The Streamlining of Attachment Procedure

John F. X. Finn

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The Streamlining of Attachment Procedure

Cover Page Footnote
Associate Professor of Law, Fordham University, School of Law

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THE STREAMLINING OF ATTACHMENT PROCEDURE

JOHN F. X. FINN

The Fordham Law Review welcomes the opportunity to publicize a proposed bill, sponsored by the Association of the Bar of the City of New York, which would materially amend the Attachment Laws of New York. Professor Finn establishes the proposition that statutory changes are imperative. The Fordham Law Review will appreciate any comment or criticism of the proposed changes in Attachment procedure.—EDIToRAL NOTE.

IT WAS Lord Mansfield, an expert in legalistic streamlining, who said:

"I never like to entangle justice in matters of form. . . It only tends to ruin . . . and destruction."

In recent days bar associations and legal thinkers generally have been concentrating upon the elimination of procedural red tape. The Federal Rules of Civil Procedure and the reports of Law Revision Commissions and Judicial Councils give testimony of the spirit of the times. The most recent notable accomplishment in the attack has been the adoption, in New York, of a modernistic "Interpleader" device which has already earned the approbation of the courts.

† Associate Professor of Law, Fordham University, School of Law.
3. Klein v. Freund & Co., N. Y. App. Div., First Department, Nov. 13, 1939. In this case a New York textile company owed $23,000 to a firm in Czechoslovakia. After the incorporation of that country into Germany, the head of the firm fled to Paris and there assigned the claim to a New York resident who brought action against the textile company. At the same time, however, claim was made upon the defendant in the name of the firm in Czechoslovakia, and also by a bank located in Prague. Under the new legislation the
It is now proposed that this device, which may well serve as a model for the entire nation, be supplemented by a renovation of the “Attachment” articles of the New York Civil Practice Act.

The objectives of the renovation, suggested and planned by the Committee on Law Reform of the Association of the Bar of the City of New York, are principally these three:

1. Simplification of the procedure for levying attachment.
2. Definition and clarification of the method by which a claim made by another than the defendant in the attachment action may be tried, when such other person claims the property held under a levy of attachment.
3. Safeguarding of the attachment garnishee (such as the defendant’s debtor) and of others who may be affected by a levy in cases where adverse claims are made to the property attached.

To attain such objectives, since all attachment procedure exists only through statute, a legislative bill has been drafted, which is appended hereto with appropriate comments of the Committee immediately following:

debtor either pays the money into court or files a bond. Non-resident claimants may be served by registered mail with notice of pendency of the action and if they do not appear within a year their claims are barred by limitation. The money is then paid to the plaintiff and the defendant is free of a possible second suit. If the other claimants do appear, their rights inter se are determined by the court, and the debtor eventually pays the successful claimant. In the instant case the Appellate Division held that in order to invoke the new statutes a New York debtor is not required to show, as formerly in interpleader proceedings, that there is a reasonable basis to the multiple claims—the mere making of such claims is deemed sufficient for the granting of relief. Lieberman v. Parsons & Whittemore, Inc., N. Y. L. J., Sept. 28, 1939, p. 855, col. 6 (Sup. Ct.); Reiss v. S. S. Steiner, Inc., N. Y. L. J., Aug. 11, 1939, p. 347, col. 3 (Sup. Ct.); Krafft v. S. S. Steiner, Inc., N. Y. L. J., Nov. 18, 1939, p. 1694, col. 7 (Sup. Ct.); cf. Anninger v. Hohenberg, N. Y. L. J., Dec. 8, 1939, p. 2032, col. 6 (Sup. Ct.), reargument granted and decision adhered to, N. Y. L. J., Dec. 22, 1939, p. 2276, col. 3 (Sup. Ct.); Loeb v. Bank of Manhattan Co., N. Y. L. J., June 30, 1939, p. 3022, col. 3 (Sup. Ct.); Stern v. Steiner, N. Y. L. J., April 20, 1939, p. 1810, col. 4 (Sup. Ct.).

These cases were decided prior to the amendments of June, 1939. See Rep. No. 206, Committee on State Legislation, Ass’n of Bar of City of New York (1939) 513-518: “The bill would effectively remedy the dangerous ‘double liability’ inherent in such situations.”

4. The members of the Committee are: Charles H. Meyer, Chairman, J. Delafield Dubois, George I. Genung, Henry Clay Greenberg, George N. Hamlin, John H. Johnson, Horace S. Manges, MacNeil Mitchell, Carl Pack, Albert Parker, Harvey Reeves, Abraham Rotwein, Milton Shalleck, William E. Shrewsbury, and Paul Van Anda. Davidson Sommers is an auxiliary member concerned with the “Attachment” revision. The proposal was approved by the Association at a meeting held on December 12, 1939, after having been withdrawn for further study at a stated meeting held on April 11, 1939. Such further study included an examination of the attachment laws of twenty-four states. As stated by former Chief Judge Crane in the foreword to the Nichols-Cahill Civil Practice Acts, “New York has been a pioneer in the domain of practice.”
lowing each section in which changes are proposed. This draft attempts

to afford plaintiffs the full advantage of the attachment statutes, to

provide defendants with adequate protection where needed, and to remove

inconsistencies, anomalies and technicalities which "eat like rust into

the substance of justice."  

1. Simplification of the Procedure for Levying Attachment

A progressive step forward was taken in New York when an amend-
ment to Section 916 of the Civil Practice Act afforded a plaintiff free
access to intangible assets by way of attachment "without reference to
the fading fiction of domicile."  

But not all of the barnacles have been
scraped from the hull of the procedural ship. Most notable among them
is the primitive doctrine of Anthony v. Wood\(^7\) to the effect that it is
necessary for the sheriff in levying upon personal property capable of
manual delivery to take it into his actual custody, no matter what the
circumstances.

In that case a promissory note was held by an agent, and the sheriff
sought to levy upon it. He demanded possession of the note but the
agent refused to surrender it. The sheriff thereupon obtained an order
from the court requiring the agent of the defendant to deliver the note
into the possession of the sheriff. In the meantime, however, the de-
fendant debtor had assigned the note. The sheriff obtained possession
of the note under his order but it was held that he had no lien upon
the note either by virtue of the original demand, since he did not take
the note into his custody, or by his subsequently obtaining the custody
of the note, as at that time the instrument was not the property of the
defendant. The court said:

"We have nothing to do with the wisdom of the rule. We can only enforce
it as it is plainly written."

---

5. People v. Tweed, 5 Hun 353, 359 (N. Y. 1875).

6. N. Y. Laws 1936, c. 818. See Kennedy, supra note 2, at 704. Consider the effect
of this amendment on Sokoloff v. National City Bank, 239 N. Y. 158, 145 N. E. 917 (1924);
 729 (1st Dep't 1910); Chrzanowska v. Corn Exchange Bank, 173 App. Div. 235, 159 N.
 679 (1st Dep't 1916); Cohn v. Enterprise, 214 App. Div. 238, 212 N. Y. Supp.
 39 (1st Dep't 1925); Clinton Trust Co. v. Compania, N. Y. L. J., Oct. 4, 1939, p. 958,
 5 (Sup. Ct.); id., N. Y. L. J., Oct. 7, 1939, p. 1020, col. 6 (Sup. Ct.); Blumbird v.
 139 Misc. 742, 249 N. Y. Supp. 319 (City Ct. 1931); Murtaugh v. Yokohama, 149
 693, 269 N. Y. Supp. 65 (City Ct. 1933).

Perhaps even more outmoded are the *Columbia Spinning* cases. The first case holds that no valid levy results when a sheriff serves a certified copy of a warrant together with a copy of the moving papers and a notice but omits taking manual possession for the sole reason that the agent of the debtor untruthfully denies that he has any of the debtor's personal property capable of manual delivery. The court stated, forsooth, that "The sheriff in this case might have taken steps to discover the truth; . . . the trouble with the appellant's case is that there is no possibility of making the levy unless the officer does the precise thing which the statute requires." 9,10

The second *Columbia Spinning* case holds that even if a sheriff puts a keeper into possession of 256 cases of yarn in a warehouse no valid levy can result if a warehouseman's lien exists, because it is impossible to have "a double possession in custody at the same time by both the sheriff and warehouseman under different liens and different rights". 11

Such philosophy has resulted in statutes to the effect that a valid attachment levy is impossible if a negotiable warehouse receipt has been issued, unless the receipt is surrendered to the warehouseman or its negotiation enjoined and the receipt is either surrendered up or impounded by the court. 12 So with other negotiable documents of title. 13

(1889) and Rinchey v. Stryker, 28 N. Y. 45 (1863) to the effect that a sheriff does not make a valid levy if he fails to get actual custody even where the goods and chattels have been fraudulently assigned by a debtor to hinder, delay and defraud creditors. Note that N. Y. Penal Law § 1171 stamps as a misdemeanor an attempt to remove property from the state to defeat an attachment, but applies only to a defendant and not to a third person. Although "in misdemeanors all are principals." N. Y. Penal Law §§ 27, 1936, 1930 (3). And see N. Y. Penal Law §§ 1873, 1200 (2); N. Y. Jud. Law §§ 750 (4), 753 (1).


13. Bill of lading, N. Y. Pers. Prop. Law §§ 210, 211, 120, 121; shares of stock, N. Y. Pers. Prop. Law § 174; American Surety Co. v. Kasco Mills, Inc., 262 N. Y. 585, 188 N. E. 75 (1933). As stated in the Commissioners' Note respecting Section 24 of the Uniform Bills of Lading Act: "If the mercantile theory of documents of title, such as bills
STREAMLINING OF ATTACHMENT PROCEDURE

The rule thus legislatively established in these few instances would not be changed by the proposed revision. It must be admitted, however, that these laws, standing alone, did but add further inconsistencies to the attachment statutes. Confusion is made worse confounded by the fact that a transferee's title may be defeated by attachment if a bill of lading is non-negotiable but by statutory definition a provision in certain bills that they are non-negotiable "shall not affect . . . negotiability".

On occasion a court struggles to find "actual custody" in the absence of actual removal if the officer has the property in full view and is "in a position" to take full possession and control. The sheriff has also been permitted to drill open a safe deposit box in order to get custody. But important commercial interests should hardly depend upon such a paucity of authority as exists.

Another barnacle on the procedural ship is the doctrine that "an attachment is leviable only on legal interests and does not extend to equitable interests" in personalty. The proposed statutes would har-
monize the attachment law with the Personal Property Law, the Debtor and Creditor Law, the General Business Law and similar statutes. It would unify methods of attachment of a debt represented by (a) a negotiable instrument, (b) a non-negotiable instrument and (c) an account or demand. It would extend the right to attach to other classes of assignable property. And above all, it would root out the peculiarities in the present law which make a distinction between the method of levying an attachment upon tangible property and upon intangible property. The former can now be levied upon as heretofore indicated, only by seizure of the property by the sheriff, while the latter is now levied upon merely by the service of a certified copy of a warrant upon the holder of the property, without any notice whatever to the defendant. It is not presently required that a copy of the moving papers accompany such warrant or be forwarded to the defendant. The distinction between the two types of property contemplated by the act is tenuous, as for example, bonds held by a banker or broker as collateral are not property capable of manual delivery if there is an unpaid loan outstanding, since the attachment is on the equity, but, if they are held with no claim by the banker or broker, they are capable of manual delivery. In most instances, moreover, and particularly in larger cities, the sheriff cannot get immediate access to tangible property to seize it, yet if publication be necessary, property must be levied upon within thirty days to enable the plaintiff to secure an order of publication. Furthermore, the holder of property is under no compulsion not to transfer tangible property (capable of manual delivery) after service upon him of a warrant but


19. N. Y. DEBTOR AND CREDITOR LAW § 278 (1b) provides: "Rights of creditors whose claims have matured. 1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser, . . . b. Disregard the conveyance and attach or levy execution upon the property conveyed." (Italics Inserted).


before the sheriff has secured actual custody, since such property has not yet been "attached." There is no good reason why the plaintiff's right to secure property by attachment within the jurisdiction, in satisfaction of his claim, or even the duties of the attachment garnishee should be subject to such peculiar exigencies. The distinction between the method of making a levy on tangible property and intangible property should be abolished, and the levy in the first instance should be made on either type of property by service of a certified copy of the warrant upon the holder thereof. In more fairness to the defendant than the present law manifests, moreover, a copy of the warrant and moving papers should in either event be served upon or forwarded to the defendant whose property is attached, or at least procedure should be provided by which the defendant can be reasonably assured of having immediate access to the papers.

As an alternative to the method of levy by service of a certified copy of the warrant, it should be possible for a levy to be made in the first instance on property capable of manual delivery, by seizure, if so requested by the plaintiff. This alternative provision would preserve such advantages as may now exist in the comparatively small number of cases wherein seizure in the first instance is possible.

As above indicated, the New York Personal Property Law, Section 174 (Uniform Stock Transfer Law) provides that no attachment or levy upon shares of stock for which a certificate is outstanding, shall be valid unless the certificate is actually seized, or its transfer by the holder be enjoined. A warrant of attachment served upon the holder of a certificate of stock under the proposed revision would enjoin the holder from transfer; and similarly the duties of the holder of negotiable documents of title would be defined. This procedure is desirable also in regard to any other property held.

It has always been the duty of the sheriff ultimately to secure possession of the property and to collect debts, effects and things in action. In fact, only thus can a judgment be satisfied when obtained. There is, however, no present limit as to the time in which such an action or special proceeding must be commenced to secure property which the sheriff has not been able to seize. For the advantage of the plaintiff and of any attachment garnishee, the proposed revision would provide that the sheriff, or the sheriff and plaintiff jointly, should proceed promptly to obtain control over property attached, and it has fixed the limit for the commencement of such action to ninety days after levy, with appropriate provision, however, for extension of time should it be

22. Cf. authorities cited in note 8, supra.
impossible to commence an action within that time. Such extension of
time would prolong the duties of the holder of property not to transfer
the same. If no steps were taken by the sheriff, or plaintiff and sheriff
jointly, the levy would become void.

All of the foregoing indicates that the proposed streamlining of
attachment procedure would produce not only a smoother procedural
style but an attachment mechanism far more effective, practical and
just than any which now exists. It would have the added advantage
of being geared to the times and adjusted to the warning of Cardozo
that “precedents drawn from the days of travel by stagecoach do not
fit the conditions of . . . today”.

2. Definition and Clarification of the Method of Determining Third-
Party Claims to Property Attached

In 1936 New York amended the method by which a third party could
make claim to ownership of property attached as that of the defendant.
Previous procedure had provided for the impanelling of a sheriff’s jury.
The procedure adopted in 1936, however, appears not to have been
extensively used, the reasons apparently being that (a) it can be invoked
only when the sheriff has property in his custody; (b) the procedure
and the rights of the parties seem somewhat indefinite; and (c) if a
trial is had, the judge, in his sole discretion, may impanel a jury. The
proposed changes in this procedure would place upon the third party
claimant the duty of making an application for an order awarding to
him the property levied upon, and would permit the court to fix the
amount of the bond if plaintiff desires to give one, or set the matter
down for a trial of the issue, at which time either side may demand a jury.

3. Protection of the Attachment Garnishee When Adverse Claims
Against Him Are Made

In the case of an action in aid of attachment to procure property
which is claimed by someone other than the defendant, the proposed
revision grants to the attachment garnishee protection against adverse
claims, by permitting procedure under Section 51-a of the Civil Practice
Act, which became law in June, 1939, and any other appropriate pro-
cedure for the adjudication of adverse claims. The attachment garnishee
is also given the right to vacate the attachment if the papers appear to
be defective; the warrant, however, to be valid as against all persons
until vacated or modified.

§ 948 affords relief only to person acquiring interest in the property after levy is made.
There is a superstition in some quarters that "you cannot interplead the sheriff". The superstition is contrary to the fact.

In *The American Trust & Savings Bank v. Thalheimer*, the Appellate Division modified an order of the Special Term so as to provide that the Sheriff of Onondaga County and certain other persons be substituted as defendants in the place of the defendant Thalheimer, upon his paying into court the sum in controversy, and that the action proceed against such other defendants alone and that the defendant Thalheimer be discharged from liability to the plaintiff and to the Sheriff and the other defendants. The court said:

"The sheriff as such is a proper party defendant, as he has attached the funds and has an interest in the result. (Simons v. Hearn, 17 N. Y. Supp. 847)."

*Simons v. Hearn* was an appeal by the plaintiff from an order of the Special Term substituting the Sheriff in the place and stead of the defendant. The action was brought against the defendant to recover a sum of money in his hands. Prior to the commencement of the action, the Sheriff had served upon the defendant a warrant of attachment against the said fund. The defendant moved for an order interpleading the Sheriff and permitting him to deposit the funds into court and be discharged from further liability, which the court granted. Affirming the order, the court said:

"... The sheriff and the plaintiff herein claim the same thing, viz., the $75.08 sued for herein. The defendants are willing to pay to the person entitled thereto said fund, but cannot without risk and hazard to themselves determine which one of the claimants is entitled to it. There is no collusion between them and the sheriff. Under these circumstances the order appealed from was properly granted. Crane v. McDonald, 118 N. Y. 654."

In *San Fernando Heights Lemon Co. v. Fruit Auction Co.*, the court granted a motion by the defendant for an order of interpleader substituting as parties defendant the City Marshal and another, where it appeared that the plaintiff was suing for a sum of money which the City Marshal claimed by reason of the service of a warrant of attachment upon the defendant.

*Corpus Juris*, in discussing the persons subject to interpleader, says:

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26. *Id.* at 174, 51 N. Y. Supp. 813, at 816.
27. 17 N. Y. Supp. 847 (City Ct. 1892).
29. 174 N. Y. Supp. 156 (City Ct. 1919).
"A sheriff who has attached the fund is a proper party defendant, as he has an interest."

Section 134, subdivision 6 of the Banking Law provides that, in all actions against a bank to recover moneys on deposit therewith, "if there be any person or persons not parties to the action, who claim the same fund, the Court in which the action is pending, may" make such claimants parties defendant thereto. Such provision is all inclusive; it provides that any person who claims the same fund may be made a party defendant. Clearly, the Sheriff claims a portion of the fund which he seeks to attach. It is immaterial whether or not he claims to be beneficially entitled to the fund. He asserts his claim on behalf of the attaching creditor. If the defendant refused to pay the Sheriff, the attaching creditor would commence an action by the Sheriff as plaintiff in aid of the attachment. To obviate the necessity of having to defend such an action brought to recover the money on deposit, the defendant is entitled to an order of interpleader, making the Sheriff as well as the other claimants, additional parties to the action.

The proposed statutory revision would codify these rules of law and allay the confusion which today exists in connection with them.

It is to be hoped that in connection with the revision the Legislature will find it possible to solve the conundrum as to what constitutes a "jurisdictional defect" in attachment papers which precludes their amendment after a motion to vacate or modify has been made. The present proposal has not attempted to attack this problem, undoubtedly because its solution might require amendments to other than the "Attachment" articles of the Civil Practice Act. The fundamental dilemma as to what constitutes a "jurisdictional defect" is, of course, not limited to attachment actions.

30. 33 C. J. 449.

In the following summary of the proposed revision attention is particularly called to the "Comment" which follows each proposed statute:

TABLE INDICATING THE SECTIONS OF THE NEW YORK CIVIL PRACTICE ACT REFERRING TO ATTACHMENTS, FROM SECTIONS 902 TO 948, INCLUSIVE, IN WHICH NO CHANGE IS SUGGESTED, AND THOSE IN WHICH PROPOSED CHANGES ARE MADE. WHERE THE HEADING OF THE SECTION IS ALSO CHANGED, THE PROPOSED NEW HEADING IS USED.

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§ 945. Joinder of plaintiff with Sheriff after action is begun.

§ 946. Court control of action by plaintiff and sheriff.

§ 947. Return of inventory; how enforced.

§ 948. Application to vacate or modify warrant, or increase security.

(Matter in brackets is to be omitted. Matter in italics is to be added.)

AN ACT to amend and clarify certain sections of articles fifty-four, fifty-five and fifty-six of the civil practice act relating to attachments,
executing warrants of attachments and vacating or modifying warrants of attachments.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section nine hundred and two of the civil practice act is hereby amended to read as follows:

§ 902. In what actions attachment of property may be had.

A warrant of attachment against the property of one or more defendants in an action may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as a tax or as damages for one or more of the following causes:

1. Breach of contract, express or implied [, other than a contract to marry].
2. Wrongful conversion of personal property.
3. An injury to person or property in consequence of negligence, fraud or other wrongful act.
4. A wrongful act, neglect or default by which the decedent's death was caused, when the cause of action arose in this state and the action is brought by an executor or administrator against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued.

COMMENT: The phrase "other than a contract to marry" is obsolete. No contract to marry operates under the Laws of New York to give rise either within or without the state to any cause or right of action for the breach thereof. Article 2-A, civil practice act, paragraphs 61-a to 61-i.

Section 2. Section nine hundred and six of the civil practice act is hereby amended to read as follows:

§ 906. Papers to be filed; service of papers upon defendant on demand.

The plaintiff procuring the warrant must [cause the affidavits and papers comprising the proof upon which it was granted to be filed in the office of the clerk], within ten days after the granting thereof [.], cause to be filed in the office of the clerk, the summons issued in the action, the complaint, if any, and a copy of the undertaking given upon the warrant, unless no undertaking is required pursuant to sections nine hundred and four and nine hundred and eight of this act, and any and all affidavits or other written evidence and exhibits thereto comprising the proof on which the warrant was granted. The said warrant, however, notwithstanding the failure of the plaintiff so to file, or any other defect
or omission in the granting or issuance thereof or levy thereunder, shall be and remain valid as to each person holding property subject to attachment of, or indebted to the defendant, on whom a certified copy of the warrant of attachment is served, as hereinafter in section nine hundred and seventeen provided, until an order vacating or modifying the same shall have been duly made and entered, and a certified copy thereof with notice of entry, served upon such person.

The court, in its discretion, for good cause shown, may, if the substantial right of any party is not thereby prejudiced, with or without terms, permit the filing of any or all of the papers herein designated after the expiration of the period of ten days.

Not more than one day after service upon plaintiff or his attorney of a written demand by the defendant or his attorney, made after levy on property of defendant has been effected under a warrant of attachment, the plaintiff shall cause to be delivered or mailed to the defendant, at the address specified in such demand, a copy of all papers herinafter designated, comprising the proof upon which the warrant was granted; and upon plaintiff's failure to comply with such demand, the court or judge, in its or his discretion, may order that any or all levies under said warrant be vacated.

The demand by or on behalf of the defendant shall not be deemed an appearance in the said action, nor a designation of a manner or method of service of process.

COMMENT: Since some confusion has existed as to the proper procedure for filing attachment papers under section 906 and rule 80, the section has been clarified by defining exactly what papers must be filed.

The person on whom a warrant is served may believe that the papers are not properly issued or have other defects in them. The amendment provides clearly that the warrant is valid until vacated or modified. This is consistent with section 911, which provides that a bond given on an improperly issued warrant is valid. A later section grants to the person on whom a warrant, apparently defective, is served, the right to move to vacate it.

The provision for notice to the defendant is suggested in fairness to the person who is most concerned about the attachment. The present law provides for no notice to him whatever, either in the case of tangible property or intangible property.

Section 3. Section nine hundred and ten of the civil practice act is hereby amended to read as follows:
§ 910. Contents of warrant; to whom directed.

The warrant may be directed either to the sheriff of a particular county, or, generally, to the sheriff of any county. Warrants may be issued at the same time to sheriffs of different counties. The warrant must require the sheriff to attach and safely keep, so much of the property or interest therein within his county, subject to attachment, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the plaintiff's demand must be specified in the warrant, as stated in the proofs on which the warrant was granted. Warrants may be issued at the same time to sheriffs of different counties.

Simultaneously with, or at any time after, the issuance of a warrant of attachment, the plaintiff may, in writing, specify particular personal property to be attached as the property of the defendant, or as property in which the defendant has an interest subject to attachment, whether or not the property so specified is held in the name of, or otherwise appears, to be the property of the defendant, and deliver the said writing to the sheriff. When levy is made upon the said specified personal property, or any part thereof, a copy of said writing, specifying the said specific personal property, shall accompany the certified copy of the warrant left by the sheriff with the person holding the said personal property specified therein, or any part thereof, or delivered to the person, if any, from whose possession the said property, or any part thereof, is taken, as the case may be. A copy of the said writing must be filed by the plaintiff in the office of the clerk within ten days after delivery by him to the sheriff. The warrant of attachment and any levy thereunder shall apply to all property of the defendant subject to attachment, whether or not so specified, unless the writing specifically limits its effectiveness to such specified property.

COMMENT: There is no statutory provision by which a plaintiff may attach property of the defendant, but not standing in the defendant's name, unless the same can, in the first instance, be seized by the sheriff. A practice has grown in instances of this kind, by which the plaintiff will give a written notice of such property to the sheriff, who serves the notice with the warrant, upon the holder of the property. If the levy be otherwise complete, the property thus specified is attached. This procedure has had the approval of our courts. Cotnareantu v. Chase, 271 N. Y. 294. The older cases seem to imply that the sheriff must point out each particular piece of property which he attaches. Clarke v. Goodridge, 41 N. Y. 210; Gittings v. Russell, 114 App. Div. 405; 187 N. Y. 538.
The suggested revision is intended to do no more than codify the rule of practice approved by the Court of Appeals. If the property seized is not, in fact, the defendant's the claimant has his remedies. It is believed the holder of such property would have complete protection under the warrant and injunction (provided in proposed section 917) against the transfer. Experience has shown that the situation above referred to will normally occur only in very few instances.

It is also believed that this provision is consistent with section 278 of the Debtor and Creditor Law, which provides that in case of fraudulent transfer, the creditor may ignore the transfer and attach the property, which in such instance obviously would stand in the name of the transferee and not the defendant.

Section 4. Section nine hundred and twelve of the civil practice act is hereby amended to read as follows:

§ 912. [Manner of attaching property and duties of sheriff, generally.]
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 [personal and real] property of the defendant, within his county, subject to attachment, [not exempt from levy and sale by virtue of an execution,] as will satisfy the plaintiff's demand, with the costs and expenses. [He must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of as prescribed by this act.]

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, 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 [is] may be necessary, until the amount [for which it] of plaintiff's demand for which the warrant was issued, with costs and expenses, has been [secured], levied upon or final
judgment has been rendered in the action, notwithstanding the expiration
of his term of office.

Subsequent levies under the same warrant shall apply only to property
not subject to any previous levy under said warrant.

COMMENT: (a) The heading has been changed for greater
accuracy.

(b) Present Section 912 requires the sheriff to levy upon prop-
erty of the defendant “not exempt from levy and sale by virtue
of an execution”. Certain property is attachable which is not
subject to such levy and sale as, for example, a bank account.

(c) Experience has shown that the provision requiring the sheriff
to take into custody books of account, etc. is seldom used, and
that in any event the information therein contained can be obtained
by examination. Seizure of such papers and records may be con-
sidered an unlawful search and seizure and one which would cause
unnecessary hardship to the defendant. In this connection see
Carples v. Cumberland Coal & Iron Co., 240 N. Y. 187. For those
reasons the provision that the sheriff must take into custody books
of account, etc. is omitted.

(d) The language of the second paragraph is taken from Sections
917(2) and 922 with appropriate changes. Proposed Section 922
is confined to the actions and special proceedings which the sheriff
may take in performance of his duties.

Section 5. Section nine hundred and fourteen of the civil practice
act is hereby amended to read as follows:

§ 914. [Attachment of unpaid subscription to foreign corporation.]

Unpaid subscription to foreign corporation subject to attach-
ment.

Under a warrant of attachment against a foreign corporation, other
than a corporation created by or under the laws of the United States,
the sheriff may levy upon the sum remaining unpaid upon a subscription
to the capital stock of the corporation, made by a person within the
county; or upon one or more shares of stock therein, held by such a
person, or transferred by him, for the purpose of avoiding payment.
thereof.

COMMENT: The heading of this section has been changed for
clarity. No other change is made.
Section 6. Section nine hundred and fifteen of the civil practice act is hereby amended to read as follows:

§ 915. [Levy upon interest in shares or bonds.]

Shares of stock and bonds or interest therein subject to attachment.

The [rights or] shares [which] of stock owned by the defendant [has in the stock of an] of any association or corporation, organized and existing under the laws of this or any other state, or any foreign country, or [in] a bond, negotiable or otherwise, or any interest in or to such a share or bond or to the right to the issuance of such a share or bond, together with [the] any interest, dividends and profits then due and accrued thereon, may be levied upon, as hereinafter provided; and the sheriff’s certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had when they were so [attached] levied upon.

COMMENT: Certificates of stock, if found within the county, are subject to attachment. Rights to the issuance of stock are also subject to attachment and levy may be made by service on the proper officer of the corporation. Issued certificates not within the county cannot be attached, nor can the rights to the issuance be attached if the corporation cannot be served within the county.

The suggested changes are for greater clarity, and to avoid any possible conflict with the provisions of the Uniform Stock Transfer Act; New York Personal Property Law, Sec. 174.

Section 7. Section nine hundred and sixteen is hereby repealed, and article fifty-five of the civil practice act is hereby amended by inserting therein a new section to be section nine hundred and sixteen to read as follows:

[§ 916.] [Levy upon cause of action, evidence of debt or claim to estate.]

The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state; which belongs to the defendant and is found within the county. Within the meaning of this section there shall be included any indebtedness due or to become due from a non-resident or foreign corporation, upon whom or which
service of process may be made within this state, to any person whether a non-resident or foreign corporation. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby. The attachment may also be levied upon a right or interest, present or future, to any of the property or estate of a deceased person which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provisions of a last will and testament admitted to probate at the time the attachment is granted, or by operation of the law in case of the intestacy of the deceased. Levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the rights and interests of the defendant at the time of such levy, subject to the rights of the executor, administrator or trustee of such estate to administer the same according to law.

§ 916. Debt or evidence thereof; cause of action on contract, debt; claim to estate or trust fund; subject to attachment.

The attachment may also be levied upon:

1. A debt, arising under or on account of a contract, represented by a negotiable bond, promissory note or other negotiable instrument for the payment of money only, whether past due or yet to become due, executed either within or without the state by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, by levying upon the said bond, promissory note or other instrument for the payment of money only, if the same belongs to the defendant and is found within the county. The levy of the attachment upon the said bond, promissory note or other negotiable instrument for the payment of money only, shall be deemed a levy upon, and a seizure of all of the defendant's rights arising by reason of said instrument in and to the debt represented thereby.

2. A debt, arising under or on account of a contract, represented by a non-negotiable bond, promissory note or other non-negotiable instrument for the payment of money only, whether past due or yet to become due, executed either within or without the state by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either by levying upon the said non-negotiable bond, promissory note or other non-negotiable instrument for the payment of money only, if the same belongs to the defendant and is found within the county, or by levying upon the debt represented thereby if service of process may be made within the county upon the person against whom the debt exists. The levy of the attachment either upon the said non-negotiable bond, promiss-
sory note or other non-negotiable instrument for the payment of money only, or upon the debt represented by such non-negotiable instrument, shall be deemed a levy upon, and a seizure of all the rights of the defendant arising by reason of said non-negotiable instrument in and to the debt represented thereby.

3. A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

4. A cause of action, arising under or on account of a contract, other than specified above, whether accruing within or without the state to a resident or non-resident person or corporation against a resident or non-resident person or corporation, upon whom service of process may be had within the state, provided that the defendant could prosecute an action thereon within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of all the rights of the defendant in and to such cause of action.

5. A right or interest, present or future, to or in any of the property or estate of a deceased person, which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provision of a last will and testament admitted to probate at the time the attachment is granted, or by operation of law in case of the intestacy of the deceased. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of the rights and interest of the defendant at the time of such levy, subject to the rights of the executor, administrator or trustee of such estate to administer the same according to law.

6. A right or interest, present or future, of the defendant to or in any property or fund, other than a decedent's estate, held or controlled by a fiduciary, by whatever name described, which could be legally assigned, released or alienated by the defendant. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of the rights and interest of the defendant at the time of such levy,
subject to the rights of the said fiduciary to administer the same according to law.

COMMENT: Present section 916 is capable of an interpretation which would give the attaching creditor greater rights in property of the defendant within the county, than the defendant himself has, and permit an action in aid of attachment to collect debts which the defendant himself could not recover within the county. It is clearly not the intention of the section, and is also contrary to decided cases.

The purpose of this somewhat extended revision of this section is intended to give to the attaching creditor all rights which present section 912 purports to give him, except those which an attaching creditor clearly does not have as defined by decided cases.

Section 8. Section nine hundred and seventeen of the civil practice act is hereby amended to read as follows:

§ 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 the personal property capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He thereupon, without delay, must deliver to the person from whose possession the property is taken, if any, a copy of the warrant and of the affidavits upon which it was granted.

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it subject to attachment, as follows: Where the property consists of a demand other than as hereinafter specified [in the last subdivision], by leaving a certified copy of the warrant with the person against whom it exists; [or, if] where it consists of a right or share in the stock of an association or corporation, or interests or profits [thereon 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, [or the] secretary, treasurer, cashier, or managing agent thereof, or [if] 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, with the executor or trustee under the will, or [the] 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 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 thereof 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 not apply to any property of the defendant or to any interest of the defendant therein or debt owing to him, held or owed by the said person where said person has, at the time of such service, no knowledge or reason to believe that the said property, interest therein or debt, belongs or is owing to the said defendant or that defendant has any interest therein subject to attachment unless such property 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 thereof.

The prohibition, as 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 otherwise, from selling and trans-
ferring 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, fur-
ther, 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.

3. If the plaintiff or his attorney shall so direct in writing, and shall
furnish the sheriff indemnity satisfactory to him, a levy may also be
made upon personal property capable of manual delivery, including a
bond, promissory note or other instrument for the payment of money,
or a certificate representing a share or shares in the stock of an asso-
ciation or corporation, by the sheriff's taking the same into his actual
custody.

4. Upon property discovered in any action brought as prescribed
in subdivision [two] three of section nine hundred and twenty-two of
this act, by entering in the proper clerk's office the judgment rendered
in said action, and thereafter levying on said property in the manner
prescribed in subdivisions one, two [and] or three of this section,

COMMENT: (a) The method of levying upon real property is
unchanged. The distinction in the different methods of making a
levy on property capable of manual delivery and property incapable
of manual delivery, has been abolished. The levy is made by serv-
ing a warrant of attachment upon the person holding property of
the defendant or indebted to the defendant, i.e., levy is made in
the first instance upon all property in the manner now prescribed
for levy upon intangible property.

(b) Upon property capable of manual delivery, the sheriff may
also levy in the first instance by seizure, if so directed by the plaintiff.

(c) The provision of Section 917, as now written, respecting
the method of attaching shares of stock, has been overruled by the
case of American Surety Co. v. Kasco Mills, Inc., 149 Misc. 10;
237 App. Div. 880, aff'd. 262 N. Y. 585, since it is in conflict
with the Uniform Stock Transfer Act; New York Personal Prop-
erty Law Sec. 174.

(d) Upon stock certificates, levy can be made only by
(aa) Seizure;
(bb) An injunction against the holder.
Service of the warrant, in the section as proposed, is an injunction for a period of ninety days against the holder. This injunctive provision, it is believed, will be of use in levying upon bonds and other instruments in addition to certificates of stock.

(e) It must be recognized that an attachment is not a replevin; it seeks merely to secure such property as will be available for satisfying the judgment. Therefore, in case of items for collection and the like, permission is given to continue collection, provided the proceeds are retained subject to the attachment, and provided that a fair market value is received.

(f) No penalty is provided for wrongful transfer by the attachment garnishee of property levied upon, since Section 753 of the Judiciary Law seems to provide sufficient penalties for transfer of such property. Lowenthal v. Hodge, 105 N. Y. Supp. 120 (App. Div. First Department, 1907).

(g) Levy on property capable of manual delivery in the first instance, by service on the holder, it is believed, will obviate the difficulty now sometimes existing of perfecting such a levy within thirty days which is necessary in order that the court have jurisdiction to issue an order of publication against a non-resident. Section 232, subdivision 6, civil practice act; Dimmerling v. Andrews, 236 N. Y. 43.

(h) It is believed the revisions will give greater effectiveness to levies, and at the same time greater protection to the holders of tangible property not now levied upon until after the sheriff has secured manual custody. Anthony v. Wood, 96 N. Y. 180, 187; Robinson v. Columbia Spinning Co., 23 App. Div. 499, 503; Robinson v. Columbia Spinning Co., 31 App. Div. 238.

(i) The last subdivision is unchanged except for numbering of the section and change of number of references to other sections of the civil practice act in that section.

Section 9. Section nine hundred and twenty-one of the civil practice act is hereby amended to read as follows:

§ 921. Inventory.
The sheriff, immediately after levying under a warrant of attachment, must make, with [the] such assistance [or two disinterested freeholders] as he may require, a description of the real property, and a just and true inventory of the personal property and all other property subject to attachment, upon which it was levied, [and of the books, vouchers, and other papers taken into his custody] stating therein the estimated
value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable [, and of any other property subject to attachment or of the interest of the defendant therein. The inventory must be signed by the sheriff and by the appraisers[, if any, and, within five days after the levy, must be filed in the office of the clerk of the county where the property is attached. If the only property levied upon be a debt, no inventory shall be required.

COMMENT: The phrase “with the assistance of two disinterested freeholders” is obsolete. It would seem sufficient if the sheriff is permitted to secure such assistance of appraisers as he may need. An inventory of a debt, i.e., bank account and the like, can serve no useful purpose. Objections have been made that the inventory in such an instance is an unnecessary expense to the plaintiff.

Section 10. Section nine hundred and twenty-two of the civil practice act is hereby amended to read as follows:

§ 922. Actions and special proceedings by sheriff.
[1.] [The sheriff, subject to the direction of the court or judge, must collect and receive all debts, effects and things in action, attached by him. He may maintain any action or special proceeding, in his name or in the name of the defendant, which is necessary for that purpose or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs.]

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. The sheriff shall not be obliged to
commence any such action or special proceeding to reduce such personal property capable of manual delivery to his actual custody or to collect, receive or enforcing debts, effects or things in action of the defendant unless the plaintiff or his attorney requests in writing that such action or special proceeding be commenced, and indemnifies the sheriff for all necessary expenditures incurred or to be incurred by him in connection therewith in manner satisfactory to him or fixed by the court.

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is, prior to the expiration of the said ninety days, served upon said person. If notice of the application is served upon such person five days before the return date thereof and prior to the expiration of said ninety days, such notice shall extend all said duties and liabilities until ten days after an order determining the motion shall have been entered.

2. In the event that within ninety days from the issuance of the warrant, unless the time has been extended as herein provided, and in that event prior to the expiration of the time as so extended, the sheriff has not taken into his actual custody all such property capable of manual delivery, or has not received payment of, or an assignment evidencing the right of, the sheriff to collect and to enforce the debts, effects or things in action attached, and if no action or special proceeding for that purpose has then been commenced by the sheriff or by the plaintiff jointly with the sheriff, as herein or hereinafter authorized, the levy shall be void as to any such personal property not so reduced to the sheriff's custody, paid, collected or assigned to him and after the expiration of such time the sheriff shall have no right therunder to take into his actual custody any such property capable of manual delivery, or to collect or receive any such debts, effects or things in action, nor shall the sheriff or the sheriff and plaintiff jointly, have any right to
commence an action or special proceeding thereunder to secure or collect the same.

[2.] 3. Where the summons was served without the state, or by publication, pursuant to an order obtained for that purpose, as prescribed by law, and where the defendant has not appeared in the action, otherwise than specially, but has made default and before entering final judgment, the sheriff, in aid of such attachment, may maintain an action against the attachment debtor and any other person or persons, or against any other person or persons, to compel the discovery of any thing in action, or other property belonging to the attachment debtor; and of any money, thing in action, or other property due to him, or held in trust for him, or to prevent the transfer thereof, or the payment or delivery thereof, to him or any other person, and the sheriff, in aid of such attachment, also may maintain any other action against the attachment debtor and any other person or persons which may be maintained by a judgment creditor in equity, either before the return of an execution in aid thereof, or after the return of an execution unsatisfied. The judgment in any of the above-mentioned actions must provide and direct that the said property shall be applied by the sheriff to the satisfaction of any judgment which the plaintiff may obtain in the attachment action.

COMMENT: It has always been the duty of the sheriff to reduce to his custody personal property capable of manual delivery in order that the same may be sold to satisfy any judgment obtained under the attachment action. It has also been his duty to collect and enforce all debts, effects and things in action for the same purpose (Section 917 and Section 922). The proposed section continues that duty, but places a time limit of ninety days in which the sheriff must either secure the property or evidence that he has a right to collect and enforce the same, or must start an action or special proceeding to secure it if requested to do so by plaintiff which gives proper indemnity. Extensions of time may be secured for good cause shown. The injunction under which the attachment garnishee is placed by the service of a warrant upon him, is continued pendente lite. Similar procedure is provided for actions of sheriff and plaintiff jointly. Sec. 943-944 post. It is to the advantage of both the attachment garnishee and the plaintiff, that any question concerning the validity of the levy should be settled as quickly as possible.
Section 11. Section nine hundred and twenty-four of the civil practice act is hereby amended to read as follows:

§ 924. Claim to property by third person.
1. If personal property, other than a vessel, attached, seized or levied upon, as the property of the defendant, is claimed by or [in] on behalf of another person, as his property, [an affidavit shall be made and delivered to the sheriff, on behalf of such person,] at any time [while] after levy thereon and prior to the time when such property or the proceeds thereof, in case the property shall have been sold, [are in the sheriff's possession, stating that he makes such a claim; specifying] have been applied in satisfaction, or partial satisfaction of a judgment obtained in the said action in which the warrant of attachment was issued, the said person claiming the property may apply on affidavit in the action in which the said property was attached, seized or levied upon, for an order directing the sheriff to deliver the property to him, if in his possession, or release such property from attachment, if not in his possession, unless the plaintiff give to the sheriff indemnity against said claim. The affidavit accompanying said application shall specify in whole or in part the property to which it relates, and in all cases [stating] state the value of the property claimed and the damages, if any, over and above such value, which the claimant will suffer in case such attachment, seizure or levy is not released. [In that case, the sheriff, in his discretion, before he sells such property, or in case the property has been sold, before paying out the proceeds from the sale thereof, may serve upon the plaintiff's attorney a copy of the affidavit, with notice that he requires indemnity against the claim. If the indemnity is not furnished within three days after the demand has been made by the sheriff, the sheriff, in his discretion, may deliver the property, or the proceeds, as the case may be, to the claimant, without incurring any liability to the plaintiff by reason of so doing; unless within three days after demand for indemnity the plaintiff shall institute a proceeding for the purpose of having the title to the claimed property or the proceeds thereof, determined. The court, or judge, before whom the proceeding is brought, shall hear and determine the title thereto, and for that purpose the judge hearing the proceeding, may, in his sole discretion, impanel a jury. If a jury is impanelled, the plaintiff shall advance the costs and expenses thereof which shall be fixed by the judge hearing the proceeding.] The application must be made on at least five days' notice to the sheriff and to the plaintiff, and to the defendant if he has appeared in the action. The judge hearing the application shall, at the request of plaintiff fix the amount of indemnity to be furnished by him to the
shire, and if no request is made by the plaintiff to furnish indemnity and it shall appear to the satisfaction of the court that there is reason to believe the claimant is entitled to the said property attached, seized or levied upon, the court must grant the application by the said third party for the delivery of the property to him unless the plaintiff shows such facts as may be deemed by the court sufficient to entitle him to a hearing to try the title to the said property. An order as herein provided, directing the sheriff to deliver the property to the claimant if it be in the sheriff's possession, or releasing the property from attachment if not within the sheriff's possession, shall relieve the sheriff or any person holding the said property so released, or any part thereof, levied upon subject to the warrant, from any liability to the plaintiff by reason of so doing.

In the event the court shall direct that title to the said property be tried, it shall fix the date and place for hearing thereon and shall specify to whom notice shall be given and direct the method in which said notice shall be given. The court or judge before whom the hearing shall be held shall determine the title of the claimant in the property attached, seized or levied upon, or so much thereof to which claim has been made by the said claimant, and any party thereto within five days after service of the order directing that title to the property be tried, with notice of entry thereof, may demand a jury. The party so demanding the jury shall advance the costs and expenses thereof which shall be fixed by the judge hearing the proceeding. If, by such proceeding it is determined that the property belongs to the claimant, it shall be delivered to him by the sheriff if in the sheriff's possession, and if not in his possession, shall be released from the levy and the sheriff shall by such determination, and any person holding the said property or any part thereof, be released thereby, from all claims for damages to the plaintiff. If by such proceeding it is determined that the attachment, seizure, levy or sale was valid, the sheriff shall proceed thereunder and the sheriff and any person holding the said property shall be released from all liability to the claimant by such determination.

A plaintiff who has specified particular personal property to be attached as the property of the defendant, pursuant to section nine hundred and ten, shall be liable in an action to the true owner thereof, if other than the defendant, for any damage sustained by him by reason of the attachment, seizure of, or levy upon said property as that of the defendant, notwithstanding an order, decision or judgment hereunder directing that the sheriff deliver the property to the claimant or to release the same from levy or otherwise, nor shall any such order, decision or judgment affect in any manner the right, if any, of the defendant in the attachment
action in or to the property discharged from the attachment, nor shall this section be construed as effecting or impairing any other right or remedy which any person might otherwise have in respect to the property attached.

Within five days after the entry of the order in such proceeding, any party thereto, upon notice to the other party or parties, may apply to the court or judge for a stay, or may give an undertaking to stay further proceedings, pending appeal. Such undertaking shall be not less than twice the amount of the claimed value of the property and damages. A person who shall falsely or fraudulently make a claim as prescribed herein may be punished as and for contempt of court and shall be liable in treble damages to the party injured thereby.

2. If any personal property attached, seized or levied upon is claimed by or on behalf of another person, as his property, at any time after an action or special proceeding has been commenced by the sheriff or by the sheriff and plaintiff jointly, to reduce to sheriff's actual custody the personal property capable of manual delivery or to collect, receive and enforce the debts, effects and things in action, as provided in this article, the claimant, in addition to any other rights which he may have, may intervene in any such action or proceeding then pending and assert therein his right, title or interest in or to the said property.

COMMENT: Under the present section a person other than the defendant who claims that the attached property belongs to him, cannot commence procedure unless the property is in the sheriff's possession. Under the revision it can be commenced at any time after levy. The present procedure as provided in section 924 is somewhat indefinite, permitting the sheriff "in his discretion" to refer the claim to plaintiff, who thereupon must demand trial of title or indemnify the sheriff. Under the proposed revision, the claimant makes an application to have the property delivered to him. This clearly submits him to the jurisdiction of the court. The court fixes the bond, whereas it is now fixed by the sheriff, and if a trial of the title be had, either side may demand a jury, which now is in the sole discretion of the judge.

The adjudication under the new section determines the disposition of the property in respect to the attachment; rights of others not party to the proceedings are not affected.

The procedure outlined in present section 924 has seldom been used. It is believed that the new procedure will expedite the disposition of such claims.

A new subdivision has also been added, granting the claimant
the right to intervene in any action or proceeding in aid of attachment.

Section 12. Section nine hundred and twenty-five of the civil practice act is hereby amended to read as follows:

§ 925. Action against sheriff by third person claiming property.

A person who has claimed personal property pursuant to the provisions of [the preceding] section nine hundred and twenty-four, and who has [served an affidavit] made an application as prescribed therein, may if indemnity has been given, as therein provided, maintain an action against the sheriff who has held or sold property claimed, [if indemnity has been given as therein provided,] to recover his damages by reason of [levying] the levy upon such property [and] or of selling [such property.] the same, if sold. The summons in such an action must be [issued] served within [three] six months after the attachment, seizure or levy upon the property [and must be served within three months after it is issued]. An action cannot be maintained against the sheriff by a person so entitled to make a claim except as prescribed in this section.

COMMENT: Section 925, as revised, is designed to avoid anomalies.

Section 13. Section nine hundred and twenty-six of the civil practice act is hereby amended to read as follows:

§ 926. Indemnity to be furnished to the sheriff.

The indemnity to be furnished to the sheriff by the plaintiff, as prescribed in section nine hundred and twenty-four, must consist of a written undertaking to him, executed by at least two sufficient sureties, to the effect that they will indemnify him against any liability for damages, costs or expenses incurred in an action brought against him by the claimant, or a person deriving title from or through the claimant by reason of attaching, seizing, levying upon, or selling said personal property, or delivering the proceeds thereof as the case may be, not exceeding a sum to be specified in said undertaking, which must be at least five hundred dollars and not less than twice the claimed value of the property and the damages, if any, over and above such value. [Each of the sureties, besides possessing the other qualifications required by law, must be a freeholder of the sheriff's county.] The sheriff, before selling the personal property or paying out the proceeds from the sale thereof, as the case may be, may require the persons offered as sureties to justify in the manner and subject to the provisions of statute or rule
regulating generally the justification of sureties in an undertaking given in an action or special proceeding. The sheriff shall be entitled to have the sureties substituted as defendants in any action as prescribed in the last section.

COMMENT: The provision that "the sureties must be freeholders of the sheriff's county", is obsolete.

Section 14. Section nine hundred and forty-two of the civil practice act is hereby amended to read as follows:

§ 942. Delivery or release of surplus money or property.
If from the certificate given, as provided in section nine hundred and eighteen hereof, or from the examination, as provided in section nine hundred and nineteen hereof, or from any other proof satisfactory to the court, it shall appear at any time after levy that property subject to attachment has been levied upon, or that [Where] the proceeds of [the] such property sold, and [the] demands collected by the sheriff, exceed the amount necessary to satisfy [of] the plaintiff's demand, with [the] costs and expenses, and of all other warrants of attachment or executions in the sheriff's hands chargeable upon the same[;], [the court, or the judge who granted the warrant, upon the application of] the defendant, [or of] an assignee of, or purchaser from the defendant, or any person holding any property, debts, effects or things in action levied upon, may apply to the court [and] upon notice to the plaintiff [,] and to the [plaintiffs in the other warrants or executions, may make an order, at any time during the pendency of the action,] sheriff, for an order releasing from the levy of attachment or directing the sheriff to pay over [the surplus] or deliver, to the applicant, [and to release from the attachment the remaining real and personal property attached.] so much of the property levied upon as shall be found to be in excess of the amount necessary to satisfy the plaintiff's demand, with costs and expenses. Before granting such an order the court must direct that notice of the said application be given to the plaintiff in other warrants, if any, or to judgment creditors of executions, if any, to or on the said property sought to be released.

COMMENT: Since the main purpose of an attachment action is to seize security for the satisfaction of the judgment when obtained, it is unreasonable that more property should be held subject to attachment and levy than sufficient to satisfy the demand, with interest, costs and expenses. The changes in this section provide a means of releasing from the attachment property above that necessary for
the purpose, and thus to prevent the use of attachments for the mere harassment either of the defendant or of the attachment garnishee.

Section 15. Section nine hundred and forty-three of the civil practice act is hereby amended to read as follows:

§ 943. Action by plaintiff and sheriff jointly.

The plaintiff, by leave of the court or judge, procured as prescribed in the next section, may bring and maintain, in the name of himself and the sheriff jointly, by his own attorney, and at his own expense, any action which, by the provisions of this act, may be brought by the sheriff, to recover property attached, or the value thereof, or a demand attached, or upon an undertaking given as prescribed in this article, by a person other than the plaintiff[;] . [the plaintiff, in his own name and the sheriff's jointly, may also bring and maintain any action which, by the provisions of subdivision two of section nine hundred and twenty-two of this act, may be brought by the sheriff.] The sheriff must receive the proceeds of such an action, but he is not liable for the costs [or] and expenses thereof. Costs may be awarded in such an action against the plaintiff in [the] a warrant, but not against the sheriff.

Any such action which, by the provisions of section nine hundred and twenty-two, might have been brought by the sheriff to reduce to the sheriff's actual possession personal property capable of manual delivery, and to collect, receive and enforce debts, effects and things in action attached by him, of which he has not secured actual custody, payment or an assignment evidencing his right to collect and enforce the same, must be commenced against any person on whom a warrant of attachment has been served within ninety days after the service of a certified copy of a warrant on such person. The effect of the failure to commence such action within the said period, unless the time has been extended; the method of securing extensions of time therefor, and the obligations imposed thereby, and the effect of the commencement of such an action, shall be the same as provided in said section nine hundred and twenty-two for such actions brought by the sheriff solely.

COMMENT: An action in aid of the attachment by plaintiff and sheriff jointly, has always been used where such an action is necessary more than the procedure in section 922, where the sheriff alone proceeds to collect debts, etc. This action must also be begun in ninety days from the time of the issuance of a warrant, unless the sheriff has succeeded in seizing property or collecting debts at-
tached. The procedure for extensions of time and the like is the same as in Section 922.

Section 16. Section nine hundred and forty-four of the civil practice act is hereby amended to read as follows:

§ 944. Procuring leave to unite with sheriff, in bringing suit.
The court or judge must grant leave to bring such an action[,] where it appears that due notice of the application therefor has been given to the sheriff; but, before doing so, the court or judge may require that notice of the application be given to the plaintiff in any other warrant against the same defendant [,] , [And] and such terms, conditions and regulations may be imposed, in the order granting leave, as the court or judge thinks proper [,] for the due protection of the rights and interests of all persons interested in the property or in the disposition of the proceeds of the action.

*COMMENT*: The procedure retained unchanged, but sufficient changes within the section to be consistent with other proposed sections of the act.

Section 17. Article fifty-five of the civil practice act is hereby amended by inserting therein a new section to be section nine hundred and forty-four-a, to read as follows:

§ 944-a. Defenses to action or proceeding to perfect levy.
In any action or special proceeding in aid of the attachment for the purpose of reducing to the sheriff's actual custody such property capable of manual delivery, and collecting and receiving by him any debts, effects and things in action, the person against whom such an action or special proceeding is brought may, in addition to such legal or equitable defenses as he may have to such an action or special proceeding, plead any defenses and make any application, by motion or otherwise, for relief to obtain the determination of the rights, if any, of any adverse claimants to said property or any part thereof which would be available to him if such action or special proceeding were brought by or in the name of the defendant in the attachment action.

*COMMENT*: At the February, 1939, meeting the Association of the Bar of the City of New York approved a proposed bill for improved procedure in avoiding double liability under adverse claims. This proposed bill was passed and became a law in June, 1939, and is known as section 51-a of the civil practice act. Adverse claims may also be made to property which the sheriff seeks under
an attachment. The purpose of the new section is, therefore, to grant such relief to an attachment garnishee under section 51-a, and other appropriate sections as he would have if the defendant in the action were suing to recover the property as his, and some other person claimed the property as the owner.

Section 18. Section nine hundred and forty-eight of the civil practice act is hereby amended to read as follows:

§ 948. Application to vacate or modify warrant, or increase security. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply, at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative.

COMMENT: The attachment garnishee is also given the right to move to vacate the warrant or to increase security. While probably of limited application, there seems no reason why, if the person on whom a warrant is served is placed in the position of potential loss or embarrassment, he should not have the right to appear in court and move to vacate the warrant.

Section 19. This act shall take effect September first, nineteen hundred and forty, provided, however, it shall not apply to any action or special proceeding pending at the effective date hereof, nor to any action or special proceeding thereafter commenced by or in connection with any attachment action in which the warrant was issued prior to September first, nineteen hundred and forty.

Conclusion

Informed persons have been justly critical of the “mangled remains” of attachment statutes which still remain upon the books despite limitations upon them found in the cases and despite complications which they have caused and will inevitably cause in the future. In some cases “complete befuddlement” has resulted from them even after their subjection to judicial analysis. No apology is needed for recommending the dissipation of such befuddlement by the erasure of statutory anachronisms from the New York Civil Practice Act or for suggesting that “so much incomprehensible learning should be relegated to limbo.”

32. Johnson, supra note 2, at 404, 406.
The life of the law is flux. And while back of precedents are juridical concepts, still

"farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn".33