St. John's Law Review

Volume 44
Number 1 *Volume 44, July 1969, Number 1*

Article 19

CPLR 5201: Future Rents Not Subject to Attachment

St. John's Law Review

failed. Therefore, in this present action against the state, he was at least contributorily negligent, and should be precluded from maintaining the action.

However, in applying the rules of collateral estoppel to a case such as this one, where perhaps there was some merit to Albero's defense and where Albero could not begin a third-party action in the federal district court, it is questionable whether the decision did *in fact* allow for a full and fair opportunity to oppose the state's contentions. In the federal district court the jury was presented with severely injured plaintiffs and with Albero as the sole defendant. From the decision it appears that those plaintiffs were free from any liability from the beginning and that the only question was as to Albero's negligence. Albero's defense, that it was the negligence of the state which caused the accident, if allowed and accepted by the jury as true, would then give the plaintiffs no recovery, and force them to sue the state by way of an action in the Court of Claims. The state is thereby placed in a superior position, because if the jury accepted Albero's defense, the state would not be collaterally estopped from successfully asserting its freedom from negligence in the Court of Claims, and if the jury did not accept Albero's defense, that finding could subsequently be used against him in the form of collateral estoppel by the state.

The problem of *Albero* is one of fairness and opportunity, and liberal use of collateral estoppel can prove fatal to many in Albero's position. In his dissenting opinion in *Schwartz*, Justice Bergan highlighted the problem of collateral estoppel:

> In this vast legal enterprise there are certain injured parties whose litigation position involves a handicap. These parties would, like all other injured persons, be quite certain of recovery could they assert their claims in simple, direct form, unencumbered by other conflicting claims.[94]

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5201: Future rents not subject to attachment.

In *Glassman v. Hyder*,[95] the Court of Appeals, affirming the judgment of the Appellate Division, First Department,[96] held that future rents were contingent and therefore not attachable as debts to become due "certainly or upon demand." The Court, in so holding,

---

94 *Id.* at 77, 246 N.E.2d at 732, 298 N.Y.S.2d at 965 (1969).

95 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968).

96 28 App. Div. 2d 974, 283 N.Y.S.2d 419 (1st Dep't 1967). For a discussion of the appellate division's treatment of *Glassman v. Hyder*, see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 140, 165 (1968).

brought New York into line with most other jurisdictions[97] which view future rents as so speculative that they are not subject to attachment or garnishment.

CPLR 6202 states that any debt against which a money judgment may be enforced under CPLR 5201 is subject to attachment for the purpose of obtaining jurisdiction over a defendant. Under CPLR 5201, a debt is subject to levy only where it will become due certainly or upon demand. While this would appear to eliminate contingent debts, an exception is provided in CPLR 5231 which permits execution on income or future wages even though they are not yet certain to become due.[98]

It is significant that the *Glassman* Court left two important questions unanswered when it stated that "[i]t need not be decided whether the income execution provision is available as a basis for attachment, or whether future rents are covered by that provision."[99] Thus, the issue of whether or not CPLR 5231 is ever available as a basis for attachment is still left open, as is the question of whether future rents are ten percent leviable as income under CPLR 5231.

A question raised under CPLR 301 was also decided in the instant case — telephone conversations between an independent New York City real estate broker and the New Mexico defendants who hired the broker did not constitute a "transaction of business" within the City of New York so as to secure in personam jurisdiction over the non-resident defendants.

CPLR 5201: Bonuses earned will be prorated for purposes of determining amount available for satisfaction of judgment.

Girard Trust Bank obtained a judgment in the amount of $4,291 against John Sample, Jr., defensive back for the New York Jets, a team owned by the defendant, Gotham Football Club. Avis-Rent-A-Car, a second judgment creditor, had obtained a judgment against Sample for $362; it was conceded that Avis, first to execute, had priority. Sample's salary for the 1967 season (July 20, 1967 to December 24, 1967) was $20,000. In addition to his salary, Sample received two bonuses; one, a $2,000 bonus for playing in 50 percent of the offensive or defensive plays, and the other, a merit bonus of $1,000 for outstanding overall performance.

In an action by the Girard Trust Bank against the Gotham Foot-

97 *See, e.g.*, United States Fidelity & Guaranty Co. v. Wrenn, 89 F.2d 838 (D.C. Cir. 1937); Calechman v. Great Atlantic & Pacific Tea Co., 120 Conn. 265, 180 A. 450 (1935).

98 *See* 7B McKINNEY'S CPLR 5021, supp. commentary 25 (1963).

99 23 N.Y.2d at 358, 244 N.E.2d at 262, 296 N.Y.S.2d at 787.