New York's Attachment Statutes: The Revision of 1941

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THE REVISION OF 1941

On September 1, 1941, the attachment statutes of New York were revised in several substantial respects. The revision was the culmination of a study of the attachment laws of New York which I made for the Judicial Council of the State of New York. In the course of this study, the attachment laws of New York were subjected to a critical analysis and overhauling. Corresponding statutes and rules of other states were carefully studied and compared. Suggestions contained in the files of the Judicial Council were placed at my disposal by Mr. Leonard S. Saxe, the extremely able Executive Secretary of the Judicial Council, and were given careful consideration. On September 4, 1940, I submitted my typewritten report of 431 pages to the Judicial Council. As submitted, the report contained two main divisions. The first division dealt with the nature and development of attachment. The second division set forth proposed amendments to the New York Civil Practice Act and Civil Practice Rules, with annotated comments. Thereafter, the Judicial Council prepared mimeographed confidential copies of the report, omitting therefrom the introductory and historical matter, and substituting summaries for my extensive notes on comparative legislation. On September 25, 1940, the mimeographed confidential copies were distributed to the members of the Judicial Council,¹ to the local bar associations, and to several specialists.

The Committee on Law Reform of the Bar Association of the City of New York submitted to the Judicial Council a brief endorsing the majority of the recommendations and opposing several of them. A number of individuals submitted memoranda suggesting additional amendments or objecting to some of those recommended. At a meeting of the Judicial Council then consisted of Charles B. Sears, Chairman, Edward Lazansky, Vice-Chairman, Herman S. Bachrach, Stephen W. Brennan, William T. Byrne, Harley N. Crosby, Benjamin F. Feinberg, Bernard E. Finucane, James P. Hill, Philip M. Kleinfeld, Henry Goddard Leach, Francis Martin, William C. McCreery, Harry D. Nims, Harry A. Reoux. Chief Judge Irving Lehman participated in the activities of the Council. Leonard S. Saxe was its Executive Secretary. See Leonard S. Saxe, The Judicial Council of the State of New York; Its Objectives, Methods and Accomplishments (1941) 35 Am. Pol. Sci. Rev. 933.

Council held on October 26, 1940, I orally stated the nature and purpose of each of the recommended amendments and the position, if any, in respect thereto of objecting parties. The recommended amendments were discussed at length and approved, with three modifications to certain sections which were redrafted, and subsequently approved.

In January, 1941, the Judicial Council submitted its annual report to the Legislature, and recommended therein the revision of the attachment statutes as set forth and explained in the Supporting Study annexed as an appendix to its report. The Supporting Study as it appears in the Council's report includes the introductory and historical matter contained in my original typewritten report.

Early in 1941, bills containing the text of the statutes as recommended for enactment in the Supporting Study were introduced in the State Senate by Honorable Benjamin F. Feinberg, and in the Assembly by Honorable Harry A. Reoux. The bill was passed by the Senate and the Assembly, was signed by the Governor on April 11, 1941, and became effective on September 1, 1941.

In the ensuing part of this article, after making some preliminary observations on the nature and development of the law of attachment, I shall briefly state the changes effected by this Act of 1941.

II. THE NATURE AND DEVELOPMENT OF ATTACHMENT

Provisional remedies are designed to afford immediate emergency relief. The New York Civil Practice Act provides four provisional remedies: Arrest, injunction, attachment and receiver.
Purposes of Attachment

Attachment serves a jurisdictional purpose and a security purpose.

1. Jurisdictional purpose. In an action against a non-resident for the recovery of a sum of money only, jurisdiction is usually obtained by (a) the personal service of a summons within the state upon the defendant,6 (b) the service of a general appearance by the defendant, or (c) the service of a summons on the defendant pursuant to an order for service of summons by publication, or by the equivalent personal service of the summons outside the state, with or without an order of publication.7 Where service of a summons is made pursuant to the methods mentioned in subdivision (c), constitutional and statutory provisions require that service of a summons shall be preceded by an attachment levy of the property of the defendant within the state.8 Under such circumstances, attachment serves a jurisdictional purpose.

2. Security purpose. If an action is commenced by the personal service of a summons upon the defendant within the territorial jurisdiction of the court, an attachment of the defendant’s property thereafter made, serves no jurisdictional purpose. Similarly, an attachment of the defendant’s property made after the service by the defendant of a general appearance serves no jurisdictional purpose. In the first instance, jurisdiction rests on the personal service of the summons. In the second instance, jurisdiction rests on the general appearance. In both of these instances, the purpose of the attachment is to secure payment of the plaintiff’s judgment, if and when recovered.

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6 Service of summons pursuant to Section 52 of the Vehicle and Traffic Law (non-resident motorist), or Section 229-b of the Civil Practice Act (non-resident natural person doing business in New York), or Section 442-g of the New York Real Property Law (licensed non-resident real estate broker), is equivalent to personal service upon the non-resident defendant.
7 N. Y. CIVIL PRACTICE ACT §§ 233, 235.
8 Pennoyer v. Neff, 95 U. S. 714 (1877); N. Y. C. P. A. § 232, 1st par. following par. 8; Dimmerling v. Andrews, 236 N. Y. 43, 139 N. E. 774 (1923).
The jurisdictional and the security purpose frequently overlap. A plaintiff may have procured an attachment because that was the only available method for acquiring jurisdiction over the defendant. Nevertheless, the property attached constitutes security for the satisfaction of the plaintiff's claim.9

Attachment is an extraordinary remedy in that it permits the seizure of a defendant's property prior to an adjudication of the plaintiff's claim and a determination of the defendant's liability. The right to make such seizure should be, and is, carefully circumscribed.10

Development of Attachment

Scholars have traced the genesis of attachment to Roman sources.11 Judges and commentators have generally accepted the view that attachment, as a proceeding whereby the defendant’s property is provisionally seized to satisfy a judgment which the plaintiff expects to recover, has no common law origin.12 The modern attachment of English law is based on an early custom of London, recognized by the merchants of London as early as 1482,13 and like customs of other English cities,14 thereafter implemented by the English courts.

Many of the American Colonies enacted attachment stat-
utes at a very early date. Massachusetts enacted an attachment statute in 1697; New Hampshire enacted an attachment statute in 1699; Connecticut enacted an attachment statute in 1702; 15 New York enacted an attachment statute in 1751.16

Modern state attachment statutes, much like their colonial antecedents, possess certain distinctive features. They are classifiable as (1) unlimited vs. limited attachment statutes, and (2) domestic vs. foreign attachment statutes.

1. Unlimited vs. limited attachment statutes. In a minority of the states, for example, Connecticut, Massachusetts, New Hampshire and Vermont, attachment is allowed in actions for money demands, without requiring the existence of any special circumstance. In a majority of the states, for example, Florida, Illinois, New York, North Carolina, Ohio, Pennsylvania, Virginia, Washington and Wisconsin, attachment is allowed in actions (enumerated or non-enumerated) for money demands, but only under special circumstances. Typical special circumstances are non-residence of the defendant, fraudulent concealment of the defendant or his property, or the projected fraudulent departure of the defendant or the removal of his property.

In the unlimited group, an attachment may be procured without requiring the plaintiff to furnish an affidavit of compliance, or to give security. The converse is generally true in the limited group.

2. Domestic vs. foreign attachment statutes. In a minority of the states, for example, Delaware, Pennsylvania and the New England states, attachment statutes contain separate provisions governing domestic and foreign attachments. The domestic attachment statute relates to resident defendants, while the foreign attachment statute relates to non-resident defendants. In a majority of the states, including New York, no statutory classification of domestic and foreign attachment exists.

16 N. Y. Absconding Debtor Act of 1751 (An Act to Prevent Frauds in Debtors), L. 1751, c. 908, 3 N. Y. Col. Laws (1894 ed.) 835. For references to other colonial statutes, see 7 Rep. N. Y. Judicial Council (1941) 396.
Law and equity actions. Virginia expressly authorizes attachment in respect to claims, legal or equitable. In other states, for example, California and Washington, attachment statutes have been construed to imply the allowance of an attachment, though the plaintiff demands incidental equitable relief. In other states, for example, New York, North Carolina and North Dakota, attachment statutes authorize an attachment in actions for the recovery of money only.\footnote{17} Under such provision, an attachment is not allowed in equity actions, or in actions at law where the plaintiff seeks incidental equitable relief.\footnote{18}

Attachment Legislation in New York

The Absconding Debtor Act of 1751 marks the beginning of attachment legislation in New York. With slight variation, the Act was incorporated in the Revised Statutes.\footnote{19} Under this law, attachment accrued to the benefit of all creditors of the debtor, and not to the benefit of the petitioning creditor only. In 1849, a more advanced type of attachment statute was included in the Code of Procedure.

Since the enactment of the attachment statute in 1849, there have been three substantial revisions:

1. The revision of 1876, incident to the adoption of the Code of Remedial Justice (later designated the Code of Civil Procedure), broadened the base for the allowance of attachments.

2. The revision of 1940 (sponsored by the Association of the Bar of the City of New York) "streamlined" attachment procedure \footnote{20} by (\textit{inter alia}) simplifying the procedure for levying an attachment,\footnote{21} by defining and clarifying the method of determining third party claims to the attached

\footnotesize{\begin{itemize}
\item See 7 N. Y. REP. JUDICIAL COUNCIL (1941) 397, ns. 34-36.
\item 2 N. Y. REV. STAT. (1829) 230, § 27.
\item See REPORT OF COMMITTEE ON LAW REFORM CONCERNING ATTACHMENTS, Ass'n of Bar of City of New York, Nov. 29, 1939; Finn, The Streamlining of Attachment Procedure (1940) 9 FORDHAM L. REV. 1.
\item See N. Y. C. P. A. §§ 916, 917.
\end{itemize}}
property,²² and by safeguarding the attachment garnishee and others who may be affected by a levy, in cases where adverse claims are made to the attached property.²³

3. The revision of 1941 (sponsored by the Judicial Council of the State of New York) deals principally with matters which were largely unaffected by the 1940 revision, including (1) the actions in which an attachment is allowable (Sections 902, 904); (2) the grounds on which an attachment is obtainable (Section 903); (3) some problems incident to the completion of the service of a summons where the warrant precedes the service of the summons (Section 905); (4) the terms of the undertaking given by the plaintiff on obtaining a warrant of attachment (Section 907); (5) the right to attach the interest of a defendant in a partnership (Section 915-a).

The 1941 revision effects change in instances where change seemed desirable. No change is made merely for the sake of change. Provisions which have stood the test of time are left untouched. Archaic, inconsistent and obsolete provisions are amended. Though some of the changes effected by the revision of 1940 do not seem to be feasible, it was believed that the 1940 revision should be given a fair trial, and, except for a few matters, the revision of 1940 is unaffected by the revision of 1941.

III. Sections of the New York Civil Practice Act as Amended by the 1941 Revision, with Brief Comments

In What Actions Attachment May Be Had

Sec. 902. In what actions attachment of property may be had. A warrant of attachment against the property of one or more defendants may be granted upon the application of the plaintiff, as specified in the next section, in any action for the recovery of a sum of money only.*

The 1941 amendment of Section 902 extends the scope of the attachment statute by allowing an attachment in any

²² See N. Y. C. P. A. §§ 922, 924.
²³ See N. Y. C. P. A. § 944-a.
* Matter in italics is new.
action for the recovery of a sum of money only. Prior thereto, Section 902 specified four classes of action in which an attachment was procurable.24

Legislative specification had come about because of judicial delimitation. By continuous extension and specification, the Code provision of 1849 authorizing attachment in an action for the recovery of money25 had become almost all-inclusive of money actions. An exception to its all-inclusiveness was the death action provision limiting attachment to an action for wrongful death, if the cause of action arose in this state.

The amendment is in accord with attachment legislation of a majority of the states.26

Persons Against Whom Attachment May Be Had

Sec. 903. What must be shown to procure warrant of attachment. To entitle the plaintiff to such a warrant, he must show that a cause of action specified in the last section exists against the defendant, and, if the action is to recover damages for breach of contract, that the plaintiff is entitled to recover a stated sum, over and above all counterclaims known to him. He must also show that the defendant

1. Is either a foreign corporation or not a resident of the state; or

2. If a natural person and a resident of the state, has departed or is about to depart therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or

3. If a natural person or domestic corporation, 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; or

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24 An attachment was procurable in an action for (1) breach of contract, (2) wrongful conversion of personal property, (3) injury to person or property in consequence of negligence, fraud, or other wrongful act, (4) a death action where the cause of action arose in this state.
25 N. Y. CODE PROC. (1849) § 227.
26 7 Rep. N. Y. JUDICIAL COUNCIL (1941) 403, n. 61.
For further comment on this amendment, see 7 Rep. N. Y. JUDICIAL COUNCIL (1941) 400.
4. 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, for the purpose of procuring credit or the extension of credit; or

5. 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, and the action is in favor of a private person or corporation and is brought to recover damages for an injury to property where the liability arose in whole or in part in consequence of the making of the false statement; or

6. In an action upon contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

7. If an adult and a resident of the state, has been continuously without the state for more than six months next before the granting of the warrant of attachment and has not made the designation, provided for by statute, of a person upon whom to serve a summons in his behalf, 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.

As a condition to the procurement of a warrant of attachment, a plaintiff must show the existence of an action for the recovery of a sum of money only, and the existence of a circumstance specified in Section 903 of the Civil Practice Act.

In some jurisdictions, for example, Connecticut, Massachusetts, New Hampshire and Vermont, attachment is allowed in almost any circumstance. In most jurisdictions, for example, Illinois, New York, Ohio, Washington and Wisconsin, attachment is allowed only in given circumstances. The circumstances are not uniform, and sometimes differ widely. The advisability of making the New York attachment statute correspond to the unlimited attachment statutes was considered, but it was determined to maintain the limited characteristic.

The 1941 amendment of Section 903 effects no radical departure from the previously existing law, but adds two new

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27 For comparative legislation, see 7 Rep. N. Y. Judicial Council (1941) 406, n. 64.
grounds for procuring an attachment, and corrects some defects.

1. **Subdivision 2 of Section 903.** The 1941 amendment of subdivision 2 of Section 903 makes the projected fraudulent departure of a defendant a ground for attachment. Prior thereto, a defendant's fraudulent departure from the state was a ground for attachment; his *projected* fraudulent departure therefrom was not a ground for attachment.28

2. **Subdivision 3 of Section 903.** The 1941 amendment of subdivision 3 of Section 903 deletes the provision authorizing an attachment on the ground that the defendant is a domestic corporation, and that no person can be found within the state after diligent effort, upon whom a summons can be served.

The deleted provision became a ground for attachment in 1919.29 The person upon whom a summons could be served in behalf of a domestic corporation did not then include the Secretary of State. Today, Section 25 of the Stock Corporation Law and Section 228 of the Civil Practice Act authorize service of a summons upon a domestic corporation by serving the Secretary of State. In view of such authorization, an attachment, on the ground of inability to effect service on a domestic corporation, should not be allowed.

3. **Subdivision 5 of Section 903.** The 1941 amendment of subdivision 5 of Section 903 transposes the deceit provision from the former Section 904. The transposition removes the ambiguity implicit in the inclusion of private deceit actions in the section (904) intended primarily and uniquely to affect actions for peculation of government property, and to make inapplicable to deceit actions the security immunity provided in Section 908. "The logical and more apposite place for this provision is at this point. Its sequence immediately after the false financial statement provision (subd. 4) correlates the two provisions (subds. 4 and 5). The attachment procurable under subdivision 4 implies a credit trans-

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action. The attachment procurable under subdivision 5 implies the existence of deceit, and of injury to property." 30

4. Subdivision 6 of Section 903. The 1941 amendment of subdivision 6 of Section 903 makes the fraud of the defendant in contracting or incurring the liability in an action upon contract, express or implied, a ground for attachment. 31 Subdivision 4 of Section 903 allows an attachment where the defendant has made a false financial statement for the purpose of procuring credit or the extension of credit. Subdivision 5 of Section 903 (transposed from Section 904) allows an attachment for injury to property where the liability arose in consequence of the making of a false financial statement. Prior to the 1941 addition of subdivision 6, other types of fraud antecedent to the making of a contract or the incurring of the liability were not grounds for procuring an attachment. 32

5. Subdivision 7 of Section 903. The 1941 amendment makes a substantive change in subdivision 7 (formerly subdivision 5) of Section 903. Subdivision 7 now provides that an attachment is procurable against a resident adult defendant who has been continuously without the state for more than six months next before the granting of the warrant of attachment and has not made the designation, provided for by the statute, of a person upon whom to serve a summons in his behalf, etc. Prior to the 1941 amendment, an attachment was procurable against such defendant who has been continuously without the state for more than six months next before the granting of the "order of publication of the summons against him". Serious difficulty arose in the implementing of this provision, since it prescribed, as a condition to the granting of a warrant, that the defendant shall have been

30. 7 REP. N. Y. JUDICIAL COUNCIL (1941) 408.
31. The language of this provision was adapted from subd. 9 of § 829 (arrest) of the Civil Practice Act.
32. In a number of other jurisdictions, fraud generally is a basis for attachment. See 7 REP. N. Y. JUDICIAL COUNCIL (1941) 409, n. 75.

Subd. 6 of § 903 relates to an action on contract. Subd. 5 relates to an action in tort. Subd. 6 includes any fraud in contracting or incurring a liability, and does not require a writing. Subd. 5 includes fraud contained in a false statement in writing as to the financial responsibility or standing of the defendant. Subd. 4 relates to a credit transaction.
continuously without the state for more than six months next before the granting of the order of publication of the summons. Section 232 of the Civil Practice Act, governing orders for service of summons by publication, provides that in a money action, the order must be founded upon proof that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state. Compliance with both of these provisions was impossible. When applying for a warrant of attachment, the plaintiff was required to show the defendant's absence for six months next before the granting of the order for service by publication, and when applying for the order he was required to show that a warrant of attachment was levied upon property of the defendant within the state. This anomalous situation is corrected by providing that the warrant of attachment may be granted if the absence is continued for six months next before the granting of the warrant of attachment.

Sec. 904. Warrant in action for peculation. A warrant of attachment against the property of one or more defendants in an action may also be granted, upon the application of the plaintiff, where the complaint demands judgment for a sum of money only; and it appears that the action is brought to recover money, funds, credits, or other property, held or owned by the state, or held or owned, officially or otherwise, for or in behalf of a public governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the state, or of a city, county, town, village, or other division, subdivision, department, or portion of the state, which the defendant, without right, has obtained, received, converted or disposed of; or in the obtaining, reception, payment, conversion or disposition of which without right, he has aided or abetted; or to recover damages for so obtaining, receiving, paying, converting or disposing of the same; or the aiding or abetting thereof. In order to entitle the plaintiff to a warrant of attachment, in the case specified in this section, he must show that a sufficient cause of action exists against the defendant for a stated sum.

The 1941 amendment of Section 904 transposes the deceit provision to Section 903. Prior thereto, Section 904 contained two provisions. The first (peculation provision) re-

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33 For further comment on this provision, see 7 Rep. N. Y. Judicial Council (1941) 410, ns. 77, 78.
lated to an action affecting government property which the defendant converted. The second (deceit provision) related to an action affecting private property where the liability arose in consequence of the false statements of the defendant as to his responsibility or credit. Confusion arose from the inclusion in one section of two quite different bases for attachment.\textsuperscript{34}

\textbf{Service of Summons After Granting of Warrant}

\textbf{Sec. 905.} Service of summons, if warrant previously granted. If the warrant be granted before the summons is served, personal service of the summons must be made upon the defendant against whose property the warrant is granted, within thirty days after the granting thereof; or else before the expiration of the same time, service of the summons by \textit{substituted service} or by publication must be commenced, or service thereof must be made without the state, as prescribed by law; and if publication has been, or is thereafter commenced, the service must be made complete by the continuance thereof \textit{except where the defendant voluntarily appears in the action}. If the defendant dies within thirty days after the granting of the warrant and before commencement or completion of service of the summons, the summons may be served upon the executor, administrator or temporary administrator of said defendant after the expiration of the same time and within sixty days after the issuance of letters testamentary or letters of administration.

A warrant of attachment may be granted to accompany the summons, or at any time after the commencement of the action, but not after final judgment.\textsuperscript{35} From the time of the granting of the warrant of attachment, the court acquires conditional jurisdiction, liable to be divested where the jurisdiction is dependent upon some action to be done after the granting of the warrant.\textsuperscript{36}

Section 905 of the Civil Practice Act provides that where the warrant is granted before the summons is served, the summons must be served within thirty days after the grant-

\textsuperscript{34} For further comment on this amendment, see 7 \textsc{Rep. N. Y. Judicial Council} (1941) 411.
\textsuperscript{35} \textsc{N. Y. C. P. A.} § 818.
\textsuperscript{36} \textsc{N. Y. C. P. A.} § 825. For construction of this provision, see \textsc{Schram v. Keane}, 279 \textsc{N. Y.} 227, 18 \textsc{N. E.} (2d) 136 (1938).
ing of the warrant, and provides the methods of effecting service of summons. Failure to effect service renders the warrant and the levy ineffective. 37

1. *Substituted service.* The 1941 amendment makes substituted service available to the plaintiff, and, in analogy to service by publication, requires that substituted service shall be commenced within thirty days after the granting of the warrant. Prior thereto, Section 905 did not authorize substituted service, and consequently where personal service within or without the state could not be made, the plaintiff was required to proceed by publication. No good reason appeared for making substituted service unavailable in respect to defendants who normally, and apart from attachment, would be subject thereto. The amendment implies that the order for substituted service shall be procured and effectuated by one of the methods prescribed in Section 231 of the Civil Practice Act, but does not imply that service shall be completed within the thirty days by the filing of proof of service.

2. *Defendant's voluntary appearance.* The 1941 amendment incorporates in the statute the substance of the court's holding in *Tuller v. Beck* 38 to the effect that if service of summons is properly commenced, the plaintiff need not complete publication where the defendant voluntarily appears in the action. 39

3. *Effect of defendant's death.* The 1941 amendment to Section 905 adds the provision that if the defendant dies within thirty days after the granting of the warrant of attachment and before commencement or completion of service of a summons, the summons may be served upon a representative of the decedent after the expiration of the same time and within sixty days after the issuance of letters testamentary or letters of administration.

Prior to the amendment, the defendant's personal representative had to be served within thirty days after the grant-

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37 Blossom v. Estes, 84 N. Y. 614 (1881).
38 108 N. Y. 355 (1888).
39 For further comment on this amendment, see 7 Rep. N. Y. Judicial Council (1941) 416.
ing of a warrant, or else the warrant and the levy became ineffective. Compliance with this requirement frequently was difficult, if not impossible. The defendant's death may have occurred so close to the expiration period as not to allow a reasonable time within which to appoint an executor or administrator, and to serve the summons upon him. The court had no power to extend the thirty-day period.

The amendment tolls the thirty-day service limitation by sixty days after the issuance of letters testamentary or letters of administration. The amendment allows time for the appointment of a representative of the decedent, and the service of the summons on the representative.

**Terms of Undertaking**

**Sec. 907.** Terms of undertaking on obtaining warrant. The undertaking to be given on the part of the plaintiff, before the granting of the warrant, shall be to the effect that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. The sum specified in the undertaking shall be such as the court, justice or judge thereof granting the warrant may, in its or his discretion, approve, not less than two hundred and fifty dollars, but nothing herein shall be construed to preclude a full and complete reconsideration of the sufficiency of said sum upon an application to increase the sum as hereinafter provided.

The 1941 amendment of Section 907 delimits the sum of the plaintiff's undertaking given upon the procurement of a warrant of attachment, by providing that the sum shall be such as the court may, in its discretion, approve, not less than $250. Prior thereto, Section 907 provided that the undertaking "must be at least $250". The old provision merely stated the minimum sum of the undertaking.

Consideration was given to a more specific delimitation of the sum of the undertaking than that contained in the 1941 amendment, but after due deliberation, the Judicial

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40 Ludwig v. Blum, 63 Hun 631, 18 N. Y. Supp. 69 (Gen. T. 1st Dep't 1892).
41 Sec 7 REP. N. Y. JUDICIAL COUNCIL (1941) 420, n. 106.
Council concluded that a more specific delimitation was undesirable at this time, and that the court or judge granting the warrant should be allowed to exercise discretion. Implicit in the amendment is the provision that the stated sum of §250 is a statement of the minimum, and not a statement of the sum actually to be required, and that the sum actually to be required shall be fixed in the discretion of the court. The sum so fixed (generally ex parte) does not preclude an application by the defendant to increase the security.\textsuperscript{43}

\textbf{Security Requirement in Deceit Actions}

\textbf{Sec. 908.} Security not required in actions for peculation. No security on the part of the plaintiff shall be required upon the granting of a warrant of attachment where the action is brought for a cause specified in section nine hundred and four of this act.

The 1941 amendment of Section 908 deletes reference to deceit actions, and thereby removes the security immunity hitherto available in respect to deceit actions, and reserves such immunity solely to actions affecting government property.

\textbf{Execution of Warrant}

\textbf{Sec. 912.} Duties of sheriff in execution of warrant. The sheriff must execute the warrant immediately, by levying, in the manner prescribed in section nine hundred and seventeen of this act, upon so much of the property of the defendant, within his county, not exempt from levy and sale by virtue of an execution unless by law specifically made subject to attachment notwithstanding such exemption, as will satisfy the plaintiff's demand, with the costs and expenses.

If levy be made upon personal property capable of manual delivery by the sheriff taking the same into his actual custody, he must, without delay, deliver to the person, if any, from whose possession the property is taken, a certified copy of the warrant. In all other cases where personal property is levied upon by him, the sheriff must, upon making such levy or as soon thereafter as may be practical, take into his actual custody all personal property capable of manual delivery, and, without delay, subject to the direction of the court or judge,

\textsuperscript{43} N. Y. C. P. A. § 948.
collect, receive and enforce all debts, effects and things in action levied upon by him.

The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as may be necessary, until the amount of plaintiff's demand for which the warrant was granted, with the costs and expenses, has been levied upon or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.

Subsequent levies under a warrant shall not apply to any property previously levied upon under the same warrant.

The 1941 amendment of Section 912 clarifies the ambiguity implicit in the 1940 amendment to Section 912, and expressly provides that the sheriff must levy upon the property of the defendant within his county, not exempt from levy and sale by virtue of an execution unless by law specifically made subject to attachment notwithstanding such exemption.44

**Partnership Interest Subject to Attachment**

*Sec. 915-a.* Interest in partnership subject to attachment. The interest of a defendant in a partnership may be levied upon as hereinafter provided. The court which granted the warrant of attachment, or any other court, may then or later appoint a receiver of the defendant's share of the profits, and of any other money due to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

The 1941 revision adds Section 915-a. The provision is new, and expressly authorizes an attachment levy upon the interest of a defendant in a partnership. It does not authorize the attachment of specific partnership property where an individual partner is subject to attachment, but authorizes the attachment of the interest of said partner in the partnership.

Since 1919, the New York Partnership Law (Uniform Partnership Act) has authorized the application of the interest of a partner by a judgment creditor of a partner by a

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44 For further comment on this amendment, see 7 Rep. N. Y. Judicial Council (1941) 428.
charging order and the appointment of a receiver.\textsuperscript{45} This Partnership Law provision is of no avail to a creditor of a partner prior to judgment. The 1941 amendment gives to a pre-judgment creditor the right to attach and levy upon this interest before judgment.\textsuperscript{46}

\textbf{Sec. 916.} Debt or evidence thereof; cause of action on contract, debt; claim to estate or trust fund; \textit{interest in partnership}; subject to attachment.

The attachment may also be levied upon:

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7. An interest of the defendant in a partnership. The levy of the attachment upon the said interest is deemed a levy upon, and a seizure and attachment of the interest of the defendant in said partnership, subject to the rights of the partners to continue the business of the partnership according to law.

Section 916, as amended in 1940, specified six intangible types of property subject to attachment, and stated the effect of an attachment levy thereon. The 1941 amendment of Section 916 adds a defendant's interest in a partnership as a seventh type of property subject to levy, and states the effect of an attachment levy thereon.

\textbf{Sec. 958.} Discharge of attachment on application of partner.

1. If a warrant of attachment is levied upon the interest of one or more partners in a partnership, the other partners, or any of them, at any time before final judgment, may apply to the judge who granted the warrant, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment as to that interest.

2. Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties to the effect that they will pay to the sheriff, on demand, if judgment is recovered against the defendant whose interest in a partnership is so levied upon, an amount not exceeding a sum specified in the undertaking, which must be not less than the value of the interests of the defendant in the partnership levied upon by virtue of the attachment, as fixed by the court or judge. If the value, in the opinion of the court or judge, is uncertain, the sum shall be such as the court or judge determines.

\textsuperscript{45} N. Y. Partnership Law § 54.

\textsuperscript{46} For further comment on this amendment, see 7 Rep. N. Y. Judicial Council (1941) 430.
3. For the purpose of fixing the sum or determining the sufficiency of the sureties, the court or judge may receive affidavits or oral testimony or may direct a reference.

The 1941 revision adds Section 958. The provision is new, and authorizes an application for the discharge of an attachment on the interest of a partner upon the application of another partner. \(^{47}\) This provision is necessary and appropriate because of the addition of the primary provision (Section 915-a) authorizing an attachment levy on the interest of a defendant in a partnership. \(^{48}\)

Method of Making Levy

Sec. 917. Method of making levy. A levy under a warrant of attachment must be made as follows:

1. Upon real property, by filing with the clerk of the county where it is situated, a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding the office address; and must be recorded and indexed by the clerk, in the same book, in like manner and with like effect as a notice of the pendency of an action.

2. Upon other property subject to attachment, as follows. Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists; where it consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock is not outstanding, with the president, or other head of the association or corporation, or a vice-president, secretary, assistant secretary, treasurer, assistant treasurer, cashier, director, or managing agent thereof, or where it consists of a right or interest to or in an estate of a deceased person arising under the provisions of a will or under the provisions of law in case of intestacy,

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\(^{47}\) The text of Section 958 is adapted from the former Section 958 of the Civil Practice Act, repealed in 1936. The repealed section affected the discharge of an attachment levy upon the interest of a partner in the property of a partnership. Such levy is contrary to the provisions of Partnership Law § 51, subd. 2(c).

\(^{48}\) For further comment on this provision, see 7 Rep. N. Y. Judicial Council (1941) 445. The 1941 amendment of Section 961 substitutes “interest in a partnership” for “personal property of a partnership”.
with the executor or trustee under the will, or administrator of the estate; or where it consists of a right or interest to or in any property or fund other than a decedent's estate held or controlled by a fiduciary, with said fiduciary; where it consists of an interest of the defendant in a partnership, by leaving a certified copy of the warrant of attachment with any other partner; where it consists of a debt represented by a non-negotiable bond, promissory note or other non-negotiable instrument for the payment of money only, by leaving a certified copy of the warrant of attachment with the holder of such non-negotiable instrument or with the person against whom such debt exists; or where it consists of a negotiable bond, promissory note or other negotiable instrument for the payment of money, or a certificate representing a share or shares in the stock of an association or corporation, with the person holding the same; upon all other kinds of property, with the person holding the same.

A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owned by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

The prohibition, provided in this section, shall not prevent a person upon whom a warrant of attachment has been served, as herein provided, who, at the time of service thereof, has in his possession or under his control an instrument belonging to the defendant, or in which the defendant has an interest received by him for collection or redemption, from collecting, presenting or redeeming the same, whether negotiable or otherwise, nor shall it prevent such person holding property of any sort of the defendant as collateral or other-
wise, from selling and transferring the same in good faith pursuant to
the pledge thereof or at the direction of any person who would,
except for the attachment, be authorized to direct the sale or transfer
thereof, provided, however, that the fair value or market price therefor
be received; and provided, further, that the proceeds of such collection,
redemption or sale, in excess of the amount necessary to satisfy the
said pledge, if any, be retained by the said person subject to the said
prohibition, nor shall the said prohibition be deemed to diminish any
rights of the holder of such property, if a creditor of defendant,
granted to a creditor under any law of this state.

* * *

The 1941 amendment of Section 917 effects three changes.

1. Subdivision 2 (first paragraph) of Section 917 pro-
vides that where the property subject to attachment consists
of a right or share in the stock of an association or corpora-
tion, for which a certificate of stock is not outstanding, an
attachment levy must be made by leaving a certified copy of
the warrant with the president, or other head of the associa-
tion or corporation, or a vice-president, secretary, assistant
secretary, treasurer, assistant treasurer, cashier, director, or
managing agent thereof. The 1941 amendment adds the as-
sistant secretary, the assistant treasurer and the director to
the persons formerly designated for the stated purpose. This
addition is in general conformity with the existing law affect-
ing the service of a summons.49

2. The 1941 amendment of subdivision 2 (first para-
graph) of Section 917 adds the provision that where a levy
is made upon an interest of the defendant in a partnership, a
certified copy of the warrant of attachment shall be left with
any other partner.50

3. In consequence of the 1940 amendment of Section
917, the sheriff, upon making an attachment levy, is not re-

49 The Civil Practice Act authorizes the service of a summons upon the
statutory designee, commonly the Secretary of State. N. Y. C. P. A. § 228,
subd. 9; N. Y. C. P. A. § 229, subd. 2. It was not deemed advisable to include
such designee among the persons on whom a warrant of attachment may be
served.
50 For further comment on this amendment, see 7 Rep. N. Y. Judicial
Council (1941) 435, par. 1.
For further comment on this amendment, see 7 Rep. N. Y. Judicial
Council (1941) 436, par. 2.
quired to take personal property, though capable of manual delivery, into his actual custody. The service by the sheriff of a certified copy of the warrant of attachment on the person designated by the statute effects an attachment levy and lien on the property for a period of ninety days from the date of such service. A person so served is forbidden to transfer or dispose of the property levied upon until the expiration of the said ninety-day period, except upon direction of the sheriff or pursuant to an order of the court.

The 1941 amendment of subdivision 2 (third paragraph) of Section 917 provides that payment or transfer of property by a person served with a warrant of attachment shall be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served. The rights of the *bona fide* payee or transferee, without notice that the warrant has been served, are made paramount to the rights of the attachment plaintiff. This is in general accord with the statutory provision governing the rights of a judgment creditor after the issuance of a property execution.

Certificate of Defendant's Interest

Sec. 918. Certificate of defendant's interest to be furnished. Upon the application of a sheriff holding a warrant of attachment, the president or other head of an association or corporation, or the vice-president, secretary, assistant secretary, treasurer, assistant treasurer, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant in the stock of the association or corporation, with all dividends declared or incumbrances thereon; or the amount, nature and description of the property held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

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51 For necessity of taking property into actual custody within ninety days from the issuance of the warrant, see N. Y. C. P. A. § 922, subd. 2. For problems arising in consequence of non-compliance with this provision, see Strucke v. Link, 176 Misc. 93, 26 N. Y. S. (2d) 748 (1941); Nemeroff v. National City Bank, 262 App. Div. 143, 28 N. Y. S. (2d) 295 (1st Dep't 1941).

52 N. Y. C. P. A. §§ 679, 683. For further comment on this amendment, see 7 Rep. N. Y. Judicial Council (1941) 436, par. 3.
Section 918 provides that upon the application of a sheriff holding a warrant of attachment, any designated officer of an association or corporation, or the managing agent thereof, holding property belonging to the defendant, must furnish to the sheriff a certificate of the defendant's interest in the stock of the association or corporation.

The 1941 amendment adds the vice-president, assistant secretary, treasurer, assistant treasurer to the persons designated for the stated purpose. The director has not been added because he frequently is not sufficiently familiar with the business and affairs of the association or corporation to justify his furnishing a certificate of the defendant's interest in the stock of the association or corporation.  

*Miscellaneous Amendments—Inconsistent, Erroneous and Obsolete Provisions*

The 1941 revision effects a number of miscellaneous amendments, a brief reference to some of which will here be made.

Section 910 is amended *(inter alia)* by eliminating the provision that warrants to the sheriffs of different counties may be issued "at the same time". Under the amendment, warrants may be issued simultaneously or successively to the sheriffs of different counties.  

Section 912 is amended *(inter alia)* by substituting the word "granted" for the word "issued" in respect to the granting of a warrant of attachment. This effects conformity with the language of Section 902. Section 920 is similarly amended.

Sections 927, 945 and 946 are amended by correcting erroneous references.

Sections 943, 944, 944-a, 945, 946, 964, 965, 966 and 971 are amended by adding provisions which effect conformity with other sections.

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83 For further comment on this amendment, see 7 Rep. N. Y. Judicial Council (1941) 437.
84 For further comment on this amendment, see 7 Rep. N. Y. Judicial Council (1941) 427, par. 3.
Section 971 is amended by removing an obsolete provision.55

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55 For correction of obsolete provision formerly contained in Section 959, see 7 Rep. N. Y. Judicial Council (1941) 446.