CONSTITUTIONAL STATUTORY JURISDICTION.

If I need any apology for calling attention to this subject, perhaps I may find it in the fact that it suggests questions upon which some of our most eminent jurists have differed, and some of our ablest courts have been in conflict with each other. It may prove interesting to study the relation of general jurisdiction to special; to inquire whether the latter may ever be presumed by reason of the existence of the former; to find what the record of a superior court should show in order to render its judgment impervious to collateral attack, when it has been exercising jurisdiction conferred by statute upon conditions.

There is a variety of judicial proceedings, not warranted by the common law, which look to legislative authorization for their right to be. Authorization is usually given when ordinary means are deemed inadequate to subserve the ends of justice, and when there has been compliance on the part of the petitioner or the court with certain requisites. It is quite common that affidavits to prescribed facts, publication notices to absentees, and bonds to indemnify those who may be injured by the application of extraordinary remedies, are required. It is quite well settled that the requisites must be observed, but some have thought that there is an exception when attachment proceedings are not in personam. In order to present this first part of my paper, I will put the question:

I. In a proceeding in rem under statutory authorization, is it essential to complete jurisdiction that all the conditions be observed,
CONSTITUTIONAL STATUTORY JURISDICTION.

if there has been seizure under a writ, fair on its face, issued by a superior court?

If not, the judgment could not be absolutely void, though it might be voidable by reason of non-compliance with conditions; it could not be collaterally assailed, though it might be reasonable on appeal, as every one knows.

It is well settled that superior courts stand on the same footing as inferior courts with respect to the acquisition of special jurisdiction. The general rule is applicable to both, that nothing shall be intended as within authority beyond what appears of record, so far as concerns statutory authorization. While it is freely conceded, on all sides, that courts of superior or general jurisdiction are always presumed to act within it when exercising common-law authority, and that their errors in its exercise are therefore merely voidable; and while it may be granted, just as plausibly, that such courts, once fully vested with special jurisdiction, have the presumption in favor of its lawful exercise, yet they, no more than inferior courts, are presumed to possess special, statutory authorization by reason of their general, common-law jurisdiction.

It is also well settled that proceedings by attachment are in rem —against property only—when the debtor has not appeared nor been summoned. It is a limited proceeding of the sort, intended not to conclude the world, as a general one does, but to conclude only the owner, alleged to be indebted, and his privies. It is prosecuted, not by virtue of any common-law right, but strictly by virtue of a conditional authorization by the legislature in derogation of the common law.

Those who hold the affirmative of my question infer, from the repugnancy of the attachment remedy to the common law, and from the limitation of extraordinary remedies to circumstances under which the ordinary would be unavailing, that seizure must be in obedience to statute in order to confer complete special jurisdiction in a case in rem, in a superior court as in any other. They hold that to resort to such remedies, without compliance with the conditions imposed by legislative power when granting these means, would be assuming jurisdiction unlawfully; that judges, under such circumstances, have no more right than any private person to command the seizure of property to secure merely ordinary debts before the indebtedness has been proved and judicially ascertained. They hold that, since the office of attachment is to create a lien as
well as to enforce it, and since the lien is not conventional but purely a creature of the law operating under prescribed circumstances and applied under stated conditions, there can be no right or power in any court to issue a writ of attachment prior to judgment by virtue of anything inherent in its general jurisdiction; and that, whether the alleged debtor be in court or not, the rule is the same.

Attachment proceedings in rem, according to those holding the affirmative of the question propounded, must follow the statute with respect to the publication notice as well as with regard to the initiatory act of seizure; for, they say, though the appearance of the defendant, in a personal action, would cure the defects of previous notice, no such result can take place in a proceeding prosecuted to the end against attached property only.

The jurisdiction acquired by lawful seizure does not render publication an act in the mere exercise of this jurisdiction, say they; for, whatever may be the rule in proceedings in rem not statutory, the court can have no authority to proceed to judgment without publication when the statute renders such notice indispensable to complete jurisdiction. As a court, by reason of its general powers, may entertain an ordinary case in personam so far as to order citation, and yet not have full authority to determine it before citation shall have been made, so it may order property attached upon a proper showing, yet be judicially incompetent to condemn it to pay the alleged debt sued upon, until the publication shall have tendered, to the absent owner of the property, his day in court.

When the statute does not expressly say that publication is indispensable to complete jurisdiction, yet if it requires this form of notice in all cases when personal citation cannot be had (as all the attachment laws do, as a general rule), it is still true (the advocates of the affirmative contend), that publication is jurisdictional in the statutory proceeding in rem, like citation in any suit in personam.

No one seems to doubt that lawful seizure, based upon an affidavit made in substantial accordance with the statute authorizing attachment, gives jurisdiction to order the sale of perishable goods when they have been the subject of the seizure, and to do whatever may be essential to conserve the property thus rightfully in the court's hands by its executive officer. But this is only one degree of that jurisdiction which needs publication to round it to perfection; for the legislator, in granting special authority to the courts
upon conditions, may and does provide that it shall reach completeness by successive steps; and whatever may be true respecting common-law jurisdiction, this is a gradually developed power by the terms of the statutes. Thus argue those who occupy the affirmative side of my question.

I think the majority of the profession are on that side; indeed that nearly all of the bench and bar of the country hold the views above set forth with regard to the jurisdictional character of both the affidavit and the publication in attachment suits in rem. The decisions of the Supreme Courts of the states to this effect are far too numerous to be cited here; they may be found by scores in any treatise upon attachment. And I think their position, as well as that which has been held by the federal Supreme Court, is well expressed by Chief Justice MARSHALL in an ejectment suit assailing a judgment of a court of general jurisdiction in a cause under statutory authorization, as jurisdictionless for lack of required publications: “These publications are indispensable preliminaries. They do not appear to have been made. The judgment was given without it appearing, by recital or otherwise, that the requisitions of the law had been complied with. We think this ought to have appeared in the record.

“In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed; and those facts, especially, which give jurisdiction, ought to appear in order to show that its proceedings are eorum judicis.” Thatcher v. Powell, 6 Wheat. 119.

The negative is presented in Cooper v. Reynolds, 10 Wall. 308. The court held that though the affidavit be not such as the statute requires, it has performed its function when the writ is issued and the attachment made; that the levy, even though made on such affidavit, “is the one essential requisite to jurisdiction;” that all the proceedings that follow, including notice, are merely the exercise of jurisdiction; that it could not be held that the court (whose judgment they were considering), “had no jurisdiction for want of a sufficient publication notice.”

The facts of this case may be briefly stated. Brownlow sued Reynolds, in Tennessee, for damages, but failed to effect service. He attached land, and publication was ordered, but the record did not disclose that the order was obeyed. No importance was given
to the recital in the judgment of the court of Tennessee that publication had been made, but the case before the United States Supreme Court, above entitled, was decided on the assumption that there had been no legal notice, since the record disclosed none. The land was condemned, and sold to Cooper. Reynolds brought suit of ejectment against Cooper, won it in the lower court, and Cooper took it to the United States Supreme Court. It was in this collateral suit that the above stated principles were enounced.

The syllabus of the reported case is misleading. The first four divisions of it are unobjectionable. The fifth correctly states the deliverance, that seizure alone gives jurisdiction. But the substitution of "defective or irregular affidavits and publications of notice," for invalid ones, such as the court assumed in their reasoning, is misleading. The sixth states that where there is a "valid writ and levy," the proceeding cannot be held void when collaterally assailed; but the very question before the court was whether they could be "valid" without compliance with statutory requisites, and it was held that they could so far as to be invulnerable to collateral attack.

The court said that the affidavit is "the preliminary to issuing the writ," and "has served its purpose" when the writ is issued and levied, though "requisite formalities" have not been observed; and, "though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of jurisdiction acquired by the writ levied upon the defendant's property.

"So also of the publication notice. It is the duty of the court to order such publication, and to see that it has been properly made; and, undoubtedly, if there had been no such publication, a court of error might reverse the judgment. But when the writ has been issued, the property seized, and that property has been condemned and sold, we cannot hold that there has been no jurisdiction for want of a sufficient publication notice."

The argument is as follows: In proceedings in rem, seizure gives jurisdiction—attachment proceedings, without a personal defendant, are in rem—therefore, seizure gives jurisdiction in such attachment proceedings. Is the premiss admissible? It is true that jurisdiction is acquired by seizure in all proceedings against property? There are several classes of such actions, not all governed by the same
CONSTITUTIONAL STATUTORY JURISDICTION.

rule. The difference between the \textit{actio in rem} under the law of nations to declare the \textit{status} of hostile property, and that under municipal law to vindicate a lien are quite marked. In the former the thing proceeded against has the \textit{status} of its owner, and there is no need to invite an enemy to the trial when he, by public law, has no standing in the court which he is fighting to destroy. The notice is therefore to all, having an interest in the \textit{res}, other than the enemy. In case of a prize ship, taken in battle, notice or monition is sometimes deemed unnecessary. The property of an enemy is already forfeited, under the laws of war: the judicial procedure is merely to ascertain whether the thing seized is the property of an enemy; and, if so, to declare its \textit{status}.

But a proceeding against property to enforce a lien requires notification to all interested. The thing is not to be declared forfeit, but merely condemned to satisfy debt; its surplus value belongs to its owner. Offending things are prosecuted as forfeited, but there must be general notice as well as seizure. When taken upon water, pursuant to the revenue, navigation and other laws of the country, the proceeding against them is in admiralty, after monition.

Cooley says, speaking generally of proceedings \textit{in rem}, and of admiralty by way of illustration: “In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and, if not given, the court which has jurisdiction of the property will have none to enter judgment;” that is, not complete jurisdiction to hear and determine: Cooley’s Const. Lim., 5th ed., 498.

The recognition of the difference between “jurisdiction of the property,” and “jurisdiction to enter judgment,” suggests at once the fallacy of the syllogism detected in the premises we are considering, in which one word is made to stand for both ideas. If it is not true that seizure gives jurisdiction to enter judgment unless there is notification, the only judicial power it gives is that of holding the \textit{res} for further proceedings, conserving it, converting it when necessary from perishable goods to imperishable money, &c. And this doctrine of degrees in the acquisition of special jurisdiction is as well founded in reason as in practice. A court may have authority at one stage of a cause to a limited extent; it may have more, when some second jurisdictional requisite has been observed, and it may be obliged to take several separate steps before becoming
clothed with complete power to condemn and sell the subject of the seizure. And these steps are not necessarily in the exercise of jurisdiction acquired by the first step; they may be, and often they are, several successive acquisitions of power, according to the terms of the statute conferring them, or the rules of the practice governing them.

It is of great importance that the precise meaning of the term should be understood when an argument turns upon the word "jurisdiction;" for it has many significations. We qualify it so as to show what we distinctly mean when we speak of equity, admiralty, probate, criminal, original, appellate, limited, general, territorial, state and federal jurisdictions. But when we use the term unqualifiedly, and say that there is jurisdiction when the defendant has been cited, it means merely that there is judicial authority in a personal suit: no one would contend that special authority over property could be meant in the absence of a levy. So, when it is said that seizure gives jurisdiction, we have no reference to power over the person of the defendant, but only to that over the thing seized. And we would not know the extent or degree of this power, from this general statement. In the extract above from Cooley's Constitutional Limitations, we should have been uncertain of the significance of the term jurisdiction, or should have been misled by it, had not the concluding words relieved it of all ambiguity.

The premise: "In a proceeding in rem, seizure gives jurisdiction," is true if "jurisdiction of the property" (to quote from Cooley) is meant; but it is untrue, if jurisdiction "to enter judgment" is to be understood, since "some species of publication" must be added to complete the judicial authority to condemn the property as forfeited, or to enforce the lien, conventional or legal, perfect or inchoate, which is the object of the proceeding.

The books are full of fallacies based upon the abuse of this term "jurisdiction"—its use in different senses in the same argument without differentiation. There are wrong judgments traceable to this illogical application of the term. Many judges seem to think that special jurisdiction is wholly conferred at once; so that, if custodial authority over the res is in the court, all other essentials to full jurisdiction are mere steps in the exercise of this special power.

There is nothing in procedure against a thing, more than in that
CONSTITUTIONAL STATUTORY JURISDICTION.

against a person, which can render nugatory what statutes require, or what is necessary to complete jurisdiction for any other reason. The former is not especially entitled to legal favor. There is no constitutional provision which gives it the preference. "Due course of law as administered in courts of justice" when the constitution was adopted, did not allow titles to be divested, and property shorn of conventional liens, without offering a day in court to interested parties, after property had been seized for condemnation; nor did it give courts the right and power to condemn without invitation to those parties.

But if, in any class of suits against things, seizure alone gives jurisdiction to enter judgment, it cannot be so in suits wholly governed by statutes which require more than that to confer such jurisdiction. I will enlarge upon this when discussing the middle term of the syllogism, to which I now call attention. It is: "Attachment proceedings are in rem when there is no personal defendant." It may be conceded that they are such. They have been held to be such by the Supreme Court of the United States and by many of the state Supreme Courts, and the wonder is that any tribunal ever should have doubted a fact so manifest. But they are not analogous to general proceedings in which all persons must be notified, since all are to be concluded by the decree; in that peculiarity, they are analogous to the extent of the interest of the owner of the thing seized, and the conclusiveness of the decree upon him and his privies, and therefore in the necessity for his being invited to come voluntarily to court to defend his seized property. But, were analogy wanting altogether, attachment of property must be accompanied by invitation to the owner of it, if he is not within the territorial jurisdiction so that he can be commanded to come, by summons. Publication notice is not "substantial service," as it is sometimes termed; it is merely an invitation. The states which require the mailing of a summons to a debtor living beyond their jurisdiction, do not thus change the invitation to a command, whatever they may mean to do. Doubtless such mailing may be good as notice, but it cannot hold as citation—cannot make the recipient of the summons officially mailed to him a party to the attachment suit. If the notified absentee was thus made a party, the proceeding in rem would become ancillary, and the principal suit would be a personal one.

The statutory authorization of attachment usually provides that
an affidavit shall be made; that it shall contain certain prescribed particulars; that a bond shall be given to secure the alleged debtor from harm should the creditor abuse the extraordinary remedy which he invokes; that certain information respecting the creditor's claim, the property seized to secure it, the court which is to pass upon the case, time within which the debtor may offer, &c., shall be published for a definite number of days, weeks or times. Who shall say that a legislature may not require all this, and make every requirement a condition to the special authorization to go out and administer the extraordinary remedy of attachment?

The middle term of the syllogism should be written: "Attachment proceedings are wholly in rem when there is no personal defendant, but they are subject to legislative provisions as to what gives jurisdiction."

The conclusion, that seizure alone gives jurisdiction in attachment suits in rem, is seen to be falsely drawn, if "jurisdiction to enter judgment" is meant.

If we discuss this matter of jurisdiction upon principle we shall see that the legislature could not grant authority to the courts based upon no other ground than the levy upon property in obedience to their own process. Attachment suits are not for the enforcement of a jus in re, like a proceeding to declare forfeiture; nor are they for the vindication of a perfected jus ad rem, like a mortgage foreclosure, or a suit to enforce any conventional right in the property seized. They are for the purpose of creating a lien by operation of law under extraordinary circumstances, as well as to enforce it. It is no more competent for the legislature to give the creditor a lien absolutely, than it would be to transfer property from one owner to another arbitrarily. It is only because property should be held responsible for the debts of its owner, if the debt be established and right of execution should subsequently arise upon judgment, that the legislature may provide for the conservation of the property, when the debtor by absconding, being absent, hiding his goods or the like, renders the ordinary remedy inadequate. It is therefore obligatory upon the legislative power that they should give the debtor opportunity to defend his property before the court can lawfully create a lien and order a sale to satisfy it. It is necessary to the constitutionality of the authorization that the safeguards should be required; and there can be no jurisdiction to condemn the seized property to pay the alleged debt, without them.
The court, in the Cooper case, appealed to principle as well as to authority; and it is submitted that jurisdiction complete, upon seizure pursuant to a writ valid on its face, without a sufficient underlying affidavit, without the required bond, and without notification, cannot be sustained upon principle.

The authorities cited in the case (p. 316 of 10 Wall.), were only to the point that errors in the exercise of lawful jurisdiction cannot be collaterally exposed. Nobody disputes the proposition. The acquisition of lawful special jurisdiction was the bone of contention in that case, not the exercise of it after it has once been legally lodged.

If this case is to be confined to that principle, there will be no overturning of attachment as a system, and of the received doctrine that statutory conditions must all be observed in order to create the special jurisdiction for the administration of the extraordinary remedy. I think the authority of this decision should be confined to that principle, so as to make it harmonize with prior and subsequent deliverances of the same tribunal. It is not impossible for any court to mistake the facts of a case, or to misapprehend the provisions of a statute under construction. It can hardly be conceived that any court would go so far as to hold that without any compliance with any statutory condition, it could acquire special jurisdiction by its own process, so as to preclude collateral attack.

The profession generally have not understood the Cooper case to go so far, but have considered it as merely one more authority on the exercise of full jurisdiction by a superior court. That they have not thought the prominence given to seizure important and the only point of the case, but have taken the other part of the opinion as the purport of the decision, appears from the fact that the bench and the bar of the country have held generally to the views herein set forth as their arguments in support of the affirmative of my question, notwithstanding Cooper v. Reynolds. Courts still hold statutory requisites sacramental in the creation of liens to secure ordinary debt, just as they held before that decision was rendered; and they make no exception in favor of attachment proceedings in rem.

But, the negative side asks: Is not the decision of the Supreme Court of the United States conclusive? The other side answers that the question before it was: What are the requisites to jurisdiction in an attachment case under the laws of Tennessee? That
was the one argued before the court. That was understood by it to be the question, for the statutes of that state and the decisions thereon came under review. That was the understanding of the dissenting justice who placed his non-concurrence on the ground that those statutes required more for the acquisition of jurisdiction than the record disclosed.

Though the court has since sought to give the decision a wider scope (as we shall soon see) yet the Supreme Courts of the states have not generally understood it to be of universal application. They have adhered to the doctrines set forth as those held by the affirmative side of my question, since the rendition of the decision as before. Time and space would fail me were I to attempt the presentation of the many decisions, rendered since, to the effect that conditional statutory jurisdiction cannot be lodged in any court without compliance with the conditions.

The Supreme Court of Tennessee said since: "To dispense with the prescribed publication and proceed to take jurisdiction upon the levy of the attachment alone, would be to act in violation of the statutes and not in conformity to them." "We may as well dispense with the levy as with the publication." (Walker v. Cottrell, 6 Bax. 257.) The court was discussing the Cooper case and evidently thought its bearing was upon the statutes of Tennessee.

The Supreme Court of the United States, in a later decision, has held the opposite doctrines to that of the Cooper case. In Windsor v. McVeigh, 93 U. S. 274, 278, which was an ejectment suit, in which there was a collateral attack upon a judgment rendered in a proceeding in rem "purely" so, as much as any to be found anywhere in the books, that court said: "The position of the defendant's counsel is, that, as the proceeding for the confiscation of the property was one in rem, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has been attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the res was not to condemn the property without further proceedings.
CONSTITUTIONAL STATUTORY JURISDICTION.

* * * The seizure in a suit in rem only brings the property seized within the custody of the court and informs the owner of that fact.

* * * The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end, some notification of the proceedings, beyond that arising from the seizure, presenting the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation or publication in some form. The manner of the notification is immaterial, but the notification itself is essential.

How different is this from the assertion in Cooper v. Reynolds, that seizure alone is "unquestionably" the one essential requisite to jurisdiction in proceedings "purely" in rem.

This is followed by a decided approval of Judge Story's decision in Bradstreet v. Neptune Ins. Co., 3 Sumner 601, and Woodruff v. Taylor, 20 Vt. 65; copious quotations are made, and the doctrine therein strongly asserted (that seizure alone does not give complete jurisdiction in a proceeding in rem, but that notification is jurisdictional), is stated most emphatically. Thus the argument drawn from general proceedings in rem, in the Cooper case, is completely refuted by the Supreme Court itself, so that it cannot be inferred, in limited proceedings of that sort (such as attachment when the case is not personal), that the levy alone gives complete authority to hear and determine the cause. Indeed, I cannot express this departure from the doctrine of the Cooper case better than to quote again from Windsor v. McVeigh (p. 277), where, speaking generally of publication as jurisdictional in this class of cases, the United States Supreme Court said: "Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter." [Not italicised in the text.] If this is contrary to Voorhies v. Bank of the U. S., 10 Pet. 449, Grignon v. Astor, 2 How. 319, &c., &c., it is later and should govern. Besides, it is supported by other and yet later decisions of the United States Supreme Court.

Notwithstanding the arguments drawn from principle and authority in favor of an affirmative answer to my question, there have been some state decisions within a year or two, which are in accord with the Cooper case; and its re-assertion and broadening of scope
CONSTITUTIONAL STATUTORY JURISDICTION.

in a federal one (*Matthews v. Densmore*, 109 U. S. 216), fully justify the presentation of the subject as one that needed ventilation. The fact that such eminent jurists as Judge Cooley and Mr. Justice Miller differed upon its doctrine; that very enlightened courts have given conflicting deliverances, and that it is exceedingly important to litigants that they should know what attachment judgments may be collaterally assailed, as *coram non judice*, would be sufficient apology for a more extended treatment of the mooted point, and by an abler pen.

It is certainly the safer course for practitioners to follow substantially, and even strictly, the statutes of their respective states, and not presume upon mere levies giving complete jurisdiction so as to render publication nothing more than the subsequent exercise of authority to determine; nor rely upon the levy as giving any special jurisdiction at all unless made under a valid writ issued upon an affidavit in conformity to the statutory authorization of the extraordinary remedy.

The case last mentioned presents another branch of the subject of statutory jurisdiction conditionally conferred; the ancillary attachment proceeding, as an "incident" of a pending case for debt, and the essentials to special jurisdiction thereof. I will put the matter into the form of a question, and make it the second part of my article.

**II.** In a suit *in personam*, with general jurisdiction over the defendant and the subject-matter, if the court should issue a writ conditionally authorized by statute—such as the writ of attachment—when there has not been compliance with the conditions, would the order and the levy thereunder be void for want of special jurisdiction?

Those on the affirmative side of this question say that the writ and its execution would be absolutely void, and open, therefore, to collateral attack; that a creditor, who has instituted his action for debt and brought his alleged debtor into court, has no right to have his claim secured by a lien (having the force of a mortgage if perfected by judgment) until he complies with the conditions of the statute which gives him this extraordinary remedy; that though the court has complete jurisdiction over the subject-matter of this simple suit for debt, and any error in its exercise cannot be exposed collaterally, yet it cannot assume special authority without render-
ing its assumption a nullity with all that follows it. For, they aver, the common-law jurisdiction of the suit for debt cannot include the right and power of granting a remedy repugnant to the common law, as attachment is conceded to be. And they say further that the subject-matter of such suit does not have any relation whatever to the unincumbered property of the debtor, which is in no way involved in the litigation, though it may be liable to execution after judgment; that the court cannot order its seizure beforehand, unless specially empowered to do so, by the legislature; and that if the legislative grant be upon conditions, there is no grant without compliance with the terms. And they say that attachment prior to judgment is not a step in the exercise of the common-law jurisdiction in the personal suit for debt, and cannot be defended as a mere "incident" in the course of a trial under such jurisdiction. On the contrary, they say such act, when unauthorized by statute, cannot be ordered by any writ without usurpation of power.

These views are so generally held by the bench and the bar that it may be asked why I have put the question involving them. Certainly, the profession would not have the patience to examine a long string of authorities sustaining these views. Let it suffice to say, on the other hand, that I am justified in presenting the question by the argument of the negative side in the case of Matthews v. Densmore, 109 U. S. 216, reversing the decision of the Supreme Court of Michigan.

In an ordinary suit for debt before the United States Circuit Court, sitting in Detroit, in which that court had undoubted general jurisdiction over the defendant and the subject-matter of that cause, the plaintiff filed an affidavit and prayed for a writ of attachment, but did not swear that the debt claimed was due upon contract, as the statutory authorization of attachment required. The writ was granted, however, and property belonging to the defendant, but in the lawful possession of Densmore as chattel mortgagee, a stranger to the suit, was directly attached—not reached by garnishment. Densmore sued the marshal, in a court of the state, thus collaterally assailing the order of attachment as void. Matthews, the marshal, having been cast in this suit, took it to the Supreme Court of the state; and there the judgment against him was affirmed on the ground that the affidavit was insufficient, and the United States Circuit Court, therefore, without the special jurisdiction necessary
CONSTITUTIONAL STATUTORY JURISDICTION.

107 to the issuing of the writ, and that the levy was trespass and the whole ancillary proceeding of attachment an absolute nullity.

In reversing this decision, the United States Supreme Court held that the United States Circuit Court, having had general jurisdiction of the defendant and the subject-matter of the suit pending against him for debt, may have committed voidable error by issuing the attachment writ on an insufficient affidavit, but that neither it nor the levy thereunder was absolutely void. They said of the affidavit, speaking generally, that it "has served its purpose when the writ has been issued and levied;" and they applied the principle to the one under consideration, in which the creditor had not sworn that the debt claimed was due upon contract as the statute required. They held that the levy, made under such circumstances, was a mere "incident" of the ordinary suit for debt which was pending under the general jurisdiction of the Circuit Court. What had been a mere remark in the Cooper case by way of distinguishing attachment suits in personam from those in rem—that the issuance of the writ, in such case, is a mere "incident"—was now repeated and made a reason for judgment. The general jurisdiction seemed to be found to include power over this "incident." The necessity of special jurisdiction over the ancillary proceeding, notwithstanding the general jurisdiction over the main case, was not asserted but entirely overlooked. The court said: "The writ cannot be absolutely void by reason of errors or mistakes in the preliminary acts which precede its issue—it may be voidable"—speaking generally of attachment writs. Again, it said that the writ may be issued without the observance of all the "requisite formalities," yet the absence of them is not thought fatal to the acquisition of jurisdiction in the ancillary proceeding. All this is equivalent to saying that without any affidavit at all, and without complying with the statutory requisites at all, a court of general jurisdiction may issue attachments which cannot be collaterally assailed.

It is equivalent; for though the court called the affidavit "defective," the document was before them, not only written in the record, but printed in a foot note to the report of the case as decided in 43d Michigan, showing that there was no oath to the maturity of the debt as the statute required; showing that the affidavit was "insufficient" as Judge Cooley had characterized it. And, though the court wrote of the non-observance of "requisite formalities,"
the record before it showed that "requisite" authorization was the thing wanting in the case. The fault was not informality but invalidity.

The court virtually assumed the invalidity of the "preliminaries," and planted this personal case on the principle announced in the Cooper case in rem; that a levy, rightful or wrongful by order of a superior court, cannot be questioned except in an appellate court. The difference between the two deliverances with regard to jurisdiction, however, should be noted; in the one it is held that the court gets it by the service of its own process—in other words, that seizure gives jurisdiction in an attachment suit in rem;—in the other, that the general jurisdiction in a pending personal case justifies ancillary attachment.

The supporters of this decision and the negative of my question contend that wrongful assumptions of special jurisdiction by a superior court cannot be treated by an equal tribunal, as nullities; especially, that those of a federal court cannot be collaterally attacked in a state court. Having general jurisdiction over the person of the defendant and the subject-matter of the personal suit, such court may employ extraordinary remedies conditionally conferred by statute; and, if they err in doing so, it is in the exercise of the general jurisdiction that they err, and therefore only an appellate court can review them. There is presumption that the general jurisdiction has not been exceeded. Who but a higher magistrate shall decide that there has been excess, when a writ has been issued during the pendency of a cause rightly before the court? If any equal court may inquire into the jurisdictional right to issue it, may not some other equal court inquire into that investigating court's right to inquire? If the Michigan court could pass upon the federal circuit court's jurisdictional power to order an attachment, why may not the latter inquire into the jurisdictional right of the state court to decide upon the affidavit's merits and upon the validity of the writ which was drawn in question in Matthews v. Densmore?

The negative side of my question further say that the presence of the defendant in court in that case gave him the opportunity to object to the writ; that he only had the right of objecting; that his silence was assent to the special jurisdiction assumed.

The affirmative make the rejoinders, 1st, that jurisdiction can always be questioned collaterally, and, 2d, that consent cannot give
jurisdiction; positions too well settled, they say, to require citations of authorities to support them. It is certainly true that the presence of the defendant renders publication unnecessary to jurisdiction over the ancillary proceeding, but it does not cure fatal defects in the affidavit upon which the attachment is issued; and so, when such affidavit is offered in evidence, in another court, it must be tested by the statute. Silence may be politic on the part of a defendant who sees the ancillary proceeding to be coram non judice; for he may choose to sell his property before judgment, and even before a valid attachment can be issued against it so as to create a lien that would follow it into the purchaser's hands. And other creditors might attack on good affidavits and rank the illegal attacher who levied first.

Those who espouse the affirmative side of the question are curious to know the source of the special jurisdiction of a court issuing an ancillary attachment, if it is not from the statute authorizing the remedy. Whence this power? It does not come from the common law, since the remedy is repugnant to it. It is not derived from the antiquated distraint to compel appearance, for that has grown into desuetude; and, indeed, it never did warrant such special authority. It is altogether different from the writ of distringas. It is not traceable to the Custom of London, for that required an affidavit, and also a pledge with sureties on the part of the creditor to restore the attached property in case the debtor should appear and defend within a year and a day—a valid affidavit and a valid pledge. It is not from Civil Law attachment, nor from the debt collecting system of Ancient India.

An eccentric friend suggests that a judge, trying an ordinary suit for debt, may as well inject into it a criminal order to have the defendant hung, as insert a writ to have his property taken from him before judgment when there is no statutory right to attach it. But the circuit court of Detroit was believed by the Supreme Court of Michigan to have done the latter—to have issued a writ without right. Whence the power? From the clerk, it is said. The organ of the United States Supreme Court in the case last cited, said that the officer whose duty it was to issue the writ might have made some mistake but that did not deprive the court of jurisdiction acquired by the levy. He did not seem to hold that the issuance of the writ is a judicial act done through the court's minister, but as a ministerial act for which the court is irresponsible; yet
such as will result in giving special jurisdiction when the writ shall have been obeyed by the attachment of property. But the issuance of the writ cannot be other than a judicial act, presumably by order of court though by ministration of the clerk. Even when the clerk is authorized by an act of the legislature to issue attachment writs upon the filing of the required affidavit, the authorization cannot be maintained as constitutional except on the principle that the authorization of the officer is to him in his capacity as minister or servant of the court acting as under a general judicial order. Otherwise, the authorization would be the bestowal of judicial power upon one not a judge. Were the judge dead and the bench vacant, the clerk could not issue a writ of attachment under such statute authorization.

Upon a review of the case of Matthews v. Densmore, it is but fair to conclude that the opinion of the court was not intended to be so broad as to give an unqualified negative answer to such a question as I have propounded. Certainly, so broad a deliverance would put the court not only in conflict with most of the other courts of the country but with the statutes themselves. The writer of the opinion had specially in view the position of the marshal who had a writ to execute which was fair on its face; and it was thought unjust that he should be punished for obeying an order of court. The writer of the opinion said he was bound to obey that order. It might be suggested here, that the marshal was an officer of the district rather than of the court; that he was not bound to obey the order, if it was issued without jurisdiction, to the extent of becoming a trespasser, any more than he would be obliged to amend a return at the court's behest. To punish him for not obeying an order to amend a return would be an impeachable offence. But this is digression. The only thought meant to be conveyed is that the organ of the court, with a commendable disposition to protect an officer who had evidently meant to do nothing wrong, seems to have lost sight for the moment of the question of jurisdiction in the ancillary suit.

I think the bar of the country does not understand that attachment in personal suits is to be different hereafter from what it was before this case was decided. Courts sustain the attachment statutes of their respective states as before. Statutory authorizations, coupled with conditions, are interpreted as before. Attachment is not deemed such an "incident" in the course of an ordinary
CONSTITUTIONAL STATUTORY JURISDICTION.

trial under general jurisdiction as to obviate the necessity of creating special jurisdiction as a barrier against collateral assailment. The books still bristle with reports of attachment cases, with all the old authorities cited in their pristine vigor.

I will suggest to the profession a few questions. Given, that the defendant is in court, and that there is general jurisdiction over him and the subject-matter of an ordinary suit against him for alleged debt, if attachment be made as a mere "incident" of such suit without the observance of the statutory requisites—

1. Would the attachment create a lien to secure ordinary debt?
2. Would such lien rank above those of junior attachers complying with the statute?
3. Could the debtor convey title to his property between the date of such incidental seizure and that of the judgment, such as would enable the purchaser to defend against the lien?
4. Could there be judgment with privilege on such attached property?
5. Could there be attachment as a mere "incident" in the exercise of general jurisdiction, if all attachment statutes were repealed?
6. If not, whence the jurisdiction over the "incident" except from the statute?

If ancillary attachment is a proceeding in rem distinguishable from the pending personal suit for debt, the question of jurisdiction must be identical with the one we herein first discussed. That it is such a proceeding and constitutes a sort of suit by itself, seems to be received doctrine. In an attachment case from Mississippi, the personal judgment was affirmed but the one in rem was reversed and remanded: Fitzpatrick v. Flannegan, 106 U. S. 648, 660. This might be done in a like suit from any state; for the debt being proved, the personal judgment may be affirmed; yet, at the same time, the judgment giving lien and privilege upon the attached property might be reversed for non-compliance with statutory requisites on the part of the attaching creditor. This would seem to be antagonistic to the theory that ancillary attachment is a mere incident of the main case.

If there are virtually two suits, and the personal one is under general jurisdiction, and the property one under special authority conditionally conferred by statute, why may there not be lack of the latter jurisdiction though presence of the former? And, in
case of such lack, why may not the judgment perfecting the inchoate lien of attachment be void while the personal decree is valid?

Ordinarily, the personal judgment may be executed upon any property of the defendant, whether attached in the course of the prior proceedings or not; but there are many circumstances under which the validity of the attachment before judgment would not cease to be questioned because of the general writ of execution. If the defendant should sell the res of a jurisdictionless ancillary proceeding before the rendition of the personal judgment, the purchaser would not allow its subsequent execution by the attachment creditor to pass unchallenged. If junior attachers have obtained legitimate privilege, they would be likely to question a judgment in rem which they deem coram non judice, if it should stand in the way of their perfected liens, though they might fully admit the jurisdictional character of the accompanying personal decree.

When special jurisdiction has been lodged, may not its rightful exercise be presumed after decree, just as in the case of general jurisdiction?

I think there can be no doubt of the presumption, when the exercise is by a superior court, to which the question should be confined. That is to say, if the special jurisdiction is merely that which is over property by reason of seizure alone, the court must be presumed to have acted within its power when making orders for the preservation of the property, its sale to prevent deterioration or destruction when it is of a perishable nature, and the like. When the special authority is complete, so that there is jurisdiction to enter judgment, doubtless there is presumption, after decree, that a superior court has rightfully exercised this power, so that errors can be corrected only in an appellate tribunal.

The mistake, to which even courts have been found liable, is the confounding of partial jurisdiction with complete authority to hear and determine, so as to make the requisites that must follow the initial one (such as giving notice), mere acts in the exercise of the custodial authority consequent upon the levy. What the statute makes a condition must be observed at any stage of the cause under penalty of nullity for want of the right and power which compliance would give. It is, therefore, not true that a valid writ, based upon a sufficient affidavit, executed by a lawful levy, can possibly render the statutory requirement of other acts any the less mandatory in order to jurisdiction to hear and determine; and their
observance is not presumable after decree, when the judgment of a
superior court is collaterally assailed.

III. Is the rule uniform in all cases where jurisdiction is condi-
tionally conferred by statute?

There are many conditional authorizations, such as those to order
the sale of minors’ real estate, to empower the administrator to sell
the lands of a decedent to pay debts, to appoint commissioners to
assess property, to raise money for some public improvement, to
carry out drainage laws, to grant a divorce, to emancipate a minor,
to declare the status of a pauper, to commit an insane person to
an asylum, to effectuate bankrupt laws, etc., etc. These legislative
grants of power to the judiciary are usually coupled with condi-
tions, such as the giving of notice—the requirement of stated pre-
liminaries of various sorts. And when the statute authorizes judi-
cial procedure on compliance with the conditions imposed, the rule
is that the court has no authority if they be disregarded. For
instance, a court of chancery has no authority to decree the sale of
the real estate of a minor, under a special statute, unless it strictly
pursues the course prescribed; for without this, no title would pass
to the purchaser by virtue of the court’s general jurisdiction:
Williamson v. Ball, 8 How. 566. In an ejectment suit, Justice
Swayne, for the Supreme Court, said: “The authorities, which
require the fact of competent jurisdiction to be presumed in certain
cases, have no application here. The statute is in contravention of
the common law, and hence to be strictly construed.” And he
held notice to be jurisdictional, and the administrator’s sale (which
he was considering) absolutely void for the want of it, though the
proceedings had been in a court of general jurisdiction: Ransom
v. Williams, 2 Wall. 818.

I think the rule is uniform with respect to all the statutory
authorizations above mentioned; and that the two decisions cited
are samples of many of like import.

Tax suits furnish good illustrations. The requirement, in Illi-
nois, that the collecting officer shall report delinquency to the court
must be obeyed to “call into activity an authority of the court be-
fore latent;” and it is held that the report must conform to the
statute in every substantial particular, “or it will fail entirely to
have any efficiency for the purpose:” Cooley on Taxation, 2d ed.
527, and cases there cited; Marsh v. Chestnut, 14 Ill. 223;
CONSTITUTIONAL STATUTORY JURISDICTION.

Charles v. Waugh, 35 Id. 315; Morrill v. Swartz, 39 Id. 108; Fox v. Turtle, 55 Id. 377; People v. Otis, 74 Id. 384; Andrews v. People, 75 Id. 605. The author goes on to say that proceedings of this nature are not usually against parties, but have regard to the taxed land itself; and that, "as in all other cases of proceedings in rem, if the law makes provision for publication of notice in a form and manner reasonably calculated to bring the proceedings to the knowledge of the parties who exercise ordinary diligence in looking after their interests, it is all that can be required." Where the sheriff made no such report as the statute provided for, it was held that the court never obtained jurisdiction to proceed in the case. (Id., citing several decisions.) Then follows a list of statutory requisites disregarded, which non-observance rendered the judgments void: Proceeding to judgment before the time limited for the voluntary payment of taxes had expired; rendering a judgment in a proceeding not taken against all owners and claimants, and by service on the land; failure of the collector's report to show whether the taxes were state or county taxes, etc. The defects "went to the power of the court to act at all:" Id.

Tax suits being of statutory authorization, there must be compliance with all the conditions of the grant, or nullity will result: Jackson v. Esty, 7 Cow. 148.

In an action of ejectment, it was held that the court which had decreed the sale of land to effect a partition, was without jurisdiction because the statutory requirement that the petitioners must make affidavit that they were ignorant of the names and rights of the parties unknown, did not appear from the record to have been obeyed: Denning v. Corwin, 11 Wend. 648; but it has since been held that, in such case, there would be presumption in favor of the record of a superior court: Borden v. Fitch, 15 Johns. 121. The Supreme Court was authorized by statute to appoint commissioners to assess land to pay for the opening of a street; they were appointed, and they made an assessment which was confirmed by the court, and land was sold under the judgment. It was held that the jurisdiction, being special, depended upon compliance with the statute: Striker v. Kelly, 7 Hill 10. The judgment of a court-martial was held void because the special jurisdiction conferred by statute had not lodged by compliance with the conditions imposed: Mills v. Martin, 19 Johns. 7, 33. When the penalty of an appeal bond is not double the amount of the damages and costs of the
judgment rendered, as required by statute, the Court of Common Pleas acquired no jurisdiction of the case appealed to it: *Latham v. Edgerton*, 9 Cow. 227. In a proceeding for a surrogate's sale to pay debts, it is essential to jurisdiction that the petition should have been accompanied by an account of the debts and of the personal estate in conformity to the statute: *Bloom v. Burdick*, 1 Hill 130. A decree of a county court, authorizing the sale of land, is absolutely void if the notice required by statute has not been given: *Haywood v. Collins*, 60 Ill. 328. And the cases applying the general rule to attachment authorization are numerous.

Is there any exception to this rule? On principle, there would seem to be none, for the same reason is applicable to all statutory authorizations of special jurisdiction conditionally conferred. But an exception was suggested in *Cooper v. Reynolds*, supra. The court, admitting the rule, and instancing the requirement of publication in divorce suits, proceedings to compel conveyance and other judicial actions pursuant to statute as coming under it, distinguished them from attachment, and held that the latter was exceptional when *in rem*.

Prior to this, the rule had been held invariable—applicable alike to all statutory proceedings whether personal or otherwise. It had been so held generally, though there were some decisions that were somewhat to the contrary in respect to presumptions after decree; they did not draw a line, however, between personal suits and others, in this matter.

Proceedings to declare personal status, such as that of a bankrupt, pauper or lunatic; of a minor praying to be emancipated; of a husband or wife claiming a divorce, etc., have been treated as *in rem* because the decree fixing the status is binding on all the world: 2 Smith's Leading Cases, Am. ed., 689 et seq. And attachment has been considered not *in rem*, because the judgment is not thus conclusive upon all persons: *Magee v. Beirne*, 39 Penn. St. 62; *Benson v. Cilly*, 8 Ohio N. S. 604. So, if the universal conclusiveness of the decree were the true criterion by which to judge whether a given proceeding be *in rem*, divorce suits and others instanced by the Supreme Court as coming under the rule because of their personal character, would really be such a proceeding, while attachment would not belong to this class. If fixing the status of a person as divorced (which is universally conclusive), though done in a proceeding nominally personal, is like fixing the
status of a thing as guilty, hostile or indebted, the argument for the exception fails to hold good.

I concede, however, that though the decree sought may be to bind others than parties and privies, the proceeding cannot be in rem unless it is, in effect, at least, against property itself. And, if it is a proceeding against property, in form, or effect, or both, it is necessarily in rem whether the decree sought be universally conclusive or not. I think the definition in the cases last cited is incorrect, and I am glad the Supreme Court of the United States have not respected it, but have held attachment cases to be in rem where there is no personal defendant, notwithstanding the form of the suit. But, if universality of conclusiveness were the rule by which to distinguish between the two classes of cases, the tables would be completely turned; a divorce proceeding could be in rem and an attachment proceeding in personam, and the argument for the exception would fall to the ground.

I agree with the court that the latter is, and the former is not against a thing. But does this render the latter exceptional to the rule that conditions must be observed when prescribed by a statute conferring special jurisdiction?

If it were true that proceedings against hostile things under the law of nations (directed it may be, by municipal statute), would divest liens without notice to lienholders not enemies; if it were true that proceedings against offending things require no publication as essential to jurisdiction to determine the status; if it were true that indebted property could be condemned to pay in a general proceeding, without notification, still, it must be insisted, the legislature of a state has the right to impose conditions, and to make publication one of them, when creating a remedy and conferring jurisdiction to apply it. No general exception can be framed that would relieve from the necessity of following the statute thus creating and conferring. How can we say that the legislative power is restricted or not, according to the character of the remedy it authorizes? How can we say that the state can prescribe the essentials of a statutory proceeding against a person, yet cannot in such proceeding against a thing? There is nothing in the nature of the latter to justify cutting off interested persons from invitation to their day in court. The jurisdictionless character of a decree in rem, where this privilege is denied to one entitled to it, and the indispensability of notification of some sort to jurisdiction complete,
are not too strongly stated in *Windsor v. McVeigh*, supra. And when the proceeding against property is statutory, and conditions are prescribed, the rule must be followed, even were general actions against things governed by a different practice. And certainly it would have been so held in the Cooper case, had the justices all understood, with the dissenting one, that the laws of Tennessee made publication jurisdictional.

The sole reason, on which the exception was based when first enunciated, was abandoned in *Matthews v. Densmore*, supra; for, the attachment therein, being treated as a mere "incident" in the exercise of general jurisdiction in a personal suit, could not have its non-conformity to statute justified on the plea that it was *in rem*. And yet that case was decided on the authority of *Cooper v. Reynolds*.

In conclusion, I call attention to the bearing which the questions above propounded have upon the prevalent system of attachment in this country, as distinguished from proceedings under the same name in other countries. If ancillary attachment is a mere "incident" in the exercise of general jurisdiction, not dependent upon compliance with statutory requisites; if attachment of property with the proceedings thereon, when there is no personal defendant is to be treated as an action *in rem* not statutory, it must be on the theory that the remedy is authorized by the common law. Indeed, it has been seriously contended that it has come to us from that source. Because Blackstone, Fleta, and others have written of attachment when commenting on the common law, and because it is certainly very ancient, and is found in the jurisprudence of many countries, the advocates of the theory are slow to concede that our remedy of the same name is wholly dependent upon our statutes. The truth is, the commentators mentioned were writing of a very different thing. They were treating of attachment by distraint, distingras, compulsory process to force the debtor to come into court. The custom of taking gage, putting the creditor in possession on giving security, after a judgment *nisi*, which had its counterpart in almost every country of the continent—certainly in Italy, France and Spain—as well as the common-law distraint above mentioned (which has been somewhat adopted in New England and Pennsylvania, with something similar in Delaware and formerly in Maryland and other states), is wholly unlike our prevalent system in which attachment is a proceeding to *create* and