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In What Actions, and upon What Facts, a Warrant of Attachment May Be Granted in New York

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IN WHAT ACTIONS, AND UPON WHAT FACTS, A WARRANT OF ATTACHMENT MAY BE GRANTED IN NEW YORK.

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This thesis treats of so much of the law pertaining to the granting of a warrant of attachment of property as is found in sections six hundred thirty-five and six hundred thirty-six of the New York Code of Civil Procedure. It does not, therefore, include the granting of warrants in actions against a public officer, etc., for peculation, which is provided for in section six hundred thirty-seven of the Code of Civil Procedure. The plan followed has been to quote a part of the section of the Code of Civil Procedure, and under that to treat of cases explanatory of the matter quoted.

Section 635:-

"A WARRANT OF ATTACHMENT AGAINST THE PROPERTY OF ONE OR MORE DEFENDANTS IN AN ACTION MAY BE GRANTED UPON THE APPLICATION OF THE PLAINTIFF." An attachment cannot be demanded as a matter of right in a case in which it is authorized, and whether in a particular case the warrant should issue is within the discretion of the court. (Sartwell v. Field, 68 N. Y. 341) The discretion of the lower court may be reviewed by the appellate division upon the merits, but an order, refusing or vacating an order granting a warrant of attachment is not appealable to the Court of Appeals, in any case, unless the order shows that it was refused or vacated for want of power, or unless it presents a question of law or an absolute legal right. If the order is granted in a case not authorized, or if there is an entire absence of facts justifying it, the case would present a question of law, and the order would be appealable. (Allen v. Meyer, 73 N. Y. 1) And the Court of Appeals has jurisdiction, upon appeal, of a question as to whether the property attached is legally the subject of attachment. (Dunlop v. The Patterson Fire Ins. Co., 74 N. Y. 145)

"WHERE THE ACTION IS TO RECOVER A SUM OF MONEY ONLY" It is here to be observed, that the warrant cannot be granted in actions for equitable relief. (Ebner v. Bradford, 3 Abb. Pr. N. S. 248; Thorington v. Merrick, 101 N. Y. 5)

"AS DAMAGES." The warrant cannot be granted for nominal damages, even in a case authorized by the Code, as it

is not within the intent of the statute to allow it for nominal damages; (Walts v. Nichols, 32 Hun. 276) and at a Special Term an attachment was vacated, where the amount of damages was largely conjectural. (White v. Goodson etc. Co., 68 St. Rep. 719)

"FOR ONE OR MORE OF THE FOLLOWING CAUSES." An attachment cannot be granted in an action in which the complaint sets forth several causes of action, upon some of which an attachment could not be issued. (Union Consolidated Mining Co. v. Raht, 9 Hun. 208)

"(I) BREACH OF CONTRACT, EXPRESS OR IMPLIED, OTHER THAN A CONTRACT TO MARRY." An action brought, under section 3247 of the Code of Civil Procedure, to recover the costs of a former action, which was prosecuted by the present defendant in the name of a third person, for the defendant's benefit, is not an action upon contract express or implied, within the meaning of this section. (The Remington Paper Co. v. O'Dougherty, 32 Hun. 255, affirmed 99 N. Y. 673) In The Remington Paper Co. v. O'Dougherty, supra, it was held that a liability imposed by provisions of a statute, is not an implied promise, which was defined as an express promise proved by circumstantial evidence. This definition of an implied promise has not been followed in subsequent cases. In Gutta Percha etc. Co. v. Mayor etc., (108 N. Y. 276), it was said that "two kinds of contracts are contemplated by section 635, express contracts, which are such as are voluntarily made by the parties thereto, and implied contracts, which, though not express-

ly made by the parties, are made by the law when it, enforcing a sound morality and a wise public policy, acting upon principles of equity and justice, imposes upon a party an obligation to pay a debt or discharge a duty." And it was accordingly held that an action on a foreign judgment was an action on an implied contract. The same conclusion was arrived at in Nazra v. McCalmont Oil Co., (36 Hun. 296). The correct rule undoubtedly is that a judgment is a contract within the attachment law, but it is not treated as a contract for all purposes. (O'Brien v. Young, 95 N. Y. 428) An action by the United States for an unpaid duty, is an action upon an implied contract (United States v. Graff, 67 Barb. 304); but an action upon a statute for a penalty, is otherwise. (Wilson v. Harvey, 52 How. Pr. 126)

An allegation in the complaint, in an action for goods sold, that a sale was induced by fraudulent representations, does not convert, what would otherwise be an action on contract, into a tort action. The allegation of fraud affects only the remedy. (Whitney v. Hirsh, 39 Hun. 326)

"(2) WRONGFUL CONVERSION OF PERSONAL PROPERTY." Thus in Weill v. Malone (39 State Rep. 899), a warrant was granted in an action brought for the conversion of certain steel.

"(3) AN INJURY TO PERSON OR PROPERTY, IN CONSEQUENCE OF NEGLIGENCE, FRAUD, OR OTHER WRONGFUL ACT." This sub-division was amended in 1894, prior to which it read, "An injury to property" instead of "An injury to person or property" as at present. Injuries to person are defined by section 3343 subd.

9 of the Code of Civil Procedure to include "libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or another." The next sub-division (Subd. 12 of section 3343) defines an "injury to property" as "an actionable act, whereby the estate of another is lessened, other than a personal injury, or a breach of a contract."

An attachment may be granted in an action to recover damages for fraudulent representations, for such representations constitute an "injury to property" within subsivision IO of section 3343 of the Code of Civil Procedure. (Campion etc. Co. v. Searing, 47 Hun. 237) And so one who has been induced to make advances on the faith of forged paper has sustained an injury to personal property, and presents a cause of action in which a warrant of attachment may issue. (Bogart v. Dart, 25 Hun. 395)

It is, however, to be observed, that while a warrant of attachment may issue in an action to recover damages for fraudulent misrepresentations, that such misrepresentations are not a ground for the granting of a warrant of attachment. (Goldschmidt v. Herschorn, 13 State Rep. 560)

Section 636:-

TO ENTITLE THE PLAINTIFF TO SUCH A WARRANT, HE MUST SHOW BY AFFIDAVIT, TO THE SATISFACTION OF THE JUDGE GRANTING THE SAME." A verified pleading is regarded as an affidavit. (sub-division 11, of section 3343 of the Code of Civil Procedure) The affidavit need not be made by the plaintiff, but may be made by any person who is familiar with the facts. (Edick v. Green, 38 Hun. 202)

It is always necessary that the application be founded upon an affidavit containing the matters required to be stated by section 636 of the Code of Civil Procedure, to give the court jurisdiction, and the omission of any of the allegations required to be stated is not a mere irregularity but a defect of jurisdiction which cannot be remedied by amendment, and a warrant so obtained will be set aside. (Zeregal v. Benoist, 33 How. Pr. 129; McVicker v. Campanini, 24 State Rep. 643) But where the affidavit sets forth enough facts to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence stated it is sufficient. (Conklin v. Dutcher, 5 How. Pr. 386) To defeat his jurisdiction it must be made to appear that there is a total want of evidence upon some material point. (Schoonmaker v. Spencer, 54 N. Y. 366)

Allegations upon information and belief only, are not sufficient, and do not give the court jurisdiction to issue the warrant. (Steuben Co. Bank v. Alberger, 78 N. Y. 252) The sources of information and the grounds of belief

must be stated, so that the judicial officer to whom the affidavit is presented may judge whether the information and belief have a proper basis to rest on; and if he is satisfied that they have, then the affidavit is sufficient to invoke jurisdiction and to be submitted to his determination. Absolute certainty is not expected; the evidence is sufficient if it is convincing and satisfactory; all that is required is that the information furnished by the affidavit shall be such that a person of reasonable prudence would be willing to accept and act upon it. (Buell v. Van Camp, 119 N. Y. 160; Bennett v. Edwards, 27 Hun. 352) In Buell v. Van Camp, supra, the plaintiff averred that the source of his information and the grounds of his belief were the affidavits of two persons named, copies of which were annexed, the original not being obtainable, and this was held to be sufficient. But where the sources of information were stated to be contained in affidavits on file in court, but which were not quoted or any portion of them stated, it was held insufficient. (Selser Bros. Co. v. Potter Produce Co., 77 Hun. 313)

Where a person having positive knowledge of the facts refuses to make an affidavit, the applicant is not obliged to procure an order under section 885 of the Code of Civil Procedure, requiring him to appear before before a referee and submit to an examination; but the fact of such refusal may be stated, together with the knowledge the person is known to possess, and any affidavit made by such reluctant witness, showing the facts, if on file, may be quoted and

referred to. (Bennett v. Edwards, 27 Hun: 352) But mere inconvenience is not a sufficient reason for not producing the affidavits of persons who have personal knowledge of the facts relied upon to make a case for the granting of the warrant. (Brewster v. Van Camp, 28 St. Rep. 591) If a verified complaint is relied on as affidavit, and the allegations, or any portion of them, are made upon information and belief, a positive affidavit verifying its statements makes it sufficient evidence of the existence of a cause of action. (Edick v. Green, 38 Hun. 202)

We have seen that when the affidavit is made upon information and belief that it is necessary that the sources of affiant's information and the grounds of his belief should be stated, and it is, therefore, important to determine when an affidavit sworn to positively by a person who is not shown to be in a position to have personal knowledge of the subject, is presumed to have been made on personal knowledge and therefore sufficient, and when he must state the sources of his information and the grounds of his belief.

Statements in an affidavit will be presumed to have been made on personal knowledge unless stated to be made on information and belief, except where it appears affirmatively and by fair inference that they could not have been, and were not, made on such knowledge, (Crowns v. Vail, 51 Hun. 204) , or that affiant did not necessarily have personal knowledge of the facts. (McVicker v. Campanini, 24 State Rep. 643) Stated in other words, the rule to be deduced from these cases

seems to be, that where the affiant is not a party to the transaction, that there is no presumption that he has personal knowledge of the facts sworn to, and he must therefore show that he has personal knowledge of the facts, or else show such circumstances that will raise a presumption that he has a personal knowledge of the facts. (See upon this subject generally Buhl v. Ball, 41 Hun. 61, at 64)

Thus far the rule seems to be well settled, but there is a considerable conflict of authority as to what circumstances are sufficient to raise a presumption that the facts are within the personal knowledge of the affiant. This is so concerning affidavits made by the officers of a corporation. Where the affidavit is made by the agent or attorney of the plaintiff, there is no doubt but that it must appear that affiant had personal knowledge of the facts sworn to, or that he had such relations to the business of his principal as to justify the inference that he knows what he states. (Buhl v. Ball, 41 Hun. 61) In Crowns v. Vail, (51 Hun. 204), it was held that where the affidavit in respect to a transaction of his client is made by one who is simply the attorney of record, that the plain inference is that such attorney has not personal knowledge of the facts as to which he affirmed. The allegations must be presumed not to be within the knowledge of the attorney, and such being the case, they must have been made upon information, and in the case of McVicker v. Campanini, (24 State Rep. 643), where the affiant alleged that he was the son of the plaintiff and had a knowledge of

the facts, but did not show how he had acquired a knowledge in respect to those facts, it was held not sufficient to infer a personal knowledge of the facts sworn to. As before pointed out, the greatest conflict is in the case of affidavits of the officers of a corporation. Attention is called to two recent cases on this point decided by the General Term of the First Department. In Hodgman v. Barker, (60 Hun. 156), the affiant was an officer, cashier, of the moving creditor, which was a banking corporation. In an opinion written by Mr. Justice Van Brunt, the presiding Justice, it was decided that the allegation of the cashier of the bank, that certain notes upon which money had been procured by the defendant were forged, was not sufficient, as it was not a plain inference that the affiant had any personal knowledge of the facts, and it was not shown affirmatively that he had. At the next term of the same court, held a month later, Mr. Justice Van Brunt wrote another opinion, in which he applied the same rule to the affidavit of the President of the corporation, which was the moving creditor. That the fact that deponent was President of the moving creditor would not justify the inference of knowledge. His associates did not concur in this, but wrote opinions in which they held, that the President's position as chief executive officer of the company, justified the inference that when he swears positively with regard to a corporate transaction he speaks of his own personal knowledge. But this is true only when it appears that deponent was President at the time that the transaction

out of which the claim arose, took place. (Manufacturers' National Bank v. Hall, 60 Hun. 466) And in the case of the cashier of a bank, it has been held that because of his position he is presumed to be acquainted with the financial affairs of the corporation of which he is an officer. (National Park Bank v. Whitmore, 40 Hun. 499) There are other conflicting cases upon this point, but it is submitted that the case of Manufacturers' Nat. Bank, v. Hall, supra, lays down the correct rule.

But where the affiant does not necessarily have knowledge of or cannot be presumed to know the several facts stated in his affidavit, it will be sufficient if he states facts which tend to show that he has personal knowledge of the facts required to be stated. (McVicker v. Campanini, 24 State Rep. 643) Thus where it appears that the affiant was the agent of the plaintiff, and that he had personally sold and delivered to the defendant the goods, to recover the price of which the action was brought, and that the plaintiffs were themselves in no manner personally connected with the transaction, it was held a statement of such facts as would show a personal knowledge of the contents of the affidavit. (Gribbon v. Back, 35 Hun. 541)

But it should be remembered that while it has been shown that where the affiant will not be presumed to have a personal knowledge of the facts to which he swears, and the affidavit is therefore treated as though made upon information and belief, that by showing the sources of the informa-

tion and the grounds of the belief, the affidavit will nevertheless be sufficient.

"THAT ONE OF THE CAUSES OF ACTION SPECIFIED IN THE LAST SECTION EXISTS AGAINST THE DEFENDANT. IF THE ACTION IS TO RECOVER DAMAGES FOR BREACH OF CONTRACT." It is only when the action is to recover damages for breach of contract, express or implied, that the plaintiff must show the facts required by sub-division I of section 636, except that the requirement "that one of the causes of action specified in the last section exists against the defendant" must be complied with in every case. (Campion etc. Co. v. Searing, 47 Hun. 237)

"THE AFFIDAVIT MUST SHOW THAT THE PLAINTIFF IS ENTITLED TO RECOVER." It must appear either expressly or by fair inference that the debt which the action was brought to recover is due. (Reilly v. Sisson, 31 Hun. 573; Smadbeck v. Sisson, id. 582)

"A SUM STATED THEREIN." It must appear that the plaintiff is entitled to recover a particular sum, which is specified. A general averment of damages is not sufficient. (Golden etc. Co. v. Jackson, 13 Abb. N. C. 476) Nor is it sufficient if the affidavit states that the plaintiff is entitled to recover the sum of $10,000.00 or a larger sum, over and above all counter-claims. (Thorington v. Merrick, 101 N. Y. 5)

"OVER AND ABOVE ALL COUNTER-CLAIMS." It is not necessary that the affidavit should state the precise words used

in the Code, if equivalent words be used. It is sufficient if the affidavit furnishes evidence from which the Judge who grants the warrant may be lawfully satisfied of the truth of the facts required to be shown, but there must be some evidence. The statament "over and above all discounts and set-offs" is equivalent to "over and above all counterclaims." (Lamkin v. Douglass, 27 Hun. 517) But an averment that "the defendant is indebted to the plaintiff in a sum stated", and that the latter "is justly entitled to recover said sum", is not a sufficient compliance with the Code, as it does not follow that the defendant has not, to the knowledge of the plaintiff, a counterclaim. (Ruppert v. Haug, 87 N. Y. 141)

"KNOWN TO HIM." This phrase refers to the plaintiff, and when the affidavit is not made by the plaintiff, the question arises, how can the affiant swear to such knowledge by the plaintiff. There is a large number of cases on this point, and they will not be reviewed here, as it is submitted that the conclusions deduced from them by Bishop, in his "Code Practice in Personal Actions", are correct. These conclusions are as follows:-

"1st If the affidavit is made by an agent, and he swears to knowledge of the plaintiff, since this must necessarily be upon information and belief, he must state the sources of such information and belief or the affidavit will be insufficient."

"2d If the affidavit is made by an agent, it will not be enough for him to swear to a sum due over and above all

counterclaims known to him; he is not the plaintiff. The defect is held to be jurisdictional."

"3d When an agent makes the affidavit, and it appears that the transaction was within his own knowledge, his affidavit that the sum is due over and above all counterclaims known to the plaintiff will be accepted."

"4th When the plaintiff is a corporation and the affidavit is made by an officer of the corporation, enough must appear respecting his position and duties to create an inference that he knew the condition of the transactions between the plaintiff and the defendant. As in the case of a cashier of a bank." (Bishop's Code Practice in Personal Actions, p 244)

"THAT THE DEFENDANT IS EITHER A FOREIGN CORPORATION." To give the court jurisdiction to grant an attachment against a foreign corporation, the affidavit in addition to setting forth a cause of action for which an attachment may be granted must show that the action could be maintained against the foreign corporation. (Oliver v. Walter Heywood Chair Co., 32 State Rep. 542) This is regulated by section 1780 of the Code of Civil Procedure, which provides that, if the plaintiff be a resident of the State, or a domestic corporation, an action may be maintained for any cause of action. But if the plaintiff be a non-resident or another foreign corporation, an action can be maintained only where the action is brought to recover damages for breach of a contract made within the State, or relating to property situated within the State at

the time of the making thereof; or where the cause of action arose within the State; except where the object of the action is to effect the title to real property situated without the State. The causes of action mentioned in sub-division second of this section are not enumerated here, as they are not actions in which a warrant may be granted.

It is enough to aver affirmatively that the defendant is a foreign corporation, stating the state,country or government by or under whose laws created, (Section 1775 of the Code of Civil Procedure), but an allegation that the above named defendant "is or holds itself out to be a foreign corporation" is an allegation in the alternative and not sufficient. (Shanks v. Magnolia Metal Co., 89 N. Y. 486)

Section 5798 of U. S. R. S., the National Banking Act, authorizing suits against banking associations organized under it, to be brought in the court of the county or city of the State in which the association is located, is permissive, not mandatory, and does not have the effect of depriving the other courts of jurisdiction. And section 5242 of said act, prohibiting the issuing of an attachment against such an association or its property before final judgment, applies only to an association which has become insolvent or to one about to become so, as specified in that section. A Judge, therefore, has jurisdiction to issue a warrant of attachment in an action against a national bank. (Robinson v. Nat. Bank, 81 N. Y. 385) But the attachment must be vacated if the bank afterwards becomes insolvent. (National etc. Bank v. Mechan-

ics Nat. Bank, 89 N. Y. 467)

"OR NOT A RESIDENT OF THE STATE." It is important under this sub-division to observe the distinction between residence and domicil, for an attachment on the ground of non-residence may be granted, even although the defendant still has his domicil in this state. (Mayor v. Genet, 4 Hun. 487; affirmed, 63 N. Y. 646) Residence means a fixed or permanent abode or dwelling place for the time being, as contra-distinguished from a temporary locality of existence. (Matter of Wrigley, 8 Wend. 134; Bell v. Pierce, 51 N. Y. 12) Domicil means something more than residence. It means an intention to remain in a particular place as one's home. A person may have his domicil in one state, and at the same time reside in another, (Mayor v. Genet, supra); and so while a person can have but one domicil, it is certain that he may have two residences, and such is the case of every person who has a town-house and a country-seat, in each of which he dwells at different seasons of the year, with the intention of making each his permanent abode for a limited period. (Frost v. Brisbin, 19 Wend. 11) Actual cessation to dwell within the state for an uncertain period, without definite intention as to any fixed time of returning, even though a general intention to return at some future time exists, constitutes non-residence. (Weitkamp v. Loehr, 53 Super. Ct. 79) One who though domiciled in this State, is living in another, with no abode here nor any place, which he could call his home or to which he could return on coming into the state, is a non-resident.

(Wood v. Hamilton, 14 Daly 41) And where a defendant after conviction and before sentence escaped, and after most strenuous efforts to discover his whereabouts were futile, it was held as the natural impulse promoting his escape would be at once to place himself out of the limits of the state of conviction, that he would be presumed to have accomplished this as soon as the circumstances would allow it to be done. And that the same reason which prompted his escape, would keep him from returning and would induce him to continue his residence abroad indefinitely, and he is therefore a non-resident. (Mayor v. Genet, supra)

The fact that a resident of another state has a place of business here does not constitute him a resident of the State within the attachment law. (Wallace v. Castle, 68 N. Y. 370) And one who maintains his family in another state, and frequently resorts to his home with them there, may be deemed a non-resident of the State within the attachment laws, notwithstanding he has furnished appartments in connection with his place of business in this State and there lodges and takes his meals. (Murphy v. Baldwin, 11 Abb. Pr. N. S. 407)

The averment of the fact of non-residence in the affidavit for attachment is sufficient. It is not necessary to state facts tending to support this. (Mayor v. Genet, supra)

"IF HE IS A NATURAL PERSON AND A RESIDENT OF THE STATE, THAT HE HAS DEPARTED THEREFROM WITH INTENT TO DEFRAUD

HIS CREDITORS, OR TO AVOID THE SERVICE OF A SUMMONS, OR KEEPS HIMSELF CONCEALED THEREIN WITH LIKE INTENT." It must appear that the defendant has departed with intent to defraud his creditors, or to avoid the service of a summons; and it is not necessary that the departure be secret. (Hertz v. Stuart, 3 Week. Dig. 332; Morgan v. Avery, 7 Barb. 656)

Where the application for an attachment is on the ground that defendant has kept himself concealed with intent to avoid the service of a summons, it is not sufficient to show that defendant could not be found at his place of business, although an attempt was made to find him there on several occasions. The purpose to accomplish a concealment with intent to avoid the service of a summons must be clearly and positively shown. Conjecture, surmise and suspicion are not sufficient. The proofs should be of such a character as to fairly justify no other construction, and dishonest purposes on the part of the defendant. (Head v. Wollner, 53 Hun. 615) The affidavits in Head v. Wollner, supra, which were held insufficient, were to the effect that the deponent on several occasions went to the place of business of defendant and could not find him; that he telephoned to such place of business; that the voice which answered, the deponent thought to be that of the defendant, but when he stated who had called, another voice replied. A deponent in another affidavit in the same action, alleged upon information and belief, that the defendant kept himself concealed to avoid the service of

a summons upon him.

But slight circumstances are sufficient to establish that the intent with which the departure was made, was to defraud creditors or avoid the service of a summons. No court is required to worry itself to find excuses for a fugitive from debt. The question of insolvency, although of great importance, is not controlling. If a perfectly solvent man departs from the State with intent to defraud his creditors or avoid the service of process, his property may be attached. (Schoonmaker v. Spencer, 54 N. Y. 366)

Where it appeared that the defendant is absent from his usual residence and place of business during business hours, when he is about to fail, and soon after a demand has been made upon him for a debt, and he refused to reveal his place of resort, it was held to sufficiently appear that defendant kept himself concealed to avoid the service of a summons. (Easton v. Malavazi, 7 Daly 147; Genin v. Tompkins, 12 Barb. 265) In the last case cited the concealment was for only nine hours, and it was held that the length of time during which the defendant kept himself concealed, was not material, if the intent appear.

In Buell v. Van Camp, (28 St. Rep. 907), it appeared that the defendant had gone away without the knowledge of his neighbors; that his wife had received a letter from him which caused her much grief, and that she said he had gone to Canada; it also appeared that defendant had been called upon in another proceeding to account as executor. These circum-

stances were held to make out a case tending to show that the defendant had left the State with intent to defraud his creditors or to avoid the service of a summons.

It is not sufficient if defendant keeps himself concealed to avoid the service of criminal process. (Lynde v. Montgomery, 15 Wend. 461)

It need not appear whether the defendant has left the State, or is concealed within it, if it is made to appear that he is not in his usual resort and cannot be discovered, and circumstances are shown from which it can be inferred that the intent is either to avoid the service of a summons upon him, or to defraud his creditors. The requirements of the statute are satisfied. The case may be stated in the alternative. It may be stated that the defendant has departed from the State, or keeps himself concealed therein, and that the intent of the debtor was to defraud his creditors, or to avoid the service of a summons. (Van Alstyne v. Erwine, 11 N. Y. 331)

The facts must show that the defendants against whom the process is sought, have done the acts; the fact that one partner has absconded will not entitle the plaintiff to a warrant of attachment against the property of the firm, unless it appears that all have absconded, with the required intent. (Bogart v. Dart, 25 Hun. 395) Proof that one of the partners has absconded will entitle the plaintiff to an attachment against the property of that one. (Buckingham v. Sevezey, 25 Hun. 85)

"IF THE DEFENDANT IS A NATURAL PERSON OR A DOMESTIC CORPORATION, THAT HE OR IT HAS REMOVED, OR IS ABOUT TO REMOVE PROPERTY FROM THE STATE, WITH INTENT TO DEFRAUD HIS OR ITS CREDITORS; OR HAS ASSIGNED, DISPOSED OR SECRETED, OR IS ABOUT TO ASSIGN, DISPOSE OR SECRETE PROPERTY WITH THE LIKE INTENT." A plaintiff applying for an attachment under this sub-division is called upon to act with promptness; and where the fraudulent disposition occurred several years before an action brought, must show a satisfactory excuse for his delay or a very clear case of fraud, before an attachment will be granted. (Allen v. Herschorn, 9 Abb. Pr. N. S. 80)

The property which is removed or secreted must be that of the defendant; the fact that defendant has disposed of the property of the plaintiff or of a third person with intent to defraud that person, is not sufficient, (German Bank v. Dash, 60 How. Pr. 124) and it is not enough to show an assignment, disposal or secretion of plaintiff's own property by defendant, and further allege that by that act defendant converted the property so that it became his own, since the title remained in the plaintiff until he waived the tort by bringing suit on contract. (Empire Warehouse Co. v. Mallett, 84 Hun. 561)

Nor is it necessary that the defendant has disposed or is about to dispose of all his property; if he disposes of a part of his property (Hyman v. Kapp, 22 Week. Dig. 310), or of any property in his possession and to which he claims title, although his title is imperfect or bad, (Treadwell v.

Lawlor, 15 How. Pr. 8), it is sufficient. And it is immaterial where the fraudulent disposition takes place so long as the court in this State has jurisdiction of the parties. (Kibbe v. Wetmore, 31 Hun. 424)

In this sub-division, as under the last, it is necessary that the intent should appear, and facts showing intent must be stated. (Hertz v. Stuart, 3 Week. Dig. 332; Fleitmann v. Seckle, 13 State Rep. 399) The intent shown must be an actual fraudulent motive, and acts from which the law infers an intent to defraud, irrespective of actual motive, or which are said to be constructively fraudulent, are not sufficient. Thus a general assignment which confers upon the assignee the power to sell the assigned property on credit, is constructively fraudulent, as the law infers an intent to work a fraud on creditors, even although the assignor entertained no fraudulent motive, and will be set aside, but the insertion of the power to sell on credit, would be no ground for the granting of a warrant of attachment, as there was no actual fraudulent intent, but merely a constructive fraud, or fraud in law. The fraudulent intent under this section involves an actual motive to defraud, and not merely a constructive intent inferred by the law from an act which in itself may be consistent with an honest purpose. (Milliken v. Dart, 26 Hun. 24; Citizens' Bank v. Williams, 128 N. Y. 77). It should be remembered that a person is presumed to have intended the natural consequences of his own act, and if his acts have a necessary tendency to defraud, the intent

will be presumed.

Fraud assumes so great a variety of forms, that no classification of the cases can be given here. Insolvency, secrecy, unusual haste, transfers to near relatives on the eve of failure, deceptions and falsehoods, are circumstances which often accompany or characterize a fraudulent intent.

It is to be noticed, that here, as in other cases, a statement in the disjunctive is proper, where the facts stated show that the case falls under one or the other of the two classes, and so an affidavit which averred that money had "been disposed of by said defendant with intent to defraud these plaintiffs or is concealed by him with like intent" was held sufficient. (Arming v. Monteverde, 8 St. Rep. 812)

"WHERE FOR THE PURPOSE OF PROCURING CREDIT, OR THE EXTENSION OF CREDIT, THE DEFENDANT 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." This sub-division is a recent amendment, it taking effect September 1st, 1894.

"WHERE THE DEFENDANT BEING AN ADULT AND A RESIDENT OF THE STATE, HAS BEEN CONTINUOUSLY WITHOUT THE UNITED STATES FOR MORE THAN SIX MONTHS NEXT BEFORE THE GRANTING OF THE ORDER OF PUBLICATION OF THE SUMMONS AGAINST HIM, AND HAS NOT MADE A DESIGNATION OF A PERSON UPON WHOM TO SERVE A SUMMONS IN HIS BEHALF, AS PRESCRIBED IN SECTION FOUR HUNDRED AND THIRTY OF THIS ACT; 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." This subdivision is new, and took effect September 1st, 1895.

CASES CITED.