

CPLR 7102: Replevin Statute Upheld Against Constitutional Attack

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Whatever the relative merits of CPLR 5519(a)(1),¹⁵⁶ its application in *Byrne* is clearly correct.

ARTICLE 71 — RECOVERY OF CHATTEL

CPLR 7102: Replevin statute upheld against constitutional attack.

The New York replevin law, article 71 of the CPLR, amended in response to *Laprease v. Raymours Furniture Co.*,¹⁵⁷ has recently been the subject of careful judicial scrutiny. Thus far, the statute has withstood the constitutional challenges which have been levied against it, including the procedural due process argument made in *General Electric Credit Corp. v. Fred Pistone, Jr., Inc.*¹⁵⁸ The plaintiff therein was the vendor's assignee of a conditional sales agreement. Title to the goods, heavy duty equipment, was to remain in the plaintiff until full payment was made. When the defendant fell behind in his payments, the plaintiff notified him of his default and ordered him to return the equipment. Upon the defendant's failure to comply, the creditor obtained an order of seizure under CPLR 7102. When confronted with this order by the sheriff, the debtor refused to surrender the goods or to state their location.

In the ensuing contempt proceeding, the defendant, relying on *Laprease*, contended that the order of seizure should be vacated because the statute was unconstitutional as a denial of procedural due process. Rejecting this argument, the court declared that by amending CPLR article 71 the Legislature had remedied its constitutional deficiencies. Under the deficient statute, a creditor could obtain a "pre-judgment seizure without even an *ex parte* order of a judge or court. . . ." ¹⁵⁹ The creditor would deliver to the sheriff an affidavit, a requisition, and an undertaking, and the sheriff could then seize the property.¹⁶⁰

The new CPLR 7102 eradicate[d] the "requisition" procedure, substituting in its place an "order of seizure". This interposes a neu-

102 App. Div. 367, 92 N.Y.S. 656 (2d Dep't), *aff'd*, 181 N.Y. 558, 74 N.E. 1120 (1905). The state's timely assertion of this defect permitted the court to avoid this issue. 67 Misc. 2d at 1085, 325 N.Y.S.2d at 148.

¹⁵⁶ The characterization of CPLR 5519 as "most unfortunate" (7 WK&M ¶ 5519.03) has been approved by the Appellate Division, Third Department, in *Union Free School Dist. No. 7 v. Allen*, 30 App. Div. 2d 629, 290 N.Y.S.2d 669, 671 (3d Dep't 1968).

¹⁵⁷ 315 F. Supp. 716 (N.D.N.Y. 1970).

¹⁵⁸ 68 Misc. 2d 475, 326 N.Y.S.2d 898 (Sup. Ct. Westchester County 1971).

¹⁵⁹ *Id.* at 479, 326 N.Y.S.2d at 902, *citing* *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716, 725 (N.D.N.Y. 1970).

¹⁶⁰ Former CPLR 7102(a). For a further discussion of the former replevin practice, see H. WACHTELL, *NEW YORK PRACTICE UNDER THE CPLR* 221 (3d ed. 1970); Comment, *Laprease and Fuentes: Replevin Reconsidered*, 71 COLUM. L. REV. 886, 888 (1971).

tral judge between the plaintiff and defendant, and eliminates the ancient right which the plaintiff had to direct the sheriff to seize a chattel from the defendant.¹⁶¹

The court also rejected the defendant's reliance on *Laprease* on the ground that specialized property was involved there. The heavy duty equipment, which was the basis of the contract, was not considered "necessary for day to day living, the taking of which will impose tremendous hardship on the defendant. . . ."¹⁶² The court found that there was probable cause for the order of seizure and ordered the defendant's president to appear for an examination as to the location of the goods.

The amended statute will probably continue to withstand constitutional challenges, despite its faults. It is, for example, overbroad on its face since there are no suggested guidelines regarding issuance of orders of seizure. The only consideration which the statute mentions is that the order should not violate the debtor's right to due process. The Legislature has permitted the courts to decide, on a case-by-case basis, (1) what types of property are specialized and (2) when a proper situation for issuing an order of seizure exists. Dean McLaughlin eloquently summarized this problem by stating that

[t]he cardinal flaw of the new legislation is its Olympian generality, for it says little other than that a judge may sign an order permitting the seizure of a chattel whenever it would be constitutional to do so.¹⁶³

CPLR 7102: Equipment utilized in business deemed "specialized property."

As a consequence of the tremendous increase in consumer credit, the remedies of replevin and attachment have been the subject of frequent judicial concern. The decisional vanguard of this movement is *Sniadach v. Family Finance Corp.*¹⁶⁴ Therein, the United States Supreme Court declared unconstitutional a Wisconsin statute¹⁶⁵ which

¹⁶¹ 7B MCKINNEY'S CPLR 7102, supp. commentary at 114 (1971). For a further discussion of the New York replevin statute, see *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 379 (1971).

¹⁶² 68 Misc. 2d at 479, 326 N.Y.S.2d at 902. *But see* Cedar Rapids Engineering Co. v. Haenelt, 68 Misc. 2d 206, 326 N.Y.S.2d 653 (Sup. Ct. Sullivan County 1971), where it was held that the seizure of tools and equipment used by the debtor to earn money was the specialized type of property contemplated by *Laprease* and its progenitor, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

¹⁶³ 7B MCKINNEY'S CPLR 7102, supp. commentary at 114 (1971).

¹⁶⁴ 395 U.S. 337 (1969).

¹⁶⁵ WIS. STAT. ANN. §§ 267.01-.24 (Supp. 1971). The sections overturned were §§ 267.04(1), 267.07(1), and 267.18(2)(a).