 F.R.D. 496 (S.D.W.Va. 1945). See *Ellington v. Milne*, 14 F.R.D. 241 (E.D.N.C. 1953).

695. The Missouri attachment law, in provisions not adopted in New Mexico, allows a defendant not personally served and who does not appear to set aside a default judgment automatically at any time within two years after the judgment was entered. Mo. Ann. Stat. §§ 521.590-521.650 (1953).

696. Defendant is "insolvent" within the meaning of the Bankruptcy Act "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditor, shall not at fair valuation be sufficient in amount to pay his debts." 52 Stat. 841 (1938), 11 U.S.C. § 1(19) (1952). Note that exempt property is not excluded in determining solvency.

697. 66 Stat. 421 (1952), 11 U.S.C. § 21(a) (3) (1952).

698. One or more creditors with liquidated, non-contingent claims of \$500 in excess of security or, if total creditors are twelve or more, three or more creditors whose liquidated, non-contingent claims in excess of security aggregate \$500. 66 Stat. 425 (1952), 11 U.S.C. § 95b (1952).

699. 66 Stat. 421 (1952), 11 U.S.C. § 21(b) (1952).

the debtor will be adjudicated a bankrupt. The debtor may, of course, avoid the bankruptcy consequences of the attachment lien by posting a discharging bond. But if, as is not unlikely in the case of an insolvent debtor, bankruptcy nonetheless results on a petition filed within four months after the lien was obtained,⁷⁰⁰ any transfer of or lien upon the debtor's non-exempt property given to indemnify, directly or indirectly, the surety on the bond is voidable by the bankruptcy trustee and the surety's liability on the bond is discharged to the extent of the value of property so recovered by the trustee.⁷⁰¹ If, on the other hand, the debtor does not discharge the lien and bankruptcy results within four months, the bankruptcy trustee under Section 67a of the Bankruptcy Act may avoid the lien.⁷⁰² In either event, the attachment plaintiff will probably end with

700. An involuntary petition alleging other acts of bankruptcy or a voluntary petition filed by the debtor.

701. 52 Stat. 875, 876 (1952), 11 U.S.C. § 107(a)(2)(5) (1952).

702. 52 Stat. 875 (1938), 11 U.S.C. § 107(a)(1). If the property has been sold and the proceeds paid to the creditor *before* bankruptcy, § 67a will not enable the trustee to reach the proceeds, *Botts v. Hammond*, 99 Fed. 916 (4th Cir. 1900), but if the creditor had reasonable cause to believe the debtor insolvent, the trustee under § 60 of the Bankruptcy Act (11 U.S.C. § 96) may recover the proceeds as a preferential payment, *Golden Hill Distilling Co. v. Logue*, 243 Fed. 343 (6th Cir. 1917); *Horowitz v. Frederick W. Huber, Inc.*, 34 F.2d 979 (S.D. N.Y. 1929), or if the creditor bought at the sale, may recover the property or its value. *Grant v. National Bank of Auburn*, 232 Fed. 201 (N.D.N.Y. 1916). If the proceeds are still in the custody of the court entertaining the attachment proceedings, they may be recovered by the bankruptcy trustee. *Clark v. Larremore*, 188 U.S. 486 (1902). A bona fide purchaser of the property at a sale prior to bankruptcy was formerly allowed to retain the property. *Clark v. Larremore*, *supra*. Now, if he acquired his title "otherwise than at a judicial sale to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property." 52 Stat. 875 (1938), 11 U.S.C. § 107(a)(3) (1952). It is doubtful that one who purchased attached property sold before judgment because perishable, as distinguished from one who purchased at a sale pursuant to judgment for plaintiff in attachment, could qualify as a purchaser "at a judicial sale to enforce such lien." See *Jones v. Springer*, 226 U.S. 148, 155 (1912) (affirming 15 N.M. 98, 103 Pac. 265 (1909)).

Where the sale in attachment proceedings occurred *after* bankruptcy, and was a sale of perishable goods and not one "to enforce the lien," it was formerly held that a bona fide purchaser of personalty without notice of the bankruptcy proceedings took good title and that the bankruptcy trustee could reach proceeds still in the custody of the court. *Jones v. Springer*, *supra*. And the sheriff who sold property pursuant to court order and without notice that bankruptcy proceedings had been initiated was not liable to the bankruptcy trustee. *Conner v. Long*, 104 U.S. 228 (1881). But post-bankruptcy judicial sales of realty in attachment proceedings are now governed by § 21(g) of the Bankruptcy Act, 52 Stat. 853 (1938), 11 U.S.C. § 44(g) (1952), which seems to deprive the attachment court of jurisdiction to authorize such a sale of realty in the county where the bankruptcy proceeding is pending or to authorize sale of realty in any other county if certain bankruptcy documents are recorded in that county. Section 70(d) of the Bankruptcy Act, 52 Stat. 881 (1938), 11 U.S.C. § 110(d) (1952), seems to validate all post-bankruptcy transfers of personalty to a good faith transferee to the extent that he gives "present consideration" and purchases before the bankruptcy adjudication or before a bankruptcy receiver takes possession, and to invalidate all transfers of personalty thereafter occurring.

an unsecured claim in the bankruptcy proceeding on which his recovery may range from 0 to 8%.⁷⁰³

B. *Financial Liability*. In addition to the risk of liability to third parties for having directed or ratified a levy upon their property⁷⁰⁴ the attachment plaintiff also assumes a substantial risk of liability to the attachment defendant.

The condition of the attachment bond posted by plaintiff is, in the Missouri pattern, that he will prosecute his action "without delay and with effect, and refund all sums of money that may be adjudged to be refunded to the defendant and pay all damages that may accrue to any defendant . . . by reason of such attachment, or any process or judgment thereon."⁷⁰⁵ The requirement that plaintiff prosecute his action "with effect" means "with success"⁷⁰⁶ and the condition of the bond is breached either by dissolution of the attachment⁷⁰⁷ or by judgment for defendant on the merits.⁷⁰⁸

In the suit on the bond, defendant in attachment can recover actual damages for the value of the use of his personal property from the time of seizure to the

703. For the years 1950-60, there were no assets available for distribution to creditors after payment of administrative expenses in 85% of the bankruptcy cases concluded, and in the remaining 15% of the cases general creditors realized an average of 8.2% on their claims. Administrative Office of the United States Courts, Tables of Bankruptcy Statistics, Tables F-4, F-6 (1950-60).

704. See pp. 118-120, *supra*.

705. Kearny Code, Attachments § 4 (1846), at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. §§ 26-1-7, 26-1-8 (1953)); Mo. Rev. Stat. ch. 11, art. I, § 4 (1845). The liability for damages also runs to any garnishee. Although the separate garnishment law enacted in 1909 requires a separate bond covering damages to any garnishee, N.M. Stat. Ann. §§ 26-2-5, 26-2-8 (1953), where a writ of garnishment is obtained in an attachment suit no additional bond is required if "a sufficient attachment bond has been filed." N.M. Stat. Ann. § 26-2-3 (1953). The Missouri statute has now been amended so that the bond covers damages to any interpleader and to any officer executing the attachment writ by "following the instructions of the plaintiff." Mo. Ann. Stat. § 521.070 (1953).

706. *Cochrane v. Stevenson*, 32 N.M. 264, 255 Pac. 404 (1927), so construes the identical language of a replevin bond, and *Roth v. Yana*, 19 N.M. 8, Pac. (1914) holds the condition of the replevin bond breached where judgment for the plaintiff is reversed on appeal.

707. *State ex rel. Lunton v. Larabie*, 25 Mo. App. 208 (1887); *State ex rel. Burton v. McKeon*, 25 Mo. App. 666 (1889); *State ex rel. Cox v. Pace*, 34 Mo. App. 458 (1889); *State ex rel. Rogers v. Gage Bros. & Co.*, 52 Mo. App. 464 (1893); *Bennett v. Southern Bank of Mexico*, 61 Mo. App. 297 (1895); *State ex rel. Thrasher v. Heckart*, 62 Mo. App. 427 (1895); *State ex rel. Clark v. Parsons*, 109 Mo. App. 432, 84 S.W. 1019 (1905). See *State ex rel. Demuth v. Williams*, 48 Mo. 210 (1871); *Johnson v. Hall*, 84 Mo. 210 (1884). See *Schofield v. Territory ex rel. American Valley Co.*, 9 N.M. 526, 56 Pac. 306 (1899).

708. *Hayden v. Sample*, 10 Mo. 215 (1846); *State ex rel. Roe v. Thomas*, 19 Mo. 613 (1854); *State ex rel. Clifford v. Beldsmeier*, 56 Mo. 226 (1874); *State ex rel. Russell v. Fargo*, 151 Mo. 280, 52 S.W. 199 (1899). A defendant who wins on the merits can sue on the bond even though he did not challenge the attachment. *State ex rel. Clifford v. Beldsmeier*, *supra*; *State ex rel. Rigby v. Goodhue*, 74 Mo. App. 162 (1898); *State ex rel. Pinckley v. Yount*, 186 Mo. App. 258, 172 S.W. 431 (1914), or even though he unsuccessfully challenged the attachment. *State ex rel. Waggoner v. Lichtman-Goodman & Co.*, 131 Mo. App. 65, 109 S.W. 819 (1908).

time of release⁷⁰⁹ and where personalty has been sold as perishable he is entitled not merely to the proceeds but to any excess in value of the property at the time of seizure with interest to the time of trial⁷¹⁰—the statutory measure of damages for conversion.⁷¹¹ He can also recover from plaintiff in attachment for any damage to the property caused by the levying officer through acts "reasonably done" but not through "willful and abusive" acts.⁷¹² Since the bond covers all damages "by reason of such attachment," the Missouri courts have also allowed damages for loss of profits where the levy interferes with the business of defendant in attachment⁷¹³ and have allowed him to try to prove that a levy on pumping machinery resulted in the flooding of his mine,⁷¹⁴ but have refused to allow damages on the bond for injury to his credit.⁷¹⁵

Damages recoverable on the bond also include the reasonable cost of defeating the attachment. If achieved by dismissal of the attachment, recoverable litigation costs stop at that point.⁷¹⁶ If it is achieved only by judgment for defendant on

709. State ex rel. Clifford v. Beldsmeier, note 708 supra; State ex rel. Hayden v. McHale, 19 Mo. App. 478 (1885); State ex rel. Cole v. Shobe, 23 Mo. App. 474 (1886); State ex rel. First Nat'l Bank v. Seavey, 137 Mo. App. 1, 119 S.W. 17 (1909); State ex rel. Stevenson v. American Sur. Co., 74 S.W.2d 1094 (Mo. App. 1934). And see State ex rel. Burton v. McKeon, 25 Mo. App. 666 (1889), where defendant recovered the cost of renting other teams of horses for use in his business while his teams were attached. No damage can result from seizure of realty, since no seizure is involved in a levy upon realty. See pp. 83-84, supra.

710. State ex rel. Rogers v. Gage Bros. & Co., 52 Mo. App. 464 (1893); State ex rel. Clark v. Parsons, 109 Mo. App. 432, 84 S.W. 619 (1905); State ex rel. Kibble v. First Nat'l Bank, 22 S.W.2d 185 (Mo. App. 1929).

711. N.M. Stat. Ann. § 21-8-24 (1953).

712. Schofield v. Territory ex rel. American Valley Co., 9 N.M. 526, 546, 56 Pac. 306 (1899). It is no defense to a suit on the bond that no effective levy was made, since damage may result from an ineffective levy. State ex rel. Cantwell v. Stark, 75 Mo. 566 (1882); State ex rel. Rigby v. Goodhue, 74 Mo. App. 162 (1898); State ex rel. Walkley v. McCullough, 85 Mo. 69 (1900); State ex rel. Senter v. Cowell, 125 Mo. App. 348, 102 S.W. 573 (1907). But where no attempt at levy is made, defendant cannot recover litigation expenses on the bond. State ex rel. Conway v. Binney, 127 Mo. App. 710, 106 S.W. 1114 (1908). And it is a defense for plaintiff in attachment, when sued on the bond for damage to the property, that defendant in attachment had made an assignment for the benefit of creditors prior to the attachment, State ex rel. Waggoner v. Lichtman-Goodman & Co., 131 Mo. App. 65, 109 S.W. 819 (1908), even though he was still in possession of the property at the time of levy. State ex rel. Waggoner v. Lichtman, 184 Mo. App. 225, 168 S.W. 367 (1914).

713. Hayden & Smith v. Sample, 10 Mo. 215 (1846).

714. State ex rel. Endeavor Mining & Inv. Co. v. Webb City & Carterville Foundry & Machine Works, 151 Mo. App. 31, 132 S.W. 18 (1910).

715. State ex rel. Roe v. Thomas, 19 Mo. 613 (1854), suggesting that such damages might be recovered in an action for malicious abuse of process.

716. Territory ex rel. Leyser v. Rindskopf Bros. & Co. 5 N.M. 93, 20 Pac. 180 (1889); Schofield v. Territory ex rel. American Valley Co., 9 N.M. 526, 56 Pac. 306 (1899); Hayden & Smith v. Sample, 10 Mo. 215 (1846); Kelly v. Beauchamp, 59 Mo. 178 (1875); State ex rel. Burton v. McKeon, 25 Mo. App. 667 (1887); State ex rel. Thrasher v. Heckart, 62 Mo. App. 427 (1895); State ex rel. Clark v. Parsons, 109 Mo. App. 432, 84 S.W. 1019 (1905); State ex rel. Shipman v. Allen, 144 Mo. App. 234, 128 S.W. 809 (1910); State ex rel. Kibble v. First Nat'l Bank, 22 S.W.2d 185 (Mo. App. 1929). See State ex rel. Lurton v. Larabie, 25 Mo. App. 208 (1887).

the merits, all costs reasonably incurred in getting that judgment are recoverable.⁷¹⁷

In action on the bond, neither the plaintiff in attachment nor his sureties can relitigate the dismissal of the attachment or the judgment for defendant on the merits. It is enough to establish their liability that plaintiff did not prosecute his attachment suit "with effect."⁷¹⁸

A provision in the Missouri attachment law allows any obligor sued on the bond to counterclaim for any claim he has against the defendant in attachment and to recover judgment if his claim exceeds the claim on the bond.⁷¹⁹ Under this provision, plaintiff in attachment who lost his attachment but won on the merits has been allowed, when sued on the bond, to counterclaim on his judgment,⁷²⁰ to intervene in a suit against his sureties for the purpose of counterclaiming on his judgment,⁷²¹ and to assign his judgment to the sureties so that they could counterclaim on it.⁷²² A plaintiff who lost on attachment and then took a non-suit on the merits was also allowed to reassert his original claim when sued on the bond,⁷²³ and a plaintiff who lost on the merits on defendant's showing that he had given notes in payment of the claim sued on asserted a counterclaim on the notes in the suit on the bond.⁷²⁴

The same results should follow in New Mexico. Our statute provides that the suit on the bond "shall proceed as in ordinary suits"⁷²⁵ and under Rule 13(b) a party may set up as a permissive counterclaim "any claim against an opposing party not arising out of the transaction or occurrence that is the subject-matter of the opposing party's claim."⁷²⁶ A right to intervene is conferred by Rule 24(a) "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."⁷²⁷ Since a principal is bound by a judgment against the

717. State ex rel. Clifford v. Beldsmeier, 56 Mo. 226 (1874); State ex rel. Hayden v. McHale, 19 Mo. App. 478 (1885); State ex rel. Cole v. Shobe, 23 Mo. App. 474 (1886); State ex rel. Rigby v. Goodhue, 74 Mo. App. 162 (1898); Pinkley v. Yount, 186 Mo. App. 258, 172 S.W. 431 (1914). Where the property is released on posting of a discharging bond which dissolves the attachment, defendant in attachment cannot recover the cost of litigating on the merits. State ex rel. Russell v. Fargo, 151 Mo. 280, 52 S.W. 199 (1899). But defendant who recovers his property by posting a forthcoming bond which does not dissolve the attachment can recover the full cost of his judgment on the merits. State ex rel. Johnson v. Weinberg, 235 Mo. App. 1274, 151 S.W.2d 134 (1941).

718. Schofield v. Territory ex rel. American Valley Co., 9 N.M. 526, 56 Pac. 306 (1899); Hayden & Smith v. Sample, 10 Mo. 215 (1846); Bennett v. Southern Bank of Mexico, 61 Mo. App. 297 (1895).

719. Mo. Ann. Stat. § 521.120 (1953).

720. State ex rel. Larson v. Mathieson, 261 S.W. 335 (Mo. App. 1924).

721. State ex rel. Kendrick v. Hudson, 86 Mo. App. 501 (1901).

722. Johnson v. Hall, 84 Mo. 210 (1884); State ex rel. Hinde v. United States Fid. & Guar. Co., 135 Mo. App. 160, 115 S.W. 1081 (1909).

723. State ex rel. Shipman v. Allen, 144 Mo. App. 234, 128 S.W. 809 (1910).

724. State ex rel. Waggoner v. Lichtman-Goodman & Co., 131 Mo. App. 65, 109 S.W. 819 (1908).

725. N.M. Stat. Ann. § 26-1-11 (1953).

726. N.M. Stat. Ann. § 21-1-1(13) (b) (1953).

727. N.M. Stat. Ann. § 21-1-1(24) (a) (1953).

surety entered after the principal has received notice of the suit, this rule should authorize intervention by the plaintiff in attachment when his surety is sued on the attachment bond⁷²⁸ in order to assert a counterclaim. Or, since judgments,⁷²⁹ written instruments⁷³⁰ and choses in action except for personal torts⁷³¹ are assignable, the surety can be equipped to assert the counterclaim.

The Missouri courts have also allowed a defendant who wins either on the attachment issues or on the merits to maintain a common law action against the plaintiff for abuse of process. Merely by showing that the attachment was dissolved he establishes that it was "wrongful" and recovers compensatory damages, as he would in a suit on the attachment bond.⁷³² Defendant in attachment has a choice between this action and an action on the bond.⁷³³

If, in addition, defendant in attachment can prove that plaintiff acted maliciously and without probable cause, he can also recover "smart money"—punitive damages.⁷³⁴ Both malice⁷³⁵ and lack of probable cause⁷³⁶ must be proved⁷³⁷

728. See *United States v. American Sur. Co.*, 142 F.2d 726 (2d Cir. 1944); *United States v. C. M. Lane Lifeboat Co.*, 25 F.Supp. 410 (E.D. N.Y. 1938).

729. *Rogers v. Garde*, 33 N.M. 245, 264 Pac. 951 (1928).

730. N.M. Stat. Ann. §§ 50-7-1 through 50-7-5 (1953), as amended by N.M. Laws 1961, ch. 96, §§ 11-106 through 11-109.

731. N.M. Stat. Ann. § 21-4-12 (1953). See also *Parker v. Beasley*, 40 N.M. 68, 64 P.2d 687 (1936); *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 24 P.2d 731 (1933); *Young v. New Mexico Broadcasting Co.*, 60 N.M. 475, 292 P.2d 776 (1956); *McInnes v. American Sur. Co.*, 12 F.2d 212 (8th Cir. 1926), cert. denied, 273 U.S. 707 (1926).

732. *Fry v. Estes*, 52 Mo. App. 1 (1892); *Talbott v. Great W. Plaster Co.*, 151 Mo. App. 538, 132 S.W. 15 (1910); *Talbott v. Great W. Plaster Co.*, 167 Mo. App. 542, 152 S.W. 377 (1912); *Miller v. Smith*, 1 F.2d 292 (8th Cir. 1924). Cf. *Witascheck v. Glass*, 46 Mo. App. 209 (1891). The prior decisions on attachment issues and on the merits are *res judicata* in the action for wrongful attachment, *Ivy v. Barnhart*, 10 Mo. 151 (1846); *Freymark v. McKinney Bread Co.*, 55 Mo. App. 435 (1893); *Powell v. Schultz*, 118 S.W.2d 25 (Mo. App. 1938), and it is no defense that plaintiff in attachment had probable cause for his belief that grounds for attachment existed. *Talbott v. Great W. Plaster Co.*, 167 Mo. App. 542, 152 S.W. 377 (1912). Defendant in attachment can maintain this suit though he did not challenge the grounds for attachment, *Guinta v. Jack Daniels Distilling Co.*, 211 Mo. App. 25, 244 S.W. 99 (1922), and it is no defense for plaintiff in attachment that the attachment proceedings were invalid. *Miller v. Smith*, *supra*. If defendant in attachment had no opportunity to defend, he may maintain the action for abuse of process even though the attachment suit terminated in a judgment for plaintiff. *Freymark v. McKinney Bread Co.*, *supra*.

733. *Talbott v. Great W. Plaster Co.*, 151 Mo. App. 538, 132 S.W. 15 (1910). But where defendant first sues on the bond and recovers compensatory damages, he cannot maintain another action for such damages although the inadequate penalty of the bond restricted his recovery in the first action. *Powell v. Schultz*, note 732, *supra*.

734. *Walser v. Thies*, 56 Mo. 89 (1874); *Scovill v. Glasner*, 79 Mo. 449 (1883).

735. "Malice means the wrongdoer not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrongful when he did it." *Witascheck v. Glass*, 46 Mo. App. 209, 214 (1891).

736. Probable cause means "belief founded on reasonable grounds." *Freymark v. McKinney Bread Co.*, 55 Mo. App. 435, 437 (1893).

737. *Walser v. Theis*, 56 Mo. 89 (1874); *Moody v. Deutsch*, 85 Mo. 237 (1884); *Witascheck v. Glass*, 46 Mo. App. 209 (1891); *Talbott v. Great W. Plaster Co.*, 86 Mo. App. 558 (1901). But good faith reliance on advice of counsel may be a defense against

although the same evidence may establish both⁷³⁸ and it may relate either to the existence of grounds for attachment⁷³⁹ or to the merits of plaintiff's underlying claim.⁷⁴⁰

The action for compensatory damages for wrongful attachment, in lieu of an action on the bond, has been successfully maintained in New Mexico in a case which recognizes both malice and lack of probable cause as essential elements to the recovery of punitive damages.⁷⁴¹

CONCLUSION

For the reader who has survived this examination of New Mexico attachment law⁷⁴² the conclusion must be obvious. That law is in a far from satisfactory state. Like other parts of our procedural machinery, such as the Rules of Civil Procedure, the attachment law should be as clear and as simple as legal ingenuity can make it. But the kindest description that can be given of our law is that it represents the best legal thinking in Missouri more than a century ago, plus a hodgepodge of subsequent additions drafted with little regard to their impact upon the basic pattern.⁷⁴³ If it has served us tolerably well thus far, the hundreds of Missouri cases litigating the obscurities and conflicts of the original model amply attest its inadequacy for our expanding economy.

any liability for punitive damages, *Alexander v. Harrison*, 38 Mo. 258 (1866), though not a defense against liability for compensatory damages. *Marron v. Barton*, 34 N.M. 516, 285 Pac. 502 (1930).

738. *Holliday v. Sterling*, 62 Mo. 321 (1876); *Scovill v. Glasner*, 79 Mo. 499 (1883). *Talbott v. Great W. Plaster Co.*, note 737, *supra*.

739. *Scovill v. Glasner*, 79 Mo. 449 (1883). See also *Reamer v. Morrison Express Co.*, 93 Mo. App. 501, 67 S.W. 718 (1902).

740. *Holliday v. Sterling*, 62 Mo. 321 (1876); *Guinta v. Jack Daniels Distilling Co.*, 211 Mo. App. 25, 244 S.W. 99 (1922).

741. *Marron v. Barton*, 34 N.M. 516, 285 Pac. 502 (1930). See also *Schofield v. Territory ex rel. American Valley Co.*, 9 N.M. 526, 56 Pac. 306 (1899), holding that in an action on the attachment bond, where no punitive damages are sought, plaintiff's probable cause to believe in the existence of grounds for attachment is irrelevant. And see *Fry v. Estes*, 52 Mo. App. 1 (1892), suggesting that an action on the bond for compensatory damage may be joined with a common law action for punitive damages.

742. In 1907 the legislature took cognizance of the debtor who did not survive the attachment proceeding and provided that in the event of his death, or expiration or termination of its charter in the case of a corporate defendant, "the proceedings, shall be carried on" with legal representatives substituted as parties. N.M. Laws 1907, ch. 107, § 1 (220) at 278 (now N.M. Stat. § 26-1-23 (1953)). See also N.M. Stat. Ann. §§ 51-7-3, 51-7-9 (1953). The effect of this provision is uncertain. Clearly it allows plaintiff to proceed to judgment, but it probably does not permit him to collect his judgment by sale of the attached property or otherwise, in such manner as to obtain a greater percentage of his claim than other creditors of the decedent's estate. See *Crenshaw v. Delgado*, 1 N.M. 376 (1866), and N.M. Stat. Ann. §§ 31-8-3, 31-8-11 through 31-8-13 (1953). Cf. Mo. Ann. Stat. §§ 521.430 through 521.460 (1953).

743. Such a pronouncement should, of course, be followed by a proposed revision of the law. In due course it will be, but other commitments make it impossible to forecast an early completion. Those disposed to undertake their own revision may get some help from the Advance Draft of The Final Report of The New York Advisory Committee on Practice and Procedure (1961).