THE MODERN UTILITY OF QUASI IN REM JURISDICTION

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Professor Carrington examines the proposed amendment to the Federal Rules of Civil Procedure that would confer quasi in rem jurisdiction on the federal courts and concludes that it should be rejected. Arguing that the expansion of the concept of personal jurisdiction has removed most of what justification there once was for quasi in rem jurisdiction, the author maintains that the latter jurisdiction often provides only limited and uncertain judgments for local plaintiffs while compelling nonresident defendants to litigate in an inconvenient forum, and therefore should not be made available in the federal courts merely to bring their practice into conformity with that of the courts of the states.

NOW that the venerable concept of quasi in rem jurisdiction has largely outlived its utility, it is proposed at long last to make it available in the federal courts. It must be conceded that the proposal of the Advisory Committee on Civil Rules to amend rule 4¹ for this purpose would bring federal courts into line with the practice in state courts and with long standing Anglo-American tradition. But greater justification than this should be required before such an antique device is appended to our modern court apparatus.

It is helpful to understanding to recall that the default judgment was unknown to English law as recently as 250 years ago. Perhaps because the defendant's presence was essential to trial by ordeal, the primitive court would not proceed without him. If he were contumacious, his presence would be compelled. One of the milder forms of duress employed for this purpose was the

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¹ The proposal was first made by the Supreme Court's Advisory Committee in 1955. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 10, 12-14 (1955). None of the 23 proposals made in this report was adopted. In 1960, Chief Justice Warren appointed a new committee; in January of 1961, it proposed three amendments which were adopted in April of that year. 81 Sup. Ct. 22 (1961). In October 1961, the Committee published a draft of 23 proposals, one of them being a repetition of the earlier proposed amendment to rule 4. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 6-9 (1961).

writ of attachment, which directed the sheriff to seize and hold the defendant's goods until he appeared and conducted his defense. The only purpose of this remedy was to compel appearance; if the defendant appeared, his goods were discharged.² A variation on this practice evolved in the Lord Mayor's Court in London, where the defendant's property was attached and his debts garnished without notice to him; the property was turned over to the plaintiff and the debtors were directed to pay their debts to the plaintiff on his pledge to make restitution if the defendant should appear and disprove the debt within a year and a day.³

The default judgment was recognized in the eighteenth century.⁴ The writ of attachment and its companion process of garnishment were then found to have other uses. While there were many variations in form, a common purpose of the American legislation dealing with attachment and garnishment was to assure the successful plaintiff satisfaction of his claim. Thus, these provisional remedies were available only upon the plaintiff's making affidavit that the defendant was of a class of persons likely to frustrate a writ of execution and filing bond to secure the defendant against wrongful attachment.⁵

These statutes were, however, also bent to the purpose of solving another problem which had been created with the recognition of the default judgment—that of remote litigation. A plaintiff cannot be permitted to compel his defendant to go to a distant court under threat of a default judgment; if the default is to be binding, the plaintiff must select a proper court. The principal restraint on the plaintiff's choice among American courts has been the requirement of service of process as a basis for personal jurisdiction.⁶ This requirement was satisfied by personal delivery to the defendant or his agent or to his place of abode.

² See generally MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 74-97 (1952); 3 BLACKSTONE, *COMMENTARIES* *279.

³ This practice was recorded by LOCKE, *FOREIGN ATTACHMENT IN THE LORD MAYOR'S COURT* (1853). It may have Roman ancestry. DRAKE, *ATTACHMENT* 1 (7th ed. 1891).

⁴ Beginning with Act To Prevent Frivolous and Vexatious Arrests, 12 Geo. 1, c. 29 (1725).

⁵ For a general survey of attachment statutes in many states, see Sturges & Cooper, *Credit Administration and Wage Earner Bankruptcies*, 42 YALE L.J. 487, 503-510 (1933). The custom of London extended only to actions of debt. Early American law limited provisional remedies to contract actions. DRAKE, *op. cit. supra* note 3, at 10-27. Most of these limitations have been removed however.

⁶ The classic discussions are the opinions in *Pennoy v. Neff*, 95 U.S. 714 (1887). The modern vitality of that decision is exhibited in the doubtful case of *Hanson v. Denckla*, 357 U.S. 235 (1958). As Justice Hunt's dissent in *Pennoy v. Neff*

The difficulties of satisfying this requirement present the plaintiff's horn of the dilemma: he should not be frustrated by the furtive defendant who is skillful at evading the process server. The statutory remedies of attachment and garnishment offered an ameliorative, for one class of defendants against whom the statutory writs could be employed were nonresidents. Where the defendant or his domicile cannot be found by the process server, the plaintiff can direct the sheriff to attach his property or summon his debtors; if the defendant then fails to appear, his assets are liquidated to satisfy the resulting default judgment. This is the familiar pattern of what has come to be known as quasi in rem jurisdiction.⁷ So long as the courts insisted on a restrictive concept of personal jurisdiction and required service of process as a requisite of a valid default judgment, the quasi in rem jurisdiction served the useful purpose of mitigating the rigors of securing personal jurisdiction. Many of the cases in which the plaintiff was forced to invoke quasi in rem jurisdiction were disputes that in fairness ought to have been subject to the decision of a local forum, which decision the defendant could otherwise have evaded by staying beyond the reach of the process server.

A line of rather questionable decisions has established that attachment and garnishment are not available in the federal courts until jurisdiction over the person of the defendant has been obtained by service of process.⁸ This deprives the federal plaintiff of the possibility of using the quasi in rem jurisdiction to compel an appearance by a nonresident defendant and has been a source of dissatisfaction for some time.⁹ And, as Professor Currie has

suggests, some early American courts were satisfied with the citizenship of the plaintiff as a basis for jurisdiction. *E.g.*, *Butterworth v. Kinsey*, 14 Tex. 495 (1855).

⁷ The modifier "quasi" is always objectionable. It is used here to distinguish in rem proceedings in which the title to the property involved is itself the subject of litigation and in personam proceedings in which attachment and garnishment may be employed as provisional remedies to conserve assets for later execution. It does not adequately distinguish actions in which the plaintiff seeks to vindicate his pre-existing claim to the property against a nonresident defendant. Most such claims may be brought in the federal courts under 28 U.S.C. § 1655 (1958). Some difficulty is encountered in applying this statute to accommodate enforcement of liens on interests which are not "property within the district." For a thorough discussion of this problem, see Annot., 30 A.L.R.2d 208 (1953).

⁸ *Davis v. Ensign-Bickford Co.*, 139 F.2d 624 (8th Cir. 1944). For a collection and criticism of the cases, see Currie, *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337 (1961). Use of local provisional remedies against a defendant already before the court is assured by FED. R. CIV. P. 64.

⁹ An early protest was voiced by Judge Lowell in *Dormitzer v. Illinois & St. Louis Bridge Co.*, 6 Fed. 217, 218 (C.C.D. Mass. 1881). See also Currie, *supra* note 8; Blume, *Actions Quasi in Rem Under Section 1655, Title 28, U.S.C.*, 50 MICH.

recently observed,¹⁰ it is perhaps an anomaly that attachment and garnishment cannot be used in an original action in a federal court for their historic purpose of compelling appearance, although they are available in state courts for that purpose.¹¹

The anomaly, however, is an anomalous exception to an anachronistic rule. In the light of the emerging concept of personal jurisdiction, the quasi in rem procedure is rarely useful to plaintiffs except in cases which the defendant ought not to be asked to defend in the forum chosen by the plaintiff. The modern development has been thoroughly analyzed and explained elsewhere;¹² it is sufficient here to observe that there is no longer any constitutional inhibition on the exercise of jurisdiction in personam over a defendant whose contacts with the state make it reasonably fair that he be asked to defend the claim in its courts. The contact may be sufficient to sustain constructive or substituted service of process if the defendant has "done business,"¹³ solicited¹⁴ or made¹⁵ contracts, operated a motor vehicle,¹⁶ or committed a tort¹⁷ in the state, at least in actions arising out of the defendant's

L. REV. 1, 8-9 (1951); Note, 34 CORNELL L.Q. 103 (1948); Note 13 SO. CAL. L. REV. 361 (1940). A rather queer limitation to the rule was applied in *Hearst v. Hearst*, 15 F.R.D. 258 (N.D. Cal. 1954), 68 HARV. L. REV. 367, which held that a writ of garnishment might be issued by a federal court in anticipation of prospective service of process, although the writ would not suffice as a basis for further proceeding and should be quashed when service appeared unlikely. Cf. *Jacobson v. Coon*, 165 F.2d 565, 567 (6th Cir. 1948).

¹⁰ Currie, *supra* note 8, at 338.

¹¹ The anomaly is seemingly emphasized by the established federal practice permitting removal of actions commenced by attachment or garnishment, 28 U.S.C. § 1450 (1958), but the inadequacy of quasi in rem procedure is not a reason to deny the defendant's right to remove in a proper case. This does not explain *Rorick v. Devon Syndicate*, 307 U.S. 299 (1939), which held that a federal court could, after removal of such a case, attach additional property without obtaining jurisdiction over the person of the defendant. That regrettable decision seems to rest on the mistaken notion that the statute (then REV. STAT. § 646 (1875)) was inconsistent with former decisions denying the use of quasi in rem jurisdiction in the federal courts.

¹² *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

¹³ *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *International Harvester Co. v. Kentucky*, 234 U.S. 579, 583, 589 (1914).

¹⁴ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

¹⁵ *Compania de Astral v. Boston Metals Co.*, 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955). *But cf. Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956).

¹⁶ *Hess v. Pawloski*, 274 U.S. 352 (1927).

¹⁷ *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951).

activities which relate him to the jurisdiction.¹⁸ All that is constitutionally required is that the legitimate interest of the plaintiff in securing relief in the forum of his selection bear a reasonable relation to the burdens imposed on the nonresident defendant who is called upon to defend in a distant forum.¹⁹ Thus, corporate defendants are perhaps more amenable to these "long-arm" jurisdictional devices than individual defendants whose personal conveniences are entitled to greater weight.²⁰ And defendants in highly regulated businesses such as insurance may be very exposed indeed, for insurance plaintiffs are recognized as having an especially proper need for local protection.²¹

While only a few legislatures have as yet fully explored the possibilities for extending the jurisdiction of their courts, a wide variety of statutes providing more occasions for the use of constructive and substituted service of process²² and judicial relaxation extending the availability of older statutes²³ have made the personal jurisdiction problem no longer the obstacle it once was to the plaintiff who seeks a reasonably accessible forum for his case. The plaintiff who must resort to quasi in rem proceedings is seeking to compel an appearance by (or impose a forfeiture on) a defendant who, so far as appears, has inadequate contact with the state to make him fairly answerable to the claim there, or who is not of a class of defendants the legislature has seen fit to subject to the judgments of its courts. Indeed, the only contact of the defendant with the community which will be established will be the fortuitous one that his property or his debtor happens to be there at the time of commencement of the action. It has been suggested that quasi in rem jurisdiction is necessary to discourage debtors from putting their property beyond the reach of a writ of

¹⁸ The qualification was suggested by Chief Justice Stone in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). Its importance in some cases may be exemplified in *L. D. Reeder Contractors v. Higgins Indus.*, 265 F.2d 768 (9th Cir. 1959). *But cf.* *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

¹⁹ *Developments in the Law — State-Court Jurisdiction*, *supra* note 12, at 924.

²⁰ *Ehrenzweig, Pennoyer Is Dead — Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285, 292 (1958).

²¹ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n v. Virginia ex. rel. State Corp. Comm'n*, 339 U.S. 643 (1950).

²² See WIS. STAT. § 262.05 (1959); ILL. REV. STAT. ch. 110, § 17 (1961). It is perhaps still an open question whether such devices for out-of-state service are available in a federal court under rule 4(d)(7) or rule 4(f).

²³ *E.g.*, *Jarrard Motors, Inc. v. Jackson Auto & Supply Co.*, 237 Miss. 660, 115 So. 2d 309 (1959); *Henry R. Jahn & Son v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

execution.²⁴ Of course, such an avoidance provides only momentary escape since a personal judgment against the debtor can be enforced by collateral proceedings where his assets are found; this is especially so in the federal system where statutory provision is made for the registration of judgments of other district courts.²⁵ And, at most, the suggestion argues only for quasi in rem commencement conditioned upon a showing by the plaintiff that such an exercise of jurisdiction is necessary to avoid unnecessary litigation or absconding. It is not an argument for the foreign attachment where abundant assets are available in a forum in which the defendant can be subjected to personal jurisdiction.

It is manifestly unsatisfactory to expose the defendant to quasi in rem litigation which is based on a garnishment summons served on a nonresident garnishee;²⁶ in such cases, there is no showing that the defendant has any voluntary contact with the forum state. A fairminded application of the balancing-of-interests test applied in personal jurisdiction cases would lead to a rejection of jurisdiction in most cases in which the plaintiff is forced to resort to such a garnishment. And it is an almost equally harsh doctrine that exposes the defendant to the hazards of litigation simply because he has purchased local property or extended credit to a local debtor, or entrusted goods to a local carrier where the litigation is unrelated to the property or debt.²⁷ Quite acceptable is the policy of the statute of Pennsylvania, for instance, which exposes landowners to jurisdiction in personam in actions arising out of their ownership.²⁸ But it is inconsistent with the modern requirement of rational forum selection to require the property owner to answer any and all claims upon pain of forfeiting his property. Indeed, Professor Ehrenzweig has suggested that it is unreasonably arbitrary to permit the plaintiff to acquire jurisdiction solely on the basis of service of process.²⁹ Whether or not this is so, the chance capture of property or debtor is surely a

²⁴ 1 BEALE, CONFLICT OF LAWS § 106.1 (1935).

²⁵ 28 U.S.C. § 1963 (1958); see 7 MOORE, FEDERAL PRACTICE ¶ 69.03(3) (2d ed. 1954).

²⁶ *E.g.*, *Harris v. Balk*, 198 U.S. 215 (1905). For an example of the sort of shenanigans invited, see *Siro v. American Express Co.*, 99 Conn. 95, 121 Atl. 280 (1923). *But cf.* *Abel v. Smith*, 151 Va. 568, 144 S.E. 616 (1928).

²⁷ Where the claim is related, at least as to the local property and goods, there is no obstacle to its assertion in federal court. See note 7, *supra*.

²⁸ PA. STAT. ANN. tit. 12, § 331 (1953). The statute was upheld in *Dubin v. City of Philadelphia*, 34 Pa. D. & C. 61 (Phila. County Ct. 1938).

²⁹ *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

slender justification for compelling the defendant to enter the jurisdiction to defend.³⁰

The most forceful argument for the preservation of such wooden, irrational procedures as service of process and quasi in rem jurisdiction is their simplicity. Future rulemakers may conclude that our present effort to rationalize the choice of forum has failed: that the time and energy devoted to resolving disputes about fairness and accessibility are excessive costs for the benefits derived.³¹ Even this argument is not easy to make with reference to the most irrational procedure involved in quasi in rem jurisdiction, for such proceedings have produced a substantial amount of uneconomic dispute not pertaining to the merits. An example is the sterile line of cases dealing with the situs of intangibles, which apparently must be located before they can be attached.³² And, in any event, if the effort-economy argument is to prevail and a return to more formalized tests is to be made, more drastic reforms than the extension of quasi in rem jurisdiction to the federal courts are in order. Otherwise the emerging expansion of personal jurisdiction takes on the appearance of class warfare. The same concept of "fair play" invoked to favor plaintiffs in extending personal jurisdiction must be available to favor defendants in restricting the quasi in rem jurisdiction. The present restriction should therefore be preserved whether it is anomalous or not. The present rulemakers should take their stand in favor of fairness and evenhandedness in preference to doctrinal symmetry.

Unfairness to the defendant, however, is not the only consideration which militates against the proposed amendment to the rules. The value of the quasi in rem jurisdiction to the federal plaintiff is likely to be more apparent than real because of the other limitations on the availability of a federal forum and because of the persistence of doubts as to the efficacy of the limited

³⁰ This view was shared by Justice Story. *Picquet v. Swan*, 19 Fed. Cas. 609, 614 (No. 11134) (C.C.D. Mass. 1828). *But see* Currie, *supra* note 8, at 345-49.

³¹ The potential for delay of the devices for challenging the selection of a forum has only begun to manifest itself. A cursory examination of the cases collected by West Publishing Co. in its digests will reveal that the process is already costly. It was this consideration that led the Supreme Court of Washington to reject the doctrine of *forum non conveniens*. *Lansverk v. Studebaker-Packard Corp.*, 54 Wash. 2d 124, 338 P.2d 747 (1959). The decision is criticized by Trautman, *Forum Non Conveniens in Washington — A Dead Issue?* 35 WASH. L. REV. 88 (1960).

³² See Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241 (1939).

judgment, which may make a quasi in rem victory indecisive.

First, it must be observed that the quasi in rem plaintiff will have to meet the restrictions of the federal venue statutes.³³ Under these statutes, most actions cognizable in a federal court may be brought only in districts in which the defendant is available for service of process. For example, actions against individuals which arise under federal law may be brought only in the district in which all the defendants reside.³⁴ In such cases the defendant can generally be served at his residence.³⁵ Actions against corporations may be brought in districts in which they are incorporated, qualified to do business, or doing business.³⁶ Such corporations are subject to service of process under the pertinent qualifications statutes.³⁷ The irrationality of these federal venue provisions has been elsewhere remarked;³⁸ it is enough here to observe that few cases remain in which resort to quasi in rem procedure is advantageous to the federal plaintiff. Two classes of cases are exceptional: actions in which jurisdiction is based on diversity of citizenship may be brought in the district in which all defendants or all plaintiffs reside,³⁹ and actions against aliens may be brought in any district.⁴⁰ A third class of exceptional cases may exist to the extent that it is possible for a defendant to have a residence in

³³ The venue requirements have been held to be inapplicable to lien enforcement proceedings brought under 28 U.S.C. § 1655 (1958) and its forebears. *Greeley v. Lowe*, 155 U.S. 58 (1894). The superficial similarity might suggest that this exception to the venue requirements be extended to include actions brought under the proposed new rule. But control of the property in dispute is essential to the relief sought under § 1655; hence the venue requirement is clearly inappropriate. This is not so with reference to the more personal liabilities sought to be enforced by the nonresident attachment proceedings brought under the proposed rule. Furthermore, the language of § 1655 deals specially with the problem of nonresidents and hence suggests an abandonment of residence requirements imposed by other statutes. This is to be contrasted with rule 82 which declares that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

³⁴ 28 U.S.C. § 1391(b) (1958).

³⁵ FED. R. CIV. P. 4(d)(1) authorizes service by leaving a copy of the summons and complaint at the defendant's "dwelling house or usual place of abode with some person of suitable age and discretion." "Dwelling place" is more inclusive than residence. *Rovinski v. Rowe*, 131 F.2d 687 (6th Cir. 1942); *Pickford v. Kravetz*, 17 Fed. Rules Serv. 4d.121, Case 1 (S.D.N.Y. 1952); cf. *First Nat'l Bank & Trust Co. v. Ingerton*, 207 F.2d 793 (10th Cir. 1953).

³⁶ 28 U.S.C. § 1391(c) (1958).

³⁷ FED. R. CIV. P. 4(d)(3)(7).

³⁸ Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954).

³⁹ 28 U.S.C. § 1391(a) (1958).

⁴⁰ 28 U.S.C. § 1391(d) (1958).

the jurisdiction for purposes of the venue statute, but not of the sort sufficient to justify the use of abode service.⁴¹ Only in such cases might the plaintiff be advantaged by the proposed amendment.⁴²

Even in such cases, however, the success of the plaintiff in forcing the defendant into the forum jurisdiction may be fleeting. Another section of the federal venue statutes provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.⁴³

If the plaintiff can find no basis for personal jurisdiction over the defendant, the chances are good that the convenience of the parties and witnesses and the interest of justice will indicate that some other district would be a more appropriate forum.⁴⁴ It seems likely that this provision would frustrate some plaintiffs proceeding quasi in rem. It will, however, be a frustration less often than might be expected because of the recent and regrettable decision of the Supreme Court in *Hoffman v. Blaski*,⁴⁵ which held transfer permissible only to districts in which the plaintiff might have successfully initiated the action over the protest of the defendant. This would be a substantial limitation on the use of section 1404 in a routine diversity case commenced quasi in rem, inasmuch as the only available transferee district would generally

⁴¹ The residence requirement in the venue statute is generally equated to domicile. *King v. Wall & Beaver Street Corp.*, 145 F.2d 377 (D.C. Cir. 1944). It is, of course, possible to have a domicile in the jurisdiction without having an "abode" for purposes of rule 4(d)(4). See cases cited in note 35 *supra*. Many states, however, exercise jurisdiction over their domiciliaries by constructive service; this practice was upheld against constitutional challenge in *Milliken v. Meyer*, 311 U.S. 457 (1940). To the extent that state procedures are available in federal courts under rule 4(d)(7) or rule 4(f), this third possibility is eliminated.

⁴² Professor Currie, *supra* note 8, at 375 suggests that the rules be "rectified in anticipation of a revision of the venue statutes." Sufficient to the day is the evil thereof; it seems eminently wise to see what these revisions might be before altering the rules in aid of unidentified future classes of plaintiffs at the expense of unidentified future classes of defendants.

⁴³ 28 U.S.C. § 1404(a) (1958).

⁴⁴ Very little effort has been made to articulate standards beyond those stated in the statute, which is taken to be addressed to the sound discretion of the trial court. *Southern Ry. v. Madden*, 235 F.2d 198 (4th Cir.), *cert. denied*, 352 U.S. 953 (1956); *Trust Co. v. Pennsylvania R.R.*, 183 F.2d 640 (7th Cir. 1950); *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950); *New York C. & St. L.R.R. v. Vardaman*, 181 F.2d 769 (8th Cir. 1950). See generally 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 86.3 (Wright ed. 1958).

⁴⁵ 363 U.S. 335 (1960).

be the district in which all the defendants reside.⁴⁶ The idea expressed in the majority opinion in the *Hoffman* case was the grammar-school morality that fairness required equality in the use of venue statutes and the requirement of service of process. The Court thus smote the defendant with his own shield, for these requirements were imposed for his benefit to equalize the plaintiff's advantage of making the initial choice of forum. Clearly, the convenience of the plaintiff must be considered in the administration of section 1404, but the limitations of the venue statute which the Court invoked are not related to that consideration and have no purposeful application to the problem.

To the extent that transfer is unavailable, the inconvenienced defendant may yet seek relief in the discretionary power of the federal court to dismiss on the ground of forum non conveniens.⁴⁷ Dismissal is a more drastic remedy than transfer, however, and the defendant who seeks it will have a heavier burden in showing inconvenience sufficient to justify relief.⁴⁸ Another difficulty is suggested by the recent holding of the Supreme Court of Minnesota that forum non conveniens is not available unless the defendant is available for involuntary service of process in the convenient forum.⁴⁹ This is a reasonable protection of the plaintiff only in a court which is unwilling to employ the practice developed in New York⁵⁰ of conditioning the dismissal upon the de-

⁴⁶ If the action were commenced at the defendant's residence, § 1404 might afford transfer to the plaintiff's residence, but there is seldom reason to commence an action quasi in rem at the defendant's residence inasmuch as personal service is generally available there. See note 41 *supra*.

⁴⁷ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Professor Currie was very critical of this decision. Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 416-38 (1955). Arguably forum non conveniens did not survive the adoption of § 1404(a). See *Hoffman v. Blaski*, 363 U.S. 335, 342 (1960) (the doctrine is referred to as "superseded"). No mention is made of it in the legislative history, however, and it is still invoked in international cases, where the statutory remedy of transfer is unavailable, although a strong showing of inconvenience is necessary to secure a dismissal forcing an American plaintiff to go abroad. *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.); *cert. denied*, 349 U.S. 922 (1955); *Lesser v. Chevalier*, 138 F. Supp. 330 (S.D.N.Y. 1956).

⁴⁸ *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). The court was silent on the issue of possible deference to state law; it was apparently assured, as it was in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947), that federal law should prevail over any state doctrine on dismissal or transfer for inconvenience. *Accord*, *Willis v. Weil Pump Co.*, 222 F.2d 261 (2d Cir. 1955).

⁴⁹ *Hill v. Upper Mississippi Towing Corp.*, 252 Minn. 165, 89 N.W.2d 654 (1958). *Accord*, *Tivoli Realty v. Interstate Circuit*, 167 F.2d 155, 156 (5th Cir. 1948).

⁵⁰ *Wendel v. Hoffman*, 259 App. Div. 732, 18 N.Y.S.2d 96, *appeal dismissed*,

defendant's appearance in the most convenient forum. This is now a familiar practice in federal admiralty jurisdiction,⁵¹ and there is no reason why it should not be extended to ordinary diversity cases in which the plaintiff has made an unacceptable choice of forum. The more restrictive use of forum non conveniens would be in keeping with *Hoffman v. Blaski*, but no reason is apparent why that lamentable decision should be extended to limit the discretionary as well as the statutory remedy.⁵²

The foregoing limitations on the availability of a federal forum exclude most of the cases in which a plaintiff might be advantaged by the availability of quasi in rem jurisdiction. It must be conceded that among the cases excluded are most of the worst. But the restrictions on transfer and dismissal leave a small residue of cases in which a nonresident or alien defendant would be unable to escape from litigation in a forum with only a fortuitous claim on his property. Even within this short range of cases, however, it is not clear that a plaintiff with a meritorious claim would be wise to seek the limited judgment thus available to him.

The most familiar hazard is the possibility of a limited appearance by the defendant, which, if permitted, will necessitate multiple litigation for full satisfaction of the plaintiff's claim. This is a hazard only in cases where the plaintiff has attached property insufficient to satisfy his claim. A substantial line of authority,⁵³ which has recently been endorsed by Professor Currie,⁵⁴ has held that a defendant in an in rem proceeding is not limited to the ugly alternatives of defaulting or subjecting himself to the juris-

284 N.Y. 588, 29 N.E.2d 664 (1940). *Accord*, *Vargas v. A.H. Bull S.S. Co.*, 25 N.J. 293, 135 A.2d 857 (1957), *cert. denied*, 355 U.S. 958 (1958).

⁵¹ *Cf.* *Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 697-98 (1950).

⁵² The *Hoffman* decision was heavily dependent on the "plain words" of § 1404(a) which were said to require the result. See 363 U.S. at 342-44.

⁵³ *McQuillen v. National Cash Register Co.*, 112 F.2d 877 (4th Cir.), *cert. denied*, 311 U.S. 695 (1940); *Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co.*, 285 Fed. 214 (6th Cir. 1922); *Miller Bros. v. State*, 201 Md. 535, 95 A.2d 286 (1953), *reversed on other grounds*, 347 U.S. 340 (1954); *Cheshire Nat'l Bank v. Jaynes*, 224 Mass. 14, 112 N.E. 500 (1916). In *Harnischfeger Sales Corp. v. Sternberg Co.*, 179 La. 317, 154 So. 10 (1934), the court held that the appearance of the Mississippi defendant in a quasi in rem proceeding did not suffice to sustain a judgment in personam. But in a later action in Mississippi for the deficiency, it was held that the defendant had had its day in court on the defense asserted in the Louisiana action. *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 73, 191 So. 94 (1939), *modification refused on rehearing*, 189 Miss. 73, 195 So. 322 (1940).

⁵⁴ Currie, *supra* note 8, at 379-80.

diction of the forum. He need not fish or cut bait, but may appear under protest, asserting that he does not intend to be bound by the judgment of the court except to the extent of the property which the court has impounded by attachment or garnishment. This device has the merit of affording defendants a shield against plaintiffs with weak claims who hope to secure modest relief through a quasi in rem judgment against property having value small in proportion to the liability which the defendant would hazard by a general appearance. On the other hand, this shield is also useful for the unworthy defendant who may employ it to compel the plaintiff to establish his meritorious claims twice before receiving full satisfaction. This is, of course, a result very much at odds with the modern concept of *res judicata*. A number of courts, including most of the federal courts recently considering the problem, have balanced the choice between mitigating the duress and permitting multiple litigation on the merits of the same claim, and have concluded that the limited appearance should be refused, forcing the defendant to appear or default.⁵⁵ Professor Moore has endorsed this view.⁵⁶ The proposed amendment to rule 4 is silent on the issue of the limited appearance, but inasmuch as the whole thrust of the amendment is a reference to a state law, it may be presumed that the Committee would contemplate its use in states in which it is permitted in local courts, although federal courts have thus far dealt with the problem as a matter of federal procedure.⁵⁷ To the extent that the limited appearance would be available in some federal courts, it would pose a threat to a plaintiff considering the use of quasi in rem proceeding against property of inadequate value.

An alternative risk faces the plaintiff who is successful by reason of the defendant's default in an action commenced by attachment of assets inadequate to cover his claim. When the plaintiff

⁵⁵ *United States v. Balonovski*, 236 F.2d 298 (2d Cir. 1956), *cert. denied*, 352 U.S. 968 (1957); *Anderson v. Benson*, 117 F. Supp. 765 (D. Neb. 1953); *Campbell v. Murdock*, 90 F. Supp. 297 (N.D. Ohio 1950); *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A.2d 365 (Sup. Ct. 1955).

⁵⁶ 2 FEDERAL PRACTICE ¶ 12.13 (2d ed. 1961). See also Note, 25 IOWA L. REV. 329 (1940).

⁵⁷ See federal cases cited note 53 *supra*. Some significance seems to be attached to FED. R. CIV. P. 12 which abolishes the *special* appearance; clearly this rule is irrelevant to the issue of the limited appearance. Professor Currie, *supra* note 8, at 379-80, suggests that the rules should be amended to provide for a limited appearance regardless of the prevailing state rule. The issue of deference to state law is a part of the larger question raised by the whole quasi in rem procedure; this is discussed below.

seeks to recover the balance of his claim in a second jurisdiction, it may become the defendant's turn to plead *res judicata*. He may then invoke as a defense the familiar injunction against splitting the cause of action. All of the existing authority which is squarely in point is against this defense.⁵⁸ But modern cases abound which evidence a willingness to require plaintiffs to settle for a single remedy in situations where a judgment for full satisfaction might have been had; the problem is not too distant from cases holding that the plaintiff may not recover a judgment of ejectment and later seek equitable relief,⁵⁹ or seek contract damages in one action and reformation in another,⁶⁰ or seek personal injury damages in one action and property damages in another.⁶¹ Cases holding against the defendant on the issue of *res judicata* have reasoned woodenly that the absence of personal jurisdiction prevents the merger of personal rights into a personal judgment. A more functional approach might suggest that it would be desirable to encourage economy of litigation by requiring the plaintiff to resolve his dispute whole in one lawsuit. Surely this is no more stringent than the burden imposed on the defendant with reference to a compulsory counterclaim,⁶² and it is in accord with the modern trend.⁶³ And it would seem to be very fair in a jurisdiction which does not recognize the limited appearance, for when the two issues are placed in juxtaposition, it is not unreasonable to urge that the plaintiff cannot have it both ways: if the defend-

⁵⁸ *Strand v. Halverson*, 220 Iowa 1276, 264 N.W. 266 (1935); *Riverview State Bank v. Dreyer*, 188 Kan. 270, 362 P.2d 55 (1961); *Oil Well Supply Co. v. Koen*, 64 Ohio St., 422, 60 N.E. 603 (1901).

⁵⁹ *Hahl v. Sugo*, 169 N.Y. 109, 62 N.E. 135 (1901); *cf. McCaffrey v. Wiley*, 103 Cal. App. 2d 621, 230 P.2d 152 (Dist. Ct. App. 1951). *But cf. Adams v. Pearson*, 411 Ill. 431, 104 N.E.2d 267 (1952). See generally Note, 104 U. PA. L. REV. 955 (1956).

⁶⁰ *Hennepin Paper Co. v. Fort Wayne Corrugated Paper Co.*, 153 F.2d 822 (7th Cir. 1946); *cf. Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959); *Massari v. Einsiedler*, 6 N.J. 303, 78 A.2d 572 (1951). *But cf. Woodbury v. Porter*, 158 F.2d 194 (8th Cir. 1946).

⁶¹ *Dearden v. Hey*, 304 Mass. 659, 24 N.E.2d 644 (1939); *Rush v. City of Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599, *cert. denied*, 358 U.S. 814 (1958). *Contra, Reilly v. Sicilian Asphalt Paving Co.*, 170 N.Y. 40, 62 N.E. 772 (1902).

⁶² FED. R. CIV. P. 13(b). The draftsman proposed also to amend this rule to make it inapplicable to actions commenced quasi in rem. This is an explicit recognition of the inconsistency of the quasi in rem judgment with the rules approach to complete litigation. By pointing to this contrast, the writer does not wish to be taken as giving full approval to the compulsory counterclaim rule, which may well be overzealous in its push for total litigation.

⁶³ *Developments in the Law — Res Judicata*, 65 HARV. L. REV. 818, 826 (1952).

ant is entitled to only one day in court, the plaintiff should be entitled to only one also. The egalitarian morality of *Hoffman* seems considerably more appropriate to this situation than to that in which it was invoked.

It has been observed that both the limited appearance and the alternative split-action rule are restraints only when the plaintiff is unable to find adequate assets in the jurisdiction to cover his entire claim. But even if he finds sufficient assets, there may yet be a chance that the fruits of the default victory will escape his grasp, if he is subject to service of process in another state more generally convenient to the parties. This possibility arises from the prospects of a later action by the defaulting defendant against the quasi in rem plaintiff for unjust enrichment. The theory of such an action would be that the deliberate choice of a forum inconvenient to the defendant for a claim of doubtful merit is so unfairly coercive as to constitute duress vitiating the plaintiff's rights to the proceeds of the former action. The authority for recovery on such a theory, as Professor Dawson has observed,⁶⁴ is remarkably sparse. The authority discovered is largely adverse to recovery,⁶⁵ and there are two fairly obvious contentions to be made by the defendant in the restitution action. The first is that he merely used legal processes in a manner permitted by law and therefore cannot be condemned as a wrongdoer disentitled to the benefits obtained. This is not, however, a complete answer, for it is clear that the present plaintiff is entitled to restitution if he can show an improper motive in the use of legal processes; a showing that the former plaintiff knew that his claim was groundless would be sufficient to show such an improper motive.⁶⁶ Impropriety has also been found, however, where a plaintiff with a claim of possi-

⁶⁴ *Duress Through Civil Litigation*: I, 45 MICH. L. REV. 571, 596 (1947). Professor Dawson's appraisal of the possibilities of future developments in such cases is that:

The limited use so far made in this area of the concept of duress can be in large part explained by the general considerations of policy already suggested, which quite rightly produce hesitation. In part, however, it appears to be due to the survival of older ideas, which associate duress with blackmail or even perhaps with mayhem, and which therefore inspire a search for some misconduct by the creditor to which disapproval can attach. In the future more decisions can be expected to support the broad proposition that where a sufficient degree of pressure is shown to exist in fact and the resulting transaction is sufficiently unjust, the means that are normally most legitimate can become an instrument of extortion.

Id. at 598.

⁶⁵ *Ochivto v. Prudential Ins. Co. of America*, 356 Pa. 382, 52 A.2d 228 (1947); *cf. Security Sav. Bank v. Kellems*, 321 Mo. 1, 9 S.W.2d 967 (1928); Annot., 18 A.L.R. 1233 (1922).

⁶⁶ RESTATEMENT, RESTITUTION § 71(1)(a) (1937).

ble merit insisted on presenting his claim at a time⁶⁷ or place⁶⁸ inconvenient to his alleged debtor. These cases would sustain restitutionary recovery by a quasi in rem defendant who anticipates the judgment by satisfying his creditor's claim. This suggests defendant's second argument against restitution, which can be made only if the judgment is entered and the assets held subject to the judgment are liquidated pursuant to it. This is the familiar cry of *res judicata*—that the judgment has laid the merits to rest. This is troublesome, however, for the quasi in rem defendant has not yet had his day in court; he has had only an opportunity to litigate, and that in an inconvenient forum. A modern court, fully indoctrinated in the enthusiasm for the convenient forum and the abandonment of mechanical anachronisms, could reasonably conclude that the quasi in rem judgment was binding only on the property, not on the absent parties, and that the time for litigation on the merits underlying the claim had not yet passed. Surely, it has been a historic function of the unjust enrichment remedy to relieve miseries caused by the wooden attributes of the doctrine of *res judicata*.⁶⁹

The hazard to the quasi in rem plaintiff of such a restitutionary liability may perhaps be dismissed as remote. At the worst, the plaintiff has succeeded in shifting the moving oar, if at the cost of some attorneys' fees. It is probable that most defendants having meritorious defenses would prefer venturing their case in the forum selected by the plaintiff to risking a devious restitutionary counterattack. Whether or not the hazards discussed are sufficient to demolish the attraction to the plaintiff of quasi in rem jurisdiction, a consideration of these problems serves at least to illuminate the inadequacies of a half-baked quasi in rem judgment. These inadequacies are the result of a historic lack of conviction about the fairness of requiring a defendant to respond in a jurisdiction whose only claim on him is its chance capture of his goods or debtor. There is no place for such a process in a procedural system which emphasizes the search for a forum which can in fairness lay the whole dispute to rest.

⁶⁷ *Vyne v. Glenn*, 41 Mich. 112, 1 N.W. 997 (1879); *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350 (1921). *But cf.* *Myers v. Watson*, 204 Iowa 635, 215 N.W. 634 (1927).

⁶⁸ *Kelley v. Osborn*, 86 Mo. App. 239 (1900); *Collins v. Westbury*, 2 S.C. (Bay) 211 (1799); *cf.* *Standard Roller Bearing Co. v. Crucible Steel Co. of America*, 71 N.J. Eq. 61, 63 Atl. 546 (Ch. 1906). *But cf.* *Dickerman v. Lord & Smith*, 21 Iowa 338 (1886).

⁶⁹ See, *e.g.*, the leading case of *Moses v. MacFerlan*, 2 Burr 1005, 97 Eng. Rep. 676 (K.B. 1760).

Of course, the federal rulemakers cannot, on their own, shield the defendant against quasi in rem jurisdiction so long as it is available in state courts.⁷⁰ It is this fact, alone perhaps, which induced the Advisory Committee to make its proposal; for the one argument advanced in favor of a change in rule 4 was that "there appears to be no reason for denying plaintiffs means of commencing actions in federal courts which are generally available in the state courts."⁷¹ This plea for conformity between state and federal law is, of course, an expression of the deferential policy first espoused in *Erie R.R. v. Tompkins*.⁷² The *Erie* decision was drastic and deliberate and had the quality of great drama: the response was so enthusiastic and the applause so deafening that the Court and its audience were lost in encores⁷³ and failed to attend to the competing needs of *Erie*'s sibling, the Federal Rules of Civil Procedure.⁷⁴ When the cheering subsided, however, there were critics to be heard,⁷⁵ and the most recent decisions of the Supreme Court⁷⁶ are indicative of an awareness that excessive deference by the federal courts to local practice in all matters potentially affecting the outcome of litigation is destructive of the rights of federal litigants. Perhaps some of the encore cases were less praiseworthy than the *Erie* decision itself.

One case which seems worthy of reconsideration is *Woods v. Interstate Realty Co.*,⁷⁷ which relates to the problem at hand. It

⁷⁰ It would surely be regarded as a usurpation to amend § 1450 to provide for a dismissal of removal cases commenced by attachment or garnishment. See note 11 *supra*.

⁷¹ COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 8 (1955).

⁷² 304 U.S. 64 (1938).

⁷³ *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Angel v. Bullington*, 330 U.S. 183 (1947); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

⁷⁴ A poet-judge has described the *Erie* decision as a prenatal injury to the rules. *Hoosier Cas. Co. v. Fox*, 102 F. Supp. 214, 222 (N.D. Iowa 1952) (Graven, J.). See also Merrigan, *Erie to York to Ragan—A Triple Play at the Federal Rules*, 3 VAND. L. REV. 711 (1950).

⁷⁵ An early, strident voice was Keefe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L.Q. 494 (1949). More telling perhaps are Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509-13 (1954) and Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958).

⁷⁶ *Magenau v. Aetna Freight Lines*, 360 U.S. 273 (1959); *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958).

⁷⁷ 337 U.S. 535 (1949). Compare *Angel v. Bullington*, 330 U.S. 183 (1947).

will be recalled that the Court there held that the federal courts in Mississippi were bound to apply a statute of that state which disabled nonqualifying foreign corporations doing business there from maintaining suit in the courts of the state. The majority opinion was dependent on the bromide that all matters classified as outcome-determinative were to be adjudged by federal courts in diversity cases on the basis of local law: since state law barred recovery in state court, it was a bar in the federal court in a diversity case. This is hard law; Justice Jackson observed in dissent:

The state statute as now interpreted by this Court is a harsh, capricious and vindictive measure. It either refuses to entertain a cause of action, not impaired by state law, or it holds it invalid with unknown effects on amounts already collected. In either case the amount of this punishment bears no relation to the amount of wrong done the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which sustained the injury, but results in unjust enrichment of the debtor, who has suffered no injury from the creditor's default in qualification.⁷⁸

It must be conceded to the majority that there is some unseemliness in the employment of federal jurisdiction to frustrate Mississippi's regulation of foreign corporations if, as the majority believed, that was what Mississippi sought to do. But the jurisdictional amount requirement⁷⁹ assures that the frustration would not be complete: the unqualified foreign corporation would still have no relief for small claims. And it is, after all, the mission of the diversity jurisdiction to protect nonresident litigants from just such harshness.⁸⁰ State rules which are fashioned especially for nonresidents are too likely to bear the imprint of hometown prejudices to be entitled to willy-nilly application in courts which should serve as bulwarks against such prejudices. The omnibus application of the *Erie* rule suggested by the majority opinion would not only deny the use of the Federal Rules of Civil Procedure in diversity cases, it would rob the diversity jurisdiction of purpose and meaning. If this is the intent, integrity would require abolition.

⁷⁸ 337 U.S. at 539-40.

⁷⁹ Now \$10,000 in diversity and federal-question cases. 28 U.S.C. §§ 1331, 1332 (1958).

⁸⁰ THE FEDERALIST No. 80 (Hamilton); Hart, *supra* note 75; Hill, *supra* note 75; Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22-28 (1948); see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

The problem of quasi in rem proceedings in diversity cases calls even more forcefully for the application of a federal policy. This is so, first, because there is no sound reason for invoking the *Erie* tradition. The most frequently articulated purpose in applying state law in diversity cases is the avoidance of forum-shopping, but it is clear that forum-shopping is not encouraged by the present system of closing the federal forum to quasi in rem actions and thereby limiting the plaintiff's choice to the state court. And it is also true that there is little substance to the local policy embodied in the continued use of quasi in rem procedure in local courts. In this respect, the *Interstate Realty* case is distinguishable. There is also an essential difference to be seen between providing a federal forum to a nonresident plaintiff who is barred by state law, and denying a federal forum to a resident plaintiff who is protected under state law, for in the one case the local policy is frustrated and in the other it is not. The recent decision of the Second Circuit in *Jaftex Corp. v. Randolph Mills, Inc.*⁸¹ is here worthy of notice. The court there offered as one ground for its decision the conclusion that amenability to service of process under rule 4(d)⁸² is to be determined by federal law, thus rejecting the contention of the defendant that sound application of the *Erie* doctrine required application of an especially restrictive New York concept of "doing business." This holding is consistent with the position taken above, but it is not consistent with the practice in other circuits⁸³ and was the subject of a vigorous dissent by Judge Friendly,⁸⁴ who urged that there is no articulated federal policy as to the amenability of foreign corporations to service of process and no sufficient reason exists for not giving effect to New York policy. Both opinions are subject to criticism for failure to perceive the difference between a federal policy which is more permissive than the state policy with respect to the demands which may be made on the nonresident defendant and

⁸¹ 282 F.2d 508 (2d Cir. 1960).

⁸² Alternatively, the court held that Randolph Mills was "doing business" in New York by any standard.

⁸³ *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (3d Cir. 1953); *Albritton v. General Factors Corp.*, 201 F.2d 138 (5th Cir. 1953); *Canvas Fabricators, Inc. v. William E. Hooper & Sons Co.*, 199 F.2d 485 (7th Cir. 1952); *Steinway v. Majestic Amusement Co.*, 179 F.2d 681 (10th Cir. 1949). *But see* *Riverbank Laboratories v. Hardwood Products Corp.*, 350 U.S. 1003 (1956), *reversing per curiam*, 220 F.2d 465 (7th Cir. 1955), *on remand*, 236 F.2d 255 (7th Cir. 1956). See generally, Note, 67 YALE L.J. 1094 (1958).

⁸⁴ 282 F.2d at 516.

one that is less permissive. Judge Friendly is probably wrong in relying on the absence of a federal policy on the issue before the court: if there is none, there should be, and there is no time like the present for beginning to work it out. But he is probably right in result for the reason that it is not consistent with any purpose of the federal diversity jurisdiction for the federal courts to be more outreaching than the state courts. If, as Judge Friendly suggests it might, New York should choose to send its plaintiffs to North Carolina to sue corporations like Randolph Mills, so that North Carolina corporations will thereby be encouraged to deal with New Yorkers, there is no federal interest which can justify the frustration of that policy by opening a federal forum in New York to the New York plaintiffs.⁸⁵ This is to be more Roman than the Pope. Where, on the other hand, New York or another state is overreaching, and seeking to expose to liability nonresident defendants who are not adequately connected with the forum, it would be highly proper for the federal courts to refuse to conform, to force the plaintiff to use the state courts for such skulduggery, and to provide only the defendant with the choice of a federal forum.⁸⁶ Even more proper is the preservation of this historic form of protest against the use of quasi in rem jurisdiction.

Whether or not the alternative holding in the *Jaftex* case is sound, it may yet be favored as a welcome signpost of the new awareness of the federal courts to their responsibility for high standards of justice in diversity cases, a responsibility too long forgotten. What Professor Currie has condemned as a historic stupidity⁸⁷ has become a modern wisdom, for the proposed amendment to rule 4 is regrettably out of step, not only with the modern quest for a fair choice of forum but also with the long-awaited and now emerging concept of the proper role of the federal diversity jurisdiction.

⁸⁵ *Per contra* where the local policy excludes actions between nonresidents as an economy in the operation of the state courts. *Willis v. Weil Pump Co.*, 222 F.2d 261 (2d Cir. 1955).

⁸⁶ The advisors could well consider the amendment of rule 4(d) to assure that federal courts will exercise their responsibility in shaping the emerging principles of forum selection. When the implications of this suggestion are considered, however, it is obvious that substantive policy factors are entitled to more weight in the decision than the rulemaking process is equipped to give them. Perhaps the advisors should address themselves to Congress. *Cf. FED. R. CIV. P. 82. But cf. Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946).

⁸⁷ *Attachment and Garnishment in the Federal Courts*, 59 MICH. L. REV. 337 (1961).