St. John's Law Review

Volume 49
Number 3 *Volume 49, Spring 1975, Number 3*

Article 16

CPLR 6201: Federal Court Declares New York's Attachment Staute Unconstitutional

St. John's Law Review

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sued on the debt by the judgment debtor, the court felt this right should not be forfeited when the judgment creditor in effect substitutes as plaintiff.[218]

In so holding, *Leedpak* is at odds with the decision of the Supreme Court, Queens County, in *First Small Business Investment Corp. v. Zaretsky*,[219] involving a special proceeding instituted under CPLR 5225(b).[220] Offering no rationale for its decision, the *Zaretsky* court summarily denied both parties a right to a jury trial of the disputed issues.[221]

The decision in *Leedpak* appears to be the better view.[222] It is well settled that when a plaintiff joins a prayer for equitable relief with a legal claim, the defendant is not deprived of the right to a jury trial.[223] Likewise, in a special proceeding pursuant to CPLR 5227, combining, as it does, legal and equitable elements in one cause of action, a respondent should not be deprived of a jury trial on issues clearly legal in nature.[224]

ARTICLE 62 — ATTACHMENT

CPLR 6201: Federal court declares New York's attachment statute unconstitutional.

The New York attachment statute, CPLR 6201,[225] was designed

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218 78 Misc. 2d at 521, 356 N.Y.S.2d at 1013. *See* 7B McKINNEY'S CPLR 5225, supp. commentary at 113-14 (1974).

219 46 Misc. 2d 328, 259 N.Y.S.2d 700 (Sup. Ct. Queens County 1965).

220 CPLR 5225(b) deals with the judgment debtor's personal property in general while CPLR 5227 specifically controls where the property involved is a debt owed to the judgment debtor. The provisions are so analogous that decisions affecting one will, more than likely, apply equally to the other. *See* 7B McKINNEY'S CPLR 5227, commentary at 124 (1963). *See also* note 203 *supra*.

221 The *Zaretsky* court gave no reason for denying a jury trial, stating summarily that "in this case the parties are not entitled as of right to a jury trial of the disputed issues," 46 Misc. 2d at 331, 259 N.Y.S.2d at 703, *citing* American Sur. Co. v. Conner, 251 N.Y. 1, 166 N.E. 783 (1929). *American Surety* merely abrogated the rule that a creditor need wait for his debt to mature and then obtain a judgment and lien prior to maintaining a suit in equity to annul a fraudulent conveyance. The Court, however, reserved comment as to the proper mode of trial where the debt is in dispute. The decision offers scant support for the position taken by the *Zaretsky* court.

222 *See* 7B McKINNEY'S CPLR 5225, supp. commentary at 113 (1974).

223 *See* Di Menna v. Cooper & Evans Co., 220 N.Y. 391, 396, 115 N.E. 993, 994 (1917); L.C.J. Realty Corp. v. Back, 37 App. Div. 2d 840, 326 N.Y.S.2d 28 (2d Dep't 1971) (mem.); 4 WK&M ¶ 4101.37.

224 *See In re* Estate of Garfield, 14 N.Y.2d 251, 258, 200 N.E.2d 196, 199, 251 N.Y.S.2d 7, 11 (1964). *See also* 7B McKINNEY'S CPLR 5225, supp. commentary at 114 (1974). Professor David D. Siegel has commented that where the right to trial by jury is given for a dispute, "the right ought not to be divested when the identical dispute appears in a modified procedural context." *Id.* CPLR 410 acknowledges the fact that jury trials may be necessary in special proceedings and consequently allows parties to a jury trial to demand one. *Id.*

225 Attachment is said to be an extraordinary remedy in that it allows the defendant's

to serve two basic functions.[226] It can furnish a jurisdictional basis for a plaintiff who is unable to secure personal service over the defendant.[227] More importantly, attachment has been used as an effectual prejudgment remedy whereby a creditor can secure the enforceability of a subsequent judgment by obtaining ex parte seizure of the debtor's property within the state.[228]

Recently, in instances of attachment for security purposes,[229] courts have had to contend with the constitutional requirements of due process.[230] The New York attachment statute was attacked in *Sugar*

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property within the state to be seized before the plaintiff's claim has been adjudicated and the defendant's liability determined. The remedy is an exception to the general common law principle that an individual's property should not be taken before an opportunity for proper adjudication is offered. Therefore, grounds for attachment must be carefully circumscribed. *Recommendations Relating to Attachment*, 7 REP. N.Y. JUD. COUNCIL 392-93 (1941). *See also* Penoyar v. Kelsey, 150 N.Y. 77, 79, 44 N.E. 788, 789 (1896); Siegel v. Northern Boulevard & 80th St. Corp., 31 App. Div. 2d 182, 183, 295 N.Y.S.2d 804, 806 (1st Dep't 1968).

226 *See* Mindlin v. Gehrlein's Marina, Inc., 58 Misc. 2d 153, 155, 295 N.Y.S.2d 172, 174 (Sup. Ct. Nassau County 1968). *See generally* 11 CARMODY-WAIT 2d § 76:3 (1966), for a concise explanation of the character and purpose of attachment.

227 7A WK&M ¶ 6201.01. By levy upon any of the defendant's property within the state and service outside the state under CPLR 314(3) or by publication under CPLR 315, the court acquires quasi in rem jurisdiction over the defendant. *See* Cohen v. Loeb, Rhoades & Co., 48 Misc. 2d 159, 162, 264 N.Y.S.2d 463, 466 (Sup. Ct. N.Y. County 1965) (where trust property is found within the state, it can be lawfully attached regardless of the trustee's or garnishee's residence); *accord*, Badigian v. Badigian, 30 App. Div. 2d 522, 523, 290 N.Y.S.2d 577, 578 (1st Dep't 1968) (per curiam) (attachment reinstated where plaintiffs made out prima facie case and defendant was a nonresident).

The importance of this function has greatly diminished due to New York's ever expanding long-arm jurisdiction under CPLR 302. Pursuant to CPLR 313, personal jurisdiction may be acquired over a person subject to long-arm jurisdiction if such person is served outside the state. Additionally, Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), further weakened the importance of CPLR 6201's jurisdictional function. In *Seider*, the promise of a foreign insurance company doing business in New York to defend and indemnify a nonresident defendant policyholder was a debt subject to attachment under CPLR 6202. Accordingly, such attachment would subject the nonresident defendant to New York jurisdiction. *See* 7B MCKINNEY'S CPLR 6202, commentary at 20 (1973). For a more extensive discussion of the impact of *Seider*, see 7B MCKINNEY'S CPLR 5201, supp. commentary at 15-73 (1973).

228 7A WK&M ¶ 6201.01. If a possibility exists that a plaintiff will have trouble enforcing a favorable judgment unless the availability of defendant's property is assured, the court will permit attachment of such property as security. Sartwell v. Field, 68 N.Y. 341, 342 (1877). Attachment may serve only a security purpose when personal jurisdiction has already been acquired over the defendant. *See* Zeiberg v. Robosonics, Inc., 43 Misc. 2d 134, 250 N.Y.S.2d 368, 369 (App. T. 1st Dep't 1964) (per curiam). Jurisdictional and security purposes of attachment may overlap, as when the defendant's property not only serves as the jurisdictional res but also the fund from which plaintiff's claim will be satisfied.

229 In the 1920's, the Supreme Court consistently upheld the constitutionality of prejudgment creditor remedies. Apparently, at that time, the Court felt that trial on the merits would serve as sufficient protection of the defendant's rights. *See* McKay v. McInnes, 279 U.S. 820 (1929) (mem.); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1921).

230 Debtors won their first victory in the battle for a greater degree of due process

v. Curtis Circulation Co.[231] on constitutional grounds.[232] Portions of the statute, namely CPLR 6201(4), (5), and (8)[233] and CPLR 6211,[234] were struck down by the United States District Court for the Southern

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protection in Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 580 (1972). Speaking for a divided Court, Justice Douglas struck down a Wisconsin statute which allowed a creditor to garnish 50% of the defendant's wages by simply leaving an ex parte order with the employer. 395 U.S. at 338. Justice Douglas emphasized the tremendous hardship imposed by the statute on family-supporting wage earners, noting the great leverage which creditors have upon wage earners. *Id.* at 340-41.

For a complete examination of the case and its impact on later decisions, *see* Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973). Some courts have limited the *Sniadach* holding to prejudgment wage garnishment procedures, though many have interpreted it to mean that all ex parte seizures of property without notice to the defendant are unconstitutional. *See* Aaron v. Clark, 342 F. Supp. 898, 900-01 (N.D. Ga. 1972); Randone v. Appellate Dep't of Superior Court of Sacramento County, 5 Cal. 3d 536, 488 P.2d 13, 20, 21, 96 Cal. Rptr. 709, 716 (1971); Larson v. Fetherston, 44 Wisc. 2d 712, 718, 172 N.W.2d 20, 23 (1969).

231 383 F. Supp. 643 (S.D.N.Y. 1974), *prob. juris. noted*, 43 U.S.L.W. 3550 (U.S. Apr. 14, 1975) (No. 74-859).

232 New York's replevin provision, article 71 of the CPLR, was declared constitutionally defective several years ago in Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970). It had been the common practice in New York that no application to the court was necessary to permit a plaintiff in a replevin action to obtain the sheriff's help in seizing chattels claimed by the plaintiff. When the papers were presented to the court, it was merely for approval of form and sufficiency of the bond. No prior notice to the person holding the chattel was required. A federal district court in New York found that procedural due process demanded that the debtor be provided with notice and an opportunity to be heard *before* the seizure, or minimally, that the court examine the circumstances upon which the replevin order was based.

After *Laprease*, CPLR 7102 was amended to provide that the order of seizure is to be used by the court "upon such terms as may be required to conform to the due process of law requirements of the fourteenth amendment to the constitution of the United States." CPLR 7102(d)(1).

233 CPLR 6201 provides, in relevant part:

> An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:
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> . . . .
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> 4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or
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> 5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or
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> . . . .
>
> 8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

234 CPLR 6211 states:

> An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

District of New York as violative of the due process clause of the fourteenth amendment.[235] In the opinion of the three-judge court, these sections were unconstitutional in that they permitted a debtor-defendant's goods to be attached without either prior notice or hearing,[236] based solely on a creditor's ex parte claim that the defendant had defrauded him.[237]

The court's opinion in *Sugar* was preceded by a series of Supreme Court decisions dealing with attachment statutes. *Fuentes v. Shevin*,[238] a 1972 decision, adopted an expansive view of the procedural due process requirements to be accorded prior to the deprivation, however temporary, of any property interest.[239] Plaintiffs, purchasers of household items under an installment plan contract, challenged two state replevin statutes authorizing summary seizure of goods.[240] Neither a court order nor notice to the possessor of the goods was statutorily mandated under either state's procedure.[241] In declaring the Florida

235 383 F. Supp. at 650.

236 Plaintiff Sugar and his controlled corporation, Champion Sports Publishing Inc., had arranged with defendant Curtis for the distribution by Curtis of Champion's publications. Upon Curtis' alleged belief that it had been defrauded by Wrestling Revue, Inc., a subsidiary of Champion, Curtis contacted a third party, National Sports Publishing Corp., claiming sums of money due Wrestling from National. Curtis moved for, and was granted, an attachment order levying against any property held by Sugar, Wrestling or Champion, without notifying any of the three parties and prior to the filing of a complaint. *Id.* at 644-45.

237 Curtis' claim was based on CPLR 6201(4), (5), and (8) and was supported by a detailed affidavit. In accordance with the statute, Curtis posted a $10,000 bond as protection for Sugar, Wrestling, and Champion in the event that Curtis did not ultimately prevail on the merits. *Id.* at 645.

238 407 U.S. 67 (1972).

239 Certain problems which *Sniadach* had left unanswered, *see* note 230 *supra*, appeared to have been resolved in the *Fuentes* decision. *Id.* at 84-90. The Court specifically included a temporary, nonfinal deprivation of property within the protection of the fourteenth amendment, and rejected the notion that the right to be heard depends upon an advance showing of a favorable judgment on the merits. Furthermore, due process protections were not limited to absolute necessities, but extended to all types of property. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (before driver's license could be suspended, driver must be granted opportunity for a fair hearing, notwithstanding fact that license did not qualify as a "necessity"). Lastly, while recognizing that the debtors lacked full title to the replevied goods, the *Fuentes* Court quoted Boddie v. Connecticut, 401 U.S. 371, 379 (1971), for the proposition that the due process clause encompasses "any significant property interest." These principles constituted a radical departure from preexisting law and greatly improved the plight of the indigent debtor.

240 While the Florida law provided for a post-seizure hearing, the Pennsylvania statute did not even require the creditor to commence an action for possession. Consequently, the debtor might never be afforded an opportunity for an adjudication on the merits after his property had been taken. 407 U.S. at 75-77.

241 Although the Florida and Pennsylvania replevin statutes required the party seeking the writ to post a security bond, he had only to recite in conclusory fashion his entitlement to the possession of the property. In granting the attachment, the court would automatically rely on the applicant's assertion. Such requirements were held not to be proper substitutes for a prior hearing since they served merely to test the applicant's belief in his own convictions. *Id.* at 83.

and Pennsylvania provisions unconstitutional, the Court, per Justice Stewart, explained that procedural due process mandated that an individual be granted an opportunity to a hearing *before* seizure by state authorities, at a time when the deprivation could still be prevented.[242] Nonetheless, the ruling in *Fuentes* did not automatically invalidate all seizures performed without prior notice or hearing. Extraordinary circumstances were recognized which would justify postponement of notice or hearing,[243] as when seizure was necessary to secure a primary governmental or public interest.[244]

The broad impact of *Fuentes* was severely narrowed by *Mitchell v. W. T. Grant Co.*[245] In *Mitchell*, the Supreme Court upheld the constitutionality of a Louisiana statute permitting sequestration of property on an ex parte court order without notice or pre-sequestration hearing.[246] Significantly, the decision was not grounded on a showing of any unusual circumstances which might effect a waiver of the due process requirements outlined in *Fuentes*.[247]

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242 In emphasizing the importance of timing if a hearing is to satisfy the due process test, the Supreme Court stated:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

Id. at 81-82.

243 *Id.* at 90, *citing* Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Various situations have justified ex parte seizures in the past. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (protection of public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (safeguard against failure of a bank); Phillips v. Commissioner, 283 U.S. 589 (1931) (collection of taxes due the United States); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (protection of country in wartime); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (destruction of food articles prejudicial to public health).

244 Even where the important governmental or public interest exists, the Court insists that there be a special need for immediate action and that a tight rein be kept over the legitimate force employed. It was apparent to the Court in *Fuentes* that the replevin statutes under review did not qualify under either of the aforementioned interests, for only the creditor's private gain was in issue. 407 U.S. at 91-92.

245 416 U.S. 600 (1974). Mr. Justice Powell went so far as to say that *Fuentes* was overruled by *Mitchell*. *Id.* at 623 (Powell, J., concurring).

246 *See* 7B McKINNEY'S CPLR 6211, supp. commentary at 27 (1974), for Dean Joseph M. McLaughlin's proposition that the *Mitchell* majority interpreted *Fuentes* as holding that the unconstitutionality in *Fuentes* was due to the lack of a judicial order, not the failure to give prior notice to the debtor. Accordingly, the *Mitchell* statute was found to be valid since the ex parte sequestration received judicial authorization in advance of the taking. Apparently, the discussion in *Fuentes* about prior notice was considered dicta by the *Mitchell* Court.

247 The W.T. Grant department store sued Mitchell for the unpaid balance of the price of certain household items which he had bought under a conditional sales contract and on which the store held a vendor's lien. 416 U.S. at 601-02. In upholding the statute,

Against the background of these two landmark decisions, the three-judge district court in *Sugar* struggled with the question whether the New York attachment procedure could "squeeze through the narrow door of constitutionality left open in *Mitchell*."[248] Judge Lasker, speaking for a unanimous bench, found five procedural guarantees in *Mitchell* which distinguished the constitutional Louisiana law from the replevin statutes struck down in *Fuentes*: 1) a sequestration order required the approval of a judge and not merely an officer of the court; 2) the grounds relied upon for issuance of the writ had to be clearly demonstrated; 3) a creditor seeking the writ was forced to file a sufficient bond; 4) the debtor could regain possession by filing his own bond; and 5) the debtor was entitled to seek immediate dissolution of the writ and such motion had to be granted unless the creditor could prove the grounds upon which the writ was issued.[249]

Although the *Sugar* court conceded that the statutory scheme under review was virtually identical to the statute upheld in *Mitchell*,[250] it was found to lack one assurance of due process deemed essential to constitutionality. The court noted that New York, unlike Louisiana, does not afford the debtor-defendant an opportunity for an immediate post-seizure hearing in which the creditor-plaintiff must prove the grounds of attachment. A defendant's sole remedy under the New York statute was said to lie in a motion to vacate the attachment, the only ground for such motion being lack of necessity to the plaintiff's security.[251] Failure to provide an opportunity for an ade-

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the Court seemed to overlook the lack of a governmental or public interest which was considered crucial to prejudgment seizure in *Fuentes*. Instead, it dwelt on the fact that because both seller and buyer had current interests in the property, due process demanded consideration of the seller's interests as well as those of the buyer.

248 383 F. Supp. at 647.

249 *Id.*

250 CPLR 6222(b) allows the defendant debtor to post a bond and thereby regain possession of the attached property. CPLR 6212(b) also corresponds to the Louisiana statute and requires the attaching creditor to post a bond for the protection of the debtor should he ultimately lose on the merits. Finally, CPLR 6219, like the Louisiana provision, subjects a writ of attachment to judicial approval and asks the creditor to show a valid cause of action and grounds upon which the writ should be issued. *See* 383 F. Supp. at 648.

251 The *Sugar* court stated that "the sole basis for vacating the attachment under the CPLR is . . . that the attachment 'is unnecessary to the security of the plaintiff . . . .'" 383 F. Supp. at 648, *quoting* CPLR 6223. The statutory language upon which the court relied reads in part as follows:

> Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. . . . If . . . the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment.

CPLR 6223. Although on its face this language appears to limit the granting of a motion

quate post-seizure hearing, the court felt, rendered the New York provisions unconstitutional under the *Mitchell* test.[252]

The reasoning behind the *Sugar* decision is faulty in that the New York proceedings are not as deficient in due process safeguards as alleged.[253] The court seems to have overlooked the fact that a motion to vacate will lie not only where the plaintiff's need for security is refuted but whenever the defendant can show that the attachment was unauthorized under the circumstances.[254] For example, the defendant may show that the plaintiff failed to set forth sufficient facts to warrant the grant of attachment.[255] Furthermore, CPLR 6222 provides an additional method whereby a defendant, whose property or debt has been levied upon, may discharge an attachment by posting a bond in the proper amount.[256]

The only accurate distinction drawn between the statute in *Mitchell* and the CPLR relates to the placement of the burden of

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to vacate an attachment to instances where "the attachment is unnecessary to the security of the plaintiff," additional grounds for vacating the attachment have long been judicially recognized. *See* notes 254-55 and accompanying text *infra*.

252 383 F. Supp. at 648.

253 *See* McLaughlin, *New York Trial Practice*, 172 N.Y.L.J. 91, Nov. 8, 1974, at 1, col. 1 [hereinafter cited as McLaughlin], for a thorough and well reasoned analysis of the *Sugar* decision.

254 *See generally* 7A WK&M ¶¶ 6223.09-.17.

255 *See, e.g.*, MacMillan, Inc. v. Hafner, 42 App. Div. 2d 533, 344 N.Y.S.2d 729, 730 (1st Dep't 1973) (mem.) (order of attachment vacated because plaintiff's presentation of "a scintilla of proof" as to elements of the fraud cause of action was insufficient to "support the drastic remedy of attachment"); Anderson v. Malley, 191 App. Div. 573, 181 N.Y.S. 729 (1st Dep't 1920) (attachment vacated because plaintiff failed to set forth facts demonstrating fraudulent intent on the part of the defendants); Rallings v. McDonald, 76 App. Div. 112, 78 N.Y.S. 1040 (1st Dep't 1902) (mere allegations of plaintiff's belief of defendant's fraudulent intent, not founded on facts, held insufficient to sustain an attachment).

256 *See* CARMODY-WAIT 2d § 76.174 (1966). Under this route, the defendant admits that the attachment is valid but asks the court to free the property levied upon. Distillers Factors Corp. v. Country Distillers Prods., Inc., 81 N.Y.S.2d 857, 858 (Sup. Ct. N.Y. County 1948). Admittedly, the posted bond serves merely as a security substitute for the attached property. A defendant's furnishing of security to discharge an attachment will not prevent him from making a subsequent motion to vacate the attachment. Shapiro v. Loft, Inc., 142 Misc. 144, 146, 254 N.Y.S. 197, 199 (Sup. Ct. N.Y. County 1931).

It should be noted, however, that as a precondition to recovering his property pursuant to a discharge, the defendant, in addition to posting a bond, must pay "poundage" fees to the sheriff based on a flat percentage of the amount of property being discharged. *See* CPLR 8012(b)(1), (3). The sheriff is entitled by statute to retain the property until such poundage is paid. CPLR 8012(b)(3). It must be admitted that poundage may constitute an unwarranted financial burden on the defendant who seeks to recover his property at the outset of the litigation. *See* Jewelry Realty Corp. v. Newport Associates, Inc., 64 Misc. 2d 409, 412, 314 N.Y.S.2d 787, 791 (N.Y.C. Civ. Ct. N.Y. County 1972); H.L. Hoffman & Co. v. Polarad Electronics Corp., 26 Misc. 2d 68, 69, 208 N.Y.S.2d 404, 405-06 (Sup. Ct. Nassau County 1960). Indeed, poundage has recently been challenged as a deprivation of procedural due process in a suit against the Sheriff of the City of New York and the City itself. *See* Liquifin A. G. v. Brennan, 383 F. Supp. 978 (S.D.N.Y. 1974) (denial of defendant's motion to dismiss the complaint on procedural grounds).

proof.[257] While Louisiana required the plaintiff to prove the grounds of attachment,[258] New York places responsibility on the defendant to establish that the attachment is unauthorized.[259] Thus, the real issue facing the *Sugar* court was whether shifting the burden of proof to the defendant rendered the statute constitutionally defective. The court's conclusion of unconstitutionality appears questionable. So long as the defendant is granted a proper opportunity to vacate an attachment, it would make little or no difference as to which party shoulders the burden of proof.[260] Due process would seem to be satisfied when a meaningful opportunity to vacate is made available.[261]

The continued validity of *Sugar* is uncertain in light of the Supreme Court's most recent pronouncement in the area of creditor remedies. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[262] the Court declared a Georgia garnishment statute violative of due process. Pursuant to the Georgia statute, a garnishment order was issuable by an officer of the court on the affidavit of a creditor or his attorney containing only conclusory allegations.[263] Judicial approval was not required and an early hearing at which the creditor was made to show probable cause was not provided. Indeed, the sole method to dissolve the garnishment apparently lay in the debtor's posting of a security bond.[264]

The New York statute reviewed in *Sugar* generally provides a measure of due process protection to debtors[265] significantly greater than that embodied in the Georgia statute. Therefore, *North Georgia* would not mandate that New York's statute be struck down as unconstitutional.[266] In any event, the constitutionality of prejudgment

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257 *See* McLaughlin, *supra* note 253, at 4, col. 2.

258 383 F. Supp. at 648.

259 *See* American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325, 79 N.E.2d 425, 426 (1948); George A. Fuller Co. v. Vitro Corp., 26 App. Div. 2d 916, 274 N.Y.S.2d 600 (1st Dep't 1966) (mem.); Bard-Parker Co. v. Dictograph Prods. Co., 258 App. Div. 638, 640, 17 N.Y.S.2d 588, 591 (1st Dep't 1940).

260 *See* McLaughlin, *supra* note 253, at 4, col. 2, wherein the view is expressed that a shift in burden of proof does not rise to constitutional proportions.

261 *See id.*

262 95 S. Ct. 719 (1975).

263 *Id.* at 721.

264 *Id.*

265 *See* text accompanying notes 253-56 *supra*.

266 Interestingly, it had been the general opinion that the New York attachment statute, for the most part, would successfully withstand a due process attack. *See* 7B McKINNEY'S CPLR 6211, supp. commentary at 27 (1974); *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 725, 753-56 (1973) (predicting the constitutionality of 6201 with the exception of subdivisions (2) and (3)); *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 586-87 (1972) (CPLR 6201 considered valid with the possible exception of subdivision (2), which permits attachment in a situation where it is unnecessary to provide jurisdiction).

attachment proceedings in New York will soon be resolved by the Supreme Court, which noted probable jurisdiction in *Sugar* on April 14, 1975.[267] It is hoped that the nature of the hearing and other safeguards contemplated by the due process clause in the area of prejudgment attachment will be clarified in order to avoid future uncertainty in other states as well.

CPLR 6202: Retaliatory adoption of Seider v. Roth *by New Hampshire.*

The *Seider v. Roth*[268] doctrine, which permits the grounding of quasi-in-rem jurisdiction over a nonresident defendant upon attachment of the contractual obligations contained in the defendant's automobile liability insurance policy,[269] continues to generate new

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267 43 U.S.L.W. 3550 (U.S. Apr. 14, 1975) (No. 74-859).

268 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), *noted in* 67 COLUM. L. REV. 550 (1967); 51 MINN. L. REV. 158 (1966); 43 ST. JOHN'S L. REV. 58 (1968). For an excellent discussion of *Seider's* development and a thorough analysis of the constitutional and procedural issues involved, see 7B MCKINNEY'S CPLR 5201, supp. commentary at 15-74 (1974).

269 Under *Seider*, the duty to defend and indemnify is attached as a debt within the meaning of CPLR 5201 and CPLR 6202. CPLR 6202 states that "[a]ny debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment." CPLR 5201(a) in pertinent part provides:

> A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment.

Seider held that the obligation of the insurer to defend and indemnify becomes fixed at the time of the accident. Critics have challenged this analysis, contending that at that point, the insurer's obligation is contingent and not fixed. Moreover, criticism has also been directed at what has been characterized as the "bootstrap" approach of *Seider*, whereby the contractual obligation to defend and indemnify, which arguably does not mature until jurisdiction has been acquired over the insured, is seized to provide the sole basis for jurisdiction. *See, e.g.*, Seider v. Roth, 17 N.Y.2d 111, 115, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 103 (1966) (Burke, J., dissenting); Simpson v. Loehmann, 21 N.Y.2d 305, 316, 234 N.E.2d 669, 675, 287 N.Y.S.2d 633, 642 (1967) (Burke, J., dissenting); Minichiello v. Rosenberg, 410 F.2d 106, 113 (2d Cir. 1968) (Anderson, J., dissenting), *aff'd en banc*, 410 F.2d 117, 120 (2d Cir.) (Anderson, J., joined by Lumbard, C.J. & Moore, J., dissenting), *cert. denied*, 396 U.S. 844 (1969).

In Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), *rearg. denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968) (mem.), the Court of Appeals held that in a *Seider* suit, recovery is to be limited to the face amount of the policy and the insured is entitled to make a limited appearance, *i.e.*, he may defend on the merits without subjecting himself to in personam jurisdiction. The constitutionality of the *Seider* doctrine was thereafter upheld on the strength of the limited appearance created by *Simpson*. *See* Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).

In addition, several decisions have suggested that *Seider* is to be limited to instances where the plaintiff is a New York resident. *See* Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir.), *cert. denied*, 396 U.S. 840 (1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 342 (1969) (dictum would restrict *Seider* to New York plaintiffs); Vaage v. Lewis, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (2d Dep't 1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 305, 341 (1968) (doctrine of *forum non conveniens*