

**A Strange Instance of Procedural Self-Denial: New York's Rule  
Immunizing Foreign Corporations Doing Business in That State  
From Levy Upon Choses in Action Owing by Them to Other  
Foreign Corporations**

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## A STRANGE INSTANCE OF PROCEDURAL SELF-DENIAL

### NEW YORK'S RULE IMMUNIZING FOREIGN CORPORATIONS DOING BUSINESS IN THAT STATE FROM LEVY UPON CHOSSES IN ACTION OWING BY THEM TO OTHER FOREIGN CORPORATIONS.

RECENT decisions—all of them by the Appellate Division of the First Department—exhibit a self-denial, on the part of our courts, which is without explanation, either in fundamental law or economic policy, and seems to be without hope of correction, except by legislation. We refer to the cases reaffirming that a levy, under a warrant of attachment, may not be made upon an indebtedness due from a foreign corporation, doing business in this state, to another foreign corporation, even though service of process upon the debtor foreign corporation may be accomplished in this state.<sup>1</sup> The rule on the subject is an excellent example of how a clearly-erroneous judicial view may become ingrained in our jurisprudence, as a basic principle, if only the error be repeated often enough, by a court of high authority.

Nor is the lesson, thus afforded, without its significance in guiding us in the problem of defining the jurisdiction of our appellate courts. For, since the question of what is leviable, under a warrant of attachment, is normally raised by a motion to vacate the levy and service of process predicated thereon, the question of what property is subject to levy, cannot, in the absence of leave to appeal granted by the Appellate Division—which, in none of these cases, has been granted—be determined by the Court of Appeals, which is the highest court of the state, since the Court of Appeals,

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<sup>1</sup> Cohn v. Enterprise Distributing Corp., 214 App. Div. 238, 212 N. Y. Supp. 37 (1st Dept. 1925); Dos Passos v. Morton, 218 App. Div. 154, 218 N. Y. Supp. 17 (1st Dept. 1926); Gerard Investing Co. v. National Railways of Mexico, 243 App. Div. 294, 276 N. Y. Supp. 1002 (1st Dept. 1935), *aff'd*, 245 App. Div. 712; leave to appeal to Court of Appeals denied, 245 App. Div. 810; motion for leave to appeal to Court of Appeals denied by Court of Appeals on Oct. 8, 1935; not yet reported; American Dry Ice Corp. v. Delancey Chemical Corp., 155 Misc. 661 (1935); leave to appeal to Court of Appeals denied, 243 App. Div. 702.

in a long line of decisions, has held that the order made on a motion to vacate a levy or to vacate service of process, is not a final order.<sup>2</sup> Thus, we have another ironic result in so important a field, *i. e.*, that the court created and perpetuated for the purpose of determining basic questions of law, for the guidance of all the courts of the state, is incapable of expressing its opinion because the intermediate courts will not certify questions to it for determination.

In four recent cases,<sup>3</sup> the Appellate Division of the First Department has adhered to its earlier decisions<sup>4</sup> that no levy may be made, under a warrant of attachment, against the indebtedness of a foreign corporation, doing business in this state, owing to another foreign corporation, even though service of process upon the debtor corporation may be made. In all of these cases, decision is made upon the basis of supposed authority. An analysis of these alleged authorities shows that they do not determine the question at all, and that, to the extent that dicta therein are applicable, they are no longer law.

The basic case on the subject is *Douglass v. Phoenix Insurance Co.*,<sup>5</sup> decided in 1893. There, it was held, in an action upon a policy of insurance, issued by defendant, a domestic corporation, that it was no defense to such corporation that, pursuant to the laws of Massachusetts—where it was licensed to do business—an action was brought by creditors of the plaintiff, residing in that state, under which a levy was made against the corporation, by which its obligation to plaintiffs was subjected to the jurisdiction of the Massachusetts courts. The Court of Appeals said that “the right of the plaintiff to prosecute his action in the courts

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<sup>2</sup> *Kramer v. Buffalo Union Furnace Co.*, 196 N. Y. 532, 89 N. E. 1103 (1909); *Polacsek v. American Iron & Steel Mfg. Co.*, 215 N. Y. 619, 109 N. E. 1090 (1915); *Hill v. International Products Co.*, 232 N. Y. 592, 134 N. E. 585 (1922); *Bernstein v. Kahn Shoe Co.*, 235 N. Y. 506, 139 N. E. 712 (1923); *Berlinsky v. Berlinsky*, 237 N. Y. 531, 143 N. E. 730 (1923); *Judis v. Martin*, 244 N. Y. 605, 155 N. E. 916 (1927); *Mitchell v. Northwestern Ohio Savings Ass'n*, 263 N. Y. 668, 189 N. E. 748 (1934).

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Bridges v. Wade*, 113 App. Div. 350, 99 N. Y. Supp. 126 (1st Dept. 1906); *Flynn v. White*, 122 App. Div. 780, 107 N. Y. Supp. 860 (1st Dept. 1907); *India Rubber Company v. Katz*, 65 App. Div. 349, 72 N. Y. Supp. 658 (1st Dept. 1901).

<sup>5</sup> *Douglass v. Phoenix Insurance Co.*, 138 N. Y. 209, 33 N. E. 938 (1893).

of his own state cannot be defeated by the pendency of attachment proceedings in another jurisdiction by a creditor there, to reach the debt owing to the plaintiff by the defendant, where the only claim of jurisdiction by the foreign court rests upon statutory authority to seize the debt by and through process proceedings against the agent of a corporation of this state which owes the debt, but which has an agent in the state where the seizure was made.”<sup>6</sup> The court reached such conclusion because “the corporation does not change its domicile of origin or its residence” by entering into another state and obtaining a license to do business there.<sup>7</sup> In so ruling, the court thought that it was enforcing “a fundamental rule,” a “general rule,”<sup>8</sup> in fact, was bound by the “rules of general jurisprudence, which this state is bound to recognize.”<sup>9</sup> “The law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, at least so as to bind another jurisdiction by the declaration.”<sup>10</sup> Thus, was it attempted to *protect* our residents against the garnishee process of *other* jurisdictions. The underlying thought was that “the rights of the plaintiff to prosecute his action in the courts of his own state cannot be defeated by the pendency of attachment proceedings in another jurisdiction \* \* \*.”<sup>11</sup>

Following this line of reasoning, in 1899 the Appellate Division of the First Department, in *Carr v. Corcoran*,<sup>12</sup> held that an indebtedness from a non-resident to a non-resident defendant could not be the subject of a levy in an action in this state, although “the principle has been sanctioned that the laws of a state for the purposes of attachment proceeding may fix the *situs* of the debt at the domicile of the debtor,” because “it is difficult to see how it could be possible for the courts of this state to enforce an attachment of this description. The debtor being a non-resident, and the creditor being a non-resident, there would be noth-

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<sup>6</sup> *Id.* at 217-218.

<sup>7</sup> *Id.* at 220.

<sup>8</sup> *Id.* at 219.

<sup>9</sup> *Id.* at 221.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Id.* at 217.

<sup>12</sup> 44 App. Div. 97, 60 N. Y. Supp. 763 (1st Dept. 1899).

ing for the court to take hold of.”<sup>13</sup> Thus was a rule, intended to protect our resident plaintiffs, applied to deny our own residents access to their own courts. The logic of the rule so required. What others could not do to them, they could not do to others.

Such decisions make it plain that these early authorities did not decide the question of policy for or against our residents, except as our courts thought they were bound to do so because they were required to recognize “general” and “fundamental” rules of “general jurisprudence.” There was no thought that it was just that our residents should be subjected to foreign attachment, and yet themselves be unable to avail themselves of a similar remedy in their own courts.

But these so-called “fundamental” rules of “general jurisprudence” had been misapprehended. For, in 1904, the Supreme Court of the United States, in *Harris v. Balk*,<sup>14</sup> with a situation presented to it precisely as in *Douglass v. Phoenix Insurance Co.*,<sup>15</sup> ruled that there was nothing of “fundamental” or “general jurisprudence,” or in the Constitution of the United States, which prevented a state from levying upon an indebtedness of a non-resident, due to a non-resident defendant, in an action brought by one of its own residents, and, indeed, held that a non-resident debtor would be protected against double liability, when sued on account of his obligation in another jurisdiction. The *Douglass* case<sup>16</sup> was, thus, no longer law, not even in New York. The opinion in *Harris v. Balk*<sup>17</sup> was written by Mr. Justice Peckham, who, of course, was familiar with our procedure and our public policy, because he had been a member of the Court of Appeals. He could not see how “the question of jurisdiction \* \* \* can properly be made to depend upon the so-called original *situs* of the debt \* \* \* . We do not see the materiality of the expression ‘*situs* of the debt,’ when used in connection with attachment proceedings. If by *situs* is

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<sup>13</sup> *Id.* at 98-99.

<sup>14</sup> 198 U. S. 215, 25 Sup. Ct. 625 (1904).

<sup>15</sup> *Supra* note 5.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Supra* note 14.

meant the place of the creation of the debt, that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the *situs* thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes \* \* \*." <sup>18</sup> Therefore, the Supreme Court of the United States laid down the rule that a debt could be levied upon in any state where the debtor of the defendant was amenable to service of process.

Thus, were our residents deprived of the protection given them by our courts—for, in this respect, by reason of the full faith and credit clause of the constitution, the decision of the Supreme Court of the United States was *obligatory*. By the same standard, they should have been permitted to do unto non-residents as non-residents could now do unto them. But that was for our own courts to decide—for, in this respect, the decision of the Supreme Court had no binding force. The question, then, became and is still a compelling one: Why should the State of New York, thus disabled from protecting its own residents from foreign garnishee process, nevertheless continue to so disadvantage its own citizens and residents that, alone among all the state sovereignties in the Union, it requires them to go elsewhere to enforce their rights, whereas other states, following the rule announced by the Supreme Court of the United States, permit their residents to use their attachment laws to full effect, even as against New York residents?

The answer to this question undoubtedly lies in appreciation of the fact that a rule intended to protect New York residents, as plaintiffs, when rendered nugatory by superior federal decision, was nevertheless deemed to be enforceable *against* the interest of New York residents, out of a mistaken sense of duty to dicta of the Court of Appeals, never intended to operate against, but in the interest of, our own residents. For the Court of Appeals had decided only that our residents might sue here, notwithstanding foreign attachment! Never that our residents might not levy here upon an indebtedness from one non-resident to another, of whom jurisdiction might

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<sup>18</sup> Harris v. Balk, 198 U. S. 215, 222, 25 Sup. Ct. 625 (1904).

be obtained! Thus was the *Douglass* case<sup>19</sup> converted from a shield into a trap, and the fact overlooked that it was no longer law!

A brief review of the authorities will demonstrate this fact:

As we have seen, *Douglass v. Phoenix Insurance Co.*<sup>20</sup>—decided in 1893—upon its precise facts was overruled by *Harris v. Balk*,<sup>21</sup> decided in 1904. It certainly is not the law today. For, obedience to the full faith and credit clause of the constitution requires us to recognize the garnishee processes of other states, and thus refrain from imposing double liability. So presented, the question is no longer one of policy, as to which we have choice, but of obligation, as to which we must obey.

*National Broadway Bank v. Sampson*<sup>22</sup> was decided in 1903—one year before the decision in *Harris v. Balk*.<sup>23</sup> It seems inconceivable that much of its *dictum* would have been uttered, had the opinion of the Supreme Court in the *Harris* case<sup>24</sup> been then available. But, on its facts, it is without any relevancy to the question under discussion. For, what had occurred in that case, was an attachment in this state of a debt owing by a non-resident *partnership* to a foreign corporation, by service upon one of the partners, who happened to be in New York. It was asserted that, by such service, jurisdiction was obtained of the firm. The court held that such service, even though personal, did not bind the non-resident members of the firm, and that, therefore, there was no valid levy *as against them*. As put by the court itself, the inquiry was: "Did the service of the warrants of attachment upon Eugene H. Sampson, one of the partners, constitute a levy upon or attachment of the indebtedness owing by that firm so as to bind his copartner, who was a non-resident, and thus make him personally liable therefor? To charge Charles E. Sampson by virtue of such service involves the conclusion that the attachment not only created a

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<sup>19</sup> *Supra* note 5.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra* note 14.

<sup>22</sup> 179 N. Y. 213, 71 N. E. 766 (1903).

<sup>23</sup> *Supra* note 14.

<sup>24</sup> *Ibid.*

lien upon the indebtedness of Eugene H. Sampson as a member of the firm, but also created a liability therefor against each of the non-resident members of that firm as well. We think no such liability as against the defendant, Charles E. Sampson, or the other non-resident members of the firm resulted from such service of the attachment."<sup>25</sup>

Thus, whatever was said in the *National Broadway Bank* case,<sup>26</sup> to the effect that any other conclusion would "give rise to the most embarrassing conflicts of jurisdiction, would lead to great confusion and uncertainty, and greatly prejudice the rights of creditors,"<sup>27</sup> was correct enough as applied to the facts in that case, *i. e.*, involving an attempt to bind a non-resident, through service upon a partner within the state, but without application here. The decision on this point would be law today, even under the rule of *Harris v. Balk*.<sup>28</sup> No further effect can be given to it. The Court of Appeals, when confronted with it in *Morgan v. Mutual Benefit Life Insurance Co.*,<sup>29</sup> distinguished it upon the ground that the "suit was in aid of an attachment claimed to have been levied in this state upon a debt owing by a Massachusetts limited partnership to a Massachusetts corporation. *The warrant of attachment was not served upon all the partners.*"<sup>30</sup> If it had been, the implication is clear that the levy would have been sustained.

This conclusion is reinforced by a careful consideration of *Plimpton v. Bigelow*,<sup>31</sup> which is cited in all the cases—even those lately determined by the Appellate Division of the First Department, and which we shall hereafter discuss. It decided that shares of stock of a foreign corporation were not subject to levy here, under Section 647 of the Code of Civil Procedure, now Section 915 of the Civil Practice Act. The decision was strictly limited to that proposition, for the court said: "But whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-

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<sup>25</sup> *Supra* note 22, at 221-222.

<sup>26</sup> *Supra* note 22.

<sup>27</sup> *National Broadway Bank v. Sampson*, 179 N. Y. 213, 225, 71 N. E. 766 (1903).

<sup>28</sup> *Supra* note 14.

<sup>29</sup> 189 N. Y. 447, 82 N. E. 438 (1907).

<sup>30</sup> *Id.* at 459.

<sup>31</sup> 93 N. Y. 592 (1883).



resident by service of notice on an agent of the corporation within the jurisdiction, we think in respect to corporate stock, which is not a debt of the corporation in any proper sense, it would be contrary to principle to hold that it can be reached by such a notice.”<sup>32</sup> Such is settled law. Even in that early case—which has been so much misapprehended in all subsequent decisions in this state—the Court of Appeals recognized that it was general practice to permit of attachments against foreign corporation debtors doing business here. So, the Court of Appeals said:

“But in some of the States foreign corporations having an agent, or a place of business within the State may be charged under what is called the trustee process, or a garnishee. \* \* \* In these proceedings the trustee or garnishee is joined with the principal defendant as a party to the action, and the debt owing by the trustee or garnishee is ascertained, and the liability of the trustee and garnishee is adjudged in the action. There may be no difficulty upon principle in compelling a corporation which has an agent and officer in another state and is transacting business there, to respond in garnishment proceedings for the debt, although the creditor—the principal defendant—is a non-resident, and if bound to respond it is certainly just that the judgment which compels the corporation to pay the debt to the plaintiff, should protect it in making such payment, against a subsequent claim by its creditor. We do not enter into this question here.”<sup>33</sup>

Indeed, the basic conception underlying recent decisions by the Appellate Division of the First Department, is without any justification in the authorities. For there is no proper line to be drawn between a domestic corporation domiciled here, and a foreign corporation, which is said to have its domicile only in the state of its origin. In *Morgan*

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<sup>32</sup> *Id.* at 601-602.

<sup>33</sup> *Id.* at 601.

v. *Mutual Benefit Life Insurance Co.*,<sup>34</sup> decided in 1907—three years after the decision in *Harris v. Balk*<sup>35</sup>—and with the cases of *Carr v. Corcoran*,<sup>36</sup> *Douglass v. Phoenix*,<sup>37</sup> *Plimpton v. Bigelow*<sup>38</sup> and *National Broadway Bank v. Sampson*,<sup>39</sup> as well as *Harris v. Balk*<sup>40</sup> and *Louisville, etc., R. R. Co. v. Deer*,<sup>41</sup> also presented to the court, in briefs of counsel, it was held that a foreign corporation licensed to do business here was a “resident of this state through its agent so located and doing business here,” and that as to claims such as were made in that case, it “should be treated as a domestic \* \* \* company and as domiciled in this state.”<sup>42</sup>

No longer was it or is it true that a foreign corporation which does business in this state “does not change its domicile of origin or its residence.”<sup>43</sup> On the contrary, it is now recognized, as we have seen—even by the Court of Appeals, which formally announced the earlier doctrine—that a foreign corporation licensed to do business here is a “resident of this state.”<sup>44</sup> The practical reason is that the subject matter of the indebtedness is in “the control of our court and any judgment that may be rendered in the action can be enforced and made effectual in this state.”<sup>45</sup>

The rule thus stated, as applied to a *foreign corporation licensed to do business here*, was not new. It had been stated with precision in *Martine v. International Life Insurance Society*.<sup>46</sup> It was approved by the Supreme Court of the United States in *New England Mutual Life Insurance Co. v. Woodworth*.<sup>47</sup> It is not without significance that Judge Chase, who wrote the opinion for the Court of Appeals in

<sup>34</sup> *Morgan v. Mutual Benefit Life Insurance Co.*, 189 N. Y. 447, 82 N. E. 438 (1907).

<sup>35</sup> *Supra* note 14.

<sup>36</sup> *Supra* note 12.

<sup>37</sup> *Supra* note 5.

<sup>38</sup> *Supra* note 31.

<sup>39</sup> *Supra* note 22.

<sup>40</sup> *Supra* note 14.

<sup>41</sup> 200 U. S. 176, 26 Sup. Ct. 207 (1905).

<sup>42</sup> *Morgan v. Mutual Benefit Life Ins. Co.*, 189 N. Y. 447, 454, 82 N. E. 438 (1907).

<sup>43</sup> *Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 220, 33 N. E. 938 (1893).

<sup>44</sup> *Supra* note 42, at 454.

<sup>45</sup> *Ibid.*

<sup>46</sup> 53 N. Y. 339 (1873).

<sup>47</sup> 111 U. S. 138, 4 Sup. Ct. 364 (1884).

*Morgan v. Mutual Benefit Life Ins. Co.*,<sup>48</sup> in his opinion distinguished every case, statements from which are quoted in the later opinions of the Appellate Division,<sup>49</sup> on the ground that such "statements" must be read in the light of the facts presented in those cases, which rendered them quite different. In none of them, except the *Douglass* case,<sup>50</sup> was there involved a foreign company licensed to do business in the attachment state, and the *Douglass* case,<sup>51</sup> as we have seen, is certainly no longer law, since overruled by *Harris v. Balk*.<sup>52</sup>

Thus was the doctrine of *situs* (for attachment purposes) duly interred. It was a theory conceived in error, and, therefore, disposed of by the Court of Appeals, which created it, at the very first opportunity given to it after the decision in *Harris v. Balk*.<sup>53</sup> Thus was our mistaken notion of *situs*, merged with the federal view of jurisdiction depending upon service of process. Indeed, in the *Morgan* case,<sup>54</sup> the Court of Appeals created a new formula, *i. e.*, that the *situs* of the debt would be found where jurisdiction of the attachment debtor could be found. And the reasoning was the rather practical proposition that "Whenever a question as to the *situs* of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the federal courts, and it has been sought to uphold the *situs* of the claim in the state where the contract was made, it has been sustained."<sup>55</sup>

Only recently, in *Severnoe Securities Corporation v. London & Lancashire Insurance Company*,<sup>56</sup> the Court of Appeals again confessed the error of its original thought—this time in an opinion by Judge Cardozo:

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<sup>48</sup> *Supra* note 29.

<sup>49</sup> *Id.* at 458-459.

<sup>50</sup> *Supra* note 5.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Supra* note 14.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* note 29.

<sup>55</sup> *Morgan v. Mutual Benefit Life Ins. Co.*, 189 N. Y. 447, 454, 82 N. E. 438 (1907).

<sup>56</sup> 255 N. Y. 120, 174 N. E. 299 (1931).

"The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal status be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor; the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. \* \* \* At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions. \* \* \*"<sup>57</sup>

If "at the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions,"<sup>58</sup> what common sense or justice is there in denying a resident of this state access to his own courts, under conditions certified as entirely proper by the Supreme Court of the United States, when such access is made available by every other state, to its own residents? Why should a New York resident be compelled to seek justice elsewhere, when his own courts were created by him and at his own expense, so that he might obtain justice here? As was said by Mr. Justice Holmes (though in a dissenting opinion upon another subject):<sup>59</sup> "A debt is a legal relation between two parties, and if we think of facts, is situated at least as much with the debtor against whom the obligation must be enforced, as it is with the creditor. To say that a debt has a *situs* with the creditor is merely to clothe a foregone conclusion with a fiction."<sup>60</sup>

To us, it seems that the decisive consideration of policy is this: Whatever may be our view with respect to our residents, the fact remains that all other states permit theirs to garnishee debts due by non-residents to other non-residents. This, of course, includes debts due to New York residents. It follows, therefore, that, whether we like it or not, when our residents become subject to garnishee process elsewhere, they have no recourse. Nothing we can do can change that

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<sup>57</sup> *Id.* at 123-124.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Safe Deposit Trust Co. v. Virginia*, 280 U. S. 83, 50 Sup. Ct. 59 (1929).

<sup>60</sup> *Id.* at 97-98.

rule, for the Supreme Court of the United States has said that it is right, and we must, therefore, obey, under the full faith and credit clause of the Constitution. All that is given to our residents, in such case, is protection against double liability, and that is all that they should have a right to expect. But, when our residents, in turn, seek, in this state, to prosecute a similar procedure against non-residents, then—unless we adopt the view for which we argue—we say to them that they must go elsewhere, and that we will not give them benefits available to residents of every other jurisdiction—in fact, available even to our own residents in other jurisdictions. There is neither rhyme nor reason in any such rule of law. Instead, it presents a novel application of the principle of self-denial, with not a bit of good that may result to any one, except the defaulting non-resident debtor, who would take advantage of the situation.

A rule formulated to protect our own residents, now that our courts are powerless to enforce it for that purpose, should not now be employed to their detriment. With respect to foreign garnishee process, we have no choice but to obey superior federal restraint. But with respect to our own law of attachment, we are free to choose. Why deny our own residents access to their own courts?

But there are further reasons which show that the supposed New York rule is without any basis whatsoever, as applied to foreign corporations. For not only was our conception of state garnishee power changed, but, also, our theory of local domicile of foreign corporations. Until 1913, Section 1780 of the Code of Civil Procedure (later, Section 47—now Section 225 of the General Corporation Law), provided for only three instances in which a non-resident might sue a foreign corporation. In substance, these were: When the contract underlying the action was made in this state; or when the subject matter of the action was real or tangible personal property here; or when the cause of action arose here. But, in 1913,<sup>61</sup> the statute was amended to add a fourth situation, *i. e.*, where a foreign corporation was doing business within the state. Here was a declaration of policy

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<sup>61</sup> Laws of 1913, c. 60.

by the Legislature of the State of New York, supreme in this field, that, notwithstanding all that had gone before—even what had been said by this court—foreign corporations were to be deemed present in this state for all purposes incident to the exercise of jurisdiction through service of process. Yet, the decisions of the Appellate Division<sup>62</sup>—later than *Mechanics & Metals National Bank of the City of New York v. Banque Industrielle De Chine*<sup>63</sup>—completely ignored this statement of basic policy, and harked back to dicta of the Court of Appeals, written in a day when public policy was different, a public policy which is now disowned, as we have shown, even by the Court of Appeals.

It is in this connection that we must consider cases like *Bridges v. Wade*<sup>64</sup> and *Flynn v. White*.<sup>65</sup>

The *Bridges* case was decided in 1906—therefore, prior to the amendment of our present General Corporation Law in 1913. The fact that defendant's debtor was doing business here was, therefore, of no consequence. The opinion of the Appellate Division shows a distinct reluctance to choose between the so-called New York rule and the federal practice, but disposes of the embarrassing problem of choice by reason of the fact that "even if we applied the rule above stated (*Harris v. Balk*), the levy must be held bad in the case at bar. That rule is that attachment will lie if the creditor of the garnishee could himself sue."<sup>66</sup> Attention is then invited to Section 1780 of the Code of Civil Procedure, and the conclusion emphasized that the "cause of action comes not within any of said requirements, and so, as it seems to us, under all the authorities, state and federal, this attempted levy was bad."<sup>67</sup> Quite clearly, this decision would have been different, had the amendment to our General Corporation Law, adopted in 1913, been then in force.

The *Flynn* case<sup>68</sup> was decided by the Appellate Division of the First Department in 1907—again before the amend-

<sup>62</sup> *Supra* note 1.

<sup>63</sup> 205 App. Div. 543, 199 N. Y. Supp. 817 (1st Dept. 1923).

<sup>64</sup> 113 App. Div. 350, 99 N. Y. Supp. 126 (1st Dept. 1906).

<sup>65</sup> 122 App. Div. 780, 107 N. Y. Supp. 860 (1st Dept. 1907).

<sup>66</sup> *Supra* note 64, at 361.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Supra* note 65.

ment to our General Corporation Law. Here, however, the court, dissatisfied with the supposed New York rule, found a circumstance upon which it seized to uphold the attachment, and that circumstance was that this contract between the defendant and his debtor was made in this state, and payments made from funds deposited here. When statements in the opinions of the Court of Appeals were urged to the contrary, the Appellate Division said, "But we have been many times admonished by the Court of Appeals that we are to be bound by the decisions of that court, and that an expression of its opinion is not to be divorced from its context and warped into an authority in another case presenting a different state of facts."<sup>69</sup> Thus, the court proceeded to distinguish all of the prior cases, and concluded:

"I have not found any case where the Court of Appeals has held an attachment or levy thereunder bad where the person upon whom the levy was attempted to be made, and who owed the debt, duty or obligation, while he had his technical domicile in an adjoining state, yet was a New York business man in every sense of the word, was in daily attendance at his regular office for the transaction of business in New York City, kept his money on deposit in the banks of this city, made the contract out of which the obligation grew in this city, which, by its terms, was payable in this city, and the greater part of the amount payable thereunder had actually been paid in this city, when the plaintiffs were residents of this city and their claim against the defendant grew out of the obtaining for the defendants the very contract which the garnishee had partially performed, and the obligation for the last payment thereunder was the debt attempted to be levied on. There is presented here no question of a temporary sojourn by a non-resident and an attempt to levy upon a debt upon a contract created and to be performed elsewhere.

"It seems to me, in view of the large numbers of business men who sleep in adjoining States and, there-

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<sup>69</sup> *Id.* at 783-784.

fore, have a technical domicile there, but who, as matter of fact, spend all their business hours in the actual transaction of business enterprises in New York City, that citizens of this State ought not to be deprived of the aid of the court in collecting their just debts by holding that the mere fact of such non-residence will prevent a levy under an attachment. Under the circumstances disclosed upon this record, it seems to me that we should hold that the thing levied upon is within the State and subject to our jurisdiction until the court of last resort has squarely passed upon such a state of facts." <sup>70</sup>

Again was decision of the basic question involved thus avoided.

The observation of the Appellate Division, in the *Flynn* case,<sup>71</sup> that none of the prior decisions were in point, was, indeed, sound. So we have seen.

Indeed, Section 225 of our General Corporation Law, in so far as it creates a distinction between residents and non-residents, who seek remedies in our courts, was held constitutional in an opinion by Mr. Justice Holmes, for the Supreme Court of the United States, because "a distinction of privileges according to residence may be based upon natural rational considerations and has been upheld by this court, emphasizing the difference between citizenship, and residence. \* \* \* There are manifest reasons for preferring residents in access to over-crowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned." <sup>72</sup> Ironical, indeed, would it be, if a statute, sustained by the Supreme Court of the United States because it reasonably discriminated in favor of residents, should be ignored in construing other parts of our law, with the result that residents are denied the benefits of the courts for which they pay.

The correct conclusion—inevitable if we regard true principles of jurisdiction and comity underlying—was

<sup>70</sup> *Supra* note 65, at 785.

<sup>71</sup> *Supra* note 65.

<sup>72</sup> *Douglass v. New York, New Haven & Hartford R. R. Co.*, 279 U. S. 377, 387, 49 Sup. Ct. 355, *aff'g*, 248 N. Y. 580, *aff'g*, 224 App. Div. 782 (1929).



reached by the Appellate Division of the First Department in *Mechanics & Metals National Bank of the City of New York v. Banque Industrielle De Chine*.<sup>73</sup> There, the court stated the proposition as follows:

“There are rulings to the effect that a debt due from one foreign corporation to another cannot be attached, but in such cases as make that holding, a foreign corporation in whose hands the debt was sought to be attached, was not engaged in business in this state. Where, however, a foreign corporation has a license issued to it to do business here and maintains an office for the regular transaction of business here, it is deemed to be a resident of the state for certain judicial purposes within the contemplation of law.”<sup>74</sup>

In *Shipman Coal Co. v. Delaware & Hudson Co.*,<sup>75</sup> the Appellate Division of the First Department succinctly formulated the principles to be applied:

“ \* \* \* in the case of debts the power of control for the purpose of attachment is to be found at the domicile of the debtor, as in this instance, for here is where the debt can be satisfactorily enforced and reduced to possession by reason of the control of the courts over the person and property of the debtor, the New York corporation. \* \* \* The only requirement in the attachment statutes as to the situs of the property made subject to attachment is that it must be ‘found’ within the county in which the levy is made. This strictly construed would only apply to physical property and is an inappropriate use of the word applied to debts or other intangible property rights. Although the word is used in the statute, its scope is doubtless restricted to property over which the courts may properly exercise jurisdiction *quasi in rem* within consti-

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<sup>73</sup> *Supra* note 63.

<sup>74</sup> *Id.* at 544.

<sup>75</sup> 219 App. Div. 312, 219 N. Y. Supp. 628 (1st Dept), *aff'd*, 245 N. Y. 567, 157 N. E. 859 (1927).

tutional limitations. Here the levy was made in New York County on the Delaware & Hudson Company, the judgment-debtor, which is domiciled and has its principal office here, and, therefore, the indebtedness was 'found' here if 'found' anywhere. That the 'situs' of debts and other intangible property rights for purposes of attachment is at the domicile of the debtor or person owing the duty is a doctrine which is generally recognized as an exception to the general rule."<sup>76</sup>

We have seen that the phrase "domicile," in attachment law, contemplates a foreign corporation licensed to do business here.

These principles were appreciated, without being applied, in *Bridges v. Wade*.<sup>77</sup> Application was unnecessary—in fact, could not be made—because defendant's debtor, as the law then stood, could not be served with process in New York. In *India Rubber Company v. Katz*<sup>78</sup> and *Flynn v. White*,<sup>79</sup> the injustice of denying access to our courts was so apparent that an exception was created and enforced. This exception was to the effect that jurisdiction might be asserted to garnishee a debt owing from one non-resident to another, if said debt emerged from the transaction of business in this state. But the exception is more apparent than real. For, in the *India Rubber* case,<sup>80</sup> defendant's debtor, a foreign corporation, was doing business in this state, and, therefore, "the debt which was the subject of the attachment was incurred by it in the course of such business."<sup>81</sup> Therefore, defendant was able to sue his foreign corporation debtor in New York, even under Section 1780 of the Code of Civil Procedure (now Section 225 of the General Corporation Law) as it then was, since the cause of action, as between defendant and his debtor, arose in New York. This is so, irrespective of whether said debtor was licensed to do

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<sup>76</sup> *Id.* at 315-316.

<sup>77</sup> *Supra* note 64.

<sup>78</sup> 65 App. Div. 349, 72 N. Y. Supp. 658 (1st Dept. 1901).

<sup>79</sup> *Supra* note 65.

<sup>80</sup> *Supra* note 78.

<sup>81</sup> *Id.* at 351.

business in New York, as to which there is no information in the opinion. And, in *Flynn v. White*,<sup>82</sup> defendant was similarly able to obtain jurisdiction of its debtor for, since it was defendant which was a foreign corporation, and its debtor an *individual* within the state, Section 1780 of the Code of Civil Procedure offered no obstacle whatsoever. Full realization of these principles will be found in the opinion in *Flynn v. White*.<sup>83</sup> The importance of these observations lies in the fact that, notwithstanding lip observance of the rule of "*situs*," in fact a levy was always sustained, whenever defendant was in a position to serve process on his foreign corporation debtor. Now, that Section 1780 of the Code of Civil Procedure (now Section 225 of the General Corporation Law) has been enlarged to permit service against a foreign corporation doing business here, no reason appears why a debt owing by said corporation to its creditor should not be subject to levy here. The reason of all prior decisions requires such a rule.

But all of these principles were completely ignored in *Cohn v. Enterprise Distributing Corp.*,<sup>84</sup> *Dos Passos v. Morton*<sup>85</sup> and *Gerard Investing Co. v. National Railways of Mexico*.<sup>86</sup> Quite significantly, in none of these cases was the *Mechanics & Metals* case<sup>87</sup> or the *India Rubber Co.* case,<sup>88</sup> cited in the opinions, nor in any of them was the fact appreciated that the decisions of the Court of Appeals, relied upon, announced a policy erroneously thought to be compelled by superior federal law, changed by amendment of our General Corporation Law, and disowned by the Court of Appeals itself, and that, in all of them, the true purport of *Plimpton v. Bigelow*<sup>89</sup> was misunderstood and inconclusive dicta in other cases misconstrued.

The futility of attempting to reconcile the recent decisions of the Appellate Division of the First Department, on this point, is recognized by Judge Patterson (United States

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<sup>82</sup> *Supra* note 65.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Supra* note 1.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Supra* note 63.

<sup>88</sup> *Supra* note 78.

<sup>89</sup> *Supra* note 31.

District Court, Southern District of New York) in *Heydemann v. Westinghouse Electric & Manufacturing Co.*, decided December 22, 1934.<sup>90</sup>

Furthermore, even under the most orthodox of *situs* theories, is it not conceded that our attachment laws fasten upon obligations, not merely at the domicile of the creditor, but also at the domicile of the debtor? Was not the rule thus stated in *National Broadway Bank v. Sampson*,<sup>91</sup> that "the attachment laws of our own and of other states recognize the right of a creditor of a non-resident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor"?<sup>92</sup> And is it not today incapable of dispute that domicile, within the meaning of attachment rules, includes the concept of a foreign corporation which is licensed to do business here?<sup>93</sup> The answer is not in doubt, if the issue is simply one of "common sense appraisal of the requirements of justice and convenience in particular conditions."<sup>94</sup> Nevertheless, a change in the law to accord to a "common sense appraisal of the requirements of justice and convenience in particular conditions"<sup>95</sup> now seems impossible, except through legislation, unless, indeed, one of the Appellate Divisions should, in some future case, see fit to grant leave to appeal to the Court of Appeals.

JAY LEO ROTHSCHILD.

October, 1935.

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<sup>90</sup> Not officially reported.

<sup>91</sup> *Supra* note 22.

<sup>92</sup> *Id.* at 223.

<sup>93</sup> *Supra* note 29.

<sup>94</sup> *Supra* note 56, at 123-124.

<sup>95</sup> *Ibid.*