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## Attachement in New Mexico

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# ATTACHMENT IN NEW MEXICO—Part I.

VERN COUNTRYMAN\*

Attachment, the provisional writ under which property of a defendant is brought into judicial custody before or during litigation and held for application against any money judgment plaintiff may recover, is said to have originated in England in the custom of London.<sup>1</sup> As transferred to this country, however, it is entirely a creature of state statutes<sup>2</sup> which the federal courts follow, formerly under the Conformity Act,<sup>3</sup> and now as required by Federal Rule of Civil Procedure 64.<sup>4</sup> These statutes may authorize garnishment of those indebted to or holding property of the defendant under the attachment writ, or may provide, as those of New Mexico now do,<sup>5</sup> for a separate writ of garnishment.

A study of New Mexico attachment law is, therefore, a study of the interpretation of statutes governing the use of that writ in the district courts<sup>6</sup> and before the justices of the peace.<sup>7</sup> I have been aided in this study by the advice of a number of lawyers<sup>8</sup> and by the response to a questionnaire by eleven district court clerks.<sup>9</sup>

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1. See *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Drake on Attachment*, ch. 1 (7th ed. 1891).

2. Save for special federal provisions for attachment in postal suits. 28 U.S.C. §§2710-2718 (Supp. II, 1960).

3. Ch. 255, §6, 17 Stat. 197 (1872). See also the earlier Process Acts, ch. 21, 1 Stat. 93 (1789), ch. 36, 1 Stat. 275 (1792).

4. N.M. Stat. Ann. §21-1-1(64) (1953) takes from the corresponding federal rule so much of its language as provides, redundantly for state practice: "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state."

5. N.M. Stat. Ann. §§26-2-1 through 26-2-36 (1953).

6. N.M. Stat. Ann. §§26-1-1 through 26-1-44 (1953).

7. N.M. Stat. Ann. §§36-7-1 through 36-7-11 (1953).

8. W. E. Bondurant, Jr., Paul L. Butt, Henry A. Kiker, Jr., William C. Schaab, Thomas J. Smiley, and Charles M. Tansey, Jr., of the New Mexico bar, Robert D. Sandifer of the Missouri bar, Professor Joseph R. Burcham of St. Louis University School of Law, Professor Glenn Avann McCleary of the University of Missouri and Professor John M. Speca of the University of Kansas City School of Law.

9. Responses were received from the clerks of the following counties: Dona Ana and Lincoln (Third District), San Miguel (Fourth District), Eddy and Chaves (Fifth District), Luna (Sixth District), Union (Eighth District), Curry (Ninth District), Quay (Tenth District) and McKinley (Eleventh District). A response for the Bernalillo County Clerk (Second District) was filed by an Assistant District Attorney.

## I. THE MISSOURI HERITAGE

On September 22, 1846, exactly forty-three days after his United States forces had concluded a march from Fort Leavenworth against evaporating Mexican troops and had occupied Santa Fe "without firing a gun or spilling a single drop of blood,"<sup>10</sup> General Kearny promulgated his Code of Laws for the Government of the Territory of New Mexico.<sup>11</sup> In his letter of transmittal to the Adjutant General,<sup>12</sup> Kearny reported that this considerable feat was due entirely to the efforts of Colonel A. W. Doniphan and Private Willard P. Hall of the First Regiment of Missouri Volunteers and that they had taken their Code provisions from the laws of Mexico, Missouri, Texas and the Livingston Code. So far as the attachment provisions of the Kearny Code are concerned,<sup>13</sup> the two Missouri soldier-lawyers did not stray from the 1845 edition of the Revised Statutes of Missouri which one of them must have carried in his saddlebags. They selected and slightly revised twenty-one of the sixty-four Missouri sections dealing with attachment proceedings in the circuit courts,<sup>14</sup> and added a section making the same procedure applicable before justices of the peace.<sup>15</sup> Like the Missouri law, the Kearny Code provided for summoning garnishees under the attachment writ.

Subsequent amendments, many of them not traceable to Missouri, more than doubled the length of the New Mexico attachment laws and in 1876 the territorial legislature adopted the Missouri plan, but wrote its own implementing provisions, of a separate attachment law for justice of the peace courts.<sup>16</sup>

In 1907 the New Mexico attachment laws were completely rewritten as a part of the revision of the Code of Civil Procedure.<sup>17</sup> In this revision the attachment law of the 1899 Revised Statutes of Missouri obviously served as a model,<sup>18</sup> although the revisors were not hesitant to undertake improvements.

10. Proclamation to the Inhabitants of New Mexico, by Brig. Gen. S. W. Kearny, August 22, 1846, reprinted in Hughes, Doniphan's Expedition, S. Doc. No. 608, 63rd Cong., 2d Sess. 47 (1914), and in 2 Twitchell, Leading Facts of New Mexican History, 211, n. 148 (1912).

11. Save as the Kearny Code exceeded the General's authority in one respect by attempting to provide for election of a delegate to Congress, it was recognized as valid law of the Territory. *Ward v. Broadwell*, 1 N.M. 75 (1854).

12. Reprinted in 2 Twitchell, *supra* note 10 at 214, n. 153, and in Kearny Code (1846), at 1 N.M. Stat. Ann. 299 (1953).

13. The attachment provisions of the Kearny Code appear in 1 N.M. Stat. Ann. 303-07 (1953).

14. Mo. Rev. Stat., ch. 11, art. I (1845).

15. The Missouri law contained separate provisions for attachment in justice of the peace courts. Mo. Rev. Stat. ch. 11, art II (1845).

16. N.M. Laws 1876, ch. 27, §§56-79; (now N.M. Stat. Ann. §§36-7-1 through 36-7-11 (1953)).

17. N.M. Laws 1907, ch. 107.

18. Mo. Rev. Stat. ch. 3 (1899). The Missouri attachment is now codified in Mo. Ann. Stat. §§521.010 through 521.890 (1953) and is largely duplicated and to some extent revised by Mo. Sup. Ct. R. 85, effective April 1, 1960.

No change was then made in the separate provisions for attachment in actions before justices of the peace or in the practice of summoning garnishees under the attachment writ, but in 1909 separate provisions were enacted to govern garnishment in both the district and justice of the peace courts.<sup>19</sup>

Because much of our attachment law is derived from Missouri,<sup>20</sup> the decisions of the Missouri courts interpreting similar or identical language are entitled to more than ordinary consideration. Our court has indicated that it will follow the decisions in the originating state construing a statute *before* its adoption in New Mexico unless there is good reason for not doing so, in accord with the common notion that there is a "presumption" that this is what the legislature intended when it adopted the statute.<sup>21</sup> There appears to be little difference in the court's attitude toward decisions of the originating state handed down after adoption in New Mexico.<sup>22</sup> While there is language indicating that decisions of intermediate appellate courts of the originating state are en-

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

20. The New Mexico Supreme Court has often noted this fact. *Torlina v. Trorlicht*, 5 N.M. 148, 154, 21 Pac. 69, 77 (1889), on rehearing, 6 N.M. 54, 27 Pac. 794 (1891); *Territory ex rel. Leyser v. Rindskopf & Co.*, 5 N.M. 93, 98, 20 Pac. 180, 181 (1899); *Perea v. Colorado National Bank*, 6 N.M. 1, 3-4, 27 Pac. 322, 324-25 (1891); *Ripley v. Astec Mining Co.*, 6 N.M. 415, 417, 28 Pac. 773, 774 (1892); *Baca v. Coury*, 27 N.M. 611, 613, 204 Pac. 57, 58 (1922); *Marron v. Barton*, 34 N.M. 516, 517, 285 Pac. 502 (1930). See also *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 185 (1857).

21. *Armijo v. Armijo*, 4 N.M. 57, 65, 13 Pac. 92, 95 (1887); *Territory ex rel. Leyser v. Rindskopf & Co.*, supra note 20; *Perea v. Colorado National Bank*, supra note 20; *Bullard v. Lopez*, 7 N.M. 561, 566, 37 Pac. 1103, 1104 (1894); *Reymond v. Newcomb*, 10 N.M. 121, 173, 61 Pac. 205, 206 (1900); *Bremen Mining Co. v. Bremen*, 13 N.M. 111, 122, 79 Pac. 806, 811 (1905); *Sacramento Irrigation Co. v. Lee*, 15 N.M. 567, 579, 113 Pac. 834, 837 (1910); *Dow v. Simpson*, 17 N.M. 357, 365, 132 Pac. 568, 570 (1912); *Palmer v. Town of Farmington*, 25 N.M. 145, 153, 179 Pac. 227, 230 (1919); *State v. Taylor*, 33 N.M. 35, 37, 261 Pac. 808, 809 (1927); *State v. Bank of Magdalena*, 33 N.M. 473, 477, 270 Pac. 881, 883 (1928); *State v. Chavez*, 42 N.M. 569, 574, 82 P.2d 900, 903 (1938); *White v. Montoya*, 46 N.M. 241, 244, 126 P.2d 471, 473, (1942); *Smith v. Meadows*, 56 N.M. 242, 250, 242 P.2d 1006, 1011 (1952); *Featherstone v. Bureau of Revenue*, 58 N.M. 557, 561, 273 P.2d 752, 755 (1954). This "presumption" is overcome if the New Mexico court concludes that such construction is "not in accord with sound reasoning, common sense . . . or . . . would render the statute inconsistent with other laws intended to be retained, or the public policy of" New Mexico. *McDonald v. Lambert*, 43 N.M. 27, 32, 85 P.2d 78, 81 (1938); *Laughlin v. Laughlin*, 49 N.M. 20, 32, 155 P.2d 1010, 1017 (1944); *State v. Reed*, 39 N.M. 44, 51, 39 P.2d 1005, 1008 (1935); *Beals v. Ares*, 25 N.M. 459, 492, 185 Pac. 780, 790 (1919); *Ripley v. Astec Mining Co.*, supra note 20.

22. Such decisions are "not binding," since they present "no question of adopted construction." *Ickes v. Brimhall*, 42 N.M. 412, 416, 79 P.2d 942, 944 (1938); *State v. State Bank*, 38 N.M. 338, 342, 32 P.2d 1017, 1020 (1934). But they are "entitled to respectful consideration," *Cain v. Bowlby* 114 F.2d 519, 523 (10 cir.), cert. denied, 311 U.S. 710 (1940), and may be found "highly persuasive." *Ickes v. Brimhall*, supra. See also *Carney v. McGinnis*, 358 P.2d 694 (N.M. 1961); *Lopez v. Singh*, 53 N.M. 245, 247, 205 P.2d 492, 493 (1949).

titled to less weight than those of its highest court,<sup>23</sup> there is evidence that decisions of the intermediate courts are also persuasive.<sup>24</sup>

## II. THE VALUES AND RISKS OF ATTACHMENT

Although these matters are discussed in detail later, any examination of the attachment law should proceed with full awareness of the value of the device and of the risks inherent in its use. One constant value to plaintiff in all attachment cases is the acquisition of a lien on defendant's property from the time of levy.<sup>25</sup> Another value, in any instance where personal jurisdiction over defendant cannot be obtained, is the "quasi-in-rem" jurisdiction obtained by attachment and substituted service.<sup>26</sup> On the other hand, the risks of the attachment plaintiff are substantial. In addition to the possibility of liability to third parties for erroneous levy upon their property,<sup>27</sup> there is also the danger of liability to the attachment defendant on and apart from the attachment bond if either the attachment or the underlying cause is dismissed.<sup>28</sup> There is also the danger that the attachment action will precipitate a bankruptcy proceeding in which plaintiff will lose all advantage gained by his attachment.<sup>29</sup>

## III. AVAILABILITY OF ATTACHMENT

*A. Nature of Claim:* The Kearny Code followed the Missouri language of the time and authorized "creditors" to "sue their debtors . . . by attachment."<sup>30</sup> Shortly after adoption here, the Missouri Supreme Court read this language to mean that attachment was not available in a tort suit.<sup>31</sup> The Missouri statute was then changed to authorize attachment in "any civil action."<sup>32</sup> We retain

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23. *State v. State Bank*, supra note 22, declining to follow an 1835 New Jersey Court of Chancery decision interpreting the corporation statute adopted here in 1905.

24. Other pre-adoption interpretations of the New Jersey corporation law by the New Jersey Chancellor have been followed here. *Sacramento Irrigation Co. v. Lee*, 15 N.M. 567, 13 Pac. 834 (1910); *State v. Bank of Magdalena*, 33 N.M. 473, 270 Pac. 881 (1923). And in two instances our court has elected to follow decisions of the Missouri Courts of Appeals interpreting the attachment statute long after its adoption here. *Baca v. Coury*, 27 N.M. 611, 204 Pac. 57 (1922); *Marron v. Barton*, 34 N.M. 516, 285 Pac. 502 (1930). See also *Jones v. Page*, 26 N.M. 440, 447, 194 Pac. 883, 886 (1920), following a 1916 decision of the New Jersey Chancellor interpreting the corporation statute adopted in New Mexico in 1905.

25. See *The Attachment Lien*, part II. (to appear Vol. II, No. 1).

26. See *Aquiring Jurisdiction Through Attachment*, *ibid.*

27. See *Third Party Claims*, *ibid.*

28. See *The Risks of Attachment-Financial Liability*, *ibid.*

29. See *The Risks of Attachment-Bankruptcy*, *ibid.*

30. Kearny Code, Attachments §§1, 22 (1846) at 1 N.M. Stat. Ann. 303, 314 (1953); Mo. Rev. Stat. ch. 11, art. I, §1 (1845).

31. *McDonald v. Forsyth*, 13 Mo. 549 (1850).

32. Mo. Ann. Stat. §521.010 (1953). See *Pearson v. Gillett*, 55 Mo. App. 312 (1893); *Houston v. Woolley*, 37 Mo. App. 15 (1889). Cf. Mo. Rev. Stat. ch. 12, art. I, §1 (1855).

the original language,<sup>33</sup> but in 1882 added a separate section<sup>34</sup> authorizing attachment in tort actions as well as in contract actions, in both the district and the justice of the peace courts.<sup>35</sup>

By adopting this course we may have avoided a problem which has arisen in Missouri. There, the phrase "any civil action" is construed to refer only to such actions as were formerly actions at law, so that attachment is not available in actions formerly equitable.<sup>36</sup> Our statute, speaking of actions "founded upon contract . . . tort or other action ex delicto,"<sup>37</sup> focuses upon the nature of the underlying claim and need not be construed to make the availability of attachment depend upon the form of the action or the remedy sought.<sup>38</sup>

At the time of the promulgation of the Kearny Code, the Missouri attachment law made no provision for attachment prior to the time when plaintiff's underlying claim had matured so that suit could be brought upon it. One year later Missouri gave creditors some protection against their debtors' anticipatory moves by authorizing attachment on "a demand not yet due."<sup>39</sup> New Mexico did not deal with the matter until more than a quarter of a century later, when it authorized attachment "on a demand not yet due in any case where an attachment is authorized, in the same manner as upon demands already due."<sup>40</sup> In Missouri, this authorization is not construed to extend to contingent claims but only to "an actual subsisting debt, which will become due by the efflux of time," so that persons secondarily liable on the debtor's undertakings cannot bring attachment suits against the debtor on his obligation to indemnify until they have first paid his debt. The rule was established in a case where the principal debt had matured so that it was perhaps not unfair to the surety to require him before attaching to make payment which he would have to make before he could take judgment.<sup>41</sup> But it has been applied as a matter of course to the

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33. N.M. Stat. Ann. §§26-1-1, 36-7-1 (1953).

34. N.M. Laws 1882, ch. 5, §1, at 21; N.M. Laws 1907, ch. 107 §1(183); N.M. Stat. Ann. §26-1-2 (1953).

35. *Butler Paper Co. v. Sydney*, 47 N.M. 463, 144 P.2d 170 (1943). For the distinction between an action on a statute imposing a penalty, for which attachment is not available, and an action to enforce a statutory remedy for a private wrong, for which attachment is available, see *Denison v. Tocker*, 55 N.M. 184, 229 P.2d 285 (1951).

36. *State ex rel. Auchincloss, Parker & Redpath, Inc. v. Harris*, 349 Mo. 190, 159 S.W.2d 799 (1942), and cases cited; *Hisel v. Chrysler Corp.*, 90 F. Supp. 655 (W.D. Mo. 1950).

37. N.M. Stat. Ann. §26-1-2 (1953).

38. But it may take a generous interpretation of "contract" and "tort" to encompass the separate maintenance action where attachment was allowed in *State ex rel. Nelson v. Williams*, 249 S.W.2d 506 (Mo. App. 1952). And see *Glasgow v. Peyton*, 22 N.M. 97, 159 Pac. 670 (1916), mooting the question whether the state may attach in an action for taxes.

39. Mo. Laws 1847, at 9; Mo. Ann. Stat. §521.020 (1953). In Missouri the grounds for attachment are more limited where the claim is unmaturing than when it is matured.

40. N.M. Laws, 1874 ch. 17, §1, at 38; N.M. Stat. Ann. §26-1-1 (1953).

41. *Hearne & Nichols v. Keath*, 63 Mo. 84, 89 (1876). See also *Borum v. Reed*, 73 Mo. 461 (1881).

case where the principal debt is not yet due,<sup>42</sup> where the justification for depriving the surety of the protection given to other creditors is not apparent.

B. *Grounds*: Save for the New England states, where indebtedness is treated as akin to ungodliness, the attachment writ is available only to the plaintiff who can establish some ground specified in the statute.<sup>43</sup> New Mexico follows Missouri in the prevailing pattern and specifies most of the same grounds, although New Mexico adaptors took some liberties with the Missouri format. They also took their own and preserved some Missouri liberties with the King's English. As specified in our statute, the grounds for attachment are nine,<sup>44</sup> although several of the statutory categories include more than one ground:

*First Ground*: "When the debtor is not a resident of, *nor resides in this state. . . .*"

The Kearny Code took the language from Missouri,<sup>45</sup> although the italicized phrase was later dropped by Missouri.<sup>46</sup> Use of the disjunctive suggests that plaintiff must show (a) that defendant does not have a residence here and (b) that he does not reside here. This in turn suggests that the "residence" contemplated by the first alternative is something more permanent than the mere residing contemplated by the second alternative. Two New Mexico cases support this interpretation. In the first, defendant husband and wife were living in a rented apartment in Texas at the time of attachment, the husband having left New Mexico more than a year before the attachment and the wife having sold their home and followed him shortly before the attachment. A finding that defendants were not "residents" of New Mexico was sustained and it was pointed out that the statute does not require that defendant "should be a resident elsewhere." It was enough that defendants "were not residing or living in the state. They had no home within the state where process could be served on either of them."<sup>47</sup> The second case<sup>48</sup> presents no facts but by its approval of the rejection of proposed instructions establishes that (a) plaintiff is not entitled to attach merely on a showing that defendant "was not actually residing in and living at some place of abode in the state," since defendant

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42. *Ellis v. Harrison*, 104 Mo. 270, 16 S.W. 198 (1891).

43. See *Sturges & Cooper, Credit Administration and Wage Earner Bankruptcies*, 42 Yale L.J. 487, 503-07 (1933). Some of the New England states ease the plaintiff's path even further by authorizing all members of the bar to issue their own attachment writs. See Comment, 38 Yale L.J. 376 (1929).

44. In the 1876 law setting up separate provisions for attachment in justice courts, the grounds were more limited. N.M. Laws 1876, ch. 27, §56, at 85, but in 1929 the statute defining grounds for attachment in district courts was made applicable to justice courts. N.M. Laws 1929, ch. 127, §1, at 238. The 1929 enactment is compiled in N.M. Stat. Ann. (1953) as §26-1-1 and again as §36-7-1.

45. Kearny Code, Attachments §1(1) (1846), at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. §26-1-1(I) (1953)); Mo. Rev. Stat. ch. 11, art. I, §1(1) (1845). (Emphasis added.)

46. Mo. Rev. Stat. ch. 12, art. I, §1(1) (1856). Mo. Ann. Stat. §521.010(1) (1953).

47. *First Nat'l Bank v. Payton*, 25 N.M. 264, 266, 180 Pac. 979, 980 (1919).

48. *First Nat'l Bank v. George*, 26 N.M. 176, 179, 190 Pac. 1026, 1027 (1920).

might be only temporarily absent from his place of abode, and (b) the test of residence is not whether a subpoena could be served on defendant, since subpoenas must be served personally<sup>49</sup> whereas summons may be served under what is now Rule 4(e)(1) of the Rules of Civil Procedure by leaving a copy with "some person residing at the usual place of abode of the defendant, over fifteen (15) years of age."<sup>50</sup>

By equating the "residence" of the first alternative to the "usual place of abode" in Rule 4(e)(1), these cases seem to read "residence" as "domicile,"<sup>51</sup> leaving for the meaning of the second alternative, "resides," a concept of residence short of domicile—both of which plaintiff must negate to become entitled to attach.<sup>52</sup>

Certain qualifications should be noted for each alternative. Plaintiff should fail on this first ground for attachment if defendant has a usual abode in the state even though it is not occupied by anyone upon whom process can be served<sup>53</sup>—although the latter fact in conjunction with others may give plaintiff a case under the second ground for attachment.<sup>54</sup> The test under the first alternative is still "residence," not amenability to service of process. By the same token, plaintiff should fail on this ground if defendant resides here, even though his domicile is elsewhere, and even though he is temporarily absent so that he cannot be served.<sup>55</sup> Conversely, defendant should not be able to defeat attachment on the first ground merely by showing that he was physically present in the state and therefore could have been served with summons. If he has no

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49. N.M. Stat. Ann. §21-1-1(45)(c) (1953).

50. N.M. Stat. Ann. §21-1-(4)(e)(1) (1953). The court relied upon the identical language of N.M. Code §4532 (1915). The same rule applies to service of process of justices of the peace. N.M. Stat. Ann. §36-4-4 (1953). Both Rule 4(e)(1) and §36-4-4 provide that if no person be found at defendant's abode willing to accept a copy of process, service shall be made by posting "in the most public part of defendant's premises." These provisions may be construed to apply both where there is a person residing at defendant's abode who is not willing to accept service and where the abode is unoccupied. But the posted notice which might be sufficient to give in personam jurisdiction in the first instance very probably would not be sufficient for that purpose in the second. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Clovis Nat'l Bank v. Callaway*, 364 P.2d 748 (N.M. 1961); *Janes v. West Puerta de Luna Community Ditch*, 23 N.M., 495, 169 Pac. 309 (1917); *Lacy v. Lemmons*, 22 N.M. 54, 159 Pac. 949 (1916).

51. This is the Missouri interpretation in cases decided after adoption here and after Missouri had dropped the disjunctive requirement. *Greene v. Beckwith*, 38 Mo. 384 (1866); *Chariton County v. Moberly*, 59 Mo. 238 (1875); *Engelhart-Davidson Mercantile Co. v. Burrell Sisters*, 66 Mo. App. 117 (1896). This also seems to be the meaning given to "usual place of abode" in statutes relating to service of process. See *Annot.*, 127 A.L.R. 1267 (1940).

52. This seems clear from the statutory language and was the rule in Missouri when the Missouri Statute included the disjunctive requirement and before it was adopted here. *Lane v. Fellows*, 1 Mo. 353 (1823); *Alexander v. Haden*, 2 Mo. 228 (1830).

53. *Lane v. Fellows*, supra note 52; *Chariton County v. Moberly*, 59 Mo. 238 (1875).

54. See pp. 310-18, *infra*.

55. *Lane v. Fellows*, 1 Mo. 353 (1823).



domicile here under the first alternative, he must "reside" here under the second, and "reside" connotes *living* here, however temporarily, rather than merely *being* here long enough for service of process.<sup>56</sup>

One further limitation established in Missouri is probably pertinent here. Since separate provision is made for the out-of-state corporation,<sup>57</sup> the first ground for attachment is not applicable to corporations.<sup>58</sup>

*Second Ground:* "When the debtor has concealed himself, or absconded, or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be passed upon him."

The draftsmen of the Kearny Code here combined two separate grounds for attachment under the Missouri law—one for concealment and one for absconding or absenting—without significant change of language.<sup>59</sup>

Our court has decided no more under this provision than that, where the issue is whether defendant has absented himself from his abode so that he cannot be served, plaintiff is not entitled to submit to the jury the question whether the defendant's absence "was protracted for an unreasonable time"—"the real ground for the attachment is, not the length of time the defendant is absent from the state, but whether he has concealed himself, absconded or absented himself from his usual place of abode so that the process of law could not be passed upon him."<sup>60</sup>

The Missouri courts have grappled more frequently with the meaning of the statutory language, but their conclusions are not entirely clear. First, the supreme court affirmed the dismissal of an attachment where plaintiff had alleged that defendant had absconded or absented herself so that ordinary process could not be served upon her, but the record showed that "the writ was served upon the defendant, within the county, the day after it was issued, and the evidence was satisfactory that she had not been out of it."<sup>61</sup> Plaintiff contended that he was entitled to submit to the jury the question whether defendant intended to avoid service of process. But the court, finding defendant's intent an

56. The Missouri Court has entertained the proposition, although plaintiff failed in his proof, that a defendant who represents himself as a non-resident may be estopped to deny non-residence in the attachment proceeding. *Exchange Bank v. Cooper*, 40 Mo. 169 (1867). Defendant has been found estopped as to other grounds, *McNichols v. Wise*, 62 Mo. App. 443 (1895), but his representation must take the form of an "unequivocal declaration of facts, which, if true, would have authorized the attachment" and plaintiff must have "sued out the writ under the belief that the statements so made *were true*." *Staed v. Mahon*, 70 Mo. App. 400, 405-06 (1897). See also *Rheinhardt v. Grant*, 24 Mo. App. 154 (1887).

57. See p. 331, *infra*.

58. *Farnsworth v. Terre-Haute, Alton & St. Louis R.R. Co.*, 29 Mo. 75 (1859).

59. *Kearny Code, Attachments* §1(2) (1846), at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. §26-1-1(II) (1953)); Mo. Rev. Stat. ch. 11, art I, §1(2)(3) (1845); Mo. Ann Stat. §521.010(2)(3) (1953).

60. *First Nat'l Bank v. George*, 26 N.M. 176, 180, 190 Pac. 1026, 1027 (1920).

61. *Temple v. Cochran*, 13 Mo. 116, 118 (1850).

express element of other grounds for attachment,<sup>62</sup> whereas this ground made no mention of intent, concluded that defendant's intent to avoid service was not an issue for the jury.

This decision was followed shortly by another which cast some doubt upon the first. The second case concerned only the question whether defendant had absented himself from his abode so that process could not be served upon him. But in disposing of that question, the court distinguished instances of concealment and absconding as being based upon "misconduct" of the debtor—a term which seems to imply a wrongful purpose or intent, as does the court's definition of absconding as a "secret withdrawing."<sup>63</sup>

What the case suggests, later decisions seem to confirm. Evidence that a debtor secretly left the state and that his wife abandoned their abode in the state was found by the supreme court to support an affidavit alleging absconding and absence from abode, and evidence that the debtor sold his goods secretly and at sacrifice prices before leaving was held admissible as tending to show "that he intended to abscond or absent himself so as to avoid the service upon him of the ordinary process of law."<sup>64</sup> And a court of appeals has found evidence for the jury showing a "concealment of defendant's person to avoid the service of ordinary process" although there was no evidence of absconding or being absent from defendant's abode, and although the concealment was so ineffective the writ of attachment was served on defendant on the day of issuance.<sup>65</sup>

Meanwhile, it has been established in Missouri that every debtor who temporarily absents himself from his place of abode without leaving someone in residence upon whom process can be served does not thereby subject himself to attachment. There can be no attachment on this ground if "the absence is such, that if a summons issued upon the day the attachment is sued out, [it] will be served upon the defendant in sufficient time before the return day to give the plaintiff all the rights he can have at the return term."<sup>66</sup>

Such a test raises a question as to when the ground for attachment must exist. Where defendant challenges the grounds alleged in plaintiff's affidavit, the court is to try the issue of the truth of the affidavit.<sup>67</sup> Normally, this will be determined

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62. Two other grounds in Missouri, Mo. Ann. Stat. §§521.010(5), (6) (1953); one other ground in New Mexico N.M. Stat. Ann. §26-1-1(V) (1953).

63. Kingsland v. Worsham, 15 Mo. 657, 661 (1852).

64. Ross v. Clark, 32 Mo. 296, 305 (1862).

65. Paddock-Hawley Iron Co. v. Graham, 48 Mo. App. 638, 641 (1892).

66. Kingsland v. Worsham, 15 Mo. 657 (1852); Ellington v. Moore, 17 Mo. 424 (1853); Chariton County v. Moberly, 59 Mo. 238 (1875). A fortiori, there can be no attachment on this ground where defendant leaves a resident at his abode upon whom service can be made. Tiller v. Abernathy, 37 Mo. 196 (1866); Independent Breweries Co. v. Lavin, 207 S.W. 851 (Mo. Ct. App. 1919); Rosenthal v. Windersohler, 115 Mo. App. 237, 91 S.W. 432 (1905).

67. N.M. Stat. Ann. §26-1-31 (1953) ("truth of the affidavit"); Mo. Ann. Stat. §521.410 (Supp. 1960) ("truth of the facts alleged in the affidavit").

as of the date of the affidavit.<sup>68</sup> But, where defendant complains that the affidavit was made a substantial period of time before the writ of attachment was issued, he has been told by the Missouri court, before and since our adoption of Missouri language, that he is entitled to "put in issue the truth of the affidavit at the time of the issuing of the writ."<sup>69</sup> Consistent with the rule that the truth of the affidavit is tested "at the time the writ was actually issued,"<sup>70</sup> defendant does not defeat attachment on grounds of concealment, absconding or absence from abode merely by showing that the writ was served upon him shortly after it was issued.<sup>71</sup> But evidence of such service is admitted as bearing on the jury issue, as one court of appeals defined it, whether defendant "intended to . . . return . . . within such a short time that the service of the ordinary process of law might be had upon him."<sup>72</sup>

The Missouri experience at least suggests a workable interpretation of the statutory language. Where the statute refers to absence, concealment or absconding "so that" defendant cannot be served, the quoted language may refer only to the *effect* and not to the *intent*. But "conceal" and "abscond" connote purposeful action, evasive action. A debtor who conceals himself or absconds is concealing or absconding *from* something. In the statutory context here, that something is "the ordinary process of law." Hence, the debtor's intent to avoid service of process should be recognized as an element of concealment or absconding under the statute.<sup>73</sup> As so defined, concealment or absconding would also cover the case of the debtor who absents himself from his usual place of abode for the purpose of avoiding legal process. But the statutory language authorizing attachment against a debtor who has "absented himself from his usual place of abode in this state so that the ordinary process of law cannot be passed upon him" probably should not be read to require an intent to avoid legal process. So read, it would be superfluous as covering no more than it already covered

68. See *First Nat'l Bank v. George*, 26 N.M. 176, 178-79, 190 Pac. 1026, 1026-27 (1920).

69. *Graham v. Bradbury*, 7 Mo. 281, 283 (1841); *Dider v. Courtney*, 7 Mo. 500 (1842); *Avery v. Good*, 114 Mo. 290, 296-97, 21 S.W. 815, 816 (1892); *Elrod v. Carroll*, 202 S.W. 4, 6 (Mo. Sup. Ct. 1918).

70. *Rosenthal v. Windensohler*, 115 Mo. App. 237, 91 S.W. 432 (1905). See also *Taylor v. Myers*, 34 Mo. 81 (1863); *Scudder v. Payton*, 65 Mo. App. 314 (1896); *Rainwater v. Faconeswich*, 29 Mo. App. 26 (1888); *Best & Russell Co. v. Meyerfeld*, 77 Mo. App. 181 (1898); *Conran v. Fenn*, 159 Mo. App. 664, 140 S.W. 82 (1911). Cf. *Hamblin v. Dunn*, 53 Mo. 137 (1873).

71. *Temple v. Cochran*, 13 Mo. 116 (1850); *Kingsland v. Worsham*, 15 Mo. 657 (1852); *Paddock-Hawley Iron Co. v. Graham*, 48 Mo. App. 638 (1892). Cf. *Louis Obert Brewing Co. v. Keller*, 173 Mo. App. 410, 158 S.W. 1057 (1913).

72. *Martin v. Barrett*, 204 S.W. 410, 411 (Mo. Ct. App. 1918).

73. The statute is probably redundant in listing concealment and absconding separately. *Websters New International Dictionary* (2d ed. unabridged, 1960) defines abscond: "1. To hide, withdraw; be concealed. 2. To depart clandestinely; to steal off and secrete oneself; used specifically of persons who leave the jurisdiction of a court or secrete themselves within its jurisdiction for a fraudulent purpose, such as hindering or defrauding creditors by avoiding legal process."

by concealment and absconding. At the same time, every debtor who leaves his abode temporarily unoccupied should not be subject to attachment. The statute need not and should not be read to mean that every plaintiff who was unable to serve summons yesterday may attach today even though he could get service tomorrow, or even today. It is an absence which will defeat or at least substantially hinder service, not one which will merely delay it, that the statute proscribes. And if the nature of the absence is to be determined as of the date of the attachment writ, its nature will have to depend upon when the defendant intended to return.

When the summons carried a definite return day<sup>74</sup> it was possible to observe the distinction between delay and defeat of service, as the Missouri court did, by inquiring whether the absent defendant intended to return to his abode before the return day on an hypothetical summons issued on the day of issuance of the attachment writ. (The summons was hypothetical because in a case begun by attachment there need be no separate summons—the attachment writ itself contains the summons.<sup>75</sup>) But under modern Rules of Civil Procedure, including those of New Mexico<sup>76</sup> and Missouri,<sup>76a</sup> the summons of a court of general jurisdiction no longer has a return day—service is to be made “with all reasonable diligence,” defendant is directed to appear and answer within thirty days after service, and the sheriff is to make his return promptly and in any event within the time during which defendant must appear and plead.<sup>77</sup>

Only in the justice courts does the summons now carry a return day. It directs defendant to appear at a time stated, in New Mexico not less than five nor more than twenty days from the date of the summons, and it is to be served at least five days before the specified return day.<sup>78</sup> This return day might be used to measure the length of defendant's intended absence in attachment cases in the justice courts, although it is not clear whether the period of measurement under the hypothetical summons should be five or twenty days. But it is of no aid in determining whether defendant's intended absence would defeat service of process in the district courts.

In Missouri a Supreme Court Rule<sup>79</sup> does direct the sheriff to return summons within thirty days of the date of issue if it cannot be served, unless the

74. See N.M. Comp. Laws §1903 (1884) ; Mo. Rev. Stat. Ann. §877 (1939).

75. N.M. Stat. Ann. §§26-1-13, 26-1-15, 26-1-17, 36-7-4 (1953) ; Mo. Ann Stat. §§521.140, 521.150, 521.170 (1953).

76. N.M. Stat. Ann. §§21-1-1(4) (b), 21-1-4(e) (5), 21-1-1(4) (f), 21-1-1(12) (1953). But see §21-1-1(4) (c).

76a. Mo. Ann Stat. §506.130 (1953) ; Mo. Sup. Ct. R. 54.02. See also Mo. Sup. Ct. R. 85.21 ; Mo. Civ. Proc. Form No. 1.

77. Substantially the same rules have prevailed in New Mexico since N.M. Laws 1897, ch. 73, §§19, 22 at 164, 165. Prior thereto, summons was returnable on the first day of the next term of court after its issuance and was to be served at least five days before the return day. N.M. Comp. Laws §§1897, 1903 (1884).

78. N.M. Stat. Ann. §36-4-2 (1953) ; Mo. Ann. Stat. §517.080 (1953).

79. Mo. Sup. Ct. R. 54.10(d).

court grants an extension of time up to ninety days. This Rule might be used to provide a measure of defendant's intended absence in the Missouri circuit courts, although it is debatable whether the measure should be 30 or 90 days. But there is no similar aid to measurement for attachment suits in the New Mexico district courts.

One possible alternative would be to take as a measure the return day on the attachment writ. This would work well enough for the justice courts, where the writ is to specify a day not less than five nor more than fifteen days from the date of the writ.<sup>80</sup> Indeed, it would work better than the return day on an hypothetical summons, since there would be an actual attachment writ with a return day specified. But difficulties would arise in the district courts where conflicting statutes are applicable. One statute, originating in the Kearny Code,<sup>81</sup> directs that original writs of attachment "shall be issued and returned in like manner as ordinary writs of summons"—which under our Rules of Civil Procedure now means without return day.<sup>81a</sup> But another provision enacted in 1897,<sup>82</sup> as part of the same statute that abolished return day on summons,<sup>83</sup> prescribes that all writs of attachment shall be returned within sixty days from the date of delivery to the officer for service. And the 1907 revision of the attachment laws reenacted the first statute,<sup>84</sup> without repealing the second.<sup>85</sup> District court clerks' responses to a questionnaire<sup>86</sup> reveal that the conflict in the statutes is reflected in the practice. The attachment writs used in Bernalillo, Chaves, Curry, Luna and Quay Counties direct the sheriff to make his return within 30 days after service upon the defendant. The Lincoln County writ directs a return "within thirty days," apparently of the date of the writ, and the Dona Ana County writ gives the sheriff sixty days from receipt of the writ to make his return. The writs of Eddy, McKinley, San Miguel and Union Counties, obviously drafted at a time when the statutes gave a defendant twenty days to answer after service in the district where suit was brought and 30 days after service elsewhere,<sup>87</sup> give the sheriff the same time after service to

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80. N.M. Stat. Ann. §36-7-3 (1953).

81. Kearny Code, Attachments §8 (1846), at 1 N.M. Stat. Ann. 304 (1953) (now N.M. Stat. Ann. §26-1-15 (1953)).

81a. See text at note 77, *supra*.

82. N.M. Laws 1897, ch. 73 §176, at 191 (now N.M. Stat. Ann. §26-1-16 (1953)).

83. See note 77, *supra*.

84. N.M. Laws 1907, ch. 107, §1 (192) at 272.

85. N.M. Laws 1907, ch. 107, §1 (300) at 294, repeals all of N.M. Comp. Laws, tit. 33, ch. 2 (1897), relating to attachment, but the statute fixing a 60-day return date for writs of attachment was compiled as N.M. Comp. Laws, tit. 33, ch. 1, §2685 (176) (1897). The 1907 revision also eliminated a recital in the attachment bond that the attachment was returnable to the next term of court, N.M. Laws 1907, ch. 107, §1 (208) at 276 (now N.M. Stat. Ann. §26-1-8 (1953)).

86. See note 9, *supra*.

87. N.M. Code §4090 (1915). N.M. Laws 1925, ch. 110, §1, at 184, amended this provision to give defendant thirty days to answer in all cases, as is now provided by N.M. Stat. Ann. §21-1-1(4) (b) (1953).

file his return. Apart from the difficulty of resolving this conflict,<sup>88</sup> there is at least a lack of logical consistency in measuring plaintiff's right to attach, on the ground that he cannot serve summons, by his ability to serve the attachment writ rather than the summons.

Another alternative would be to abandon the notion that plaintiff's right to attachment is to be determined on the basis of the facts as they exist on the date of issuance of the attachment writ, and to hold that if defendant is in fact served after issuance of the writ or enters a general appearance in the action, plaintiff is not entitled to maintain the attachment. If defendant's appearance to deny the allegations of the attachment affidavit were treated as a general appearance on the merits, this would mean that an attachment on the ground that defendant had absented himself from his abode so that process could not be served would only be sustained where the allegation of such absence was not challenged. If, on the other hand, defendant can challenge the affidavit by special appearance, as the Missouri Supreme Court has decided,<sup>89</sup> this would mean that defendant could defeat attachment on this ground only by proving that his absence had not prevented service of summons (a heavy burden for a defendant entering a special appearance), by submitting to service, or by entering a general appearance on the merits.

As a practical matter, this would mean that plaintiff could have attachment on this ground only when the court could not get personal jurisdiction over the defendant, so that attachment was necessary to give the court *in rem* jurisdiction. Whenever the court could get personal jurisdiction, by service or general appearance, plaintiff would lose the additional advantage of attachment—preservation of judicial custody over defendant's property until judgment

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88. New Mexico sheriffs have a considerable interest in having the conflict resolved. N.M. Stat. Ann. §§24-1-9, 26-1-16 (1953) both direct that writs of execution shall be returned within sixty days from date of delivery to the sheriff, and a sheriff who levies under an execution writ after the expiration of the sixty-day period acts without authority and is liable in trespass to the judgment defendant. *Gallegos v. Sandoval*, 15 N.M. 216, 106 Pac. 373 (1909). Hence, depending upon which of the conflicting attachment statutes is controlling, the sheriff may be liable to plaintiff for refusing to levy more than sixty days after receipt of the writ or to defendant for doing so.

89. *State ex rel. Auchincloss, Parker & Redpath, Inc. v. Harris*, 349 Mo. 190, 159 S.W.2d 799 (1942). Actually defendant had appeared, not to challenge the affidavit's allegation of non-residence, but successfully to contend that the case was not one in which attachment was authorized. But the court defined the question broadly and announced that defendant could by special appearance challenge the attachment on any ground, including denial of the allegations of the affidavit. See also *Whiting & Williams v. Budd*, 5 Mo. 443 (1838); *Evans v. King*, 7 Mo. 411 (1842); *Withers v. Rodgers*, 24 Mo. 340 (1857); *Hisel v. Chrysler Corp.*, 90 F. Supp. 655 (W. D. Mo. 1950). Cf. *Smith's Adm'r v. Rollins*, 25 Mo. 408 (1857).

Our court has held only that defendant can enter a special appearance for the purpose of moving to quash the attachment action for defects apparent on the face of the writ, *Holzman v. Martinez*, 2 N.M. 271 (1882); or on the face of the record, *Waldo v. Beckwith*, 1 N.M. 97 (1854). See also *Colter v. Marriage*, 3 N.M. (Gild. B. W. ed.) 429, 3 N.M. (Gild. E.W.S. ed.) 604, 3 N.M. (John. ed.) 351, 9 Pac. 383 (1886).

on the merits. There is some logic to this result only if the sole reason for this ground of attachment is thought to be plaintiff's inability to serve defendant personally, and not at all that plaintiff has any reason to fear that defendant will dispose of his property.<sup>90</sup>

But such an argument probably proves too much. It may also be made where plaintiff attaches on the ground of non-residence or of concealment or absconding to avoid process, although the concealed or absconding debtor may have demonstrated such general untrustworthiness as to cause reasonable apprehension about his disposing of his property before judgment. And, in any event, such treatment of one or more of the grounds for attachment does too much violence to the statutory plan. Attachment laws in this country have followed one of two patterns. Early statutes, based on the custom of London, provided for "foreign attachment" whereby the property of an absent defendant was attached and he was allowed to appear and plead only if he first posted a "special bail" bond which also operated to dissolve the attachment, and for "domestic attachment" of local defendants under which defendant was not required to post bond before being allowed to plead but could obtain dissolution of the attachment by posting bond.<sup>91</sup> Later statutes in nearly all states have eliminated the distinction between foreign and domestic attachments. In all cases the bond may be posted to dissolve the attachment, but the foreign defendant is no longer required to post such bond before being allowed to plead.<sup>92</sup>

If the Missouri or New Mexico legislatures had intended to provide a unique attachment remedy whose sole purpose was to bring defendant within the juris-

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90. A rule that the attachment must be dismissed if the court later acquires personal jurisdiction over the defendant would create no statute of limitations problem for two reasons:

- (a) Under N.M. Stat. Ann. §23-1-9 (1953), the statute of limitations is tolled for the time defendant is "absent from or out of the state or concealed within the state." This statute applies to causes of action arising within or without the state, *In re Goldsworthy's Estate*, 45 N.M. 406, 115 P.2d 627 (1941), and even though defendant has never resided within the state, *Bunton v. Abernathy*, 41 N.M. 684, 73 P.2d 810 (1937). But it does not apply to actions on foreign judgments, *Northcutt v. King*, 23 N.M. 515, 169 Pac. 473 (1917). See also *In re Goldsworthy's Estate*, supra.
- (b) In any event under our Rules of Civil Procedure, plaintiff's action is commenced when the complaint is filed and not when jurisdiction is perfected. N.M. Stat. Ann. §21-1-1(3) (1953). And N.M. Stat. Ann. §23-1-13 (1953) specifically makes the rule applicable for purposes of the statute of limitations. Other provisions of our Rules authorize issuance of summons at any time within one year after the complaint is filed, N.M. Stat. Ann. §21-1-1(4) (a) (1953), and issuance of alias summons if the original writ is returned without service, N.M. Stat. Ann. §21-1-1(4) (1) (1953). But the special statute dealing with limitations which provides that filing of the complaint shall be deemed a commencement of the action also requires an "intent that process shall issue immediately" and has been construed to require diligence in procuring issuance of process. *Murphy v. Citizens Bank of Clovis*, 244 F.2d 511 (10th Cir. 1957). See also *Isaacks v. Jeffers*, 144 F.2d 26 (10th Cir. 1944). Cf. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

91. See note 1 supra.

92. Drake, Attachment, ch. 13 (7th ed. 1891); Waples, Attachment and Garnishment §§762-68 (2d ed. 1895).

diction of the court, and which was to be dissolved without bond when that purpose was accomplished, some evidence of such intended treatment for foreign attachments should appear in the statutes. But there is no such evidence. Non-residence, concealment, absconding and absence from abode are listed in a single section along with all other grounds for attachment.<sup>93</sup> The attachment writ is directed to be served as an ordinary summons regardless of the ground upon which it was issued<sup>94</sup> and provision is made for substituted service in any attachment case when defendant cannot be personally served.<sup>95</sup> In any case defendant can controvert the grounds for attachment as alleged in attachment affidavit<sup>96</sup> or have the attachment dissolved by posting bond.<sup>97</sup>

For the reasons indicated, none of the alternatives suggested above seems feasible, at least for attachments in the district courts. Accordingly, it is suggested that, in the case of the defendant who is absent from his abode on the day the attachment writ issued for some reason other than avoidance of process,<sup>98</sup> the question whether his absence will defeat service of summons should be determined on the basis of when he intends to return. And his intent to return should be measured by that familiar legal concept, a reasonable time,<sup>99</sup> which is also the measure of time within which process should be served upon a defendant available for service.<sup>100</sup> What is a reasonable time will, of course, vary with such circumstance as the length of defendant's absence *prior* to issuance of the attachment writ, the extent of plaintiff's efforts to serve defendant with summons *prior* to attachment, the purpose of the absence, and plaintiff's need to effect service in order to save his rights.<sup>101</sup> Ordinarily, defendant should not subject himself

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93. N.M. Stat. Ann. §26-1-1 (1953); Mo. Ann. Stat. §521.010 (1953).

94. N.M. Stat. Ann. §26-1-17 (Supp. 1961); Mo. Ann. Stat. §521.170 (1953).

95. N.M. Stat. Ann. §26-1-18 (1953); Mo. Ann. Stat. §521.380 (1953); Mo. Ann. Stat. §506.160 (1952).

96. N.M. Stat. Ann. §26-1-31 (1953); Mo. Ann. Stat. §521.410 (1953).

97. N.M. Stat. Ann. §26-1-30 (1953); Mo. Ann. Stat. §521.480 (1953).

98. As suggested on page 312, *supra*, absence for the purpose of avoiding process can be treated as a concealment or absconding.

99. Such a measure would require overruling, or at least serious qualification, of the decision in *First Nat'l Bank v. George*, 26 N.M. 176, 190 Pac. 1026 (1920). See text at note 60 *supra*.

100. Under N.M. Stat. Ann. §21-1-1(4)(e)(5) (1953), service is to be made "with all reasonable diligence." The federal courts have held that service must be made with reasonable diligence under Federal Rules of Civil Procedure 4(b) and 4(g), which are substantially similar to N.M. Stat. Ann. §21-1-1(4)(b) and (f) (1953), in disposing of motions to dismiss for lack of prosecution under Federal Rule 41(b), which is identical with N.M. Stat. Ann. §21-1-1(41)(b) (1953): *Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956); *Huffmaster v. United States*, 186 F.Supp. 120 (N.D. Cal. 1960); *Schram v. Koppin*, 35 F.Supp. 313 (E.D. Mich. 1940). See also *California Brewing Co. v. Red Star Yeast & Products Co.*, 19 F.R.D. 179 (N.D. Cal. 1956); *United States v. Greitzer*, 18 F.R.D. 304 (E.D. Pa. 1955); *Livingstone v. Hobby*, 127 F.Supp. 463 (E.D. Pa. 1954). The federal decisions would be persuasive here. See *Lopez v. Singh*, 53 N.M. 245, 205 P.2d 492 (1949); *Carney v. McGinnis*, 358 P.2d 694 (N.M. 1961). On the action to be taken where defendant cannot be served, see text at note 104 *infra*.

101. See *United States v. Greitzer*, *supra* note 100; *Schram v. Koppin*, *supra* note 100.



to attachment by leaving his abode for a month's vacation, but the result might be different if defendant were a traveling salesman without family whose itinerary had defeated plaintiff's diligent efforts to serve him for the previous ten months.

If the reasonable time measurement were adopted for district court attachment cases, it might be advisable in the interests of uniformity and common sense to adopt it for justice courts also. The short five-to-twenty day return period<sup>102</sup> for service of an hypothetical summons is an unrealistic measure of the period of absence which would defeat service even though justices of the peace are not authorized to issue alias process.<sup>103</sup> Plaintiff should be able to dismiss his action without prejudice when service cannot be made within this period.<sup>104</sup> If he can, there is no need to read the return period as the measure of a reasonable time save possibly where the statute of limitations will run within that period.<sup>105</sup> In other cases the attachment statute should not be read to mean that justice court attachment is the penalty for every man who does not so regulate his absence from home that his small creditors can serve him in any three-week period of their choice.

*Third Ground:* "When the debtor is about to remove his property or effects out of the state [territory], [;] or has fraudulently concealed or disposed of his property or effects so as to defraud, hinder or delay his creditors."<sup>106</sup>

All following the first comma was taken verbatim from Missouri, with the

102. N.M. Stat. Ann. §36-4-2 (1953).

103. Cf. the authority of district courts under N.M. Stat. Ann. §21-1-1(4)(e) (1953).

104. This quite clearly would be true in the district courts. Under our Rules of Civil Procedure, provisions for dismissal of an action on the merits for failure to prosecute, N.M. Stat. Ann. §21-1-1(41)(b) (1953), and for dismissal with prejudice when plaintiff fails to take any action within two years, N.M. Stat. Ann. §21-1-1(41)(e) (1953), are not construed to apply where "process has not been served because of inability to execute it on account of the absence of the defendant from the state, or his concealment within the state" or where "from some other good reason, the plaintiff is unable, for causes beyond his control, to bring the case to trial." *Ringle Dev. Corp. v. Chavez*, 51 N.M. 156, 159-60, 180 P.2d 790, 792 (1947); *Pettine v. Rogers*, 63 N.M. 457, 459, 321 P.2d 638, 639 (1958). *Accord, Vigil v. Johnson*, 60 N.M. 273, 291 P.2d 312 (1955); *Featherstone v. Hanson*, 65 N.M. 398, 338 P.2d 298 (1959). See also *Otero v. Sandoval*, 60 N.M. 444, 292 P.2d 319 (1956); *Pueblo De Taos v. Archuleta*, 64 F.2d 807 (10th Cir. 1933). See also *Costello v. United States*, 81 Sup. Ct. 534 (1961); *Smith v. Ford Gum & Machine Co.*, 212 F.2d 581 (5th Cir. 1954); *Thomas v. Furness (Pac.) Ltd.*, 171 F.2d 434 (9th Cir. 1948), cert. denied, 337 U.S. 960 (1949); *Bucholz v. Hutton*, 153 F. Supp. 62 (D. Mont. 1957); *Myers v. Westland Oil Co.*, 96 F.Supp. 667 (D. N.D. 1949) (construing Federal Rule of Civil Procedure 41(b), from which N.M. Stat. Ann. §21-1-1(41)(b) (1953) was copied).

105. Even this qualification may be unnecessary. N.M. Stat. Ann. §23-1-14 (1953), provides that if an action fails "for any cause, except negligence of prosecution, and a new suit be commenced within six months thereafter," the second suit shall, for purposes of the statute of limitations, "be deemed a continuation of the first." See *Miller v. Smith*, 59 N.M. 235, 282 P.2d 715 (1955).

106. N.M. Stat. Ann. §26-1-1(3) (1953). *Kearny Code, Attachments §1(3) (1846)* at 1 N.M. Stat. Ann. 303 (1953).

word "defraud" inserted.<sup>107</sup> But that which precedes the first comma is a substantial contraction of a separate ground for attachment in Missouri: "Where the debtor is about to remove his property or effects out of this state, *with the intent* to defraud, hinder or delay his creditors."<sup>108</sup> The express requirement of *intent* the Kearny draftsmen eliminated. What is not so clear is whether the contemplated removal of property from the state, as well as a concealment or disposition of property, must be "so as to" defraud, hinder or delay creditors. "So as to" apparently refers to *effect* rather than *intent*.<sup>109</sup> If that language is applicable to a contemplated removal of property from the state, our statute substitutes a test of the effect of the removal for the Missouri test of the defendant's intent.

So far as punctuation is a guide to meaning, the matter is not free from doubt. What is now the first comma in the New Mexico provision was, in the Kearny Code, a semicolon. This punctuation was preserved in subsequent revisions and compilations<sup>110</sup> until 1897<sup>111</sup> when the comma was substituted. The new punctuation was perpetuated in the 1907 reenactment<sup>112</sup> and in subsequent amendments thereto.<sup>113</sup>

Our court has not considered the matter. But if it is to be assumed that the Kearny draftsmen used the semi-colon deliberately to separate completely independent phrases and to eliminate any inquiry into the effect of a contemplated removal of property from the state, there is as much reason to assume that the 1897 compilers changed the semicolon to a comma with equal deliberation to require an inquiry into the effect of removal,<sup>114</sup> although such a purpose would have been better implemented if a comma had also been inserted after the second appearance of the word "effects." If, on the other hand, no significance is attached to the use of the semicolon in the Kearny Code, and all grounds there specified are to be tested by their effect, no contrary significance can be attached

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107. Mo. Rev. Stat. ch. 11, art. I, §1(6) (1845). The Missouri language was later revised to cover the defendant who has fraudulently "concealed, removed or disposed" of his property so as to hinder or delay his creditors. (Emphasis added.) Mo. Rev. Stat. ch. 12, art. I, §1(8) (1885); Mo. Ann. Stat. §521.010(8) (1953).

108. Mo. Rev. Stat. ch. 11, art. I, §1(4) (1845); Mo. Ann. Stat. §521.010(5) (1953). (Emphasis added).

109. Cf. the similar interpretation of the statutory language "so that" under the second ground for attachment at p. 312, *supra*.

110. N.M. Rev. Stat. ch. 2, §1 (1854); N.M. Rev. Stat. ch. 31, §1 (1865); N.M. Comp. Laws tit. 23, ch. 7, §1923 (1884).

111. N.M. Comp. Laws tit. 23, ch. 2, §2686(3) (1897).

112. N.M. Laws 1907, ch. 107, §1(182)(3), at 270.

113. N.M. Laws 1917, ch. 113, §3(3), at 325. N.M. Laws 1929, ch. 127, §1(3), at 289, (now N.M. Stat. Ann. §26-1-1(3) (1953)).

114. The Act authorizing the 1897 compilation provided that "the laws so compiled shall be received by all the courts and officers of this territory, and shall in all respects be as valid and as binding as [an] original enrolled act approved and filed in the office of the Secretary of the Territory as now provided by law." N.M. Laws 1897, ch. 43, §7, at 85.

to the later substitution of the comma.<sup>115</sup> In either event, the statute as it now reads would be construed as requiring that the defendant be about to remove his property from the state so as to defraud, hinder or delay his creditors.

Since the test is *effect* rather than *intent*, the plaintiff may have an easier case under the removal provision in New Mexico than in Missouri. In the latter state, where the contemplated removal of property from the state must be with intent to defraud, hinder or delay, a defendant in the business of shipping goods out-of-state has been able to avoid attachment because of the absence of such intent.<sup>116</sup> Here, such contemplated shipments by a financially embarrassed defendant might provide grounds for attachment, if defendant was not to receive, within the state, an immediate payment or exchange of goods of equal value, or was not to acquire an account payable by an obligor subject to garnishment within the state, so as to avoid the effect of at least hindering or delaying his creditors.<sup>117</sup> This analysis assumes that the contemplated removal of "property or effects" covered by the statute need not be of *all* of the debtor's property, but only of enough to defraud, hinder or delay creditors because of an insufficient remainder in the state. If the statute applied only where all of the debtor's property was to be removed, any inquiry as to the effect of such removal on creditors would be superfluous.

In any event, the plaintiff must be prepared to show that defendant "is about to" remove his property from the state. If he has already done so before the attachment writ issues, plaintiff has acted too late.<sup>118</sup> But plaintiff need not show that defendant intends an "immediate" removal. If he had to wait until this

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115. See *Robinson v. Hesser*, 4 N.M. 282, 13 Pac. 204 (1887), where both the plaintiff in his attachment affidavit, *Id.* at 285, 13 Pac. at 204, and the court in its opinion, *Id.* at 286, 13 Pac. at 205, substituted a comma for the semicolon then in the statute.

116. *Switzer v. Carson*, 9 Mo. 740 (1846). Cf. *Crow v. Marshall*, 15 Mo. 499 (1852).

117. Since the statute specifies "defraud, hinder or delay" in the disjunctive, any one will do. *Dunham-Buckley & Co. v. Halberg*, 69 Mo. App. 509 (1897). Cf. *Stewart v. Cabanne*, 16 Mo. App. 517 (1885).

118. This is the interpretation placed upon another ground for attachment in Missouri: "Where the defendant *is about* fraudulently to conceal, remove or dispose of his property or effects, so as to hinder or delay his creditors. . . ." Mo. Ann. Stat. §521.010 (1953). (Emphasis added.) Cf. N.M. Stat. Ann. §26-1-1(IV) (1953). See *Mathewson v. Larson-Myers Co.*, 217 S.W. 609, 612 (Mo. App. 1919), which recognizes that evidence of past transfers may be admissible as tending to show "further contemplated conveyances." The fact that a conveyance is actually made *after* attachment is not enough to establish the right to attach on this ground. Plaintiff must show that the conveyance was contemplated by the defendant at the time the writ issued. *Scudder v. Payton*, 65 Mo. App. 314 (1896); *Best & Russell Co. v. Meyerfield*, 77 Mo. App. 181 (1898). But a fraudulent conveyance made after plaintiff brings suit will afford a ground for ancillary attachment which is available under N.M. Stat. Ann. §26-1-43 (1953) at any time before judgment. See *Kingman & Co. v. Cornell-Tebetts Machine & Buggy Co.*, 150 Mo. 282, 51 S.W. 727 (1899).

could be shown, his attachment might well come too late.<sup>119</sup> It is enough to show that there is "present in the mind of the debtor a purpose to [remove] which he is on the verge of executing."<sup>120</sup>

The alternative grounds for attachment under this provision—that defendant has fraudulently concealed or disposed of his property so as to defraud, hinder or delay creditors—differ from the contemplated removal of property from the state in at least two significant respects. They deal with accomplished facts, concealment or disposition,<sup>121</sup> not with what defendant is about to do.<sup>122</sup> And they require that the concealment or removal be done "fraudulently," which connotes a wrongful intent.

One obvious form of concealment is shown where defendant has converted his property to cash and concealed the proceeds.<sup>123</sup> And defendant cannot defeat attachment by showing that he intended to use the concealed money to defend anticipated attachment suits, or by producing his hidden funds after

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119. Again, this is by analogy to the interpretation placed on another ground for attachment in Missouri, which was not adopted here: "Where the defendant *is about* to remove out of this state, with intent to change his domicile. . . ." Mo. Ann. Stat. §521.010(6) (1953). (Emphasis added.) See *Elliot v. Keith*, 32 Mo. App. 579 (1888).

120. Once again, by analogy to another ground for attachment: "When the debtor *is about* fraudulently to convey or assign, conceal or dispose of his property or effects, so as to hinder or delay his creditors . . ." N.M. Stat. Ann. §26-1-1 (IV) (1953). (Emphasis added.) See *C. J. L. Meyer & Sons Co. v. Black*, 4 N.M. 352, 368-69, 16 Pac. 620, 626 (1888), holding insufficient an affidavit that defendant "has attempted fraudulently to convey" as not stating "a present purpose to do something which is likely to be accomplished at any moment. . . ."

121. A disposition or conveyance of property contemplates some affirmative or at least cooperative action of the debtor. A confession of judgment may constitute a fraudulent conveyance. *Field & Beardslee v. Liverman*, 17 Mo. 218 (1852); *Rainwater v. Faconeswich*, 29 Mo. App. 26 (1888); *Gries v. Blackman*, 30 Mo. App. 2 (1888); *H. S. Burr & Co. v. Frank Mathers & Co.*, 51 Mo. App. 470 (1892). Cf. *Estes v. Fry*, 22 Mo. App. 80 (1886). But a judgment in litigation which the debtor contested in good faith, or the mere fact that other creditors have attached, will not. *Mathewson v. Larson-Myers Co.*, 217 S.W. 609 (Mo. App. 1919). And see *Heideman-Benoist Saddlery Co. v. Urner & Prewett*, 24 Mo. App. 534 (1887). And it is no ground for attachment that defendant has insufficient property within the state unless his condition is the result of removal or fraudulent concealment or disposition. *Sullivan v. Michelli*, 35, N.M. 59, 289 Pac. 803 (1930).

122. *Bauer Grocery Co. v. Smith*, 74 Mo. App. 419, 424 (1898), suggests that the attaching plaintiff may avail himself of any fraudulent conveyance made within the period of the statute of limitations on his underlying claim. Cf. *Douglass Candy Co. v. Shenk*, 195 Mo. App. 592, 194 S.W. 754 (1917).

123. *First Nat'l Bank v. Lesser & Lewinson*, 9 N.M. 604, 58 Pac. 345 (1899); *Powell v. Matthews*, 10 Mo. 49 (1846); *Mathews v. Loth*, 45 Mo. App. 455 (1891). See also *Mahner v. Linck*, 70 Mo. App. 380 (1897), finding a concealment where defendant withdrew his money from one bank and deposited it in another, and was unable to give any reason for so doing. Cf. *First Nat'l Bank v. Lesser & Lewinson*, 10 N.M. 700, 65 Pac. 179 (1901), where plaintiff was unable to make his proof on the theory that defendant had concealed funds from an assignee for the benefit of creditors.

attachment.<sup>124</sup> One Missouri Court of Appeals has also treated as evidence of concealment the fact that a mortgage on a merchant's stock of goods is left on record after all of the mortgaged stock has been disposed of, since the mortgage may then appear to cover new stock.<sup>125</sup> And, since "account books" are expressly subject to attachment levy in Missouri,<sup>126</sup> another Court of Appeals has concluded that concealment of such books to prevent levy upon them is a ground for attachment.<sup>127</sup> The same court has concluded that it will not avail the defendant to plead that he concealed the property from one creditor to preserve it for another. "The law will uphold an executed preference, but not an executory preference with an intermediate concealment."<sup>128</sup>

With regard to a fraudulent "disposition" of property, the Missouri courts have gone to extraordinary lengths to give the concept some meaning apart from a fraudulent "concealment," and apart from a fraudulent "conveyance" or "assignment," which is a separate ground for attachment in Missouri.<sup>129</sup> The Missouri solution is that transfers which require written documents to be effective are "conveyances" or "assignments," while "dispositions" include confessed judgments and such "pledges, gifts, pawns, bailments and other transfers and alienations as may be effected by mere delivery, and without the use of any writing, assignment or conveyance."<sup>130</sup> This of course, introduces into the attachment law a distinction which is not observed in the substantive law allowing creditors to avoid fraudulent conveyances, under the fraudulent conveyance statute in force in Missouri since 1804,<sup>131</sup> under the common law doctrine of

124. *Mathews v. Loth*, supra note 123. Defendant is not estopped to contest attachment by the fact that he previously told plaintiff his property was "all covered up," since he has not "unequivocally" declared that it was either concealed or conveyed. *Staed v. Mahon*, 70 Mo. App. 400 (1897).

125. *Bauer Grocery Co. v. Smith*, 61 Mo. App. 665 (1895), 74 Mo. App. 419 (1898). See also *Field & Beardslee v. Liverman*, 17 Mo. 218 (1852), indicating that concealment was found from the fact that the defendant confessed judgment for his brother-in-law, who then had a writ of execution issued, but delayed the levy thereunder until plaintiff delivered an attachment writ to the sheriff.

126. Mo. Ann. Stat. §521.240 (1953). New Mexico has not adopted this provision. If account books are subject to levy here it is under less specific statutory provisions, adapted from Missouri, prescribing that the writ shall command the sheriff to attach the defendant by his "lands and tenements, goods, moneys, effects, credits and all other property and interests in property of whatsoever nature and kind," N.M. Stat. Ann. §26-1-13 (1953); cf. Mo. Ann. Stat. §521.140 (1953); and directing the sheriff to seize, when accessible, "goods and chattels, moneys, effects, evidences of debt or other personal property. . . ." N.M. Stat. Ann. §26-1-17 (1953). Cf. Mo. Ann. Stat. §521.170(4) (1953).

127. *Dodson-Hills Mfg. Co. v. Payton*, 65 Mo. App. 311 (1896).

128. *Dodson-Hills Mfg. Co. v. Payton*, supra note 127, at 314. Cf. note 162, infra.

129. Mo. Ann. Stat. §521.010(7) (1953). The fraudulent conveyance or assignment, like the fraudulent concealment or disposition, must be made "so as to hinder or delay his creditors. . . ."

130. *Bullene v. Smith*, 73 Mo. 151, 161 (1880); *Conran v. Fenn*, 159 Mo. App. 664, 140 S.W. 82 (1911); *Douglass Candy Co. v. Shenk*, 195 Mo. App. 592, 194 S.W. 754 (1917).

131. Mo. Laws 1804, at 19, (now Mo. Ann. Stat. §§428-010 through 428.110 (1953)).

fraudulent conveyance<sup>132</sup> followed in New Mexico<sup>133</sup> until 1959, nor under the Uniform Fraudulent Conveyance Act adopted in New Mexico in that year.<sup>134</sup>

There is a separate and compelling reason for not adopting the distinction under the New Mexico attachment law. Unless all fraudulent conveyances are treated as fraudulent "dispositions," they constitute no ground for attachment here.<sup>135</sup> In point of fact, New Mexico creditors have, without challenge on this point, treated as fraudulent dispositions a written assignment of a stock of merchandise,<sup>136</sup> a chattel mortgage on a stock of merchandise,<sup>137</sup> a written deed of assignment covering lumber and "certain mining property,"<sup>138</sup> and a "deed," apparently of realty.<sup>139</sup>

Our court and the Missouri courts have recognized that the requirement that the concealment or disposition be done "fraudulently" imparts an element of fraudulent intent.<sup>140</sup> But in the case of a conveyance, as is true in the substantive law of fraudulent conveyance, this requirement may be satisfied either by showing actual intent to defraud or by showing an effect which the court

132. See 1 Glenn, *Fraudulent Conveyances and Preferences*, chs. XHIA, XIIB (rev. ed. 1940).

133. The fraudulent conveyance statutes of 13 Eliz. ch. 5 (1571), and 27 Eliz., ch. 4 (1585), were adopted with the common law in New Mexico. *Marchbanks v. McCullough*, 47 N.M. 13, 16, 132 P.2d 426, 428 (1943). Although none reached the Supreme Court, any attempt to set aside a transfer as a fraudulent conveyance before the 1876 enactment of N.M. Stat. Ann. §21-3-3 (1953) making the common law the "rule of practice and decision" in this state, presumably would have been decided according to the civil law of Mexico. See *Leitensdorfer v. Webb*, 1 N.M. 34 (1853), *aff'd* 61 U.S. (20 How.) 176 (1857) (where an assignment for the benefit of creditors was held invalid under the Mexican Civil Code and therefore a fraudulent disposition under the attachment statute); *Beals v. Ares*, 25 N.M. 459, 185 Pac. 780 (1919); *Field v. Otero*, 35 N.M. 68, 290 Pac. 1015 (1930).

134. N.M. Stat. Ann. §§50-14-1 through 50-14-13 (1953). "Conveyance" is defined in §50-14-1 to include "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance."

135. Though the nimble plaintiff may attach where defendant "is about fraudulently to convey or assign, conceal or dispose of" his property so as to hinder or delay his creditors. N.M. Stat. Ann. §26-1-1 (IV) (1953).

136. *Leitensdorfer v. Webb*, 1 N.M. 34 (1853), *aff'd* 61 U.S. (20 How.) 176 (1857).

137. *Spiegelberg v. Hersch*, 3 N.M. (Guild. B.W. ed.) 204, 3 N.M. (Gild. E. W. S. ed.) 281, 3 N.M. (John. ed.) 185, 4 Pac. 705 (1884).

138. *C. J. L. Meyer & Sons v. Black*, 4 N.M. 352, 369, 16 Pac. 620, 627 (1888) (the statute "contemplates any kind of fraudulent disposition whether by deed or otherwise. . .").

139. *First Nat'l Bank v. Lesser & Lewinson*, 9 N.M. 604, 58 Pac. 345 (1899).

140. The intent must be to defraud creditors. Defendant's sale of property which does not belong to him is not a fraudulent conveyance. *Ring v. Ring*, 12 Mo. App. 88 (1882). Neither, without more, is sale of goods which he has not yet paid for. *Steinwender v. Creath*, 44 Mo. App. 356 (1891). Cf. *Houser v. Andersch*, 61 Mo. App. 15 (1895); *Kramer v. Wilson*, 22 Mo. App. 173 (1886). Nor is the giving of a mortgage to secure a debt bearing usurious interest. *Adler & Sons Clothing Co. v. Corl*, 155 Mo. 149, 55 S.W. 1017 (1900).

is willing to label fraudulent as a matter of law.<sup>141</sup> Thus, a gratuitous transfer by a debtor who is thereby left insolvent is fraudulent as a matter of law.<sup>142</sup> So, in Missouri, is a shifting stock mortgage were the mortgagor is not required to account to the mortgagee for the proceeds of sale<sup>143</sup>—a view once adopted but later rejected by our court<sup>144</sup> and now rejected also by the Uniform Commercial Code.<sup>145</sup> So also, in Missouri, is a deed absolute given as security only.<sup>146</sup> And in New Mexico an assignment for the benefit of creditors which fails in substantial respects to comply with statutory requirements has been treated as a fraudulent conveyance as a matter of law, entitling creditors to attach.<sup>147</sup>

141. "[A]ny form of disposal accompanied by fraud in fact, as an intention to prevent the collection of debts, or by fraud in law, arising from the inevitable tendency of his act to unreasonably hinder and delay such collection, will support the action." *C. J. L. Meyer & Sons v. Black*, 4 N.M. 352, 369-70, 16 Pac. 620, 627; *Torlina v. Trorlicht*, 5 N.M. 148, 21 Pac. 69 (1889) *aff'd* on rehearing, 6 N.M. 54, 27 Pac. 794 (1891); *Reed v. Pelletier*, 28 Mo. 173 (1859); *Enders v. Richards*, 33 Mo. 598 (1863); *Spencer v. Deagle*, 34 Mo. 455 (1864); *State ex rel. First Nat'l Bank v. Trimble*, 315 Mo. 966, 287 S.W. 432 (1926); *Jacob Furth Grocery Co. v. May*, 78 Mo. App. 323 (1899); *Bowles Live Stock Comm'n Co. v. Hunter*, 91 Mo. App. 333 (1902); *First Nat'l Bank v. Kibble*, 221 Mo. App. 311, 273 S.W. 148 (1925). *Cf. Beach v. Baldwin*, 14 Mo. 597 (1851). But where intent is established by effect, a delaying or hindering effect must be unreasonable. The reasonable delay incident to liquidating the debtor's property, by sale or assignment for the benefit of creditors, does not without more establish fraudulent intent. *Torlina v. Trorlicht*, *supra*.

142. *First Nat'l Bank v. McClellan*, 9 N.M. 636, 58 Pac. 347 (1899) (not an attachment case); *Rogers v. Balduini*, 28 N.M. 102, 206 Pac. 514 (1922) (not an attachment case); *Merchants Bank v. Dunn*, 41 N.M. 432, 70 P.2d 760 (1937) (not an attachment case); *Portales Nat'l Bank v. Beeman*, 52 N.M. 243, 196 P.2d 876 (1948) (not an attachment case); *Bucks v. Moore*, 36 Mo. App. 529 (1889); *Cooper v. Standley*, 40 Mo. App. 138 (1890); *Farmers & Merchants Bank v. Price*, 41 Mo. App. 291 (1890); *Glacier v. Walker*, 69 Mo. App. 288 (1897); *American Nat'l Bank v. Thornburrow*, 109 Mo. App. 639, 83 S.W. 771 (1904); *Hunter v. Anthony*, 209 Mo. App. 1, 236 S.W. 412 (1922).

143. *Reed v. Pelletier*, 28 Mo. 173 (1859); *Rock Island Nat'l Bank v. Powers*, 134 Mo. 432, 34 S.W. 869, 35 S.W. 1132 (1896); *Eby, Dowden & Co. v. Watkins*, 39 Mo. App. 27 (1890); *Cole Mfg. Co. v. Jenkins*, 47 Mo. App. 664 (1892); *Sauer v. Behr*, 49 Mo. App. 86 (1892); *Bank of Elkhart v. Western Lumber Co.*, 59 Mo. App. 317 (1894); *Bauer Grocery Co. v. Smith*, 61 Mo. App. 665 (1895); *Sauerwein v. Renard Champagne Co.*, 68 Mo. App. 29 (1896); *Kahmke v. Weber*, 187 Mo. App. 698, 173 S.W. 76 (1915). *Cf. Commercial Credit Corp. v. Davis*, 117 F. Supp. 3 (W. D. Mo. 1953).

144. *Spiegelberg v. Hersch*, 3 N.M. (Gild. B. W. ed.) 204, 3 N.M. (Gild. E. W. S. ed.) 281, 3 N.M. (John ed.) 185, 4 Pac. 705 (1884), overruled in *First Nat'l Bank v. Stewart*, 13 N.M. 551, 86 Pac. 622 (1906) (not an attachment case) and *First Nat'l Bank v. Haverkamp*, 16 N.M. 497, 121 Pac. 31 (1911), *aff'd* 235 U.S. 689 (1914) (not an attachment case).

145. N.M. Stat. Ann. §50A-9-205 (Supp. 1961) (effective Jan. 1, 1962).

146. *Rock Island Nat'l Bank v. Powers*, 134 Mo. 432, 34 S.W. 869, 35 S.W. 1132 (1896); *Hunter v. Anthony*, 209 Mo. App. 1, 236 S.W. 412 (1922).

147. *Leitensdorfer v. Webb*, 1 N.M. 34 (1853). This case involved provisions of the Mexican Civil Code then applicable here. Presumably, the same result would follow under our assignment statute, N.M. Stat. Ann. §§27-1-1 through 27-1-53 (1953). Since failure to comply with the assignment statute is not necessarily evidence of fraudulent intent, treatment of the defective assignment as a fraudulent conveyance rather than as an ineffective conveyance seems questionable. Apart from statutory requirements

The Missouri courts have also, by highly dubious reasoning, found a substitute for the defendant's intent to defraud in the transferee's failure to comply with statutory notoriety requirements. Thus, the chattel mortgage recording act, providing that the mortgage "shall not be valid against any other person" unless recorded or unless possession of the property is delivered to the mortgagee,<sup>148</sup> has been construed as rendering an unrecorded mortgage with the mortgagor in possession a fraudulent conveyance as a matter of law under the attachment statute.<sup>149</sup> But the court was influenced by the fact that the recording statutes for chattel mortgages and conditional sales at the time of decision appeared in the official code as part of the chapter on fraudulent conveyances,<sup>150</sup> a peculiarity now obtaining in Missouri only with respect to conditional sales,<sup>151</sup> and one which never existed in New Mexico where our recording statutes long preceded any statute dealing with fraudulent conveyances. And our court has held, in a case arising not on attachment but on the efforts of a bankruptcy trustee to set aside a chattel mortgage as a fraudulent conveyance, that a thirteen-month delay in recording does not render the mortgage fraudulent as a matter of law and is not even evidence of fraudulent intent in the absence of an agreement for such delay between mortgagor and mortgagee.<sup>152</sup>

Other cases<sup>153</sup> suggest, though they do not hold, that a sale made without compliance with the Missouri Bulk Sales Act is a fraudulent conveyance under the attachment statute, since that Act pronounces such sales "*fraudulent* and void against all creditors of the vendor"<sup>154</sup> (emphasis added), but this tenuous

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an assignment for the benefit of creditors is not a fraudulent conveyance merely because some delay for creditors is involved in the orderly liquidation of the property by the assignee. *Torlina v. Trorlicht*, 5 N.M. 148, 21 Pac. 69 (1889). Nor is an assignment a fraudulent conveyance merely because it authorizes, but does not direct, the assignee to sell on credit, at least where the assignee made no sales on more than thirty days' credit. *C. J. L. Meyer & Sons v. Black*, 4 N.M. 352, 16 Pac. 620 (1888). See also *Ring v. Ring*, 12 Mo. App. 88 (1882); *Douglas v. Cissna*, 17 Mo. App. 44 (1885); *Third Nat'l Bank v. Cramer*, 78 Mo. App. 476 (1899).

148. Mo. Ann. Stat. §443.460 (1952). A 1959 amendment has slightly revised the quoted language.

149. *Rock Island Nat'l Bank v. Powers*, 134 Mo. 432, 34 S.W. 869, 35 S.W. 1132 (1896). See also *Bank of Elkhart v. Western Lumber Co.*, 59 Mo. App. 317 (1894). Cf. *Sauerwein v. Renard Champagne Co.*, 68 Mo. App. 29 (1896); *Sauer v. Behr*, 49 Mo. App. 86 (1892).

150. Mo. Rev. Stat. §§5176, 5180 (1889).

151. Mo. Ann. Stat. §428.100 (1952). The chattel mortgage recording statute and statutes dealing with fraudulent conveyances appear as separate articles of a chapter on conveyances in Mo. Rev. Stat. (1909 in ch. 30, and now appear separately in Mo. Ann. Stat. (1952) as chs. 428 and 443.

152. *First Nat'l Bank v. Haverkampff*, 16 N.M. 497, 121 Pac. 31 (1911), aff'd 235 U.S. 689 (1914).

153. *Joplin Supply Co. v. Smith*, 182 Mo. App. 212, 167 S.W. 649 (1914); *Riley Pennsylvania Oil Co. v. Symmonds*, 195 Mo. App. 111, 190 S.W. 1038 (1916). See also *Douglass Candy Co. v. Shenk*, 195 Mo. App. 592, 194 S.W. 754 (1917).

154. Mo. Ann. Stat. §427.020 (1953).



basis for the suggestion is not available under our Act, which simply pronounces such sales "void"—and which will soon pronounce them only "ineffective."<sup>155</sup> And one case<sup>156</sup> recognizes under the attachment statute a sale of personalty not accompanied by change of possession as a fraudulent conveyance, apparently because another statute included in the fraudulent conveyance chapter of the Missouri code, but with no counterpart in New Mexico, pronounces such sales "fraudulent and void" against creditors of the vendor.<sup>157</sup>

The plaintiff's case is easier in one respect where he alleges a fraudulent conveyance as a ground for attachment than were he seeks to set the conveyance aside. Under the attachment statute the good or bad faith of the transferee is immaterial.<sup>158</sup> But since under the attachment statute the conveyance must have been made "fraudulently" and "so as to defraud, hinder or delay creditors," both the debtor's *intent* and the *effect* on creditors must be shown, as the Missouri cases have frequently recognized,<sup>159</sup> and as most courts require in applying the common law doctrine of fraudulent conveyance in a creditor's suit to set a transfer aside.<sup>160</sup> Where the effect is sufficiently apparent, the intent will be deemed proved thereby, which is the rationale for finding a conveyance fraudulent as a matter of law.<sup>161</sup> But the injurious effect to creditors should be established in each case, whether the conveyance is to be held fraudulent as a matter of law or fraudulent because of the debtor's actual intent to defraud, hinder or delay creditors.<sup>162</sup>

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155. N.M. Stat. Ann. §50-10-1 (1953). It is Article 6 of the Uniform Commercial Code, which will replace the Bulk Sales Act on January 1, 1962, under which bulk sales not made in compliance with statutory requirements are "ineffective" against creditors. N. M. Stat. Ann. §§50A-6-104, 50A-6-105 (Supp. 1961).

156. *Simmons Hardware Co. v. Pfeil*, 35 Mo. App. 256 (1889).

157. Mo. Ann. Stat. §428.080 (1953). Under the Uniform Commercial Code, creditors of the seller may after January 1, 1962, treat a sale where the seller retains possession as "void" if such a sale "is fraudulent under any rule of law of the state where the goods are situated" save that retention of possession in good faith and current course of trade by a merchant-seller for "a commercially reasonable time" after sale "is not fraudulent." N.M. Stat. Ann. §50A-2-402 (Supp. 1961). We have no such "rule of law" and dictum in *Heisch v. J. L. Bell & Co.*, 11 N.M. 523, 529, 70 Pac. 572 (1902) indicates that retention of possession by the seller "is only prima facie evidence of fraud, which may be rebutted by proof showing the bona fides of the transaction."

158. *Enders v. Richards*, 33 Mo. 698 (1863); *National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co.*, 118 Mo. 365, 22 S.W. 947 (1893); *Sauer v. Behr*, 49 Mo. App. 86 (1892); *Shull v. Kallauner*, 222 Mo. App. 64, 300 S.W. 554 (1927).

159. *Enders v. Richards*, 33 Mo. 598 (1863); *Spencer v. Deagle*, 34 Mo. 455 (1864); *Douglas v. Cissna*, 170 Mo. App. 44 (1885); *Glacier v. Walker*, 69 Mo. App. 288 (1897); *Jacob Furth Grocery Co. v. May*, 78 Mo. App. 323 (1899); *American Nat'l Bank v. Thornburrow*, 109 Mo. App. 639, 83 S.W. 771 (1904); *Conran v. Fenn*, 159 Mo. App. 664, 140 S.W. 82 (1911).

160. Glenn, *supra* note 132, §§266-68.

161. See note 141 *supra*.

162. One type of injury to creditors—relative disparity of treatment—is not encompassed by the substantive law of fraudulent conveyance or by the attachment statute. A transfer by an insolvent debtor given as bona fide payment of or security for a debt is a preference but not a fraudulent conveyance. *Field v. Otero*, 32 N.M. 338, 255 Pac.

In several cases the Missouri courts seem to have lost sight of this requirement of the attachment statute. The fact that the debtor has sufficient property remaining after the conveyance to pay all of his debts is held to be immaterial.<sup>163</sup>

Another requirement imposed by some courts, in the creditor's suit to set aside a fraudulent conveyance, seems to have been carried over to the fraudulent conveyance as a ground for attachment, with dubious propriety. The creditor seeking to set aside a fraudulent conveyance who did not extend credit until after the conveyance was made is, in some jurisdictions, required to prove that the debtor's fraudulent purpose was addressed to future creditors, or at least that future creditors were in contemplation.<sup>164</sup> One Missouri Court of Appeals has imposed the same requirement on a post-conveyance creditor seeking to treat the fraudulent conveyance as a ground for attachment.<sup>165</sup> And our court has assumed that it would apply under the attachment statute, but avoided application by finding that the note upon which the creditor sued was given in renewal of a pre-conveyance note, so that he could qualify as an existing creditor.<sup>166</sup>

Whatever the validity of this requirement in an action designed to remedy an injury to creditors by setting aside the conveyance, it has no apparent validity under the attachment statute. That statute is not designed to provide a remedy for injury, but to allow creditors to prevent further injury at the hands of a debtor who has demonstrated by one injurious act that there is cause for further apprehension. The fact that the debtor has made a fraudulent conveyance, when the fact is discovered, gives as good a cause for apprehension to a post-conveyance creditor as to existing creditors. Hence, the decision of another Missouri Court

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785 (1927) (not an attachment case); *Addison v. Tessier*, 65 N.M. 222, 226-27, 335 P.2d 554, 556-57 (1959) (not an attachment case) (collecting authority); *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79, 4 S.W. 260 (1887); *Knapp, Stout & Co. v. Joy*, 9 Mo. App. 47 (1880); *Estes v. Fry*, 22 Mo. App. 80 (1886); *Deering & Co. v. Collins*, 38 Mo. App. 80 (1889); *Smith & Co. v. National Ry. Elec. & Industrial Exposition Ass'n*, 47 Mo. App. 462 (1892). Cf. *National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co.*, 118 Mo. 365, 22 S.W. 947 (1893); *Gries v. Blackman*, 30 Mo. App. 2 (1888). An unsuccessful attempt to prefer a creditor by inducing him to attach when he has no grounds for attachment, likewise gives creditors no ground for attachment. *Heideman-Benoist Saddlery Co. v. Urner & Prewitt*, 24 Mo. App. 534 (1887). Cf. text at note 128 supra.

163. *Rock Island Nat'l Bank v. Powers*, 134 Mo. 432, 34 S.W. 869, 35 S.W. 1132 (1896); *Bank of Elkhart v. Western Lumber Co.*, 59 Mo. App. 317 (1894); *Dixon Nat'l Bank v. Western Lumber Co.*, 68 Mo. App. 81 (1896). *Barry County Bank v. Russey*, 74 Mo. App. 651 (1898), attempts to limit this treatment to cases where the debtor's actual intent to defraud is shown, but all of the cases previously cited involved conveyances held fraudulent as a matter of law. The same notion seems to prevail in cases holding that the debtor's intent to hinder, delay or defraud other creditors may convert a preferential transfer into a fraudulent conveyance. *Nelson Distilling Co. v. Creath*, 45 Mo. App. 169 (1871); *Barry County Bank v. Russey*, supra.

164. Glenn, supra note 132, ch. XVIII(A); *Notes 40 Ky. L.J. 433 (1952)*, 30 *Colum. L. Rev.* 202 (1930), 37 *Harv. L. Rev.* 489 (1924).

165. *Bauer Grocery Co. v. Smith*, 74 Mo. App. 419 (1898).

166. *First Nat'l Bank v. Lesser & Lewinson*, 9 N.M. 604, 58 *Pac.* 345 (1899). See also *First Nat'l Bank v. McClellan*, 9 N.M. 636, 58 *Pac.* 347 (1899) (not an attachment case).

of Appeals, that if the conveyance was fraudulent as to any creditor all may attach, seems preferable.<sup>167</sup>

Further difficulties in reconciling the concept of a fraudulent conveyance as a ground for attachment, with the concept of a fraudulent conveyance which a creditor can set aside, are presented by the 1959 adoption of the Uniform Fraudulent Conveyance Act in New Mexico. That Act defines three types of conveyances which are fraudulent as a matter of law:

- (1) One made without fair consideration<sup>168</sup> where the debtor is left insolvent<sup>169</sup>—such a transfer is “fraudulent as to creditors without regard to . . . actual intent.”<sup>170</sup>
- (2) One made without fair consideration by a debtor engaging or about to engage in a business or transaction for which the property remaining in his hands would be an unreasonably small capital—such a conveyance is “fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to . . . actual intent.”<sup>171</sup>
- (3) One made without fair consideration when the debtor intends or believes that he will incur debts beyond his ability to pay as they mature—such a conveyance is “fraudulent as to both present and future creditors.”<sup>172</sup>

In addition, the Act defines a fourth type of fraudulent conveyance:

- (4) One made “with actual intent, as distinguished from the intent presumed in law, to hinder, delay or defraud either present or future creditors”—such a conveyance “is fraudulent as to both present and future creditors.”<sup>173</sup>

Obviously, the three definitions of conveyances fraudulent as a matter of law, with their various distinctions as to the classes of creditors who can treat the conveyance as fraudulent for purposes of setting it aside or obtaining other individual relief,<sup>174</sup> will perpetuate the question whether creditors not in the desig-

167. *Noyes, Norman & Co. v. Cunningham*, 51 Mo. App. 194 (1892). If any creditor is to be barred it should be only the post-conveyance creditor who knew of the fraudulent conveyance at the time he extended credit.

168. Fair consideration is defined in N.M. Stat. Ann. §50-14-3 (1953). Since the definition allows a transfer by which “as fair equivalent therefor . . . an antecedent debt is satisfied” or a transfer “to secure . . . antecedent debt in an amount not disproportionately small,” the preferential transfer (see note 162, *supra*) is still not a fraudulent conveyance.

169. The Act contains its own definition of insolvency. N.M. Stat. Ann. §50-14-2 (1953).

170. N.M. Stat. Ann. §50-14-4 (1953).

171. N.M. Stat. Ann. §50-14-5 (1953).

172. N.M. Stat. Ann. §50-14-6 (1953).

173. N.M. Stat. Ann. §50-14-7 (1953).

174. See N.M. Stat. Ann. §§50-14-9, 50-14-10 (1953).

nated classes may treat the conveyance as a ground for attachment. Moreover, there is the question of the exclusiveness of the Act's definitions of conveyances fraudulent as a matter of law. Is the court still free to formulate additional definitions, either for the purpose of affording creditors a remedy against the transfer made or for the purpose of attachment law? The fourth definition suggests that all fraudulent conveyances which cannot be brought under one of the previous three definitions must be found to have been made with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud. But a general saving provision in the Act provides that, "in any case not provided for in this act the rules of law and equity . . . shall govern."<sup>175</sup> And federal courts, construing this provision in other states, have read it to mean that common law concepts of the conveyance fraudulent as a matter of law, not embodied in the Act's three definitions, are still applicable.<sup>176</sup>

The fourth definition raises an additional problem, since it turns entirely upon the debtor's intent without regard to the actual *effect* upon creditors. By virtue of another provision of the Uniform Act, a transferee who has given fair consideration, so that no injury to creditors results from the transfer, is protected if he is "without knowledge of the fraud."<sup>177</sup> But where the debtor's fraudulent intent and the transferee's knowledge thereof are established, it is recognized that injury to creditors is no element of the Act's fourth definition of a fraudulent conveyance.<sup>178</sup> Does this mean that under the attachment statute, where the transferee's bad faith is irrelevant,<sup>179</sup> the only requirement now is that the debtor be guilty of actual intent to hinder, delay or defraud? That conclusion could be reached only on the unwarranted assumption that the Uniform Act was intended to amend the attachment statute by repealing, for fraudulent dispositions only, its requirement that the disposition be made "so as to defraud, hinder, or delay creditors."<sup>180</sup>

*Fourth Ground:* "When the debtor is about fraudulently to convey or assign, conceal or dispose of his property or effects, so as to hinder or delay his creditors."

The Kearny Code combined separate Missouri grounds for contemplated conveyance or assignment and contemplated concealment or disposition, and altered the concluding phrase of require that the contemplated action be "so

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175. N.M. Stat. Ann. §50-14-11 (1953).

176. *Shapiro v. Wilgus*, 287 U.S. 348 (1932); *Lee v. State Bank & Trust Co.*, 54 F.2d 518 (2d Cir.), cert. denied, 285 U.S. 547 (1931).

177. N.M. Stat. Ann. §50-14-9 (1953).

178. *Joseph P. Manning Co. v. Shinopoulous*, 317 Mass. 97, 56 N.E.2d 869 (1944); *Scholtz v. Yastrzemski*, 247 App. Div. 823, 286 N.Y. Supp. 694 (1936).

179. See text at note 158 *supra*.

180. The Uniform Act does provide that a creditor, "when his claim has matured," may . . . "[d]isregard the conveyance and attach or levy execution upon the property conveyed. . . ." N.M. Stat. Ann. §50-14-9 (1953). But this provision should no more be construed to authorize attachment where no grounds therefore exist under the attachment statute than to authorize execution without judgment.

as to hinder, delay or defraud . . . creditors."<sup>181</sup> "Defraud" was dropped in the 1929 revision.<sup>182</sup>

If the fraudulent disposition under the third ground for attachment is read to cover fraudulent conveyances and assignments, as previously suggested,<sup>183</sup> this fourth ground obviously covers the debtor who is about to do something which if accomplished, would be covered by the third ground. And what was said about the defendant who "is about to" remove his property from the state, under the third ground of attachment, is equally applicable here. It will not do to show that the action has already been taken, nor need it be shown that defendant intends to take action immediately.<sup>184</sup> As our court has said, in holding that an allegation that defendant had "attempted fraudulently to convey" was insufficient to charge that he was about to do so, the statute means "that there must be present in the mind of the debtor a purpose of convey which he is on the verge of executing" and an allegation of a past attempt "does not state a present purpose to do something which is likely to be accomplished at any moment." Rather, the allegation "related to a past transaction which . . . may have been absolutely abandoned, and heartily repented of."<sup>185</sup> But the Missouri courts have found the necessary imminent concealment or disposition where the debtor confessed judgment for his brother-in-law, who stayed execution levy until plaintiff had delivered his attachment writ to the sheriff,<sup>186</sup> and where the debtor had offered to pay another to set fire to his insured goods.<sup>187</sup>

Here again, the word "fraudulently" imports an intent on the part of the debtor to achieve the proscribed effect.<sup>188</sup> Here again, the intent may be found as a matter of law where the effect is clear enough.<sup>189</sup> But where the only appar-

181. Kearny Code, Attachments §1(4) (1846) at 1 N.M. Stat. Ann. 303 (1953; Mo. Rev. Stat. ch. 11, art. I, §1(7)(8) (1845) (now Mo. Ann Stat. §521.010(9), (10) (1953)).

182. See note 44 supra; N.M. Stat. Ann. §26-1-1(IV) (1953). The deletion is probably of no significance. See *Custis v. Settle*, 7 Mo. 452 (1842).

183. See p. 323, supra.

184. See text accompanying notes 118-20, supra.

185. *Meyer & Sons v. Black*, 4 N.M. 352 at 368-69, 16 Pac. 620 at 627 (1888).

186. *Field v. Liverman*, 17 Mo. 218 (1852).

187. *Wilson-Obear Groc. Co. v. Cole*, 26 Mo. App. 5 (1887). And see *Eby, Dowden & Co. v. Watkins*, 39 Mo. App. 27 (1890), suggesting that an unrecorded transfer which would otherwise be a fraudulent conveyance as a matter of law, but which was "not a conveyance" as to creditors protected by the recording act, was as against such creditors and until recording, a fraudulent conveyance which the debtor was about to make.

188. An effect either of delaying or of otherwise hindering creditors will do. See note 117 supra.

189. Here again, as in the case of the fraudulent conveyance (see text supra note 163), the Missouri courts have on occasion disregarded the statutory requirement that the contemplated conveyance or concealment be "so as to hinder or delay" creditors and have allowed attachment without regard to the amount of property which would be left for creditors after the conveyance or concealment was accomplished. *Taylor v. Meyers*, 34 Mo. 81 (1863); *Weinstein v. Reid*, 25 Mo. App. 41 (1887); *Mathewson v. Larson-Myers Co.*, 217 S.W. 609 (Mo. App. 1919).

ent effect is to delay creditors, the delay must be unreasonable in order to establish a fraudulent intent. The statute does not proscribe only such delay as is incidental to an orderly liquidation of property by a contemplated assignment for the benefit to creditors.<sup>190</sup>

*Fifth Ground:* "When the debt was contracted out of this state, and the debtor has absconded or secretly removed his property or effects into the state, with the intent to hinder, delay or defraud his creditors."

This concern for the out-of-state creditor, which the Kearny draftsmen took from Missouri without significant change,<sup>191</sup> seems logically to correlate with the third ground for attachment, which reaches the New Mexico debtor who is about to remove his property from this state or who has concealed his property. But in more than a century there is not instance in the reported cases of the use of this ground for attachment in either New Mexico or Missouri.

*Sixth Ground:* "Where the defendant is a corporation whose principal office or place of business is out of the state, unless such corporation shall have a designated agent in this state, upon whom service of process may be made in suits against the corporation."

The corporation was not in 1846 of sufficient importance to warrant this separate treatment in either the Missouri law or the Kearny Code. In 1855 Missouri added: "Where the defendant is a corporation, whose chief office or place of business is out of this state."<sup>192</sup> New Mexico followed in 1874, substituting "principal office" for "chief office" and adding the qualification that the corporation must have failed to designate an agent for service of process.<sup>193</sup>

The Missouri provision is construed as making the first ground for attachment—non-residence—inapplicable to corporations, and as authorizing attachment against all corporations, foreign and domestic, whose chief office or place of business is out-of-state.<sup>194</sup>

While it is essential to establish that the corporation's principal office or place of business is outside the state,<sup>195</sup> it is no defense for the corporation in Missouri

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190. *Torlina v. Trorlicht*, 5 N.M. 148, 21 Pac. 69 (1889). And see *Belcher & Brown Lumber & Mercantile Co. v. Drane*, 107 Mo. App. 56, 80 S.W. 307 (1904). The necessary intent is not demonstrated by showing that the debtor is about to make a preferential payment, *Smith & Co. v. National Ry. Elec. & Industrial Exposition Ass'n*, 47 Mo. App. 462 (1892).

191. Kearny Code Attachments §1(5) (1846) at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. §26-1-1(IV) (1953)); Rev. Stat. Mo. ch. 11, art I §1(9) (1845) (now Mo. Ann. Stat. §521.010(11) (1953)).

192. Mo. Rev. Stat. ch. 12, art. I, §1(2) (1855) (now Mo. Ann. Stat. §521.010(2) (1953)).

193. N.M. Laws 1874, ch. 17, §1 at 38 (now N.M. Stat. Ann. §26-1-1(VI) (1953)).

194. *Farnsworth v. Terre-Haute, Alton & St. Louis R. R.*, 29 Mo. 75 (1859).

195. *Middough v. St. Joseph & Denver City R. R. Co.*, 51 Mo. 520 (1873). If the corporation has no principal office in this state, N.M. Stat. Ann. §21-1-1(4)(e)(3) (1953), prescribing various methods of effecting service, apparently would be inapplicable.

that, under statutes and rules relating to process,<sup>196</sup> it may nonetheless be effective served with summons in the state.<sup>197</sup>

In New Mexico, however, it is also necessary for plaintiff to show that the corporation has not "designated" an agent for service of process. Such designation is required by statute for foreign corporations generally as a part of the procedure by which they qualify to do business in this state,<sup>198</sup> and for foreign and domestic insurance companies as part of the licensing procedure.<sup>199</sup> And if "designation" includes the naming of an agent for service of process required in the certificate of incorporation for New Mexico corporations,<sup>200</sup> and required also for all foreign and domestic corporations doing business in the state by the Corporate Reports Act of 1959,<sup>201</sup> then all law-abiding domestic corporations, as well as all law-abiding foreign corporations doing business here, should be immune from attachment on this ground.

For the corporations that have not complied with the requirement that an

196. A special provision in our Rules of Civil Procedure authorizes service upon any railroad company by serving "any station agent of any such company at any station or depot, and if there are no stations or agents within the county, then service may be made upon any conductor of a passenger or freight train of cars of such company." N.M. Stat. Ann. §21-1-1(4)(e)(2) (1953). In addition, N.M. Stat. Ann. §21-1-1(4)(o) (1953), authorizes service upon any domestic or foreign corporation by serving "an officer, a managing or general agent, or . . . any other agent authorized by appointment or law to receive service of process" if a copy is also mailed to the defendant.

With respect to foreign corporations only, N.M. Stat. Ann. §21-3-6(a) (1953), authorizes service upon any officer, director or agent personally, or by leaving a copy of the process at his dwelling house or usual place of abode, or at "the office, depot or usual place of business of such foreign corporation."

Constitutional questions arising from the application of these provisions to foreign corporations are beyond the scope of this article. But see *Caledonian Oil Co. v. Baker*, 196 U.S. 432 (1905); *State ex rel. Grinnell Co. v. McPherson*, 62 N.M. 308, 309 P.2d 981, 982 (1957); *Silva v. Crombie & Co.*, 39 N.M. 240, 44 P.2d 719 (1935); *Kurland*, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958).

197. *Wayne Mfg. Co. v. Challenge Co.*, 280 S.W. 448 (Mo. App. 1926).

198. N.M. Stat. Ann. §51-10-4 (1953). See also special provisions for foreign corporations contracting with the state, N.M. Stat. Ann. §6-6-14 (1953); for foreign building and loan associations, N.M. Stat. Ann. §48-15-23 (1953); for Mexican casualty companies, N.M. Stat. Ann. §58-5-9(d) (1953), and for real estate brokers, N.M. Stat. Ann. §67-24-31 (1953).

199. N.M. Stat. Ann. §58-5-8 (1953).

200. The certificate of incorporation must set forth "The location of [the corporation's] principal office in this state, and the name of the agent therein and in charge thereof, upon whom process against the corporation may be served." N.M. Stat. Ann. §51-2-8 (1953).

201. Each such corporation is to file an annual report with the State Corporation Commission setting forth, among other things, "the location of its registered office in this state and the name of the agent upon whom process against the corporation may be served." N.M. Stat. Ann. §51-21-2 (1953). See also N.M. Stat. Ann. §51-2-24 (1953). The "registered office" referred to in this statute is apparently the same as the "principal office in this state" referred to in note 200. See N.M. Stat. Ann. §51-2-37 (Supp. 1961).

agent be designated, it presumably is no defense to attachment that the statutes provide other means for serving them with summons.<sup>202</sup>

One additional problem disposed of in Missouri suggests a related problem here. The more specific provision of the attachment law was there held to limit an earlier provision of the corporation law which on its face appeared to authorize attachment against any foreign corporation having property in the state.<sup>203</sup> Our corporation law, adopted in 1905 long after enactment of the specific provision in the attachment law governing out-of-state corporations, contains a section providing with more brevity than clarity that "Attachments may issue against corporations not created or recognized as corporations and joint stock associations of this state by the laws of this territory [state] and not having qualified themselves to do business in this territory [state]."<sup>204</sup> The draftsmen of our corporation law, using the New Jersey corporation law as a model,<sup>205</sup> apparently strayed into the New Jersey attachment law for this provision, but mutilated it considerably in the transition.<sup>206</sup> It was settled in New Jersey at this time that corporations not "created" by the state were foreign corporations, and that a foreign corporation was not "recognized" by the law of New Jersey unless it had qualified to do business there.<sup>207</sup>

Since this section was adopted in New Mexico after the attachment statute, it cannot easily be concluded that it is limited by the attachment statute. And since a part of the procedure for qualifying to do business in the state is the designation of an agent for service of process,<sup>208</sup> the corporation law may be construed to authorize attachment against foreign corporations that have not designated such agents even though their principal office or place of business is within the state. Indeed, it may be construed to authorize attachment against a foreign corporation which has designated an agent and does have its principal

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202. Cf. *Wayne Mfg. Co. v. Challenge Co.*, 280 S.W. 448 (Mo. App. 1926). And see note 209 *infra*. N.M. Stat. Ann. §21-3-6 (1953) authorizes service upon the Secretary of State where a foreign corporation doing business in this state fails to designate an agent. See also N.M. Stat. Ann. §§6-6-16, 21-3-7 through 21-3-11, 21-3-16, 58-5-47 (1953) and the caveat about constitutional limitations in note 196. N.M. Stat. Ann. §21-3-5 (1953), also authorizes service on the Secretary of State where a foreign or domestic corporation fails to file the annual report naming an agent for service of process as formerly required by N.M. Stat. Ann. §51-2-36 (1953). But §51-2-36 was repealed by the Corporate Reports Act [N.M. Laws 1959, ch. 181, §10, at 491], with any change being made in §21-3-5.

203. *Farnsworth v. Terre-Haute, Alton & St. Louis R. R.*, 29 Mo. 75 (1859).

204. N.M. Laws 1905, ch. 79, §106, at 179 (now N.M. Stat. Ann. §51-10-8 (1953)).

205. See *Jones v. Page*, 26 N.M. 440, 447, 194 Pac. 883, 886 (1920); *State v. Bank of Magdalena*, 33 N.M. 473, 477, 270 Pac. 881, 883 (1928); *State v. State Bank*, 38 N.M. 338, 342, 32 P.2d 1017, 1020 (1934).

206. "Attachments may issue against . . . corporations not created or recognized as corporations of this state by the laws of this state and joint stock associations." N.J. Laws 1901, ch. 74, §1 (4).

207. *Goldmark v. Magnolia Metal Co.*, 65 N.J.L. 341, 47 Atl. 720 (1900); *Phillipsburgh Bank v. Lackawanna R. R. Co.*, 27 N.J.L. 206 (1858). See also *Brand v. Auto Serv. Co.*, 75 N.J.L. 230, 67 Atl. 19 (1907).

208. N.M. Stat. Ann. §51-10-4 (1953).



office or place of business in the state, but has otherwise failed to qualify here.<sup>209</sup>

The position of the foreign joint stock association is even more uncertain. The forms of business organization which may qualify to do business as building and loan associations, insurance companies, Mexican casualty companies and real estate brokers are broadly enough defined to include joint stock companies.<sup>210</sup> But the general qualification statute is by its terms confined to corporations,<sup>211</sup> from which it might be concluded either that the foreign joint stock company need not or that it cannot qualify to do other types of business here.

All things considered, we might be well advised to follow the New Jersey example further. That state in 1951 dropped the provision for attachment of corporations "not created or recognized" and joint stock associations.<sup>212</sup>

*Seventh Ground:* "Where the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit is brought or obtained credit from the plaintiff by false pretenses."

Missouri adopted its more simple provision in 1885: "Where the debt sued for was fraudulently contracted on the part of the debtor."<sup>213</sup> Our provision was added in 1874,<sup>214</sup> and has not yet been construed by our Supreme Court.

Since our provision is not confined to "debts contracted," but extends also to "obligations incurred," there is no need to exclude, as the Missouri courts have done, an action for fraudulent conversion of property,<sup>215</sup> or a purchaser's action to rescind a sale fraudulently induced and to recover the purchase price.<sup>216</sup> And even in Missouri the seller who has been induced by fraud to part with his goods can waive the fraud and sue for the price, and yet assert the fraud as a ground for attachment.<sup>217</sup>

The Missouri courts have allowed juries to find fraud not only where the creditor relies upon the debtor's misrepresentation of his financial condition

209. In New Jersey, the fact that another statute, which apparently constituted the model for N.M. Stat. Ann. §21-3-6(a) (1953), authorizes a feasible method for serving summons on the foreign corporation was held not to preclude attachment on the ground that the corporation had not qualified to do business in the state. *Goldmark v. Magnolia Metal Co.*, 65 N.J.L. 341, 47 Atl. 720 (1900).

210. N.M. Stat. Ann. §§48-15-22, 48-15-23, 58-1-1, 58-5-8, 58-5-9, 67-24-20, 67-24-31 (1953).

211. N.M. Stat. Ann. §51-10-4 (1953).

212. N.J. Rev. Stat. §2A26-2 (1952).

213. Gen. Stat. Mo. (1866), ch. 141, §1(XIV) (now Mo. Ann. Stat. 521.010(14) (1953)).

214. N.M. Laws 1874, ch. 17 §1, (now N.M. Stat. Ann. §26-1-1(VII) (1953)).

215. *Finlay v. Bryson*, 84 Mo. 664 (1884). But the conversion must be accomplished by fraud. Simple misappropriation or embezzlement will not come within the statute. *Finlay v. Bryson*, supra; *Rohan Bros. Boiler Mfg. Co. v. Latimore*, 18 Mo. App. 16 (1885); *Sunday Mirror Co. v. Galvin*, 55 Mo. App. 412 (1893).

216. *Ryles, Wilson & Co. v. Shelley Mfg. Co.*, 93 Mo. App. 178 (1902); *Steele v. Brazier*, 139 Mo. App. 319, 123 S.W. 477 (1909).

217. *Blackwell v. Fry*, 49 Mo. App. 638 (1892); *Mapes v. Burns*, 72 Mo. App. 411 (1897); *Kansas City Stained Glass Works & Sign Co. v. Robertson*, 73 Mo. App. 154 (1898). See also *Alexander v. Wade*, 107 Mo. App. 321, 80 S.W. 917 (1904). Cf. *Finlay v. Bryson*, 84 Mo. 664 (1884).

directly<sup>218</sup> or through a credit agency,<sup>219</sup> but also where the jury was persuaded that the debtor intended not to pay for goods when he bought them and concealed his unworthy intention from the seller.<sup>220</sup> But they have not agreed on the question whether the purchaser of goods who promises to write a check for them as soon as he gets home, knowing that he has no bank account, has incurred a debt for the purchase price by fraudulent misrepresentation.<sup>221</sup>

One limitation clearly applicable in Missouri is probably also applicable here. Under the Missouri statute the debt fraudulently incurred must be the "debt sued for." Plaintiff cannot sue on one claim and attach on the ground that another claim was fraudulently incurred; nor can he join the two and attach for both. Unless he has some additional ground, the attachment must be limited to the claim fraudulently incurred.<sup>222</sup> The same limitation is clearly incorporated in so much of our statute as refers to the fraudulent contracting of the debt or incurring of the obligation "respecting which the suit is brought," but is not so clearly applicable to the disjunctive phrase "or obtained credit from the plaintiff by false pretenses."

One difficulty with the disjunctive phrase is that of assigning any meaning to it not already covered by the concept of a "fraudulently . . . incurred . . . obligation" covered by the preceding phrase. "False pretense" is not, in the law of tort, a concept apart from "fraud," but merely one way of committing fraud.<sup>223</sup> The crime of obtaining money or property by false pretenses has been recognized in the criminal law for more than 170 years<sup>224</sup> and in New Mexico since the Kearny Code.<sup>225</sup> But in the original<sup>226</sup> and all New Mexican<sup>227</sup> defi-

218. *Eisenhardt v. Cabanne*, 16 Mo. App. 531 (1885); *Ring v. Chas. Vogel Paint & Glass Co.*, 44 Mo. App. 111 (1891); *Cole Mfg. Co. v. Jenkins*, 47 Mo. App. 664 (1892).

219. *Gries v. Blackman*, 30 Mo. App. 2 (1888); *Tootle, Hosea & Co. v. John J. Lysaght & Co.*, 65 Mo. App. 139 (1896).

220. *Cole Mfg. Co. v. Jenkins*, 47 Mo. App. 664 (1892); *Blackwell v. Fry*, 49 Mo. App. 638 (1892). See also *Telman v. Galles*, 41 N.M. 56, 63 P.2d 1049 (1936) (not an attachment case).

221. *Matthews v. Eby*, 149 Mo. App. 157, 129 S.W. 1016 (1910); *Matthews v. Eby*, 168 Mo. App. 134, 151 S.W. 470 (1912). And see *State v. Tanner*, 22 N.M. 493, 164 Pac. 882 (1917) (not an attachment case). Cf. *State v. Davis*, 26 N.M. 523, 194 Pac. 882 (1921) (not an attachment case); *State v. Thompson*, 37 N.M. 229, 20 P.2d 1030 (1933) (not an attachment case); *State v. Gilmore*, 47 N.M. 59, 134 P.2d 541 (1943) appeal dismissed 320 U.S. 710 (1943) (not an attachment case).

222. *Third Nat'l Bank v. Cramer*, 78 Mo. App. 476 (1899). But a running account has been treated as a single debt, so that if any part of it was incurred by fraud plaintiff can attach for the entire amount. *Mackey v. Hyatt*, 42 Mo. App. 443 (1890).

223. Modern writers on torts eschew the word "fraud" as too vague and speak instead of actionable misrepresentation, a concept broader than the early common law action for deceit. See *Harper & James, Torts*, ch. VII (1956); *Prosser, Torts*, ch. 18 (2d ed., 1955).

224. See *Hall, Theft, Law and Society*, ch. 18 (2d ed., 1955).

225. *Kearny Code, Crimes and Punishments*, art. II, §3 (1846); *N.M. Laws 1853-54*, §30 at 106; (now *N.M. Stat. Ann. §40-21-1* (1953)). See also *N.M. Stat. Ann. §40-21-3* (1953).

226. 30 *Geo. 2*, ch. 24 (1757).

227. Note 225, *supra*.

nitions, "intent to defraud" is an essential element of the crime.<sup>228</sup> While the "false pretense" may be manifested by conduct as well as by express statements,<sup>229</sup> it must result in defendant obtaining money or property from the plaintiff.<sup>230</sup> Embezzlement of property obtained from defendant without fraud will not do.<sup>231</sup>

If, therefore, the attachment law incorporates the criminal law concept of false pretense, defendant can "obtain credit from the plaintiff by false pretenses" so as to render himself subject to attachment, without at the same time violating the criminal law, only if he somehow obtains credit from plaintiff without obtaining from him "any money or goods, wares, merchandise or other property, or any service or other thing of value."<sup>232</sup> But, whether or not he obtains money, property, service or other thing of value, he appears to have "fraudulently . . . incurred [an] obligation" under the first alternative in this ground for attachment, so that the second alternative is superfluous.

If the court is not to read all meaning out of the second alternative, therefore, it apparently must construe it to mean (a) that no intent to defraud is required, and plaintiff can attach where defendant obtained credit by negligent, or perhaps by any, misrepresentations, and/or (b) that a defendant who obtains credit from plaintiff by fraudulent misrepresentation is subject to attachment on any claim which plaintiff has against him. With these choices, the preferable conclusion seems to be to read the second alternative as meaningless surplusage.

*Eighth and Ninth Grounds:* "That the debt is for work and labor, or for any services rendered by the plaintiff, or his assignor, at the instance of the defendant."

"Where the debt was contracted for the necessities of life."

These provisions which have no counterparts in Missouri, were added to our attachment law in 1929.<sup>233</sup> They have not been construed by our Supreme Court, but obviously reflect the same compassion for wage and salary claimants and suppliers of necessities as is manifested also by exceptions in various exemption laws.<sup>234</sup> The claim for "necessities of life" probably extends to necessities furnished to any of the debtor's family or dependents for whose support he is

228. *State v. Ferguson*, 56 N.M. 398, 244 P.2d 783 (1952).

229. *State v. Kelly*, 27 N.M. 412, 202 Pac. 524 (1921); *State v. Garcia*, 57 N.M. 166, 256 P.2d. 532 (1953).

230. *Territory v. Hubbell*, 13 N.M. 579, 86 Pac. 747 (1906); *State v. Faggard*, 25 N.M. 76, 177 Pac. 748 (1918).

231. See *State v. Seefeldt*, 54 N.M. 24, 212 P.2d 1053 (1949). Cf. note 215, supra.

232. N.M. Stat. Ann. §40-21-1 (Supp. 1961). "Any service or other thing of value" was added by N.M. Laws 1959, ch. 113, §1, at 294.

233. N.M. Laws 1929, ch. 217, §1, at 289, (now N.M. Stat. Ann. §26-1-1(VIII)-(IX) (1953)).

234. N.M. Stat. Ann. §24-5-1 (1953) ("debts incurred for manual labor"); N.M. Stat. Ann. §24-6-1 (Supp. 1961) ("lien of a . . . laborer"); N.M. Stat. Ann. §59-9-18(c) (1953) ("necessaries furnished to such individual or his spouse or dependents").

responsible, as is made explicit in some of the exemption laws. And the claim for "work and labor, or for any services rendered" probably includes more than the "labor" claims favored by the exemption laws. It apparently may include the salary of an executive and the fees of a professional man, and may be enforced by attachment at the instance of the original claimant or of his assignee.

#### IV. OBTAINING THE WRIT

A. *The Attachment Affidavit*: The plaintiff seeking to begin his suit by attachment must file not only his complaint but also an attachment affidavit and bond.<sup>235</sup> The affidavit has been required to allege, since the Kearny draftsmen copied the Missouri language, "that the defendant is justly indebted to the plaintiff, after allowing all just credits and offsets," in a sum to be specified in the affidavit, "and on what account," and must also allege that the affiant "has good reason to believe, and does believe, the existence of one or more" of the grounds for attachment.<sup>236</sup> The affidavit may be made "by the plaintiff, or some person for him."<sup>237</sup> In 1855 we added a statutory form of affidavit which prescribes the method of alleging indebtedness, ignores the earlier requirement of an allegation "on what account," and leaves the allegation of grounds for attachment to the ingenuity of plaintiff's counsel.<sup>238</sup>

In the absence of any express statutory authority for amendment of the affidavit, our court has on occasion construed statutory requirements strictly,

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235. N.M. Stat. Ann. §26-1-4 (1953). N.M. Stat. Ann. §26-1-10 (1953) requires the affidavit and bond to be filed before the writ is issued. *Waldo v. Beckwith*, 1 N.M. 97 (1854), holds an attachment writ issued before the filing of the affidavit and bond a nullity which should be quashed. N.M. Stat. Ann. §16-3-49 (1953) authorizing "all . . . matters" to be "performed nunc pro tunc when the ends of justice may require it," was held in the *Waldo* case not to authorize the court to permit retroactive filing of affidavit and bond. *Accord, Stevenson & Hord v. Robbins*, 5 Mo. 18 (1837), where the affidavit was filed before and the bond after the writ was issued.

236. Kearny Code, Attachments §3 (1846) at 1 N.M. Stat. Ann. 303 (1953); (now N.M. Stat. Ann. §26-1-5 (1953)). The grounds alleged need not necessarily be consistent. See *First Nat'l Bank v. George*, 26 N.M. 176, 190 Pac. 1026 (1920); *Field & Beardslee v. Liverman*, 17 Mo. 218 (1852); *Tucker v. Frederick*, 28 Mo. 574 (1859).

237. Kearny Code, Attachments §3 (1846) at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. §26-1-6 (1953)); Mo. Rev. Stat. ch. 11, art. I, §3 (1845). The corresponding provision for justice courts is N.M. Stat. Ann. §36-7-2 (1953). The Missouri language has now been slightly revised. Mo. Stat. Ann. §521.060 (1953).

Where the affidavit is made by an agent, it should disclose the fact of agency but need not disclose the agent's means of knowledge. *Irwin v. Evans*, 92 Mo. 472, 4 S.W. 693 (887); *Gilkeson v. Knight*, 71 Mo. 403 (1880); *Clafin v. Hoover*, 20 Mo. App. 314 (1886); *Mackey v. Hyatt*, 42 Mo. App. 443 (1890); *Kirksville Savings Bank v. Spangler*, 59 Mo. App. 172 (1894); *Bauer Grocery Co. v. Smith*, 61 Mo. App. 665 (1895). See also N.M. Stat. Ann. §26-1-6 (1953). Cf. N.M. Stat. Ann. §36-11-1 (1953).

238. N.M. Laws 1854-55, §3, at 77 (now N.M. Stat. Ann. §26-1-6 (1953)). A similar form for justice courts is prescribed by N.M. Stat. Ann. §36-11-1 (1953). Missouri, instead, adopted a provision that allegations of statutory grounds in the statutory language will be sufficient. Mo. Ann. Stat. §521.030 (1953).

quashing a writ issued in a suit brought by a partnership because the affidavit was made in behalf of the firm without naming the partners, although they were named in the complaint,<sup>239</sup> and refusing to allow a plaintiff whose affidavit alleged a fraudulent conveyance of partnership property to prove a fraudulent conveyance of the individual property of the partners although they had appeared in the suit against the firm and their individual property would be subject to the judgment.<sup>240</sup> But an intervening decision disapproves the first holding and sustains an affidavit which was sworn to before a notary public instead of the clerk of the court as prescribed in the statutory form,<sup>241</sup> and which departed from the statute in not prefacing the allegation of statutory grounds with a recital that the affiant "has good reason to believe and does believe" in their existence.<sup>242</sup> The court also pointed out that if the affidavit was to be treated as a pleading, as the earlier decision treated it, liberal statutory provisions for amendment comparable to present Rule 15<sup>243</sup> were available.

In the 1907 revision of the attachment act, provision for amendment was made in terms which may be more restrictive than in the case of other pleadings: "where an original writ of attachment . . . has been quashed for defect in the affidavit, bond or writ, the court shall allow an amendment thereof to cure the defect, under such circumstances as amendments of ordinary pleadings are allowed by law and with like effect." The issuance of alias and pluries writs, upon new affidavit and bond, was also authorized "where a prior writ has been quashed for defect that cannot be cured by amendment."<sup>244</sup>

Since this provision seems to contemplate amendments only after the writ has been quashed, and to contemplate some noncurable defects, it might have been wiser to follow a Missouri provision that no attachment shall be dissolved for

239. *Bennett v. Zabriski*, 2 N.M. 7 (1880), on rehearing 2 N.M. 176 (1881). Cf. N.M. Stat. Ann. §21-1-1(10) (a) (1953).

240. *First Nat'l Bank v. Lesser & Lewinson*, 10 N.M. 700, 65 Pac. 179 (1901).

241. *Robinson v. Hesser* 4 N.M. 282, 13 Pac. 204 (1887). The court relied upon N.M. Stat. Ann. §43-1-3 (1953), authorizing notaries public to administer oaths in all cases where officers may do so. The Missouri courts, whose statute is silent as to who shall administer the oath, have accepted affidavits made before oath-taking authorities in other states. *Hays v. Bouthalier*, 1 Mo. 346 (1823); *Posey v. Buckner*, 3 Mo. 604 (1834). And see *Avery v. Good*, 114 Mo. 290, 21 S.W. 815 (1892).

242. See *Stevenson & Hord v. Robbins*, 5 Mo. 18 (1837), holding insufficient an affidavit alleging affiant's belief but failing to allege he had good reason to believe. Cf. *Massey v. Scott*, 49 Mo. 278 (1872). Cf. also *Livengood v. Shaw*, 10 Mo. 273 (1847), sustaining an affidavit alleging that defendant was "indebted," rather than "justly indebted," to plaintiff. In any event, the statute does not require that plaintiff allege grounds for attachment as a matter of fact—an allegation that plaintiff believes and has good reason to believe that a designated ground exists is sufficient. *Audenreid v. Hull*, 45 Mo. App. 202 (1891).

243. N.M. Stat. Ann. §21-1-1(15) (1953). See also N.M. Stat. Ann. §§21-4-16 through 21-4-18 (1933).

244. N.M. Laws 1907, ch. 107 §1 (227), at 280 (now N.M. Stat. Ann. §26-1-14 (1953)).

insufficiency "if the plaintiff shall file a good and sufficient affidavit, to be approved by the court, in such time and manner as the court shall direct."<sup>245</sup> Under this provision the Missouri courts have refused to quash the writ and have allowed plaintiff to file an amended affidavit "almost without limit,"<sup>246</sup> even after appeal from justice to circuit court where the case is tried *de novo*,<sup>247</sup> drawing the line and quashing the writ only where plaintiff fails to execute the original affidavit upon which the writ was issued.<sup>248</sup> And, where the case proceeds to judgment and execution sale without challenge to the attachment affidavit, they have held in subsequent litigation between the defendant and the plaintiff or execution purchaser that an attachment proceeding based upon an affidavit which could have been amended is not subject to collateral attack.<sup>249</sup>

The Missouri courts have also held that a single affidavit may serve as the attachment affidavit and as the affidavit required by the statute authorizing service by publication,<sup>250</sup> where the attachment is on grounds which entitled plaintiff to proceed on constructive service.<sup>251</sup> The same result is contemplated by our attachment statute, which contains its own provision for service by publi-

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245. Mo. Rev. Stat. ch. 11, art. I, §47 (1845), (now Mo. Ann Stat. §521.480(1) (1953)).

246. Mauer v. Phillips, 182 Mo. App. 440, 447, 168 S.W. 669, 671 (1914). See also Hackney v. Williams, 3 Mo. 455 (1834); Henderson v. Drace, 30 Mo. 358 (1860); State ex rel. Rabiste v. Southern, 300 Mo. 417, 254 S.W. 166 (1923); Clafin v. Hoover, 20 Mo. App. 314 (1886); Mackey v. Hyatt, 42 Mo. App. 443 (1890); Kirksville Savs. Bank v. Spangler, 59 Mo. App. 172 (1894); Shelton v. Smith, 214 Mo. App. 519, 257 S.W. 509 (1924).

247. Musgrove v. Mott, 90 Mo. 107, 2 S.W. 214 (1886). See also Marshall v. Brown, 145 Mo. App. 426, 122 S.W. 790 (1909). On appeal from our justice courts to the district courts the case is also tried *de novo*. N.M. Const. art. VI, §27; N.M. Stat. Ann. §36-18-6 (1953). See also N.M. Stat. Ann. §36-18-15 (1953).

248. Third Nat'l Bank v. Garton, 40 Mo. App. 113 (1890). See also Hargadine v. Van Horn, 72 Mo. 370 (1880); Burnett v. McCluey, 78 Mo. 676 (1883). Cf. Marshall v. Brown, *supra* note 247. The same rule is applied where an affidavit is executed in the name of a partnership or a corporation which cannot take a corporal oath, rather than by an agent who can, Norman v. Horn, 36 Mo. App. 419 (1889); Farmers' State Bank v. Gibson, 278 S.W. 737 (Mo. App., 1926); or where the clerk of the court is plaintiff and his oath is taken by his deputy. Owens v. Johns, 59 Mo. 89 (1875). But where plaintiff filed a new and properly executed affidavit before the first writ was served, and procured issuance and service of a second writ thereon, the case was treated as one of valid ancillary attachment. First Nat'l Bank v. Griffith, 192 Mo. App. 443, 182 S.W. 805 (1916).

249. Burnett v. McCluey, 92 Mo. 230, 4 S.W. 694 (1887); Avery v. Good, 114 Mo. 290, 21 S.W. 815 (1893). See also Gilkeson v. Knight, 71 Mo. 403 (1880). Here also, there must have been at least an executed affidavit. Hargadine v. Van Horn, *supra* note 248; Burnett v. McCluey, *supra* note 248; Norman v. Horn, *supra* note 248.

250. Mo. Ann. Stat. §506.160 (1953). The inscrutable reference in the Missouri attachment statute to service by publication "as directed," Mo. Ann. Stat. §521.380 (1953), is traceable to a time when the attachment statute contained its own provisions for service by publication. See Mo. Rev. Stat. ch. 12, art. I, §§23, 24, 43 (1855).

251. Bray v. Marshall, 75 Mo. 327 (1882); Burnett v. McCluey, 78 Mo. 676 (1883); Avery v. Good, 114 Mo. 290, 21 S.W. 815 (1893).

cation whenever it appears "from the affidavit for attachment and the return of the sheriff, that . . . defendant cannot be personally served with process."<sup>252</sup>

B. *The Attachment Bond*: The second prerequisite to issuance of an attachment writ, the filing of an attachment bond with the clerk,<sup>253</sup> closely follows the Missouri model.<sup>254</sup> As the requirements now read, the bond must be executed by plaintiff or some responsible person as principal, and by two or more sureties, residents of the state, or by some bonding company authorized to do business in the state. If individual sureties are used, the assets of each in excess of debts must be worth the penalty of the bond, which must be at least double the amount sworn to in the attachment affidavit unless the court fixes a lesser amount. The condition of the bond is that plaintiff will prosecute his action without delay and with effect,<sup>255</sup> and upon breach thereof will pay all damages resulting to defendant.<sup>256</sup> In 1855 a statutory form of bond was enacted<sup>257</sup> which, as later

252. N.M. Stat. Ann. §26-1-18 (1953).

253. See note 235 *supra*. The bond need not be dated. It takes effect when filed with the clerk. *Clafin v. Hoover*, 20 Mo. App. 314 (1886).

254. Kearny Code, Attachments §4 (1846), at 1 N.M. Stat. Ann. 303 (1953) (now N.M. Stat. Ann. §26-1-7 (1953)); Mo. Rev. Stat. ch. 11, art. I, §4 (1845). The Kearny draftsmen increased the number of sureties from "one or more" to "two or more" and eliminated the requirement that they be "householders." Whether they thereby made corporations, partnerships and other forms of business associations eligible as sureties has not been determined. Cf. *Stappacher, Arnold & Co. v. McClure*, 75 Mo. App. 135 (1898).

255. The meaning of the condition and the consequences of its breach are examined more fully under The Rules of Attachment—Financial Liability, part II, to appear in the next issue of the Journal.

256. N.M. Stat. Ann. §26-1-7 (1953). The original requirement that individual sureties be residents of the county in which the suit was brought was eliminated in 1874. N.M. Laws 1874, ch. 18, §1, at 39. The 1907 revision added the alternative use of a bonding company instead of individual sureties. N.M. Laws 1907 ch. 107, §1(186), at 271. Authority in the court to reduce the penalty of the bond was first added in 1913, restricted to cases where levy was to be limited to realty, N.M. Laws 1913, ch. 56 §1(186), at 72, and extended to all cases in 1939. N.M. Laws 1939, ch. 159, §2, at 344. The same 1939 amendment added the requirement as to the net worth of individual sureties. The 1913 amendment made the bond payable to the defendant rather than to the state, but did not repeal N.M. Stat. Ann. §26-1-11 (1953), requiring suits on the bond to be maintained "by any party injured in the name of the state." Under N.M. Stat. Ann. §36-7-2 (1953) the bond in justice court must still have two or more "sufficient securities," although there is no express requirement as to their residence or net worth, and the court is given no authority to reduce the penalty of the bond.

N.M. Stat. Ann. §26-1-9 (1953) enacted by N.M. Laws 1874, ch. 18, §2, at 39, and revised by N.M. Laws 1907, ch. 107, §1(187), at 271, requires the sureties to acknowledge their execution of the bond "in the manner and before such officer as may be prescribed by law for the acknowledgment of conveyances of real estate." N.M. Stat. Ann. §43-1-4 (1953) lists the officers who may take acknowledgments of any written instrument, and §43-1-9 prescribes forms of acknowledgment for written instruments affecting real estate. While acknowledgment of a real estate conveyance is by §71-1-3, as amended by N.M. Laws 1961, ch. 96, §11-118, at 423, a necessary prerequisite to recording, *McBee v. O'Connell*, 16 N.M. 469, 120 Pac. 734 (1911), acknowledgment has not since 1901 been otherwise essential to the validity of the conveyance. *Garcia v. Leal*, 30 N.M. 249, 231 Pac. 631 (1924).

257. N.M. Laws 1854-55 §4, at 79.

revised,<sup>258</sup> prescribes a form for use with two individual sureties.<sup>259</sup> Plaintiffs using a bonding company as surety must revise the form slightly and must pay a fee of \$10 per \$1000 of the penalty of the bond.<sup>260</sup>

The clerk of the court is to "judge the sufficiency of the penalty and the security in the bond." At the time this provision was taken from Missouri,<sup>261</sup> this function with respect to the penalty consisted only of ascertaining that it was double the amount sworn to in the attachment affidavit. In a case where the court exercises later-granted authority to reduce the penalty,<sup>262</sup> the clerk's role would be to ascertain that the penalty corresponds with the amount so fixed.

The clerk's function with respect to the sufficiency of security is more substantial. If individual sureties are used, he must ascertain that each of them is a resident of the state and has assets in excess of debts equal to the penalty of the bond. If a bonding company is the surety, the clerk must ascertain that it is authorized to do business in this state.<sup>263</sup> And he gets no assistance from the

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258. N.M. Laws 1907, ch. 107, §1 (208), at 276, N.M. Stat. Ann. §26-1-8 (1953). The 1907 revision, reflecting the 1897 elimination of return days on summons (note 77 *supra*), eliminated a recital in the bond that the attachment was returnable to the next term of court. The compilers of N.M. Code §4318 (1915), took account of the 1913 amendment (note 256 *supra*) making the bond payable to defendant rather than the state.

259. A slightly different form of bond for justice courts, payable to the state, is prescribed by N.M. Stat. Ann. §36-11-1 (1953).

260. This is the rate per annum, with an annual minimum of \$10, for fixed penalty attachment bonds listed in the Rate Manual of Fidelity, Forgery and Surety Bonds of the Surety Association of America, whose rates are filed with the Superintendent of Insurance, in accordance with N.M. Stat. Ann. §§58-10-1 through 58-10-34 (1953), on behalf of more than eighty bonding companies. Some forty-seven other companies have filed independently, but for the most part have filed the same rates. Letter of April 20, 1961, from Vincent J. Basso, Rate Analyst, State of New Mexico, Department of Insurance. I am advised, however, that some bonding companies under some circumstances will deviate from the Manual rates.

261. Mo. Rev. Stat. ch. 11, art. I, §5 (1845); Kearny Code, Attachments §5 (1846), at 1 N.M. Stat. Ann. 303-04 (1953) (now N.M. Stat. Ann. §26-1-10 (1953)).

262. See note 256 *supra*.

263. The clerks of Chaves, Curry, Eddy, McKinley and Quay Counties indicate that they check the tax rolls to determine whether individual sureties have realty of a value equal to the penalty of the bond. The clerks of Luna and Union Counties "check records" and the clerk of Lincoln County checks "property valuation" and "title." The clerk of Bernalillo County answered "no" to the question about what information is required in passing on an individual surety and the clerk of San Miguel County indicated that all sureties are approved by the court. Where a bonding company is surety, the clerk of Lincoln County satisfies himself of "proper amount and proper signatures," the clerk of Bernalillo County determines that it is a "reputable bonding company," the clerk of Luna County relies upon a statement on the bond that the company is licensed to do business in New Mexico, the clerk of McKinley County checks "to make sure that bond is properly executed by an officer of the company and signed by the resident agent," the clerk of Curry County determines that the company is authorized to do business in the state, the clerk of Chavez County requires a copy of the resident agent's power of attorney be attached to the bond, and the clerks of Eddy, Quay and Union Counties require no information. See note 9, *supra*.



statutory form of bond, which contains no recitals as to the qualifications of sureties.<sup>264</sup>

If the clerk approves the bond he is to "endorse his approval thereon,"<sup>265</sup> but his failure to do so is not fatal. The fact that he accepts and files the bond and issues the attachment writ is treated as sufficient evidence of his approval.<sup>266</sup>

The clerk's determination as to the sufficiency of the bond is, in any event, not final. At any time before judgment defendant may move for additional security and if the court is satisfied "that any surety on such bond has removed from the state, or that for any other reason such bond is not sufficient security for the amount thereof," it may require a new bond to be filed within a reasonable time, and if plaintiff fails to do so may make such order for disposition of the attached property "as the failure to give such additional security may require."<sup>267</sup> This provision, added in 1907,<sup>268</sup> differs from an earlier Missouri provision<sup>269</sup> in several details but in general seems to have the same effect. Unless there is a significant difference between the court's power to inquire whether the bond is "sufficient security for the amount thereof" under our statute and whether the bond is "insufficient" under the Missouri statute, this provision, which is apparently designed for the protection of the defendant, may be construed here as in Missouri to aid the plaintiff. There, defendants who have sought to have the attachment writ quashed because of a variety of defects in the bond have been told that they should, instead, invoke the statutory provision for remedying the insufficiency of the bond.<sup>270</sup>

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264. N.M. Stat. Ann. §§26-1-8, 36-11-1 (1953). Cf. the garnishment statute which authorizes the clerk to require the affidavits of the "securities." N.M. Stat. Ann. §26-2-6 (1953). The clerk should not in any event be liable if one qualified surety remains solvent and able to respond to judgment on the bond. See *State ex rel. Johnson v. Dunn*, 60 Mo. 64 (1875).

265. N.M. Stat. Ann. §26-1-10 (1953). The problem of the court clerk who is also plaintiff in the attachment suit arose once in Missouri in *Owens v. Johns*, 59 Mo. 89 (1875) where the clerk-plaintiff had his deputy take his oath on the affidavit and approve the bond. The court held the affidavit void and did not rule upon the validity of the bond. Others may administer the oath for the affidavit (see note 241 *supra*), but, save for deputy or assistant clerks (see N.M. Stat. Ann. §16-3-35 (1953)), the statutes provide no alternate who may approve the bond.

266. *Baca v. Coury*, 27 N.M. 611, 204 Pac. 57 (1922); *Whitman Agricultural Ass'n v. Nat'l Ry., Elec. & Industrial Ass'n*, 45 Mo. App. 90 (1891); *First Nat'l Bank v. Griffith*, 40 Mo. App. 113 (1890).

267. N.M. Stat. Ann. §26-1-12 (1953);

268. N.M. Laws 1907 ch. 107, §1 (221), at 278-79.

269. Mo. Rev. Stat. ch. 11, art. I, §§6, 7 (1845); (now Mo. Ann. Stat. §§521.090, 521.100 (1953)).

270. *Van Arsdale v. Krum*, 9 Mo. 397 (1845) (condition not in statutory form); *Tevis v. Hughes*, 10 Mo. 380 (1847) (no sureties); *Wood v. Squires*, 28 Mo. 528 (1859) (defective execution by principal); *Beardslee v. Morgan*, 29 Mo. 471 (1860) (no execution by principal); *Henderson v. Drace*, 30 Mo. 358 (1860) (bond not under seal); *Jasper County v. Chenaut*, 38 Mo. 357 (1866) (no sureties); *R. L. McDonald Co. v. E. Fist & Co.*, 53 Mo. 343 (1873) (defective execution by principal); *Whitman Agricultural Ass'n v. Nat'l Ry., Elec. & Industrial Ass'n*, 45 Mo. App. 90 (1891) (no execution by principal).

Our statutes also contain provision for relief of the surety on the bond. Whenever he has "reason to believe himself in danger" he may apply to the court to be relieved from the bond. But such relief may not be granted until "a new bond shall have been given and approved."<sup>271</sup>

*C. Ancillary Attachment:* "In any civil suit, when the summons against the defendant has been returned, executed," plaintiff may at any time before judgment, by filing an attachment affidavit and bond, get an ancillary writ<sup>272</sup> and the suit is thereafter to proceed as if commenced by attachment.<sup>273</sup>

These provisions, added in 1860,<sup>274</sup> follow the Missouri law in referring to "any civil suit"<sup>275</sup>—a phrase which, as used in the Missouri statute relating to actions commenced by attachment, was later construed there to exclude equitable actions.<sup>276</sup> We do not follow Missouri in authorizing ancillary attachment in any suit "commenced by summons."<sup>277</sup> But the difference does not appear material. In any case where the summons cannot be served, plaintiff may still file an affidavit and bond and treat the suit as one commenced by attachment. The applicable statutes<sup>278</sup> do not require that affidavit and bond accompany the complaint, but only that they be filed before the writ issues.

In any event, by delayed application for the writ or by timely application for an ancillary writ, plaintiff can take advantage of grounds for attachment not discovered or not coming into existence until after the complaint was filed.<sup>279</sup>

*D. Issuance of the Writ:* Since the Kearny Code our statute has provided that attachment writs "shall be issued . . . in like mannare as an ordinary writ of summons."<sup>280</sup> This means in most judicial districts that the writ must be signed

See also *Englehart-Davidson Mercantile Co. v. Burrell Sisters*, 66 Mo. App. 117 (1896), holding that it is too late to challenge the sufficiency of the bond in a motion for new trial after judgment for plaintiff on the issues raised by defendant's denial of allegations of the attachment affidavit.

271. N.M. Stat. Ann. §28-1-7 (1953).

272. N.M. Stat. Ann. §26-1-43 (1953).

273. N.M. Stat. Ann. §26-1-44 (1953).

274. N.M. Laws 1860, p. 16. Although this provision is codified with provisions applicable to district courts, it may apply also in justice courts. Cf. *Butler Paper Co. v. Sydney*, 47 N.M. 463, 144 P.2d 170 (1943).

275. In Missouri the reference is to "any civil action." Mo. Rev. Stat. ch. 12, art. 1, §13 (1856) (now Mo. Ann. Stat. §521.130 (1953)).

276. *Gage v. Gates*, 62 Mo. 412 (1876); *State ex rel. Auchincloss, Parker & Redpath, Inc. v. Harris*, 349 Mo. 190, 159 S.W. 2d 799 (1942), and cases cited therein.

277. The dictum statement in *Southern California Fruit Exch. v. Stamm*, 9 N.M. 361, 368-369, 54 Pac. 345, 347 (1898), that, "An ancillary attachment is a proceeding in aid of the personal action, when the debtor has been served or has appeared" is broader than the statute. (Emphasis added.)

278. N.M. Stat. Ann. §§26-1-4, 26-1-10 (1953).

279. See *Kirgman & Co. v. Cornell-Tebbetts Mach. & Buggy Co.*, 150 Mo. 282, 51 S.W. 727 (1899); *California Fruit Exch. v. Stamm*, 9 N.M. 361, 369, 54 Pac. 345, 347 (1898).

280. *Kearny Code, Attachments*, §8 (1846) at 1 N.M. Stat. Ann. 304 (1953) (now N.M. Stat. Ann. §26-1-15 (1953)).

by the clerk and issued under the seal of the court.<sup>281</sup> But in the first, second, third, fifth and eleventh districts, which have more than one judge, the statutes now require that all process be under the teste of the presiding judge.<sup>282</sup> (Notwithstanding which the clerks of Bernalillo County in the Second District, Lincoln and Dona Ana Counties in the Third District, Chaves County in the Fifth District and McKinley County in the Eleventh District indicate that they still sign attachment writs.)

In two instances the issuance of a writ is forbidden: where defendant has made an assignment for the benefit of his creditors, unless and until the assignment has been declared void *ab initio*,<sup>283</sup> and while delinquency proceedings are pending against an insurance company debtor.<sup>284</sup>

*(Part II of this article will appear in the next issue of the JOURNAL.)*

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281. N.M. Stat. Ann. §21-1-1(4)(b) (1953). Cf. Kearny Code, Practice at Law in Civil Suits, §2 (1846) at 1 N.M. Stat. Ann. 341 (1953). In justice courts, the writ is to be signed by the justice. N.M. Stat. Ann. §36-4-1 (1953). See also §§36-7-3, 36-11-1. Cf. Kearny Code, Courts and Judicial Powers, §26 (1846) at 1 N.M. Stat. Ann. 314 (1953). A writ of execution signed by the sheriff is void and if he levies thereunder he has no protection against an action of replevin or for damages. *Munis v. Herrerra*, 1 N.M. 362 (1862). In Missouri the omission of the court's seal on the attachment writ can be corrected after defendant has filed a motion to quash the writ. *Jump v. McClurg*, 35 Mo. 193 (1864). But a writ which the clerk has neglected to sign is subject to a motion to quash, at least where plaintiff makes no attempt to correct the omission by amendment. *Smith, Heddins & Co. v. Hackley*, 44 Mo. App. 614 (1891).

282. N.M. Stat. Ann. §§16-3-3.3, 16-3-6, 16-3-6.4, 16-3-10.1, 16-2-10.2 (Supp. 1961). In §§16-3-6 and 16-3-10.2 the requirement is that process be under the presiding judge's "witness" rather than "teste."

283. N.M. Stat. Ann. §27-1-46 (1953). See *Schofield v. Folsom*, 7 N.M. 601, 38 Pac. 261 (1894), appeal dismissed 168 U.S. 706 (1897), and *Saint v. Folsom*, 8 N.M. 650, 46 Pac. 1117 (1896), where writs were quashed because issued after the assignment was made, and *Lyndonville Nat'l Bank v. Folsom*, 7 N.M. 611, 38 Pac. 253 (1894), where the writ was sustained because an earlier attempted assignment was ineffective to transfer title to the assignee. *Schofield v. Folsom*, supra, indicates that the procedure for having the assignment declared void *ab initio* is a separate creditor's action under N.M. Stat. Ann. §27-1-46 (1953).

284. N.M. Stat. Ann. §58-6-13 (1953). The statute forbids not merely issuance of the writ, but the commencement of an action by attachment.