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THE EFFECT OF RECENT AMENDMENTS
IN THE LAW OF ATTACHMENT AS A PROVISIONAL REMEDY
IN THE NEW YORK CODE OF CIVIL PROCEDURE.

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1896.

I N T R O D U C T I O N

The object of this thesis is to show the effect of the principal amendments to the Code of Civil Procedure of New York of 1894 and 1895 in the law of attachment as a provisional remedy. The changes that have been made are radical and opposed in some measure to the general law of attachment. In order that the extent and nature of the changes may be completely shown, and what principles of the law of attachment have been disregarded, the first part of this work has been given up to a short history of the law of attachment and a summary of those principles that are applicable in most of the States, and upon which the statutes and decisions governing the remedy are usually based. The second part is made up of the sections that have been amended in 1894 and 1895, in their original form and as amended, and an explanation of the object and effect of the amendments. The amendments to sections 652 and 658 have not been considered, being merely changes in practice and of no general interest.

HISTORY AND GENERAL LAW OF ATTACHMENT.

DEFINITION:-

Attachment is the preliminary arrest of the defendant's property as security for the eventual satisfaction of the plaintiff's demand. It is a preliminary levy anticipatory of final execution. Attachment of the debtor's property before judgment is a remedy of great antiquity. From the first its object has been to provide a means to enforce the rights of creditors against debtors who are non-residents, or who have absconded or concealed themselves, and over whom, consequently, it is impossible to obtain jurisdiction.

UNDER THE CIVIL LAW:-

Under the civil law in its earliest stages there was allowed a seizure of the property of absconding or insolvent debtors upon the institution of proceedings against them. This practice was affirmed in the Institutes and Digests of Justinian, and new processes for the attainment of the same purpose added. "If a man secrete himself with the intent to defraud his creditors, and is not defended by a procurator I will order his property seized and sold." (Digest 42, 71) A preliminary citation always preceded the process and on the failure of the **debtor** to appear, the attachment issued.

AT COMMON LAW:-

The common law writ of attachment was derived from

the Roman Law and preserved most of its characteristics. It is thus described by Blackstone,- "In like manner as in the Civil Law the first process is by personal citation. If the defendant disobeys the verbal monition, the next process is by a writ of attachment. The sheriff is commanded to take certain of his goods if he do not appear." (3 Blackstone's Com. 280)

CUSTOM OF LONDON:-

By the ancient custom of London a creditor was permitted to attach the chattel interests and credits of the debtor. This custom differed from the common law in that no notice to the defendant was necessary. The process was made to extend to foreign debtors and was hence sometimes called foreign attachment. The peculiar features of the custom of London have been preserved in substance in most of the statutes regulating attachment in the various States of the Union, but the scope of the remedy has been enlarged and diversified. The necessity of certain grounds for resort to the remedy and the requirement of the undertaking on the part of the plaintiff, to indemnify the defendant against damages arising out of the attachment, are additions to the original process.

SCOPE OF PART I:-

It is intended here to give the most general outline of the law of attachment as it exists in the United States, no particular reference being made to the statute of any single state, but only to those characteristics of the remedy common to most of them, and the general principles

upon which legislation on attachment proceeds.

CAUSE OF ACTION.

Attachment must be founded on the present right to recover from the defendant a certain sum of money. This general rule is based upon the ground that if the claim is not due, the cause of action is not complete. There being no right of action, naturally there can be no provisional remedy. The remedy only contemplates those actions where the damages are liquidated, or may be liquidated by computation, or the application of the rules of evidence. As a result of this, actions on personal torts are excluded, as the damages can only be ascertained by the circumstances of each individual case. There can be no attachment in an action ex contractu when the cause of action affords no rule whereby damages may be ascertained, where the damages cannot be stated in the affidavit of the plaintiff, or where the amount of damages is necessarily uncertain until the jury has determined it.

IN EQUITY PROCEEDINGS:-

The remedy of attachment can only be used where the relief demanded consists of money damages only; hence it is not applicable to equity proceedings. However, if there is some equitable relief demanded before money judgment can be rendered, in an action where the ultimate object is the recovery of money damages, attachment may issue and the preliminary equitable relief does not constitute the action any the less an action for money damages. (Corson v. Ball, 47 Barb. 452)

ACTION ON A JUDGMENT:-

It is somewhat unsettled whether attachment will issue in an action on a judgment. It depends whether judgments are regarded as contracts, and the weight of authority seems to deem them such for the purpose of attachment, at least. (Gutta Percha & Rubber Mfg. Co. v. Mayor, 108 N. Y. 276; Morse v. Tappan, 3 Gray 411; contra, Rau v. Hulbert, 17 Ill. 572) A judgment is certainly a debt, and where the remedy is not limited to contract actions, but includes actions on debts, then attachment will issue in an action on a judgment.

ACTIONS ON PENALTIES:-

Actions on penalties are of two kinds, and whether attachment may be issued therein depends upon the nature of the penalty. Penalties arise in the case of breach of contract or through the breach of a statutory requirement. The action for damages for the breach of the agreement containing the stipulated penalty is clearly an action ex contractu. If the damages are capable of liquidation attachment may issue in such an action. (Lord v. Sladdis, 6 Iowa 57) Penalties created by law are contracts in the same sense that judgments are. In jurisdictions where penalties imposed by law are regarded as contracts attachment will issue in actions thereon.

GROUNDS FOR ATTACHMENT.

The general ground for attachment which probably exists in every State, is the non-residence of the defendant.

The question of non-residence is one of fact, to be gathered from the intent of the defendant and the duration and character of the absence.

CORPORATIONS:-

A corporation is a resident of the State creating it, for the purposes of suits, and consequently a non-resident of all other States for the same purposes. (Menick v. Van Santvoord, 34 N. Y. 208) Therefore, under proper circumstances, the property of foreign corporations may be attached. This is the case even though all, or a majority, of the stockholders of the corporation are citizens of the State where the action is brought, and notwithstanding that the corporation has a place of business in that State.

CONCEALED OR ABSCONDED DEBTOR:-

Attachment will issue when the defendant has absconded or concealed himself. In order that attachment may issue on these grounds, two things must be shown,- actual removal and intent by such act to defraud creditors or avoid service. It is only necessary to prove one of the above intents.

FRAUDULENT DISPOSITION OF PROPERTY:-

The remedy of attachment was first extended to prevent the fraudulent disposition of the debtor's property, in 1830, by an act of the Legislature of the State of New York. Since then it has been adopted generally in this country. The remedy is here preventive as well as punitive, being applicable when there is merely intent to fraudulently dispose of property, as well as when there has been actual fraudulent

disposition.

PARTIES TO THE ACTION.

PLAINTIFF:-

Any person who may maintain an action on contract may have attachment against the property of the defendant under proper circumstances. Therefore, in the absence of express statutory disability a non-resident may obtain an attachment. (Kneeland on Attachment, Sec. 261)

DEFENDANT:-

Attachment will not lie against property of a deceased debtor held by his personal representatives, (Matter of Hurd, 9 Wend. 465), nor against the property of a defunct corporation in the hands of trustees, nor against foreign receivers of insolvent estates. In those States where attachment is regarded as a lien, the remedy will survive the death of the attachment debtor, happening during the pendency of the action.

COPARTNERS:-

As a general proposition it may be said that execution may be had against the property of a co-partnership on a judgment against a co-partner on his individual debt, or against a co-partner upon his joint liability for a firm debt. The same rule applies to the process of attachment. An attachment may issue against a partnership if one or more of the partners are persons against whom the remedy may be directed.

CORPORATIONS:-

The rules of attachment apply equally to corporations and individuals, in the absence of special statutory provisions. For the purpose of suits corporations are considered in the same light as natural persons when they are placed in the same situation that natural persons would be. (South Carolina R. R. Co. v. McDonald, 5 Ga. 531)

UNINCORPORATED ASSOCIATIONS:-

Attachment against unincorporated associations follows the procedure of suits against such bodies; namely,- against the association as a body; and, secondly, against the members on their individual liability to reach their separate estates. An attachment against a member of an incorporated association for his individual debt can only reach the stock or interest the debtor holds in the company.

PROPERTY SUBJECT TO ATTACHMENT.**PERSONAL PROPERTY:-**

That property which may be levied upon by execution may be attached. (Smith v. Orser, 42 N. Y. 132; Pierce v. Jackson, 6 Mass. 242; Packs v. Cushman, 9 Vt. 320; Myers v. Mott, 29 Cal. 359) Attachment will furthermore issue against accounts due and property held for the debtor. The following are exempt from attachment: patent rights, books and papers, except for the purpose of evidence, state or municipal property, and private property in actual use. The latter exemption is now restricted in this country to property worn

upon or attached to the person of the debtor. Equitable interests may not be attached, except where the defendant has possession of the property, and right to hold the same, in which case the interest is attachable. Therefore, property covered by a chattel mortgage may be attached as long as possession and right of possession remain in the mortgagor. (Bailey v. Burton, 8 Wend. 339; Menit v. Niles, 25 Ill. 283; Fairbanks v. Phelps, 22 Pick. 535) This necessity of the right of possession prevents goods pledged from being attached. Fixtures and emblements may be attached when they are such personal property that the owner would otherwise have the right to dispose of them.

FRAUDULENT TRANSFERS:-

Transfers made to hinder, delay or defraud creditors do not pass title, and property so transferred may be attached for the debts of the fraudulent assignor. (Booth v. Bruce, 33 N. Y. 139; Russell v. Winne, 37 N. Y. 591) This rule does not apply to transfers of choses in action and property exempt by law from levy and sale on execution.

EXEMPTIONS:-

The custom of exempting certain property from levy on attachment or execution had an early origin. It has generally extended to those articles of furniture, husbandry and apparel that are immediately necessary to the livelihood and ordinary welfare of the debtor. The specific articles exempted are commonly enumerated in the statutes that regulate the process. Besides these exemptions of personalty, there

is the exemption of realty known as homestead, a creation of thirty years standing, and peculiar to the United States. The value of the real property so exempt differs in the various States. It is founded on public policy and is only applicable where the debtor and owner of the property is the head of a family.

REAL PROPERTY:-

Interests in real estate are attachable after the remedy against personalty has been exhausted. There can be no attachment against real property as such, when the defendant's interest is less than a life estate. The interest of a mortgagor is real estate and is attachable. Trust estates are attachable in an action against the cestui que trust, if the latter has an assignable interest therein. Vested estates in expectancy are attachable. Tenancy by curtesy is an attachable interest in the absence of statutory provision to the contrary. Until there has been an assignment, dower is not attachable. (Tompkins v. Fonda, 4 Paige 448) An attachment against realty only applies to such interests of the defendant as are assignable. When the defendant holds lands in common, attachment must issue against the interest he holds. After partition, attachment and final execution in proper cases may issue against the part owned by the defendant.

PART II.G A R N I S H M E N T

Garnishment is a process whereby property which cannot be seized may be reached and debts due to the defendant subjected to the debt due from the defendant to the attaching creditor. This process was peculiar to the custom of London and is now a feature of attachment in this country. In New York and in other Code States the property in the hands of third parties is attached by serving a copy of the warrant on the holder and requiring from him a certificate stating what property of the defendant he holds, and by virtue of what right it is held. The ordinary procedure is by way of a separate action which is known as garnishment or trustee process. Speaking broadly, we may use the term garnishment as a manner of obtaining property held by, or money due from, third persons. The object is the same in all jurisdictions and the difference in the remedy in the Code States and those States providing for a separate action is only in form and not in substance. Garnishment only reaches leviable property, and only that property which might be attached if it were in the hands of the defendant. There may be no garnishment if the bailee of property has a lien thereon. (*Brownell v. Camby*, 3 Duer 9) In some states property pledged may be garnished and held, subject to the pledgee's interest. (*Boardman v. Cushing*, 12 N. H. 105; *Hughes v. Cory*, 20 Iowa 399) In

New York when goods are held subject to the bailee's lien, the Code provides that the bailor's interest may be attached by serving on the bailee a notice stating the interest levied upon.

NON-RESIDENTS:-

Non-residents cannot be made subject to garnishment with reference to goods held for, or debts owing to, other non-residents. This is the case in some jurisdictions only where the defendant is a resident and the garnishee a non-resident. When the non-resident garnishee has contracted to pay the defendant money within the State, where the defendant has been summoned; or where he has property of the defendant within that State, the above rules do not apply.

(Drake on Attachment, Sec. 475)

POSSESSION NECESSARY:-

In order that garnishment may lie, the garnishee must have actual possession of the property. Constructive possession will not be sufficient. (Andrews v. Ludlow, 5 Pick. 28)

PROPERTY IN CUSTODIA LEGIS:-

Property in custody of the court or held by a person appointed by the court, may not be attached. This is the rule in its broadest form. The title to property held by the court is vested in the court and there may be no garnishment thereof. Thus property held by a sheriff on attachment is protected against garnishment. The weight of authority has decided that money belonging to the defendant and held by the

sheriff after execution sale is not subject to garnishment. (Turner v. Feudall, 1 Cranch 116; Dubois v. Dubois, 6 Cowen 494) Opposing decisions hold that the right to require the sheriff to pay over the money is a chose in action and therefore subject to garnishment. (Lovejoy v. Tee, 35 Vt. 430; Woodbridge v. Morse, 5 N. H. 519) Money paid into court or held by executors, administrators or guardians is subject to garnishment only when the amount due to the various parties has been determined and the court has ordered the same paid.

PROPERTY HELD BY TRUSTEES:-

Property held by trustees and receivers may not be attached by way of garnishment, but surplus after the execution of the trust may be reached.

GARNISHMENT OF DEBTS AND CHUSES IN ACTION:-

Garnishment can only reach those debts due to the defendant, on which he would have the right to bring an action for a specific sum of money. This is the strict rule and does not apply in those states where all the "property rights of the defendant in the hands of others" are included in the terms of the statute. All choses in action of the defendant whether due or certain to become due, are subject to garnishment. Claims ex delicto or for unliquidated damages cannot be the subject of garnishment proceedings.

PART III.SECTION 635

Prior to 1894 section 635 of the New York Code of Civil Procedure read as follows,- "A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff as specified in the next section, when the action is to recover a sum of money only, as damages for one or more of the following causes. 1. Breach of contract, express or implied, other than a contract to marry. 2. Wrongful conversion of personal property. 3. Any other injury to personal property in consequence of negligence, fraud or other wrongful act." It will be seen that this excluded injury to person or to real property resulting from negligence, fraud or other wrongful act.

AMENDMENT OF 1894:-

In 1894 the above section was amended so as to include tortious injuries to real property. There was no good reason why this class of actions should have been hitherto excluded. The general effect of the amendment is obvious and the change was undoubtedly founded on sound principles.

AMENDMENT OF 1895:-

In 1895 the same clause was again amended and reads,- "and injury to person or property in consequence of negligence, fraud or other wrongful act." This amendment is opposed to the rule before stated, that in order that attachment

may issue the action must be for liquidated damages, or for damages which may be liquidated by application of rules of evidence. The liquidation of the damages for personal injury can only be accomplished by the jury. The practice in New York State is to make a demand for damages in these cases far in excess of the sum it is expected to recover. This may be for the purpose of forcing a settlement, or to create an impression on the jury, or both. At any rate, to permit attachment to issue for the amount alleged as damages in the complaint, and to require the defendant to give a bond for an equal amount before he can get his property back, is plainly in many cases a hardship. On the face of the statute, however, such seems to be the right of the plaintiff.

CONSTRUCTION OF THE AMENDMENT:-

In a case decided in the Superior Court of New York City, (Rouge v. Rouge, 35 N. Y. Supp. 836), this amendment was construed differently. The facts were as follows: The action was brought by the plaintiff for \$25,000.00 damages for the alienation of her husband's affections. Attachment was issued against the defendant's property to the amount of the damages prayed for in the complaint. A motion was made by the defendant to have the attachment vacated. The motion was denied, but the amount reduced to \$5,000.00. The learned judge said,- "The legislature certainly did not intend that the attachment should run for any amount the plaintiff might see fit to insert in the ad damnum of his complaint. The plaintiff might have put them at \$250,000.00, but it does not

follow that the property of the defendant is to be impounded to answer the demand in this action. Upon the facts stated in the complaint and affidavit it is not at all likely that the plaintiff would recover more than \$5,000.00 damages, and there is no reason why the attachment should be held for a greater amount."

This decision seems to be founded on good sense, but can hardly be considered a correct construction of the words of the Code. The remedy must come from legislation and at present attachment should be to the full amount of the demand for damages in actions for personal injury.

S E C T I O N 6 3 6

The next section of the Code that has been recently amended is section 636. Before the amendments it read as follows:- "To entitle the plaintiff to such a warrant he must show by affidavit to the satisfaction of the judge granting the same as follows: 1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein above all counterclaims known to him. 2. That the defendant is either a foreign corporation or is not a resident of the State, or if he is a natural person and a resident of the State, that he has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with

like intent; or if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the State with intent to defraud his or its creditors; or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete property with the like intent."

AMENDMENT OF 1894:-

In 1894 the following was added to the above section,- "or when for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing under his own hand or signature, or under the hand or signature of a duly authorized agent made with his knowledge and acquiescence, as to his financial responsibility or standing."

EFFECT OF AMENDMENT:-

This amendment is a natural extension of the remedy as a protection against fraudulent debtors. Before the amendment the section included actions against non-residents and those debtors who removed or concealed themselves or their property, or who fraudulently assigned the latter. The remedy is now directed as well against those debtors who have made false statements in writing for the purpose of procuring credit, or for the extension of credit. The amendment is a distinct innovation, the Code previously following the general rule of permitting attachment only under the circumstances above stated, namely: the inaccessibility of the defendant or fraudulent acts of the latter intended to remove his property

from the reach of the court. The amendment, however, is of another class. It provides that attachment may issue in an action on a contract when there has been fraud in the inception of the contract, and no other attendant circumstances need be shown.

AMENDMENT OF 1895:-

In 1895 the section under discussion was further amended by adding the following clause,- "or where the defendant being an adult and a resident of the State, has been continuously without the United States for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf as prescribed in section four hundred and thirty of this act, or a designation so made no longer remains in force, or service upon the person so designated cannot be made within the State after diligent effort.

EFFECT OF AMENDMENT:-

The effect of this amendment is to permit attachment to issue when an adult resident of the State has been without the United States continuously for six months prior to the granting of the order of publication of the summons. Under these circumstances it is not necessary to prove any intended fraud on the part of the defendant in absenting himself. It might be said that such absence with neglect to provide for proper substitutes to receive service, established a conclusive presumption of fraudulent intent in the de-

fendant.

S E C T I O N 6 3 7

AMENDMENT OF 1894:-

The amendment to section 637 that was introduced in 1894 has such slight connection with the section to which it is annexed that it is unnecessary to recite the latter. The amendment provides for attachment in a certain cause of action, and reads as follows:- "Or in an action in favor of a private person or corporation brought to recover damages for an injury to personal property when the liability arose in whole or in part in consequence of the false statements of the defendant as to his responsibility or credit in writing, under the hand or signature of the defendant or his authorized agent made with his knowledge and acquiescence." Attachment may therefore be had in an action for injury to personal property caused by the circumstances detailed in the amendment, without showing any attendant circumstances of non-residency or concealment of the defendant. Like the similar amendment of 1894 to section 636, and for the same reasons, it is an exception to the general law of attachment.

S U M M A R Y

The recent amendments to the law of attachment have for their purpose a general extension of the remedy. The number of actions in which attachment may be had has been greatly increased. Slight regard has been paid to the estab-

lished rules of attachment, the legislature evidently considering the necessity paramount to precedent. It is too soon to say whether such necessity is fancied or real. The practical effect of the amendments can only be shown by time and experience. The extension of the remedy being against the fraudulent debtor, and in favor of creditors, the latter class generally not too well protected;- on the face of the amendments it seems that they are a satisfactory addition to the law of Attachment under the Code.